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STRATEGERY'S REFUGE

CHRISTOPHER SEEDS*

Strategic decisions are entitled to deference under *Strickland* only if they were made on the basis of reasonable professional judgment after diligent investigation of the pertinent facts. Anything less than that is "strategery," not "strategy."

—Stephen F. Smith[1]

[I]t falls most importantly to the trial attorney, as the composer . . . to minimize dissonance and enhance harmony.

—Scott. E. Sundby[2]

By popular account, the Supreme Court's recent decisions on effective assistance of counsel in capital sentencing—aggressive critiques of counsel's failure to investigate and present mitigating evidence—initiate an era of improved oversight of the quality of legal representation in death penalty cases. One would expect the new and improved jurisprudence to curb post hoc efforts by trial counsel to disguise incomplete trial preparation as a tactical decision, a practice that has long undercut the Strickland *doctrine. But the shelters for post hoc rationalizations—the refuges for "strategery"—remain. Surveying decisions of the federal courts of appeals since the turn of the century, this Article illustrates two reasons why, and explores solutions.*

I. INTRODUCTION

The "distorting effects of hindsight"—this is how the United States Supreme Court, since *Strickland v. Washington,*[3] has referred to the dangers

* Adjunct Professor of Law, Cornell Law School. For valuable comments and suggestions, many thanks to Russell Stetler, John H. Blume, Stephen P. Garvey, Sheri Lynn Johnson, and the students of the capital punishment law and federal habeas corpus seminars at Cornell Law School. Thanks also to the editorial staff of the Journal of Criminal Law and Criminology for helping to clarify what I consider to be some of the most important points herein.

[1] Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 359 (2008).

[2] Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1115 (1997).

that inhere in postconviction critiques of trial counsel's performance. Skepticism toward backward glances resonates because of the belief that counsel at trial is better positioned to exercise judgment in the moment than experienced litigators or members of the judiciary who reconstruct the circumstances years down the road. But an inverse phenomenon, just as risky, holds sway today: rules and perspectives molded to outdated standards of the past govern the present. For decades, this has hindered the legal doctrine of effective assistance of counsel in capital sentencing proceedings, and has resulted in the denial of relief to many defendants whose counsel performed below prevailing professional norms. Just as hindsight ought not distort the past, the past ought not obscure the evolution to the present; lawyers should be held to standards of their time, not to the less exacting requirements of a bygone era. This has and continues to be the case, however, with constitutional review of the effectiveness of counsel in capital sentencing trials.

The beneficiaries of this time slip are underperforming trial counsel faced with ineffectiveness claims in collateral review. The Supreme Court's early ineffective assistance of counsel cases, *Strickland v. Washington*,[4] *Burger v. Kemp*,[5] and *Darden v. Wainwright*,[6] found counsel's representation constitutionally adequate, despite the fact that what jurors heard about the defendant in those cases was a paltry patchwork—a life story incoherent, inconsistent, and incomplete, seemingly a far cry from the individualized sentencing proceeding that the Court, not long before, found the Eighth Amendment mandates. These early decisions, looking to performance standards in the late 1970s as guides, condoned limited investigations into the defendant's life history and resulting failures to present mitigating evidence, on the ground that the evidence that counsel allegedly (in hindsight) should have pursued would not have helped and, indeed, may have harmed the defendant's case for life. For years, this precedent, accepting counsel's failure to investigate or present life history mitigation where evidence was "double-edged," facilitated post hoc attempts by counsel (and courts) to shelter subpar performance under the guise of tactical decisions.[7] Professor Stephen Smith, borrowing a word

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[3] 466 U.S. 668 (1984).

[4] *Id.*

[5] 483 U.S. 776 (1987).

[6] 477 U.S. 168 (1986).

[7] The Supreme Court's recognition of the concept of "double-edged" mitigating evidence is often linked to the discussion of the constitutionality of executing individuals with mental retardation in *Penry v. Lynaugh*, 492 U.S. 302, 324, 328 (1989). The Court first addressed the concept, however, two years earlier, in the context of ineffective assistance of counsel. *See* Burger v. Kemp, 483 U.S. 776, 794-795 (1987).

from the lexicon of the television show Saturday Night Live, has used the term "strategery" to describe these post hoc rationalizations.[8]

The propagation and acceptance of post hoc rationalizations—the sheltering of "strategery"—since *Strickland* has occurred principally in two ways, each linked to one of the *Strickland* standard's two parts.[9] First, courts have excused incomplete investigations into factors relevant to sentencing as appropriate defense strategy. Second, courts have tacitly condoned deficient preparation or presentation by finding that counsel's failures, even if strategically unsound, did not materially impact the outcome. Underlying each maneuver is a belief that additional efforts by counsel would have merely yielded evidence more aggravating than mitigating—that counsel's failure to investigate evidence of mental illness or childhood physical or sexual abuse, for example, was reasonable (or that counsel's failure to present such evidence to explain a defendant's background was not prejudicial) because the evidence would have been perceived by a jury to promote rather than oppose a death sentence. Although the *Strickland* doctrine provides that no tactical decision by counsel is justifiable unless it is based on reasonably thorough investigation, this principle has long been underused as courts have failed to recognize the steady rise in the standards of capital defense practice.

Since the turn of the century, however, the Supreme Court has taken steps to bring its jurisprudence up to date. In three cases, *Williams v. Taylor*,[10] *Wiggins v. Smith*,[11] and *Rompilla v. Beard*,[12] the Court found representation deficient that it would have accepted years earlier. In each case, the Court reiterated that prevailing performance standards should guide assessments and stressed the need for thorough life history investigation as a precursor to any strategic decision-making. To many, these cases mark the advent of an era of stronger Court oversight of the quality of representation and stronger policing of political incentives in death penalty cases. Commentators have celebrated that the right to effective assistance of counsel in capital cases at last has teeth—something

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[8] Smith, *supra* note 1, at 357 n.266. As Smith explained, the skit satirized former President George W. Bush's "reputation for mispronouncing words," and mingled the terms "strategy" and "strategic" to arrive at "strategery." Smith used the term "strategery" to refer to "tactics that purport to be strategy but are anything but strategic." *Id.*

[9] The ineffective assistance of counsel standard established in *Strickland* requires a petitioner to establish that his attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

[10] 529 U.S. 362 (2000).

[11] 539 U.S. 510 (2003).

[12] 545 U.S. 374 (2005).

that, as death-sentenced defendant after death-sentenced defendant in the 1980s and 1990s experienced, it sorely lacked.

But this celebration is half-blind. Behind the scenes of the Supreme Court's nascent recognition of the need for attorneys in capital cases to investigate and present comprehensive life histories of their clients and the Court's reaffirmation of the importance of prevailing professional norms, lurk remnants of the past. Indeed, more than remnants. The survey of decisions from federal courts of appeals conducted for this Article shows that, despite the Supreme Court's aggressive critiques of counsel in *Williams*, *Wiggins*, and *Rompilla*, the shelters for post hoc rationalizations remain.

The next three Parts of this Article set the lay of the land. Part II begins with the Court's early cases ruling on the performance of counsel in capital sentencing trials that took place in the late 1970s, shortly after the modern era of the death penalty began. After tracing the growth of the concept of mitigation in capital defense practice, and the lag with which courts acknowledged that evolution, the discussion turns to the Court's new precedent, which incorporates more demanding contemporary professional standards.

Part III shows how the new precedent, while reinvigorating the use of prevailing professional norms as guides, nevertheless permits a refuge for post hoc rationalizations through its general acceptance of the old precedent. There is a long-standing tension between the prevailing standards of practice and the old precedent that *Wiggins* and *Rompilla* left unresolved. On one hand, much life-history material that is "double-edged" forms the essence of explaining who the defendant is, which is the purpose of the individualized sentencing proceeding in a capital case. On the other hand, given the frequency with which a defendant's future dangerousness is alleged as an aggravating factor in capital cases, concern about presenting mitigation, such as evidence of mental illness, that could turn against the client (or open the door to counterargument that would portray the client as a psychopath or otherwise support a propensity for violence) is perhaps warranted.[13] The idea that avoiding or withholding evidence that is double-edged may be the best road to a life sentence therefore arguably holds some force—and according to the old precedent, this is just the type of decision by counsel that distorting hindsight ought not overturn. As the new cases seek to enforce full life-history investigations, the old precedent in certain circumstances allows something less. In *Wiggins* and *Rompilla*, the Court

[13] Studies show that jurors' feelings of sympathy for the defendant compete, often unsuccessfully, with commensurate, if not stronger, feelings of fear of the defendant. *See* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 31, 64-67 (2000).

sought to distinguish, rather than overrule or explicitly limit, the old precedent. While, as I will explain, a reasonable read of the new precedent relegates the old precedent to a small set of cases in which counsel substantially investigates and then seeks to limit additional investigation or the presentation of evidence (cases, in other words, in which counsel's decisions are not post hoc anyway), some courts have used the gap between the cases to sanction abbreviated investigations of double-edged evidence and limited theories of mitigation.[14]

Part IV surveys all federal courts of appeals' decisions on sentencing ineffectiveness since the Court decided the first of the new trio, *Williams v. Taylor*,[15] in April 2000. This identifies a second, more deeply rooted reason for the continued shelter of strategery. In addition to the apparent doctrinal gap discussed in Part III, a perceptual divide exists between decision-makers who see double-edged background evidence as mostly mitigating and those who see it as equally (or more) aggravating. A principal shelter of strategery, therefore, may be the divergent perceptions among judges of the value of explanatory mitigation, which in turn fuels weak readings of *Williams*, *Wiggins*, and *Rompilla*.[16]

While a lot has changed in capital practice standards since the modern era of capital punishment began in the late 1970s, for many attorneys and courts, the question of what counsel should do with "double-edged" evidence in a capital sentencing trial is still up in the air. As commentators pronounce that the Court has taken a stand against post hoc rationalizing,[17] any federal or state postconviction judge routinely reviewing capital trial counsel's performance knows that loopholes remain. Without addressing the bases of these gaps, the possibility that inadequate counsel will use the old precedent as cover, after the fact, for poor trial preparation endures. The refuges for post hoc rationalizations still stand.

Part V explores how the divergent perceptions among judges and lawyers over the value of explanatory mitigation can be bridged. The matter is complicated. Post hoc rationalizations still find oases based on a

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[14] *See* Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 MICH. L. REV. 2001, 2022 (2004) (recognizing that the disconnect between the new cases and the old posed a "deadly dilemma" for capital counsel). By "limited theories of mitigation," I refer to the type that rely on residual or lingering doubt, a mere mercy plea, or positive evidence about the client showing that he is a "good guy" who will not be dangerous in the years ahead.

[15] 529 U.S. 362 (2000).

[16] To help control for the many factors that affect the outcome in any individual case—including, significantly, the quality of postconviction advocacy in pursuing and presenting information that trial counsel did not—Part IV studies divergent views (expressed in majority and dissenting opinions) on the *same* evidence.

[17] *See* Smith, *supra* note 1, at 294-336.

perceptual divide because assessment of ineffective assistance of counsel depends on a judge's view of the persuasiveness of the mitigating evidence (or relative damage to the mitigation case that the evidence at issue would inflict). If a judge is more likely to find mental health evidence aggravating, for example, he or she is more likely to assert that a reasonable attorney would see it as double-edged and choose not to investigate; a judge more inclined to find evidence of mental of health issues mitigating will emphasize the need for counsel to pursue the information. A similar scenario plays out with prejudice: the difference between cumulative repetition and significant nuance depends in large part on how a court believes a jury would respond to evidence. To some extent, this involves the unique personal experience and political views of each individual decision-maker, but not entirely.

Social science studies of capital jurors' attitudes toward mitigation also contribute. A reliable ineffective assistance of counsel jurisprudence—in assessing both the reasonableness of counsel's performance and its impact on the jury—must factor in what we know about juror understanding. At present, however, the social science has reached a stalemate. As the case of *Wilson v. Sirmons* (discussed in Part IV) highlights, existing studies—many based on the same juror interview data, now roughly ten years old—support *both* that jurors find explanatory mitigation mitigating *and* that they find it aggravating. A takeaway point of Part V is that researchers should begin to ask a question left unanswered to this point: What were the *qualities* of the mitigation presentation that interviewed jurors heard?

My hypothesis—rooted in the principles of the prevailing professional guidelines and supported by the existing studies and analysis regarding how jurors make decisions and what matters to them[18]—is that jurors who hear complete and coherent mitigation presentations are more likely to find double-edged explanatory life history evidence mitigating, not aggravating. Jurors respond to consistency and coherence, and those inclined by personal experience to vote for a life sentence, in particular, will respond to detail. In short, how jurors perceive explanatory mitigation may depend less on the

[18] On the Capital Jury Project generally, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 IND. L.J. 1043 (1995). Stephen P. Garvey's article, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556-59 (1998), discusses jurors' perceptions about the aggravating or mitigating nature of certain evidence. Other analyses of capital jury decision-making include: Valerie P. Hans, *Death by Jury*, *in* CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 149, 161-63 (Kenneth C. Haas and James A. Inciardi eds., 1988); John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1039, 1051-53 (2008); Sundby, *supra* note 2, at 1178-79.

"double-edged" nature of the evidence, and more on *how* the evidence is presented.

To the extent that research supports this hypothesis, it would help to bring the perceptual divide, which appears facially as an issue of personal or political difference, back to the legal question of counsel's performance. If counsel does a thorough job, explanatory mitigation is nothing to shy away from, but rather fundamental to the case for life. Presented in incomplete or incoherent form, however, some explanatory mitigation—evidence of mental illness, for example—can be devastatingly aggravating. This distinction is significant for eradicating strategery because it renders the validity of counsel's claims of judgment about certain evidence directly subject to the completeness of their investigative work and the coherence of their presentation to the jury.

The Court took an important initial step in *Williams*, *Wiggins*, and *Rompilla* by recognizing the evolution of capital defense practice standards. An important next step is for the Court to explicitly state that the new precedent limits the once-broad application of *Burger* and *Darden* to cases already founded on a thorough investigation. Another is for judges and attorneys to recognize, optimally with the aid of up-to-date social science research, the principles and knowledge that contemporary performance standards already integrate about juror understanding and communication. So informed, courts might take a different view of what makes for a reasonable decision of whether to investigate and present evidence, and could have a better perspective, with respect to prejudice, of what evidence is harmful or helpful. These steps could align the Sixth Amendment ineffectiveness doctrine with the Eighth Amendment promise of a sentencing proceeding that provides a full picture of the capital defendant.

II. A BRIEF HISTORY: HOW EVOLVING PROFESSIONAL STANDARDS HAVE CHANGED THE MEANING OF *STRICKLAND* IN CAPITAL SENTENCING TRIALS

A. OLD PRECEDENT: ASSESSING CAPITAL SENTENCING TRIALS FROM THE 1970S

The modern era of the death penalty began in the summer of 1976, and the United States Supreme Court's decision in *Woodson v. North Carolina*[19] played a formative role. In *Woodson*, the Court rejected a North Carolina statute that made a death sentence mandatory for a conviction of first-degree murder. The statute's principal flaw, the Court determined, was its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition

[19] 428 U.S. 280 (1976).

upon him of a sentence of death."[20] In words now immortal to capital jurisprudence, the Court explained that "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[21] The North Carolina statute was such a process because it "treat[ed] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[22] This began the Court's foray into mitigation, an evidentiary presentation at capital sentencing trials tailored to the background of the individual defendant, much more expansive than the presentence reports or allocutions common in non-capital criminal cases.

When the Court decided *Strickland v. Washington*[23] in 1984 the pressing question—whether the Sixth Amendment to the United States Constitution provides defendants charged with state crimes a right to effective representation by counsel and, if so, by what standard—was not unique to the death penalty. David Washington argued that counsel who represented him at a death sentencing trial conducted in the winter of 1976 was ineffective, but the capital nature of Washington's claim, while adding an air of gravity, played a marginal role in the Court's reasoning.[24] *Strickland*'s famous two-pronged test, which requires a showing of deficient performance by counsel and a reasonable probability that, but for counsel's failures, the result of the proceeding would have been different, rests on several general principles. Among the most significant are that counsel's tactical decisions are entitled to great deference,[25] if based on

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[20] *Id.* at 303.

[21] *Id.* at 304.

[22] *Id.*

[23] 466 U.S. 668 (1984).

[24] *See id.* at 686-87 ("A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.") (citations omitted).

[25] *Id.* at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

"thorough" and "reasonable" investigations,[26] and that "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."[27] The Court declined to set specific duties for counsel, instead endorsing a general "reasonable[ness] considering the circumstances" standard informed by "[p]revailing norms of practice as reflected in American Bar Association standards and the like."[28] The Court then denied Washington relief, finding that the lawyer, who presented no mitigating evidence at sentencing, satisfied the Sixth Amendment by merely interviewing Washington and phoning his wife and mother. In doing so, the Court sidestepped the notion of "death is different" that drove many of its early decisions in capital cases.[29] The Court paid equally little attention to Eighth Amendment precedent under *Woodson* and the resulting ways in which defense counsel's role in a death sentencing trial differs from and expands upon counsel's traditional function.[30]

For years, the biting criticism of *Strickland* was that the holding made effective counsel an illusory right, by announcing a test so lenient that no attorney could fail.[31] Much of the futility that capital defendants

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[26] *Id.* at 690-91 ("[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. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

[27] *Id.* at 690.

[28] *Id.* at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.").

[29] *See, e.g.*, Beck v. Alabama, 447 U.S. 625 (1980) (holding a court must instruct the jury on available lesser included offenses in a capital trial); Green v. Georgia, 442 U.S. 95 (1979) (holding a state evidentiary rule could not apply to preclude mitigating evidence in a capital sentencing trial); Gardner v. Florida, 430 U.S. 349 (1977) (finding due process violation where defendant was sentenced to death on the basis of a presentence report that he had no opportunity to review or explain).

[30] *See Strickland*, 466 U.S. at 715-716 (Marshall, J., dissenting) ("The majority suggests that, '[f]or purposes of describing counsel's duties,' a capital sentencing proceeding 'need not be distinguished from an ordinary trial.' I cannot agree. . . . Reliability in the imposition of the death sentence can be approximated only if the sentencer is fully informed of all possible relevant information about the individual defendant whose fate it must determine.) (quotations and citations omitted). For early discussions of the unique duties of counsel in capital sentencing proceedings, see Dennis N. Balske, *New Strategies for the Defense in Capital Cases*, 13 AKRON L. REV. 331 (1979), and Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335-39 (1983).

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

experienced stems from two decisions issued shortly after *Strickland* that also considered capital trials from the late 1970s in which counsel failed to present any mitigating evidence.[32] First, in *Darden v. Wainwright,*[33] the Court found reasonable counsel's decision to limit the scope of the mitigation on the ground that the evidence that the defendant argued counsel should have pursued and presented could have harmed more than helped the case for life. Finding counsel's preparation adequate,[34] the Court offered several reasons why counsel's choice to rely solely on a mercy plea was sound: (1) "[a]ny attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions"; (2) any attempt to portray the petitioner as incapable of committing the crime would have invited rebuttal with a psychiatric report indicating that he was a sociopath; and (3) any attempt to portray the petitioner as a family man would have been belied by his admission that "although still married, he was spending the weekend furlough with a girlfriend."[35] The *Darden* Court framed the issue as a fundamental tactical question of what to leave in and what to leave out, and found justified counsel's decision not to present mitigating evidence that the State could rebut with a negative fact.

The Court addressed sentencing ineffectiveness again a year later in *Burger v. Kemp,*[36] which involved a capital trial from early 1978. In preparation for trial, counsel spoke with the client's mother, the codefendant, an attorney counsel hoped would serve as a character witness,

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Much criticism of *Strickland* is indirect, addressing the failure of state mechanisms for appointing qualified counsel for indigent defendants. *See* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000).

[32] Burger v. Kemp, 483 U.S. 776 (1987); Darden v. Wainwright, 477 U.S. 168 (1986).

[33] 477 U.S at 185-187. The case reached the Supreme Court after *Strickland*, but the trial took place over a year before *Strickland*, even before the Court introduced the concept of individualized sentencing in *Woodson*. The principal issue in *Darden* was prosecutorial misconduct. In the decision's closing paragraph, the Court upheld trial counsel's decision to present at sentencing no more than the client's mercy plea.

[34] The Court majority stated, "a great deal of time and effort went into the defense." *Id.* at 185. But the amount of time counsel spent working on the case and the extent of counsel's investigation, even by the majority's description, was slim. *See id.* at 184-85 ("As an initial matter, petitioner contends that trial counsel devoted only the time between the close of the guilt phase of trial and the start of the penalty phase—approximately one-half hour—to preparing the case in mitigation. That argument is without merit. . . . Counsel obtained a psychiatric report on petitioner, with an eye toward using it in mitigation during sentencing. Counsel also learned in pretrial preparation that Mrs. Turman was opposed to the death penalty, and considered the possibility of putting her on the stand at the sentencing phase.").

[35] *Id.* at 186.

[36] 483 U.S. 776.

several of the client's peers, and a psychologist whom counsel asked to determine the client's competence to stand trial.[37] This investigation, a step up from *Strickland*, uncovered evidence that Burger was abandoned and neglected as a child and started abusing drugs at a young age. It also indicated a prior record of juvenile offenses and "violent tendencies," which counsel perceived at odds with his strategy to present Burger as subject to domination and duress during the crime.[38] Noting that counsel "interview[ed] all potential witnesses who had been called to his attention,"[39] the Court held that counsel's decision not to undertake further investigation was reasonable, because "an explanation of petitioner's history would not have minimized the risk of the death penalty."[40]

Together, *Burger*, which approved of a decision to cut short background investigation, and *Darden*, which accepted the failure to present any mitigation, demand little. Counsel need only investigate evidence immediately available. Counsel may decline to pursue evidence of a defendant's background that could potentially harm the jury's perspective of the client. Counsel may choose to focus solely on positive aspects of a defendant's background and character, and need not explain more complex aspects of the client's history, including evidence of mental illness, physical or sexual abuse, drug abuse, or poverty. In fact, counsel could decide—as counsel did in *Burger*, *Darden*, and *Strickland*—to present no mitigating evidence at all. All three decisions endorsed evidentiary presentations and mitigation investigations that bypassed or ignored significant aspects of a defendant's life.

What these cases allow and what *Woodson* says the Eighth Amendment requires in capital sentencing do not match.[41] As Justice Powell and Justice Blackmun emphasized in dissent in *Burger*, "mitigating evidence is not necessarily 'good'" because the "[f]actors that mitigate an individual defendant's moral culpability ste[m] from the diverse *frailties* of humankind."[42] It is important to keep in mind that *Burger*, *Darden*, and

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[37] *Id.* at 790-91.

[38] *Id.* at 791-93 (describing the evidence as not "uniformly helpful").

[39] *Id.* at 794-95.

[40] *Id.* at 795.

[41] Neither the *Burger* majority nor the *Darden* majority cited *Woodson*. In contrast to *Strickland*, neither referred to "prevailing professional norms" or local, regional, or national standards of performance.

[42] *Id.* at 820-21 (Powell, J., dissenting) (discussing *Woodson* and noting that "Burger's stunted intellectual and emotional growth and the details of his tragic childhood are far from 'good,'" and that "background information would have 'indicated violence and stuff at an earlier [age],'" but that the information was mitigating nevertheless); *see id.* at 813 (Blackmun, J., dissenting) (citing Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)) (recognizing that the majority's reasoning was inconsistent with the Court's precedent

Strickland considered counsel's performance under professional standards in effect immediately after *Woodson*, at the beginning of the modern death penalty era. While methods for mitigation investigation and presentation were on the horizon, they were the exception when Darden was tried in 1975, when Strickland was sentenced in 1976, and when Burger was resentenced in 1979. The first American Bar Association guidelines for performance for death penalty counsel, discussed in the next section, were more than a decade away. Nevertheless, the court's early ineffectiveness precedent, which *Burger* epitomizes, planted a seed of conflict with *Woodson*'s individualized sentencing principle that would ripen as capital defense litigation matured.

B. MITIGATION EVOLVES AS A PRACTICE AND A SCIENCE

In the years after *Woodson*, the concept of individualized sentencing developed into a right to present, and a concurrent duty of juries and judges to consider and give effect to, "any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death."[43] The Court defined the mitigation presentation as a vehicle for providing a sentencing judge or jury with the "fullest information possible concerning the defendant's life."[44] In line with *Woodson*'s emphasis on "diverse frailties," evidence of difficult and disadvantaged background, childhood abuse and neglect, mental illness, and any other factors that impacted the defendant's life, negatively or positively, were critically important to the sentencer's "moral inquiry into the culpability of the defendant."[45]

As the Court's view of individualized sentencing seasoned throughout the 1980s and 1990s, developments in the sciences contributed to a view of mitigation as a broad-based exploration of cause and effect, "undermin[ing] the simplistic view that everything a person does past a certain point in his

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following *Woodson*). Justice Powell was concerned that Burger's culpability was reduced because he was a minor. *See id.* at 823 (Powell, J., dissenting). The Court had not yet interpreted evolving standards of decency to prohibit the execution of offenders who were juveniles at the time of the crime. Burger was seventeen. *Id.* at 818.

[43] Lockett v. Ohio, 438 U.S. 586, 604 (1978); *see id.* at 605 (emphasizing "the uniqueness of the individual").

[44] *Id.* at 603 (citations omitted); *see also* Penry v. Lynaugh, 492 U.S. 302 (1989); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982). *See generally* James Liebman, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1627 (2006) (discussing how Justice Stevens's opinions follow the principle of the more information before the sentencer, the better). The Court's (and Justice Stevens's) interest in providing the fullest information to the sentencer applied to aggravating factors as well. *See* Zant v. Stephens, 462 U.S. 862 (1983) (allowing state to present evidence of non-statutory as well as statutory aggravating factors).

[45] California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

life is the exclusive product of his free and autonomous choices."[46] The "science of mitigation" that developed in the decades after *Woodson* combined advances in social work, psychology, anthropology, and related fields with legal understanding of how best to communicate information to a sentencing judge or jury.[47] As Craig Haney explained:

> Social histories, in this context, then, are not excuses, they are explanations. An explanation does not necessarily dictate an outcome, not even a penalty trial outcome. Some explanations lead to life verdicts, and some do not. But no jury can render justice in the absence of an explanation. In each case, the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.[48]

At times, this type of "explanatory" mitigating evidence central to life histories is understandably referred to as "classic" mitigation.[49]

Standards of defense practice evolved in step.[50] In 1989, the American Bar Association issued the first guidelines exclusively for counsel defending death penalty cases, which focused on the unique demands of capital trials.[51] Memorializing standards of care that prevailed among

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[46] Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 857 (2008).

[47] For more on the evolution of the Eighth Amendment concept of mitigation and concurrent developments in psychology and related disciplines, see generally *id.* at 845-64. The impact of developments in anthropology on mitigation theory and practice is discussed in Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883 (2008). On the mitigation function generally, see Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237 (2007-2008).

[48] Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 560-61 (1995).

[49] *See* Correll v. Ryan, 539 F.3d 938, 944 (9th Cir. 2008) ("[I]n light of the abundance of classic mitigation evidence of which counsel was aware, his almost complete failure to investigate is startling."); Haney, *supra* note 48, at 607 n.141 (noting "psychological evidence represents classic mitigation that, in the appropriate case, might make all the difference").

[50] *See* Haney, *supra* note 46, at 857 (explaining that counsel became increasingly aware that a "more nuanced and comprehensive perspective helps to explain rather than excuse a capital defendant's behavior"). For a thoughtful discussion of the standard of care soon after *Strickland*, see Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 341-42, 361.

[51] AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (1989), *available at* http://www.abanet.org/deathpenalty/resources/docs/1989Guidelines.pdf [hereinafter 1989 GUIDELINES] ("Death Penalty Guidelines"). The ABA amended the Guidelines in 2003, without changing the core substance. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, *in* 31 HOFSTRA L. REV. 913 (2003), *available*

capital defense attorneys in the 1980s, the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases included provisions specifically directed to developing evidence against the death penalty in the individual case. The principal themes of the Death Penalty Guidelines are completeness and coherence. The Guidelines emphasize a prompt, thorough, multigenerational investigation into a client's background and spotlight a wide range of information that counsel must investigate, including medical, family, social, educational, criminal, and employment histories.[52] The Guidelines stress that a consistent theory should tie the guilt-or-innocence trial to the sentencing trial,[53] and emphasize that mitigation presentations must possess an internal coherence, the goal being to "construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors."[54]

The comprehensive life history narrative the Guidelines call for integrates positive aspects of a client's background and character with explanatory mitigation. Mitigation thus serves to "provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)" *and* to "give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison."[55] This emphasis on investigating explanatory mitigation[56]

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at http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf [hereinafter 2003 GUIDELINES]; *see* Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003) ("New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel . . . [but] do not depart in principle or concept from Strickland."). More recently, the SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, *in* 36 HOFSTRA L. REV. 677 (2008), further defined the function of mitigation in capital cases and the standard of care for developing the mitigation presentation in sentencing proceedings.

[52] *See* 2003 GUIDELINES, *supra* note 51, guideline 10.7 cmt., at 1022-26 ("Because the sentencer in a capital case must consider in mitigation, 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,' 'penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.'" (internal citations omitted)).

[53] *See id.* guideline 10.10.1, at 1047-48 ("[T]rial counsel should formulate a defense theory . . . that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.").

[54] *Id.* guideline 10.11 cmt., at 1061.

[55] *Id.* guideline 10.11, at 1056. The Guidelines offer as illustration that the testimony of family members and friends can "provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants" and can also "allow[] the jury to see [the defendant] in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way." *Id.* guideline 10.11 cmt., at 1062.

acknowledges how difficult it is to convince a juror to spare the life of a person convicted of aggravated murder solely on the argument that he or she is "nice" or "good." Mitigation is relevant not to excuse, therefore, but to explain.[57]

What it meant to put together a mitigation case in the 1980s, and what it means today, far exceeds the standard of practice that was condoned when *Burger*, *Darden*, and *Strickland* were decided.[58] Although a lack of qualified counsel and poor representation remain critical problems in the administration of the death penalty in the United States,[59] higher standards put deficient performances in starker relief.[60] Courts, however, were slow to acknowledge the rise in prevailing professional norms. At century's end, the Supreme Court had heard very few ineffective assistance cases, and in none did the Court find counsel to be ineffective at sentencing.[61]

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[56] *See id.* guideline 4.1 cmt., at 956 (stating that "[c]ounsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary."); *id.* guideline 10.7 cmt., at 1022 (stating that counsel must investigate "[f]amily and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention").

[57] *Id.* at 1060.

[58] *Compare* Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1947 (2006) ("The result of these decades' worth of developments is a discernable improvement in the quality of representation. The need for a lawyer to be specially trained in capital defense is now widely recognized and has fostered the emergence of a professional capital defense bar."), *with* Ivan K. Fong, Comment, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 467 (1987) (critiquing the performance of capital sentencing counsel and collateral review of counsel's performance shortly after *Strickland*).

[59] *See generally* Bright, *supra* note 31, at 1805; Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States*, 34 AM. J. CRIM. L. 293 (2007). *Cf.* Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521 (discussing problems with the performance of capital postconviction counsel).

[60] *See* White, *supra* note 14 (discussing contemporary standards that experienced capital defense counsel employ).

[61] Prior to the turn of the century, *Burger*, *Darden*, and *Strickland* were the only cases in which the Court directly applied the *Strickland* standard to capital counsel's failure to investigate or present mitigating evidence. In a number of cases, the Court denied certiorari on the issue. *See, e.g.*, Lawson v. Dixon, 510 U.S. 1171 (1994) (Blackmun, J., dissenting from denial of certiorari).

Strickland's identification of the ABA Standards as guides seemed at best an empty promise, or worse, no longer the law.[62] Beginning with *Williams v. Taylor*[63] in April 2000, the Court took steps to change this.

C. NEW PRECEDENT: ASSESSING CAPITAL REPRESENTATION BY CONTEMPORARY STANDARDS

A trio of cases this century (*Williams* (2000), *Wiggins* (2003), and *Rompilla* (2005)) mark the Court's recognition that capital attorneys throughout the 1980s and 1990s were often judged at a standard of performance lower, sometimes much lower, than prevailing professional norms and, similarly, that the prejudicial impact of counsel's failures on sentencing proceedings were often underestimated. In each of these cases, the Court determined that representation that likely would have passed the bar in the late 1970s no longer did. In doing so, the Court named the ABA Death Penalty Guidelines as the yardstick.

1. A New Century, New Precedent

Williams was the first Sixth Amendment decision by the Court to appreciate the central role that explanatory mitigation plays in capital sentencing proceedings. The Court critiqued counsel's curt investigation, which began a week before trial and consisted of several interviews with peers and a consultation with an under-prepared psychiatrist who had received no social service, prison, or juvenile criminal records. The Court faulted counsel for not discovering and presenting evidence that Williams had borderline mental retardation and had lived through a "nightmarish childhood," during which he was subjected to severe physical abuse and decrepit living conditions before his parents were imprisoned for criminal neglect.[64] Trial counsel's alleged strategy was to capitalize on the fact that Williams turned himself in and expressed genuine remorse for the crime by portraying Williams as a "nice boy."[65] For this, counsel offered the testimony of Williams's mother and two neighbors (one whom counsel noticed in the courtroom and called impromptu to testify), coupled with a taped excerpt from the psychiatrist stating that before another robbery offense Williams removed the bullets from his gun.[66] This paltry evidence could not compete with the prosecution's proof of prior arsons, robberies,

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[62] *See* John Jeffries & Williams Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 682 (1990) ("In practice, the constitutional standard for ineffective assistance of counsel approximates gross negligence.").

[63] 529 U.S. 362 (2000).

[64] *Id.* at 369-71, 395 & n.19.

[65] *Id.* at 398.

[66] *Id.* at 369.

and assaults committed by Williams or the argument that Williams posed a future danger to society.[67] Further, belying counsel's stated theory, counsel overlooked evidence that in prison Williams had returned a guard's wallet, helped to break up a drug ring, and had generally adjusted well.[68] Trial counsel's postconviction testimony about Williams's 1986 death sentence was archetypal of the post hoc rationalizations that passed as adequate ten years earlier.

By the time Williams's case reached the Supreme Court, however, the inadequacy of counsel's investigation was "barely disputed."[69] Focused on the prejudice prong,[70] the Court acknowledged that not all of the evidence offered in postconviction "was favorable to Williams."[71] Yet the Court found that, while the evidence "coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."[72] The state court had applied *Strickland* unreasonably by failing to appreciate that "[m]itigating 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."[73] The opinion did not mention *Burger* or *Darden*, and its emphasis on the value of explanatory mitigating evidence, which cut against the old precedent, was strikingly new.

Less than three years later, the Court considered similar circumstances surrounding a death sentence returned in Maryland in 1989.[74] Counsel's preparation consisted of interviewing several family members, obtaining social service and probation records (but no more), and consulting a psychologist who found that the defendant, Kevin Wiggins, had a borderline IQ and a personality disorder.[75] In postconviction proceedings, trial counsel said that they knew of evidence of "severe privation and abuse in the first six years of [Wiggins's] life while in the custody of his alcoholic, absentee mother[,] [and] physical torment, sexual molestation,

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[67] *Id.* at 368-69.

[68] *Id.* at 396.

[69] *Id.* at 395.

[70] *Id.* at 396-98; *see also id.* at 418-19 (Rehnquist, C.J., dissenting on prejudice prong only).

[71] *Id.* at 396 (majority opinion).

[72] *Id.* at 398.

[73] *Id.* at 398.

[74] Wiggins v. Smith, 539 U.S. 510 (2003).

[75] *Id.* at 524-25.

and repeated rape during his subsequent years in foster care."[76] However, counsel claimed that they had worried the evidence of abuse and intellectual disability would be perceived as aggravating and, thus, would undercut their argument that the client lacked direct responsibility for the crime.[77] At sentencing, counsel had proffered the psychologist's report, which showed limited intellectual capacity and Wiggins's childlike character; but neither finding shed much light on the "powerful mitigating narrative"[78] of Wiggins's personal history.[79] Noting that counsel promised the jury they would hear evidence of Wiggins's "difficult life,"[80] the Court perceived a post hoc rationalization for performance that was "neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records."[81] Picking up where *Williams* left off, *Wiggins* breathed new life into the principle that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'"[82] What *Williams* suggested about the importance of a thorough mitigation investigation into explanatory as well as positive-character evidence, *Wiggins* made explicit, and linked this to prevailing national and local performance norms, which it emphasized—as *Strickland* had—as guides.

The third panel of the triptych is *Rompilla v. Beard*,[83] in which the Court reviewed a Pennsylvania death sentence from 1989. Counsel's preparation surpassed that in *Williams* and *Wiggins*. Counsel interviewed the defendant's family members and consulted three mental health experts. After conversations with the client, his family, and the mental health experts, however, counsel decided that mitigation would have little return[84]

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[76] *Id.* at 535.

[77] Brief for Respondents at 2, 8-9, Wiggins v. Smith, 539 U.S. 510 (2003) (No. 02-311), 2003 WL 543903. This, counsel argued, motivated a motion for a bifurcated sentencing proceeding in which the State would prove the direct-responsibility aggravating factor first, and mitigation would follow only if the jury found the aggravating factor. *Id.* The trial court denied the bifurcation motion, however, and the jury found the aggravating factor, prompting the need for mitigation. *Wiggins*, 539 U.S. at 515.

[78] *Id.* at 537. The postconviction evidence also showed that Wiggins had borderline mental retardation. *Id.* at 535.

[79] *Wiggins*, 539 U.S. at 516.

[80] *Id.* at 526.

[81] *Id.* at 526-27, 534; *see also id.* at 524 (citing 1989 GUIDELINES, *supra* note 51, guideline 11.4.1(C)) (stating that investigations into mitigating evidence "'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'").

[82] *Id.* at 512 (quoting Strickland v. Washington, 466 U.S. 668, 690-91 (1984)).

[83] 545 U.S. 374 (2005).

[84] *Id.*

and at sentencing presented only alibi evidence to support a theory of residual doubt.[85] The Court noted at the outset, "[t]his [wa]s not a case in which defense counsel simply ignored their obligation to find mitigating evidence."[86] Nevertheless, counsel's investigation of Rompilla's school, medical, and juvenile records was incomplete. Most significant, counsel failed to obtain Rompilla's prior conviction file,[87] which contained evidence pointing to organic brain damage, borderline mental retardation, schizophrenia, and the fact that Rompilla's father was an alcoholic who physically and verbally abused him.[88] "The accumulated entries," the Court found, "destroyed the benign conception of Rompilla's upbringing and mental capacity that defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts."[89] "[T]aken as whole," the Court concluded, this evidence would have led a reasonable attorney to present an entirely different mitigation case.[90] *Rompilla* affirms the importance of explanatory mitigation and highlights counsel's duty to pursue all reasonable leads before limiting mitigation theories.

2. *Initial Critical Acclaim*

Commentators and practitioners have heralded these three decisions as a welcome, if overdue, response to the "impenetrable *Strickland* standard" and as an effort by the Court "to effectuate real improvement in the representation of capital defendants."[91] Those most optimistic see *Williams*,

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[85] *Id.* at 378. The defendant's son also testified that he loved his father and hoped to visit him in prison. *Id.*

[86] *Id.* at 381.

[87] *Id.* at 383-84, 387 (citing 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1982 Supp.). The Court also cited Guideline 11.4.1.D of the 1989 GUIDELINES, *supra* note 51, and Guideline 10.7 commentary of the 2003 GUIDELINES, *supra* note 51. *Rompilla*, 545 U.S. at 387 n.7.

[88] *Id.* at 392-93. This included an incident in which the father locked Rompilla "in a small wire mesh dog pen that was filthy and excrement filled" and forced him to "attend school in rags." *Id.*

[89] *Id.* at 392.

[90] *Id.* at 386. Some courts have expressed confusion over the Court's apparent failure to weigh the evidence in aggravation in assessing prejudice in *Rompilla*. Pinholster v. Ayers, 525 F.3d 742 (9th Cir. 2008) (Kozinski, J., concurring in reversal of district court grant of relief on sentencing ineffectiveness) (expressing uncertainty "whether *Rompilla v. Beard* still allows us to 'reweigh the evidence in aggravation against the totality of available mitigating evidence,' when counsel fails to uncover mitigating evidence. After all, counsel failed to uncover mitigating evidence in *Rompilla*, and the Supreme Court didn't seem to address the aggravating evidence in assessing prejudice.") (quoting Wiggins v. Smith, 539 U.S. 510 (2003)).

[91] John H. Blume & Stacey D. Neumann, "*It's Like Deja Vu All Over Again*": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines*

Wiggins, and *Rompilla* as initiating an era of greater Court oversight,[92] attuned to a more demanding standard that shows less deference to counsel's decisions and adheres more closely to prevailing professional norms.[93]

The decisions—which explicitly adhere to *Strickland*—do not change the law, but they do show the Court finally taking note that the performance bar has been raised and that standards of capital representation have evolved.[94] Reinvigorating a doctrine that slept for many years, they impose

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Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 129 (2007); *see also id.* at 153 ("In essence, the Supreme Court realized that *Strickland* was part of the problem, not a solution to poor representation in capital cases. Capital defendants were frequently being represented by ineffective counsel, and the high threshold of the *Strickland* standard tied the hands of appellate courts from doing much about the problem.").

[92] *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 383 (2008); *cf.* Sundby, *supra* note 58, at 1946 ("Although the Sixth Amendment standard for competent representation in capital cases remains far below what research has shown is required to mount a successful 'case for life,' the Court finally appears to be patrolling at least the outermost parameters of ineffective representation.").

[93] *See, e.g.*, Whitney Cawley, Note, *Raising the Bar: How* Rompilla v. Beard *Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139, 1185 (2007) ("In recent decisions regarding capital defendants' claims of ineffective assistance of counsel, the Court has shown a tendency toward modifying *Strickland* and imposing stricter standards on capital defense lawyers . . . ."); Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 104 (2007) (arguing the Court "tightened counsel's duty to investigate, not by changing the test formulated in *Strickland*, but by using the ABA standards as an evaluative tool rather than mere 'guidelines'"). Blume and Neumann suggest that the Court has essentially adopted a checklist approach akin to that favored by Judge Bazelon of the Circuit Court for the District of Columbia before *Strickland*. Blume & Neumann, *supra* note 91, at 143, 152. This argument finds some support in the *Rompilla* dissent, 545 U.S. at 402 (Kennedy, J., dissenting) ("One of the primary reasons this Court has rejected a checklist approach to effective assistance of counsel is that each new requirement risks distracting attorneys from the real objective of providing vigorous advocacy as dictated by the facts and circumstances in the particular case. The Court's rigid requirement that counsel always review the case files of convictions the prosecution seeks to use at trial will be just such a distraction."), but not in the language of the *Williams*, *Wiggins*, and *Rompilla* majority opinions. For a case applying the Death Penalty Guidelines in a checklist-like manner, see Summerlin v. Shriro, 427 F.3d 623, 630 (9th Cir. 2005) (en banc) (granting relief on sentencing ineffectiveness).

[94] White, *supra* note 14, at 2017 ("Although *Wiggins* simply applied *Strickland*'s ineffective assistance of counsel test, the Court's analysis indicates that its view of the standard of care required by an attorney representing a capital defendant may have evolved since *Strickland* was decided in 1984."); *accord* Elizabeth Gable & Tyler Green, Comment, Wiggins v. Smith: *The Ineffective Assistance of Counsel Standard Applied Twenty Years After* Strickland, 17 GEO. J. LEGAL ETHICS 755, 769 (2004) ("Although there was concern that *Wiggins* would alter the *Strickland* standard, in actuality it reaffirmed that *Strickland* was the standard, and demonstrated that attorney conduct would be examined on an objective basis, following the two prongs established in *Strickland*.").

a duty upon counsel to conduct a comprehensive life history investigation along the lines set forth in the Death Penalty Guidelines.[95] Failure to uncover and present mitigating evidence is no longer "justif[iable] as a tactical decision" unless counsel "fulfill[s] their obligation to conduct a thorough investigation of the defendant's background."[96] This includes a duty to pursue leads ("red flags") indicating explanatory mitigation, not just positive aspects of the defendant's background or character.[97] The results in these cases are all the more striking because the Court reversed the state court judgments under strict habeas standards of review.[98] As one writer put it:

> the Court finally provided death penalty lawyers with a clear mandate to vigorously investigate all potentially relevant aspects of their client's social history [and,] [o]nce having collected and assembled these facts into a mitigating narrative, attorneys were now on notice to present that more comprehensive and balanced view to the sentencing jury.[99]

But what of *Burger* and *Darden*?

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[95] Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003) ("[T]he *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases. This principle adds clarity, detail and content to the more generalized and indefinite 20-year-old language of *Strickland*. . . .").

[96] Wiggins v. Smith, 539 U.S. 510, 522 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 396 (2000)).

[97] *Rompilla* 545 U.S. at 389, 391 n.8; *Wiggins*, 539 U.S. at 527; *see* Mason v. Mitchell, 543 F.3d 766, 768 (6th Cir. 2008) ("We hold that trial counsel provided ineffective assistance by failing to interview Mason's family members and investigate the obvious red flags contained in state records suggesting that Mason's childhood was pervaded by violence and exposure to drugs in the home from an early age."). As the Third Circuit has stated, two principles resound: first, although counsel is not required "'to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing[,]'" they are in no position to decide, as a tactical matter, not to present mitigating evidence or not to investigate further just because they have *some* information about their client's background; second, "the presence of certain elements in capital defendant's background, such as family history of alcoholism, abuse, and emotional problems, triggers a duty to conduct further inquiry before choosing to cease investigating." Earp v. Ornoski, 431 F.3d 1158, 1175-76 (9th Cir. 2005) (quoting *Wiggins*, 539 U.S. at 533) (remanding for evidentiary hearing on sentencing ineffectiveness).

[98] In each of the cases, governed by the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), the Court was constricted to grant relief only if the state court judgment unreasonably applied clearly established federal law (28 U.S.C. § 2254(d)(1)) or unreasonably determined the facts (28 U.S.C. § 2254(d)(2)).

[99] Haney, *supra* note 46, at 855.

III. STRATEGERY'S REFUGE

The brief history recounted above and the aspects of *Wiggins* that most have grasped do not tell the whole story. As the "science" of mitigation has developed over the past three decades, so has the scope of aggravating evidence. The Court has allowed an expansive range of evidence that weighs in favor of a death sentence.[100] The most significant development is the concept of future dangerousness, which refers to the likelihood that a prisoner will commit violent crime again.[101] For reasons rooted in fear more than rationality, future dangerousness is constantly on the minds of capital jurors. Even when the sentencing alternative to a death sentence is life imprisonment without the possibility of parole, and although many capital defendants adjust better in a structured prison environment than in society, jurors nevertheless routinely ponder the unlikely event of a defendant's escape or early release.[102]

The science of mitigation has responded to jurors' fears of dangerousness with information about the defendant's background in the form of risk factors, which aid in predicting the likelihood that the defendant will pose a future problem.[103] But this does not extinguish jurors' concerns.[104] Accordingly, capital defense counsel remain wary of evidence that could potentially support a future dangerousness finding. Often this is mitigating evidence, however, of the classic type: mental illness, brain damage, or a history of sexual or physical abuse, neglect, or drug or alcohol abuse. This evidence lessens the defendant's culpability and humanizes the defendant by explaining his or her frailties, but it also may suggest a potential for violent conduct in the future.[105]

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[100] *See* Zant v. Stephens, 462 U.S. 862 (1983) (upholding state's use of non-statutory aggravating factors); *see also* Tuilaepa v. California, 512 U.S. 967 (1994) (holding state statute need not specify whether jurors should consider relevant but ambiguous factors, such as age, as mitigating or aggravating).

[101] *See generally* John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (2001). *See also* Barefoot v. Estelle, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting) (recognizing that "two out of three" predictions of future dangerousness are wrong (emphasis omitted)).

[102] *Id.* at 404-05.

[103] *See* Mark D. Cunningham et al., *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 LAW & HUM. BEHAV. 46 (2008). As the authors explain, "future dangerousness" "is a . . . descriptor that arguably applies to virtually all capital offenders, if not almost all violent felons, and thus does little to individualize the application of the death penalty." *Id.* at 47 n.2.

[104] Blume et al., *supra* note 101, at 397.

[105] *See* Wiggins v. Smith, 539 U.S. 510, 553 n.4 (Scalia, J., dissenting).

The omnipresence of future dangerousness explains the appeal of the *Burger* principle under which counsel may reasonably decide not to fully investigate or present explanatory mitigation and choose instead a "good guy" or residual doubt defense. It helps to explain why courts before *Williams*, *Wiggins*, and *Rompilla*, expecting no more from counsel than *Burger* required, liberally upheld counsel's representation. The *Burger* principle does not excuse incomplete work by defense counsel, but under the cover of the old precedent counsel could explain away an incomplete or inconsistent defense as an intentional decision to avoid certain explanatory background evidence.[106]

There are two distinct yet highly related mechanisms by which post hoc rationalizations—strategery—in the capital sentencing context have been condoned. On *Strickland*'s performance prong, courts falling for strategery have excused abbreviated investigations that did not otherwise meet the thorough demands of professional standards as tactical decisions meant to avoid jury findings of future dangerousness.[107] Second, on *Strickland*'s prejudice prong, some courts have made expansive use of "double-edged" doctrine to forgive counsel's failures to investigate or present explanatory mitigation.[108] These mechanisms are similar in that both turn on the perceived mitigating value of the evidence that defense counsel failed to investigate and present; but whereas the first identifies

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[106] Professor Stephen Smith refers to such post hoc rationalizations as "strategery." Smith, *supra* note 1, at 357 n.266.

[107] *See infra* IV.A.1 (discussing West v. Bell, 550 F.3d 542 (6th Cir. 2008)).

[108] John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480, 1489, 1502-03. In 1999, Blume and Johnson noted that the Fourth Circuit had "invoked [the double-edge] rationale in dismissing evidence of a defendant's organic brain dysfunction, evidence of a defendant's abuse as a child, and evidence of a defendant's drug addiction, a history of abuse, and mental impairment." *Id.* at 1497. The court adhered to the double-edge rationale so strongly, they critiqued, that in essence "all psychologically based mitigating evidence" was a "'two-edged sword,' because although evidence of a defendant's mental impairment may diminish his blameworthiness for his crime, it also may indicate[] that there is a probability that he will be dangerous in the future." *Id.* at 1480-81 (quotations omitted); *see id.* at 1497 ("The Fourth Circuit will simply imagine how a juror might possibly view the mitigating evidence in a negative light, find that the mitigating evidence is "two-edged," and conclude that the defendant cannot show prejudice."). The double-edged sword principle, if rooted in legitimate concerns of hurting the case for life, was—as used by counsel seeking to justify limited investigation and by courts approving of the same—extremely broad. *See, e.g.*, St. Pierre v. Walls, 297 F.3d 617 (7th Cir. 2002) (reversing grant of relief by district court). "[T]he availability and admissibility of practically any evidence is a double-edged sword. If counsel introduces mitigating evidence the prosecution can rebut with other evidence, which may turn out to be substantially more damaging." *Id.* at 632 (citing Darden v. Wainright, 477 U.S. 168, 185-86 (1986)).

shortcomings in counsel's performance, the second asks whether those shortcomings mattered. It is hard to imagine that *Woodson*, in fashioning a constitutional requirement of individualized sentencing, intended a circumstance where counsel would routinely disregard substantial mitigation out of fear that, despite the evidence's mitigating potential, it might be perceived as aggravating, and therefore forego the evidence in favor of a limited or incomplete theory of mitigation. That was the case, however, before *Williams*, *Wiggins*, and *Rompilla*.

At first glance, the holdings and reasoning of the new cases plainly will not accept investigations limited merely by fear of mitigating evidence's double edge. After all, in each case, the Supreme Court rejected trial counsel's post hoc attempt to justify an abbreviated investigation as the product of a mitigation theory. The Court rejected counsel's "strategic" decision to limit mitigation to residual doubt in *Rompilla*;[109] to lack of criminal responsibility in *Wiggins*;[110] and to showing that the client was a "nice boy" in *Williams*.[111] Moreover, the *Williams* Court wrote of the importance of explanatory mitigation, faulting counsel for thinking that a mere positive-evidence presentation could suffice.[112] The very investigation and presentation of mitigating evidence the Court allowed counsel to bypass in *Burger* and *Darden*, it now champions.

But what the new precedent says about the old precedent a reader may find surprising. If *Williams* foretold an end to the relevance of *Burger*'s principle, *Wiggins* and *Rompilla* hedged. Rather than excise *Burger* as an anachronism, or explain that the course taken in *Burger* could only apply following a full mitigation investigation (as one would expect given the reasoning of the Court's decisions), the Court settled for merely distinguishing—and not very convincingly—the factual circumstances of the old precedent from the new. The Court said that "Wiggins' history contained little of the double edge we have found to justify limited investigations,"[113] and distinguished *Burger*, *Darden*, and *Strickland* as cases where counsel actually knew of harmful evidence, which they intentionally avoided:

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[109] Rompilla v. Beard, 545 U.S. 374, 378 (2005).

[110] Wiggins v. Smith, 539 U.S. 510 (2003); *see* Brief of Respondents, *supra* note 77, at 2-9.

[111] Williams v. Taylor, 529 U.S. 362, 396 (2000).

[112] *Id.*; *see, e.g.*, Outten v. Kearney, 464 F.3d 401 (3d Cir. 2006) ("The State asserts, and we acknowledge, that not all of the evidence in the records counsel failed to investigate is favorable to Outten. This is nearly always the case. Indeed, the same was true of the evidence not investigated by counsel in *Williams*.").

[113] *Wiggins*, 539 U.S. at 535 (citing Burger v. Kemp, 483 U.S. 776 (1987); Darden v. Wainright, 477 U.S. 168 (1986)).

> [C]ounsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable. *See, e.g.*, *Strickland* (concluding that counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger v. Kemp* (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden v. Wainwright* (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail).[114]

Similarly, in *Rompilla*, the Court described *Burger* as a case in which "limited investigation [was] reasonable because all witnesses brought to counsel's attention provided predominantly harmful information," and differentiated *Strickland* again as a case in which "counsel could reasonably surmise . . . that character and psychological evidence would be of little help."[115] "[R]easonably diligent counsel," the Court remarked, "may draw a line when they have good reason to think further investigation would be a waste."[116]

Upon closer inspection, the factual distinctions in each decision are questionable. In light of contemporary standards, characterizing *Darden* as a case of "extensive investigation" seems far outdated. Describing *Burger* as a "limited investigation" to tactically avoid "predominantly harmful information" rings untrue because the types of mitigation found harmful in *Burger* (childhood abuse and neglect and mental illness) are just those that counsel failed to uncover in *Wiggins*. The *Wiggins* Court's attempt to distinguish the evidence of "troubled childhood and severe mental problems" at issue in *Wiggins* from the "violent conduct" counsel feared in *Burger*[117] itself implies *Burger*'s limits and, further, does not distinguish Williams or Rompilla, who did have a record of violence.[118] Finally, the Court's suggestion that counsel in *Wiggins* and *Rompilla* did not know of

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[114] *Id.* at 525 (citations omitted).

[115] Rompilla v. Beard, 545 U.S. 374, 383 (2005) (internal quotation marks omitted).

[116] *Id.*

[117] *See* White, *supra* note 14, at 2059-60 ("Based on *Wiggins* itself, a capital defendant's attorney cannot reasonably conclude that introducing mitigating evidence relating to a defendant's troubled childhood or severe mental problems would be so double-edged that the attorney can curtail investigation for such evidence. . . . Justice O'Connor emphasized that the mitigating evidence available in *Wiggins* did not show that Wiggins had previously engaged in violent conduct.").

[118] *See Rompilla*, 545 U.S. at 378 ("Rompilla had a significant history of felony convictions indicating the use or threat of violence."); *Williams*, 529 U.S. at 368 ("The prosecution described two auto thefts and two separate violent assaults on elderly victims perpetrated [by Williams].").

the mitigation at issue[119] is forced because counsel testified they were aware that mitigating evidence existed.[120]

However unconvincing these distinctions, there can be no mistake that *Wiggins* and *Rompilla* send mixed messages about counsel's duty to investigate and present explanatory mitigation and about the impact of explanatory mitigation on a jury insofar as it is relevant to determining prejudice. Is explanatory mitigation the classic background information that is the bread and butter of the individualized sentencing determination that *Woodson* envisions? Or is it evidence with a double edge that would have made little mitigating impact on the jury and might have hurt the case for life? The new cases emphasize the need for comprehensive life history investigation and endorse the ABA Death Penalty Guidelines, but leave the old law of *Burger*, *Darden*, and *Strickland*—historically, strategery's most reliable refuge—standing.[121] Can the new decisions finally "give[] teeth"[122]

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[119] By implication, if counsel had been aware, they could have made a reasoned choice not to pursue the evidence for the reasons enunciated in *Burger*. By this reading, once counsel does *some* investigation into available mitigating evidence, greater deference is due counsel's strategic decisions. This reasoning could extend to the presentation of evidence as well. *See* Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1664-65 (2008) ("Once counsel becomes aware of the available mitigation evidence, substantial deference will adhere to his or her decisions regarding the presentation of this material at trial. . . . [C]ourts rarely second-guess informed decisions by counsel regarding what facts, within the universe of available evidence, should be presented at the penalty phase of a capital trial.").

[120] The *Wiggins* majority intimated that counsel never reviewed the content of the PSI and DSS records, but the postconviction testimony shows otherwise. *Wiggins*, 539 U.S. at 538 (Scalia, J., dissenting); *see id.* at 545 (noting that counsel "testified in the state postconviction proceedings that he was aware . . . that Wiggins was subjected to neglect and abuse from his mother, that there were reports of sexual abuse at one of his foster homes, that his mother had burned his hands as a child, that a Job Corps supervisor had made homosexual overtures toward him, and that Wiggins was 'borderline' mentally retarded." (citations omitted)); *id.* at 546 (arguing that counsel "was aware of all this potential mitigating evidence, [but] chose not to present it to the jury for a strategic reason—namely, that it would conflict with his efforts to persuade the jury that Wiggins was not a 'principal' in [the] murder (*i.e.*, that he did not kill [the victim] by his own hand").

[121] Shortly after *Wiggins*, an article thoughtfully explored this tension. White, *supra* note 14. After careful consideration of the competing precedent, the study concluded that "[b]ased on *Wiggins*'s holding and analysis, the circumstances under which a capital defendant's attorney's strategic choice to curtail an investigation for mitigating evidence will constitute deficient performance [are] unclear." *Id.* at 2022 ("The Court's analysis does not suggest . . . that an attorney could never reasonably make a strategic choice to curtail investigation because she concluded that seeking additional mitigating evidence would be unproductive. On the contrary, the Court intimated that an attorney would be able to justify such a choice in cases where the attorney could reasonably conclude that she would not want to introduce potential mitigating evidence because of a concern that it would be unproductive or double-edged.").

[122] Rigg, *supra* note 93, at 97.

to Strickland's ineffectiveness test if they have not closed the doors to strategery?

Closing the doors to strategery, as the case survey in the next section illustrates, involves more than clarifying precedent. But it is a necessary initial step, and I will make some attempt here. Despite the Court's reluctance to explicitly overrule *Burger* and *Darden*, the principles and reasoning of the new precedent plainly demand that no decision to limit mitigation investigation is reasonable unless a thorough life history investigation precedes it. In other words, counsel cannot make a reasonable decision about what to investigate or not investigate, or what to present or not present to the jury, without a full picture of the client's life. The Death Penalty Guidelines, *Wiggins*'s guides, point overwhelmingly against limitations on investigation, especially after counsel discovers leads evincing explanatory mitigation such as a horrible childhood or mental illness. These issues also turn on counsel's ethical duties in capital cases, and those duties, stressed by ethics authorities,[123] permeate the practice of the very defense litigators who have developed and advanced capital practice over the past three decades.[124] Parsing the language of the Court's new decisions to create a gaping loophole for abbreviated investigations whenever counsel is aware of explanatory mitigation would indeed be ironic, because the thorough investigation that *Williams*, *Wiggins*, *Rompilla*, and the Death Penalty Guidelines demand is an effort to discover just the sort of information—and to discover it in detail—that *Burger* allowed counsel to dismiss after very little searching.

At the very least, the new cases demand a merger of the old precedent with modern standards of practice. This means modifying *Burger* to require investigation along the lines of what the Guidelines call for today. As such, abandoning investigation of an explanatory mitigation avenue may be reasonable in limited circumstances, but is subject to much more scrutiny than counsel's performance in the 1970s. Prevailing professional norms require a more nuanced consideration of the pros and cons of integrating positive and double-edged evidence before deciding to refrain.[125] For example, although counsel must account for aggravating

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[123] *See, e.g.*, Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775 (2008).

[124] *See, e.g.*, White, *supra* note 14, at 2038-42 (reporting interviews with experienced capital litigators).

[125] For an example of investigation that would have been accepted in *Darden* and *Burger* but not now, see Outten v. Kearney, 464 F.3d 401, 418 (3d Cir. 2008) ("It was standard practice at the time of Outten's trial for a death-eligible defendant's penalty-phase investigation to include his medical history, educational history, family and social history, employment history, and adult and juvenile correctional records. Counsel's investigation, however, was limited solely to conversations with Outten and his mother—a woman who, as

evidence and counteract future dangerousness testimony,[126] rather than reject mitigating evidence with a double edge, "[c]ounsel should integrate the defense response to the prosecution's evidence in aggravation with the overall theory of the case."[127] By this reading, which preserves the recognizable meaning of the new cases that most commentators advance, even if *Burger* and *Darden* remain law, the new precedent leaves little room for strategery to excuse counsel's shortcomings. The reasoning of *Wiggins*, *Williams*, and *Rompilla*, which demand thorough investigation before tactical decisions, relegate *Burger* and *Darden* principles to a small set of cases in which counsel first substantially investigates and only then seeks to limit additional investigation or the presentation of evidence—to cases, in other words, in which counsel's decisions are not post hoc anyway.

Before moving on, other recent precedent, which has not been all positive for those seeking a stronger right to effective counsel, deserves mention. Since *Williams*, the Court has reaffirmed its suggestion in *Strickland* that counsel are not ineffective for following a directive by the client not to present mitigating evidence.[128] The Court has reversed a grant of habeas relief for sentencing ineffectiveness, determining that a state court's finding of no prejudice was not unreasonable given the overwhelming aggravating evidence in the case.[129] But the decision most

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demonstrated by the unreviewed-by-counsel records, had not 'shown great[ ] continued interest in [her son].' We conclude that this effort fell well short of the national prevailing professional standards articulated by the American Bar Association and was, therefore, unreasonable." (citation omitted)).

[126] 2003 GUIDELINES, *supra* note 51, guideline 10.11(G), at 1056-57 ("In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. "). *Id.* guideline 10.11 cmt., at 1062 ("Counsel should give serious consideration to making an explicit presentation of information on [future dangerousness].").

[127] *Id.* guideline 10.11 cmt., at 1065. The Guidelines suggest using motions in limine "to ensure that the defense case concerning penalty is constricted as little as possible by this consideration." *Id.* guideline 10.11(G), at 1057. The Guidelines also provide:

> [I]n preparing a defense presentation on mitigation, counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible. . . . However . . . if there is uncertainty as to the scope of how wide this opening would be or if counsel believes that excessive rebuttal is to be admitted, they should object and make a full record on the issue.

Id. at 1064 & n.291.

[128] *Shriro v. Landrigan*, 550 U.S. 465, 481 (2007).

[129] *Woodford v. Visciotti*, 537 U.S. 19, 26 (2002). The Court held so despite counsel's

> failure to present evidence of respondent's "troubled family background," which included his being "berated," being "markedly lacking in self-esteem and depressed," having been "born with club feet," having "feelings of inadequacy, incompetence, inferiority," and the like, moving "20 times" while he was growing up, and possibly suffering a "seizure disorder."

pertinent to the Court's treatment of explanatory mitigation is *Bell v. Thompson*.[130] In *Thompson*, the Court considered a decision by a Sixth Circuit panel, which recalled its mandate denying relief for ineffective assistance of sentencing counsel, and then granted relief, after discovering the deposition of a mental health expert showing that the defendant-petitioner grew up in horrible circumstances, had a family history of mental illness, and suffered from schizophrenia throughout childhood, adolescence, and at the time of the crime.[131] Reversing the panel decision, the Court found that the mitigating evidence, while undoubtedly relevant, was "unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim."[132] Thompson's trial attorneys, the Court added, made a strategic decision, after interviewing Thompson's grandmother, sister, and ex-girlfriend, "not to pursue a mitigation strategy based on mental illness," and rather present "character evidence from family and friends and expert testimony that he had the capacity to adjust to prison."[133] While the question presented in *Thompson* had to do with abuse of the mandate, the Court's finding that counsel's performance, which ignored compelling evidence of hardship and mental illness, did not prejudice Thompson is unsettling.[134]

The manner in which the *Thompson* Court interprets the value of explanatory mitigation, focused on its double edge, points to a shelter for post hoc rationalization that is more perceptual than doctrinal. As the next section discusses, divergent perceptions among judges over the value of explanatory mitigation may be the principal source of the continuing tension between contemporary professional standards and the old case law. Where the federal courts of appeals' decisions from *Williams* through the end of 2008 display disagreement over the current reach of *Burger*, at root lies a difference in perception about the value of much of the background evidence that *Lockett* and *Woodson* deem fundamental.

Id.

[130] 545 U.S. 794 (2005) (applying 28 U.S.C. § 2254(d)(1)); *see also* Bell v. Cone, 535 U.S. 685 (2002) (denying a claim of sentencing ineffectiveness after applying Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)).

[131] 545 U.S. at 820 (Breyer, J., dissenting).

[132] *Id.* at 808-09 (majority opinion).

[133] *Id.* at 810. A four justice dissent written by Justice Breyer strenuously disagreed. *Id.* at 827 (Breyer, J., dissenting).

[134] The Supreme Court has granted certiorari in another case that, like *Thompson*, involves sentencing ineffectiveness as a secondary issue. *See* Wood v. Allen, 542 F.3d 1281 (11th Cir. 2008), *cert. granted*, 129 S. Ct. 2389 (2009) (mem.). The questions presented address the application of the AEDPA—specifically the interaction of 18 U.S.C. §§ 2254(d)(2) and 2254(e)(1)—to the review of state court fact determinations. *See* Petition for Writ of Certiorari at i, Wood v. Allen, No. 08-9156 (U.S. Mar. 12, 2009), 2009 WL 1370171.

IV. GENERATION GAPS: SURVEYING THE INEFFECTIVE DIVIDE IN THE FEDERAL COURTS OF APPEALS

Following *Strickland* in 1984 and throughout the 1990s, a grant of relief for ineffective assistance based on counsel's failure to investigate and present mitigating evidence was something no postconviction petitioner could expect, even if well deserved. Today, following *Williams*, *Wiggins*, and *Rompilla*, if courts measure ineffective assistance according to more demanding contemporary standards, one would expect some increase in the number of victorious sentencing ineffectiveness claims. Even if *Williams*, *Wiggins*, and *Rompilla* simply stand as a strong reminder of the evolving standards of capital defense practice, one might anticipate a rise in successful claims. Since the Court decided *Williams* in April 2000, hundreds of claims of attorney failure to adequately investigate or present mitigating evidence—raised in state prisoners' petitions for federal habeas corpus or federal prisoners' habeas petitions under 28 U.S.C. § 2255—have come before the federal courts of appeals. Between *Williams* and the end of 2008, the courts of appeals addressed the issue in over three hundred cases.[135] Of these, 51 resulted in grants of relief, 254 in denials, and the remaining handful were remanded for an evidentiary hearing. This marks slightly greater success than in the 1980s and 1990s, but not by much.[136]

Dispositions by the circuit courts show that courts are, by and large, staying the course. In the Fourth, Fifth, or Eleventh Circuits, for example, which found not a single lawyer ineffective in capital sentencing prior to *Williams*, *Wiggins*, and *Rompilla*, the success rate of claims of ineffective assistance of capital counsel at sentencing remains very low. In the Fourth Circuit, only one claim resulted in a grant of relief out of forty-six. The Fifth Circuit heard over seventy such claims, granting relief only twice. And the Eleventh Circuit assessed counsel's failure to investigate and

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[135] The breakdown by circuit between *Williams* and the end of 2008 is as follows: Third Circuit, nine cases; Fourth Circuit, forty-six cases; Fifth Circuit, seventy-one cases; Sixth Circuit, fifty-one cases; Seventh Circuit, nine cases; Eighth Circuit, fifteen cases; Ninth Circuit, thirty-seven cases; Tenth Circuit, twenty-eight cases; and Eleventh Circuit, forty-nine cases. The First, Second, and Twelfth Circuits have not adjudicated claims of this type in the capital context. This encompasses all claims of ineffectiveness of counsel based on capital counsel's failure to investigate or present mitigating evidence, including claims alleging an overall failure to investigate or present evidence, as well as claims alleging limited failures to investigate or present evidence (e.g., failure to present the testimony of a particular individual or expert). *See infra* Appendices 1 (listing cases and dispositions in the Sixth Circuit) and 2 (listing cases and dispositions in the Fourth Circuit). The Sixth Circuit and Fourth Circuit are chosen as representative of jurisdictions that grant relief and do not grant relief, respectively, for ineffectiveness at capital sentencing.

[136] *See* Graham, *supra* note 119, at 1656 (noting that "[i]n recent years, courts have become slightly more receptive to claims alleging the ineffective investigation and presentation of mitigating evidence—but only slightly").

present mitigating evidence in forty-nine cases and granted relief in only two.[137]

Other circuits, also maintaining roughly the same course as before *Williams*, present a different picture. The Third, Sixth, and Ninth Circuits granted relief occasionally for sentencing ineffectiveness before *Williams*, and still do. In the Third Circuit, five of nine petitions won relief on sentencing ineffectiveness; one of the denials was *Rompilla*, which the Supreme Court reversed. The Sixth Circuit granted relief in sixteen of fifty-two cases, denied relief in thirty-four, and remanded two. The Ninth Circuit granted relief on capital sentencing ineffectiveness in seventeen cases, denied relief twelve times, and remanded for an evidentiary hearing in eight cases. Twenty-eight claims of sentencing ineffectiveness came before the Tenth Circuit between *Williams* and the end of 2008, resulting in five grants of relief, twenty denials, and three remands for evidentiary hearings.[138]

Together, the Sixth Circuit and Ninth Circuit have granted relief on sentencing ineffectiveness claims since *Williams* more than the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits combined (compare sixteen grants of relief in the Sixth Circuit and seventeen in the Ninth Circuit to thirteen successful claims in the five circuits combined).[139] A petitioner presenting a sentencing ineffectiveness claim in the Sixth Circuit has an approximately 33% chance of relief; in the Ninth Circuit, a defendant has near a 50% chance of relief. Compare that to the Fifth Circuit, where the odds since *Williams*—with one grant in seventy-one claims—are a sobering 1.4%; the Fourth Circuit, where the rate of success is 2.2%; or the Eleventh Circuit, where the odds remain extremely low at 4%, and a discrepancy is clear.

If *Williams*, *Wiggins*, and *Rompilla* have strengthened constitutional review of capital counsel's performance, one would expect a more uniform rise, across all Circuits. Certainly the low number of successful claims in the Fourth, Fifth, and Eleventh Circuits is not explained by the superiority of representation provided by court-appointed trial counsel in those

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[137] *See infra* Appendix 2 (listing cases and dispositions in the Fourth Circuit).

[138] *See infra* Appendix 1 (listing cases and dispositions in the Sixth Circuit).

[139] In circuits that grant relief on sentencing ineffectiveness more than once in a blue moon, the rate of success appears to have increased slightly over time in response to the new trio of cases. Looking at claims in the Sixth Circuit chronologically after the Supreme Court's decisions in *Williams*, *Wiggins*, and *Rompilla* shows that, since *Wiggins*, the court has granted relief in twelve cases and denied relief in twenty-four, and since *Rompilla*, the court has granted relief in ten cases and denied relief in twenty-one. In 2007, the court granted relief in two cases and denied relief in six. In 2008, the court granted relief on the issue in four cases and denied relief in six. *See infra* Appendix 1.

jurisdictions.[140] Some of the trio's small impact may be attributable to the restrictions on relief from state judgments in federal habeas corpus imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA).[141] But the Court in *Williams*, *Wiggins*, and *Rompilla* was restrained by the AEDPA and granted relief, so the AEDPA alone cannot explain the trio's muted impact. Nor would the uniformly applicable AEDPA explain the discrepancy between the circuits. While the quality of postconviction and habeas counsel may have some impact, dissension within cases shows that other factors are at work.

A close look at federal courts of appeals decisions since *Williams* shows neither that counsel across the country are doing a great job nor that courts are ignoring the emphasis that *Williams*, *Wiggins*, and *Rompilla* placed on the importance of a full life history investigation. Rather, the muted impact of the new precedent derives in significant part from (1) differing views on how to read *Wiggins*'s and *Rompilla*'s acceptance of *Burger* and *Darden* and simultaneous adherance to contemporary standards of performance as set forth in the Death Penalty Guidelines; and (2) differing perceptions of the value of explanatory mitigation. As the following case examples illustrate, the Court's message after *Williams*, *Wiggins*, and *Rompilla* is incomplete. This has left room for differences in interpretation that divide the circuits and the panels within some circuits.[142]

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[140] *See, e.g.*, Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000) (criticizing quality of court-appointed capital defense lawyers in Texas, which is under the jurisdiction of the Fifth Circuit).

[141] *See* Woodford v. Visciotti, 537 U.S. 19 (2002) (reversing grant of habeas relief based on sentencing ineffectiveness on the ground that the Ninth Circuit failed to properly apply § 2254(d)(1) of the AEDPA to a state court determination of *Strickland* prejudice). Because *Strickland* is a general rule, a state court's application has to be pretty far off the mark before it meets the "unreasonableness" standard that the statute requires to grant the writ. *See* Wright v. West, 505 U.S. 277, 308-09 (1992) ("Where the beginning point is a rule of . . . general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.") (Kennedy, J., concurring). *See generally* Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L. J. 283 (2004).

[142] *See*, e.g., Correll v. Ryan, 539 F.3d 938 (9th Cir. 2008) (reversing district court denial of sentencing ineffectiveness relief and denying rehearing en banc over five judge dissent), *cert. denied sub nom.* Schriro v. Correll, 129 S. Ct. 903 (2009) (mem.); Wilson v. Sirmons, 536 F.3d 1064 (10th Cir. 2008) (reversing district court denial of sentencing ineffectiveness relief), *reh'g en banc granted*, 549 F.3d 1267 (10th Cir. 2008), *aff'd sub nom.* Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009) (en banc); Wood v. Allen, 542 F.3d 1281 (11th Cir. 2008) (reversing district court grant of sentencing relief), *cert. granted*, 129 S. Ct. 2389 (2009) (mem.); Foster v. Schomig, 223 F.3d 626 (7th Cir. 2000) (reversing district court grant of sentencing ineffectiveness relief and denying rehearing en banc over four judge dissent).

Rather than the moot point of whether *Wiggins* changed the law, a more important question is how *Burger* and the dismissive attitude toward explanatory mitigation at its root fare today.

A. *WIGGINS*'S LOOPHOLE

In the Sixth Circuit, the divergent views of appellate panels stand like two sides of a canyon, and a petitioner's ineffectiveness claim a glider whose fate, for better or worse, resides on whichever side it lands. In this Circuit, where a petitioner bringing a mitigation ineffectiveness claim has a roughly one in three chance of getting relief, the pattern of how individual judges vote for or against sentencing phase ineffectiveness relief is marked. The basis for this difference is not that certain judges are expressly for or against the death penalty,[143] or that particular judges believe in mitigation as an Eighth Amendment requirement while others do not.[144] The division is not, in other words, because members of the court would not impose death under any circumstance, or because a member of the court does not believe in the right to individualized sentencing. The difference is not about Eighth Amendment fundamentals. It concerns the Sixth Amendment—specifically, what the Constitution requires of capital defense counsel investigating and presenting mitigating evidence.[145]

The most immediate measures of this difference are cases that involve a common set of facts, in which one court reverses another or individual members of the court disagree, such as a panel decision on an issue in which one of three judges dissents, an en banc reversal of a panel decision, a dissent from denial of rehearing en banc, or a circuit court panel's reversal of the district court decision below. An advantage of looking at these cases is that it eliminates the performance of postconviction and habeas counsel as a factor: the judges heard the same evidence, witnessed the same presentation by collateral counsel, yet reached different conclusions. In the

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[143] *Cf.* Gregg v. Georgia, 428 U.S. 153, 229, 231 (1976) (Brennan, J., & Marshall, J., dissenting) (concluding the the Eighth Amendment forbids the death penalty in all circumstances).

[144] *Cf.* Walton v. Arizona, 497 U.S. 639, 669-73 (1990) (Scalia, J., concurring) (concluding that the principle of individualized sentencing has no basis in the Eighth Amendment).

[145] *See, e.g.*, Keith v. Mitchell, 466 F.3d 540, 548 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing en banc) ("Indeed, members of this Court have gone on the record to second-guess the jurisprudence of the Supreme Court, and this Court, that requires counsel to conduct an adequate investigation of potential mitigating circumstances for purposes of capital sentencing, and mandates the reversal of convictions where this does not occur. This reasoning strikes me as demonstrating callousness and possible animosity toward the Sixth Amendment right to counsel.") (citing Poindexter v. Mitchell, 454 F.3d 564, 588 (6th Cir. 2006) (Boggs, J., concurring); *id.* at 589 (Suhrheinrich, J., concurring)).

fifty-two Sixth Circuit decisions on sentencing ineffectiveness, over half (twenty-nine) involve dissents.[146] There are a handful of splits in other postures—one en banc reversal of a panel decision, one dissent from the denial of rehearing en banc, and three panel reversals of district court rulings. In sum, nearly 60% (32 of 54) of the Sixth Circuit's decisions on the effectiveness of capital counsel's mitigation investigation and presentation come with a dissent or involve some disagreement on the application of Sixth Amendment law to the facts of the case. Judges in other circuits share contrasting views, but in no circuit is the distribution as noticeable and as contentious as in the Sixth Circuit.[147]

1. Case Example 1: West v. Bell *(6th Cir. 2008)*

In the last case on sentencing ineffectiveness the Sixth Circuit decided in 2008, the majority relied on *Burger* and denied the writ; the dissent applied *Wiggins* and would have granted relief, finding ineffective assistance based on counsel's failure to investigate and present mitigating evidence.[148] The case involved a twenty-three year old defendant, convicted and sentenced to death in 1987 for the murder and rape of a fifteen year old girl and the murder of her mother.[149] West's trial attorney decided to show that West had been "a good and decent citizen: that he had never before been in trouble with the law, that he was a veteran who served his country, and that he was a loving husband and a soon-to-be father."[150] Counsel presented six witnesses at sentencing: three family friends; the county sheriff, who testified that West was peaceable in jail prior to trial;

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[146] *See infra* Appendix 1.

[147] The characteristics of decisions differ by Circuit. For example, in contrast to the Sixth Circuit, the Fourth Circuit unanimously denies nearly every sentencing ineffectiveness claim. *See infra* Appendix 2. The Fifth Circuit's panel decisions on sentencing ineffectiveness, like the Fourth Circuit's, are almost always unanimous, but they are usually short and often per curiam. Many Fifth Circuit decisions in this area are unreported. The prevalence of unreported decisions suggests that the court views these cases as easy decisions; however, the approach taken in many is questionable and debated by judges in other circuits. Most often, the court adjudicates sentencing ineffectiveness claims by skipping the performance prong and considering only prejudice, which it then dismisses on the ground that the uncovered mitigation was double-edged, cumulative, or overwhelmed by the strength of aggravating factors. An exception is the Fifth Circuit's decision in *Walbey v. Quarterman*, 309 Fed. App'x 795 (5th Cir. 2009), in which the court, granting relief on sentencing ineffectiveness, provided a thorough discussion of prejudice, noting that it long ago rejected the argument that the brutality of a crime trumps mitigation. Other circuits also have distinguishing features. The Eleventh Circuit, despite *Wiggins*, maintains along the lines of *Burger* that counsel need not investigate the defendant's complete background, only what is constitutionally compelled. *See* Ford v. Hall, 546 F.3d 1326 (11th Cir. 2008).

[148] West v. Bell, 550 F.3d 542 (6th Cir. 2008).

[149] *Id.* at 546.

[150] *Id.* at 556.

West's sister, who testified that "West was the baby of the family and had never been in trouble"; and West's wife, who stated under oath that "they had a good relationship and that West was a good father to their eleven-month-old daughter."[151] The sentencing proceeding's last witness was West, who admitted his presence at the scene but denied murdering the victims and said that "he had no prior criminal records, had been an honor student in school, and had never had any disciplinary problems."[152]

West's trial counsel left out that West was a frequent victim of abuse when he was young, that he was born in a psychiatric hospital where his mother was a patient, and that he had a history of psychological instability throughout childhood and adolescence. Counsel interviewed West's sister, his parents, and his wife, but did not hire a mental health expert for mitigation, obtained no employment, medical, or school records, and failed to introduce military records pointing to a history of child abuse.[153] Looking back, West's counsel sought to justify the failure to conduct a more thorough investigation as a tactical decision to present only evidence that portrayed West in a positive light.

West presents a scenario very similar to *Williams* and *Wiggins*: counsel's failure to conduct a full life history investigation resulted in a limited and lopsided mitigation presentation (along the lines of *Rompilla*), subsequently explained as a strategic decision to avoid presenting evidence that the jury might interpret to support a finding of future dangerousness. Looking to *Burger*, the panel majority decided that "an explanation of petitioner's history would not have minimized the risk of the death penalty" and that trial counsel's decision "not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment."[154] Even if counsel pursued "the evidence of West growing up victimized by abuse and psychological instability," the majority surmised, "the very same evidence may have had the opposite effect on the jury."[155] The jury, the court continued, "might have believed that violence begets violence and that West's past abuse made him the kind of person who could have raped and tortured a fifteen year-old girl. They might have despised West and sentenced him to death with greater zeal."[156] The court concluded that West had not proved deficient performance.[157]

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[151] *Id.* at 547.
[152] *Id.* at 547.
[153] *Id.* at 554.
[154] *Id.* at 554-55 (quoting Burger v. Kemp, 483 U.S. 776, 776, 794 (1987)).
[155] *Id.* at 556.
[156] *Id.* at 556.
[157] *Id.* at 556.

The dissent, in contrast, perceived that counsel failed to follow leads in military records, which included allegations of abuse and evidence of West's birth in a psychiatric hospital, and that this rendered the decision to limit the mitigation investigation unreasonable.[158] Chiding the majority for giving mere lip service to *Williams*, *Wiggins*, and *Rompilla*, the dissent found that the evidence of abuse

> would have changed West's mitigation case from one about West's character as 'a good and decent citizen,' 'never before . . . in trouble with the law,' 'a veteran,' and 'a loving husband and a soon-to-be father,' to one that actually explained why West behaved the way that he behaved.[159]

Quoting *Rompilla*, the dissent concluded that the "evidence adds up to a mitigation case that bears no relation to the mitigation case actually presented by counsel."[160]

Seen through the prism of the new precedent, *West* turns on the question of how much investigation trial counsel must do before they can reasonably decide to curtail further avenues of investigation or limit the evidence presented to the sentencing jury. The *West* majority believed that interviewing the client and several family members; consulting a mental health expert, but only with respect to competence to stand trial; and obtaining no school, employment, or medical records sufficed as a basis for limiting mitigation to good character evidence. Surely *Wiggins* refutes the panel majority's finding of no deficient performance. The investigation in *West* comes nowhere near what *Wiggins* found necessary and bears no resemblance to the thorough investigation called for by the Death Penalty Guidelines. In fact, counsel's failures in *West* are comparable to those in *Wiggins* and *Rompilla*. The failure to obtain records was particularly important in *West* because counsel was aware of indications of mental illness. West's attorney did not know enough about West's life history to make a reasonable decision to limit the investigation and the mitigation theory. And yet, the Sixth Circuit declined to rehear the case en banc.

As easy a case as *West* is under the Court's recent precedent, however, it is also straightforward under *Burger*. Seen through the prism of *Burger*, trial counsel, after interviewing several easily accessible witnesses and catching inklings of abuse and mental illness in petitioner's background, dropped those avenues, believing sufficient positive information about the client existed that he need not risk alarming the jurors, whom he thought might take the evidence of childhood abuse as indicating a potential to abuse others as an adult and the mental illness history as an indication of

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[158] *Id.* at 569 (Moore, J., dissenting).

[159] *Id.* at 569.

[160] *Id.* at 569 (quoting Rompilla v. Beard, 545 U.S. 374, 393 (2005)).

future dangerousness. *Burger* said that the double-edged nature of the evidence in question makes that a reasonable choice.

Is West's counsel's testimony "strategery"—a post hoc rationalization by counsel who failed to do his job? Or was this a reasonable response to a client's unsavory background by the client's lawyer, the person in the best position to decide what evidence the jury should hear? The answer that the new precedent provides is that, absent a thorough mitigation investigation, counsel is in no position to make decisions of the sort *Burger* allowed. *West* shelters post hoc rationalizations, and is wrongly decided because the panel majority made no effort to infuse the *Burger* principle with modern standards of practice. So applied, much of what *Wiggins* does to advance comprehensive mitigation investigations and complete and coherent sentencing presentations, *Burger* undercuts. But as the next section shows, for cases like *West* that lose in the federal circuit courts, there are others in which the dissenting view in *West* prevails.

2. *Case Example 2:* Correll v. Ryan *(9th Cir. 2008)*

Also in 2008, the Ninth Circuit split, denying rehearing en banc on the issue of sentencing counsel's effectiveness in a case tried in Arizona in 1984.[161] Trial counsel was aware that the client had a history of drug abuse, possible brain damage, spent most of his teen life as a ward of the state or inmate, and had previously been committed to psychiatric institutions, but did not follow any of these leads.[162] Counsel obtained no medical, school, corrections, or police records.[163] Reminiscent of *Burger*, all counsel did was interview the client's immediate family and, in doing so, looked only for positive information about the client or information that would exculpate the client from the crime.[164] Counsel presented no mitigation at the sentencing proceeding and half-heartedly objected to the state's presentence report, which he acknowledged as "one-sided" but accepted.[165] In postconviction proceedings, trial counsel explained that he feared the judge would not be amenable to explanatory mitigating evidence and therefore chose to focus exclusively on evidence that the client was "a good person . . . who had done good deeds."[166]

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[161] Correll v. Ryan, 539 F.3d 938, 946 (9th Cir. 2008), *cert. denied sub nom.* Schriro v. Correll, 129 S. Ct. 903 (2009) (mem.).

[162] *Id.* at 943.

[163] *Id.* at 943.

[164] *Id.* at 945.

[165] *Id.* at 946-47, 949. Counsel also conceded several statutory aggravating factors and offered no mitigating factors, which, under Arizona law at the time, mandated the death penalty. *Id.* at 947.

[166] *Id.* at 946.

A majority of the court saw this as a transparent case of post hoc rationalizing, with counsel seeking to cover for an incomplete investigation that overlooked powerful mitigation.[167] The dissent saw in the same picture an assemblage of double-edged evidence that counsel reasonably decided to avoid. Noting that "the Supreme Court in *Wiggins* repeatedly emphasized that the *Darden-Burger* line of cases remains in effect,"[168] the dissent stressed that the evidence with a "double edge" that the defendant offered "would have enabled the prosecution to present very damaging evidence in rebuttal."[169]

After a majority of the Circuit denied rehearing en banc, four judges joined the dissenting panel judge, arguing that because the client insisted on his innocence, and given "the double-edged nature of the so-called 'classic mitigating evidence,'" a lingering-doubt defense at sentencing was "perhaps the only reasonable approach available."[170] Finding that counsel's estimation of the trial judge's views was "probably accurate and definitely reasonable,"[171] the en banc dissent criticized the majority opinion for "mak[ing] it almost impossible" for capital counsel to provide effective assistance: "Where, as here, defense counsel recognizes that what might arguably be mitigating evidence is also damaging," the dissent concluded, "he or she faces an impossible decision."[172]

Like *West*, *Correll* seems like an easy case under *Wiggins*. Counsel did little of the investigation the Death Penalty Guidelines call for and presented no evidence at sentencing. On this tenuous foundation, counsel offered as an explanation only that he did not think the trial judge would be receptive. This is precisely the kind of post hoc rationalizing that *Wiggins* should eradicate. If counsel could do as little investigation as the dissent in *Correll* would permit, the thorough mitigation investigation that *Williams*, *Wiggins*, and *Rompilla* require would be all but washed away. The manner in which the *West* majority and *Correll* dissent enlist *Burger* to support an abbreviated investigation is a luxury that the language of *Wiggins* and *Rompilla* allow, but that the principles and reasoning of the cases do not. Still, the loophole remains, for the time being, one of strategery's refuges.

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[167] *Id.* at 950-51.

[168] *Id.* at 956 (O'Scannlain, J., dissenting).

[169] *Id.* at 956.

[170] *Id.* at 973 (en banc dissent).

[171] *Id.* at 979.

[172] *Id.* at 981-82.

B. THE PERCEPTUAL DIVIDE: WHAT IS THE VALUE OF EXPLANATORY MITIGATION?

There is more at work than a lack of clarity in the Court's precedent. A court's decision to follow either *Wiggins* or *Burger* is linked to the judges' perspectives on the mitigating value of the information that counsel failed to investigate or failed to present. Of course, different facts warrant different results, but this difference in perspective extends beyond the facts of any given case. If a judge thinks a juror hearing evidence of mental illness, sexual or physical abuse, or brain damage would find the defendant more likely to be dangerous in the future, then *Burger*'s reasoning retains a strong pull, and an attorney's decision to take a different, more limited direction in mitigation seems more reasonable. If a judge, on the other hand, believes a juror would find the same evidence significantly mitigating, then counsel's failure to fully investigate is inexcusable. Of course, a judge's view on how jurors perceive evidence is linked to his or her own perception of the evidence's mitigating value. The extent to which a judge favors *Burger* or *Wiggins*, thus, can be motivated by how the judge interprets the mitigating value of certain aspects of a petitioner's troubled social history. This is illustrated in a recent Tenth Circuit case, *Wilson v. Sirmons*.[173] Before discussing *Wilson*, a note on the significance of judges' perceptions of mitigation to *Strickland*'s prejudice prong is necessary.

1. A Note on Prejudice

As we saw in *West* and in *Correll*'s dissenting opinions, a perceptual divide plays out in rulings on *Strickland*'s first prong when courts consider counsel's decision not to investigate or present evidence of explanatory mitigation despite either an incomplete investigation or the ignoring of red flags. Take, for example, the *West* majority's comment that, even if counsel pursued as mitigation the evidence of West growing up victimized by abuse and psychological instability, "the very same evidence may have had the opposite[, an aggravating,] effect on the jury."[174] The perceptual divide plays out as much, if not more, in rulings on prejudice.

If explanatory mitigation is characterized as double-edged, counsel's failure to present it is arguably less prejudicial because jurors could have perceived the evidence as weighing in favor of a death sentence. The

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[173] Wilson v. Sirmons, 536 F.3d 1064 (10th Cir. 2008), *aff'd sub nom.* Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009) (en banc). The issue accepted for en banc review was whether a federal habeas court properly reviews a state court judgment de novo when the state court determines an ineffectiveness claim based on the direct appeal record alone. The court answered the question affirmatively. *Wilson*, 577 F.3d at 1293.

[174] West v. Bell, 550 F.3d 542,556 (6th Cir. 2008).

Correll dissent thus criticized the majority for "ignor[ing] the mountain of precedent which requires us . . . to consider not only the likely benefits of the mitigating evidence Correll's counsel failed to present, but also its likely drawbacks."[175] Applied in a broad fashion, the double-edge argument operates essentially as a "no prejudice" standard that could swallow all explanatory mitigation.[176] Of course, this perspective is not consistent with *Williams*. In the Sixth Circuit case *Morales v. Mitchell*, the panel majority rightly cited *Williams*, concluding that given "the volume and compelling nature of th[e] [mitigating] evidence," there was "a reasonable probability that effective counsel could have achieved a different outcome"[177]; the dissent, however, citing to *Burger* and *Darden*, concluded that "defense counsel's failure to present allegedly new mitigation evidence cannot possibly be deemed prejudicial [because] the additional testimony would have made Morales look like a violent and out-of-control drunk who presents a danger to society."[178]

A related issue that divides courts on *Strickland* prejudice is how much information is enough to communicate the client's life history, or parts of it. Courts come out differently on the extent to which additional detail would impact a jury's decision. The Fourth Circuit, for example, has routinely dismissed evidence offered in postconviction hearings as cumulative,[179]

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[175] Correll v. Ryan, 539 F.3d 938, 956 (9th Cir. 2008) (O'Scannlain, J., dissenting) (citing Burger v. Kemp, 483 U.S. 776 (1987); Darden v. Wainwright, 477 U.S. 168 (1986)).

[176] *See, e.g.*, Johnson v. Cockrell, 306 F.3d 249 (2002) ("[A]ny evidence about Johnson's alleged brain injury, abusive childhood, and drug and alcohol problems is all 'double edged.' In other words, even if his recent claim about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness."); Bowie v. Branker, 512 F.3d 112, 121 (4th Cir. 2008) ("Bowie's history, however underprivileged, would not have impacted the jury's finding of these two aggravating factors. . . . On the other side of the balance, the mitigating evidence presented at Bowie's MAR hearing should be discounted, under our precedent, as double-edged. For example, evidence of Bowie's alcoholism and the absence of parental oversight during his childhood could be viewed as either supporting or detracting from the mitigating circumstances of immaturity and youthfulness. Likewise, had counsel for Bowie introduced a mental-health expert at sentencing, the government could have introduced experts who . . . would have vigorously opposed the characterization of Bowie as suffering from mental illness." (citations omitted)). *See generally* Blume & Johnson, *supra* note 108, at 1502-03 (discussing the Fourth Circuit's broad use of the "double edge" argument in *Strickland* prejudice determinations).

[177] Morales v. Mitchell, 507 F.3d 916, 935 (6th Cir. 2007)

[178] *Id.* at 950 (Surheinrich, J., dissenting).

[179] *See* Moody v. Polk, 408 F.3d 141, 159 (4th Cir. 2005), ("[B]ecause trial counsel presented some evidence of Moody's traumatic and abusive childhood (albeit from less than ideal sources), and at least some of the jurors found mitigating circumstances based upon this evidence, I concur in the judgment affirming the denial of habeas relief."). *But see* Gray v. Branker, 529 F.3d 220, 223 (4th Cir. 2008) (finding defense counsel's failure to investigate and present mitigating evidence prejudiced petitioner and granting sentencing relief).

whereas the Third Circuit has consistently found that the quality and nuance of mitigating evidence matters. "Simply because some mitigating evidence regarding [a defendant's] abusive childhood was introduced to the jury," the Third Circuit stated in one decision granting sentencing relief, "it does not follow that the jury was provided a comprehensive understanding of [the defendant's] abusive relationship with his father or other aspects of his troubled childhood."[180] In another, a unanimous panel affirmed a grant of relief on sentencing ineffectiveness, finding the state court wrongly "equated the paltry testimony at the penalty phase hearing with the vastly expanded testimony provided by friends and family members at the [postconviction] hearing."[181] "The two sets of testimony brook no comparison," the panel continued, because "[t]he first left the impression that [the defendant] came from a supportive (if poor) family but went on a crime spree after the type of disappointments many people face in life [and t]he second showed that he had grown up in an extraordinarily dysfunctional environment rife with abuse and neglect."[182] A majority of the Sixth Circuit panel in *Morales* took the same path, finding that "the available information that Morales's trial counsel failed to discover and present to the jury included many specific details about his tumultuous life, continued and uncontrolled alcohol and drug abuse, dysfunctional family history, potential mental health problems, and detailed cultural background."[183]

To be sure, at times the evidence presented in postconviction *is* cumulative or unimpressive and adds little to the evidence the jury heard at trial. But at other times, the double-edge rationale, and the tendency to equate some information on a topic with a detailed exposition, too easily discounts mitigation that the Death Penalty Guidelines view as integral to a complete and comprehensive life history and that experienced capital counsel believe makes an important difference in the case for life.[184] These

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[180] Outten v. Kearney, 464 F.3d 401, 421 (3d Cir. 2006).

[181] Bond v. Beard, 539 F.3d 256, 291 (3d Cir. 2008).

[182] *Id. See* Jermyn v. Horn, 266 F.3d 257, 311 (3d Cir. 2001) ("[T]he fact that counsel presented some mitigating evidence of a different nature and quality seems largely beside the point, given the significance of the evidence that was omitted and the reasonable likelihood that the totality of the available mitigating evidence . . . might have led to a different result.") (citing Williams v. Taylor, 529 U.S. 362, 397-98 (2000)). *But see* Ries v. Quarterman, 522 F.3d 517, 528 (5th Cir. 2008) ("Unlike *Wiggins* and *Williams* . . . . [t]he claim here boils down to a disagreement with *the manner and style* in which trial counsel elected to present mitigating evidence, a choice which appears to have been strategic.") (emphasis added).

[183] Morales, 507 F.3d at 935 (quotation marks omitted).

[184] *See, e.g.*, Mark E. Olive, *Narrative Works*, 77 UMKC L. Rev. 989, 1018-19 (2009); White, *supra* note 14, at 2038-42 (discussing interviews with experienced capital litigators). In its starkest form, this includes evidence of mental retardation, which, in part because of its double-edged nature, the Supreme Court held constitutes an exemption from the death

perspectives on prejudice sanction mitigation presentations based on partially complete, yet inadequate investigations.[185]

The *Wiggins* dissent argued that trial counsel knew essentially all the facts and the "basic features," only they were not as "graphic" or "detailed" as the evidence presented in postconviction.[186] Counsel's failures, the dissent argued, therefore did not prejudice Wiggins because the "incremental information" provided in postconviction proceedings would not have induced counsel to change their mitigation theory.[187] But the *Wiggins* majority recognized that this secured a haven for strategery, and Justice Scalia's dissent did not prevail.[188]

2. *Case Example 3:* Wilson v. Sirmons *(10th Cir. 2008)*

On the surface, *Wilson v. Sirmons* involves a debate like *West* and *Correll* over whether counsel had a reasonable strategic reason to limit mitigation.[189] At sentencing in 1996, counsel's alleged strategy was to portray Wilson as a positive role model in prison. Counsel called six witnesses: two who attended church with Wilson and testified that he was "mannerable," "respectful," and "intelligent"; two teachers who added that Wilson was "respectful," "fun-loving," and a "very good student";[190] Wilson's mother (she had not spoken with counsel previously), who testified to Wilson's involvement in church and briefly about Wilson's

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penalty. *See* Atkins v. Virginia, 536 U.S. 304 (2002); *see also* Wood v. Allen, 542 F.3d 1281, 1325 (11th Cir. 2008) (Barkett, J., dissenting) (dissenting from reversal of a district court grant of relief on sentencing ineffectiveness due to failure to investigate and present evidence of diminished mental capacity and mental retardation), *cert. granted*, 129 S. Ct. 2389 (2009) (mem.). Judge Barkett noted:

> Assuming that a jury would have used evidence of [the defendant's] mental impairments against him directly contravenes the Supreme Court and Eleventh Circuit cases that have consistently held that diminished mental capacity may suggest to a jury that a defendant is in fact "less morally culpable," and that evidence of even mild retardation is mitigating evidence that should be investigated and presented to the jury.

Id. (citing *Atkins*, 542 F.3d at 306-07).

[185] *See* Graham, *supra* note 119, at 1669 ("[I]f the defendant or petitioner alleges a total or near-total failure to investigate mitigation evidence, the potential drawbacks of the undiscovered evidence are minimized and only bear upon the question of prejudice; if the defendant or petitioner alleges a failure to present mitigation material, the downside of this evidence is magnified and made central to both the threshold question of whether counsel was ineffective and any prejudice inquiry. This difference helps explain why it is more difficult for a defendant or petitioner to succeed with a 'failure to present' argument than with a 'failure to investigate' challenge.").

[186] Wiggins v. Smith, 539 U.S. 510, 538, 541 (2002) (Scalia, J., dissenting).

[187] *Id.* at 553-54.

[188] *Id.* at 536 (majority opinion).

[189] Wilson v. Sirmons, 536 F.3d 1064, 1085 (10th Cir. 2008).

[190] *Id.* at 1075.

father;[191] and a psychologist (provided with incomplete records), whose testimony emphasized that Wilson had a high IQ, a "severe mental disorder," and a father who abused drugs and neglected him.[192] The psychologist's testimony ultimately focused "on the 'two pictures' of Mike. On the one hand, you have the picture of the Sunday school-going child. On the other, the picture of the gang and the uninvolved father, who did not set a particularly good role model."[193] The state's cross-examination of the psychologist focused on Wilson's high intelligence, enticing the expert to classify Wilson as a "psychopath." The Tenth Circuit panel described this testimony as a "train wreck."[194]

Addressing the performance prong of *Strickland*, the panel majority drew three "important principles" from the Supreme Court's recent cases: (1) some investigation is not enough; (2) the Death Penalty Guidelines "serve as reference points for what is acceptable preparation for the mitigation phase of a capital case"; and (3) "because of the crucial mitigating role that evidence of a poor upbringing or mental health problems can have in the sentencing phase, defense counsel must pursue this avenue of investigation with due diligence."[195] Applying those principles, the panel majority concluded that counsel's incomplete investigation did not support the assertion that the limited mitigation theory was a reasonable strategic decision.[196] The dissent, by contrast, believed counsel "obtained sufficient information about Wilson's mental health to make a reasonable decision about trial strategy."[197] In terms reminiscent of

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[191] *Id.* at 1075-76 ("[A]fter defense counsel finished his questioning, [Wilson's mother stated] that she 'did want to say something else, if I'm allowed.' Because defense counsel had rested, the court could not permit her to do so.").

[192] *Id.*

[193] *Id.* at 1076. Counsel waited nearly two years, until only three weeks before the trial, to retain the psychologist; and though the expert was able to meet with Wilson several times prior to trial and diagnosed Wilson with a series of serious mental disorders (PTSD, bipolar disorder, generalized anxiety disorder, schizotypal personality disorders, and others), time precluded further testing the expert recommended. *Id.* at 1075.

[194] *Id.* at 1076. In appellate proceedings, Wilson supplied the psychologist with more information, showing that he experienced delusions and hallucinations consistent with schizophrenia. Postconviction evidence also illustrated Wilson's childhood life, showing that Wilson's father was generally absent, that Wilson's brother was involved in gangs, and that Wilson grew up in an environment populated with gangs, frequently in the line of gunfire. *Id.* at 1077.

[195] *Id.* at 1084-85 (citing 1989 GUIDELINES, *supra* note 51).

[196] *Id.* at 1091 (noting counsel failed to interview family members, to gather the available evidence pertinent to mental illness and Wilson's youth presented in collateral proceedings, to provide the psychologist with background information, and to present the diagnosis of mental illness that counsel obtained from the psychologist before trial).

[197] *Id.* at 1132 (Tymkovich, J., dissenting).

those used to uphold the 1975 conviction and death sentence in *Darden*, the dissent emphasized the postconviction evidence's double edge:

> [The mental health evidence] could have undercut counsel's chosen strategy of focusing on Wilson's ability to grow into a useful role model for other young men in trouble. A schizophrenia diagnosis could have made Wilson's mental health problems appear more intractable and untreatable, and added ammunition to the prosecution's case that Wilson was a dangerously ill person.
>
> As with the evidence of Wilson's gang involvement, emphasizing Wilson's mental health issues was a two-edged sword. As the majority believes, the jury may have felt some sympathy for Wilson based on a diagnosis of schizophrenia. But, equally as likely, this diagnosis may have supported the prosecution's portrait of Wilson as a dangerous and continuing threat to society. In this case, counsel could reasonably conclude that additional mental health evidence would not help Wilson's case and might actually harm it.[198]

The dissent closed with citations to *Burger*, *Darden*, and the Supreme Court's more recent decision in *Bell v. Thompson*.[199]

The panel split on prejudice as well. The majority, following recent decisions in other circuits,[200] saw in the postconviction evidence important nuance and detail.[201] The dissent saw repetition[202] and a mitigating impact lessned by the evidence's double edge.[203] The panel majority responded that if mental health evidence's double edge could eviscerate its mitigating value, then "*Williams, Wiggins*, and *Rompilla*, . . . and many more decisions across the country holding that the failure of counsel to present mental health evidence of this sort was prejudicial" could not have been decided as

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[198] *Id.* at 1138 (citations omitted).

[199] *Id.* at 1141.

[200] *See* Williams v. Allen, 542 F.3d 1326, 1342 (11th Cir. 2008) ("As reported by Williams' family members and Dr. Gelwan, the violence experienced by Williams as a child far exceeded—in both frequency and severity—the punishments described at sentencing."); Jells v. Mitchell, 538 F.3d 478, 500-01 (6th Cir. 2008) ("As opposed to the evidence presented at the hearing, the additional evidence shows that Jells experienced significant learning disabilities which caused him great frustration and led to increasingly aggressive behavioral responses. This additional evidence further demonstrates that Jells experienced a profound sense of victimization due to his mother's abusive relationships. In short, rather than being cumulative, this evidence provides a more nuanced understanding of Jells's psychological background and presents a more sympathetic picture of Jells.").

[201] *Wilson*, 536 F.3d at 1093-95 ("Far from presenting a full picture of Wilson to the jury, counsel failed to present even the most rudimentary facts about his family circumstances [and] gave the jury a pitifully incomplete picture of Mr. Wilson.") (citation omitted) (internal quotation marks omitted).

[202] *Id.* at 1135 (Tymkovich, J., dissenting) ("The bulk of the affidavit testimony Wilson offers in his habeas petition simply repackages the information counsel actually presented to the jury. This repetition suggests counsel did a reasonably thorough job of uncovering the major contours of Wilson's family and social history.").

[203] *Id.* at 1139-40 (Tymkovich, J., dissenting).

they were.[204] The Supreme Court's new cases, the majority concluded, "do not permit us to regard the failure of counsel to effectively present mitigating evidence based on mental health as inconsequential"; rather, that is "exactly the sort of evidence that garners the most sympathy from jurors."[205]

One scholar of the intersection between the death penalty and mental illness has noted that viewing severe mental illness as aggravating evidence is inconsistent with the "role that mental illness is supposed to play in capital sentencing proceedings."[206] Not presenting information in a capital sentencing proceeding hinders the Eighth Amendment ideas at the foundation of *Woodson*—a capital sentencing proceeding should include the defendant's "frailties," and not merely the defendant's positive qualities or good deeds. The *Wilson* dissent's perspective thus questions the "science of mitigation" that has developed as a confluence of professional practice, psychology, anthropology, and other sciences over the past several decades, which says that full, detailed life histories (containing positive and negative information about the defendant) are the most effective way to convey the unique frailties of a capital defendant to jurors. In doing so, the *Wilson* dissent also questioned the prevailing professional norms in capital practice, standardized in the Death Penalty Guidelines, which follow this science. It disputes the seasoned view that, in cases as aggravated as capital murder cases, merely showing that the defendant has a positive character and no more is, except in the rare case, a long shot to humanize the defendant.

All capital counsel, including those intent on meeting the Death Penalty Guidelines' performance standards, face the difficult decision of whether to withhold mitigating evidence that could support a finding of future dangerousness, despite the mitigating work it would do. While courts have navigated this conflict with the principle that no decision is

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[204] *Id.* at 1095-96.

[205] *Id.* at 1096 (citation omitted).

[206] Ronald J. Tabak, *Executing People With Mental Disabilities: How We Can Mitigate An Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283, 288-89 (2006) ("What the capital sentencer should do is recognize that someone with severe mental illness is seriously disabled in a way that is really important to, and *diminishes*, moral culpability."). Tabak argues "it does not help a capital defendant that jurors' or judges' perceptions about the impact of mental illness on future dangerousness is wrong if they are allowed to act on their misconceptions or if defense counsel fails to present mental illness due to concern about those misconceptions." *Id.* at 289. Courts have misleadingly cited this source to support a conflicting proposition. *See* Edwards v. Ayers, 542 F.3d 759, 776 (9th Cir. 2008) (denying relief on sentencing ineffectiveness and citing Tabak, *supra*, to support reasonableness of counsel's decision not to present evidence of mental illness out of fear that "juries often view severe mental illness as more aggravating than mitigating").

reasonable unless it is based on a full investigation, the divided opinions in *Wilson* illustrate that the issue of how much investigation is reasonable is still often intertwined with a judge's view of the persuasiveness of the evidence or the relative damage that would be inflicted by the evidence not presented or investigated. The prejudice assessment, too, depends on how a judge, drawing on his or her experience, believes jurors hearing the evidence would respond. The apparent gap between *Burger* and *Wiggins* that acts as one refuge for strategery thus rests on another, a divide of perspective on the value of explanatory, but double-edged, background evidence in garnering a life sentence from a jury.

V. BRIDGING THE PERCEPTUAL DIVIDE: LISTS VERSUS STORIES

Judicial perspectives on the mitigating versus aggravating value of evidence of mental illness, abuse, addiction—in general, evidence that explains the defendant, but not necessarily in a positive light—are naturally a product, in part, of personal experience and political views. But not entirely. One aspect that makes the opinions in *Wilson* particularly interesting is that, to support their divergent views of whether the evidence counsel could have investigated and presented at sentencing would have helped or harmed the client, both looked to social science studies for guidance. The panel majority supported its conclusion by noting that a "majority of empirical studies demonstrate that mental health evidence has a mitigating effect on juries."[207] The dissent countered with additional empirical studies and essays suggesting that "[s]evere mental illness . . . although appearing to be a compelling mitigating circumstance, raises a number of collateral issues that may lead the jury to vote for a sentence of death rather than life."[208] As the opinions show, there is a role for research on jurors' attitudes and responsiveness toward evidence, just as there is a role for informed professional judgment. Reference to social science reached a stalemate in *Wilson*, however, because, as the majority opinion acknowledged, many of the studies (some conflicting) come from the same data set and are nearly a decade old. The studies arguably cut both ways,

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[207] *Wilson*, 536 F.3d at 1096 n.4 (citing Blume, *supra* note 18; Bowers, *supra* note 18; Garvey, *supra* note 13, at 27 n.4).

[208] *Id.* at 1139-40 (Tymkovich, J., dissenting) (quoting Sundby, *supra* note 2, at 1165). The *Wilson* dissent also cited Leona D. Jochnowitz, *Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing*, 43 CRIM. L. BULL. 1 (2007), and James M. Doyle, *The Lawyers' Art: 'Representation' in Capital Cases*, 8 YALE J.L. & HUMAN. 417 (1996).

showing that double-edged mitigating evidence is essential to obtain a life sentence but also, potentially, most deadly.[209]

In closing, I want to explore a bridge between the divergent views expressed in *Wilson*, and in *Correll* and *West* and the many cases like them, by pursuing a question that the *Wilson* opinions—and the studies they cited—did not ask. In one study using interviews with capital jurors, Stephen Garvey reported that certain evidence was found by different jurors to be both aggravating and mitigating.[210] In another, Professor Garvey assessed the role of emotion in capital jurors' sentencing decisions. Identifying a conflict between fear of the defendant and sympathy for the defendant based on the facts of the crime, he indirectly pinpointed the complexity of explanatory mitigation: "If a juror believed the defendant was emotionally unstable or disturbed, he responded with sympathy, just as expected. Yet he also responded with disgust. Emotionally disturbed defendants can thus leave a juror feeling sympathetic and disgusted all at once."[211] Findings like Garvey's could say to a reasonable attorney: Be most wary of evidence with a double edge because fear may be more powerful than sympathy.

But whether jurors perceive double-edged life history evidence as more mitigating than aggravating or vice versa may depend on more than the nature of the evidence. It may also depend on *how* the evidence is presented. As useful as the first generation Capital Jury Project interviews are, and as insightful as the articles synthesizing the data have been,[212] there are factors not directly addressed: How thorough a mitigation presentation did the jurors hear? Did the jurors (or mock jurors) whose answers made up the data set hear complete or incomplete mitigation presentations? Did the interviewees hear evidence of mental illness or troubled life history as part of a coherent and comprehensive narrative? The differences in the studies noted by the *Wilson* majority may turn on more than a blanket response by jurors to particular types of information. It may also have to do

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[209] *Wilson*, 536 F.3d at 1096 n.4 ("We acknowledge . . . that there are some conflicting studies; additionally, almost all of the studies are based on the same data set, which is now over ten years old. . . . [M]ore investigation of this important issue would be useful.").

[210] *See* Garvey, *Aggravation and Mitigation in Capital Cases*, *supra* note 18, at 1556-59.

[211] Garvey, *supra* note 13, at 57-58.

[212] A "second generation" of Capital Jury Project research promises to link jury interviews with the relevant trial transcripts in a general effort to learn more about jury decisionmaking and, specifically, to investigate the reasons for a national downturn in death sentencing. *See* William J. Bowers et al., *The Capital Jury Experiment of the Supreme Court*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 199, 208-12 (Charles S. Lanier et al., eds., 2009); William J. Bowers & Scott E. Sundby, *Why the Downturn in Death Sentences?*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 47, 57-62 (Charles S. Lanier et al., eds., 2009).

with jurors' response to the detail, nuance, and coherence of the information. The studies, therefore, may not be as conflicting as they seem.

The emphasis on storytelling as a model for understanding jury decision-making, and the need for completeness and coherence in the investigation and presentation of mitigating evidence that the Death Penalty Guidelines call for, already finds support in work based on empirical data, including that of the Capital Jury Project, and in other fields, including communication and organization theory and linguistic anthropology.[213] An excellent example is the book *A Life and Death Decision*, in which Scott Sundby recounts the deliberations of a jury in a capital murder case deciding whether to impose a sentence of life imprisonment or the death penalty.[214] Sundby's account investigates the jury's deliberative process, focusing on how jurors' different personalities work together and against each other. The book follows its characters, Ken, the Chorus, and Peggy, as they travel from an initial 9-3 split to a unanimous decision in favor of death. Sundby's account is based on interviews with actual jurors and draws from the Capital Jury Project databank of interviews from over a dozen jurisdictions. The case of Ken, the Chorus, and Peggy thus serves as an illustration of jury dynamics in capital sentencing across jurisdictions and in many capital cases. One of Sundby's most striking conclusions has to do with the death-directing power of categories and lists.

Lists are innate to capital punishment in the modern era because nearly all death penalty statutes follow to some degree an approach to sentencing devised by the Model Penal Code, which identifies certain facts about the crime as aggravating factors (multiple murder, felony murder) and others pertaining to the individual character or circumstances of the capital defendant as mitigating factors.[215] Once a jury finds these exist, the model asks jurors to balance, or "weigh," the aggravating factors against the mitigating factors to decide whether death is the appropriate punishment. The Model Penal Code established a framework in which lists, while not meant to apply purely quantitatively (as in the number of aggravating factors versus the number of mitigating factors), nevertheless provide a basis for the jury's sentencing decision.

Sundby recognizes from the Capital Jury Project interviews that capital juries frequently use lists in their decision-making. There are two primary types. The first is, understandably, a list of facts "for death" (aggravating factors) pitted against a list of facts "for life" (mitigating factors). The

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[213] *See* Blume, *supra* note 18, at 1051-53; Hans, *supra* note 18; Sundby, *supra* note 2, at 1178-79.

[214] SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY (2005).

[215] *See* MODEL PENAL CODE § 210.6 (1985).

second common list is a chronology of the defendant's life; in essence translating the defendant's mitigation evidence into a timeline as a means of looking for opportunities the defendant had to choose a different life course, one that would have led him in a direction away from the murder at which he ended up.[216] Sundby shows how jurors who favor the death penalty often use both types of lists to impress the rationality of their position upon jurors who favor life.[217] The story of Ken and Peggy illustrates this, as the lists are used among other techniques and obfuscations to convince Peggy, after two days the lone holdout, that her position is objectively wrong.[218]

What Sundby reports about capital jury decision-making dynamics reflects what communication, persuasion, and organization theorists have long recognized about the comparative, often competing, power of lists and stories. Lists are powerful because, like rules, they present a codified knowledge. "[T]heir legitimacy is based on the belief that technique—a set of specific steps—will lead to identifiable, predictable outcomes"[219]; in other words, the belief that there is a right and wrong answer and that lists help identify the right one. Lists also allow those who use them to "'transform political discourse to discourse on technique, thus disguising political value judgments as rational responses to technical problems in which order, justice, equality, and rationality appear to dominate.'"[220] Therefore, lists are effective tools in bringing about "discipline and in-group identity."[221] Ken's position in Sundby's account follows this theory—he is resilient and unwavering in his mission to show Peggy the light, to help her see what is "right."[222] Ken seems removed from his stated political preference for the death penalty in his effort to bring Peggy back into the fold and help her establish that she is normal, not crazy. It has been asserted that "[t]he extent of the power in a list can be difficult for other forms of discourse to match."[223] And indeed this is so in Sundby's account,

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[216] SUNDBY, *supra* note 214, at 50, 141-42; *see also* Sundby, *supra* note 2, at 1136.

[217] SUNDBY, *supra* note 214, at 79, 141-42, 151, 153.

[218] *Id.* at 50, 79.

[219] *See* Larry Davis Browning, *Lists and Stories as Organizational Communication*, 2 COMM. THEORY 281, 283 (1992).

[220] *Id.* at 284 (quoting Mark. A. Covaleski & Mark W. Dirsmith, *The Use of Budgetary Symbols in the Political Arena: An Historically Informed Field Study*, 13 ACCT., ORGS. & SOC'Y 1, 7 (1988)).

[221] *Id.* at 284.

[222] SUNDBY, *supra* note 214, at 25-26; *id.* at 52-54, 90.

[223] Browning, *supra* note 219, at 284.

as Peggy, inclined to eschew stereotype and without clinging to lists of her own, becomes less and less convinced of her own views.[224]

While Sundby's account, drawn from the first generation of Capital Jury Project data, does not tell of the completeness or coherence of the mitigation presentation that Peggy and the other jurors heard, her reaction to the evidence nevertheless presents a compelling illustration of the power that a story or detailed narrative can have. It is a different power than lists. In Sundby's account, Peggy was not impressed with lists; she was "curious" about and moved by complexity in the defendant's life.[225] Her experience illustrates the challenge stories have in competing with lists. Lists codify and centralize, providing a "unitary experience"; stories "are local knowledge," which "allow for accepting the single experience of individuals by accepting their points of view."[226] "Stories are important because grand plans [(i.e., lists)] account for only a partial explanation . . . ."[227] Stories present "differences—different points of view, different needs, different experiences."[228] The individualized life history—a detailed and thorough life story—is therefore a natural tool for the capital defendant, who is almost always marginalized, often from a marginalized socio-economic background, often with mental illness or disorder, and always, because of the crime itself, viewed by jurors as dangerously different.

Stories do not lack power, but to have power they must appeal to sense. "Stories must have narrative probability—is the story coherent?—and narrative fidelity—does the story ring true with the stories known to be true in one's life?"[229] As Buselle and Bilandzic explain, a story, regardless of how true or false, will suffer from a lack of believability with the listener if it lacks coherence in one of these respects. The narrative of a life history, in other words, is not simply a matter of making a certain point and backing it up with proof; it is also a matter of aligning the points made. A narrative moves a jury not just by a type or category of evidence and the amount of

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[224] The contest between Ken, the Chorus, and Peggy in Sundby's account brings to mind the discussion of capital sentencing deliberations and gender in Joan Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345.

[225] SUNDBY, *supra* note 214, at 70, 85-86, 115.

[226] Browning, *supra* note 219, at 289; *see id.* at 287 (citing JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., Minnesota University Press 1984)).

[227] *Id.* at 289.

[228] *Id.* at 296.

[229] *Id.* at 289; *see also* Rick Buselle & Helena Bilandzic, *Fictionality and Perceived Realism in Experiencing Stories: A Model of Narrative Comprehension and Engagement*, 18 COMM. THEORY 255, 256 (2008) (referring to these necessary properties of stories as, respectively, narrative realism and external realism).

proof to support it, but also by the believability—the coherence—and therefore the persuasiveness of the story as a whole.[230] The more coherent a life history presentation is, the more likely it will be viewed as mitigating; the less coherent, the more likely it will be perceived as aggravating.

These points about detail (or completeness) and coherence are more than good advice for counsel investigating and preparing a capital defense;[231] they are a part of how postconviction courts must assess capital counsel's failures and the prejudicial impact of those failures at sentencing under *Williams, Wiggins*, and *Rompilla*. This tells us something about how courts should think about the evidence that trial counsel failed to present. It says that courts should not assess old evidence versus new as though some is enough; to do so ignores the difference between a list as Ken made and a story that Peggy needed to hear to maintain her vote for life. It eviscerates the power of narrative, which is the capital defendant's tool under the Eighth Amendment, and it defaces the individualized nature of the sentencing proceeding. If double-edged evidence turns aggravating when it is presented incompletely, it becomes powerfully mitigating when coherent and detailed. The distorting effect of hindsight when mitigation evidence is measured by "some is enough" and "double-edge" mantras is no longer a second-guessing of defense counsel's well-informed choices, but rather an obscuring of the defendant's life into a selection of categories, stereotypes, and cookie-cutter soundbytes that strip a life history presentation of its power and overlook or severely underestimate the power that new evidence could have had on a sentencing juror. Particularly on a juror more inclined to vote for a life sentence.[232] A juror like Peggy.

One can try to parse through the cases to develop patterns of what categories of mitigation (mental illness, drug abuse, sexual or physical abuse, poverty) courts will find sufficiently mitigating to warrant further investigation or a finding of prejudice. But this misses the crux of the issue. *Woodson* calls for an individualized sentencing determination, unique to the defendant. Boxing the defendant's mitigation in categories and deciding from there whether counsel should have pursued investigation or present

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[230] *See, e.g.*, Mark Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 HOFSTRA L. REV. 1067, 1092 (2008) ("But the larger task of humanizing the client, of enabling judges, clemency commissioners, and state executives to feel empathy for a death row inmate, takes more than standards, checklists, and practice tips.").

[231] See the recent law review symposium issue dedicated to the importance of storytelling in capital defense litigation. Symposium, *Death Penalty Stories*, 77 UMKC L. Rev. 831 (2009).

[232] *See* Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165, 184-85 (2004) (referring to such life leaning jurors as "high mercy jurors.").

evidence misses the bigger picture of the defendant's life as a whole. It forgets that compartmentalized accounts are bound to fail to be believable.

The *Burger* principle endorsing dismissal of double-edged mitigation evidence operates from a myopic view, one that sees mitigation evidence as falling into a series of boxes, rather than presenting the dynamic of a defendant's life. When defense counsel begin to operate with snapshots rather than an integrated whole, they lose the completeness and coherence of mitigation theory that the Death Penalty Guidelines seek, they begin to do the client a disservice because the life story starts to look like a fiction, or to look more like a series of isolated character traits or events. More like a list, less like a story. And with this loss of narrative goes the mitigation case's explanatory value.

VI. CONCLUSION

The survey conducted here indicates that the federal courts of appeals continue to shelter post hoc rationalizations by capital counsel because court panels and judges take different views of: (1) what constitutes a reasonable investigation of a capital defendant's life history after *Williams*, *Wiggins*, and *Rompilla;* and (2) the value of much mitigating evidence long considered fundamental to individualized sentencing. The most sensible reading of the Court's new precedent, taking into account the Court's distinction of *Burger* and *Darden*, is this: If the *Burger* principles stand they must be modified to meet modern professional standards, not those of the late 1970s. This demands that counsel thoroughly investigate a defendant's life history (the good and the bad) before deciding what evidence to present or not present to the jury.

With regard to the perceptual divide, studying how jurors respond to explanatory mitigation relative to the completeness and coherence of the mitigation presentation is an important next step. This is significant for eradicating strategery because evidence supporting the hypothesis that jurors hearing complete and coherent presentations find explanatory background evidence more mitigating and less aggravating would render the validity of counsel's claims of judgment about certain evidence directly subject to the quality of their investigative work and their presentation to the jury. So rooted in the facts, post hoc rationalizations have little place, if any, to hide.

APPENDIX 1

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ALLEGING FAILURE TO INVESTIGATE OR PRESENT MITIGATING EVIDENCE, 2000–2008 U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

	Relief Granted	Relief Denied	Dissent	Rev'g Panel or Lower Court
1. West v. Bell, 550 F.3d 542 (6th Cir. 2008)		✓	✓	
2. Owens v. Guida, 549 F.3d 399 (6th Cir. 2008)		✓	✓	
3. Hawkins v. Coyle, 547 F.3d 540 (6th Cir. 2008)		✓		Rev'g DCT Gant
4. Johnson v. Bagley, 544 F.3d 592 (6th Cir. 2008)	✓			
5. Mason v. Mitchell, 543 F.3d 766 (6th Cir. 2008)	✓		✓	Rev'g DCT Denial
6. Jells v. Mitchell, 538 F.3d 478 (6th Cir. 2008)	✓		✓	Rev'g DCT Denial
7. Beuke v. Houk, 537 F.3d 618 (6th Cir. 2008)		✓	✓	
8. Van Hook v. Anderson, 535 F.3d 458 (6th Cir. 2008)	✓			
9. Fautenberry v. Mitchell, 515 F.3d 614 (6th Cir. 2008)		✓	✓	
10. Brooks v. Bagley, 513 F.3d 618 (6th Cir. 2008)		✓		
11. Morales v. Mitchell, 507 F.3d 916 (6th Cir. 2007)	✓		✓	
12. Getsy v. Mitchell, 495 F.3d 295 (6th Cir. 2007)		En Banc	✓	Rev'g Panel Grant
13. Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007)	✓		✓	
14. Hartman v. Bagley, 492 F.3d 347 (6th Cir. 2007)	✓		✓	
15. Durr v. Mitchell, 487 F.3d 423 (6th Cir. 2007)		✓		

	Relief Granted	Relief Denied	Dissent	Rev'g Panel or Lower Court
16. Foley v. Parker, 488 F.3d 377 (6th Cir. 2007)		✓	✓*	
17. Henley v. Bell, 487 F.3d 379 (6th Cir. 2007)		✓	✓	
18. Nields v. Bradshaw, 482 F.3d 442 (6th Cir. 2007)		✓		
19. Keith v. Mitchell, 466 F.3d 540 (6th Cir. 2006)		✓	Reh'g Denied En Banc	
20. Williams v. Anderson, 460 F.3d 789 (6th Cir. 2006)	✓			
21. Poindexter v. Mitchell, 454 F.3d 564 (6th Cir. 2006)	✓			
22. Keith v. Mitchell, 455 F.3d 662 (6th Cir. 2006)		✓	✓	
23. Dickerson v. Bagley, 453 F.3d 690 (6th Cir. 2006)	✓		✓	Rev'g DCT Denial
24. Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006)		✓	✓	
25. Gillard v. Mitchell, 445 F.3d 883 (6th Cir. 2006)		✓		
26. Carter v. Mitchell, 443 F.3d 517 (6th Cir. 2006)		✓		
27. Broom v. Mitchell, 441 F.3d 392 (6th Cir. 2006)		✓		
28. White v. Mitchell, 431 F.3d 517 (6th Cir. 2005)		✓		
29. Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005)		✓	✓	
30. Moore v. Parker, 425 F.3d 250 (6th Cir. 2005)		✓	✓	
31. Harries v.Bell, 417 F.3d 631 (6th Cir. 2005)	✓			
32. Payne v. Bell, 418 F.3d 644 (6th Cir. 2005)		✓		
33. Hill v. Mitchell, 400 F.3d 308 (6th Cir. 2005)		✓		
34. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003)	✓		✓	Rev'g DCT Denial

* Dissenting on other grounds.

	Relief Granted	Relief Denied	Dissent	Rev'g Panel or Lower Court
35. Smith v. Mitchell, 348 F.3d 177 (6th Cir. 2003)		✓	✓	
36. Johnson v. Bell, 344 F.3d 567 (6th Cir. 2003)		✓	✓	
37. Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003)	✓		✓	
38. Powell v. Collins, 332 F.3d 376 (6th Cir. 2003)	✓		✓	
39. Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003)	Remand for Evid. Hearing		✓	
40. Wickline v. Mitchell, 319 F.3d 813 (6th Cir. 2003)		✓		
41. Alley v. Bell, 307 F.3d 380 (6th Cir. 2002)		✓		
42. Lorraine v. Coyle, 291 F.3d 416 (6th Cir. 2002)		✓		
43. Cooey v. Coyle, 289 F.3d 882 (6th Cir. 2002)		✓		
44. Martin v. Mitchell, 280 F.3d 594 (6th Cir. 2002)		✓		
45. Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001)		✓		
46. Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001)	✓			
47. Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001)	Remand for Evid. Hearing			
48. Williams v. Coyle, 260 F.3d 684 (6th Cir. 2001)		✓	✓	
49. Campbell v. Coyle, 260 F.3d 531 (6th Cir. 2001)		✓		
50. Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000)	✓			
51. Abdur'Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000)		✓	✓	Rev'g DCT Grant
52. Carter v. Bell, 218 F.3d 581 (6th Cir. 2000)	✓			

APPENDIX 2

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ALLEGING FAILURE TO INVESTIGATE OR PRESENT MITIGATING EVIDENCE, 2000–2008 U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

	Relief Granted	Relief Denied	Dissent	Rev'g Panel or Lower Court
1. Frogge v. Branker, 286 Fed. App'x 51 (4th Cir. 2008)		✓	✓	
2. Hyde v. Branker, 286 Fed. App'x 822 (4th Cir. 2008)		✓		
3. Strickland v. Branker, 284 Fed. App'x 57 (4th Cir. 2008)		✓		
4. Gray v. Branker, 529 F.3d 220 (4th Cir. 2008)	✓		✓	
5. Yarbrough v. Johnson, 520 F.3d 329 (4th Cir. 2008)		✓		
6. Cagle v. Branker, 520 F.3d 320 (4th Cir. 2008)		✓		
7. Bell v. Kelly, 260 Fed. App'x 599 (4th Cir. 2008)		✓		
8. Bowie v. Branker, 512 F.3d 112 (4th Cir. 2008)		✓		
9. Gardner v. Ozmint, 511 F.3d 420 (4th Cir. 2007)		✓		
10. Meyer v. Branker, 506 F.3d 358 (4th Cir. 2007)		✓		
11. Wilkinson v. Polk, 227 Fed. App'x 210 (4th Cir. 2007)		✓		
12. McNeill v. Polk, 476 F.3d 206 (4th Cir. 2007)		✓	✓*	
13. Emmett v. Kelly, 474 F.3d 154 (4th Cir. 2007)		✓	✓	
14. Buckner v. Polk, 466 F.3d 280 (4th Cir. 2006) (denying reh'g en banc), aff'g, 453 F.3d 195 (4th Cir. 2006)		✓	✓	

* Dissenting on other grounds.

	Relief Granted	Relief Denied	Dissent	Rev'g Panel or Lower Court
15. Campbell v. Polk, 447 F.3d 270 (4th Cir. 2006)		✓		
16. Hedrick v. True, 443 F.3d 342 (4th Cir. 2006)		✓		
17. Vinson v. True, 436 F.3d 412 (4th Cir. 2006)		✓		
18. Moody v.Polk, 408 F.3d 141 (4th Cir. 2005)		✓		
19. Lovitt v. True, 403 F.3d 171 (4th Cir. 2005)		✓		
20. Walker v.True, 401 F.3d 574 (4th Cir. 2005)		✓	✓	
21. McHone v. Polk, 392 F.3d 691(4th Cir. 2004)		✓	✓	
22. Syriani v. Polk, 118 Fed. App'x 706 (4th Cir. 2004)		✓		
23. Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004)		✓		
24. United States v. Roane, 378 F.3d 382 (4th Cir. 2004)		✓		
25. Richmond v. Polk, 375 F.3d 309 (4th Cir. 2004)		✓		
26. Bailey v. True, 100 Fed. App'x 128 (4th Cir. 2004)		✓		
27. Wilson v. Ozmint, 352 F.3d 847 (4th Cir. 2003)		✓		Rev'g DCT Grant
28. Orbe v. True, 82 Fed. App'x 802 (4th Cir. 2003)		✓		
29. Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003)		✓		
30. Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003)		✓		
31. Brown v. Lee, 319 F.3d 162 (4th Cir. 2003)		✓		
32. Bramblett v. True, 59 Fed. App'x 1 (4th Cir. 2003)		✓		
33. Hunt v. Lee, 291 F.3d 284 (4th Cir. 2002)		✓		
34. Basden v. Lee, 290 F.3d 602 (4th Cir. 2002)		✓		

	Relief Granted	Relief Denied	Dissent	Rev'g Panel or Lower Court
35. Wiggins v. Corcoran, 288 F.3d 629 (4th Cir. 2002)		✓		Rev'g DCT Grant
36. Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001)		✓		
37. Jones v. Catoe, 9 Fed. App'x 245 (4th Cir. 2001)		✓		
38. Rose v. Lee, 252 F.3d 676 (4th Cir. 2001)		✓		Rev'g DCT Grant
39. Frye v. Lee, 235 F.3d 897 (4th Cir. 2000)		✓		
40. White v. Lee, 238 F.3d 418 (Table) (4th Cir. 2000)		✓		
41. Bacon v. Lee, 225 F.3d 470 (4th Cir. 2000)		✓		
42. Grandison v. Corcoran, 225 F.3d 654 (4th Cir. 2000)		✓		
43. Baker v. Corcoran, 220 F.3d 276 (4th Cir. 2000)		✓		
44. Oken v. Corcoran, 220 F.3d 259 (4th Cir. 2000)		✓		
45. Fisher v. Lee, 215 F.3d 438 (4th Cir. 2000)		✓		