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The T-Rex Without Teeth: Evolving *Strickland v. Washington* and the Test for Ineffective Assistance of Counsel

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I. INTRODUCTION

In *Strickland v. Washington* the United States Supreme Court formulated the test for determining whether counsel in a criminal case is ineffective.[1] When the Court decided *Strickland* it created a doctrine of enormous proportions, but with little impact—a legal tyrannosaurus rex without teeth.[2] In the last decade, by using American Bar Association ("ABA") standards[3] to evaluate counsel's performance, the Court has given the T-Rex some sizable incisors. The purposes of this article are to: (1) determine how frequently the United States Supreme Court uses ABA standards in its decisions and describe briefly for what purposes the Court uses those standards; (2) describe in some detail the decision of *Strickland v. Washington* and its test for determining whether counsel was ineffective; (3) describe the decisions of *Williams v. Taylor*,[4] *Wiggins v. Smith*,[5] and *Rompilla v Beard*,[6] and their implications on the test formulated in *Strickland* as to how the ABA standards relate to defense counsel's duty to investigate; (4) report on the ABA's efforts to discover and describe the causes of ineffective assistance; and (5) suggest changes that tighten the *Strickland* test, giving it more traction as a guide for the courts in measuring counsel's performance.

II. AMERICAN BAR ASSOCIATION STANDARDS AND THE SUPREME COURT

Before turning to *Strickland*, a review of the Court's use of the ABA standards indicates their prevalence in the Court's decisions.

The Court has used ABA standards in a variety of contexts, making the Court no stranger to ABA standards. They are used as primary and secondary authority in majority, concurring,[7] and dissenting[8] opinions. As

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1. Strickland v. Washington, 466 U.S. 668, 687 (1984).

2. *Id.* at 668.

3. The most recent standards are published in ABA STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1993) [hereinafter ABA CRIMINAL JUSTICE].

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

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

6. Rompilla v. Beard, 545 U.S. 374 (2005).

7. *See* Morris v. Slappy, 461 U.S. 1, 21 n.4 (1983) (Brennan, J., concurring) (determining whether granting a continuance for substitute counsel to prepare for trial denied the defendant effective assistance of counsel); Gannett Co. v. DePasquale, 443 U.S. 368, 433 n.13 (1979) (Blackmun, J., dissenting in part and concurring in part) (determining whether the public and the press could be excluded from a pretrial suppression hearing); Hudson v. Palmer, 468 U.S. 517, 550 n.20 (1984) (Stevens, J., concurring in part and dissenting in part) (determining the constitutional parameters of prison searches).

8. *See, e.g.*, City of Chi. v. Morales, 527 U.S. 41, 108-09 (1999) (Thomas, J., dissenting) (determining the vagueness of a city ordinance); United States v. Mezzanatto, 513 U.S. 196, 214-15 (1995) (Souter, J., dissenting) (discussing the admissibility for impeachment purposes of statements made during a plea); Michigan v. Harvey, 494 U.S. 344, 364 n.8 (1990) (Stevens, J., dissenting) (determining the admissibility of a defendant's statement offered for impeachment); Caplin &

early as 1971, the Court used the ABA standards in determining whether a defendant's right to a speedy trial was violated.[9] In the following years the Court used the standards when addressing a number of issues presented, ranging from the conduct of criminal[10] and civil[11] proceedings to the

Drysdale, Chartered v. United States, 491 U.S. 617, 645 (1989) (Blackmun, J., dissenting) (determining whether attorney's fees are exempt from a federal forfeiture statute); Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 468-69 n.4 (1989) (Marshall, J., dissenting) (determining whether a state corrections department could restrict visitation); United States v. Taylor, 487 U.S. 326, 352-53 n.5 (1988) (Stevens, J., dissenting) (determining whether a dismissal of a federal indictment for a violation of a speedy trial rule is appropriate); Burger v. Kemp, 483 U.S. 776, 797-98 n.4 (1987) (Blackmun, J., dissenting) (determining whether defense counsel had a conflict of interest where counsel's partner represented a co-indictee in a separate prosecution); Turner v. Safley, 482 U.S. 78, 112 n.14 (1987) (Stevens, J., dissenting) (determining the reasonableness of a prison regulation restricting inmate marriages and correspondence with other inmates); Ponte v. Real, 471 U.S. 491, 520-21 (1985) (Marshall, J., concurring in part and dissenting in part) (determining whether the failure to record the reasons for not calling witnesses at a prison disciplinary hearing violates due process); McKaskle v. Wiggins, 465 U.S. 168, 195-96 n.3, n.4 (1984) (White, J., dissenting) (determining the appropriateness of standby counsel's participation in the trial of a defendant representing himself); H. L. v. Matheson, 450 U.S. 398, 445 n.39 (1981) (Marshall, J., dissenting) (determining whether a parental notification statute was constitutional); United States v. Bailey, 444 U.S. 394, 421 n.3 (1980) (Blackmun, J., dissenting) (determining whether inmates who escaped from prison are entitled to instruction on the defenses of duress or necessity); Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 34 n.16 (1979) (Marshall, J., dissenting in part) (determining whether a parole procedure complies with due process).

9. *See* United States v. Marion, 404 U.S. 307, 321 n.12 (1971). In *Marion*, the Court cited the ABA standards' definition to determine when the delay period commences. *Id.*

10. *See* Deck v. Missouri, 544 U.S. 622, 629 (2005) (determining whether the restraint of a prisoner in the presence of the jury is permissible); Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000) (determining counsel's obligation to file a notice of appeal in a criminal case); Mu'Min v. Virginia, 500 U.S. 415, 430 (1991) (determining whether a defendant in a criminal case had a fair and impartial jury); Penry v. Lynaugh, 492 U.S. 302, 337 (1989) (determining whether a jury should consider mental retardation and abuse during the death penalty phase of a trial); McCoy v. Ct App. of Wis., Dist. 1, 486 U.S. 429, 436 n.8 (1988) (determining whether a state rule requiring counsel to state why an appeal is frivolous is constitutional); Buchanan v. Kentucky, 483 U.S. 402, 418 (1987) (determining whether the use of a death-qualified jury when the death penalty is sought only against a codefendant violated the defendant's right to a fair and impartial jury); New York v. Burger, 482 U.S. 691, 717 (1987) (determining whether a statutorily authorized warrantless search of a vehicle dismantling establishment falls within the administrative inspection exception); McCleskey v. Kemp, 481 U.S. 279, 314 n.37 (1987) (determining whether racial discrepancy in the imposition of the death penalty violated constitutional safeguards); Holbrook v. Flynn, 475 U.S. 560, 571 (1986) (determining whether additional security placed in the front row of a spectators' section deprived the defendant of a fair trial); Nix v. Whiteside, 475 U.S. 157, 170-71 n.6 (1986) (determining whether trial counsel was ineffective for threatening to withdraw as counsel based on defendant's perjury); Davis v. Florida, 473 U.S. 913, 915 (1985) (mem.) (Marshall, J., dissenting) (determining that a petition for certiorari that raised the issue of pretrial publicity should have been granted); Black v. Romano, 471 U.S. 606, 613 (1985) (determining whether a sentencing court must take into account alternatives to incarceration at a probation violation hearing); Ake v. Oklahoma, 470 U.S. 68, 81 n.7 (1985) (determining whether an indigent defendant was entitled to an expert witness at the state's expense); Spaziano v. Florida, 468 U.S. 447, 463 n.8 (1984) (evaluating jury instructions in a capital case); Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983) (determining whether appellate counsel is obligated to raise every issue a client desires); United States v. DiFrancesco, 449 U.S. 117, 121 n.4

determination of ethical boundaries applied to attorneys.[12] It is not surprising that in 1984, when the Court was asked to formulate a test for ineffective assistance of counsel, it turned to the ABA standards.

III. THE *STRICKLAND* TEST

A. Enunciation of the Strickland *Test*

In the 1984 case *Strickland v. Washington*, the Court referred to the ABA standards in formulating the test to determine whether defense counsel was ineffective.[13] The defendant pled guilty to three capital murder charges, against trial counsel's advice.[14] The trial court commended the defendant for accepting responsibility, but made no promises regarding the sentencing decision.[15] Trial counsel did not present any evidence during the subsequent sentencing hearing and, instead, relied on the plea colloquy with the court.[16]

(1980) (determining whether a statute authorizing the government to appeal sentences violated the Double Jeopardy Clause); Cuyler v. Sullivan, 446 U.S. 335, 346 n.11 (1980) (determining whether representation of multiple defendants in a criminal case violated the defendants' right to effective assistance of counsel); Blackledge v. Allison, 431 U.S. 63, 71 n.2 (1977) (determining whether a federal collateral attack of a guilty plea entered in state court was proper); Bearden v. Georgia, 461 U.S. 660, 669 n.10 (1983) (determining whether a court should revoke a defendant's probation for failure to pay a fine and restitution).

11. *See* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 759-60 (2005) (determining police liability for a civil action brought pursuant to 42 U.S.C. § 1983); I.N.S. v. St. Cyr, 533 U.S. 289, 322 n.48 (2001) (determining whether an immigration statute could be applied retroactively); Town of Newton v. Rumery, 480 U.S. 386, 398 n.9 (1987) (determining whether an agreement where a defendant in a criminal case forgoes the right to pursue a civil action in exchange for dismissal of the criminal charges is constitutional); Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) (determining whether a prosecutor is immune from civil suits brought under 42 U.S.C. § 1983); Polk County v. Dodson, 454 U.S. 312, 318 (1981) (determining whether a public defender was acting under the color of state law, thus subjecting the office to a 42 U.S.C. § 1983 action).

12. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1036-37 (1991) (determining whether a state supreme court sanction for a lawyer's pretrial press conference is constitutionally permissible); Bonin v. California, 494 U.S. 1039, 1042 (1990) (mem.) (determining whether a conflict of interest resulted from a literary agreement between defense counsel and their client); United States v. Sells Eng'g, Inc., 463 U.S. 418, 430 (1983) (determining whether disclosure of grand jury materials to a government attorney is proper); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982) (determining whether federal courts should abstain from intervening in state disciplinary proceedings against attorneys); Lassiter v. Dep't of Soc. Services of Durham County, N.C., 452 U.S. 18, 34 (1981) (determining whether counsel should be appointed to indigent parents in a termination proceeding); Wood v. Georgia, 450 U.S. 261, 270-71 n.15 (1981) (determining whether a conflict of interest existed in counsel representing both employee and employer).

13. Strickland v. Washington, 466 U.S. 668, 688–89 (1984).

14. *Id.* at 672.

15. *Id.*

16. *Id.* at 673 (noting that the trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility," but that he was making no statement at all about his likely sentencing decision).

The sentencing judge found a litany of aggravating factors, and the defendant was sentenced to death.[17]

Subsequently, the defendant claimed that trial counsel's efforts constituted ineffective assistance of counsel.[18] The defendant challenged six aspects of counsel's performance: (1) failure to move for continuance to prepare for sentencing;[19] (2) failure to request a psychiatric report;[20] (3) failure to investigate and present character evidence;[21] (4) failure to present meaningful arguments to the sentencing judge;[22] (5) failure to investigate the medical examiners' reports;[23] and (6) failure to cross-examine the medical experts called by the state at the sentencing proceeding.[24]

The claims were reviewed in both state court[25] and the federal courts.[26] The United States Supreme Court granted certiorari "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."[27]

The Court began its analysis by stating that everyone has the Sixth Amendment right to counsel to protect their fundamental right to a fair trial.[28] The Court defined a fair trial as one where "evidence subject to adversarial testing is presented to an impartial tribunal," and the right to

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17. *Id.* at 674-75. The Court stated:

> The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, and all involved repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved a robbery, the murders were found to be done for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe and ultimately fatal injuries.

Id.

18. *Id.* at 674.

19. *Id.* at 676.

20. *Id.* at 675–76.

21. *Id.* at 675. "In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so." *Id.*

22. *Id.* at 675-76. The Court noted trial counsel's strategic decisions to rely on the plea colloquy, so as to (1) minimize the client's exposure to cross examination and (2) preclude the state from putting on its own psychiatric evidence. *Id.* at 673. The Court also commented on the waiver of a presentence investigation that would have proven to be more "detrimental than helpful." *Id.*

23. *Id.* at 675-76.

24. *Id.* at 676.

25. *Id.* at 675-78.

26. *Id.* at 678-83.

27. *Id.* at 684.

28. *Id.*

counsel plays a "crucial role."[29] The Court went on to recognize that a person's right to counsel necessarily includes the right to effective assistance of counsel.[30]

The Court established the guiding policy in evaluating counsel's performance to be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[31] The decision also established the principle that the penalty phase of a capital case is the equivalent of a trial of the underlying charge regardless of where the case is tried.[32]

The Court then articulated what has become known as the *Strickland* test for ineffective assistance of counsel.[33] The test involves a two-step analysis. The first is a determination of whether counsel's performance was within the range demanded of lawyers in criminal cases. The second is a determination of whether the proceeding's result would have been different had counsel not made unprofessional errors.[34]

The Court reasoned: "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, are guides to determining what is reasonable, but they are only guides."[35]

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29. *Id.* at 685.

30. *Id.* at 685-86. As the Court explained:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.
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> For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel."

Id. (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

31. *Id.* at 686.

32. *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 . . . 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 [sic].") (citations omitted).

33. *Id.* at 687.

34. *Id.* The court explained that when presenting an ineffective assistance of counsel claim,

> [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

35. *Id.* at 688 (internal citations omitted).

In a cautionary tone the Court advised lower courts not to adopt "detailed rules,"[36] and also advised courts to give great deference to counsel's performance.[37] The Court remarked that "detailed guidelines could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."[38] In a surprising revelation, the Court noted that the goal of the Sixth Amendment guarantee of effective assistance is "*not to improve the quality of legal representation*, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."[39] This comment by the Court generates the perception that a lawyer's performance is static rather than evolving, meaning that what would pass in 1980 as adequate performance would be the same in 2007. This ignores advancements in technology, especially those in forensic science such as DNA testing. The "presumption that counsel's conduct falls within the wide range of reasonable professional assistance"[40] has led to a number of decisions allowing questionable attorney behavior to fall within the range of adequate assistance of counsel.

With regard to the duty to investigate, the Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[41] While addressing the performance of counsel in *Strickland*, the Court found that counsel's actions were reasonable and any prejudice that accrued was insufficient to set aside the death sentence.[42]

In a dissenting opinion, Justice Marshall pointed out the porous nature of the *Strickland* test:

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36. *Id.* at 688-89. The Court noted that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* The Court was concerned that detailed rules would "interfere with the constitutionally protected independence of counsel" and restrict choices. *Id.* at 689.

37. *Id.* The Court averred that "scrutiny of counsel's performance must be highly deferential." *Id.* "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." *Id.* Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* The Court then commented on the various strategies that could be adopted by counsel. *Id.* at 689-90.

38. *Id.* at 689.

39. *Id.* (emphasis added).

40. *Id.*

41. *Id.* at 691.

42. *Id.* at 689-99.

> My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts . . . . In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.
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> The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution . . . . It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale? The majority offers no clues as to the proper responses to these questions.[43]

B. *Initial Application of the* Strickland *Test*

Strickland was decided on May 14, 1984.[44] On October 29, 1984, Justice Marshall used *Strickland* and the ABA Standards in evaluating a petition for certiorari in *Alvord v. Wainwright*.[45] Once again, the Court faced the question of trial counsel's competence in investigation of a death penalty case.[46] Although the Court declined to grant certiorari, the dissent outlined trial counsel's lack of investigation.[47]

Alvord, the petitioner, was convicted of multiple murders in Florida after escaping from a mental hospital in Michigan.[48] The petitioner was committed to the mental health facility in Michigan as a result of being found not guilty by reason of insanity for rape and murder.[49]

A part-time public defender was appointed to represent Alvord. He refused to talk with the lawyer.[50] After learning from the prosecutor that Alvord was previously found not guilty by reason of insanity, "[c]ounsel moved for a mental examination."[51] Alvord refused to talk to the

43. *Id.* at 707-08 (Marshall, J., dissenting) (footnote omitted).
44. *Id.* at 668 (majority opinion).
45. Alvord v. Wainwright, 469 U.S. 956, 960 n.4 (1984) (Marshall, J., dissenting).
46. *Id.* at 956-57 (majority opinion).
47. *Id.* at 956.
48. *Id.* at 957.
49. *Id.*
50. *Id.*
51. *Id.*

psychiatrists without counsel, but did speak with a psychiatrist who knew him from Michigan.[52] The psychiatrist was brought into the case by the State.[53] The trial court subsequently found Alvord competent to stand trial.[54] In spite of Alvord's lengthy mental health history and having been previously found not guilty by reason of insanity, counsel did not conduct an "independent investigation into Alvord's history of mental illness."[55] Other than the contact with the psychiatrist brought into the case by the State, the attorney did not consult with the other treating psychiatrist from Michigan and only obtained a small portion of his client's medical records.[56] He did not obtain an independent expert to review the portion of the medical records he did obtain.[57] Nor did counsel contact Alvord's lawyer in Michigan to discuss Alvord's condition or the viability of any defense.[58] This is especially troubling given Florida's defendant-friendly law, which creates a presumption of insanity and places the burden of proof on the state to prove the defendant is sane beyond a reasonable doubt at trial.[59] Other jurisdictions commonly place the burden of an insanity defense on the defendant.[60]

Instead, trial counsel relied on the defendant's assertion of a "frivolous alibi defense."[61] Assuming counsel was reasonable in concluding the

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52. *Id.* at 957 n.1. Alvord did speak to the two psychiatrists after speaking to the psychiatrist from Michigan. One determined that Alvord was competent to stand trial; the other could not draw a conclusion. *Id.*

53. *Id.* at 957.

54. *Id.*

55. *Id.* at 957-58.

56. *Id.* at 958.

57. *Id.*

58. *Id.* Justice Marshall wrote:

> At the federal habeas hearing, one of Alvord's Michigan psychiatrists testified:
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> > Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. *But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.*

Id. at 958 n.3 (emphasis in original).

59. *Id.*

60. *See, e.g.*, Leland v. Oregon, 343 U.S. 790, 798 (1952) (holding that the Oregon statute that placed the burden on the defendant to establish insanity defense beyond a reasonable doubt was constitutional).

61. *Alvord*, 469 U.S. at 959-60 (Marshall, J., dissenting).

investigation into his client's background would not yield valuable evidence, it is disturbing that counsel only spent fifteen minutes with Alvord outside of court proceedings to discuss the case.[62]

Marshall's dissent details counsel's obligation to inform a client and quotes the ABA standards extensively, stating:

> The lower court ruling is therefore premised on a significant misunderstanding of the division of responsibility between counsel and client at trial, and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determining the reasonableness of counsel's assistance.[63]

Although the Court denied the petition in *Alvord*, the Court would return to the ABA standards as a basis to evaluate defense counsel's performance in a number of decisions with less than satisfactory reviews.[64]

C. *Early Condemnation of the* Strickland *Test*

This highly elastic approach used to address claims of ineffective assistance of counsel has been condemned for allowing substandard performance by defense counsel.[65] Stephen Bright published a law review article ten years after *Strickland*, chronicling conduct that had passed as effective assistance in death penalty cases.[66] The first case Bright cited involved counsel who was drunk at trial, did not investigate allegations of abuse by the victim, and failed to adequately prepare an expert witness on domestic violence.[67] Bright went on to cite cases where counsel had not fully investigated clients' background information relating to mental health issues, and therefore did not present the evidence to the jury.[68] Bright noted

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62. *Id.* at 957.

63. *Id.* at 960 n.4.

64. *See infra* Part III.C, Part IV.C.

65. Adam Hime, *Life or Death Mistakes: Cultural Sterotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. DET. MERCY L. REV. 181 (2005); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV 425 (1996); *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) [hereinafter Bright, *Counsel for the Poor*]. However, as Stephen Bright has suggested, "in [*Strickland*] the standard of representation in death penalty cases has been brought down to meet the kind of representation that poor people receive." Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 497 (1995).

66. Bright, *Counsel for the Poor*, *supra* note 65.

67. *Id.* at 1835-36 (citing State v. Haney, No.7 Div. 148 (Ala. Crim. App. 1989); Haney v. State, 603 So. 2d 368 (Ala. Crim. App. 1991); *Ex parte* Haney, 603 So. 2d 412 (Ala. 1992)).

68. *Id.* at 1837. The author Bright cites to instances, in both state and federal court, involving

that the causes of the failure to investigate are inexperience, incompetence, and lack of adequate funding.[69] With regard to the "presumption" of competence in *Strickland*, Bright's critique is blunt and unyielding:

> There is no basis for the presumption of competence in capital cases where the accused is represented by counsel who lacks the training, experience, skill, knowledge, inclination, time, and resources to provide adequate representation in a capital case. The presumption should be just the opposite—where one or more of these deficiencies exist, it is reasonable to expect that the lawyer is not capable of rendering effective representation. Indeed, the presumption of competence was adopted even though the Chief Justice of the Supreme Court, who joined in the majority in Strickland, had written and lectured about the lack of competence of trial attorneys.[70]

Later, in 1994, Justice Blackmun, in a dissenting opinion from the denial of a writ of certiorari, voiced criticism of *Strickland*.[71] He cited instances of substandard attorney conduct allowed to pass under *Strickland*, echoing Bright's concerns and citing his article.[72] Blackmun concluded:

> Our system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a

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inadequate investigation. *See, e.g.*, Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), *cert. denied*, 479 U.S. 996 (1986) (discussing counsel's failure to mention that defendant suffered from schizophrenia); Smith v. Kemp, 664 F. Supp. 500 (M.D. Ga. 1987) (setting aside death sentence on other grounds), *aff'd sub nom.* Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (en banc); Holoway v. State, 361 S.E.2d 794, 796 (Ga. 1987) (discussing counsel's failure to mention that defendant had an IQ of forty-nine and an intellectual capacity of a seven year old); Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6 (noting that when newspapers first reported that the defendant was mentally retarded, at least one juror stated that, had she known, she would not have voted for the death penalty).

69. Bright, *Counsel for the Poor*, *supra* note 65, at 1849.

70. *Id.* at 1863 (citation omitted).

71. McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting).

72. *Id.* Justice Blackmun wrote:

> Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required under *Strickland v. Washington*. Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than "a person who happens to be a lawyer."

Id. (internal citation omitted); *see also* Bright, *Counsel for the Poor*, *supra* note 65.

presumptively reliable result. When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. And when this Court curtails federal oversight of state-court proceedings, it does so in reliance on the proposition that justice has been done at the trial level. My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the failings of our present system of capital representation and the conviction to do what is necessary to improve it.[73]

IV. THE TURNING POINT: *WILLIAMS*, *WIGGINS*, AND *ROMPILLA*

A. Williams v. Taylor[74]

The issue of inadequate investigation by defense counsel continued throughout the 1990's, highlighted by rising criticism of counsel's performance in death penalty cases. The year 2000 represented a watershed year for claims of ineffective assistance of counsel.[75] The United States Supreme Court in *Williams v. Taylor* found defense counsel ineffective for failure to investigate a client's background in a death penalty case.[76] The death of the victim was attributed to alcohol poisoning until Williams wrote a letter to the police confessing he had killed the victim and had stolen three dollars from him.[77]

During the penalty phase of the trial, the prosecution introduced evidence of prior crimes, a written confession given by Williams, as well as two separate "violent assaults on elderly victims" committed after the murder for which Williams was on trial.[78] One confession of an assault on

73. *McFarland*, 512 U.S. at 1264 (Blackmun, J., dissenting).

74. 529 U.S. 362 (2000).

75. *See* STATE OF ILLINOIS, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), *available at* http://www.state.il.us/defender/report/complete_report.pdf. The governor of Illinois imposed a moratorium on the death penalty. *Id.* at i. He then ordered the establishment of a commission to investigate the death penalty, following the reversal of thirteen death row inmates' convictions. *Id.*

76. *Williams*, 529 U.S. at 395.

77. *Id.* at 367-68.

78. *Id.* at 368.

an elderly woman was significantly harmful to Williams because "the woman was in a 'vegetative state' and not expected to recover."[79] He was also convicted of arson for setting fire to the jail while awaiting trial.[80] The prosecution called two experts who testified there "was a 'high probability' that Williams would pose a serious continuing threat."[81]

Defense counsel countered the prosecution's case by calling Williams's mother and his two neighbors, and also by showing a taped excerpt from a statement of a psychiatrist.[82] Their testimony characterized Williams as a "nice boy" and not a violent person.[83] During cross examination of the state's witness, counsel focused on the confession, highlighting the fact that Williams had implicated himself in the murder and other unsolved crimes.[84] Williams's counsel concluded by arguing that it would be "very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself."[85]

What counsel did not discover, and the jury never heard, was a recount of "extensive records graphically describing Williams' nightmarish childhood."[86] The Supreme Court agreed with the lower court's finding that:

> [T]he jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.[87]

Trial counsel also failed to present to the jury "evidence that Williams was 'borderline mentally retarded'" and had not advanced beyond the sixth grade.[88] Testimony could also have been presented by prison officials that Williams, as an inmate, was "least likely to act in a violent, dangerous or

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79. *Id.*
80. *Id.*
81. *Id.* at 368-69.
82. *Id.* at 369.
83. *Id.*
84. *Id.*
85. *Id.* at 369 n.2.
86. *Id.* at 395. Trial counsel incorrectly believed state law prohibited the disclosure of juvenile records. *Id.*
87. *Id.* (footnote omitted).
88. *Id.* at 396.

provocative way."[89] Defense counsel could have included evidence to show that Williams thrived in a more structured atmosphere, as shown through his education efforts while incarcerated.[90] This, of course, would directly contradict the state's experts' conclusion that Williams posed a "serious continuing threat."[91] These failings may easily be attributed to the fact that counsel did not start preparing for the sentencing phase until the week before trial.[92]

The Supreme Court in reversing stated:

> But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.[93]

Factually, the omissions in *Williams v. Taylor* look strikingly similar to those in *Strickland v. Washington*. Both cases involve a failure to investigate as well as a failure to adequately prepare for the sentencing phase of a death penalty case.[94] The question becomes whether or not *Williams* signals a change in the way the Court is reviewing claims of ineffective assistance of counsel, keeping in mind that the *Strickland* test remained the same. As the Supreme Court appeared to reassess *Strickland* in light of inadequate investigations, lower courts were also looking more closely at trial counsel's investigation.[95] More evidence that the Court was tightening up standards came in 2003.

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89. *Id.*

90. *Id.* Williams earned a carpentry degree while incarcerated. *Id.*

91. *Id.* at 368-69.

92. *Id.* at 395.

93. *Id.* at 396 (citing 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, cmt. at 4-55 (2d ed. 1980)).

94. *See supra* text accompanying notes 20-25, 86-92.

95. *See, e.g.*, Stevens v. Del. Corr. Ctr., 152 F. Supp. 2d 561, 576-77 (D. Del. 2001). Stevens "was convicted of unlawful sexual intercourse in the first degree" and sentenced to life in a Delaware state court proceeding. *Id.* at 565. In reviewing the investigation conducted by counsel, the trial court noted that the attorney only contacted people suggested by the defendant despite knowing that the defendant was an unreliable witness concerning the events of the night in question. The court stated: "An attorney's performance is deficient when he or she fails to conduct any investigation into exculpatory evidence and has not provided any explanation for not doing so." The court found the attorney's work to be inadequate largely based on his failure to investigate. *Id.* at 576-77.

B. Wiggins v. Smith[96]

In *Wiggins v. Smith* the Supreme Court found defense counsel ineffective based on the failure to conduct an adequate investigation into the client's background.[97] Wiggins was indicted for the murder of a seventy-seven year old woman who was drowned in her bathtub.[98] After conviction by the trial court, Wiggins chose to be sentenced by a jury.[99] During this phase of the proceedings, Wiggins' attorney did not present any evidence of Wiggins' history.[100] According to subsequent testimony offered at a postconviction proceeding, a number of mitigating factors were present, including his abusive and neglectful upbringing by his mother,[101] abuse while in foster care,[102] his life on the street and return to foster care,[103] and abuse suffered in a job training program.[104]

Reviewing trial counsel's failure to conduct a thorough investigation into Wiggins's history, the Court noted that "[c]ounsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as 'guides to determining what is reasonable.'"[105]

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96. 539 U.S. 510 (2003).

97. *Id.* at 524.

98. *Id.* at 514.

99. *Id.* at 515.

100. *Id.*

101. *Id.* at 516-17. The Court noted:

> [P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization.

Id. (internal citation omitted).

102. *Id.* "At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, as petitioner explained to Selvog, the father in his second foster home repeatedly molested and raped him." *Id.* at 517 (internal citation omitted).

103. *Id.* "At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion." *Id.* (internal citation omitted).

104. *Id.* The Court noted that after foster care, Wiggins was sexually abused by a supervisor while in Job Corps. *Id.*

105. *Id.* at 524-25 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984); Williams v. Taylor, 529 U.S. 362, 396 (2000)). The Court in *Wiggins* also stated that "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id.* (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C), 93 (1989) [hereinafter ABA DEATH PENALTY] (emphasis added by the Court)). The Court then admonished counsel for failing

C. Rompilla v. Beard[106]

Within two years of the *Wiggins* decision the Supreme Court reversed a third death penalty case based on trial counsel's inadequate investigation. In *Rompilla v. Beard*, the Court again cited the ABA standard for investigation in criminal cases to reverse a conviction for capital murder.[107] Rompilla was charged with the death of an individual who had been repeatedly stabbed and set on fire.[108] The prosecution introduced evidence of three aggravating factors: "that the murder was committed in the course of another felony; that the murder was committed by torture; and that Rompilla had a significant history of felony convictions indicating the use or threat of violence."[109]

In postconviction proceedings, Rompilla's new counsel argued trial counsel had failed to perform an adequate investigation into Rompilla's background.[110] Trial counsel had not investigated Rompilla's troubled childhood, mental illness, and alcoholism, but instead relied on Rompilla's "description of an unexceptional background."[111] Trial counsel, knowing of the prosecution's intention to introduce evidence of Rompilla's prior conviction for rape and assault, had not bothered to look at the prosecutor's file.[112] The Court declared:

> The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one:
>
> > It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The

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to pursue his obligation to investigate the petitioner's background and cited the ABA standards, which provide that counsel should consider presenting topics such as "medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* (emphasis in original).

106. 545 U.S. 374 (2005).

107. *Id.* at 387.

108. *Id.* at 377-78.

109. *Id.* at 378.

110. *Id.* at 382.

111. *Id.* at 378-79.

112. *Id.* at 385-86. "Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize." *Id.*

> investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.[113]

The Court in *Rompilla* noted that the ABA standard had been amended in 1993, but found there was no material difference.[114] The Court again stated: "[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'"[115] The Court also approvingly remarked on the ABA's adoption of ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in 1989.[116] In a footnote the Court gave a history of the guidelines as applied in death penalty cases. The Court stated:

> Later, and current, ABA Guidelines relating to death penalty defense are even more explicit:
>
> > Counsel must . . . investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction.
> >
> > Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines.[117]

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113. *Id.* at 387 (citing 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1982 Supp.)).

114. *Id.* at 387 n.6. The Court explained:

> The new version of the Standards now reads that any "investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities" whereas the version in effect at the time of Rompilla's trial provided that the "investigation" should always include such efforts . . . . We see no material difference between these two phrasings, and in any case cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.

Id. (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-4.1).

115. *Id.* at 387 (quoting Wiggins v. Smith, 539 U.S. 510, 524 (2003)).

116. *Id.* at 387 n.7.

117. *Id.* (citations omitted).

In *Rompilla*, the Court held that trial counsel's investigation fell "below the line of reasonable practice."[118] The Court noted that by looking at the file, counsel would have found "a range of mitigation leads that no other source had opened up."[119] In summary, the Court held that the "evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury."[120]

D. *Effect of* Williams, Wiggins, *and* Rompilla

The effect of *Williams*, *Wiggins*, and *Rompilla* is a detailed analysis of trial counsel's preparation and investigation, especially in death penalty cases by both state and federal courts.

In *Coleman v. Mitchell*, one of the early applications of *Williams*, the Sixth Circuit reversed a capital murder conviction.[121] Again, the reversal was based on trial counsel's lack of investigation into mitigating facts that would be relevant to the penalty phase of the trial.[122] *Coleman* presented an interesting argument advanced by the government. The petitioner had stated his desire to conduct a mitigation phase proceeding using the petitioner's own unsworn statement.[123] The district court found that trial counsel had honored the petitioner's request and therefore did not provide substandard representation.[124] An analogy was drawn between the limited representation presented in this case with a self-representation request.[125] The Sixth Circuit rejected the analogy, finding that counsel had never had a colloquy with the defendant that advised him of the dangers of his approach to the penalty phase of the case.[126] The court further found that the petitioner's request did not excuse trial counsel's duty to conduct an independent investigation.[127]

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118. *Id.* at 390.

119. *Id.*

120. *Id.* at 393.

121. Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001). *Williams v. Taylor* was decided on April 18, 2000. Williams v. Taylor, 529 U.S. 362 (2000). *Coleman v. Mitchell* was decided on October 10, 2001. *Coleman*, 268 F.3d at 417.

122. *Coleman*, 268 F.3d at 444-53.

123. *Id.* at 445.

124. *Id.*

125. *Id.* at 448-449.

126. *Id.* The court compared the case at bar to *Faretta v. California*, a case where an unrepresented defendant was charged with grand theft, and had previously represented himself. Faretta v. California, 422 U.S. 806, 807 (1975). In *Faretta*, the superior court judge had a discussion with the unrepresented defendant, explaining the applicable criminal statutes and trial procedure. *Id.* at 808-10. Ultimately the court in *Coleman* decided the case at bar was distinguishable because in *Coleman*, there was no showing that the defendant understood his rights, understood the danger of self-representation, or was making the decision of his own free will. *Coleman*, 268 F.3d at 449.

127. *Coleman*, 268 F.3d at 449-50.

The court's finding is in harmony with the general duty to investigate as stated in the ABA standards cited by the Supreme Court in *Williams v. Taylor*:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.[128]

After *Wiggins*, the Sixth Circuit further articulated a more detailed analysis of defense counsel's duty to investigate mitigating circumstances. In *Hamblin v. Mitchell*, the Sixth Circuit granted a writ of habeas corpus based on trial counsel's failure to investigate mitigating circumstances in a death penalty case.[129] The court used both the 1989 ABA guidelines and the 2003 Guidelines to amplify counsel's obligation to conduct an investigation.[130] Central to the court's finding was the premise that:

> [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

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128. 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1982 Supp.) (subsequently cited with approval by the Supreme Court in *Rompilla v. Beard*, 545 U.S. 374, 387 (2005)).

129. Hamblin v. Mitchell, 354 F.3d 482, 493-96 (6th Cir. 2003).

130. *Id.* at 487. The court stated:

> The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland*. They are the same type of longstanding norms referred to in *Strickland* in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past. The Court in Wiggins clearly holds that it is not making "new law" on the ineffective assistance of counsel either in *Wiggins* or in the earlier case on which it relied for its standards.
>
> New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances.

Id. (internal citations omitted).

> adds clarity, detail and content to the more generalized and indefinite 20-year-old language of Strickland . . . .[131]

The court was not troubled by the fact that the petitioner's trial occurred prior to the adoption of the 1989 standards.[132] Needless to say, state courts seized on the *Williams* and *Wiggins* application of ABA standards as well as their detailed factual inquiry into counsel's performance.

An example of this detailed analysis is found in *In re Lucas*.[133] The California Supreme Court vacated a capital murder conviction after appointing a special master to conduct an investigation into trial counsel's failure to adequately investigate.[134] Although trial counsel did interview the petitioner's wife, mother and sister, counsel only briefly explored the petitioner's history surrounding his childhood.[135] The California court specifically found that the petitioner was in and out of foster homes growing up, and that when his birth mother reclaimed him, there was evidence he had been beaten.[136] After the abuse was discovered the petitioner was placed in an abused children's facility where they verified that the petitioner had been severely abused and, as a result, had suffered advanced emotional trauma.[137] Records and witnesses of the petitioner's tragic childhood were readily available to trial counsel.[138]

This detailed finding by the court highlights the fact analysis done by the United States Supreme Court in *Wiggins*.[139] The court consistently referred to the findings in *Wiggins*, saying:

> As the United States Supreme Court has instructed: strategic 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. In any ineffectiveness case, a particular decision not to investigate must be

131. *Id.* at 486.
132. *See id.* at 488.
133. 94 P.3d 477 (Cal. 2004).
134. *Id.* at 512.
135. *Id.* at 486-87.
136. *Id.* at 486.
137. *Id.*
138. *Id.*
139. Wiggins v. Smith, 539 U.S. 510 (2003).

> directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[140]

The Court's use of ABA standards[141] as a means to measure a lawyer's performance in death penalty cases signifies a change that may subject attorneys to valid claims of ineffective assistance of counsel. This use of the ABA standards was not envisioned by the drafters of the standards. Both the current prosecution standards and defense standards begin with an admonition by the drafters:

> These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of [prosecutor/defense counsel] to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.[142]

In spite of the cautionary note by the ABA, the Court is using the standards in evaluating counsel's performance. In doing so, the Court has given teeth to the test for ineffective assistance articulated in *Strickland.*

The invocation of the ABA standards does not automatically mean a reversal of a conviction based on a claim of ineffective assistance of counsel. Courts throughout the country routinely reject claims of ineffective assistance.[143] However, the evolving use of the ABA standards has heightened the scrutiny courts use in evaluating counsel's performance over the years. Despite the favorable trend of ineffective assistance cases, the *Strickland* test is still criticized for setting the constitutional and ethical safeguards too low.[144] Eliminating the *Strickland* requirement that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"[145] is one step the Court may wish to take in order to focus more closely on counsel's performance. Looking at the language of *Williams*,[146] *Wiggins*,[147] and *Rompilla*,[148] the

140. *Lucas*, 94 P.3d at 502 (internal quotations and citations omitted).

141. *See* ABA CRIMINAL JUSTICE, *supra* note 3, at 4-1.1 et seq. (Defense Function).

142. *See id.* at 3-1.1, 4-1.1.

143. *See, e.g*, Vinson v. True, 436 F.3d. 412, 419 (4th Cir. 2006) (holding there was no ineffective assistance of counsel by distinguishing the case at bar from *Wiggins*).

144. *See* Myrna S. Raeder et al., *Convicting the Guilty, Acquitting the Innocent: Recently Adopted ABA Policies*, 20 CRIM. JUSTICE 4, 16-18 (2006).

145. Strickland v. Washington, 466 U.S. 668, 689 (1984).

146. Williams v. Taylor, 529 U.S. 362, 395 (2000).

147. Wiggins v. Smith, 539 U.S. 510, 521-23 (2003).

Court may have in fact abandoned the presumption in favor of a detailed factual analysis of the alleged breach of duty. If that is the case, then the abandonment of the presumption is well justified and long overdue. Where the Court is headed is, as always, subject to speculation by commentators. However, if the Court continues to follow the principle of adequate investigation fleshed out in *Williams*, *Wiggins*, and *Rompilla*, a look at the American Bar Association's recent studies may serve as a guide for what defense counsel can expect.

V. EVOLVING ABA DEFENSE STANDARDS

In 2004 the American Bar Association Standing Committee on Legal Aid and Indigent Defendants outlined the minimum steps defense counsel should take to adequately represent clients charged with a crime.[149] The Committee found that defense counsel should:

> [K]eep abreast of the substantive and procedural criminal law in the jurisdiction;[150] avoid unnecessary delays and control workload to permit the rendering of quality representation;[151] attempt to secure pretrial release under condition most favorable to the client;[152] prepare for a initial interview with the client;[153] seek to establish a relationship of confidence and trust with the client and adhere to ethical confidentiality rules;[154] secure relevant facts and background from the client as soon as possible;[155] conduct a prompt and thorough investigation of the circumstances of the case and all potentially available legal claims;[156] avoid conflicts of interest;[157]

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148. Rompilla v. Beard, 545 U.S. 374, 380-81 (2005).

149. *See* ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004) [hereinafter ABA, GIDEON'S BROKEN PROMISE].

150. *Id.* at 15 (citing NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 1.2 (1995) [hereinafter NLADA, PERFORMANCE GUIDELINES]).

151. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-1.3).

152. *Id.* (citing NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 2.1).

153. *Id.* (citing NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 2.2).

154. *Id.* (citing ABA, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 4 (2002); ABA CRIMINAL JUSTICE, *supra* note 3, at 4-3.1; NATIONAL STUDY COMMISSION ON DEFENSE SERVICES § 5.10 (1976) [hereinafter NAT'L STUDY COMM'N]).

155. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-3.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 2.2; ABA DEATH PENALTY, *supra* note 105, § 10.5).

156. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-4.1; ABA DEATH PENALTY, *supra* note 105, §§ 10-7, 10-8; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 4.1); *see also* Wiggins v. Smith, 539 U.S. 510 (2003) (holding that counsel's decision not to expend investigation beyond presentence investigation and Department of Social Services records fell short of professional standards).

157. ABA, GIDEON'S BROKEN PROMISE, *supra* note 149, at 15 (citing ABA CRIMINAL JUSTICE,

> undertake prompt action to protect the rights of the accused at all stages of the case;[158] keep the client informed of developments and progress in the case;[159] advise the client on all aspects of the case;[160] consult with the client on decisions relating to control and direction of the case;[161] adequately prepare for trial and develop and continually reassess a theory of the case;[162] explore disposition without trial;[163] explore sentencing alternatives;[164] and advise the client about the right to appeal.[165]

Most of the committee recommendations follow a common sense approach to criminal defense practice. Should the judiciary assume most lawyers conform their practice habits to these recommendations? Unfortunately, the committee's findings indicated there are system-wide failures throughout the United States.[166]

The committee, through various witnesses and documentary evidence, found the practice of providing defense counsel fell short in several aspects.[167] The report issued by the committee cited many troubling issues in criminal defense work, including: "Meet 'em and Plead 'em" lawyers;[168] incompetent and inexperienced lawyers;[169] excessive caseloads;[170] lack of

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supra note 3, at 4-3.5; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 4-1.3).

158. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-3.6; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 5.1, 5.2, 5.3).

159. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-3.8, 4-6.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 6.3).

160. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-5.1; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 6.4).

161. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-5.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 6.1, 6.3).

162. *Id.* (citing NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 4.3, 7.1; ABA DEATH PENALTY, *supra* note 105, § 10.10.1).

163. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-6.1; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 6.1, 6.2).

164. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-8.1; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 8.1-8.7; ABA DEATH PENALTY, *supra* note 105, § 10.11-10.12).

165. *Id.* (citing ABA CRIMINAL JUSTICE, *supra* note 3, at 4-8.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 150, § 9.2; ABA DEATH PENALTY, *supra* note 105, § 10.14).

166. *See id.* (citing failures in adequate counsel, lack of funding, inadequate attorney compensation, and lack of training).

167. *Id.*

168. *Id.* at 16. Several of the witnesses provided examples which characterized exchanges between attorneys and their criminal defendant clients as nothing more than "hurried . . . moments before entry of a guilty plea and sentencing." *Id.*

169. *Id.* at 16-17. Several documented instances exist where lawyers with little or no experience, sometimes fresh out of law school, are appointed to represent indigent defendants. *Id.* Other cases illustrate how attorneys appointed in such criminal matters lack training in criminal defense. *Id.*

contact with clients and continuity in representation;[171] lack of investigation, research, and zealous advocacy;[172] lack of conflict-free representation;[173] and ethical violations of defense lawyers.[174]

After these findings the questions become why do these problems exist and what can be done? As previously stated, the courts are starting to use ABA standards to evaluate defense counsel performance. The problem is not a lack of standards; it is the bench and the bar's lack of enforcement of existing standards. Again the case is made for the abandonment of *Strickland's* presumption of counsel's effectiveness.[175]

VI. ETHICAL SANCTIONS FOR REPEATED VIOLATIONS OF *STRICKLAND*/ABA STANDARDS

The test for ineffective assistance of counsel provides a specific remedy for the defendant in a criminal case—reversal of the conviction.[176] In a larger sense, ineffective assistance jeopardizes the profession and public by allowing attorneys who are not competent to continue practicing in a field where life and liberty are at stake. Thus the law should provide not only a remedy for the criminal defendant harmed by the ineffective assistance, but also provide a remedy for the legal profession through ethical sanctions. The ABA standards are corollaries to the ABA Model Code of Professional Responsibility. The ABA standards reference the ABA Model Code as a related standard. For example, the ABA's guideline regarding the duty to investigate, referred to in the above section, cites the ABA Model Code of Professional Responsibility.[177] The Ethical Considerations section of the ABA Model Code provides that "a lawyer should act with competence and proper care in representing clients."[178] In addition, the Model Disciplinary

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170. *Id.* at 17 ("[O]ftentimes caseloads far exceed national standards, making it impossible for even the most industrious of attorneys to deliver effective representation in all cases.").

171. *Id.* at 18. Witnesses have provided evidence to show that indigent criminal defendants often have very little contact with their appointed counsel. *Id.* Moreover, they are often appointed different attorneys throughout their court proceedings, instead of having the opportunity to establish a close attorney-client relationship. *Id.*

172. *Id.* at 19 ("Witnesses from a number of states indicated that, in many cases, indigent defense attorneys fail to fully conduct investigations, prepare their cases, or advocate vigorously for their clients at trail and sentencing.").

173. *Id.* at 19. Attorneys have frequently represented multiple criminal defendants in the same case. This constitutes a conflict of interest for the attorney and is an express violation of the rules of professional conduct. *Id.*

174. *Id.* at 20. Ethical issues not only arise from conflicts of interest, but also from the actions of attorneys who are not diligent in their representation of indigent criminal defendants.

175. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984).

176. *Id.* at 687.

177. *See* ABA CRIMINAL JUSTICE, *supra* note 3, at 4-4.1 (Duty to Investigate) (noting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 as a related standard).

178. MODEL CODE OF PROF'L RESPONSIBILITY EC 6-1, *reprinted in* ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 239 (2004) [hereinafter ABA

Rules provide that: "A lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances . . . [nor] [n]eglect a matter entrusted to him."[179]

A. In re Miller

Several jurisdictions have suspended attorneys for neglecting their clients' criminal cases. In the case of *In re Miller*, the Indiana Supreme Court suspended an attorney's license to practice law for sixty days.[180] The suspension was based on three findings of misconduct. The first was for neglecting a defendant's armed robbery case.[181] On April 6, 1999, the attorney entered an appearance.[182] The defendant was incarcerated, but the attorney did not meet with the client until February of 2000, at the client's second court appearance.[183] At the time, the attorney promised to meet with the client within two weeks, but failed to do so.[184] The defendant pled guilty to burglary and robbery and received a nine year sentence, four years of which were suspended.[185]

This attorney's second ethical violation involved a client who was charged with residential entry.[186] The attorney entered an appearance on October 29, 2000.[187] The client was unable to contact the attorney, and the attorney failed to appear at a pretrial hearing.[188] At another hearing on June 6, 2001,[189] the client pled guilty as charged and received credit for time served.[190] The attorney's third violation was the refusal to respond to the disciplinary commission.[191]

COMPENDIUM].

179. MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101, *reprinted in* ABA COMPENDIUM, *supra* note 178, at 240.

180. *In re* Miller, 759 N.E.2d 209, 212 (Ind. 2001).

181. *Id.* at 211.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* The court attributes the June 6 hearing to the year 2000. This of course would be impossible given the attorney's appearance in October of 2000. The author assumes the court meant June 6, 2001.

190. *Id.*

191. *Id.* at 210.

B. Office of Disciplinary Counsel v. Henry

In *Office of Disciplinary Counsel v. Henry*, the Supreme Court of Tennessee upheld the two-year suspension of an attorney's license to practice law.[192] The attorney, who had never represented anyone facing a felony charge, accepted a client charged with first degree murder.[193] The court found the attorney did not talk to witnesses, including potential alibi witnesses, and did not attempt to discover the case the state was going to present.[194] The court also concluded the attorney did not understand the rules of criminal procedure.[195] Astonishingly, the attorney filed an answer and an amended answer to the murder indictment, as if it were a civil action.[196] In the amended answer, the attorney detailed his client's version of the offense without determining whether his client had made a previous statement to the police.[197] The Tennessee Supreme Court noted that without the statement in the amended answer, the state "would have had difficulty in getting by the 'directed verdict' stage in any trial on the indictment."[198] The court went on to describe two other civil cases mishandled by the attorney.[199]

C. Office of Lawyer Regulation v. Dumke

In a variant of the "meet 'em and plead 'em" theme,[200] a Wisconsin attorney was retained to represent a client who had been convicted and sentenced in a sexual assault case where the state sought to commit the client as a sexually violent person.[201] The attorney had never represented a client subject to commitment under the sexually violent person provision of the Wisconsin statutes.[202] The attorney did not explore the factors used by the state to determine who would qualify for commitment pursuant to the statute.[203] Also, the attorney did not seek experts who could evaluate the client even though the statute provided for court appointed experts and the client's mother had offered to pay to retain an expert.[204] What the attorney

192. Office of Disciplinary Counsel v. Henry, 664 S.W.2d 62, 64-65 (Tenn. 1983).

193. *Id.* at 62.

194. *Id.* at 63.

195. *Id.* The attorney filed motions based on statutes that were superseded by the Rules of Criminal Procedure. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 63-64.

200. *See supra* note 168.

201. Office of Lawyer Regulation v. Dumke, 635 N.W.2d 594, 595-96 (Wis. 2001).

202. *Id.* at 596-97.

203. *Id.* at 596.

204. *Id.* at 596-97. The explanation tendered by the attorney was that he did not want to retain an expert because he might bolster the state's case. *Id.* This was rejected by the court since the expert would not have disclosed unfavorable results unless the expert testified. *Id.* at 597.

did do was to appear on the trial date, waive his right to trial, and admit to the allegations by the state.[205] Subsequently the attorney stipulated to being confined to a mental health facility.[206] The Wisconsin Supreme Court suspended the lawyer's license for two years.[207]

D. Attorney Grievance Commission of Maryland v. Middleton

The Court of Appeals in Maryland suspended an attorney's license for three years based on various forms of neglect in four cases.[208] In the first case, the lawyer represented a client charged with criminal assault and use of a handgun.[209] The client was convicted at trial and sentenced to a five-year term of incarceration.[210] The conviction was ultimately set aside in the post conviction relief hearing where the state conceded the attorney had provided ineffective assistance.[211] The court found trial counsel had failed to:

> (a) Meet with and go over possible defense strategies with his client; (b) Pursue a motion to suppress evidence that may have been illegally obtained; (c) Present evidence in support of an intoxication defense that may have been available to his client; (d) Prepare adequately to cross-examine the State's witnesses; (e) Prepare and submit voir dire; (f) Prepare and request specific jury instructions applicable to the charges in the case; and (g) Object to possibly improper jury instructions prejudicial to his client.[212]

In the subsequent disciplinary proceedings the court found the attorney had violated Maryland's Disciplinary Code by failing to provide competent[213] representation and counsel had "engage[d] in conduct that is prejudicial to the administration of justice."[214]

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205. *Id.* at 596.
206. *Id.*
207. *Id.* at 598.
208. Att'y Grievance Comm'n of Md. v. Middleton, 756 A.2d 565, 568-74 (Md. 2000).
209. *Id.* at 568.
210. *Id.*
211. *Id.*
212. *Id.* These findings were made by a judge in a bar proceeding and subsequently adopted by the Maryland Court of Appeals.
213. *Id.* at 568 n.1. "Rule 1.1, 'Competence,' provides: 'A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.'" *Id.*
214. *Id.* at 568 n.2. "Section (d) of Rule 8.4, 'Misconduct,' provides: 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . . .'" *Id.*

In the second case cited by the Maryland Court of Appeals, the attorney undertook representation of a client charged with first degree rape in October of 1997.[215] In April of 1998, on the day of trial, counsel had not filed any discovery requests or pretrial motions and moved for a continuance, complaining of a physical ailment.[216] The court continued the case but removed the attorney.[217] In the disciplinary proceeding, the court found the lawyer had failed to act with diligence.[218]

The third case involved a misrepresentation to a judge regarding an appearance in a different court in order to obtain a continuance.[219] Upon checking, the judge determined the representation was false.[220] This precipitated the filing of a criminal contempt action that resulted in an eighteen-month suspended sentence with the imposition of a number of conditions of probation, including the surrender of the attorney's law license for one year.[221] In the disciplinary case, the court concluded the lawyer engaged in misconduct by knowingly making a false statement to the court.[222] In the fourth case, involving a client charged with possession and intent to distribute cocaine, the attorney failed to appear for a scheduled trial.[223] Finally, the attorney failed to respond to the bar complaints.[224]

Enforcing ethical rules through attorney disciplinary proceedings would send a powerful message to lawyers. As states continue to address attorneys' misconduct, the standards are given meaning and usefulness. In turn, this will diminish the instances that the ABA committee reported of "meet 'em and plead 'em lawyers," incompetent and inexperienced lawyers, and other examples of ineffectual counsel.[225] The more the standards are enforced, the better the legal profession will be.

VII. CONCLUSION

It is clear that the United States Supreme Court has 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." This evolution was caused by the Court having to adapt to changing

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215. *Id.* at 569.

216. *Id.*

217. *Id.*

218. *Id.* at 569 n.3. "Rule 1.3, 'Diligence,' provides: 'A lawyer shall act with reasonable diligence and promptness in representing a client.'" *Id.*

219. *Id.* at 569-70.

220. *Id.* at 570.

221. *Id.*

222. *Id.* at 570 n.5. "Section (a)(1) of Rule 3.3, 'Candor toward the tribunal,' provides: 'A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . . .'" *Id.*

223. *Id.* at 571.

224. *Id.*

225. *See* ABA, GIDEON'S BROKEN PROMISE, *supra* note 149, at 20.

circumstances. The change to a more active use of the standard was needed because of counsel's performance documented over the years since *Strickland*.[226] This evolution should continue with the American Bar Association honing its standards to fit the heightened expectations of counsel's performance.[227] The evolution also must include the evaluation of counsel's performance by courts and, when necessary, taking the appropriate disciplinary actions. Criminal defense lawyers who practice without consulting the ABA standards do so at their professional peril. Thanks to the evolution of *Strickland* and the adoption of ABA Standards as more than mere guidelines, the originally useless *Strickland* tyrannosaurus now has teeth.

226. Strickland v. Washington, 466 U.S. 668 (1984).
227. *See* ABA, GIDEON'S BROKEN PROMISE, *supra* note 149.