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Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases

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I. INTRODUCTION

In the span of twenty-three years, sixty-eight percent of capital judgments reviewed by the courts were overturned due to serious error, most commonly because of grossly incompetent defense lawyering.[1] The error rates in capital cases have reached epidemic proportions, "subjecting innocent and other undeserving defendants–mainly, the poor . . . –to execution."[2] Although high quality legal representation is crucial in capital cases, the reality is that poor lawyering runs rampant, as almost all capital cases are handled by court-appointed attorneys, who lack the time and resources to fully devote themselves to the cases.[3]

The growing public sentiment is that "death sentences are doled out in capital cases 'not for the worst crimes but for the worst lawyers.'"[4] Yet our courts have taken a passive stance on defense lawyering in capital cases, giving broad deference to attorney decisions, and attributing errors and omissions to sound trial strategy.[5] This passivity allows questionable attorney conduct to go undeterred, thus perpetuating poor quality legal representation.[6] Unfortunately, there are many examples of egregious conduct that have been held by courts to be adequate, such as cases where attorneys were intoxicated, abusing drugs, mentally ill, or sleeping during the trial.[7]

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1. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* 24 (Columbia Law Sch. Pub. Law Research Paper, Working Paper No. 15, 2000), *available at* http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf.

2. *Id.* at 22.

3. *See* John E. Spomer, III, Note, *Scared to Death: The Separate Right to Counsel at Capital Sentencing*, 26 HASTINGS CONST. L.Q. 505, 520 (1999) (quoting Stephen S. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1865 (1994)).

4. *Id.* at 520.

5. *See* Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel,* 38 AM. CRIM. L. REV. 147, 148-49 (2001).

6. *Id.* at 165.

7. 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, 455 (1996); *see* Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982) (defendant's trial attorney was an alcoholic and suffered blackouts while representing him, but the court refused to establish a rebuttable presumption of ineffectiveness for an attorney who is an alcoholic, and found that the defendant failed to show that he was prejudiced by any of his attorney's errors); People v. Garrison, 765 P.2d 419, 440-41 (Cal. 1989) (defendant's attorney was an alcoholic and was arrested for driving to the courthouse under the influence of alcohol, but the court nevertheless rejected the claim that the attorney was per se ineffective because of his alcoholism); State v. Coates, 786 P.2d 1182, 1187 (Mont. 1990) (the court found that under *Strickland*, the attorney's use of cocaine was irrelevant to a claim of ineffective assistance of counsel); Smith v. Ylst, 826 F.2d 872, 875-86 (9th Cir. 1987) (the court refused to apply a per se ineffectiveness rule where defense counsel was mentally ill); United States v. Petersen, 777 F.2d 482, 484 (9th Cir. 1985) (defendant alleged that counsel fell asleep during trial, but the court found that defendant failed to show prejudice under *Strickland*).

The standard for deciding effective assistance was announced by the Court in the 1984 case of *Strickland v. Washington*.[8] In order to find ineffective assistance under *Strickland*, the defendant must prove that counsel's performance was deficient, and that the deficient performance prejudiced the defense.[9] *Strickland* instructs the courts to measure counsel's performance based on his perspective at the time and not in hindsight.[10] As a result, despite cases involving questionable representation, lawyers are given the benefit of the doubt, and few convictions have been reversed. However, in the past five years, the United States Supreme Court has made a sudden shift in their approach to handling claims of ineffective assistance in capital cases, and is now taking an active stance in monitoring attorney performance.

Rompilla v. Beard[11] is the latest case demonstrating the Court's desire to remedy the errors in the capital system. The Court has recently held that the execution of the mentally retarded and juveniles is unconstitutional,[12] and *Rompilla* is the third major case in the past five years in which the Court has overturned a death sentence due to ineffective assistance of counsel.[13] *Rompilla* is unique because it is not a case in which defense counsel simply failed to make attempts to provide a defense, but rather counsel was held ineffective even though their performance was neither nonexistent nor terrible.[14]

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8. 466 U.S. 668 (1984).

9. *Id.* at 687.

10. *Id.* at 689.

11. 545 U.S. 374 (2005).

12. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the death penalty for the mentally retarded is unconstitutional); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty for juveniles is unconstitutional).

13. *See* Williams v. Taylor, 529 U.S. 362 (2000) (overturning a death sentence due to ineffective assistance of counsel); Wiggins v. Smith, 539 U.S. 510 (2003) (overturning a death sentence due to ineffective assistance of counsel); *Rompilla*, 545 U.S. at 374.

14. *Rompilla*, 545 U.S. at 380-81. *See* Colin Garrett, *Death Watch: Supreme Court Re-Emphasizes Need For Thorough Penalty Investigation*, 29 CHAMPION 52, 53 (2005). Justice Souter delivered the opinion of the Court, in which he acknowledges that "[t]his is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts", as counsel interviewed Rompilla and several of his family members and arranged for three mental health experts to examine reports of Rompilla's mental state. *Rompilla*, 545 U.S. at 381. During the sentencing phase, counsel presented testimony of Rompilla's family members who testified on his behalf, claiming that he was innocent and a good man. *Id.* Thus, this was not a case in which counsel entirely failed to investigate and present mitigating evidence. Nevertheless, the Court found counsel's performance inadequate because they failed to pursue a particular avenue of mitigating evidence; namely, Rompilla's prior conviction file. *Id.* at 383.

Ronald Rompilla was charged with the 1988 murder of James Scanlon, a bar owner from Allentown, Pennsylvania.[15] The court appointed two public defenders to represent him at trial.[16] At the guilt phase, the jury found Rompilla guilty on all counts, and during the sentencing phase, the jury found that the aggravating factors outweighed the mitigating evidence, and sentenced him to death.[17] In preparing their mitigation case, defense counsel interviewed Rompilla and five of his family members, and arranged for three mental health experts to evaluate him.[18] However, Rompilla was uninterested in helping them develop a mitigation case, and his family members suggested that no mitigation evidence was available.[19] Rompilla, however, sought post-conviction relief, raising a claim of ineffective assistance of counsel, where it was then discovered that his trial lawyers had failed to pursue numerous avenues in building their mitigation case, such as examining his school, medical, court, and prison records.[20] Further, had they reviewed the case file pertaining to his prior conviction, they would have discovered mitigating evidence regarding Rompilla's traumatic childhood, organic brain damage, mental retardation, mental health impairments, and alcoholism.[21]

Applying the *Strickland* standard, the Court held that defense counsel's performance was deficient, and that the deficient performance prejudiced the defense. Specifically, it held that counsel's failure to examine Rompilla's prior conviction file constituted deficient performance, as counsel knew the prosecution intended to use Rompilla's prior conviction to prove an aggravating circumstance, yet they failed to examine the file, which contained significant mitigation evidence that would likely have caused the jury to reach a different result had it been presented to them.[22] The Court held that when both the capital defendant and his family members suggest that no mitigating evidence is available, his lawyer must make reasonable efforts to review material he knows the prosecution will likely rely on as evidence of aggravation at the sentencing phase.[23]

The purpose of this note is to analyze the *Rompilla* decision and discuss its implications. Part II presents a brief history of the Sixth Amendment right to counsel and the development of the right to effective assistance of counsel in the context of capital cases.[24] Part III outlines the facts of

15. *Id.* at 377.
16. *Id.* at 378.
17. *Id.*
18. *Id.* at 381-82.
19. *Id.*
20. *Id.* at 382.
21. *Id.* at 390-91.
22. *Id.* at 393.
23. *Id.* at 377.
24. *See infra* notes 28-169.

Rompilla.[25] Part IV summarizes and evaluates the Court's majority, concurring, and dissenting opinions.[26] Part V examines both the legal significance and the societal impact of the *Rompilla* decision.[27]

II. HISTORICAL BACKGROUND

This section will trace the evolution of the Sixth Amendment right to effective assistance of counsel, and its application to capital cases. First, it traces the history of the right to counsel, from its inception to its first judiciary application, followed by an examination of how it came to be interpreted over time by the Court. Next, this section examines the Court's interpretation of the Sixth Amendment right to counsel as being the right to *effective* assistance of counsel. The majority of the section is devoted to an analysis and critique of the Supreme Court case of *Strickland v. Washington*, which established a uniform standard for effective assistance of counsel. Finally, this section examines the right to effective assistance of counsel in the context of capital cases.

A. Sixth Amendment Right to Counsel

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence* [sic].[28]

Former U.S. Court of Appeals judge, David L. Bazelon, described "the history of the application of the sixth amendment [right to counsel] . . . [as] one of tiny steps forward followed by long periods without any movement."[29] He analogized this historical progression to plateaus, with the steps forward being the slopes, and the motionless periods as plateaus.[30]

The history of the Sixth Amendment right to counsel begins with an analysis of English common law. Originally, in England, a person who had been charged with treason or a felony was denied the assistance of counsel, whereas a party to a civil case or a person charged with a misdemeanor was

25. *See infra* notes 170- 98.

26. *See infra* notes 199-268.

27. *See infra* notes 269-309.

28. U.S. CONST. amend. VI (emphasis added).

29. Kelly Green, *"There's Less in This Than Meets the Eye:" Why* Wiggins *Doesn't Fix* Strickland *and What the Court Should Do Instead*, 29 VT. L. REV. 647, 650 (2005) (citing David L. Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 818-19 (1976)).

30. *Id.*

entitled to the full assistance of counsel.[31] In 1688 the rule was abolished as to treason, but not for felonies.[32] Many English lawyers saw this rule as outrageous, as a person was granted assistance in petty offenses but not in cases where it was most needed.[33] Proponents of the rule argued that in many felony cases the court itself was counsel for the defendant.[34] But judges "cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused."[35] Indeed, the common law rule prohibiting assistance of counsel to those persons charged with a felony was rejected by the American colonies.[36]

The right to counsel first came about with the ratification of the Sixth Amendment in 1791, which recognized a right to counsel in all criminal prosecutions. [37] With the adoption of the Fourteenth Amendment nearly 100 years later, Congress dictated that no State shall "deprive any person of life, liberty, or property, without due process of law."[38] Thus, as it applies to the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment requires states to "abide by all procedures essential to fundamental fairness in assistance of counsel issues."[39]

The right to counsel was not directly addressed by the judiciary until 1932, when the Supreme Court heard the case of *Powell v. Alabama.*[40] In *Powell,* the Supreme Court held that defendants have a right to retain counsel, and that counsel must be appointed for indigent defendants in state capital cases.[41] In *Powell,* the defendants pled not guilty to charges of

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31. Powell v. Alabama, 287 U.S. 45, 60 (1932) (citing 1 Cooley's Const. Lim., 8th ed., 698, *et seq.*, and notes).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 61 (J. Sutherland arguing that a judge cannot act as counsel for the defendant).

36. *Id.* at 61-65. Prior to the adoption of the United States Constitution, almost all of the colonies had rejected the English common law rule and recognized a right to counsel in all criminal prosecutions, except for one or two colonies, in which the right was reserved for capital offenses or more serious crimes. *Id.* at 64-65. The view of the colonists is illustrated by the remarks of Zephaniah Swift, in his book, "Of Crimes and Punishments", printed in 1795:

> We have never admitted that cruel and illiberal principle of the common law of England that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence [sic], which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice: for it is apparent . . . that a court can never furnish a person accused of a crime with the advice, and assistance necessary to make his defence [sic].

Id. at 63 (citing ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT, Windham by John Byrne, 1795-96, Vol. II, Bk. 5, "Of Crimes and Punishments," c. XXIV, "Of Trials," pp.398-99).

37. U.S. CONST. amend. VI.

38. U.S. CONST. amend. XIV.

39. Green, *supra* note 29, at 653.

40. 287 U.S. 45 (1932).

41. *Id.* at 71.

rape[42], and at their arraignment they were not asked whether they had or were able to employ counsel, or wished to have counsel appointed.[43] Rather, the judge simply appointed "'all the members of the bar'" to represent the defendants at trial "'if no counsel appears.'"[44] But since the judge never appointed a specific attorney to represent the defendants, they had no counsel for consultation, investigation, or pre-trial preparation.[45] In fact, it was not until the morning of the trial that a lawyer was designated to represent the defendants.[46] The defendants were ultimately found guilty and sentenced to death.[47] The Supreme Court reversed and remanded the convictions and death sentences, because it held that the denial of counsel from the time of their arraignment until their trial was a violation of due process under the Fourteenth Amendment.[48] Although the Court held that the Sixth Amendment right to counsel in a capital case is a fundamental right, this case was analyzed and decided under the Due Process Clause of the Fourteenth Amendment. Specifically, the Court held that the lower court's failure to give the defendants reasonable time and opportunity to find counsel was a denial of due process.[49] The Court said that even if they had had time to obtain counsel "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."[50]

It was not until its 1963 decision in *Gideon v. Wainwright*[51] that the Supreme Court shifted the focus of the right to counsel analysis from the Fourteenth Amendment to the Sixth Amendment. In *Gideon,* the Court held that the right to counsel guaranteed by the Sixth Amendment is one of the fundamental rights "made obligatory upon the States by the Fourteenth

42. *Id.* at 49. The defendants in *Powell* were seven African-American boys who were charged with raping two white girls. The defendants had been riding on a train through Alabama, which is where the rape allegedly occurred. *Id.* at 50. Once off the train they were taken into custody and arrested. *Id.* at 51.

43. They were all ignorant, illiterate, and from out of state. *Id.* at 52. They were not asked whether they had counsel, were able to afford counsel, or wished to have counsel appointed. *Id.*

44. *Id.* at 53.

45. *Id.* at 57.

46. *Id.* at 56.

47. *Id.* at 50.

48. *Id.*

49. *Id.* at 71. The Court stated that notice and the opportunity to be heard constitute the main elements of due process of law. *Id.* at 68. The opportunity to be heard includes the right to assistance of counsel. *Id.* at 69. The Court found that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69.

50. *Id.* at 71.

51. 372 US 335 (1963).

Amendment."[52] Thus, all criminal defendants, whether in state or federal court, have a right to be represented by counsel.[53] Further, the Court held that courts must appoint counsel for an indigent defendant if he or she is charged with a felony.[54] Although this rule does not apply to indigent misdemeanants, the Supreme Court subsequently held in *Argersinger v. Hamlin*[55] that no imprisonment may be imposed for misdemeanors unless the defendant is represented by counsel.[56]

While these cases clearly established that the right to counsel is a fundamental right, they did not define the exact nature of this constitutional guarantee. In the next step of the development of the right to counsel, the courts began to flesh out the nature of this right.

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52. *Id.* at 342. *Gideon* involved an indigent defendant charged with breaking and entering, which was a felony under state law. *Id.* at 336-37. However, the particular felony was not a capital offense, and under then existing state law defendants were only entitled to appointment of counsel in capital cases. *Id.* at 337. Accordingly, the defendant was forced to conduct his own defense, and was ultimately found guilty. *Id.*

53. *Gideon* represents an expansion of *Powell* because it extended the right to counsel to all criminal defendants, not just capital defendants. Further, in arriving at its decision in *Powell* that courts must appoint counsel for indigent defendants in capital cases, the Court focused on the unfortunate circumstances of the defendants, and their inability to make their own defense. *Powell,* 287 U.S. at 71. The facts indicated that the defendants were ignorant, illiterate, young, and far away from their family and friends. *Id.* Thus, the Court felt that the appointment of counsel was a necessity, stating that

> in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . .

Id.

However, in *Gideon*, the defendant was intelligent and competent, and conducted his own defense as best as he could. *Gideon,* 372 U.S. at 337. He made opening and closing statements, cross-examined the state's witnesses, presented his own witnesses, and refused to testify. *Id.* Unlike *Powell*, the Court did not focus on the circumstances or abilities of the defendant in making its decision that the right to counsel is a fundamental right that must be provided to all criminal defendants. Instead, it emphasized the importance of the professional training, knowledge, and experience that attorneys provide, and stated that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law . . . [h]e lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one." *Id.* at 345 (quoting *Powell*, 287 U.S. at 68-69).

54. *Gideon*, 372 U.S. at 344. Specifically, the Court held that the right to counsel is a fundamental right and an indigent defendant cannot be assured a fair trial without counsel. *Id.* The Court recognized that since the government hires prosecutors, and almost all defendants charged with crimes who can afford counsel hire the best attorneys to assist them, "lawyers in criminal courts are necessities, not luxuries." *Id.* Thus, in order to ensure a fair process, indigent defendants must have the assistance of counsel when facing their accusers. *Id.* However, the Court implicitly limited the application of this rule to felonies. *Id.*

55. 407 U.S. 25 (1972).

56. *Id.* at 40.

B. The Sixth Amendment Guarantee of Effective Assistance of Counsel

1. Pre-*Strickland* Era

The notion that the Sixth Amendment guarantees a right to *effective* assistance of counsel has its roots in the *Powell* decision.[57] Seven years later, in the case of *McMann v. Richardson*[58], the Supreme Court found that "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel."[59] Thus, implicit in this language is a need for minimum standards of an adequate defense. However, the Court failed to define the concept of "effective assistance," so the lower courts were left to establish their own standards.[60] Some of the lower courts turned to the Fifth Amendment's Due Process Clause for guidance.[61] The Court had recently agreed with a holding that the Fifth Amendment's Due Process Clause was only violated "'where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice.'"[62] Thus, for those courts that adopted the "farce or mockery of justice" test, counsel's performance would only be deemed ineffective if it shocked the conscience of the court.[63] Other courts turned to the Sixth Amendment for guidance, and interpreted the right to counsel as requiring counsel to provide reasonably effective assistance.[64] The

57. *Powell*, 287 U.S. at 56. Although the defendants in *Powell* did have counsel during the trial, counsel was not appointed until the morning of the trial. *Id.* The Supreme Court held that the presence of counsel during the trial was not enough, because the failure to make an *effective* appointment of counsel amounted to "a denial of effective and substantial aid," which was a denial of due process in and of itself. *Id.* at 53, 71. Although the attorneys made their best efforts to represent the defendants at trial, the defendants were denied counsel from the time of their arraignment until the start of their trial, which the Court identified as a critical period of the proceedings, since "consultation, thoroughgoing investigation and preparation were vitally important." *Id.* at 57.

58. 397 U.S. 759 (1970).

59. *Id.* at 771 n.14.

60. Green, *supra* note 29, at 656.

61. *Id.* See also Kirchmeier, *supra* note 7, at 431-32. By 1970 all eleven circuits had turned to the Fifth Amendment's Due Process Clause for guidance as to the appropriate standard to measure attorney performance. *Id.*

62. Green, *supra* note 29, at 656 (quoting Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945)).

63. Elizabeth Gable & Tyler Green, *Current Developments 2003-2004:* Wiggins v. Smith: *The Ineffective Assistance of Counsel Standard Applied Twenty Years After* Strickland, 17 GEO. J. LEGAL ETHICS 755, 757 (2004); *see also* Green, *supra* note 29, at 657. The "farce and mockery of justice" test was particularly harsh on defendants claiming that counsel had been ineffective, as it was nearly impossible to surmount. Green, *supra* note 29, at 657. For example, instances in which defense attorneys had slept during the trial or complained to judges about having to be involved in the cases were not found to be ineffective under this standard. *Id.*

64. Green, *supra* note 29, at 657-68.

"reasonably effective assistance" standard required counsel to act with diligence and competence in conformity with the prevailing standards of professional conduct.[65] This standard was much friendlier to defendants, and by 1983, all of the circuit courts had adopted this in favor of the "farce and mockery" test.[66] In addition to requiring proof that counsel had been ineffective, some circuits introduced the "prejudice" component, which required defendants to show that the ineffectiveness harmed them.[67] However, this rule was not applied uniformly among the circuits, and there was disagreement as to the weight and application of the rule.[68]

2. The *Strickland* Standard for Ineffective Assistance of Counsel

In response to the lack of clarity as to the proper test for effective assistance of counsel, the Supreme Court arrived at a standard for determining ineffective assistance in the landmark case of *Strickland v. Washington.*[69] In a claim of ineffectiveness of counsel, *Strickland* requires the defendant to prove: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense.[70]

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65. *Id.* at 658.

66. *Id.* at 657-59. See also Kirchmeier, *supra* note 7, at 431-42. Courts began to abandon the "farce and mockery" test after 1970. *Id.* at 431. In 1970, the Fifth Circuit "interpreted the right to effective counsel to mean 'counsel reasonably likely to render and rendering reasonably effective assistance.'" *Id.* at 431-32. Then, the Third Circuit replaced the farce and mockery test with a "'normal competency'" standard. *Id.* at 432. Thereafter, the rest of the circuit courts began to adopt the "reasonably competent assistance" standard, and by 1983 no circuit court used the farce and mockery test. *Id.*

67. Green, *supra* note 29, at 659.

68. *Id.*

69. 466 U.S. 668 (1984). In *Strickland,* the defendant was indicted for three brutal murders, in which he repeatedly stabbed his victims. *Id.* at 672. The defendant waived his right to a jury trial and pleaded guilty. *Id.* Before the trial, the defendant told the judge he had no prior criminal record and was under extreme stress at the time of the crimes, but that he accepted responsibility. *Id.* In preparation for the sentencing phase, counsel spoke with the defendant about his background, as well as his wife and mother. *Id.* at 672-73. However, given the overwhelming evidence against the defendant and the absence of mitigating circumstances, counsel decided not to present character witnesses because he felt they could not overcome evidence of defendant's confessions. *Id.* at 673. Further, he did not request a psychiatric examination because based on his conversations with the defendant, there was no indication that he had psychological problems. *Id.* Counsel's strategy was to convince the jury at the sentencing phase that defendant's life should be spared because he had been under extreme stress at the time, and he accepted responsibility for his crimes. *Id.* The judge found that the aggravating circumstances far outweighed any mitigating factors, and sentenced him to death. *Id.* at 675.

The defendant then sought relief, claiming that counsel had provided ineffective assistance by his failure to request a psychiatric report, investigate and present character witnesses, and make meaningful arguments to the judge. *Id.* Ultimately, the Supreme Court denied his claim, and held that counsel had been effective, because counsel's strategic decision not to seek more mitigation evidence was based on reasonable professional judgment. *Id.* at 699. Further, the Court held that there was no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating factors. *Id.* at 700.

70. *Id.* at 687.

In a claim for ineffective assistance of counsel, the Court places the burden on the defendant to prove that counsel's performance was deficient.[71] This requires the defendant to specify the acts or omissions that are allegedly deficient.[72] Under the first prong of *Strickland,* counsel's performance will only be "deficient" if it falls below an objective standard of reasonableness, thus not "within the range of competence demanded of attorneys."[73] The Court held that an attorney's performance should conform to prevailing professional norms, which entail basic duties such as providing zealous advocacy for the client's cause, and consulting with the defendant on important decisions.[74] Although the Court stated that the American Bar Association standards and the like could be used as guides to determine reasonable attorney conduct, it refused to impose specific guidelines or requirements of effective assistance.[75] Its reasoning was that the Sixth Amendment merely refers to the right to counsel, and does not specify certain requirements for effective assistance, so no specific guidelines are needed.[76] Further, the Court was concerned that a set of rules would fail to take into account the wide range of scenarios attorneys face, and would restrict their ability to make tactical decisions.[77] Thus, the Court held that the attorney's conduct must be analyzed in light of all of the circumstances to determine whether it was reasonable.[78] In analyzing the attorney's conduct, the Court mandated that courts should avoid hindsight, and evaluate performance based on counsel's perspective at the time.[79] Courts must indulge a strong presumption that counsel's conduct was reasonable and effective, so the burden rests on the defendant to prove otherwise.[80]

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71. *Id.*

72. *Id.* at 690.

73. *Id.* at 687-88 (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).

74. *Id.* at 688.

75. *Id.*

76. *Id.*

77. *Id.* at 689. The Court was particularly concerned that rigid requirements could impair the independence of counsel, and discourage attorneys from accepting cases. *Id.* at 690. Further, the Court feared that detailed guidelines might distract counsel, such that he or she would be spending more time worrying about complying with all of the rules than advocating the client's cause. *Id.* at 689. The Court also pointed out that the aim of the Sixth Amendment "is not to improve the quality of legal representation," but merely to ensure a fair procedure. *Id.* Thus, when courts are analyzing an ineffective assistance of counsel claim, they should focus primarily on whether or not the procedure was fair and just.

78. *Id.* at 688.

79. *Id* at 689.

80. *Id.* This presumption exists in order to account for the broad range of styles and strategies employed by attorneys. *Id.* The Court recognizes that not all attorneys will approach a case from the same way, so there must be a strong presumption that counsel's actions and decisions were based on sensible trial strategy. *Id.*

Even if the defendant is able to prove that counsel's performance was deficient, he must still prove prejudice in order to prevail on his claim of ineffective assistance of counsel.[81] Under the second prong of *Strickland,* in order to show that the deficient performance prejudiced the defense, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[82] A reasonable probability is defined as that which is "sufficient to undermine confidence in the outcome."[83] There are certain circumstances in which prejudice is presumed, so the second-prong of *Strickland* is automatically satisfied. Prejudice is presumed where there is: 1) a complete denial of counsel during a critical stage of the trial, 2) a complete failure to subject the prosecution's case to meaningful adversarial testing, 3) a low probability that even a fully competent attorney could provide effective assistance, and 4) an instance in which counsel "'actively represented conflicting interests.'"[84]

3. Critique of *Strickland*

Strickland established a uniform standard for determining when counsel's performance will be deemed constitutionally infirm. Although *Strickland* resolved the confusion among the lower courts as to the proper test for effective assistance of counsel, the decision has been wrought with criticism. Critics argue that the test fails to provide a workable framework by which to measure attorney performance and allows questionable legal representation to go unchecked, as judges are afforded broad discretion in reviewing ineffective assistance claims, which often leads to arbitrary decisions.[85]

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81. *Id.* at 691-92.

82. *Id.* at 694.

83. *Id.* The Court stated that it would not be enough for the defendant to show that the deficient performance had some possible effect on the outcome, because practically any error of counsel could satisfy this test. *Id.* at 693. However, the defendant does not have to go so far as to prove that the deficient performance more likely than not altered the outcome. *Id.*

84. *Id.* at 692.

85. *See* Green, *supra* note 29, at 648 ("*Strickland's* high deference to counsel's strategic choices allows appellate courts to view egregious errors as trial tactics"); David D. Langfitt & Billy H. Nolas, *Ineffective Assistance of Counsel in Death Penalty Cases,* 26 ABA LITIG. 6, 8 (2000) ("on review, courts seem to search until they find a reasonable tactic somewhere in counsel's failure"); Richard L. Gabriel, *The* Strickland *Standard For Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process,* 134 U. PA. L. REV. 1259 (1986) (arguing that reviewing courts quickly excuse counsel's errors by labeling acts or omissions as tactical decisions); Amy R. Murphy, *Further Developments on Previous Symposia: The Constitutional Failure of the* Strickland *Standard in Capital Cases Under the Eighth Amendment,* 63 LAW & CONTEMP. PROBS. 179, 180 (2000) ("*Strickland* has given appellate courts overly broad discretion to determine exactly what constitutes ineffective assistance of counsel. As a result, there is little consistency within judicial districts or across districts."); Donald J. Hall, *Effectiveness of Counsel in Death Penalty Cases,* 42 BRANDEIS L.J. 225 (2003-04) (arguing that *Strickland* permits "'effective but fatal'" counsel); Levinson, *supra* note 5, at 147; Gable & Green, *supra* note 63, at 764

In establishing the standard for effective assistance of counsel, the *Strickland* Court asserted that the purpose of the Sixth Amendment is "not to improve the quality of legal representation" but merely "to ensure that criminal defendants receive a fair trial."[86] Indeed, one of the critiques of the *Strickland* standard is that it allows grossly incompetent attorney conduct to go undeterred, thus perpetuating poor quality legal representation.[87] In his dissenting opinion in *Strickland*, Justice Marshall cautioned that the first prong 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."[88] In his view, the requirement that counsel act like a "reasonably competent attorney" is so vague, that it provides no workable framework for courts to measure attorney conduct.[89] In fact, though it appears to be an objective standard of reasonableness, it is actually a subjective test, because the definition of reasonableness varies depending upon the particular beliefs of the judge.[90] As courts are instructed to give much deference to counsel's tactical decisions, they will generally find some way to attribute any errors or omissions to a tactical choice.[91] Further, although judges can turn to standards of conduct such as those promulgated by the American Bar Association as guides for evaluating performance, they do not have to abide

("*Strickland* adversely affects the public because questionable representation by attorneys is often not evaluated if their conduct did not prejudice the outcome of the case.").

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

87. Levinson, *supra* note 5, at 165; *see* Gable & Green, *supra* note 63, at 764 (demonstrating that if the court determines that counsel's performance didn't prejudice the defense, it will not be evaluated, so questionable representation may go unchecked).

88. *Strickland*, 466 U.S. at 707 (Marshall, J., dissenting).

89. *Id.* at 708.

90. Green, *supra* note 29, at 676. Standards such as those propagated by the American Bar Association represent the current consensus as to what constitutes effective lawyering. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.1(A) (rev. ed. 2003) [hereinafter DEATH PENALTY GUIDELINES], *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf. For example, the ABA standards state that defense counsel must: conduct an early investigation to determine any weaknesses in the prosecution's case and uncover mitigating evidence, limit their caseloads so they can provide each client with high quality representation, retain a mitigation specialist and fact investigator, and conduct a thorough investigation as to issues relating to guilt and penalty. *Id.* at §§ 10.2, 10.3, 10.4, 10.7. However, since judges are not bound by these standards, they do not have to follow any specific checklists for conduct, so they are given free reign in evaluating counsel's conduct.

91. Levinson, *supra* note 5, at 165. Generally, if counsel has a justifiable reason for making an error or omission, courts will approve of this tactical decision. *Id.* Conduct which the court deems in hindsight to be based on strategy, may in fact have been a mere error or omission. As a result, choices which appear to be strategic on the surface but are actually baseless slip under the radar as courts do not look to the decision underlying the choice. *Id.* at 166.

by them.[92] Therefore, judges may find reasonable what would be deemed ineffective under the standards.[93]

Courts are very eager to find some way to attribute conduct to strategy, so it is very difficult for defendants to prevail.[94] Critics of *Strickland* argue that if a defendant proves that counsel's performance was constitutionally infirm, he should not have the additional heavy burden of demonstrating that there is a reasonable probability that but for the errors, the result of the proceeding would have been different.[95] Critics urge that if the prejudice prong is to be applied, it must be re-worked. Some suggest that the burden should be shifted to the prosecution to prove a *lack* of prejudice, such that if the defendant proved that counsel's performance was deficient, it would be deemed ineffective assistance unless rebutted by the prosecution.[96]

Since the Sixth Amendment is concerned with providing fair procedures, some argue that deficient performance alone constitutes a constitutional violation.[97] By requiring the defendant to prove both deficient performance and prejudice, the concern is that the prejudice prong "ignores the independent procedural harm caused by the appointment of an incompetent attorney."[98] Regrettably, there are many examples of egregious conduct that have been held by courts to be adequate, such as cases where attorneys were intoxicated, abusing drugs, mentally ill, or sleeping during the trial.[99] Yet, if the court determines that the conduct did not prejudice the defense, it will go undeterred even though it was grossly incompetent. In many states, if a defendant brings a claim for ineffective assistance, he or she is collaterally estopped from bringing a subsequent civil malpractice action.[100] Therefore, if the ineffective assistance claim is dismissed for

92. *Strickland*, 466 U.S. at 688.

93. Green, *supra* note 29, at 673.

94. *See* Gable & Green, *supra* note 63, at 765. This is propounded by the fact that an attorney's reputation is at stake when a defendant brings a claim of ineffective assistance against him, so the attorney will work hard to vigorously defend his or her conduct. *Id.*

95. *Strickland,* 466 U.S. at 716-17 (Marshall, J., dissenting); *see* Gable & Green, *supra* note 63, at 765-69; Gabriel, *supra* note 85, at 1276.

96. Green, *supra* note 29, at 676; *see also Strickland,* 466 U.S. at 716-17 (Marshall, J., dissenting) (suggesting that the defendant should merely have to show that there was a significant chance that absent counsel's errors the result would have been different rather than the higher standard of "reasonable probability").

97. Gabriel, *supra* note 85, at 1276-77 (arguing that deficient performance alone constitutes a denial of effective assistance, so it should be sufficient to proving a constitutional violation regardless of prejudice); Levinson, *supra* note 5, at 169 (stating that "the prejudice prong inherently assumes that no injury is caused solely by the denial of procedural due process").

98. Levinson, *supra* note 5, at 177.

99. Kirchmeier, *supra* note 7, at 455. Courts have refused to hold that abuse of alcohol and drugs is per se ineffective, so as not to create the presumption that these habits render attorneys incompetent. *Id.* at 456. However, courts have held that when counsel sleeps through a substantial portion of the trial it will be per se ineffective, but they are split as to what is meant by "substantial." *Id.* at 462-63.

100. Gable & Green, *supra* note 63, at 766-77.

failure to satisfy the prejudice prong, this egregious conduct cannot be remedied. However, despite all of the criticism, it is conceded that the existence of a prejudice prong is necessary for judicial economy. As one commentator noted, "eliminating the prejudice prongs . . . would multiply the number of claims and invite rampant second-guessing of trial attorneys."[101]

The inadequacies of the *Strickland* standard are most apparent in the context of capital cases. The right to effective assistance of counsel is vital in capital cases, as the defendant's life is at stake. Thus, the consequences of a malleable standard that allows egregious attorney conduct to go undeterred are especially grave when a person's life is on the line.

C. *Effective Assistance of Counsel in the Context of Capital Cases*

1. Capital Trials

The well-established notion that criminal defense lawyers are necessities and not luxuries is especially true in the case of capital trials. One commentator has noted that "death sentences are doled out in capital cases 'not for the worst crimes but for the worst lawyers'"[102] Capital cases are very complex, and much is at stake, as the defendant risks losing not only his freedom but his life. Thus, the consequences of ineffective assistance of counsel at the sentencing phase of a capital trial are especially grave.[103] Counsel should ideally be required to possess a greater degree of skill and experience when representing capital defendants.[104] Due to the heightened gravity of capital trials, the Supreme Court has consistently held that

101. Levinson, *supra* note 5, at 163. Admittedly, the prejudice prong allows courts to ignore strategic errors and questionable representation, but it is argued that "[w]hile this still may cheat defendants out of procedural fairness, it can be viewed as a necessary evil in the name of judicial economy." *Id.*

102. Spomer, *supra* note 3, at 520 (quoting Stephen S. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1864 (1994)).

103. DEATH PENALTY GUIDELINES, *supra* note 90, at § 1.1 (2003) (stating that counsel must make "'extraordinary efforts on behalf of the accused'" throughout every stage of proceedings due to the "extraordinary and irrevocable nature of the penalty") (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993)).

104. In the introductory commentary to these guidelines, one writer is quoted as saying, "[e]very task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution." *Id.* (quoting Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995)). In addition to the normal pressures in preparing for trial, defense counsel in capital cases are faced with psychological and emotional pressures, as a person's life is in their hands. *Id.*

counsel's conduct must be scrutinized closely to ensure procedural fairness and accurate factfinding.[105]

"[C]apital trials are bifurcated into a guilt phase and a . . . sentencing phase."[106] If the defendant is found guilty, a sentencing phase ensues, in which the trier of fact determines whether or not to impose the death penalty.[107] In most capital cases, the focus is on the issue of punishment, as there is rarely a plausible argument for innocence.[108] During the sentencing phase, evidence pertaining to aggravating and mitigating factors is presented.[109] The prosecution can present "any evidence relevant to a statutorily defined aggravating circumstance," and the defense is free to present anything it finds to be a mitigating circumstance.[110] Mitigating evidence is used to persuade the trier of fact to show mercy on the defendant because "his character or background indicates that he will be rehabilitated, will be harmless in prison, or does not deserve to die for some other reason."[111] This type of evidence is not used to justify the defendant's actions, but to explain them.[112] In most states, the death penalty can only be imposed if the aggravating factors outweigh the mitigating factors.[113] When effectively presented, mitigation evidence often evokes feelings of compassion and sympathy among the jurors, causing them to spare the life of the defendant.[114] Since all the defense needs is one juror to vote for life

105. Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring) (stating that the Court has always recognized a great need for procedural safeguards in capital cases, as the right to counsel was recognized in capital cases long before it was established in all felony cases).

106. Spomer, *supra* note 3, at 508.

107. *Id.*

108. *Id.* at 518.

109. *Id.* at 508.

110. *Id.* at 518 (internal quotations omitted).

111. Levinson, *supra* note 5, at 171; Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists,* 31 HARV. C.R.–C.L. L. REV. 325, 331-33 (1996) (stating that mitigating evidence humanizes the defendant).

In his concurring opinion in *Strickland*, Justice Brennan pointed out that during the sentencing phase, it is vital that the jury have "all possible relevant information about the individual defendant whose fate it must determine", thus "the sentencer . . . must be permitted to consider any relevant mitigating factor." Strickland v. Washington, 466 U.S. 668, 705 (1984). However, he adds that this right is worthless if counsel fails to investigate or present mitigating evidence. *Id.* at 706.

112. DEATH PENALTY GUIDELINES, *supra* note 90, at §10.11, cmt. Generally, counsel looks to such things as the defendant's family, social, educational, employment, and prior correctional histories, to formulate a human narrative. Frequently, capital defendants have sordid life histories involving abuse, neglect, and mental disorders. Alfieri, *supra* note 111, at 332-33. Defense attorneys often employ victimization theory to show how a defendant's life experiences have impacted his conduct, to serve as an explanation for his or her crime. *Id.* Mitigation evidence is usually presented in the form of testimony by family, friends, teachers, and mental health professionals. *Id.* at 332. Although it can be a very time-consuming task to obtain mitigating evidence, if effectively presented, it frequently leads to the sparing of a defendant's life. *Id.* at 333.

113. Spomer, *supra* note 3, at 508.

114. Alfieri, *supra* note 111, at 333.

imprisonment rather than death, mitigation evidence can be a very powerful tool.[115]

2. Ineffective Assistance of Counsel in Capital Cases

Although the need for competent counsel is crucial in capital cases, the reality is that there is a lack of effective attorneys in the capital system. According to statistics, ninety percent of capital defendants are indigent.[116] Unfortunately, most court appointed attorneys are seriously under-compensated, so they have limited time and resources to devote to the case, and are often less willing to vigorously represent their clients.[117] Thus, this creates an inequality between the rich and the poor, because those defendants who can afford to retain counsel often obtain better representation than those who are indigent.[118]

Capital cases consist of two phases,[119] so the attorney essentially has to prepare for two separate trials, which requires much time and effort if done effectively.[120] Many attorneys make the mistake of focusing too much on the guilt phase, and not enough on the sentencing phase.[121] This works a detriment to capital defendants, because more attention should be focused on sparing the defendant's life at the sentencing phase, as there is rarely a credible argument for innocence.[122]

In two recent cases, the Supreme Court overturned death sentences due to ineffective assistance of counsel. In *Williams v. Taylor*,[123] the Court

115. Levinson, *supra* note 5, at 164.

116. *Id.* at 149.

117. Spomer, *supra* note 3, at 519.

118. *See* Erwin Chemerinsky, Professor, Univ. S. Cal. L. Sch., Keynote Address at the Honorable James J. Gilvary Symposium on Law, Religion, & Social Justice: Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support? (Oct. 9, 2003), 29 DAYTON L. REV. 201, 204 (2004). Studies have shown that whether a capital defendant receives the death penalty is largely dependent upon whether he has private counsel or a court-appointed attorney. *Id.* One study revealed that capital defendants who had court-appointed attorneys were 2.6 times more likely to receive the death penalty than those who had private counsel. *Id.*

119. Spomer, *supra* note 3, at 517. A capital trial consists of both the guilt phase and the sentencing phase. *Id.* During the guilt phase the trier of fact determines whether or not the defendant is guilty of the crime for which he has been charged. DEATH PENALTY GUIDELINES, *supra* note 90, at § 1.1, cmt. If found guilty, there is a separate sentencing phase, in which the trier of fact determines whether the defendant should be sentenced to death. *Id.*

120. See DEATH PENALTY GUIDELINES, *supra* note 90, at §1.1, cmt (stating that because counsel must prepare for "what are effectively two different trials . . . providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation").

121. Spomer, *supra* note 3, at 519.

122. *Id.*

123. 529 U.S. 362 (2000).

found both deficient performance and prejudice for counsel's failure to investigate and present mitigating evidence.[124] The defendant, Williams, confessed to killing an elderly man.[125] At the sentencing phase, the prosecution proved that he had two prior convictions, described two auto thefts and violent assaults that he had committed after the murder, and introduced his written confessions of the murder into evidence.[126] Defense counsel introduced weak mitigation evidence that was of little use, and Williams was sentenced to death.[127] Williams brought a claim of ineffective assistance for counsel's failure to introduce five categories of significant mitigating evidence.[128] Specifically, Williams asserted that counsel had failed to uncover and introduce the following: 1) evidence of his background; 2) that he had been abused by his father; 3) testimony from prison officials stating that Williams did not pose a threat while incarcerated, that he had helped break up a drug ring in prison, and had returned a guard's wallet; 4) several character witnesses, including a well-respected accountant; 5) and that Williams was borderline mentally retarded.[129] Applying the *Strickland* standard, the Court focused not on whether this evidence should have been presented, but whether counsel conducted a reasonable investigation into Williams' background.[130] The Court found that counsel's failure to discover this mitigation evidence was unjustified, because a reasonably competent attorney would have conducted a thorough investigation of the defendant's background.[131] Further, had the jury been apprised of the evidence pertaining to his dysfunctional childhood and mental condition, there is a reasonable probability that it may have convinced the jury to spare his life.[132] Thus, counsel's failure to discover and present this evidence constituted deficient performance and prejudiced the defense.[133]

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124. *Id.* at 395-96.

125. *Id.* at 367-68.

126. *Id.* at 368.

127. *Id.* at 369-70. Specifically, counsel had reviewed evidence that Williams had been committed when he was eleven years old, had suffered abuse and neglect as a child, and was borderline mentally retarded, yet failed to introduce this. *Id.* at 370. Instead, counsel decided to focus their defense on the fact that Williams had voluntarily confessed to the crimes, in hopes that the jurors would take mercy on him and spare his life. *Id.* at 373.

128. *Id.* at 372-73.

129. *Id.* at 372-73 n.4.

130. *Id.* at 396.

131. *Id.*

132. *Id.* at 399.

133. *Id.* at 398-99. Counsel failed to conduct an investigation into Williams' childhood, not for strategic reasons, but because they erroneously believed that state law forbade access to these records. *Id.* at 395. The Court found that a reasonably competent attorney would have pursued these leads and conducted a thorough investigation into Williams' background. *Id.* at 396.

Similarly, in *Wiggins v. Smith*[134], the Court overturned a death sentence for counsel's failure to investigate and present mitigating evidence.[135] Wiggins was found guilty for the robbery and death of an elderly woman.[136] Counsel filed a motion to bifurcate the sentencing phase, because they hoped to first prove that he did not actually kill the woman by his own hand, and then to present a mitigation case if necessary.[137] The court denied the motion.[138] Although counsel told the jury in its opening statement that they would hear evidence of Wiggins' difficult life, at no point during the proceedings did they introduce any evidence of his life history.[139] Instead, counsel attempted to prove that Wiggins was not directly responsible for the murder, and the only mitigation evidence presented was his lack of prior convictions.[140] The jury ultimately sentenced him to death.[141]

Wiggins filed a claim of ineffective assistance for counsel's failure to investigate and present evidence of his life history.[142] Unlike *Williams,* in which counsel failed to investigate *and* present mitigating evidence, here counsel actually conducted quite a bit of investigation which they nevertheless failed to present.[143] Counsel retained a psychologist to conduct tests, which revealed that Wiggins had a low IQ, difficulty dealing with demanding situations, and a personality disorder.[144] They also had a one-page report documenting his miserable youth and time spent in foster care, as well as records of his placement in foster care.[145] Although they had funds available to obtain a social history report, which would have revealed that Wiggins had suffered severe physical and sexual abuse as a youth, counsel chose not to pursue this.[146] Their decision not to further their investigation fell below prevailing standards of both the state and the American Bar Association.[147] The Court held that a reasonably competent

134. 539 U.S. 510 (2003).
135. *Id.* at 534.
136. *Id.* at 514-15.
137. *Id.* at 515.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 516.
142. *Id.*
143. *See id.* at 518.
144. *Id.* at 523.
145. *Id.*
146. *Id.* at 516-18.
147. *Id.* at 524. At the time, the prevailing standard in Maryland was to prepare a social history report. *Id.* The American Bar Association standards said 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.*

attorney would have seen that it was necessary to pursue these mitigation leads to make an informed decision about the defense.[148] The Court pointed out that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case."[149] However, it held that strategic choices made before conducting a complete investigation must be reasonable in terms of prevailing professional norms.[150] Thus, the Court held that counsel's decision not to present mitigating evidence was unreasonable because they failed to expand their investigation as a reasonable attorney would have done given the available information.[151] Further, this failure prejudiced the defense in that had the jury been presented with this favorable mitigation evidence, it is reasonable to assume that it may have come back with a different verdict.[152]

These two cases represent an important movement in ineffective assistance jurisprudence. Although *Strickland* was decided in 1984, the Supreme Court did not invalidate a death sentence under *Strickland* until their 2000 decision, *Williams v. Taylor*.[153] In *Strickland,* counsel failed to investigate and present *any* mitigating evidence, because it felt any investigation would be fruitless.[154] But, in *Williams* and *Wiggins*, the Court held that unless counsel uncovers information that leads them to believe that either a mitigation case would be of little help, or that further investigation would be fruitless, they have an "obligation to conduct a thorough investigation of the defendant's background."[155] Further, the holding in *Wiggins* essentially makes it easier for defendants to meet the performance prong under *Strickland,* because "*Wiggins* overturns a death sentence based on attorney performance that is *better* than the attorney performance in *Strickland*."[156] Not only did the attorney in *Strickland* fail to present mitigating evidence, he even failed to investigate any. On the other hand, counsel in *Wiggins* conducted a limited investigation, but their performance was deemed deficient because they unreasonably failed to further their investigation. As one commentator pointed out, "failing to investigate

148. *Id.* at 525. The Court distinguished this from *Strickland*, in which the decision not to conduct further investigation was justified, as counsel had reason to believe that further investigation would be fruitless due to the overwhelming evidence against the defendant and the lack of mitigating factors. *Id.* Here, based on the evidence reviewed by counsel, there was no reason for them to believe that further investigation would be fruitless. *Id.*

149. *Id.* at 533.

150. *Id.*

151. *Id.* at 535.

152. *Id.* at 536.

153. Green, *supra* note 29, at 670 n.200.

154. Strickland v. Washington, 466 U.S. 668, 673 (1984).

155. Williams v. Taylor, 529 U.S. 362, 396 (2000); *Wiggins*, 539 U.S. at 525.

156. Green, *supra* note 29, at 673.

evidence is worse than failing to present evidence under *Strickland* because attorneys who fail to investigate cannot make 'reasonable' strategic decisions."[157]

Effective assistance of counsel and death penalty jurisprudence have developed together over time. Since the Court has consistently acknowledged that the death penalty, when arbitrarily handed out, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment,[158] "the standards for the imposition of the death penalty are scrutinized carefully."[159] Just as the Court has begun to scrutinize counsel's performance more carefully in capital cases, as exhibited in both *Williams* and *Wiggins*, the Justices have also begun to examine whether the death penalty can be administered fairly.

3. Death Penalty Jurisprudence

In the 1972 case of *Furman v. Georgia*[160], the Supreme Court held that the then-existing Georgia death penalty statute was unconstitutional, as it violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[161] Although this case stood for the proposition that the death penalty itself is unconstitutional, "[s]tates temporarily discontinued capital punishment out of confusion."[162] Then, in 1976, the Court, in *Gregg v. Georgia*,[163] held that the death penalty is constitutional so long as it is administered fairly and certain procedural requirements are met.[164]

From 1976 to 2002, the Supreme Court denied review in most death penalty cases, and when it did grant review, it rarely reversed death sentences.[165] However, recent death penalty decisions suggest a change in trend. In 2000, the Supreme Court reversed a death sentence due to the ineffective assistance of counsel in *Williams v. Taylor*.[166] Then, in 2002, the

157. *Id.* at 672-73.

158. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (requiring certain procedural requirements to be met in order for the death penalty to meet constitutional muster); Furman v. Georgia, 408 U.S. 238 (1972) (holding that the death penalty statute in effect at the time violated the Cruel and Unusual Punishment Clause of the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the death penalty for the mentally retarded violates the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty for juveniles violates the Eighth Amendment).

159. Levinson, *supra* note 5, at 158.

160. 408 U.S. 238 (1972).

161. *Id.* at 238.

162. Levinson, *supra* note 5, at 158.

163. 428 U.S. 153 (1976).

164. *Id.* at 153.

165. Chemerinsky, *supra* note 118, at 208.

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

Supreme Court held that the death penalty for the mentally retarded is unconstitutional.[167] Next, it reversed another death sentence for ineffective assistance of counsel in *Wiggins v. Smith*,[168] and just last term it ruled that the death penalty for juveniles is unconstitutional.[169]

III. FACTS

James Scanlon was murdered in his bar on the morning of January 14, 1988.[170] He was found dead, his body having been repeatedly stabbed and set on fire.[171] Ronald Rompilla was indicted for Scanlon's murder and related offenses, and the Commonwealth gave notice of intent to seek the death penalty.[172] The court appointed Rompilla two public defenders, and he was ultimately found guilty on all counts.[173] During the sentencing phase, the prosecution sought to prove three aggravating circumstances to justify imposition of the death penalty: "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."[174] The jury found this evidence persuasive.[175]

Although defense counsel knew the prosecution intended to use Rompilla's prior rape and assault convictions to demonstrate his violent character as an aggravating factor, they did not examine the prior conviction file.[176] Further, counsel did not obtain Rompilla's school, medical, police, and prison records to determine whether or not they contained useful mitigating information.[177] Rather, defense counsel interviewed Rompilla, who stated that his childhood had been normal, and five of his family members, who all stated that they believed he was innocent.[178] Then, counsel arranged for three mental health experts to evaluate Rompilla's mental state at the time of the offense, but their reports failed to reveal any useful information.[179] Accordingly, defense counsel's mitigation case consisted of the testimony of Rompilla's five family members.[180] In addition, Rompilla's fourteen-year-old son testified as to his love for his

167. Atkins v. Virginia, 536 U.S. 304 (2002).
168. Wiggins v. Smith, 539 U.S. 510 (2003).
169. Roper v. Simmons, 543 U.S. 551 (2005).
170. Rompilla v. Beard, 545 U.S. 374, 377 (2005).
171. *Id.*
172. *Id.* at 377-78.
173. *Id.* at 378.
174. *Id.*
175. *Id.*
176. *Id.* at 383.
177. *Id.* at 382.
178. *Id.* at 381-82.
179. *Id.* at 382.
180. *Id.* at 381-82 (stating that they believed he was both innocent and a good person).

father, and his intent to visit him in prison.[181] Consequently, the jury found two mitigating factors: that his son had testified on his behalf and that there was a possibility for rehabilitation.[182] However, the jury ultimately determined that the aggravating factors outweighed this mitigating evidence, and sentenced Rompilla to death.[183] Both the conviction and death sentence were affirmed by the Supreme Court of Pennsylvania.[184]

Armed with new lawyers, Rompilla sought state post-conviction relief, filing claims that included one for ineffective assistance of counsel for failing to present significant mitigating evidence of his life history.[185] However, the court affirmed the conviction and death sentence and denied relief, finding that counsel conducted an adequate investigation in preparation of its mitigation case.[186] Rompilla then filed an application for re-argument to the Supreme Court of Pennsylvania, which was denied by a per curiam order of the court.[187] Next, Rompilla petitioned for a writ of habeas corpus in federal district court, arguing that both the conviction and sentence should be overturned.[188] The court refused to overturn the finding of guilt, but granted the petition as to the sentencing phase for ineffective

181. *Id.* at 378.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* Rompilla claimed that counsel failed to present evidence pertaining to his childhood, mental health, and alcoholism. *Id.* Specifically, he asserted that counsel failed to obtain records that would have assisted the mental health experts in their evaluations of him as they documented low test scores, a low IQ, and alcohol abuse. Commonwealth v. Rompilla, 721 A.2d 786, 789 (Pa. 1998).

186. *Rompilla*, 545 U.S. at 374, 378. The mental health experts diagnosed him as a sociopath, but found nothing helpful to his case. *Rompilla*, 721 A.2d at 790. The court found that just because Rompilla has now found two mental health experts who conclude that he has brain damage, does not negate the fact that counsel conducted an investigation as to his mental state. *Id.* Similarly, although Rompilla and his family members now claim that counsel failed to disclose mitigation evidence such as the fact that he was abused as a child, this information was never revealed to counsel before trial in their interviews with Rompilla and his family. *Id.* Since they did not provide counsel with this information previously, counsel was led to believe that their only hope of sparing Rompilla's life was to beseech the jury to have mercy on him. *Id.*

187. Commonwealth v. Rompilla, 1999 Pa. LEXIS 105, at *1 (Jan. 19, 1999).

188. *Rompilla*, 545 U.S. at 374, 379. In order to apply for a writ of habeas corpus, the applicant must have first exhausted all of the available state remedies. 28 U.S.C. § 2254(b)(1)(A) (2004). In addition, an application will not be granted as to any claim judged on the merits in state court, unless the adjudication:

> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2) (2004).

assistance of counsel, holding that the Supreme Court of Pennsylvania had unreasonably applied *Strickland* as to the sentencing phase.[189] In making its determination, the court found that counsel failed to investigate obvious signs that Rompilla had a dysfunctional childhood, mental illness and suffered from alcoholism.[190] The Commissioner of the Pennsylvania Department of Corrections appealed the granting of Rompilla's habeas corpus petition.[191] The appeal was heard before a Third Circuit panel, which was composed of three judges.[192] In a divided opinion, the Third Circuit reversed the district court's decision as to the ineffective assistance of counsel claim, holding that the Supreme Court of Pennsylvania had *not* unreasonably applied the *Strickland* standard.[193] The majority found that counsel *did* make reasonable efforts to uncover mitigation material by interviewing Rompilla and several of his family members, as well as consulting with three mental health experts.[194] Although the majority conceded that counsel did not search through relevant records pertaining to Rompilla's background, it "saw the . . . investigation as going far enough to leave counsel with reason for thinking further efforts would not be a wise use of the limited resources they had."[195] However, the dissenting judge felt that counsel had unreasonably relied on their interviews with Rompilla's family and the mental health experts to determine which records might be useful, and believed that counsel should have expanded their investigation

189. *Rompilla*, 545 U.S. at 374, 379. Even though neither Rompilla nor his family were forthcoming about his alcoholism or dysfunctional childhood, the court found that given what counsel knew about Rompilla's criminal background, there were signs that he may have suffered from alcoholism and had a difficult childhood. Rompilla v. Horn, No. 99-737, 2000 U.S. Dist. LEXIS 9620, at *39 (E.D. Pa. July 11, 2000). The court was reluctant to find counsel's performance deficient, as it noted that counsel performed "so admirably according to [its] review of the record. But . . . they had reason to know of [his] past and should not have relied on [him] alone or his family to reveal the true nature of his background." *Id.* In addition, the court found prejudice because the jury's lack of information about Rompilla's mental capacity, alcoholism, and abusive childhood, was sufficient to warrant a finding that had this been presented, there was a reasonable probability that the result might have been different. *Id.* at *40-41.

190. *Rompilla*, 545 U.S. at 374, 379.

191. *Id.* (citing Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004)).

192. *Id.* at 379.

193. *Id.* Of note is the fact that Justice Samuel Alito, recent appointee to the United States Supreme Court, authored this Third Circuit decision upholding Rompilla's death sentence. Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004). The implications of this are discussed later in the article. *See infra* notes 306-310.

194. *Id.*

195. *Id.* Based on their interviews with Rompilla and his family, as well as the consultations with the mental health experts, counsel concluded that there was no reason to believe further investigation into Rompilla's records would be useful. *Id.* Thus, the majority felt they were justified in stopping their investigation where they did. *Id.* The majority's decision here is similar to the Supreme Court's conclusion in *Strickland*, that if counsel's investigation leads them to believe that further search would be fruitless, a limited investigation is justified. *See* Strickland v. Washington, 466 U.S. 668, 691 (1984). The majority then distinguished this case from *Wiggins v. Smith*, in which counsel's limited search was unjustified because it yielded leads as to mitigating factors that a reasonably competent attorney would have pursued. *Rompilla*, 454 U.S. at 374, 379.

and obtained records on Rompilla's background.[196] Rompilla petitioned for a rehearing, but his petition was denied by a six to five vote by the Third Circuit.[197] In 2004, the Supreme Court granted certiorari to determine whether the Supreme Court of Pennsylvania unreasonably applied the *Strickland* standard in holding that counsel's performance constituted effective assistance.[198]

IV. ANALYSIS OF THE COURT'S OPINION

A. Justice Souter's Majority Opinion

This case calls for the Court to determine whether the conduct of Rompilla's trial attorneys fell below the standard of reasonable competency required of defense counsel under the Sixth Amendment. The constitutional question before the Court is whether the Sixth Amendment requires counsel to make reasonable efforts to obtain and review material it knows the prosecution will probably use as evidence of aggravating factors at the sentencing phase, when it is suggested by both the capital defendant and his family members that no mitigating evidence is available.[199]

In his opinion, Justice Souter resolves this question through a two-prong analysis. First, he analyzes whether counsel's conduct constituted deficient performance under the first prong of the *Strickland* standard for effective assistance of counsel.[200] Second, he examines whether counsel's errors prejudiced the defense under the second prong of the *Strickland* test.[201]

196. *Rompilla*, 545 U.S. at 374, 379-80.

197. *Id.* at 380. Of note is the dissenting opinion, authored by Judge Nygaard, in which he stated that counsel's failure to conduct even a cursory investigation into Rompilla's background constitutes ineffective assistance, and falls below the prevailing professional norms. Rompilla v. Horn, 359 F.3d 310, 312 (3d Cir. 2004). Judge Nygaard also spoke of the lack of effective attorneys in capital cases, and critiqued the *Strickland* standard as allowing too many cases of inept lawyering to be deemed effective. *Id.* at 311. He asserted that "every death case in which a divided panel of the court reverses a well-reasoned decision of the District Court that granted a writ of habeas corpus, should raise in our minds 'a question of exceptional importance.'" *Id.* at 310 n.1. In his opinion, Judge Nygaard felt that given its importance, this case should not have been decided by a divided panel, and felt that the court should have carefully examined the *Strickland* standard and set forth a threshold for effective assistance. *Id.* at 312.

198. *Rompilla*, 545 U.S. at 374, 380.

199. *Id.* at 377.

200. *Id.* at 380.

201. *Id.* at 390.

1. Performance Prong Analysis

Under the first prong of *Strickland*, attorney performance is "measured against an 'objective standard of reasonableness under prevailing professional norms.'"[202] Further, *Strickland* mandates that courts must examine performance in light of counsel's perspective at the time, and give much deference to counsel's decisions.[203]

Justice Souter begins his analysis by stating that many of counsel's decisions are debatable.[204] However, he concedes that "[t]his is not a case in which defense counsel simply ignored their obligation to find mitigating evidence." [205] He then examines counsel's investigation, and concludes that none of the sources were very helpful in building a mitigation case.[206] Next,

202. *Id.* at 380.

203. *Id.* at 381. Justice Souter reiterates the Court's findings in *Strickland*, in which it stated 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." Strickland v. Washington, 466 U.S. 668, 688-89 (1984). According to the American Bar Association standards, defense counsel must begin planning and investigation for both the guilt and sentencing phases immediately, which requires counsel to coordinate its strategies at both phases of the capital trial. DEATH PENALTY GUIDELINES, *supra* note 90, at §1.1, cmt. Thus, Justice Souter is referring to the decisions made by counsel in planning and strategizing how best to present their defense. This could include decisions as to how to go about uncovering mitigating evidence, and whether and to what extent mitigating evidence should be presented. *See id.*

204. *Rompilla*, 545 U.S. at 381.

205. *Id.* He points out that although they had a very busy workload as public defenders, they still took the time to interview Rompilla and his family members, and examined reports of the three mental health experts. *Id.* This is noteworthy, considering that in the habeas corpus proceedings in the federal district court, counsel stated that when he was handling Rompilla's case, his office had two investigators and 2,000 cases. Rompilla v. Horn, No. 99-737, 2000 U.S. Dist. LEXIS 9620, at *37 (E.D. Pa. July 11, 2000). Public defenders are often faced with heavy caseloads and limited resources, and they are often unable to devote the time and resources necessary to make a complete investigation of a defendant's background. Rompilla's counsel stated that he routinely starts by talking to the client and the family, and if they are able to shed light on a possible mitigating factor, he will further develop that lead. *Id.* at *37. However, if nothing develops from conversations with the client and his family, he admitted that "[t]here's a certain point in time when you have two or three thousand cases in a year that you have to deal with some of the things your client tells you and give that some full faith and credit and rely on it." *Id.* Although Justice Souter acknowledges the difficulties faced by public defenders, he holds that based on the facts known to counsel in this particular case, they had a duty to take their investigation a bit further. *Rompilla*, 545 U.S. at 383. This decision is important because it indicates that the Court is willing to hold counsel ineffective even in cases where counsel's performance was neither nonexistent nor terrible. *See* Garrett, *supra* note 14, at 53.

206. *Rompilla*, 545 U.S. at 381. Rompilla was uninterested in helping them build a mitigation case, and at one point told counsel that he was '"bored being here listening'", after which he returned to his cell. *Id.* When questioned about his background, he maintained that his childhood and schooling had been normal except for quitting school in the ninth grade. *Id.* Counsel had spoken with Rompilla's relatives numerous times, but they did not provide any useful information, as they admitted that they didn't really know Rompilla very well since he had spent much of his life in custody. *Id.* at 381-82. However, it was pointed out to counsel during the habeas corpus proceedings in the federal district court, that it may have been "more prudent to go beyond the client and beyond those who may have abused the client to look for other indications of abuse" given the fact that they might be reluctant to discuss this sensitive issue. Rompilla v. Horn, No. 99-737, 2000

Justice Souter points out some of counsel's shortcomings by listing the numerous avenues they could have followed to uncover helpful information in building their mitigation case, such as school and prison records.[207] Although he recognizes that the duty to investigate does not require an attorney to "scour the globe on the off-chance something will turn up", he states that at least some of these avenues probably should have been explored.[208] However, Justice Souter does not focus his analysis on these other avenues, because he found that the failure to examine Rompilla's prior conviction file was enough in itself to constitute ineffective assistance of counsel.[209]

Justice Souter argues that counsel's failure to examine the prior conviction file constitutes deficient performance, as it fell below an objective standard of reasonableness. First, he avers that counsel knew the prosecution planned to introduce evidence of Rompilla's prior conviction to emphasize his violent character, and even though it was readily available, they did not examine it until the day before the sentencing phase.[210] Analyzing the situation through the eyes of counsel at that time, Justice Souter states that a reasonable attorney would have realized that he would seriously jeopardize his client's case if he failed to examine the prior conviction file, as it would limit his ability to respond to the aggravating evidence.[211] He stresses that counsel had a duty to "make all reasonable

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U.S. Dist. LEXIS 9620, at *24 (E.D. Pa. July 11, 2000). Although counsel stated that the reports written by the mental health experts did not reveal anything helpful, one of the doctors attached a note at the end of his report stating that there was a possibility that Rompilla could become violent while under the influence of alcohol, which he felt warranted further evaluation. *Id.* at *32-33. However, counsel did nothing to further explore this. *Id.* at *33.

207. *Rompilla*, 545 U.S. at 382. Justice Souter argues that the school records should have been examined, especially because Rompilla admitted that he dropped out of school in the ninth grade, and his family members shed so little light on his childhood. *Id.* Further, they knew he had a criminal record, yet failed to consult his prison records. *Id.* Finally, they learned from the police report that he had been drinking heavily at the time the crime was committed, and had been advised by one of the mental health experts that he was prone to violent behavior when drinking, yet they did not look to see whether he had a history of substance abuse. *Id.*

As one commentator noted, "[t]here is always mitigating evidence . . . . [and] [w]hile the Supreme Court has said, 'reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste,' . . . if the attorneys haven't found compelling mitigation evidence, by definition it is not reasonable for them to stop." Garrett, *supra* note 14, at 53.

208. *Rompilla*, 545 U.S. at 383.

209. *Id.*

210. *Id.* at 383-84. Counsel was warned by the prosecution that it planned to introduce a transcript of the rape victim's testimony from the earlier proceeding to prove the prior conviction. *Id.* Counsel did not look at the transcript until the night before the sentencing phase, and even after they obtained the file, counsel did not look at any of the other material in the file. *Id.* at 385.

211. *Id.*

efforts" to learn about the prior offense, which included obtaining the prior conviction file.[212] To support this view, Justice Souter turns to the American Bar Association Standards for Criminal Justice, which state that the attorney has a duty to explore all avenues which might lead to relevant mitigating information, which includes "efforts to secure information in the possession of the prosecution and law enforcement authorities."[213]

Justice Souter rejects the position taken by the state post-conviction courts that counsel was justified in failing to examine the prior conviction file because they attempted to find mitigating evidence by other means.[214] His main argument is that if given the option between reviewing a file that contains information that counsel knows the prosecution will use or questioning the defendant or his family as to whether they have any useful information, a reasonable attorney would choose the former as it is a sure bet.[215] Also critical to his determination that counsel's performance was

212. *Id.* Justice Souter argues that it is essential for counsel to examine prior conviction files as they will know in advance what the prosecution can argue, so there will be no surprises, and it will give them time to prepare an argument to counteract the aggravating factor. *Id.* at 385-86. This is consistent with the ruling in *Williams v. Taylor*, which held that counsel has an obligation to conduct a thorough investigation of a defendant's background. Williams v. Taylor, 529 U.S. 362, 396 (2000). Similarly, in *Wiggins v. Smith*, counsel had reviewed social services records, which revealed that Wiggins had a low IQ, features of a personality disorder, and had been in and out of the foster care system throughout his youth, yet counsel failed to expand their investigation to further these mitigation leads. Wiggins v. Smith, 539 U.S. 510, 523 (2003). The Court ultimately held that counsel's performance was deficient because a reasonably competent attorney would have realized that it was necessary to pursue these leads in order to make an informed decision as to what line of defense to pursue for his client. *Id.* at 525. Much like *Wiggins*, Rompilla's counsel were aware of the circumstances of his prior conviction, its similarity to the present crime, and the prosecution's plan to use the prior conviction to prove an aggravating circumstance. As in *Wiggins*, counsel failed to further investigate by examining the prior conviction file. *Rompilla*, 545 U.S. at 386. The majority applies the Court's reasoning from *Wiggins* to hold that counsel's performance fell below the level of a reasonably competent attorney. *Id.* at 390.

213. *Rompilla*, 545 U.S. at 387 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION 4-4.1 (3d. ed. 1993)). Although *Strickland* made clear that American Bar Association Standards and the like are only to be used as guides and should not be construed to create checklists for attorney conduct, the Court has often turned to them in determining whether attorney conduct was reasonable. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)). The Court points to the case of *Wiggins v. Smith,* which involved similar facts as those present here, as another example of when the Court turned to the American Bar Association Standards in making their determination whether counsel's performance was reasonable. *Wiggins*, 539 U.S. at 524. There, the Court cited the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which state 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.* at 524. The current ABA Guidelines go even further by specifically requiring counsel to investigate prior convictions that could either be used as aggravating circumstances or be introduced into evidence in another way. *Rompilla*, 545 U.S. at 387 n.7.

In *Strickland,* the Court refrained from imposing set rules or checklists for attorney conduct, because it felt this would impair counsel's ability to employ creative strategies and detract from zealous advocacy. *Strickland*, 466 U.S. at 689. But in relying so heavily on these ABA standards, this suggests that the Court may in fact be using these as checklists for attorney conduct.

214. *Rompilla*, 545 U.S. at 388-89.

215. *Id.* at 389.

deficient, was the fact that the file was readily available to counsel, so there was no reasonable excuse for failing to obtain it for review.[216] Thus, he holds that the state courts were unreasonable in holding that counsel was justified in failing to make any effort to review the file.[217] However, Justice Souter carefully limits his decision to the particular fact pattern in this case, admitting that in situations where defense counsel is unaware of the prosecution's intention to use a prior conviction as an aggravating circumstance, his performance may be assessed differently.[218]

2. Prejudice Prong Analysis

In order to satisfy the prejudice prong under *Strickland*, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[219] Justice Souter examines the prejudice claim *de novo*, since the state courts never even reached this issue because they found counsel's performance to be adequate.[220] He concludes that Rompilla has proven beyond any doubt that counsel's errors prejudiced the defense.[221]

First, he states that if counsel had looked in Rompilla's prior conviction file they would have found mitigation leads that they did not find elsewhere, such as his prison file, which described his traumatic childhood and mental

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216. *Id.*

217. *Id.* at 389-90. In *Strickland* the Court held that

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. Therefore, the Court held that courts must indulge a strong presumption that any error or omission was the result of sound trial strategy. *Id.* However, this is the third decision in the past five years in which the Court has overturned death sentences due to ineffective assistance of counsel during sentencing, so the Court seems to be giving less deference to counsel's decisions, and making a strong effort to correct poor lawyering in capital cases. *See* Williams v. Taylor, 529 U.S. 362 (2000); *Wiggins*, 539 U.S. at 510; *Rompilla*, 545 U.S. at 374. For example, in both *Williams* and *Wiggins*, the Court held that no tactics could justify counsel's failure to investigate and present mitigating evidence, and that their errors were due to neglect and not strategy. *See Williams*, 529 U.S. at 393; *Wiggins*, 539 U.S. at 526. Instead of just attributing the error to strategy, the Court is now closely scrutinizing counsel's conduct to determine whether the act or omission was a legitimate tactical decision.

218. *Rompilla*, 545 U.S. at 390. Justice Souter makes this statement in order to redress the dissent's concern that the majority has created a bright-line rule requiring counsel to conduct "a complete review of the file on any prior conviction introduced." *Id.*

219. *Id.* (citing *Strickland*, 466 U.S. at 694).

220. *Id.*

221. *Id.*

health.[222] Based on their limited investigation, counsel was led to believe that Rompilla had a normal childhood. However, the contents of the file indicated the exact opposite, revealing the fact that he had been raised in the slums, had been incarcerated many times, exhibited symptoms of schizophrenia and other mental disorders, and tested at a third-grade level of cognition.[223] Justice Souter believes that if counsel had been confronted with this information, they "would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case."[224] Thus, this would essentially create a domino effect, as each piece of information uncovered would lead counsel to pursue further investigation.

Justice Souter argues that they presumably would have discovered the material uncovered by Rompilla's post-conviction attorneys, which revealed that his parents were severe alcoholics; his mother drank while pregnant with him; his father was physically abusive to him; and on at least one occasion he was locked in an outdoor dog pen filled with excrement.[225]

Second, when presented with this information, the mental health experts who were retained during the post-conviction proceedings found that this indicated a need to test further.[226] The tests revealed that Rompilla "'suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions . . . likely caused by fetal alcohol syndrome'" which impaired his ability to conform his conduct to the law.[227]

Finally, Justice Souter asserts that these results would probably have led counsel to look at Rompilla's school and juvenile records, which documented his mother's alcoholism and neglect of her children, as well as the fact that his IQ placed him in the mentally retarded range.[228]

Justice Souter concludes that all of this evidence taken together is a far cry from the "few naked pleas for mercy actually put before the jury."[229]

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222. *Id.* at 390-91.

223. *Id.* Had they reviewed the prison file, they would have realized that Rompilla's life history was actually much different than how it had been depicted by both Rompilla and his family members. For example, the record reveals that Rompilla was raised in the slums and at a young age "'started a series of incarcerations . . . often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.'" *Id.*

224. *Id.* at 391.

225. *Id.* at 392. This information was elicited from testimony of several of Rompilla's family members during the post-conviction proceedings who had not been interviewed by trial counsel. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 393. The dissent criticizes the majority for basing their ruling on the assumption that counsel would have discovered this information had they looked through the file, because the majority cannot be certain that this would have actually been found. *Id.* at 405 (Kennedy, J., dissenting).

229. *Id.* at 393. Mitigation evidence is not used to justify a defendant's conduct, but rather serves to explain their actions. *See* Craig Haney, *The Social Context of Capital Murder: Social Histories*

Although he acknowledges that there is a chance that even after hearing this mitigation evidence the jury may still have sentenced Rompilla to death, there is a reasonable probability that had this been presented to the jury it may "'have influenced the jury's appraisal' of [Rompilla's] culpability."[230]

B. Justice O'Connor's Concurring Opinion

Justice O'Connor writes separately merely to quell the dissent's fear that the majority creates a per se rule that defense counsel must review all documents of any prior conviction file that the prosecution might use at trial.[231] She asserts that the majority does not create a bright-line rule, but simply applies the traditional case-by-case approach to determining effective assistance of counsel under *Strickland*.[232] She then concludes that trial counsel's performance was deficient because their failure to look at the prior conviction was objectively unreasonable for three main reasons.[233]

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and the Logic of Mitigation, 35 SANTA CLARA L. REV. 547, 560 (1995). Many capital defendants have suffered from poverty, maltreatment, and neglect. *Id.* at 565. Thus, when information of a defendant's life history is presented to the jury:

> 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.

Id. at 561. While evidence of maltreatment, abuse, and neglect in no way minimizes the significance of a defendant's crime, it may convince the jury that there is an explanation for the defendant's actions, such that he or she deserves a life sentence but does not deserve to die.

The mitigation case presented to the jury by Rompilla's trial counsel consisted of testimony from his family members that he was innocent and a good person. *Rompilla*, 545 U.S. at 378. These bare pleas did nothing to explain Rompilla's actions in the context of his life experiences. Arguably, whenever a defendant is eligible for the death penalty, his or her loved ones will attempt to persuade the jury that the defendant is a good person and deserves to live, seeing as he or she is family or a close friend. However, in all likelihood, this information is not enough to convince the jury to spare the defendant's life, because without more meat to these pleas, the jury is not given any explanation as to why the defendant acted in this way to convince them that the death penalty is not warranted. Thus, Justice Souter presumes that had the jury been aware of Rompilla's sordid life history, they may have had a greater understanding as to why he did what he did given his life experiences, and concluded that he did not deserve to die.

230. *Rompilla*, 545 at 393.

231. *Id.* at 393-94. (O'Connor, J., concurring). Justice O'Connor clarifies the extent of the Court's holding, and emphasizes its narrow application to the particular facts at hand. *See id.*

232. *Id.* (O'Connor, J., concurring). The failure to obtain the prior conviction file is similar to counsel's failure to obtain a social history report in *Wiggins v. Smith*. *See* Wiggins v. Smith, 539 U.S. 510, 524 (2003). Both were readily available and would have revealed important mitigation information. *Id.* In both cases, the attorney's conduct fell below the prevailing professional standards. However, *Wiggins* did not create a bright-line rule requiring counsel to obtain a defendant's social history report in all capital cases, and the majority argues that no bright-line rule is created here either.

233. *Rompilla*, 545 U.S. at 393-94 (O'Connor, J., concurring). Justice O'Connor states that the

First, she contends that counsel knew that Rompilla's prior conviction would be central to the prosecution's case.[234] The prosecution was attempting to prove his prior rape conviction as an aggravating circumstance, which would make him eligible for the death penalty.[235] The prior conviction was violent in nature and very similar to the crime for which he was currently on trial, so the prosecutors intended to "use details of the prior crime as powerful evidence that Rompilla was a dangerous man for whom the death penalty would be both appropriate punishment and a necessary means of incapacitation."[236] Thus, Justice O'Connor argues that a reasonable defense attorney would have placed a high priority on reviewing this prior conviction file in order to "anticipate and find ways of deflecting the prosecutor's aggravation argument."[237]

Court came to this conclusion only after following *Strickland's* case-by-case approach to determining whether an attorney's performance was deficient by analyzing their decisions in light of all the circumstances. *Id.* Although the Court appears to stray from *Strickland* as it has given less deference to counsel's tactical decisions in deciding that their failure to examine the prior conviction file was unreasonable, Justice O'Connor insists that the Court is still following the *Strickland* approach. *Id.* She continues her discussion by listing the reasons why, in light of the circumstances, counsel's decision not to examine the prior conviction file was unreasonable. *Id.* at 394-96.

234. *Id.* at 394 (O'Connor, J., concurring). According to the American Bar Association standards, counsel must investigate prior convictions that can be used as aggravating circumstances and should "carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible." DEATH PENALTY GUIDELINES, *supra* note 90, at 10.11(I). In order to determine what evidence the prosecution intended to introduce and whether it was admissible, it was essential for counsel to examine the prior conviction file. Thus, under *Strickland*, Justice O'Connor argues that counsel's failure to examine this file fell below the objective standard of reasonable defense lawyering. *See Rompilla*, 545 U.S. at 394 (O'Connor, J., concurring).

235. *Rompilla*, 545 U.S. at 394 (O'Connor, J., concurring). It appears as if defense counsel lost faith in their ability to deflect the prosecution's powerful aggravation argument, so they saw no use in looking at the prior conviction file. Yet the American Bar Association standards specifically state that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." DEATH PENALTY GUIDELINES, *supra* note 90, at §10.11(A). Of special concern to Justice O'Connor is the fact that the prior conviction "went not to a collateral matter, but rather to one of the aggravating circumstances making Rompilla eligible for the death penalty." *Rompilla*, 545 U.S. at 394 (O'Connor, J., concurring). Perhaps the Court would be willing to turn a blind eye to the fact that counsel breached their duty to investigate had the prior conviction been something the prosecution merely intended to mention in passing, but here it was central to their aggravation case. *See id.* In Justice O'Connor's opinion, this made the blunder impossible to ignore and sweep under the heading of a "tactical decision", because no reasonable attorney would have failed to at least make a cursory review of the prior conviction file in preparation of its defense. *Id.* at 395.

236. *Rompilla,* 545 U.S. at 394 (O'Connor, J., concurring).

237. *Id.* Yet the dissent argues that there was nothing in the file that could have weakened the aggravating nature of his prior rape conviction, and the only way that counsel could have minimized the force of this aggravating factor was through their argument to exclude the transcript, which was ultimately unsuccessful. *Id.* at 405 (Kennedy, J., dissenting). In his dissent, Justice Kennedy also points out that counsel was aware of Rompilla's prior convictions and the circumstances surrounding them, and based on their conversations with Rompilla and his family, reasonably decided that it would not be the best investment of their time and resources to review the entire file. *Id.* at 400-01 (Kennedy, J., dissenting). According to *Strickland*, courts are required to give much deference to counsel's decisions and are to avoid analyzing attorney performance in hindsight. Strickland v.

Second, Justice O'Connor asserts that the prosecution planned to use Rompilla's prior conviction to counteract the defense's primary mitigation argument of residual doubt as to his guilt.[238] Since the prior crime was so similar to the one at hand, there was a strong probability that the residual doubt argument would be rejected by the jury.[239] Thus, Justice O'Connor asserts that it was necessary for counsel to examine the prior conviction file to determine whether they could salvage their residual doubt argument, or whether they should abandon that argument and search for other mitigating evidence.[240]

Third, counsel's decision not to obtain and review the prior conviction file was not based on an informed tactical decision, but was due to inattention.[241] According to Justice O'Connor, they did not make the decision to forego examining the file in order to devote their time and efforts

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Washington, 466 U.S. 668, 689 (1984). In retrospect, counsel's decision to forego examination of the file seems unreasonable, as we are now aware of the numerous mitigation leads that were present in the file that counsel failed to discover through other means. However, if counsel's conduct was reasonable given the circumstances at the time, *Strickland* states that courts cannot later claim that counsel acted unreasonably. *Id.* at 691. One of the criticisms of *Strickland* is that it affords too much deference to attorney conduct, so perhaps the majority is trying to remedy this by closely scrutinizing whether counsel's conduct could really have been seen as reasonable at the time.

238. *Rompilla*, 545 U.S. at 394 (O'Connor, J., concurring). Justice O'Connor stated that since Rompilla's conviction was based on strong circumstantial evidence, the defense hoped to persuade the jury that the death penalty should not be imposed due to residual doubt as to his guilt. *Id.* at 394-95. However, the dissent asserts that residual doubt was not the main thrust of the mitigation argument, but that counsel wanted to use the testimony of Rompilla's family to humanize him rather than argue that he was innocent. *Id.* at 401 (Kennedy, J., dissenting).

239. *Id.* at 395 (O'Connor, J., concurring).

240. *Id.* Attorneys are not required to address every single issue or fact involved in a case, as it may often be more effective to focus on a small number of main points. *See* Yarborough v. Gentry, 540 U.S. 1, 7 (2003) (per curiam). *Yarborough* reinforced the finding in *Strickland* that "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Id.* at 8. Similarly, in *Bell v. Cone*, the Court found that sometimes it is sound tactical judgment to omit certain evidence or arguments. 535 U.S. 685, 700 (2002). Thus, Justice O'Connor argues that had they looked at the file and decided that it would be better to abandon the residual doubt argument, the Court would have upheld this decision as sound tactical judgment. *Rompilla*, 545 U.S. at 395 (O'Connor J., concurring).

241. *Rompilla*, 545 U.S. at 395-96 (O'Connor, J., concurring). Thus, it seems then, that applying the strong presumption that attorney conduct was based on a tactical decision, the Court should have upheld counsel's decision not to look at the file, because they made the decision to focus on other sources for mitigation information. As the dissent points out, there is no evidence in the record to show that counsel's decision was not strategic. *Id.* at 400-02 (Kennedy, J., dissenting). Since the justices cannot read the minds of counsel and determine whether their decisions were actually based on strategy, they must make inferences. Thus, whether or not conduct is deemed to be based on strategy is actually based on the assessment of the justices. One of the critiques of *Strickland* is that ineffective assistance goes undeterred, because judges are eager to find some justifiable reason to attribute errors to strategy. However, here the Court departs from precedent and closely scrutinizes counsel's conduct, and given all of the circumstances, cannot find a reason why the failure to look through the file could have been attributed to a sound tactical decision.

to other crucial leads, nor did they "determine that the file was so inaccessible or so large that examining it would necessarily divert them from other trial-preparation tasks they thought more promising."[242] Rather, they had ample warning and opportunity to obtain the file, but they unreasonably failed to do so.[243] Although Justice O'Connor found counsel's performance deficient under the particular circumstances in this case, she declares that counsel's failure to obtain the file may not have been deemed deficient had it resulted from a "reasoned strategic judgment."[244]

C. Justice Kennedy's Dissenting Opinion

Justice Kennedy argues that the holding departs from the Court's Sixth Amendment jurisprudence by distorting *Strickland*, which warned against the creation of explicit guidelines or checklists for evaluating attorney conduct.[245] Yet he states that the majority's holding creates a per se rule that defense counsel must "review all documents in what it calls the 'case file' of any prior conviction that the prosecution might rely on at trial."[246] Further, he asserts that this rule, if followed, will actually lead to *less effective* assistance, by "taking resources away from other important tasks in order to satisfy [this] rule."[247] Justice Kennedy declares that counsel's performance was both adequate and conscientious.[248] They made their best efforts to develop a mitigation case, and as the Court has held before, "when a defendant has given counsel reason to believe that pursuing certain

242. *Rompilla*, 545 U.S. at 395 (O'Connor, J., concurring). The majority could easily have indulged this presumption and concluded, like the dissent, that counsel's conduct was reasonable, but the Court is deciding to give less deference to counsel's conduct by closely analyzing their decisions.

243. *Id.*

244. *Id.* at 396 (O'Connor, J., concurring). This supports her view that the Court has not created a per se rule, and that these claims will still be decided on the traditional case-by-case approach. While the majority's holding has created a framework for determining effective assistance, its holding is very limited. This ruling provides no guidance as to how to rule on similar claims with slightly different fact patterns, because Justice O'Connor does not expound upon how counsel's omission here could have been found to be based on strategic judgment.

245. *Id.* at 396-97.

246. *Id,* at 396.

247. *Id.* at 397. Although it would have been beneficial for counsel to review the file in this case, that may not be true for every case in the future. Since many court-appointed attorneys in capital cases are severely under-compensated, the dissent fears that this ruling would require them to devote some of their precious resources toward a complete examination of a prior conviction file, even if it would not be the best use of their funds. *See id.* What happens if counsel does not have enough resources to obtain and review a prior conviction file? For example, what if the attorney only has enough resources to conduct a cursory review of the entire file, or examine part of the file? Would this be considered sub-par performance even though he made attempts to investigate and it was through no fault of his own that he had to cut short his investigation? The majority does not address the issue, so it is unclear how they would deal with this in the future.

248. *Id.*

investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."[249]

Justice Kennedy's main contention with the majority's holding is that it radically departs from the standard set forth in *Strickland*. First, he argues that by establishing this new per se rule the majority ignores *Strickland's* warning against creating specific guidelines or checklists for attorney conduct.[250] The *Strickland* Court felt that specific rules for attorney conduct would not be able to take into account the varying circumstances in each case or the wide range of legitimate strategies employed by defense counsel.[251] Thus, the ABA standards are to be used only as guides, and do not form the framework by which to determine whether counsel was effective. However, Justice Kennedy states that the majority ignores this mandate and treats the ABA standards "as if they were binding statutory text."[252] Although the majority denies that they are creating a bright-line rule, Justice Kennedy states that their opinion explicitly imposes a rigid requirement on defense attorneys to review prior conviction files when the prosecution intends to use those priors as aggravating circumstances.[253]

Second, Justice Kennedy argues that the majority ignores *Strickland's* demand that courts' review of counsel's performance must be highly deferential.[254] Here, counsel knew of Rompilla's prior convictions, and although they did not obtain the prior conviction file, counsel had reviewed

249. *Id.* at 398 (Kennedy, J., dissenting) (citing Strickland v. Washington, 466 U.S. 668, 691 (1984)).

250. *Id.* at 399-400 (Kennedy, J., dissenting). Joining in the dissent are Justices Scalia and Thomas, who also dissented in *Wiggins v. Smith*. Much like today, in *Wiggins* they stressed the fact that the ABA standards are only to be used as guides. Wiggins v. Smith, 539 U.S. 510, 547 (2003) (Scalia, J., dissenting). Thus, they are strict adherents to the standard set forth in *Strickland*.

251. *Rompilla*, 545 U.S. at 399-400 (Kennedy, J., dissenting).

252. *Id.* at 400 (Kennedy, J., dissenting). Critics of *Strickland* argue that it gives too much deference to attorney conduct, allowing many cases of questionable conduct to go undeterred. *See* Green, *supra* note 29, at 673. Since judges are not bound by the ABA standards in evaluating attorney conduct, they are free to disregard them and often find to be reasonable what would be deemed ineffective under the ABA standards. *Id.* Arguably, the ABA standards, which reflect prevailing professional norms, are a better measure of reasonable conduct than a judge's subjective belief. Perhaps the majority was thinking along these lines when it decided to closely adhere to the standards in evaluating counsel's conduct.

253. *Rompilla*, 545 U.S. at 400 (Kennedy, J., dissenting). The majority's position is that when it found counsel deficient for failing to examine the prior conviction file, its decision was carefully limited to the particular facts of this case. *Id.* at 395 (O'Connor, J., concurring). They did not automatically find counsel deficient for failing to look at the file before taking into account all of the facts and circumstances in the case. *Id.* Rather, it was only after analyzing all of the facts, that the majority decided that a reasonable attorney would have looked at the file and they found no legitimate tactical reason to justify this error. Further, the majority explicitly states that other situations might call for a different analysis. *Id.* at 389-90.

254. *Id.* at 401 (Kennedy, J., dissenting).

documents relating to the priors, and strategically decided that it would not be the best use of time or money to look through the file.[255] Yet the majority argues that anything short of a complete examination of the file constitutes deficient performance.[256] But Justice Kennedy argues that their reasoning behind the rule is flawed, as it is based on pure speculation; counsel *might* have discovered information as to Rompilla's mental state and childhood had they examined the file, but there is no absolute guarantee that this would have been uncovered.[257] The majority assumes that it will require little time and effort for counsel to review the file, but in reality it can be a very time consuming task, as files sometimes comprise numerous boxes of documents.[258] Justice Kennedy asserts that this per se rule will actually lead to less effective assistance, as counsel will be required to divert limited resources from other tasks to fulfill this requirement, even if counsel has reasonably concluded that reviewing a prior conviction file would be a waste of time and effort.[259] Further, with this rule, there is the risk that a defendant

255. *Id.* at 401-02 (Kennedy, J., dissenting). Similarly, in *Wiggins v. Smith*, counsel testified at the post-conviction proceedings that although he did not obtain a social history report of the defendant, he was aware of the defendant's troubled childhood. *Wiggins*, 539 U.S. at 529. Thus, Justices Scalia and Thomas held in the dissent that there was no need to get a social history report when they were already aware of what it would reveal. *See id.* at 541 (Scalia, J., dissenting). Once again they adhere to *Strickland's* requirement that counsel's decisions be given much deference, and make the same finding. Justice Marshall cautioned in his dissenting opinion in *Strickland* that the standard set out by the majority was so malleable and vague that it "[would] yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting). *Strickland* has been criticized for allowing grossly incompetent conduct to go undeterred. Levinson, *supra* note 5, at 165. Since the Court refused to create any specific guidelines by which to measure attorney conduct, the decision as to whether counsel acted reasonably is largely based on the judge's subjective beliefs. Indeed, there are examples of egregious attorney conduct, such as showing up intoxicated or sleeping during portions of the trial, which courts have held to be adequate under *Strickland*. Kirchmeier, *supra* note 7, at 455. In this case, as well as *Williams v. Taylor* and *Wiggins v. Smith*, the majority appears to grant less deference to counsel's decisions. Perhaps they are reconsidering the Court's standard set in *Strickland* in light of all the criticism it has received.

256. *Rompilla*, 545 U.S. at 401 (Kennedy, J., dissenting).

257. *Id.* The mitigation leads that the majority speaks of were actually comprised of notations in Rompilla's prison transfer petition, which was a ten-page document. *Id.* at 406 (Kennedy, J., dissenting). Thus, the dissent argues that if counsel had examined the file to uncover evidence about his prior convictions, they might not even have found these leads since they were contained in a document that did not have details pertaining to his priors. *Id.* However, the majority is less concerned with whether counsel would have actually discovered the mitigation leads in the file, than the simple fact that they failed to even attempt to examine the file. *Id.* at 385-86. It was this omission that the majority found to be objectively unreasonable. *Id.* at 383. If counsel had obtained the file and made reasonable efforts to review it, and failed to discover these leads, it would be more difficult to find their performance to be deficient.

258. *Id.* at 403 (Kennedy, J., dissenting).

259. *Id.* Most court appointed attorneys are seriously under-compensated, so they have limited time and resources to devote to the case, and are often less willing to vigorously represent their clients. Spomer, *supra* note 3, at 519. So, arguably this ruling will provide *more* effective assistance as it will require counsel to spend more time preparing their case. Although the majority's ruling establishes more concrete guidelines for effective assistance, it is limited to the particular scenario in this case. The majority did not make a broad ruling that anything less than what the ABA standards

might try to overturn his conviction by arguing that counsel did not review something in a prior conviction file. According to Justice Kennedy, "[t]his elevation of needle-in-a-haystack claims to the status of constitutional violations will benefit undeserving defendants and saddle States with the considerable costs of retrial and/or resentencing."[260]

Next, Justice Kennedy asserts that the Court errs in holding that the Pennsylvania Supreme Court was incorrect and objectively unreasonable in its holding that counsel provided effective assistance under *Strickland*.[261] The Pennsylvania Supreme Court followed the precedent set by *Strickland*, and gave much deference to counsel's conduct and held that counsel's performance was adequate.[262] Justice Kennedy argues that it is this Court's ruling, and not the state court's, that is unreasonable, and concludes that "[t]he Pennsylvania courts can hardly be faulted for failing to anticipate today's abrupt departure from *Strickland*."[263]

Lastly, Justice Kennedy maintains that even if the Court can establish that counsel's performance was deficient, Rompilla cannot prove that counsel's errors prejudiced his defense.[264] Nothing in the file detracts from the violent nature of the prior conviction, and there is no way of saying conclusively that had counsel looked in the file they would have come across these mitigation leads that the majority speaks of.[265] These leads were actually located in one document—a prison transfer petition—and Justice Kennedy argues that even if counsel had examined the file to obtain information about Rompilla's prior conviction, they probably would not have given much thought to this document because it did not pertain to his prior conviction.[266] Thus, he argues that if counsel were deficient in failing

require will be deemed deficient, but confined its rule to the narrow facts in this case. While this decision indicates that the Court is attempting to create stricter standards for attorney conduct, one could argue that it may not have as much of a far-reaching effect for future ineffective assistance of counsel claims, as the case was decided on the narrowest possible means. However, it will likely set the bar for future cases, requiring courts to evaluate attorney conduct more critically.

260. *Rompilla*, 545 U.S. at 404 (Kennedy, J., dissenting).

261. *Id.* at 404-05.

262. *Id.*

263. *Id.* at 405 (Kennedy, J., dissenting). The dissent represents the Court's longstanding position on ineffective assistance of counsel claims. The Court strictly adheres to the precedent set in *Strickland*, and fears that the majority's opinion represents a departure from this. However, given the vast amount of criticism that *Strickland* has received, the majority's recent decisions indicate that perhaps they are responding to this criticism and are making attempts to rework the standard set in *Strickland*.

264. *Id.*

265. *Id.* at 405-06.

266. *Id.* at 406. *Strickland* stated that

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to

to look at the file, there is no reasonable probability that looking in the file would have led counsel to find the transfer petition and explore the leads.[267] So, prejudice could only be found if counsel were deficient in failing to give intense scrutiny to every document in the file.[268]

V. IMPACT OF THE COURT'S DECISION

A. Legal Impact

The Court's decision in *Rompilla* carries significant implications. First, this is the third case in the past five years in which the Court has overturned death sentences due to ineffective assistance of counsel at sentencing, which suggests that the Court is taking a stricter stance on lawyering in capital cases.[269] Second, the Court further defines effective assistance by holding that regardless of other mitigation efforts, if counsel knows of information that the prosecution will probably rely on at the sentencing phase, he must make all reasonable efforts to obtain and review it.[270] Third, this case indicates a departure from precedent, as the Court looks more closely and critically at counsel's performance, and appears to give more weight to the American Bar Association standards and codes of conduct as to how to

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> likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. It is not enough . . . to show that the errors had some conceivable effect on the outcome of the proceeding.

Strickland v. Washington, 466 U.S. 668, 693 (1984). Thus, the dissent argues that the failure to obtain the prior conviction file could have just as easily been harmless as opposed to prejudicial, because there is a likelihood that even had counsel looked through the file, they may not have uncovered these mitigation leads. Further, the dissent avers that Rompilla is unable to show that the failure to obtain and review the prior conviction file *actually* had an adverse effect on his defense, because he cannot prove that counsel would have actually uncovered this information had they looked in the file. *See id.*

Yet, one can argue that the dissent's argument is also speculative. While there is a possibility that even had counsel examined the file they might not have discovered all of the mitigation leads, they surely would have uncovered something, in addition to what they already knew, to help Rompilla's mitigation case. There is no indication in the record that it would have required much time and effort to examine the file. *Rompilla*, 545 U.S. at 390-91. Thus, it is unlikely that counsel would have failed to come across these mitigation leads had they looked through the file.

267. *Rompilla*, 545 U.S. at 406-07 (Kennedy, J., dissenting).

268. *Id.* The dissent's prejudice argument is perhaps even more convincing than that offered by the majority. However, this is precisely one of the criticisms of *Strickland*; conduct that is clearly deficient goes unchecked because defendants are unable to satisfy the prejudice prong. Some have argued that a finding of deficient performance should be sufficient for deeming performance ineffective, and if the prejudice requirement is to remain, the burden should be shifted to the prosecution to prove lack of prejudice.

269. *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla, 545 U.S. at 374.

270. *Rompilla*, 545 U.S. at 377.

present a mitigation case, than counsel's decisions as to how to proceed.[271] Finally, this decision is important because it indicates that the Court is willing to hold counsel ineffective even in cases where counsel's performance was neither nonexistent nor terrible.[272]

From 1976 to 2002 the Supreme Court denied review in most death penalty cases.[273] In 1984, the Court established the standard for determining effective assistance of counsel in *Strickland*, yet it was not until 2000 that the Court overturned a death sentence for ineffective assistance under *Strickland*.[274] This represents the Court's longstanding reluctance to deem capital defense counsels' performance deficient. Indeed, critics argue that *Strickland* is not demanding enough; courts seek to attribute conduct to strategy, and when that is impossible, they attempt to conclude that the conduct did not prejudice the defense.[275] As a result, despite cases involving questionable representation, lawyers are given the benefit of the doubt, and

271. If one reads the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in conjunction with the opinion in *Rompilla*, it is obvious that the Court relied heavily on these standards in making its decision that counsel's performance was deficient. Indeed, the opinion even quotes verbatim from the standards in its opinion, when it concludes that counsel breached its duty to investigate prior convictions that can be used as aggravating circumstances by the prosecution. *Id.* at 387. Yet, in the past, the language in *Strickland*, which stated that judicial scrutiny of counsel's performance must be highly deferential, allowed courts to turn a blind eye to these standards and conclude that counsel's errors were the result of a tactical decision. Levinson, *supra* note 5, at 165. Here, the Court refuses to take the easy way out, and closely scrutinizes counsel's conduct in light of prevailing professional norms of defense lawyering in capital cases.

272. *Rompilla*, 545 U.S. at 380-81. *See* Garrett, *supra* note 14, at 53. This is perhaps the most significant aspect of the Court's decision, as the Court is taking a stance in refusing to accept mediocre defense lawyering. In the past, courts have labeled to be "effective" representation instances in which attorneys were intoxicated, abusing drugs, mentally ill, or sleeping during the trial. Kirchmeier, *supra* note 7, at 455. Here, defense counsel were competent and fully alert throughout the entire proceeding, and they conducted an investigation for mitigation evidence, despite suffering from a lack of time and resources. *Rompilla*, 545 U.S. at 380-81. For all intents and purposes, they provided decent representation, which was clearly much better than what many capital defendants receive. However, the Court was not content with settling for passable representation, but rather insisted on high quality representation. It is no coincidence that this is the level of representation required by the current American Bar Association standards. DEATH PENALTY GUIDELINES, *supra* note 90, at § 1.1.

273. Chemerinsky, *supra* note 118, at 208.

274. Green, *supra* note 29, at 670.

275. Levinson, *supra* note 5, at 165. First, it is argued that *Strickland* allows courts to ignore egregious conduct if an attorney's error can somehow be attributed to a tactical choice. *Id.* Second, critics allege that *Strickland* does not provide a workable framework by which to measure attorney performance, which has in turn given reviewing courts broad discretion in determining what constitutes effective assistance, leading to inconsistent judgments. Murphy, *supra* note 85, at 179. Third, critics argue that the prejudice requirement presents a near insurmountable hurdle for defendants, and questionable representation by attorneys is often not evaluated if their conduct did not prejudice the outcome of the case. Gable & Green, *supra* note 63, at 764.

few convictions have been reversed. A large part of the Court's reluctance to create a stricter standard for attorney conduct is the concern that courts would then be flooded with ineffective assistance claims, as it would be easier for defendants to prevail.[276] Thus, the Court has viewed the deprivation of fair procedures for some defendants as a necessary evil due to the concern for judicial economy, which has taken precedence over the issue of poor lawyering. This is the view retained by the dissenters in *Rompilla*, who are hesitant to veer from precedent.[277]

It is remarkable that for a period of sixteen years, no death sentences were overturned by the Court for ineffective assistance, yet in the span of five years three death sentences have been invalidated under *Strickland*.[278] This represents the Court's growing concern over the quality of lawyering in capital cases, and its efforts to impose stricter standards on the lawyer's performance. Although the Court has not explicitly required counsel to comport with the American Bar Association standards, it has incorporated these standards in its decisions in both *Wiggins* and *Rompilla*.[279] Thus, each holding has established a specific guideline that counsel must abide by in order for his or her performance to be deemed adequate. As a result, these

276. *See* Murphy, *supra* note 85, at 191 (observing that "[a]pparently, the Court decided that controlling the deluge of appeals by convicted defendants was preferable to holding attorneys accountable for anything but the most blatant sort of negligent practice").

277. *Rompilla*, 545 U.S. at 399-400 (Kennedy, J., dissenting). The dissenters are adamant about adhering to the language of *Strickland*, which required that courts be highly deferential to counsel's decisions. *Id.* They reiterate the fact that *Strickland* specifically stated that American Bar Association standards and the like should only be used as guides and not a constitutional framework for analyzing counsel's performance. *Id.* Further, the dissenters voice their concern that the decision has departed from precedent in stating that "[t]he majority's analysis contains barely a mention of *Strickland* and makes little effort to square today's holding with our traditional reluctance to impose rigid requirements on defense counsel." *Id.* Similarly, in the dissenting opinion in *Wiggins,* Justices Scalia and Thomas, who also joined the dissent in *Rompilla*, insisted that under *Strickland* the American Bar Association standards are only to be used as guides. Wiggins v. Smith, 539 U.S. 510, 543 (2003) (Scalia, J., dissenting).

However, the majority seems to be of the opinion that the *Strickland* standard is inadequate, at least as applied to the sentencing phase in capital trials, thus making a departure from precedent a necessity. *See Rompilla*, 545 U.S. at 387.

278. *See* Green, *supra* note 29, at 670.

279. *Rompilla*, 545 U.S. at 374; *Wiggins*, 539 U.S. at 510. In 2003, The American Bar Association propounded the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which are designed to "set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." DEATH PENALTY GUIDELINES, *supra* note 90, at § 1.1(A). The Guidelines are said to "embody the current consensus about what is required to provide effective defense representation in capital cases." *Id.* at §1.1, cmt. The Guidelines state that attorneys should limit their workloads, inform their clients of all issues that might materially impact their case, and conduct thorough investigations relating to issues of guilt and penalty, so as to enable them to provide each client with high quality representation. *Id.* at §§ 10.3, 10.5, 10.7. In particular, counsel must "investigate prior convictions . . . that could be used as aggravating circumstances" and "should use all appropriate avenues . . . to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members." *Id.* at §10.7 cmt.

holdings have raised the bar for attorney conduct, suggesting that courts should give less deference to counsel's decisions and closely scrutinize their acts or omissions before making a determination as to the quality of their performance.[280]

The decision in *Rompilla* is important because the Court deemed counsel ineffective even though counsel's conduct was neither nonexistent nor appalling.[281] This represents an important shift in ineffective assistance jurisprudence, as courts have consistently deemed representation much worse than this to be adequate. Although the ruling in *Rompilla* was narrowly confined to its particular facts and circumstances, its holding suggests that courts should look more closely and critically at counsel's conduct, and give much weight to the American Bar Association standards in measuring attorney performance.[282] Its net effect is that courts may turn to the *Rompilla* decision and decide to take a stronger stance against poor

280. *See Williams*, 529 U.S. at 398-99; *Wiggins*, 539 U.S. at 537-38; *Rompilla*, 545 U.S. at 377. In *Williams*, the Court held that counsel has a duty to conduct a thorough investigation of the defendant's background. *Williams*, 529 U.S. at 396. The majority specifically cites the American Bar Association standards as the source for this requirement. *Id.* Similarly, in *Wiggins*, the Court turns to its decision in *Williams* in determining how to conduct its analysis. *Wiggins*, 539 U.S. at 522. The Court then turns to the American Bar Association standards, which state that counsel should attempt "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating" circumstances the prosecution may introduce at trial. *Id.* at 524. When measured against these standards, the Court concluded that counsel abandoned their investigation too soon, such that they could not possibly have made a fully informed tactical decision with respect to strategy. *Id.* at 527. In *Rompilla*, the Court concluded that in light of prevailing professional norms, counsel's failure to investigate Rompilla's prior conviction file constituted deficient performance. *Rompilla*, 545 U.S. at 383.

281. *Rompilla*, 545 U.S. at 381-82; *see* Garrett, *supra* note 14, at 53.

282. *Rompilla*, 545 U.S. at 385-87. The majority states that

> [n]o reasonable lawyer would forego examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony. Nor would a reasonable lawyer compare possible searches for school reports, juvenile records, and evidence of drinking habits to the opportunity to take a look at a file disclosing what the prosecutor knows and even plans to read from in his case.

Id. at 389. If we analyzed counsel's decisions by strictly applying *Strickland*, the Court should have avoided using hindsight and examined counsel's decisions based on his perspective at the time. Strickland v. Washington, 466 U.S. 668 (1984). Here, counsel knew the prosecution intended to introduce testimony of Rompilla's victim in his prior crime to establish the aggravator of a prior conviction, but they did not believe that they could have rebutted this through further investigation of the file, so they decided not to examine it. *Rompilla*, 545 U.S. at 385-86. Rather, counsel decided to focus on building a mitigation case by interviewing Rompilla and some of his family members, in addition to having three mental health experts look into his mental state. *Id.* at 381-82. Based on counsel's perspective at the time, these decisions seem reasonable. However, here the Court departed from the *Strickland* approach, and based their decision on the fact that counsel's performance, while decent, was nevertheless inadequate because it failed to measure up to the prevailing professional norms. *Id.* at 389-90.

lawyering. For example, a situation may arise in which an attorney makes mitigation efforts, but nevertheless falls far below the standard of reasonable competency according to prevailing professional norms because he or she failed to pursue a particular line of investigation. Following the reasoning in *Rompilla*, a court may then deem counsel's performance deficient, which will serve to further define "effective assistance." If courts begin to hold attorneys to a higher standard, the quality of representation should ameliorate, as attorneys will know what is expected of them and will no longer commit the same errors without consequence.[283]

In the past, the prejudice prong under *Strickland* has posed the biggest stumbling block for defendants raising ineffective assistance of counsel claims, because even if a defendant can prove that counsel's performance was deficient, their claim will be dismissed if there is no prejudice.[284] As one commentator noted, "[b]ecause *Strickland* is a two-prong test, and defendants must make sufficient showings under *both* prongs, altering one prong without altering the other will have little effect on the ultimate outcome of cases."[285] The Court altered the performance prong in *Williams* by requiring counsel to conduct a thorough investigation of a defendant's background.[286] The performance prong was further relaxed in *Wiggins*, where the Court held that strategic choices made before conducting a complete investigation must be reasonable in terms of prevailing professional norms.[287] Now, *Rompilla* additionally weakens the performance prong by requiring counsel to examine a defendant's prior conviction file if they know that the prosecution intends to use the prior crime as an aggravating circumstance.[288] These cases, when considered together, impose stricter standards on attorney conduct, and effectively make it easier for a defendant to prove deficient performance. At first glance, none of these decisions appear to do anything to modify or weaken the prejudice prong, making the alterations to the first prong useless. However, the Court found prejudice in all three cases, which involved situations in which counsel failed to uncover and present significant mitigation evidence.[289] All three defendants suffered physical abuse and neglect during

283. Levinson, *supra* note 5, at 178. One commentator argues that higher standards for ineffective assistance could ultimately lead to the elimination of the death penalty because "almost all capital defendants have mitigating circumstances, and requiring attorneys to be skilled enough to bring them out will neutralize the aggravating factors brought out by the prosecution and result in significantly fewer impositions of the death penalty." *Id.*

284. Gable & Green, *supra* note 63, at 764.

285. Green, *supra* note 29, at 673.

286. Williams v. Taylor, 529 U.S. 362, 391-98 (2000).

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

288. Rompilla v. Beard, 545 U.S. 374, 390-91 (2005).

289. *Williams*, 529 U.S. 362 at 398 (finding prejudice because "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"); *Wiggins*, 539 U.S. at 535 (holding that had the jury been confronted with the fact that Wiggins "experienced

their youth and suffer from diminished mental capacities.[290] The Court acknowledges that this is the kind of evidence it has "declared relevant to assessing a defendant's moral culpability."[291] In each of these cases the Court focuses primarily on the performance prong, and quickly concludes that the prejudice prong is satisfied. It appears that the Court already made up its mind that counsel's assistance was constitutionally infirm before even considering the prejudice prong.[292] These cases suggest that perhaps the Court relaxed the defendant's burden of proving prejudice in cases where an overwhelming amount of evidence as to the defendant's background and mental state was not presented to the jury. Based on the Court's consistent findings of prejudice in these cases, it almost appears as if the Court has implicitly expanded the number of exceptions in which prejudice is presumed to include cases such as these.

With the addition of *Rompilla*, the Supreme Court is sending out a clear signal that it is concerned with the quality of lawyering in capital cases and whether the death penalty can be administered fairly. This is not one isolated example, but rather it involves the invalidation of three death sentences in quick succession, thus requiring the lower courts to take notice of the Supreme Court's call to improve the *Strickland* standard.

B. Societal Impact

The ruling in *Rompilla* generates an important societal impact, as it seeks to improve the quality of representation for capital defendants and indicates that the Court may be veering away from the death penalty. The Court's actions may, in fact, be in response to the recent decline in public support for the death penalty.[293] According to a new landmark study on the error rates in capital cases, "[t]here is a growing bipartisan consensus that

severe privation and abuse . . . while in the custody of his alcoholic absentee mother . . . [and that] [h]e suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care . . . along with his diminished mental capacities" there is a reasonable probability that it would have returned a different sentence); *Rompilla*, 545 U.S. at 393 (holding that had counsel presented the jury with information pertaining to Rompilla's traumatic childhood, mental health, and alcoholism, "the likelihood of a different result . . . is 'sufficient to undermine confidence in the outcome' actually reached at sentencing").

290. *Williams*, 529 U.S. at 397; *Wiggins*, 539 U.S. at 535; *Rompilla*, 545 U.S. at 393.

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

292. Critics of *Strickland* urge that proving deficient performance alone should be sufficient to find a constitutional violation. *See* Gable & Green, *supra* note 63, at 765-69; Gabriel, *supra* note 85, at 1276. The idea is that counsel's deficient performance deprives a defendant of procedural fairness, which is what the Sixth Amendment guarantees.

293. Liebman, *supra* note 1, at 2. According to the study, six years ago four-fifths of the population were in favor of the death penalty, whereas currently only two-thirds of the population support the death penalty. *Id.* at i.

flaws in America's death-penalty system have reached crisis proportions" as the capital appeals process is often very lengthy, and capital trials put many people on death row that do not deserve to be there.[294] Further, the study indicates that of the capital judgments that were fully reviewed between the years of 1973 and 1995, sixty-eight percent were overturned due to serious error, with one of the most common errors being grossly incompetent defense lawyering.[295]

Among the main concerns with the administration of the death penalty in the United States are that innocent people are getting sentenced to death and executed, and that many facing death sentences are not provided with adequate counsel.[296] Until recently, the Supreme Court seemed to take a relatively passive role in death penalty cases, particularly in cases involving ineffective assistance of counsel claims in capital cases.[297] However, in the past five years, the Supreme Court has ruled that the execution of juveniles and the mentally retarded is unconstitutional and, in addition has overturned three death sentences for ineffective assistance of counsel.[298]

While the Supreme Court has taken a more active role in death penalty cases in the past five years, there is a concern that this trend might change, due to the recent change in composition of the Court with the appointment of Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O'Connor. It has been said that the replacement of Chief Justice Rehnquist with Chief Justice Roberts will "not affect the Court's balance"

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294. *Id.* at 2. The study indicated that "82% of the people whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve a sentence *less than death* . . . [and] *7% were found to be innocent of the capital crime.*" *Id.* at ii.

295. *Id.* at i.

296. *See id.*

297. *See* Hill v. Lockhart, 474 U.S. 52 (1985) (attorney's failure to advise defendant on parole eligibility did not constitute prejudice under *Strickland*); Burger v. Kemp, 483 U.S. 776 (1987) (counsel's decision not to conduct a complete investigation into defendant's background for mitigating evidence was reasonable and did not constitute ineffective assistance); Lockhart v. Fretwell, 506 U.S. 364 (1993) (counsel's failure to raise an objection that an aggravating factor in his sentence improperly duplicated an element of the offense for which he was convicted did not constitute prejudice); Bell v. Cone, 535 U.S. 685 (2002) (defense counsel's failure to make a closing argument does not warrant a presumption of ineffectiveness); Yarborough v. Gentry, 540 U.S. 1 (2003) (defense counsel's failure to discuss certain piece of exculpatory information in his closing argument did not constitute ineffective assistance); Florida v. Nixon, 543 U.S. 175 (2004) (since the defendant neither consented nor objected to counsel's strategy to concede guilt during his capital trial, the concession did not automatically constitute ineffective assistance).

298. Roper v. Simmons, 543 U.S. 551 (2005) (holding that execution of juveniles constitutes a violation of the Eighth Amendment as juveniles are less culpable than the average criminal); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of the mentally retarded constitutes excessive punishment in violation of the Eighth Amendment); Williams v. Taylor, 529 U.S. 362 (2000) (overturning a death sentence due to counsel's failure to uncover and present significant mitigating evidence); Wiggins v. Smith, 539 U.S. 510 (2003) (invalidating a death sentence due to counsel's failure to further expand their investigation to discover and present additional mitigating evidence); Rompilla v. Beard, 545 U.S. 374 (2005) (overturning a death sentence due to counsel's failure to examine the defendant's prior conviction file when it knew the prosecution planned to use the prior to prove an aggravating circumstance).

because "[l]ike Rehnquist, Roberts is deeply conservative."[299] Of concern is the replacement of Justice O'Connor, who has often provided the swing vote in death penalty cases, most recently in *Rompilla*.[300] Although Justice O'Connor has long been a supporter of the death penalty, she recently revealed that her thoughts on attorney performance standards are changing due in part to her awareness of "[s]erious questions . . . being raised about whether the death penalty is being fairly administered" and her concern that "'the system may well be allowing some innocent defendants to be executed.'"[301] She then proposed that "'it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.'" [302] Given these statements, it is not surprising that she joined the majority in *Williams*, *Wiggins*, and *Rompilla*, to overturn death sentences due to ineffective assistance of counsel during sentencing.[303] Since Justice O'Connor has frequently been a swing vote in death penalty cases, her replacement will play a very important role in future decisions.

During his tenure as a judge on the U.S. Court of Appeals for the Third Circuit, Justice Alito heard ten capital cases.[304] In five of these cases, he disagreed with his colleagues and voted to uphold a death sentence against the inmate.[305] Of particular importance is the fact that Justice Alito presided over Rompilla's case when it came before the Third Circuit to determine whether the Federal District Court should have granted his habeas petition as

299. MSNBC, *Roberts Confirmation Hearings to Begin Monday* (Sept. 6, 2005), http://www.msnbc.msn.com/id/9215790/ (last visited Feb. 13, 2006). With the exception of Wiggins, in which Rehnquist voted with the majority to invalidate the death sentence due to ineffective assistance of counsel, he typically votes in favor of the death penalty. *See Wiggins*, 539 U.S. at 510. *But see Williams*, 529 U.S. at 416 (Rehnquist, J., dissenting) (voting to uphold Williams' death sentence); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Rehnquist, J., dissenting) (maintaining that the imposition of the death penalty of the mentally retarded is constitutional); *Roper*, 543 U.S. at 587 (Scalia, J., dissenting) (joining in the dissenting opinion, which held that execution of juveniles should not be categorically unconstitutional); *Rompilla*, 545 U.S. at 396 (Kennedy, J., dissenting) (joining in the dissenting opinion, which held that Rompilla's death sentence should be upheld).

300. Editorial, *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, *available at* http://www.nhcadp.org/justice_sandra_day_oconnor.htm. Indeed, Justice O'Connor provided the swing vote in *Rompilla*, in which she joined the majority in overturning Rompilla's death sentence. *Rompilla*, 545 U.S. at 393.

301. Editorial, *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, *available at* http://www.nhcadp.org/justice_sandra_day_oconnor.htm.

302. *Id.*

303. *See Williams*, 529 U.S. at 362; *Wiggins*, 539 U.S. at 510; *Rompilla*, 545 U.S. at 374.

304. Goodwin Liu & Lynsay Skiba, *Judge Alito and the Death Penalty* 1 (Am. Const. Soc'y for L. & Policy, Paper, 2005), *available at* http://www.acslaw.org/node/555.

305. *Id.*

to his ineffective assistance claim.[306] Justice Alito authored the 2-1 panel decision, reversing the grant of his petition, holding that counsel's performance was reasonable.[307] He stated that "while a 'good' or 'prudent' lawyer might have examined the records, Rompilla's lawyers had done all that was 'constitutionally compelled' by interviewing him, some of his family members, and three mental health professionals." In arriving at this conclusion, "Judge Alito rejected the relevance of the American Bar Association (ABA) Standards for Criminal Justice to determining the scope of defense counsel's duty to investigate."[308]

Rompilla's case then came before the Supreme Court to resolve the issue as to whether counsel's performance required the sentence to be overturned. The Supreme Court reversed in a five to four decision, with Justice O'Connor casting the swing vote. The Court found that Judge Alito's decision was an unreasonable application of clearly established law.[309] This is particularly important given the fact that Justice O'Connor's vote decided this case, and had Justice Alito been on the Supreme Court in her place he would have voted to uphold Rompilla's death sentence. Justice Alito's reasoning is in line with the dissenters, who felt that counsel's performance was adequate. This carries significant implications as Justice Alito's presence on the Supreme Court threatens to arrest the Court's recent steps to modify *Strickland* and raise the bar for defense lawyering in capital cases. Justice Alito's propensity to rule against the inmate and uphold death sentences led one commentator to conclude that "his opinions . . . show a disturbing tendency to tolerate serious errors in capital proceedings."[310] If this is true, then *Rompilla* may mark the end of the Court's progression toward stricter standards for capital defense attorneys.

On the whole, it is difficult to determine the effect that *Rompilla* will have on society given its narrow application. Although it represents yet another step forward in the Court's efforts to impose stricter standards on capital defense attorneys, the fact that it was decided on the narrowest means possible is a sign of the Court's lingering reluctance to depart from precedent, which may be propounded with the addition of Justice Alito to the Court. However, when combined with the Court's recent rulings in *Williams* and *Wiggins*, and the decline in public support for the death penalty, there may be fewer death sentences imposed as attorneys are now

306. *Id.* at 8 (citing Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004)).

307. *Id.* at 9.

308. *Id.* This aligns him with the dissenters, who refuse to depart from *Strickland*, holding fast to the notion that the American Bar Association standards are only to be used at guides and should not be viewed as codifications of the Sixth Amendment requirements. Yet if these guidelines represent the consensus as to what constitutes high quality legal representation, it seems that they should be given more weight.

309. *Id.* (citing Rompilla v. Beard, 545 U.S. 374 (2005)).

310. *Id.* at 1.

held to a higher standard, and judges have more guidance as to what constitutes effective assistance.

VI. CONCLUSION

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, and *Rompilla* is no exception. On its own, *Rompilla* does not appear to have a wide-reaching effect. However, when analyzed in light of the Court's recent decisions and its sudden shift in attitude toward imposition of the death penalty, it bears much significance. With each new decision, the Court has further defined "effective assistance", establishing rules of conduct for attorneys and providing lower courts with more guidance as to how to evaluate attorney performance. Although the Court originally held in *Strickland* that no specific guidelines for attorney performance should be implemented, its recent decisions have done just the opposite. Given the current publicity over wrongful convictions due in large part to ineffective lawyering,[311] the Court has recognized the need to re-work *Strickland.* Although the Court has stopped short of making substantial changes to *Strickland*, it has taken several steps in quick succession to lessen the burden defendants must overcome in order to prove ineffective assistance. Had the composition of the Court remained as it was, one could predict that the Court would continue to re-work *Strickland* in future ineffective assistance of counsel claims. However, with the addition of Chief Justice Roberts and Justice Alito, the question remains as to whether the Court will continue on its quest to improve procedural fairness in capital trials, or whether it will stop in its tracks and revert to its passive approach to death penalty cases. Only time will tell.

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311. Liebman, *supra* note 1, at 1.

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