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Kandies v. Polk 385 F.3d 457 (4th Cir. 2004)

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I. Facts

In April 1994 a North Carolina jury found Jeffrey Clayton Kandies guilty of the first-degree rape and first-degree murder of his fiancee's four-year-old daughter, Natalie Lynn Osborne.[1] During the sentencing phase of the trial, the defense called witnesses, including Kandies's mother, who testified about Kandies's good parenting, his history of drug and alcohol abuse, his relatively clean criminal record, his difficult childhood, and his relationship with his step-father.[2] In addition, the defense called two clinical psychologists, Dr. Brian Glover and Dr. Claudia Coleman.[3] Dr. Glover, who had met with Kandies three times, testified that Kandies had a severe alcohol problem and that on the day of the crime "Kandies was suffering from a mental disorder and that his ability to appreciate the criminality of his conduct was impaired."[4] Dr. Coleman met with Kandies twice and testified that she conducted psychological tests and reviewed his work, school, military, and police records.[5] Dr. Coleman opined that Kandies's judgment on the day of the crime may have been impaired by his various emotional and mental disturbances and alcohol dependence.[6] Jurors found two aggravating factors as well as three statutory and eighteen non-statutory mitigating factors.[7]

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1. Kandies v. Polk, 385 F.3d 457, 461–64 (4th Cir. 2004).
2. *Id.* at 464–65, 464 n.2.
3. *Id.* at 464.
4. *Id.*
5. *Id.* at 464–65.
6. *Id.* at 465.
7. *Kandies*, 385 F.3d at 465; *see* N.C. GEN. STAT. § 15A-2000(b) (2003) (instructing jurors to consider aggravating and mitigating circumstances to determine whether a death sentence is appropriate). The two aggravating factors were: "(1) Kandies murdered Natalie during the commission of first-degree rape and (2) the murder of Natalie was especially heinous, atrocious or cruel." *Kandies*, 385 F.3d at 465; *see* N.C. GEN. STAT. § 15A-2000(e) (listing possible aggravating circumstances). The statutory mitigating factors were: "(1) Kandies did not have a significant criminal history; (2) Kandies murdered Natalie while suffering from a mental or emotional disturbance; and (3) Kandies's capacity to appreciate the criminality of his conduct or conform to the requirements of the law was impaired." *Kandies*, 385 F.3d at 465 n.4; *see* N.C. GEN. STAT. § 15A-2000(f) (listing statutory mitigating circumstances). The eighteen non-statutory mitigating circumstances primarily involved Kandies's remorse, his cooperation with authorities, his history of substance abuse, and his difficult childhood. *Kandies*, 385 F.3d at 465 n.5; *see* N.C. GEN. STAT. § 15A-2000(f) (permitting jurors to consider mitigating circumstances other than those listed in the statute).

The jury concluded that the aggravators outweighed the mitigating factors and, consequently, sentenced Kandies to death.[8]

The Supreme Court of North Carolina affirmed Kandies's conviction and sentence, and the United States Supreme Court denied certiorari.[9] In September 1997 Kandies filed a postconviction motion for appropriate relief ("MAR") in the trial court, which asserted that, inter alia, his trial counsel were ineffective because they failed to investigate whether he was sexually abused as a child.[10] The MAR court denied Kandies's ineffective assistance of counsel ("IAC") claim and his other claims, and the Supreme Court of North Carolina ultimately denied Kandies's petition for further review of the merits of his claims.[11] In October 1999 the United States District Court for the Eastern District of North Carolina denied Kandies's petition for a writ of habeas corpus.[12] Subsequently, the United States Court of Appeals for the Fourth Circuit granted a certificate of appealability.[13]

II. Holding

A majority of the three-member Fourth Circuit panel reviewed the state court's findings under the standards set forth in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and held that the state court's decisions regarding Kandies's IAC claim were neither " 'contrary to, [n]or involved an unreasonable application of' " *Strickland v. Washington*.[14] Specifically, two judges

8. *Kandies*, 385 F.3d at 465.

9. *Id.* at 466; State v. Kandies, 467 S.E.2d 67, 88 (N.C. 1996), *cert. denied*, 519 U.S. 894, 894 (1996); *see* N.C. GEN. STAT. § 15A-2000(d) (giving the Supreme Court of North Carolina automatic review of all death sentences).

10. *Kandies*, 385 F.3d at 466; *see* N.C. GEN. STAT. § 15A-1411 (2003) (permitting a defendant to file an MAR to seek post-trial relief from an error committed by the trial court). In support of his claim, Kandies submitted an affidavit that described the sexual abuse he suffered as a child. *Kandies*, 385 F.3d at 466.

11. *Kandies*, 385 F.3d at 466–67.

12. *Id.* at 467.

13. *Id.*; *see* 28 U.S.C. § 2253(c)(1)(A) (2000) (requiring a defendant to obtain a COA before appealing a district court's denial of the defendant's habeas petition, if the petition's claims arise out of state court; part of AEDPA); *see also* 4TH CIR. R. 22(a) (providing the Fourth Circuit's procedures for requesting a certificate of appealability). *See generally* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 635 (2004) (analyzing 4TH CIR. R. 22(a)). The Fourth Circuit granted a certificate of appealability on his IAC claim and his claim that the prosecution exercised racially based peremptory strikes in violation of *Batson v. Kentucky*. *Kandies*, 385 F.3d at 467; *see* Batson v. Kentucky, 476 U.S. 79, 84 (1986) (prohibiting the prosecution from striking a juror solely on the basis of race). The Fourth Circuit denied Kandies's *Batson* claim, and the issue will not be discussed in this case note. *Kandies*, 385 F.3d at 478.

14. *Kandies*, 385 F.3d at 467–68, 478–79 (quoting 28 U.S.C. § 2254(d) (2000)); *see* Strickland v. Washington, 466 U.S. 668, 687–98 (1984) (providing a two-part test to determine whether trial

concluded that the state court reasonably determined that Kandies's counsel did not err by failing to retain a mitigation expert or by failing to inquire into Kandies's childhood sexual abuse.[15] Although one judge did find counsel's failure to explore the issue of sexual abuse to be unreasonable, all three judges concluded that the state court reasonably determined that counsel's performance, if deficient, did not prejudice Kandies.[16] Thus, the Fourth Circuit affirmed the district court's denial of Kandies's habeas petition.[17]

III. Analysis

A. Ineffective Assistance of Counsel

In assessing whether the state court reasonably determined Kandies's IAC claim, Judge Gregory first reiterated *Strickland*'s two-part IAC test.[18] *Strickland*'s first prong requires defendants to show "that defense counsel's performance fell below an objective standard of reasonableness, the proper measure of which is prevailing professional norms."[19] In capital cases, counsel must thoroughly investigate the defendant's background but need not investigate every possible avenue of mitigation if it is unlikely to assist the defendant at sentencing.[20] In assessing the adequacy of counsel's investigation, courts review whether the investigation was adequate under professional norms in that par-ticular case viewed from counsel's perspective at the time of trial.[21] *Strickland*'s second prong requires a defendant to show "that he or she was prejudiced by defense counsel's objectively unreasonable performance."[22] A defendant may establish prejudice in capital sentencing by showing " 'a reasonable probability that *at least one juror*' " would have voted differently if not for trial counsel's defective performance.[23]

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counsel was ineffective and, if so, whether trial counsel's errors require reversal). AEDPA only permits a federal court to overturn a state court's decision when it is " 'contrary to, or involve[s] an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States,' " or it is " 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Kandies*, 385 F.3d at 467 (quoting 28 U.S.C. § 2254(d) (2004)); *see* 28 U.S.C. § 2254 (2000) (providing the standard of review for federal habeas petitions challenging state court decisions; part of AEDPA).

15. *Kandies*, 385 F.3d at 478; *Kandies*, 385 F.3d at 488–490 (Traxler, J., concurring).

16. *Kandies*, 385 F.3d at 471–72; *Kandies*, 385 F.3d at 481 (Michael, J., concurring); *Kandies*, 385 F.3d at 490 (Traxler, J., concurring).

17. *Kandies*, 385 F.3d at 478–79.

18. *Id.* at 468–69; *see Strickland*, 466 U.S. at 687–98 (providing a two-part IAC test).

19. *Kandies*, 385 F.3d at 468 (citing *Strickland*, 466 U.S. at 687–88).

20. *Id.* at 469; *see* Wiggins v. Smith, 539 U.S. 510, 533 (2003) ("[W]e emphasize 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.").

21. *Kandies*, 385 F.3d at 469 (citing *Wiggins*, 539 U.S. at 523).

22. *Id.* at 468 (citing *Strickland*, 466 U.S. at 687).

23. *Id.* at 468–69 (quoting *Wiggins*, 539 U.S. at 537).

Strickland's prejudice prong requires courts to " 'reweigh the evidence in aggravation against the totality of available mitigating evidence,' " yet remain deferential to trial counsel's decisions.[24]

Kandies asserted that his counsel were ineffective under *Strickland*'s first prong because they failed to obtain a mitigation expert and failed to inquire specifically into whether Kandies was sexually abused as a child.[25] Regarding counsel's failure to obtain a mitigation expert, Judge Gregory rejected any "*per se* rule requiring defense counsel to retain a mitigation expert in every capital case."[26] Courts must give trial counsel discretion to pursue different avenues in investigating mitigation and refrain from adopting a "rigid checklist" for defense attorneys in capital cases.[27] Further, Judge Gregory noted that investigation techniques, such as interviewing family and friends, can be as effective as a mitigation specialist in preparing a convincing mitigation case.[28] Thus, Judge Gregory rejected Kandies's contention that the failure to retain a mitigation expert constituted IAC.[29]

Kandies next contended that his trial counsel were ineffective because they failed to explore the issue of sexual abuse.[30] At trial, no witness testified that Kandies's uncle sexually abused the defendant as a child.[31] Kandies argued that studies that show people who commit acts of child abuse are very likely to have been abused as children should have alerted counsel to the possibility of childhood sexual abuse.[32] Judge Gregory first recounted trial counsel's thorough mitigation investigation, which included extensive interviews with Kandies's family and friends as well as the retention of two psychologists who met with Kandies on numerous occasions.[33] The retention of the two psychologists was important in assessing the decision not to investigate sexual abuse even though Kandies's counsel asked one to focus on substance abuse, and the other to

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24. *Id.* (quoting *Wiggins*, 539 U.S. at 534).

25. *Id.* at 469–70. Kandies also asserted that his counsel were ineffective because the attorney assigned to develop mitigation evidence, Scott N. Dunn, was too inexperienced to try a capital case. *Id.* at 469 n.7. Although Dunn had never tried a criminal case, Judge Gregory noted that inexperience does not establish per se ineffectiveness; rather, a court must examine the attorney's actual performance. *Id.* Although Judge Gregory treated this claim in a footnote, Judge Traxler discussed the issue slightly more in depth. *Id.*; *Kandies*, 385 F.3d at 488 (Traxler, J., concurring).

26. *Kandies*, 385 F.3d at 470.

27. *Id.*; *see Strickland*, 466 U.S. at 688–89 ("No 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.").

28. *Kandies*, 385 F.3d at 470.

29. *Id.* at 469–70.

30. *Id.* at 470.

31. *Id.* at 464–65.

32. *Id.* at 470.

33. *Id.* at 471.

screen for brain damage, and not specifically to look for past sexual abuse.[34] Because no interviewee or psychologist mentioned the sexual abuse, counsel did not fail to discover the past sexual abuse "due to a half-hearted investigation into Kandies's background."[35] Judge Gregory asserted that an investigation's reasonableness largely depends upon information conveyed by the defendant and, accordingly, counsel's investigation was reasonable because nothing in their investigation should have alerted them to the sexual abuse.[36] Thus, the state court reasonably determined that counsel's performance did not fall "below an objective standard of reasonableness as measured by prevailing professional norms."[37]

In addition to determining that counsel's performance did not fail *Strickland*'s first prong, Judge Gregory also concluded that the state court reasonably found that Kandies had not established that "at least one juror would have weighed the aggravating and mitigating evidence differently had the jury been informed" about the sexual abuse.[38] The addition of childhood sexual abuse to the previously found twenty-one mitigating factors did not convince Judge Gregory that the mitigating factors outweighed either aggravating factor enough to cause a reasonable juror to change his or her mind.[39] In coming to this conclusion, the judge highlighted the vileness of the crime and Kandies's lies about the crime in the days after the murder.[40]

In a separate concurring opinion, Judge Michael disagreed with the panel majority and argued that counsel's performance was deficient under *Strickland*'s first prong.[41] However, Judge Michael agreed that Kandies's counsel's performance did not prejudice Kandies enough to satisfy *Strickland*'s second prong and, accordingly, concurred in the denial of Kandies's habeas petition.[42] Regarding the deficiency of counsel's performance, Judge Michael noted that any decision not to investigate must be reasonable under the particular circumstances of the case.[43] The American Bar Association Guidelines for the Appointment and

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34. *Kandies*, 385 F.3d at 471.

35. *Id.*

36. *Id.* at 471 n.8; *see* Barnes v. Thompson, 58 F.3d 971, 979–80 (4th Cir. 1995) (finding that counsel "may rely on the truthfulness of his client and those whom he interviews in deciding how to pursue his investigation").

37. *Kandies*, 385 F.3d at 471 (citing *Strickland*, 466 U.S. at 688).

38. *Id.* at 471–72.

39. *Id.* at 472.

40. *See id.* ("I am not convinced that the jury . . . would not have sentenced Kandies to death after having found him guilty of the rape and murder of his fiancee's four-year-old daughter . . . dumping her body in a plastic bag and then lying about the incident for a couple of days.").

41. *Kandies*, 385 F.3d at 479 (Michael, J., concurring).

42. *Id.*

43. *Id.* (citing *Strickland*, 466 U.S. at 691).

Performance of Counsel in Death Penalty Cases ("ABA Guidelines") instruct counsel to " '[c]ollect information relevant to the sentencing phase of trial, including, but not limited to: . . . family and social history (including physical, sexual, or emotional abuse).' "[44] Judge Michael determined that counsel's failure to inquire into an area recommended by the ABA Guidelines indicated a deficient performance.[45] Counsel's failure to investigate sexual abuse, despite studies that show men who sexually abuse were often sexually abused themselves, also supported his conclusion regarding counsel's ineffectiveness.[46] Further, Judge Michael rejected the contention that counsel did not need to inquire into sexual abuse because it had not surfaced in interviews with family members or psychiatrists.[47] Counsel must conduct mitigation investigation with specificity, and extensive investigation into some areas does not make up for deficiencies in other areas.[48]

Judge Traxler also concurred and addressed each part of Kandies's IAC claim.[49] First, Judge Traxler rejected Kandies's assertions that one of his attorneys, Scott Dunn, was ineffective because he was too inexperienced and that his inexperience resulted in the failure to obtain a mitigation expert as recommended by the ABA Guidelines.[50] In assessing IAC claims, the issue is the adequacy of the actual representation and not the attorney's experience.[51] Further, the failure to obtain a mitigation expert was not ineffective because counsel compensated for the lack of a mitigation expert with what Judge Traxler viewed as a thorough mitigation investigation.[52]

Additionally, Judge Traxler concluded that the state court reasonably determined that defense counsel met their duty of conducting a reasonable mitigation investigation despite their failure to explore Kandies's past sexual abuse.[53] Counsel's investigation was sufficient in light of their extensive interviews with family members and retention of well-qualified experts.[54] Further,

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44. *Id.* (quoting A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 11.4.1(D)(2) (1989)).

45. *Id.*; *see Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.").

46. *Kandies*, 385 F.3d at 480 (Michael, J., concurring).

47. *Id.*

48. *Id.* at 480–81.

49. *Kandies*, 385 F.3d at 481–503 (Traxler, J., concurring).

50. *Id.* at 488; *see* A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 4.1 (Rev. Ed. 2003) [hereinafter ABA GUIDELINES] (recommending that proper capital defense teams contain mitigation experts).

51. *Kandies*, 385 F.3d at 488 (Traxler, J., concurring).

52. *Id.*

53. *Id.* at 489–90.

54. *Id.*

counsel are not per se ineffective for failing to inquire into childhood sexual abuse in any case involving child molestation.[55] Finally, Judge Traxler concluded that the state court reasonably determined that counsel's performance did not prejudice Kandies because the viciousness of the crime and the twenty-one separate mitigating circumstances made it unlikely that a juror would reach a different decision after learning about the sexual abuse. [56]

IV. Application in Virginia

The Fourth Circuit's holding in *Kandies* sheds additional light on the level of performance that courts will consider adequate under *Strickland*'s first prong. Since *Strickland*, courts have increasingly used the ABA Guidelines in assessing whether an attorney's performance was objectively reasonable under *Strickland*'s first prong.[57] Particularly, the Court in *Wiggins v. Smith*[58] employed the ABA Guidelines and the state's prevailing professional norms to determine that counsel had a duty to investigate "*all reasonably available* mitigating evidence."[59] The ABA Guidelines specifically recommend that capital defense counsel hire a mitigation expert and investigate their client's history for sexual abuse.[60] However, despite these recommendations, Judges Traxler and Gregory reiterated that the ABA Guidelines are not "rigid checklist[s]" to evaluate counsel's performance and determined that counsel were adequate despite their failure to hire a mitigation expert and their failure to explore the issue of sexual abuse.[61]

Rejecting Kandies's claim that the failure to obtain a mitigation specialist is per se IAC, Judges Traxler and Gregory noted that counsel can compensate for the lack of a mitigation expert with a thorough investigation into the defendant's background.[62] The court seemed to discount a mitigation expert's importance

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55. *Id.*

56. *Id.* at 491–92.

57. *See Strickland*, 466 U.S. at 688–89 (noting that the ABA Guidelines serve as guides to determining whether counsel performed reasonably). *See also Wiggins*, 539 U.S. at 524 (relying primarily on the ABA standards in determining that reviewing a capital defendant's social history was a prevailing professional norm); Williams v. Taylor, 529 U.S. 362, 396 (2000) (citing the ABA standards in determining that counsel had a duty to investigate thoroughly a defendant's background).

58. 539 U.S. 510 (2003).

59. *Wiggins*, 539 U.S. at 524 (quoting A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 11.4.1(C) (1989)).

60. ABA GUIDELINES, *supra* note 50, § 4.1(A)(1), § 10.7 Cmt. (recommending that defense teams hire a mitigation specialist and explore their client's social history for sexual abuse).

61. *See Kandies*, 385 F.3d at 470 (citing *Strickland*, 466 U.S. at 689) (noting that *Strickland* rejected adopting any rigid checklist to evaluate counsel's performance); *Kandies*, 385 F.3d at 488 (Traxler, J., concurring) (rejecting Kandies's contention that the ABA Guidelines require that capital defense counsel hire a mitigation expert).

62. *See Kandies*, 385 F.3d at 470 ("While the retention of a mitigation expert in these instances

and assumed that an attorney could obtain as much information in an interview with a family member as a mitigation specialist could.[63] Yet, the ABA Guidelines note that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."[64] Further, it is unlikely that an attorney will have the time to compile a complete social history of the defendant that a proper mitigation case requires.[65] *Kandies* highlights the importance of a mitigation expert because a properly trained mitigation expert could probably have detected that Kandies had been sexually abused as a child.

Additionally, Judges Traxler and Gregory concluded that counsel's failure to explore the issue of sexual abuse did not render their performance inadequate.[66] Both judges came to this conclusion notwithstanding the fact that Kandies's offense involved the rape of a child and that studies have shown that people convicted of sexual abuse are likely to have been sexually abused as children.[67] The failure to follow up on such a lead recalls defense counsel's performance in *Wiggins*, in which the attorneys failed to follow up on social service reports that indicated the need to conduct further investigation.[68] Although the Court in *Wiggins* recognized that counsel does not need to investigate every possible avenue of mitigation, the Court did not tolerate counsel's failure to investigate when information available to the attorney indicated that a particu-

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may nonetheless be advisable, I do not believe defense counsel should be required, or feel compelled, to do so."); *Kandies*, 385 F.3d at 488 n.2 (Traxler, J., concurring) (finding that Kandies's counsel's failure to obtain a mitigation expert did not render their performance ineffective). Note that currently, Capital Defender Units ("CDU") in the state of Virginia have access to mitigation specialists as part of the defense team. *See* Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 59 (2003) ("The lead attorney at each CDU has determined that all defendants represented by the CDU attorney will also have access to the assistance of the CDU's fact investigator and the mitigation specialist.").

63. *Kandies*, 385 F.3d at 470 ("[T]here will be some circumstances where the assistance of lay persons, such as family, friends and colleagues, is more useful in discovering and presenting mitigating evidence than that of a mitigation expert.").

64. ABA GUIDELINES, *supra* note 50, § 4.1 Cmt.

65. *See id.* (noting that a mitigation specialist's duties include "compil[ing] a comprehensive and well-documented psycho-social history of the client . . . analyz[ing] the significance of the information in terms of impact on development . . . identif[ying] the need for expert assistance; assist[ing] in locating appropriate experts; [and] provid[ing] social history information to experts").

66. *Kandies*, 385 F.3d at 471; *Kandies*, 385 F.3d at 489–90 (Traxler, J., concurring).

67. *See Kandies*, 385 F.3d at 470 (noting that numerous studies show that people who sexually abuse children are likely to have been sexually abused as children); ABA GUIDELINES, *supra* note 50, § 10.7 Cmt. ("Counsel needs to explore . . . family and social history (including physical, sexual or emotional abuse . . .).").

68. *See Wiggins*, 539 U.S. at 524–25 (noting that the DSS records in counsel's hands would have revealed that Wiggins's "mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; [and] he had frequent, lengthy absences from school").

lar avenue may be fruitful.[69] Thus, it is hard to reconcile Judges Traxler and Gregory's opinions regarding counsel's failure to explore the issue of sexual abuse with the Court's reasoning in *Wiggins*.

In discussing counsel's failure to explore the issue of sexual abuse, Judges Traxler and Gregory repeatedly credited counsel's retention of the expert psychologists as a reason why counsel performed adequately even though Kandies's counsel did not hire the experts to investigate Kandies's social history nor did they direct the expert's attention to the possibility of sexual abuse.[70] Among the issues pending in *Rompilla v. Beard*[71] is whether the state court reasonably determined that counsel was sufficient when he hired a psychiatrist and forensic psychologist to assist the defense but did not provide them with any of Rompilla's records.[72] Although Rompilla's past was filled with potentially mitigating evidence, the lack of information provided to the experts caused them to miss most of it.[73] Thus, the United States Supreme Court's forthcoming decision in *Rompilla* may clarify what an attorney must do beyond retaining mental health experts in order to render adequate assistance under *Strickland*.

Finally, each judge agreed that counsel's errors did not prejudice Kandies because the circumstances of the offense made death a likely sentence and the jury had already found twenty-one total mitigating factors.[74] The court's opinion reveals a persistent problem with *Strickland*'s second prong: courts are unlikely to find that counsel's error prejudiced the defendant whether counsel presented an otherwise strong case for mitigation or a weak one.[75] Generally, courts find prejudice in this context only when the evidence that was not uncovered due to counsel's error was exceptionally powerful and when counsel presented a very weak mitigation case at trial.[76]

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69. *Id.* at 533–34.

70. *See, e.g., Kandies*, 385 F.3d at 471 (explaining that counsel's performance was adequate because they had obtained two expert psychologists to investigate Kandies's background).

71. 125 S. Ct. 27 (2004).

72. Rompilla v. Horn, 355 F.3d 233, 240 (3rd Cir. 2004); *see* Rompilla v. Beard, 125 S. Ct. 27, 27 (2004) (granting Rompilla's petition for a writ of certiorari).

73. *Rompilla*, 355 F.3d at 240–44.

74. *Kandies*, 385 F.3d at 471–72; *Kandies*, 385 F.3d at 481 (Michael, J., concurring); *Kandies*, 385 F.3d at 490–92 (Traxler, J., concurring).

75. *See Kandies*, 385 F.3d at 471–72 (finding no prejudice because of the plethora of mitigation evidence already before the jury); Kuiken v. Lee, No. 94-6023, 1995 WL 224045, at *2–*3 (4th Cir. Apr. 17, 1995) (finding that counsel's failure to introduce certain character evidence in mitigation did not prejudice the defendant when there was no other evidence in mitigation).

76. *See, e.g., Wiggins*, 539 U.S. at 534–38 (explaining that the evidence that trial counsel failed to uncover was particularly powerful and that the only mitigating evidence presented to the jury was that Wiggins had no prior convictions).

V. Conclusion

Of the three Fourth Circuit judges writing opinions in *Kandies*, two determined that the state court reasonably decided that Kandies's counsel's performance was sufficient under *Strickland*'s first prong.[77] Specifically, Judges Traxler and Gregory concluded that counsel's performance in this child-rape and murder case was adequate despite their failure to explore whether Kandies himself was sexually abused as a child.[78] Further, all three judges determined that given the plethora of mitigating evidence available to the jury and the gruesomeness of the crime, counsel's performance, if inadequate, did not prejudice the defendant under *Strickland*'s second prong.[79]

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77. *Kandies*, 385 F.3d at 469–71; *Kandies*, 385 F.3d at 490 (Traxler, J., concurring).

78. *Kandies*, 385 F.3d at 469–71; *Kandies*, 385 F.3d at 488–90 (Traxler, J., concurring).

79. *Kandies*, 385 F.3d at 472; *Kandies*, 385 F.3d at 481 (Michael, J., concurring); *Kandies*, 385 F.3d at 490 (Traxler, J., concurring).