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Wiggins v. Smith 123 S. Ct. 2527 (2003)

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I. Facts

Seventy-seven-year-old Florence Lacs ("Lacs") was found dead in the bathtub of her ransacked apartment in Woodlawn, Maryland on September 17, 1988. Kevin Wiggins ("Wiggins") was indicted on October 20, 1988 for the drowning of Lacs and was charged, *inter alia*, with first-degree murder. Wiggins elected to be tried before a judge in Baltimore County Circuit Court and was represented by two public defenders, Carl Schlaich ("Schlaich") and Michelle Nethercott ("Nethercott"). On August 4, 1989, Wiggins was found guilty of first-degree murder, robbery, and two counts of theft.[1]

After being convicted, Wiggins elected to be sentenced by a jury, and his counsel filed a motion for bifurcation of sentencing.[2] Defense counsel sought to bifurcate the sentencing proceedings to present evidence that Wiggins was not the principal and evidence in mitigation separately so as not to dilute either presentation.[3] The court denied the motion for bifurcation and the sentencing proceedings began soon thereafter.[4] On October 18, 1989, the jury sentenced Wiggins to death and a divided Maryland Court of Appeals affirmed the conviction and sentence.[5]

A. State Postconviction Proceedings

With new counsel, Wiggins sought postconviction relief from the Baltimore County Circuit Court in 1993, alleging ineffective assistance of counsel at sentencing in violation of the Sixth Amendment.[6] Wiggins claimed that the public defenders had rendered constitutionally defective assistance by not investigating and presenting mitigation evidence concerning his "dysfunctional background."[7] Wiggins presented testimony by a licensed social worker, Hans Selvog ("Selvog"),

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1. Wiggins v. Smith, 123 S. Ct. 2527, 2531–32 (2003) [hereinafter *Wiggins III*].
2. *Id.* at 2532.
3. *Id.*
4. *Id.*
5. *Id.*; *see* Wiggins v. State, 597 A.2d 1359, 1374 (Md. 1991) (affirming the trial court's conviction and sentence), *cert. denied*, 503 U.S. 1007 (1992).
6. *Wiggins III*, 123 S. Ct. at 2532, 2534; *see* U.S. CONST. amend. VI (stating in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence").
7. *Wiggins III*, 123 S. Ct. at 2532.

whom the court certified as an expert.[8] Selvog had compiled a detailed social history report concerning the physical and sexual abuse Wiggins had endured as a child and young adult and testified to the contents of his report.[9]

Schlaich testified during the postconviction proceedings that he could not remember requesting a social history report even though funds were available from the public defender's office for this purpose.[10] According to Schlaich, he and Nethercott had decided prior to trial to focus their strategy on contesting Wiggins's actual responsibility for the murder.[11] The trial judge noted "that he could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, '[n]ot to do a social history, at least to see what you have got, to me is absolute error.' "[12] Despite its reservations, the court denied Wiggins's petition for postconviction relief and stated that " 'when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel.' "[13] The Maryland Court of Appeals affirmed the trial court's denial of relief and held that counsel's decision to focus on Wiggins's actual guilt was a tactical decision and that trial counsel " 'made a reasoned choice to proceed with what they thought was their best defense.' "[14]

B. Federal Habeas Proceedings

In September 2001 Wiggins filed a petition for a writ of habeas corpus and the United States District Court for the District of Maryland granted the writ.[15] The court cited *Williams v Taylor*[16] and held that the Maryland courts' denial of Wiggins's ineffective assistance of counsel claim " 'involved an unreasonable application of clearly established federal law.' "[17] The district court held that in

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8. *Id.*

9. *Id.* at 2532–33. According to Selvog's report, Wiggins had been physically abused by his mother and sexually abused during his stays with a series of foster parents. *Id.* at 2533.

10. *Id.* at 2533. Defense counsel possessed both a presentence investigation ("PSI") report and the Department of Social Services ("DSS") records prior to the sentencing proceedings. *Id.* Each report gave a partial account of Wiggins's background and circumstances, but defense counsel did not request a social history report. *Id.*

11. *Id.*

12. *Id.*

13. *Wiggins III*, 123 S. Ct. at 2533 (alteration in original) (internal citation omitted).

14. *Id.* at 2533–34 (quoting Wiggins v. State, 724 A.2d 1, 17 (Md. 1999)).

15. *Id.* at 2534; *see* Wiggins v. Corcoran, 164 F. Supp. 2d 538, 547 (D. Md. 2001) [hereinafter *Wiggins I*] (vacating Wiggins's conviction). *See generally* 28 U.S.C. § 2254 (2000) (stating that a writ of habeas corpus pursuant to a state court decision can only be granted if the state court decision was contrary to or an unreasonable application of clearly established federal law; part of AEDPA).

16. 529 U.S. 362 (2000).

17. *Wiggins III*, 123 S. Ct. at 2534 (quoting *Wiggins I*, 164 F. Supp. 2d at 557); *see* 28 U.S.C. 2254(d)(1) (allowing the issuance of a writ of certiorari if the lower court's decision "involved an unreasonable application of, clearly established Federal law"; part of AEDPA); Williams v. Taylor,

order for defense counsel's "strategic decision to be reasonable, it must be 'based upon information the attorney has made after conducting a reasonable investigation.' "[18] The court found that trial counsel's decision not to investigate further was unreasonable based on the evidence they had and concluded that "their knowledge triggered an obligation to look further" into Wiggins's background and life history.[19] The district court vacated Wiggins's conviction and sentence and ordered that Wiggins be released unless the State appealed the ruling, which it did.[20] The Fourth Circuit reversed the district court's decision and held that Schlaich's and Nethercott's decision to focus on Wiggins's direct responsibility was "a reasonable strategic decision" in light of the fact that they "knew at least some details of Wiggins' childhood from the PSI and social services records."[21] The court agreed with the Maryland Court of Appeals that the information obtained by Schlaich and Nethercott was sufficient to make an informed choice of strategy.[22] Wiggins petitioned the United States Supreme Court and the Court granted certiorari.[23]

II. Holding

The Supreme Court reversed the Fourth Circuit's decision and remanded the case for further proceedings.[24] The Court held that the Maryland Court of Appeals unreasonably applied the applicable legal principle as set forth in *Strickland v. Washington*[25] for determining Sixth Amendment effective assistance of counsel.[26] The Court applied the two-pronged test from *Strickland* and held that

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529 U.S. 362, 395–99 (2000) (holding that defense counsel's failure to present mitigating evidence at the sentencing hearing constituted ineffective assistance).

18. *Wiggins III*, 123 S. Ct. at 2534 (quoting *Wiggins I*, 164 F. Supp. 2d at 558).

19. *Id.*

20. *Wiggins I*, 164 F. Supp. 2d at 577.

21. *Wiggins III*, 123 S. Ct. at 2534; *see* Wiggins v. Corcoran, 288 F.3d 629, 641 (4th Cir. 2002) [hereinafter *Wiggins II*] (stating that tactical decision by defense counsel to focus on Wiggins's guilt was reasonable). For a complete discussion and analysis of *Wiggins II*, see generally Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 221 (2002) (analyzing Wiggins v. Corcoran, 288 F.3d 629 (4th Cir. 2002) and Hunt v. Lee, 291 F.3d 284 (4th Cir. 2002)).

22. *Wiggins II*, 288 F.3d at 637.

23. *Wiggins III*, 123 S. Ct. at 2534; *see* Wiggins v. Corcoran, 537 U.S. 1027, 1027 (2002) (mem.) (granting certiorari).

24. *Wiggins III*, 123 S. Ct. at 2544.

25. 466 U.S. 668 (1984).

26. *Wiggins III*, 123 S. Ct. at 2538; *see* 28 U.S.C. § 2254(d)(1) (2000) (mandating that a writ of habeas corpus shall not issue unless the lower court proceedings "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"; part of AEDPA); Strickland v. Washington, 466 U.S. 668, 687 (1984) (creating two-pronged test for addressing ineffective assistance of counsel claims); *Williams*, 529 U.S. at 413 (holding that writ of habeas corpus may be granted if "the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to

the decision of Schlaich and Nethercott not to expand their investigation of Wiggins's history for mitigating evidence beyond the PSI and DSS evidence fell short of prevailing professional norms and that the inadequate investigation prejudiced Wiggins's defense.[27] Justice Scalia, joined by Justice Thomas, dissented.[28]

III. Analysis

Under § 2254(d)(1), a federal court may grant a writ of habeas corpus if the state court proceedings "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."[29] In applying this standard, the Supreme Court determined in *Williams* "that the 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case."[30] The Court has further held in applying § 2254(d)(1) that the state court's application of the governing legal principle must be "objectively unreasonable" and not just incorrect or erroneous.[31]

The Court first identified *Strickland* as the clearly established federal law to apply when determining ineffective assistance of counsel.[32] Under *Strickland*, an applicant must prove that defense counsel's performance was constitutionally deficient and that counsel's errors prejudiced the defense.[33] The Court found that *Williams* was "illustrative of the proper application of" *Strickland*.[34] *Williams* also involved a claim that defense counsel failed to conduct a proper investiga-

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the facts"); *see also* Bell v. Cone, 535 U.S. 685, 694 (2002) ("The focus of the [unreasonable application] inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable . . . .").

27. *Wiggins III*, 123 S. Ct. at 2542–44; *see Strickland*, 466 U.S. at 687 (holding that to prove ineffective assistance of counsel an applicant must show deficient performance of counsel and that the deficient performance prejudiced the defense so as to prevent a fair trial).

28. *Wiggins III*, 123 S. Ct. at 2544 (Scalia, J., dissenting).

29. 28 U.S.C. § 2254(d)(1).

30. *Wiggins III*, 123 S. Ct. at 2534–35 (quoting *Williams*, 529 U.S. at 413).

31. *Wiggins III*, 123 S. Ct. at 2535 (quoting *Williams*, 529 U.S. at 409); *see* Lockyer v. Andrade, 123 S. Ct. 1166, 1175 (2003) (citing *Williams* for the proposition that application of precedent must be "objectively unreasonable"); *Bell*, 535 U.S. at 699 (same); Woodford v. Visciotti, 537 U.S. 19, 27 (2002) (per curiam) (same).

32. *Wiggins III*, 123 S. Ct. at 2535.

33. *Id.* at 2535; *see Strickland*, 466 U.S. at 687 (establishing two-pronged test for ineffective assistance of counsel).

34. *Wiggins III*, 123 S. Ct. at 2535; *see Williams*, 529 U.S. at 396 (stating that counsel's limited investigation could not be justified as a tactical decision).

tion of mitigating evidence.[35] The *Williams* Court concluded that this failure could not be justified as a tactical decision and that failure to investigate further was unreasonable.[36] The *Wiggins* Court also noted that, although its decision in *Williams* had not yet been decided when the Maryland Court of Appeals ruled on Wiggins's case, no new law was created in *Williams*. Rather, the *Williams* decision was " 'squarely governed' " by the Court's decision in *Strickland*; therefore, the federal law the state court should have applied was clearly established.[37]

A. Application of Strickland

1. Performance Prong

Counsel's performance must fall "below 'an objective standard of reasonableness' " to be categorized as deficient under the first element of *Strickland*.[38] The Court established that " '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' "[39] Wiggins claimed that his trial counsel's failure to expand the scope of their investigation of potential mitigating evidence amounted to ineffective assistance of counsel.[40] Schlaich and Nethercott defended their decision to stop the investigation by stating that they made a tactical decision to focus on an alternate strategy that did not depend on mitigating evidence.[41] The Court pointed out that the strategic judgments of counsel are " 'virtually unchallengeable.' "[42] As in *Williams*, the Court found that the question was not whether the choice of strategy was reasonable, but whether the investigation of Wiggins's background, or lack thereof, "*was itself reasonable*" using prevailing professional norms as a guide.[43]

The Court found that Schlaich's and Nethercott's decision not to further their mitigation investigation fell short of Maryland's professional standards in 1989.[44] The Court pointed to Schlaich's acknowledgment that standard practice in Maryland at the time included acquiring a social history report and that defense counsel did not obtain one, even with money available from the Public

35. *Wiggins III*, 123 S. Ct. at 2535 (citing *Williams*, 529 U.S. at 396).

36. *Id.*

37. *Id.* at 2535–36 (quoting *Williams*, 529 U.S. at 390). This determination was for the benefit of the dissent, which suggested that *Williams* did not qualify as "clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at 2546 (Scalia, J., dissenting) (quoting 28 U.S.C. § 2254(d)(1) (2000)).

38. *Id.* at 2535 (quoting *Strickland*, 466 U.S. at 688).

39. *Id.* (quoting *Strickland*, 466 U.S. at 688) (alteration in original).

40. *Id.* at 2535.

41. *Wiggins III*, 123 S. Ct. at 2535.

42. *Id.* (quoting *Strickland*, 466 U.S. at 690).

43. *Id.*; *see Williams*, 529 U.S. at 415 (concluding that defense counsel has a duty to conduct a thorough investigation into a client's background).

44. *Wiggins III*, 123 S. Ct. at 2536.

Defender's office.[45] The Court also pointed out that Schlaich's and Nethercott's performance "similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)— standards to which we long have referred as 'guides to determining what is reasonable.' "[46] The Court noted that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases recommend that defense counsel should endeavor to gather all reasonably available mitigating evidence.[47] The Court found that Schlaich and Nethercott did not meet this standard and stopped the investigation with "only rudimentary knowledge" of Wiggins's background gathered "from a narrow set of sources."[48]

The Court also found that the scope of Schlaich's and Nethercott's investigation was limited unreasonably in light of the evidence present in the DSS records.[49] Agreeing with the district court, the Court found that the absence of any aggravating factors in Wiggins's background and the long list of mitigating factors in the DSS record would have caused any reasonably competent attorney to pursue the leads in the record to make an informed choice concerning strategy.[50] The Court further found that Schlaich and Nethercott did not discover evidence that indicated that further investigation would be counterproductive and distinguished this case from Supreme Court precedent that upheld limited investigations because of their counterproductivity.[51] In fact, the Court noted that further investigation would have revealed the sexual abuse later found in the post-conviction proceedings.[52]

The Court also found the record of the sentencing proceedings to be indicative of Schlaich's and Nethercott's inattention and not their "reasoned

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45. *Id.*

46. *Id.* at 2537 (quoting *Strickland*, 466 U.S. at 688); *see* The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 11.4.1(C) (1989) [hereinafter "ABA Guidelines for Death Penalty Defense"] (detailing the minimum requirements for the appointment and performance of counsel for death penalty defense).

47. *Wiggins III*, 123 S. Ct. at 2537; *see* ABA Guidelines for Death Penalty Defense, *supra* note 46, at § 11.4.1(C) (providing that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence").

48. *Wiggins III*, 123 S. Ct. at 2537.

49. *Id.*

50. *Id.* (citing *Wiggins I*, 164 F. Supp. 2d at 559).

51. *Id.*; *see, e.g.*, *Strickland*, 466 U.S. at 699 (finding that limited investigation was reasonable because counsel could make a strategic choice that further evidence would not be helpful); Burger v. Kemp, 483 U.S. 776, 794–95 (1987) (finding that limited investigation was reasonable because much of the evidence found was harmful); Darden v. Wainwright, 477 U.S. 168, 186 (1986) (finding limited investigation reasonable because of damaging testimony that would have been presented if mitigating evidence was used).

52. *Wiggins III*, 123 S. Ct. at 2537.

strategic judgment."[53] Schlaich and Nethercott persisted in their desire for bifurcation of the sentencing proceedings until the day before sentencing.[54] The Court concluded from this that defense counsel had every reason to continue preparing a mitigation case until the court denied the bifurcation motion.[55]

The Court found further support for its conclusion that defense counsel's conduct was unreasonable in the fact that counsel did not focus exclusively on Wiggins's direct responsibility for the murder during the sentencing proceedings.[56] In her opening statement, Nethercott suggested that the jury was going to hear about Wiggins's "difficult life."[57] Yet, defense counsel never presented mitigating evidence about Wiggins's life history.[58] They presented evidence in mitigation, however, that was not related to Wiggins's life history or his direct responsibility for the murder, which indicated to the Court that defense counsel presented a "half hearted" mitigation case that could only be justified as a "tactical choice" by post-hoc rationalization.[59]

In holding that the Maryland Court of Appeals unreasonably applied *Strickland*, the Court noted that "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."[60] The Court stated that *Strickland* did not establish that an investigation of any scope justifies a strategic decision.[61] Instead, a habeas court must consider the reasonableness of the investigation used to support the chosen strategy.[62] The Maryland Court of Appeals recognized that defense counsel's failure to request a social history did not meet minimum standards, but the court failed to assess whether the decision to confine the mitigating evidence investigation to the PSI and DSS records "demonstrated reasonable professional judgement."[63] The Court found that in light of the PSI and DSS records, defense counsel "abandon[ed] their investigation at an unreasonable juncture, making a fully informed decision with respect

53. *Id.*

54. *Id.*

55. *Id.* at 2538. The Court also factored in Schlaich's and Nethercott's representation that they were prepared to present mitigating evidence in reaching its conclusion. *Id.*

56. *Id.*

57. *Id.*

58. *Wiggins III*, 123 S. Ct. at 2538.

59. *Id.*

60. *Id.*

61. *Id.* The Court also limited the reach of its decision by stating "that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence .... Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. . . . Both conclusions would interfere with the 'constitutionally protected independence of counsel' at the heart of *Strickland*." *Id.* at 2541 (quoting *Strickland*, 466 U.S. at 689).

62. *Id.* at 2538.

63. *Id.*

to sentencing strategy impossible."[64] Thus, the Court held that the Maryland court's assumption of adequacy was an objectively unreasonable application of *Strickland*.[65] The Court concluded that " 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' "[66]

2. *Prejudice Prong*

The Court proceeded to the second prong of *Strickland* and reviewed de novo whether the inadequate performance prejudiced Wiggins's defense.[67] To establish prejudice, an applicant " 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' "[68] The Court stated that the failure to present the "powerful" mitigation case concerning Wiggins's past prejudiced the defense.[69] The Court concluded that the jury only heard one mitigating factor— that Wiggins had no prior convictions of any type— and that if confronted with the evidence of Wiggins's past, there was a reasonable probability that a jury could have delivered a different result.[70]

B. *The Scalia Dissent*

Justice Scalia first attacked the majority's contention that *Williams* qualified under § 2254(d)(1) as "clearly established federal law."[71] Scalia argued that *Williams* was not clearly established " '*as of the time of the relevant state-court decision.*' "[72] The majority rejected this contention, stating that because *Williams* was only

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64. *Wiggins III*, 123 S. Ct. at 2538.

65. *Id.*; *see* 28 U.S.C. § 2254(d)(1) (2000) (providing for the issuance of a writ of habeas corpus if lower court unreasonably applied Supreme Court precedent; part of AEDPA).

66. *Wiggins III*, 123 S. Ct. at 2539 (quoting *Strickland*, 466 U.S. at 690–91). The Court also noted that the Maryland Court of Appeals made " 'an unreasonable determination of the facts in light of the evidence presented' " when it cited Wiggins's sexual abuse as part of the PSI and DSS records; the Court only found Wiggins's sexual abuse history in Selvog's report. *Id.*; 28 U.S.C. § 2254(d)(2).

67. *Wiggins III*, 123 S. Ct. at 2542.

68. *Id.* (quoting *Strickland*, 466 U.S. at 694).

69. *Id.* at 2543.

70. *Id.*

71. *Id.* at 2546 (Scalia, J., dissenting); *see* 28 U.S.C. § 2254(d)(1) (providing for issuance of writ of habeas corpus if lower court unreasonably applies clearly established federal law as determined by the Supreme Court; part of AEDPA).

72. *Wiggins III*, 123 S. Ct. at 2546 (Scalia, J., dissenting) (quoting *Williams*, 529 U.S. at 412) (emphasis in *Wiggins III*).

before the Court on habeas review and not direct appeal, the governing law was the *Strickland* precedent that had been clearly established since 1984.[73]

Next, Scalia disagreed with the majority's lack of deference to the Maryland Court of Appeals's factual determination that Schlaich and Nethercott made a permissible tactical decision.[74] Justice Scalia argued that the majority's conclusion—that the lower court's *Strickland* application was unreasonable—rested on a "fundamental fallacy."[75] According to Justice Scalia, the majority's error was in asserting "that the state court 'clearly assumed that counsel's investigation began and ended with the PSI report and DSS records.' "[76] Justice Scalia found nothing in the Maryland court's decision that indicated that this was its conclusion; in fact, he found that the state court record indicated clearly that defense counsel had looked beyond the PSI report and DSS records.[77] Justice Scalia also pointed out that Schlaich had testified that he knew information about Wiggins's background which was not in the PSI report and DSS records.[78] Justice Scalia argued that the state court's determination that defense counsel had adequately investigated Wiggins's background was reasonable under § 2254(d)(1).[79] The majority disagreed, finding that the record provided evidence that the state court believed that defense counsel did not look beyond the two pieces of evidence they possessed.[80]

Finally, Justice Scalia dissented from the majority's conclusion that Wiggins was prejudiced by his attorneys' conduct.[81] Justice Scalia found no "reasonable probability" that a social history report would have altered the strategy of Wiggins's counsel.[82] Because Justice Scalia found that defense counsel was aware of Wiggins's background and found that the decision to limit the investigation was a strategic choice, he found no reason to believe that defense counsel would have chosen a different strategy based on a social history report.[83] Justice Scalia also concluded that Selvog's report would have been inadmissible at trial and sentencing anyway.[84] He based this conclusion on the fact that the report contained "hearsay-statements" and Maryland law requires that only reliable

73. *Id.* at 2535–36.

74. *Id.* at 2547 (Scalia, J., dissenting).

75. *Id.*

76. *Id.* (quoting the majority opinion).

77. *Id.*

78. *Wiggins III*, 123 S. Ct. at 2547 (Scalia, J., dissenting).

79. *Id.*; *see* 28 U.S.C. § 2254(d)(1) (2000) (requiring that writ of habeas corpus issue only if lower court application of federal law was unreasonable; part of AEDPA).

80. *Wiggins III*, 123 S. Ct. at 2538–39.

81. *Id.* at 2551 (Scalia, J., dissenting).

82. *Id.*

83. *Id.* at 2551–52 (Scalia, J., dissenting).

84. *Id.* at 2552 (Scalia, J., dissenting).

evidence be admitted at sentencing.[85] Justice Scalia, admitting for the sake of argument that Selvog's report would have been admissible, concluded that there was no "reasonable probability" that a jury would have believed Wiggins's statements concerning his history and sentenced him to life as a result.[86]

IV. Application in Virginia

In *Woodford v. Visciotti*,[87] the Court attempted to resolve the proper application of the AEDPA term "objectively unreasonable" to state court decisions regarding the *Strickland* standard.[88] The Court's decision in *Wiggins*, however, is analytically closer to its decision in *Williams*.[89] In *Williams*, the Court found fault with the Supreme Court of Virginia's interpretation of *Strickland*; it found that the Virginia court's novel interpretation of the performance prong and that court's "obvious failure to consider the totality of the omitted mitigation evidence" in applying the prejudice prong was objectively unreasonable.[90] The Court, however, did not define what the objectively reasonable standard actually was. In *Woodford*, the Court overturned a Ninth Circuit decision that found that a California state court unreasonably applied the Supreme Court's standard as defined in *Strickland*.[91] The Court noted that an " '*unreasonable* application of federal law is different from an *incorrect* application of federal law' " and that "[t]he Ninth Circuit did not observe this distinction, but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)."[92] *Woodford* stands for the proposition that great deference should be granted to state court decisions when reviewed under § 2254(d)(1) unless the lower court's decision was "objectively unreasonable."[93] That term, as applied in *Woodford*,

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85. *Id.*; *see* Whittlesey v. State, 665 A.2d 223, 243 (Md. 1995) (holding that for evidence to be admissible at capital sentencing it must be reliable, but formal rules of evidence do not apply).

86. *Wiggins III*, 123 S. Ct. at 2553–54 (Scalia, J., dissenting).

87. 537 U.S. 19 (2002).

88. *See Woodford*, 537 U.S. at 27 (finding that federal courts may issue a writ of habeas corpus under § 2254(d)(1) only when the lower court decision was "objectively unreasonable"). " '[U]nder § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly.' " *Id.* (quoting *Bell*, 535 U.S. at 699). "The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Id.* For a complete discussion and analysis of *Woodford*, see generally Philip H. Yoon, Case Note, 15 CAP. DEF. J. 427 (2003) (analyzing Woodford v. Visciotti, 123 S. Ct. 357 (2002)).

89. *See Williams*, 529 U.S. at 409, 416 (finding that the Supreme Court of Virginia's decision not to consider the totality of the mitigating evidence was "objectively unreasonable").

90. *Id.* at 414–16.

91. *Woodford*, 537 U.S. at 27.

92. *Id.* at 25 (quoting *Williams*, 529 U.S. at 410).

93. *See id.* at 27 (holding that the Ninth Circuit misinterpreted the holding in *Williams* when it overturned a state court decision because it was incorrect and stating that incorrect or erroneous

appeared to mean "virtually incomprehensible."[94] *Wiggins*, read with *Williams*, appears to limit that deference. While the Court still did not define what "objectively unreasonable" exactly is, the Court reaffirmed that defense trial counsel cannot depend on the deference granted to state court decisions if their conduct does not conform with " 'prevailing professional norms.' "[95]

It also appears from the Court's decision that the ability of counsel to rely on a tactical decision to justify an inadequate mitigation investigation under *Strickland* is not absolute.[96] The Court signaled that a reviewing court's acceptance of a tactical decision at trial will not automatically be given deference.[97] The Court established that a reviewing court first must apply the appropriate standard to determine whether defense counsel's assistance was ineffective.[98] If the assistance rendered was ineffective, then the reviewing court must determine under § 2254 whether the lower court's determination of defense counsel's actions was objectively unreasonable.[99] The Fourth Circuit did not follow this formula; instead, the court deferred to the judgment of the Maryland Court of Appeals that defense counsel's actions were reasonable.[100] Such deference to a lower court's assumptions of defense counsel's reasonableness will no longer be acceptable under *Wiggins*.[101]

Wiggins arguably makes the appointment of a mitigation specialist mandatory in all capital cases.[102] The Court found that the professional standard in Maryland was to retain a mitigation specialist.[103] In addition, the ABA Guidelines for Death Penalty Defense recommend a defense team that includes two attorneys, a fact investigator, and a mitigation specialist in all capital cases.[104] Virginia

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decisions are not necessarily "objectively unreasonable").

94. Yoon, *supra* note 88, at 431–32 (analyzing *Woodford* and finding that the Court is implying that "unreasonable" means "incomprehensible").

95. *Wiggins III*, 123 S. Ct. at 2535–36 (quoting *Strickland*, 466 U.S. at 688).

96. *Id.* at 2538.

97. *Id.*

98. *Id.* at 2538–39.

99. *Id.* at 2534–35.

100. *Id.* at 2534 (citing *Wiggins II*, 288 F.3d at 639–42).

101. *Wiggins III*, 123 S. Ct. at 2538.

102. *See generally* Daniel L. Payne, *A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43 (2003).

103. *Wiggins III*, 123 S. Ct. at 2536–37. The *Wiggins III* court highlighted the importance of mitigation evidence at capital sentencing proceedings "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." *Id.* at 2542 (quoting Penry v. Lynaugh, 492 U.S. 302, 319 (1989)).

104. *See* The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 4.1(A)(1) (rev. ed. 2003) (requiring the appointment of "no fewer than two attorneys . . . an investigator, and a mitigation specialist").

Capital Defender Units ("CDUs") will soon have full coverage of the Commonwealth, and each CDU assigns a defense team as mandated by the ABA Guidelines for Death Penalty Defense, including a mitigation specialist, to every capital case it handles.[105] The existence of CDUs throughout Virginia combined with *Wiggins* creates two constitutional issues. First, under *Wiggins*, if a capital defendant is not given the benefit of a mitigation specialist to aid the defense in gathering all reasonably available evidence, contrary to the standards published by the ABA Guidelines for Death Penalty Defense and the Virginia standard established by the CDUs, the Sixth Amendment guarantee of effective assistance of counsel is violated.[106] Second, a matter of equal protection is raised for those defendants appointed counsel external to the CDUs.[107] Those attorneys will be forced to move for a mitigation specialist in open court. As a result, defendants with representation external to the CDUs are disadvantaged when compared to defendants represented by a CDU. Defense counsel should file a motion for a mitigation specialist based on *Wiggins* and equal protection grounds.[108]

In Virginia it is especially important to investigate thoroughly a defendant's background for mitigating evidence because the sentencing proceeding typically occurs immediately after the capital conviction. Therefore, defense counsel should prepare for the presentation of mitigating evidence well in advance of the sentencing proceedings because time can become a limiting factor after a verdict and before evidence is presented to the sentencing jury. Defense counsel should move for the appointment of a mitigation specialist at the earliest possible opportunity.

V. Conclusion

Wiggins and *Williams* make it clear that a decision not to present mitigating evidence based on a limited investigation will not pass constitutional muster. Defense counsel must make every effort, and use every tool at her disposal, to investigate mitigating evidence. The failure to do so amounts to ineffective assistance of counsel.

Terrence T. Egland

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105. Telephone Interview with Steven Mahar-Milani, Director, Virginia Capital Defender Unit, Southwest Region (Nov. 14, 2003).

106. *See Wiggins III*, 123 S. Ct. at 2536–37 (finding that Wiggins's counsel's performance was ineffective because it fell below Maryland standards and, similarly, the ABA Guidelines).

107. *See* Payne, *supra* note 102, at 59-60 (arguing that the Sixth Amendment requires the appointment of a mitigation specialist in capital cases).

108. Contact the Virginia Capital Case Clearinghouse at (540) 458-8557 for a motion requesting the appointment of a mitigation specialist.