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Tucker v. Ozmint 350 F.3d 433 (4th Cir. 2003)

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I. Facts

On June 25, 1992, James Neil Tucker ("Tucker") drove up Dolly Oakley's ("Oakley") driveway, forced her into her home, and attempted to bind her with tape in her bedroom. However, he was interrupted by two men looking for Oakley's husband before he could completely restrain Oakley. Tucker took Oakley outside where Oakley pleaded with her husband's friends not to leave. She told them that she was in danger, but despite her pleas, the two men sped away, and Tucker dragged Oakley back inside. Tucker then stole fourteen dollars from Oakley's purse and shot her twice in the head— once when she tried to grab the gun and again "to 'put her out of her misery.' "[1]

Tucker was tried in South Carolina state court and found guilty of the murder of Dolly Oakley.[2] During the sentencing proceedings, Tucker's trial counsel presented the testimony of forensic psychologist Dr. Robert Noelker ("Dr. Noelker").[3] Dr. Noelker testified that, although Tucker "understood the requirements of the law," he suffered from an " 'antisocial personality disorder' " ("APD") brought on by physical and sexual abuse that left him unable to behave in accordance with the law.[4] Tucker's wife, two "vocational rehabilitation workers" acquainted with Tucker, and the widow of one of Tucker's former prison mates also testified on behalf of Tucker during the sentencing proceedings.[5] The prosecution responded by presenting the testimony of three expert witnesses who concurred with Dr. Noelker's diagnosis of APD but did not agree with Dr. Noelker that the disorder prevented Tucker from obeying the law.[6] The prosecution experts held the view that APD is not a mental disease or defect but only a description of behavior.[7]

The jury recommended a sentence of death after finding the presence of three statutory aggravating factors, and the trial court sentenced Tucker to death

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1. Tucker v. Ozmint, 350 F.3d 433, 436–37 (4th Cir. 2003).
2. *Id.* at 437. Tucker was also found guilty of "kidnapping, first-degree burglary, armed robbery, and possession of a weapon during a violent crime for actions at the Oakley residence." *Id.* In addition, Tucker was convicted for two other break-ins that took place after the murder of Oakley. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 441.
6. *Id.* at 437.
7. *Tucker*, 350 F.3d at 437–38.

upon the jury's recommendation.[8] Tucker was denied relief on direct appeal to the Supreme Court of South Carolina, the United States Supreme Court, and in state postconviction proceedings.[9] Tucker then filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina.[10] The district court denied relief on the merits, and Tucker appealed to the United States Court of Appeals for the Fourth Circuit.[11] In his appeal, Tucker claimed his trial counsel rendered ineffective assistance in violation of the Sixth Amendment of the United States Constitution due to: (1) a failure to turn over two documents relating to Tucker's childhood sexual abuse to Dr. Noelker; and (2) a failure to investigate and discover that one of the prosecution's three expert witnesses was on professional probation at the time the witness testified.[12]

II. Holding

After applying the two-pronged standard for ineffective assistance of counsel from *Strickland v. Washington*,[13] the Fourth Circuit held that Tucker's trial counsel did not render ineffective assistance of counsel.[14] First, the court held that under *Wiggins v. Smith*[15] Tucker's trial counsel was not required to investigate

8. *Id.* at 438. The court instructed the jury to consider both statutory and non-statutory mitigating factors as well as statutory aggravating factors. *Id.*; *see* S.C. CODE ANN. § 16-3-20(C)(a)-(b) (Law. Co-op. 1976 & Supp. 2003) (codifying the mitigating and aggravating circumstances to be considered by a jury during sentencing deliberations in South Carolina). Tucker's jury instruction included the following mitigating factors: (1) cooperation with law enforcement; (2) the circumstances of Tucker's childhood; (3) the circumstance of Tucker's imprisonment; and (4) mitigating circumstances supported by the evidence. *Tucker*, 350 F.3d at 438. Tucker also received a sentence of "life imprisonment for kidnapping, life imprisonment for first-degree burglary, twenty-five years for armed robbery, five years for possession of a weapon, five years for third-degree burglary, and thirty days for larceny." *Id.*

9. *Tucker*, 350 F.3d at 438; *see* State v. Tucker, 478 S.E.2d 260, 271 (S.C. 1996) (affirming both Tucker's conviction and sentence), *cert. denied*, 520 U.S. 1200 (1997); Tucker v. Maynard, 534 U.S. 1073, 1073 (2002) (mem.) (denying a stay of execution and denying certiorari).

10. *Tucker*, 350 F.3d at 438; *see* 28 U.S.C. § 2254 (2000) (providing standard for issuance of a writ of habeas corpus; part of AEDPA).

11. The opinion does not indicate whether the district court or the Fourth Circuit issued a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1) (2000) (providing for an appeal only after a circuit justice or judge issues a certificate of appealability; part of AEDPA).

12. *Tucker*, 350 F.3d at 436; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence").

13. 466 U.S. 668 (1984).

14. *Tucker*, 350 F.3d at 445; Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that to prove ineffective assistance of counsel a defendant "must show that counsel's performance was deficient" and that the deficiency prejudiced the defense to such a degree so "as to deprive the defendant of a fair trial").

15. 123 S. Ct. 2527 (2003).

every avenue of mitigation evidence and, unlike trial counsel in *Wiggins*, Tucker's trial counsel's investigation into Tucker's childhood abuse was not unreasonably limited.[16] Second, the court held that Tucker's trial counsel had no reason to suspect that the prosecution witness was subject to discipline and that in such a case counsel does not act unreasonably in not investigating the professional status of non-crucial expert witnesses.[17]

III. Analysis

The Fourth Circuit first noted that it reviews de novo a denial of habeas relief in the district court based on the record of the state court.[18] Next, the court found that when reviewing a denial of postconviction relief on the merits in a state court under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a court of appeals can grant habeas relief only if "the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' "[19] The Fourth Circuit found that the state court properly identified *Strickland* as the applicable law for determining ineffective assistance of counsel and concluded, therefore, that habeas relief was unavailable to Tucker under the "contrary to" prong of § 2254(d)(1).[20] Under *Strickland*, a claim of ineffective assistance of counsel can succeed only if: (1) counsel's performance is shown to have fallen "below an objective standard of reasonableness"; and (2) that the defendant was so prejudiced by counsel's errors that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[21] The court stated that the focus of its

16. *Tucker*, 350 F.3d at 441–42; *see* Wiggins v. Smith, 123 S. Ct. 2527, 2538 (2003) (finding that defense counsel's investigation fell well short of established professional norms). For a complete discussion and analysis of *Wiggins*, *see generally* Terrence T. Egland, Case Note, 16 CAP. DEF. J. 101 (2003) (analyzing Wiggins v. Smith, 123 S. Ct. 2527 (2003)).

17. *Tucker*, 350 F.3d at 444–45.

18. *Id.* at 438; *see* Bell v. Ozmint, 332 F.3d 229, 233 (4th Cir. 2003) (holding that under AEDPA courts of appeals "conduct de novo review of a 'district court's decision on a petition for writ of habeas corpus based on a state court record' " (quoting Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 555 (4th Cir. 1999))). For a complete discussion and analysis of *Bell*, *see generally* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 121 (2003) (analyzing Bell v. Ozmint, 332 F.3d 229 (4th Cir. 2003)).

19. *Tucker*, 350 F.3d at 438 (quoting 28 U.S.C. § 2254(d)(1) (2000)). Courts of appeals can also grant habeas relief if the state court decision 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)(2). Tucker claimed the state court made several "unreasonable determination[s]" of fact, but the Fourth Circuit found it unnecessary to consider them in light of its ruling that Tucker's trial counsel was not ineffective in their mitigation investigation. *Tucker*, 350 F.3d at 443 n.6; 28 U.S.C. § 2254(d)(2).

20. *Tucker*, 350 F.3d at 439 n.2; *see Strickland*, 466 U.S. at 687 (formulating a two-pronged test for determining ineffective assistance of counsel).

21. *Tucker*, 350 F.3d at 439 (citing *Strickland*, 466 U.S. at 688, 694).

inquiry was whether the state court's application of *Strickland* was " 'objectively unreasonable.' "[22]

A. Failure to Conduct Adequate Investigation

Tucker first claimed that his trial counsel provided ineffective assistance when they did not provide Dr. Noelker with two reports further elaborating on Tucker's childhood sexual abuse.[23] In particular, Tucker claimed that his trial counsel "unreasonably limited the scope of their investigation into his childhood abuse."[24] The Fourth Circuit noted that counsel's failure to investigate adequately mitigating evidence can amount to ineffective assistance as the United States Supreme Court demonstrated in *Wiggins*.[25] The court pointed out that, unlike in *Wiggins*, Tucker's counsel did not put on a " 'halfhearted mitigation case.' "[26] The court emphasized the fact that defense counsel presented five witnesses, including the forensic psychologist Dr. Noelker, as well as Tucker's wife and others who knew him.[27] Dr. Noelker testified regarding his diagnosis of APD and its origins in Tucker's exposure to sexual abuse and parental indifference.[28] Dr. Noelker also reviewed a social history report compiled by a social worker in preparation for Tucker's prior trial for, inter alia, capital murder.[29] The court concluded that there was no doubt that the jury was "offered a clear, coherent mitigation case that focused on Tucker's history of abuse."[30]

The court compared the failure of counsel in *Wiggins* with the actions of Tucker's trial counsel.[31] The court concluded that Tucker's trial counsel's performance far exceeded the inadequate performance in *Wiggins*.[32] The court stated that " '*Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client' " and

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22. *Id.* (quoting Bell v. Cone, 535 U.S. 685, 694 (2002)).

23. *Id.* at 440.

24. *Id.*

25. *Id.*; *see Wiggins*, 123 S. Ct. at 2538 (holding that an investigation falling short of professional norms amounts to ineffective assistance of counsel).

26. *Tucker*, 350 F.3d at 440–41 (quoting *Wiggins*, 123 S. Ct. at 2537–38).

27. *Id.* at 441.

28. *Id.*

29. *Id.* at 437, 441. The court noted that defense counsel did not call the social worker because of her poor performance at Tucker's prior trial. *Id.* at 441 n.3.

30. *Id.* at 441.

31. *Id.*

32. *Tucker*, 350 F.3d at 441. In *Wiggins*, defense counsel failed to obtain a social history report when funds were available for such a purpose and the prevailing professional norms in Maryland required the use of such a report at sentencing. *Wiggins*, 123 S. Ct. at 2536–37.

held that the trial court's decision was not an unreasonable application of *Strickland*'s performance prong.[33]

The court further concluded that had Tucker's counsel's performance been deficient, he suffered no prejudice as a result.[34] The court again cited *Wiggins*, this time for the proposition that when a reviewing court determines prejudice it must " 'reweigh the evidence in aggravation against the totality of available mitigating evidence.' "[35] The court further found that under *Strickland* a defendant has been prejudiced only when "the facts 'undermine confidence in the outcome' of the proceeding."[36]

As for aggravating circumstances, the court pointed out that the prosecution proved the following three aggravators: (1) kidnapping; (2) burglary; and (3) armed robbery.[37] On the other hand, the court found that the mitigation case would not have been significantly bolstered by Dr. Noelker receiving the two extra reports on Tucker's childhood sexual abuse.[38] The court noted that the significant evidence of Tucker's childhood presented to the jury an adequate picture of the abuse Tucker suffered.[39] Further, the court recognized that both the defense and prosecution experts had agreed that Tucker was the victim of childhood sexual abuse and that the additional evidence would not have added to Tucker's mitigation case.[40] The court again cited the three prosecution witnesses who refuted Dr. Noelker's conclusions as to the effect of APD on criminal behavior and found that the additional evidence would have added little to defense counsel's cross-examination of the witnesses.[41] Thus, the court concluded that the state court did not unreasonably apply *Strickland*'s prejudice prong and that the district court properly denied habeas relief on the claim regarding the two reports.[42]

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33. *Tucker*, 350 F.3d at 442 (quoting Green v. French, 143 F.3d 865, 892 (4th Cir. 1998)).

34. *Id.*

35. *Id.* (quoting *Wiggins*, 123 S. Ct. at 2542).

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

37. *Id.* The jury also was presented evidence of Tucker's crimes following the events at the Oakley residence, which included another murder for which he was convicted prior to this prosecution and for which he received a sentence of death. *Id.*; *see* State v. Tucker, 512 S.E.2d 99, 102, 106 (S.C. 1999) (affirming Tucker's sentence of death for the armed robbery and murder of Shannon Mellon).

38. *Tucker*, 350 F.3d at 442.

39. *Id.* at 442–43.

40. *Id.*

41. *Id.*

42. *Id.*

B. Failure to Investigate Prosecution Witness

Tucker also claimed that his trial counsel were ineffective because they failed to discover the probationary status of Dr. John Dunlap ("Dr. Dunlap"), one of the prosecution's three expert witnesses.[43] Tucker's appellate counsel discovered that Dr. Dunlap had been placed on professional probation during the time that Tucker's trial took place.[44] Tucker argued that his trial counsel should have discovered this information to impeach Dr. Dunlap's testimony.[45]

The court found no merit in Tucker's contention because there was no indication at the time of trial that Dr. Dunlap was on probation.[46] The court agreed that trial counsel must investigate prosecution witnesses for methods of cross-examination and failure to investigate may amount to ineffective assistance.[47] Part of the determination was based on the importance of the witness to the prosecution's case.[48] Had Dr. Dunlap been crucial to the prosecution's case, failure to investigate his professional status may have taken on more importance.[49] However, the court found that Dr. Dunlap was merely a redundant witness confirming the testimony of other competent witnesses.[50] The court concluded that Dr. Dunlap's testimony was not " 'critical to the determination of guilt.' "[51]

Further, the court found that neither the prosecution nor defense counsel knew of Dr. Dunlap's probation.[52] Also, Dr. Dunlap's testimony did not give any indication of his probationary status.[53] The court pointed out that "the only way to find out about Dr. Dunlap's record would have been to subpoena documents from, or file a [Freedom of Information Act] request with, the Board of

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43. *Id.* at 444.

44. *Tucker*, 350 F.3d at 444.

45. *Id.*

46. *Id.*

47. *Id.* (citing Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998) and Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986)).

48. *Id.*

49. *See id.* (noting Dr. Dunlap's relative unimportance to the overall case compared to alibi witnesses or eyewitnesses).

50. *Tucker*, 350 F.3d at 444.

51. *Id.* (quoting *Huffington*, 140 F.3d at 580). *Huffington* was not a capital case. *See Huffington*, 140 F.3d at 575 ("When the State elected not to seek the death penalty, the state trial court resentenced Huffington to consecutive life terms."). The court did not address the fact that the United States Supreme Court has required that factors that lead to the imposition of the death penalty be subjected to a heightened reliability standard. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference [between a sentence of life and a sentence of death], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

52. *Tucker*, 350 F.3d at 444–45.

53. *Id.* at 445.

Medical Examiners."[54] The court concluded that when a witness is non-crucial, as was Dr. Dunlap, failing to conduct such investigations is not unreasonable.[55]

The court also found an absence of prejudice even if Tucker's counsel's performance had been ineffective.[56] The court highlighted the cumulative nature of Dr. Dunlap's testimony and the fact that trial counsel attempted to impeach his testimony.[57] The court found that the testimony of Dr. Dunlap was not essential to the prosecution's case and that the State's theory that APD is not an excuse for criminal behavior was adequately conveyed with or without his testimony.[58] The court concluded that in light of the aggravating and mitigating circumstances in Tucker's case, the failure to discover Dr. Dunlap's probationary status did "not 'undermine confidence in the outcome' of the proceeding."[59]

IV. Application in Virginia

A. Wiggins *Issue*

Read in conjunction with *Byram v. Ozmint*,[60] *Tucker* further illustrates the limited effect that the Supreme Court's holding in *Wiggins* has in the Fourth Circuit.[61] According to *Wiggins*, for ineffective performance to be found, trial counsel must have unreasonably limited the scope of their investigation in light of "prevailing professional norms."[62] However, unlike the United States Supreme Court in *Wiggins*, the Fourth Circuit made no reference to the "prevailing professional standards" in its review of Tucker's trial.[63] Instead, the Fourth Circuit only recounted the mitigation case that Tucker's trial counsel presented and deemed it adequate and thorough without a comparison with prevailing

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54. *Id.*

55. *Id.* The court also noted that Tucker's trial counsel did attempt to impeach Dr. Dunlap's testimony. *Id.* The court cited *Strickland* for the proposition that "the distorting effects of hindsight" should not be allowed to affect the review of trial counsel's performance. *Id.* (quoting *Strickland*, 466 U.S. at 689).

56. *Id.*

57. *Id.*

58. *Tucker*, 350 F.3d at 445.

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

60. 339 F.3d 203 (4th Cir. 2003).

61. *See Tucker*, 350 F.3d at 441 (finding mitigation case presented by defense counsel to be adequate and thorough); Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003) (finding that Byram's defense counsel's limited investigation into mitigating evidence was not unreasonable, and distinguishing the facts in *Wiggins*). For a complete discussion and analysis of *Byram*, *see generally* Terrence T. Egland, Case Note, 16 CAP. DEF. J. 133 (2003) (analyzing Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003)).

62. *Tucker*, 350 F.3d at 441 (citing *Wiggins*, 123 S. Ct. at 2536).

63. *Id.* at 441–42; *see Wiggins*, 123 S. Ct. at 2536 (finding that Wiggins's defense counsel's performance fell below the prevailing professional norms in Maryland).

professional norms.[64] A mitigation case consisting of only a four lay witnesses and one expert, a forensic psychologist, whose testimony was easily refuted by three experts for the prosecution, would not be adequate under Virginia's professional norms.[65] In 2002, Virginia designed a statutory standard for the representation of capital defendants through its development of Capital Defense Units ("CDU").[66] "The General Assembly has required that when a circuit judge appoints defense counsel to an indigent capital defendant, 'one of the attorneys appointed shall be from a capital defense unit maintained by the Public Defender Commission.'"[67] Each CDU employs a fact investigator and a mitigation specialist in order to mount the best possible mitigation case for each defendant it represents.[68] In addition, every Virginia capital defendant is entitled to a mitigation expert ("3:1 expert"), usually a forensic psychologist, under section 19.2-264.3:1.[69] Therefore, each capital defendant assigned a CDU attorney receives the benefit of a defense team comprised of two capital defense attorneys, a fact investigator, a 3:1 expert, and a mitigation specialist.[70] The Fourth Circuit has yet to adopt this standard for capital representation even though the United States Supreme Court has endorsed a similar model based on the American Bar Association guidelines for capital representation.[71]

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64. *Tucker*, 350 F.3d at 441–42.

65. *See id.* at 441 (noting that Tucker's trial counsel presented "five witnesses, including Tucker's wife, two vocational rehabilitation workers who knew Tucker, a widow whose husband Tucker had befriended while in prison, and Dr. Noelker" as mitigation witnesses during sentencing proceedings); *see also* Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 59–60 (2003) (discussing the prevailing professional norms in Virginia).

66. Payne, *supra* note 65, at 59; *see* VA. CODE ANN. § 19.2-163.2.10 (Michie Supp. 2003) (requiring the Public Defender Commission to "establish four regional capital defense units by the end of fiscal year 2004").

67. Payne, *supra* note 65, at 60 (quoting VA. CODE ANN. § 19.2-163.7 (Michie Supp. 2003)); *see* VA. CODE ANN. § 19.2-163.7 (requiring appointment of a CDU attorney in each Virginia capital case).

68. Payne, *supra* note 65, at 59.

69. *See* VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 2003) (providing for the appointment of "one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including . . . whether there are any other factors in mitigation").

70. Payne, *supra* note 65, at 59–60; *see* Affidavits of John B. Boatwright, III, Leonard R. Piotrowski, and Joseph A. Migliozzi, Jr, lead attorneys for the Central Virginia, Northern Virginia, and Southeastern Virginia Capital Defender Units, respectively (on file with the Virginia Capital Case Clearinghouse) (stating that the staff of each CDU consists of three capital defense attorneys, a fact investigator, and a mitigation specialist).

71. *See Wiggins*, 123 S. Ct. at 2537 (recognizing the American Bar Association standards for capital representation as a reasonable guide for professional norms). *See generally* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 4.1 (rev. ed. 2003) (detailing the minimum requirements for the appointment and performance for death penalty

B. *The Need for a Mitigation Specialist*

The *Tucker* court found it unconvincing that the two extra reports from Tucker's Utah juvenile records would have added anything to the mitigation case.[72] For a limited investigation into mitigating evidence to rise to the level of ineffective assistance under *Strickland*, a court must find that the mitigating effect of evidence not investigated or presented would have so bolstered the mitigation case that the defendant was prejudiced to such a degree that the outcome of the trial would have been different.[73] Relying on its conclusion that Dr. Noelker gave a full account of Tucker's childhood sexual and physical abuse, the court found that Tucker was not prejudiced by his defense counsel's failure to present the reports to Dr. Noelker before he testified and that the reports would have likely been redundant.[74]

The Fourth Circuit's conclusion emphasizes the importance of employing a mitigation specialist in *every* capital case.[75] The mitigation specialist can investigate, organize, and help present a much more compelling mitigation case than one forensic psychologist can acting alone.[76] Had a mitigation specialist been included on the defense team from the start, Tucker's background history would have been synthesized so as to include all relevant detail. Mitigation specialists can research information that provides rich detail for a defendant's mitigation case. In turn, this detail can provide the 3:1 mitigation expert with documentary and other materials to enhance the credibility of his testimony.[77] Dr. Noelker's testimony was clinical in nature and obviously not as convincing as it could have been with the inclusion of a mitigation specialist on the defense team.[78]

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defense and suggesting the appointment of two capital defense attorneys, a fact investigator, a forensic psychologist, and a mitigation expert).

72. *Tucker*, 350 F.3d at 442–43.

73. *Id.* at 442.

74. *Id.* at 442–43.

75. A mitigation *specialist*, employed to investigate and compile mitigating evidence, must be distinguished from a mitigation *expert*, mandated by section 19.2-264.3:1 and usually a forensic psychologist or other mental health expert. *See* Payne, *supra* note 65, at 45–48 (explaining the role of a mitigation specialist); VA. CODE ANN. § 19.2-264.3:1 (Michie Supp. 2003) (providing for the appointment of "one or more qualified mental health experts" to aid in presentation of mitigation evidence).

76. *See* Payne, *supra* note 65, at 44–45 (arguing that a mitigation specialist is needed and required on the defense team for all capital cases "[b]ecause no other member of the defense team has either the proper training or the experience to develop properly and investigate thoroughly all potential mitigating circumstances").

77. *See* VA. CODE ANN. § 19.2-264.3:1 (providing for the appointment of "one or more qualified mental health experts" to aid in the presentation of mitigation evidence).

78. *See Tucker*, 350 F.3d at 442 (recounting Dr. Noelker's testimony at trial in which he noted Tucker's childhood physical and sexual abuse and how the abuse resulted in Tucker's APD). The

C. *Investigation of Prosecution Expert*

It is also important to note that if the prosecution knew that Dr. Dunlap was on professional probation, a violation of *Brady v. Maryland*[79] would have occurred.[80] Under *Brady*, the prosecution is obligated to turn over all evidence in its possession which bears on the guilt or innocence of the defendant or on the determination of penalty.[81] Dr. Dunlap's probationary status could have been used to impeach his testimony and thus could have lessened the impact of the prosecution's rebuttal expert witnesses who cast doubt on the effect of APD on criminal behavior. It is important for defense counsel to realize that the prosecution could present witnesses who have professional records containing disciplinary actions against them. Defense counsel should investigate the professional backgrounds of key prosecution experts in order to ascertain if any disciplinary action can be used to impeach the witness. Defense counsel should also ask the prosecution to disclose the professional records of prosecution experts.[82] When the prosecution is lining up expert witnesses to refute defense witnesses, as in *Tucker*, this point becomes even more important. Defense counsel must do everything possible to lessen the impact of the parade of experts.

D. *Limited Value of Claiming Antisocial Personality Disorder*

Tucker also makes clear that the value of claiming that a defendant suffers from APD is limited.[83] The prosecution has the ability to present numerous experts willing to testify that APD is not a disease but merely a definition of behavior.[84] Without more, it appears that claiming APD is an ineffective mitigating factor and should be used as only one piece of a larger mitigation strategy.[85]

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excluded reports would have aided in refuting the prosecution's claim that Tucker's abuse allegations were fabricated. *Id.*

79. 373 U.S. 83 (1963).

80. Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that suppression of penalty evidence favorable to the defense violates the Due Process Clause of the Fourteenth Amendment); *see* U.S. CONST. amend. XIV, § 1 (stating in pertinent part that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law").

81. *Brady*, 373 U.S. at 86–87.

82. For a *Brady* motion requesting disclosure by the prosecution of records in its possession, please contact the Virginia Capital Case Clearinghouse at (540) 458-8557.

83. *See Tucker*, 350 F.3d at 443 (denying relief even though Tucker was subjected to physical and sexual "abuse [that], according to Dr. Noelker, resulted in the development of a personality disorder, which caused Tucker to engage in aggressive and violent behaviors").

84. *See id.* ("[T]he State's experts uniformly testified that antisocial personality disorder is merely descriptive and does not explain the cause for Tucker's criminal behavior.").

85. In fact, a diagnosis of APD has tended to support a finding of future dangerousness. *See* Williams v. Angelone, No. 98-28, 1999 WL 249026, at *2 (4th Cir. Apr. 28, 1999) (unpublished table decision) ("Because of [antisocial personality disorder's] aggravating nature, counsel elected not to

V. Conclusion

Tucker illustrates *Wiggins*'s minimal impact on ineffective assistance of counsel claims concerning limited mitigation investigations in the Fourth Circuit to date. In the Fourth Circuit, trial counsel's investigation must seem reasonable only to the court standing alone and not in comparison to prevailing professional norms as required by *Wiggins*. Further, *Tucker* illustrates the need to investigate prosecution expert witnesses for evidence that can be used to impeach their testimony.

Terrence T. Egland

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submit Dr. Zwemer's report into evidence or call him to testify."); Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir. 1997) ("The record indicates that these experts found no psychiatric or neurological disorders but found that Satcher had an antisocial personality disorder that might make him a 'future danger.'"). Again, this point emphasizes the need for a mitigation specialist who can explore all avenues of possible mitigating evidence. *See generally* Payne, *supra* note 65 (discussing the role and benefits of employing a mitigation specialist).