

# “THERE’S LESS IN THIS THAN MEETS THE EYE”: WHY WIGGINS DOESN’T FIX *STRICKLAND* AND WHAT THE COURT SHOULD DO INSTEAD

## INTRODUCTION

In *Strickland v. Washington*, the Supreme Court established the standard for determining when the United States Constitution’s Sixth Amendment requires a defendant’s death sentence to be set aside because counsel provided ineffective assistance.<sup>1</sup> The standard requires a defendant raising an ineffective-assistance-of-counsel claim to make a sufficient showing under a two-prong test.<sup>2</sup> First, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness”; this is difficult because the test requires judicial scrutiny of counsel’s representation to be “highly deferential.”<sup>3</sup> Second, “[t]he defendant must show that . . . but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>4</sup> The two prongs are referred to as the “performance prong” and the “prejudice prong,” respectively. The State of Florida executed David Leroy Washington, the *Strickland* appellant, because he failed to make a sufficient showing under this test.<sup>5</sup>

Criticism of *Strickland* appeared as soon as the ink of the opinion dried and continues today, two decades after the Supreme Court handed down the decision.<sup>6</sup> Justice Marshall provided the initial criticism of the case in his lone dissent.<sup>7</sup> He argued that the “reasonably effective” language “is so malleable that, in practice, it will either have no grip at all or will yield excessive variation” and that prejudice “may be impossible . . . to ascertain.”<sup>8</sup> In sum, Marshall thought that having ineffective counsel—

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1. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Sixth Amendment provides that defendants in criminal prosecutions “shall enjoy . . . the Assistance of Counsel.” U.S. CONST. amend. VI.

2. *Strickland*, 466 U.S. at 687.

3. *Id.* at 688, 689.

4. *Id.* at 694.

5. *See id.* at 698–701 (applying the test and denying appellant’s writ of habeas corpus).

6. *See, e.g.*, Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 441–42 (2004) (arguing that *Strickland* fails to assure indigent defendants even minimal effectiveness); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 50–52 (2002) (concluding that *Strickland* is partly to blame for shortcomings in the criminal defense system); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1272–81 (1986) (discussing how *Strickland* weakened the Sixth Amendment).

7. *Strickland*, 466 U.S. at 706–19 (Marshall, J., dissenting).

8. *Id.* at 707, 710.

without an additional showing of prejudice—was enough to constitute a violation of the Sixth Amendment.<sup>9</sup>

Today critics argue that *Strickland* creates a formidable barrier to the right to effective counsel and, as a result, too many defendants with legitimate claims of ineffectiveness are unsuccessful.<sup>10</sup> One scholar contends that the performance prong “requires little more than a ‘warm body with a law degree standing next to the defendant’ during trial.”<sup>11</sup> Others argue that *Strickland*’s high deference to counsel’s strategic choices allows appellate courts to view egregious errors as trial tactics.<sup>12</sup>

Criticism of *Strickland*, and of the application of the death penalty in general, has not fallen on deaf ears. In a speech given in 2001, Justice Sandra Day O’Connor revealed that her thoughts on attorney performance standards are changing due in part to her awareness of “[s]erious questions . . . being raised about whether the death penalty is being fairly administered in this country.”<sup>13</sup> Justice O’Connor expressed concern that “[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed.”<sup>14</sup> Furthermore, Justice O’Connor noted that due process questions plague capital cases, and often defendants with the most money get the best lawyers.<sup>15</sup> The solution she suggested is one that has circulated widely in the legal community: “it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”<sup>16</sup>

9. *Id.* at 711–12. “[A] showing that the performance of a defendant’s lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.” *Id.* at 712.

10. *E.g.*, ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 33 (1992). Garcia describes the *Strickland* test as an “insuperable threshold.” *Id.*

11. Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 77 (2002) (quoting Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999)).

12. *E.g.*, Fogelman, *supra* note 11, at 78.

13. *See* Editorial, *Justice O’Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16 (quoting Justice Sandra Day O’Connor’s speech).

14. *Id.*

15. *Id.* According to a reporter covering the speech:

She also decried the gap in legal defense available to those with money and those without. In Texas last year, she said, those who were represented by appointed defense attorneys were 28 percent more likely to be convicted than were those who had retained their own attorneys; if convicted, they also were 44 percent more likely to be sentenced to death.

Maria Elena Baca, *O’Connor Critical of Death Penalty*, MINNEAPOLIS STAR TRIB., July 3, 2001, at 1A.

16. Editorial, *supra* note 13.

Given her comments, it is not surprising that the Supreme Court recently took a stab at softening the formidable *Strickland* standard in *Wiggins v. Smith*.<sup>17</sup> In *Wiggins*, the Court applied the *Strickland* standard to a case with facts similar to *Strickland*'s but found for the defendant and reversed his death sentence—an opposite result.<sup>18</sup> Justice O'Connor wrote the majority opinion.<sup>19</sup> The case upheld the *Strickland* standard, but weakened it to the slight advantage of capital defendants.<sup>20</sup> Nevertheless, while *Wiggins* is a minor gain for defendants, it is no cause for celebration because it fails to address the vagueness of the performance prong and does nothing to mitigate the effects of prejudice prong. Thus, *Wiggins* fails to make a measurable impact in correcting the damage that *Strickland* has done to the right to effective assistance of counsel.<sup>21</sup> As Tallulah Bankhead once said, “[t]here’s less in this than meets the eye.”<sup>22</sup>

This Note suggests that if the Supreme Court is earnest about correcting the damage *Strickland* has done to the right to counsel, it would abandon efforts—such as *Wiggins*—to weaken *Strickland* and would adopt a different test altogether. Furthermore, this Note suggests that the Court should begin its search for a better test by looking to Judge Robert S. Vance’s opinion in *Washington v. Strickland*<sup>23</sup> and another pre-*Strickland* circuit court test in *Coles v. Peyton*.<sup>24</sup> Part I of this Note traces the development of the right to effective assistance of counsel from colonial America to the modern era of judicial development of the right. Part II

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17. *Wiggins v. Smith*, 539 U.S. 510 (2003). *Wiggins* was not the first recent Supreme Court case to examine *Strickland*; in 2000, the Court considered the question of when a failure to investigate and present mitigating evidence at a capital trial constitutes ineffective assistance of counsel. See *Williams v. Taylor*, 529 U.S. 362, 398–99 (2000) (holding that a denial of effective assistance of counsel is established when counsel fails to investigate and present mitigating evidence during sentencing). For a discussion of *Williams*, see Donald J. Hall, *Effectiveness of Counsel in Death Penalty Cases*, 42 BRANDEIS L.J. 225, 227–30 (2004).

18. Compare *Wiggins*, 539 U.S. at 334–38 (reversing a death sentence because an attorney who fails to present mitigating evidence provides ineffective assistance of counsel), with *Strickland*, 466 U.S. at 699 (upholding a death sentence because failure of an attorney to investigate mitigating evidence was a reasonable strategy decision, therefore assistance of counsel was not ineffective).

19. *Wiggins*, 539 U.S. at 514. O’Connor also wrote the majority opinion in *Strickland*. *Strickland*, 466 U.S. at 671.

20. See discussion *infra* Part III.B.

21. See discussion *infra* Part III.C.

22. Quotation by Tallulah Bankhead (1952), in THE BEACON BOOK OF QUOTATIONS BY WOMEN, at 70 (Rosalie Maggio comp., 1992).

23. *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982). Congress split the Fifth Circuit in 1981. Unit B of the Fifth Circuit became the Eleventh Circuit, hearing cases from Georgia, Florida, and Alabama. Therefore, in the text of this Note I refer to *Washington v. Strickland* as a decision of the Eleventh Circuit. For a history of the Eleventh Circuit Court of Appeals, see the Court’s website at <http://www.ca11.uscourts.gov/about/appealshistory.php> (last visited Mar. 10, 2005).

24. *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968).

examines the facts and holding of *Washington v. Strickland*, where Judge Vance laid out the Eleventh Circuit's standard for ineffective assistance of counsel, and *Strickland v. Washington*, where the Supreme Court reviewed and reversed the Eleventh Circuit. Part III examines the facts and holding of *Wiggins v. Smith* and explains how *Wiggins* weakens *Strickland* to the slight advantage of capital defendants but does not positively affect most defendants. Part IV suggests how the Supreme Court should use Judge Vance's original decision, as well as *Coles v. Peyton*, to correct the damage *Strickland* has caused to the right to counsel.

#### I. SLOPES AND PLATEAUS: THE DEVELOPMENT OF THE RIGHT TO COUNSEL IN CAPITAL CASES

The late David L. Bazelon, former Chief Judge of the U. S. Court of Appeals for the District of Columbia Circuit, saw “[t]he history of the application of the sixth amendment [right to counsel] . . . [as] one of tiny steps forward followed by long periods without any movement.”<sup>25</sup> He likened these steps and motionless periods to plateaus.<sup>26</sup> In his analogy, expansions in the Supreme Court's application of the Sixth Amendment are steps forward—these forward steps are analogous to a plateau's escarpments or slopes.<sup>27</sup> The long periods without movement are times when law-making bodies ruminated about the right to counsel, but did not expand it—these periods are the plateaus.<sup>28</sup>

Using this analogy, the right to counsel first came ashore in colonial America and ascended its first slope to its first plateau, an expansion marked by the ratification of the Sixth Amendment, in 1791.<sup>29</sup> This first plateau lasted until 1932. Then, in *Powell v. Alabama*, the Supreme Court held that, in capital cases, “defendants are entitled to ‘effective and substantial aid’ from counsel.”<sup>30</sup> Thus, the right to counsel climbed another slope. A second plateau followed as lower courts struggled to define effective aid; most courts determined that attorneys fail to provide effective

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25. David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 818 (1976).

26. *Id.* at 818–19.

27. An escarpment is a “steep slope separating two comparatively level or more gently sloping surfaces.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 775 (3d ed. 1971). Although Judge Bazelon did not use the words “escarpment” or “slope” to describe the steps forward, I expand his analogy for clarity's sake.

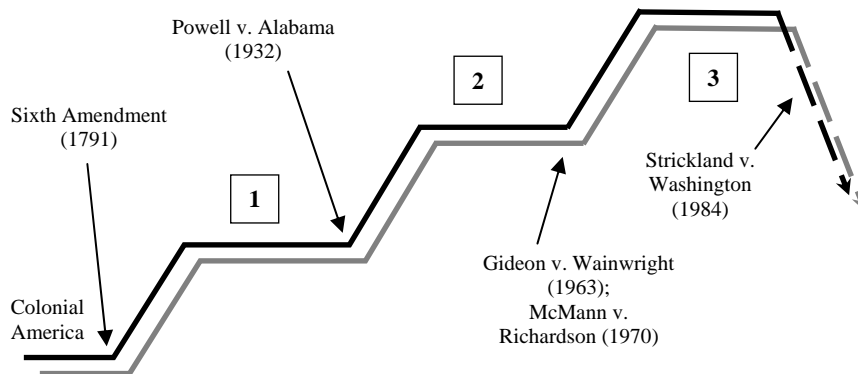
28. See Bazelon, *supra* note 25, at 818–19 (discussing the slow movement of the courts to expand the right to effective counsel).

29. See discussion *infra* Part I.A (discussing the early development of the right to counsel). Bazelon leaves out the colonial history of the right to counsel from his plateau analogy, but I include it because it provides a sea-level starting point.

30. See Bazelon, *supra* note 25, at 819 (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932)).

aid “only when the [resulting] trial was a farce, or a mockery of justice . . . .”<sup>31</sup>

In 1970, the right to counsel climbed its third slope when the Supreme Court held, in *McMann v. Richardson*, that the Sixth Amendment gives criminal defendants the “right to the effective assistance of counsel.”<sup>32</sup> In response to *McMann*, lower courts dropped “farce and mockery” language in favor of “reasonably effective assistance” language.<sup>33</sup> While the end of the “farce and mockery” standard was a gain for defendants, it hastened an era of circuit court disarray that ultimately led the Supreme Court to reexamine the right to effective counsel. Unfortunately for defendants, the Court’s reexamination resulted in *Strickland v. Washington*, a case that sent the right to counsel tumbling downward.



#### A. To the First Plateau: Early Legislative History

American legislative bodies have long recognized a right to counsel in capital cases. Although early Puritan colonies originally prohibited any representation by counsel,<sup>34</sup> it was not long before most colonies allowed

31. *Id.* (quoting *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965)).

32. *McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970).

33. *Strickland*, 466 U.S. at 683. “In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the ‘reasonably effective assistance’ standard in one formulation or another.” *Id.*

34. Early Puritan colonists expanded the English practice of denying counsel to accused felons by denying counsel to everyone, in both civil and criminal cases, because Puritans feared “that lawyers would use their technical skills to find loopholes in the laws and defeat the ends of justice.” EDGAR J. MCMANUS, *LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620–1692*, at 94–95 (1993). The English practice of denying counsel to accused felons may have

criminal defendants to be represented by counsel. By 1641, for example, the Massachusetts settlement authorized counsel by unpaid attorneys in Article 26 of *The Body of Liberties*, the settlement's code.<sup>35</sup> And "as early as 1701, the Penn Charter (Art. V) declared that 'all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors.'"<sup>36</sup> A Pennsylvania statute enacted under the Charter provided "that in capital cases learned counsel should be assigned to the prisoners."<sup>37</sup> By the start of the Revolutionary War, several colonial legislatures had enacted laws requiring the appointment of counsel in capital cases.<sup>38</sup> After the Revolution, it was not long before the new federal government registered its thoughts on the matter: in 1790, the First Congress passed a law requiring the appointment of counsel in federal capital cases.<sup>39</sup>

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begun as early as the reign of Henry I, and may have totally prohibited all aid of counsel to felons, but scholars debate these assertions. See Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1018–19 (1964) (arguing that the common interpretation of a passage in *Leges Henrici Primi*, which suggests that felons were totally denied counsel as early as 1115, involves a misunderstanding of the Latin word *consilium*). Regardless, by medieval times, English law denied accused felons the assistance of counsel for arguing matters of fact, but permitted counsel to argue matters of law. See *id.* at 1022–23, 1023 n.129 (noting that contemporaries praised this rule because defendants know the facts of their case better than counsel). While it may seem that the fact–law rule was a favorable improvement over an absolute ban of counsel for defendants in capital cases, in reality "the fact–law distinction became a method for forcing men on trial for their lives to stand alone against the state." *Id.* at 1025. The rule's heavy burden on defendants became evident during England's seventeenth-century treason trials. *Id.* at 1025–26. As a result, Parliament passed a law in 1695 permitting assistance of counsel for people accused of treason in both matters of fact and law. *Id.* at 1027. However, Parliament did not grant the right to counsel to all felons until 1836. *Powell*, 287 U.S. at 60.

35. MCMANUS, *supra* note 34, at 95. Seven years later, an amended code allowed the use of paid attorneys. *Id.* The text of Article 26 can be found online thanks to the people at Hanover College's Hanover Historical Texts Project:

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.

THE MASSACHUSETTS BODY OF LIBERTIES, art. 26 (1641), available at <http://history.hanover.edu/texts/masslib.htm> (last visited Feb. 8, 2005).

36. *Powell*, 287 U.S. at 61.

37. *Id.*

38. See Comment, *supra* note 34, at 1030 (noting that by 1777, Connecticut, Pennsylvania, Delaware, South Carolina, and perhaps New York required the appointment of counsel in felony cases).

39. The text of the law appears as follows:

[E]very person so accused and indicted for any of the crimes aforesaid, shall . . . be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall . . . [be] required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire . . .

1 Stat. 118 (1790).

Ultimately, the right to counsel achieved constitutional stature. In late 1791, Congress ratified the Sixth Amendment of the United States Constitution<sup>40</sup> and provided that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>41</sup> Congress intended the amendment to assure that counsel would not be denied to criminal defendants as it had been in seventeenth-century English capital treason trials.<sup>42</sup> After the Civil War, Congress amended the Constitution by adding the Fourteenth Amendment which provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>43</sup> In the context of the Sixth Amendment right to counsel, the Due Process Clause requires states to abide by all procedures essential to fundamental fairness in assistance of counsel issues.<sup>44</sup>

*B. From the First Plateau to the Second: Powell v. Alabama*

Despite a lengthy legislative history and the right to counsel’s constitutional stature, the American judiciary did not directly address the right to counsel in capital (or non-capital) cases until 1932.<sup>45</sup> Then, 141 years after the Sixth Amendment’s ratification, the Supreme Court heard the infamous *Powell v. Alabama*, and decided it on Sixth and Fourteenth Amendment grounds.<sup>46</sup> More popularly known as the Scottsboro trial,<sup>47</sup> the facts that gave rise to *Powell* are murky: a fight broke out between a group of black boys and a group of white boys on a train passing through Alabama.<sup>48</sup> All but one of the white boys, but not the two white girls

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40. Comment, *supra* note 34, at 1031.

41. U.S. CONST. amend. VI.

42. Comment, *supra* note 34, at 1031; *see also supra* text accompanying note 34.

43. U.S. CONST. amend. XIV.

44. *See* JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 21–22 (2002) (describing the adoption of the Fourteenth Amendment as “a watershed event” in the development of the right to counsel because it “furnished a predicate that the Court would later rely upon to extend the right to counsel to legions of defendants facing criminal accusations in state courts”).

45. *See* Comment, *supra* note 34, at 1031 n.181 (discussing how three nineteenth-century Supreme Court cases briefly refer to the right to counsel).

46. *See Powell v. Alabama*, 287 U.S. 45, 66–71 (1932) (holding that the Sixth Amendment right to counsel in a capital case is a fundamental right guaranteed by the Fourteenth Amendment’s Due Process Clause).

47. That this first important right to counsel case gets its popular name from Scottsboro, Alabama, the city where it was tried, should be noted. Alabama has been the setting for several important right-to-counsel cases. *See, e.g., Avery v. Alabama*, 308 U.S. 444, 446 (1940) (noting that the Constitution’s guarantee of assistance of counsel requires appointed counsel to prepare a proper defense).

48. *Powell*, 287 U.S. at 50–51.

traveling with them, were thrown off the train.<sup>49</sup> Before the train reached Scottsboro station, a sheriff's posse took the black boys into custody and brought them, along with the two girls, to Scottsboro.<sup>50</sup> There, the white girls accused the black boys of raping them.<sup>51</sup>

At their indictment and arraignment for rape,<sup>52</sup> a capital offense in Alabama at the time, the judge appointed "all the members of the bar for the purpose of arraigning" and representing the boys at trial "if no counsel appears."<sup>53</sup> This strange, expansive appointment apparently led to confusion over who exactly was to prepare the defense<sup>54</sup> and, as a result, no one prepared for the trials on behalf of the boys.<sup>55</sup> Six days after the arraignment, the boys were brought to trial.<sup>56</sup> At the start of the first trial, Milo Moody, the only local bar member interested in the \$100 fee customarily given to lawyers appointed to capital cases, agreed to defend the boys.<sup>57</sup> In addition, Stephen R. Roddy, a lawyer from Chattanooga, Tennessee, announced that he was asked by "people who are interested" in the boys to assist local counsel in the case.<sup>58</sup> Thus, the trials began and ended with Moody and Roddy defending all nine boys. As the guilty verdicts came in, the courtroom crowd cheered.<sup>59</sup> The boys were sentenced to death.<sup>60</sup>

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49. *Id.* at 51.

50. *Id.*; see also Gerald F. Uelmen, 2001: *A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 LAW & CONTEMP. PROBS. 13, 15 (1995).

51. *Id.* One of the girls, Ruby Bates, later recanted and became an outspoken advocate for the boys. JAMES GOODMAN, *STORIES OF SCOTTSBORO* 198 (1994). In an address at the Union Baptist Church in Baltimore in May 1933, she told a crowd of five thousand:

I want to tell you that the Scottsboro boys were framed by the bosses of the south and two girls. I was one of the girls and I want you to know that I am sorry. . . . Those boys did not attack me . . . and now I am willing to join hands with black and white to get them free.

*Id.*

52. The state indicted and arraigned the boys on the same day. *Powell*, 287 U.S. at 49.

53. *Id.* at 53.

54. See *id.* at 56-57 ("[T]his action of the trial judge in respect of appointment of counsel . . . impos[ed] no substantial or definite obligation upon any one . . .").

55. See *id.* at 57 ("[U]ntil the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense . . .").

56. *Id.* at 53.

57. Uelmen, *supra* note 50, at 15.

58. *Powell*, 287 U.S. at 55.

59. Uelmen, *supra* note 50, at 16.

60. *Id.*



The fact that Moody and Roddy had no time to prepare for the trials<sup>61</sup> gave rise to the Scottsboro boys' claim that Alabama had violated their Fourteenth Amendment rights to due process by substantially denying their Sixth Amendment right to the assistance of counsel.<sup>62</sup> The Supreme Court agreed, concluding that "during perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense . . ." <sup>63</sup> Although the holding of *Powell v. Alabama* is limited to the rule that defendants in state capital prosecutions have a right to retain counsel or have one appointed to them,<sup>64</sup> the justices' concern that the defense team complete a "thoroughgoing investigation" of the case foreshadowed developments in later ineffective-assistance-of-counsel cases.<sup>65</sup>

*C. From the Second Plateau to the Third: Post-Powell Creation of Effective Assistance of Counsel*

While the *Powell* Court undoubtedly expanded the rights of capital defendants, it was not until the judiciary recognized that defendants are entitled to *effective* assistance of counsel that the right to counsel began to offer a semblance of real protection to defendants.<sup>66</sup> But this expansion

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61. Uelmen points out that *Powell v. Alabama* is not a "denial of counsel case" but a "denial of competent counsel" case. *Id.* Besides the lack of trial preparation, Uelmen points out that Roddy was "well fortified with spirits" during the trial. *Id.* at 15–16. *Powell* also provided the Court an opportunity—which it did not take—to examine the issue of conflict of interest; the attorney representing Alabama on the boys' direct appeal to the Alabama Supreme Court, Thomas E. Knight, Jr., was the son of one of the state supreme court's justices. *Id.* at 16.

62. See *Powell*, 287 U.S. at 52 (limiting the question in the case to "whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment").

63. *Id.* at 57.

64. See TOMKOVICZ, *supra* note 44, at 35.

65. See, e.g., *Strickland*, 466 U.S. at 691 (holding that defense counsel has a duty to reasonably investigate or to make reasonable decisions that make an investigation unnecessary). Furthermore, the *Powell* Court noted that the duty to appoint counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell*, 287 U.S. at 71.

66. History bears this out: having an ineffective attorney is often as bad as—and sometimes worse than—having no lawyer at all. For example, defendants in the Massachusetts settlement were arguably better off without lawyers because colonists distrusted lawyers, and defendants who consulted attorneys risked irking magistrates. MCMANUS, *supra* note 34, at 95. And, the Scottsboro trials were plagued by effective-assistance-of-counsel problems: one lawyer appointed to defend the boys was drunk at trial. See *supra* note 61 and accompanying text. Furthermore, colonial lawyers were not necessarily trained in law. MCMANUS, *supra* note 34, at 95. Perhaps the 1718 Pennsylvania statute requiring "learned counsel" be assigned to defendants was enacted to address a problem of untrained,

developed slowly and the right to counsel remained on the second plateau for several decades.<sup>67</sup> In the years following *Powell*, the Supreme Court continued to hint that the Constitution requires the effective assistance of counsel but did not directly address how lower courts should determine effectiveness.<sup>68</sup> For example, in *Avery v. Alabama*, a capital case on appeal from the Alabama Supreme Court, the Court affirmed the state's decision denying the defendant a continuance despite the fact that his lawyers had only one day to prepare for his capital trial.<sup>69</sup> The Court noted that the Constitution's guarantee of assistance of counsel requires appointed counsel to have an opportunity to prepare a defense, but it did not articulate what would amount to an adequate opportunity.<sup>70</sup>

Left without specific guidance from the post-*Powell* Supreme Court, lower courts established their own standards of effectiveness.<sup>71</sup> And because the *Powell* Court did not explicitly hold that the Sixth Amendment provides capital defendants with a right to *effective* counsel, lower courts looked to the Fifth Amendment's Due Process Clause for a basis for these standards.<sup>72</sup> In 1945, the D.C. Circuit was the first court to develop a standard under this framework. In *Diggs v. Welch*, the court held that a state violated the Fifth Amendment's Due Process Clause only "where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice."<sup>73</sup> The Supreme

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and ineffective, counsel. *Powell*, 287 U.S. at 61.

67. For a well-researched case history of the development of the right to effective assistance of counsel, see Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 465-470 (1996) (arguing that courts should not apply the *Strickland* prejudice requirement to cases where the effectiveness of drunk and sleeping lawyers is at issue and proposing a separate standard to apply in those cases).

68. See *Glasser v. United States*, 315 U.S. 60, 70 (1942) ("[T]he failure of [a] court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law . . ."); *Avery v. Alabama*, 308 U.S. 444, 446, 452-53 (1940) (noting that the Constitution's guarantee of assistance of counsel requires appointed counsel to prepare a proper defense, but affirming an Alabama Supreme Court decision denying a capital defendant a continuance despite his trial lawyers' claims that they did not have enough time to prepare a defense).

69. *Avery*, 308 U.S. at 447-48.

70. *Id.* at 445-46.

71. See Kirchmeier, *supra* note 67, at 431-32 (citing various courts' standards); see also Steven H. Goldblatt, *Ineffective Assistance of Counsel: Attempts to Establish Minimum Standards*, in THE DEFENSE COUNSEL 221, 225-34 (William F. McDonald ed., 1983) (describing the slow development of effective-assistance-of-counsel standards in circuit courts after 1945).

72. Kirchmeier, *supra* note 67, at 431. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

73. *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945).

Court denied a writ of certiorari in the case,<sup>74</sup> and by 1970 most circuits had adopted the “farce and mockery” standard.<sup>75</sup>

Application of the “farce and mockery” standard proved to be disastrous for defendants. In *United States v. Katz*, for example, Judge Friendly of the U.S. Court of Appeals for the Second Circuit found that the performance of Murry Boxer, Esq., a court-appointed lawyer, was not ineffective and did not violate his client’s right to a fair trial.<sup>76</sup> Neither Boxer’s statements to the trial judge that he did not want to be involved in the case and was “just doing a duty,” nor the fact that he fell asleep during trial, concerned Judge Friendly.<sup>77</sup> “Much as we deplore such methods,” the friendly judge wrote in reference to Boxer’s complaining and dozing off, “Mr. Boxer was not the first attorney to use them and doubtless will not be the last.”<sup>78</sup>

While the complaining-and-sleeping-through-trial method of representation seems to have lasted, the “farce and mockery” standard did not. In 1960, Judge Wisdom of the U.S. Court of Appeals for the Fifth Circuit—which Congress later divided to create the new Fifth and Eleventh Circuits<sup>79</sup>—wisely replaced the standard in his circuit with a standard less plainly biased against defendants. In *MacKenna v. Ellis*, Judge Wisdom wrote: “We interpret the right to counsel . . . to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.”<sup>80</sup> Judge Wisdom reversed a camera thief’s eight-year jail sentence and remanded the case for a new trial in *MacKenna* because the thief’s attorneys were recent law school graduates, still wet behind the ears.<sup>81</sup> Despite having gone to “good law schools,” the newly-minted attorneys failed to object to the trial judge’s decision to move their client’s trial up a few days, failed to file a continuance, and failed to interview key witnesses.<sup>82</sup>

Even with the “farce and mockery” standard’s disastrous results, other circuits kept the standard active for years after the Fifth Circuit dropped it.

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74. *Diggs v. Welch*, 325 U.S. 889 (1945).

75. See Kirchmeier, *supra* note 67, at 431 n.31 (providing a timeline with case citations noting the years circuits adopted the D.C. Circuit’s 1945 “farce and mockery” standard: 1948 (Seventh Circuit); 1958 (Eighth Circuit); 1959 (Fourth Circuit, Ninth Circuit); 1961 (Third Circuit, Sixth Circuit); 1962 (Tenth Circuit); 1965 (Fifth Circuit); 1970 (First Circuit)).

76. *United States v. Katz*, 425 F.2d 928, 930–31 (2d Cir. 1970).

77. *Id.* at 931.

78. *Id.*

79. See *supra* note 23.

80. *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960).

81. *Id.* at 604–05.

82. *Id.* at 600–01.

In fact, it was not until the Supreme Court decided *Gideon v. Wainwright*<sup>83</sup> and *McMann v. Richardson*<sup>84</sup> that other circuits reconsidered “farce and mockery.”<sup>85</sup> In *Gideon*, the Supreme Court shifted the focus of right-to-counsel cases from the due process language of the Fifth Amendment back to the right-to-counsel language of the Sixth Amendment.<sup>86</sup> In *McMann*, the Court noted that the Sixth Amendment right to counsel specifically contemplates the “effective assistance of counsel” and suggested lower courts protect criminal defendants from receiving ineffective counsel by maintaining proper standards of attorney performance.<sup>87</sup>

The *Gideon* and *McMann* decisions sounded the death knell for the defendant-unfriendly “farce and mockery” standard and opened the door for lower courts to create new standards of effective counsel, thus bringing the right to counsel to its third—and highest—plateau.<sup>88</sup> Immediately after *McMann*, the U.S. Court of Appeals for the Third Circuit abandoned “farce and mockery” in favor of requiring counsel to act with “normal competency.”<sup>89</sup> Three years later, the D.C. Circuit ruled that defendants are “entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.”<sup>90</sup> In 1975, the U.S. Court of Appeals for the Seventh Circuit adopted language requiring counsel to provide a “minimum standard of professional representation.”<sup>91</sup> Other circuits followed, using their own unique phrasing.<sup>92</sup> In 1983, the Second Circuit

83. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

84. *McMann v. Richardson*, 397 U.S. 759 (1970).

85. See Kirchmeier, *supra* note 67, at 432 nn.34–37 (providing a timeline with case citations noting the years circuits abandoned their “farce and mockery” standards: 1960 (Fifth Circuit); 1970 (Third Circuit); 1973 (D.C. Circuit); 1974 (Sixth Circuit); 1975 (Seventh Circuit); 1976 (Eighth Circuit); 1977 (Fourth Circuit); 1978 (First Circuit, Ninth Circuit); 1980 (Tenth Circuit); 1983 (Second Circuit, Eleventh Circuit)).

86. See *Gideon*, 372 U.S. at 339–45 (framing the right to counsel issue within the Sixth Amendment).

87. *McMann*, 397 U.S. at 771 & n.14.

88. Although the new standards seem more defendant-friendly than “farce and mockery,” David Bazelon, a former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, saw “little difference between the old and the new standards.” Goldblatt, *supra* note 71, at 229–30. While the “reasonable counsel” standard “appears to mark an improvement, there is, in Dorothy Parker’s phrase, ‘less here than meets the eye’; the new test is built on words like ‘customary’ or ‘reasonable,’ which are themselves empty vessels into which content must be poured.” Bazelon, *supra* note 25, at 820. For the record, it was Alabama-native Tallulah Bankhead that coined the phrase, “There’s less in this than meets the eye.” See Quotation by Tallulah Bankhead, *supra* note 22.

89. Kirchmeier, *supra* note 67, at 432 (citing *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970) (en banc)).

90. *Id.* (citing *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973)).

91. *Id.* n.37 (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1975) *cert. denied*, 423 U.S. 876 (1975)).

92. See *supra* note 71 and accompanying text.

became the last circuit to scrap “farce and mockery,” replacing it with “reasonably competent assistance.”<sup>93</sup>

Along with the abandonment of “farce and mockery” language, the third plateau saw the rise of “prejudice rules.”<sup>94</sup> Circuits began requiring a defendant to show not only that his attorney was ineffective, but also that the ineffectiveness harmed the defendant.<sup>95</sup> Unlike their relative agreement on the “reasonably effective assistance” language, circuits disagreed on the level of prejudice the defendant should be required to show, and on other aspects of the prejudice rule.<sup>96</sup> The U.S. Court of Appeals for the Fourth Circuit, for example, placed the burden on the state to show *lack* of prejudice.<sup>97</sup> The Third Circuit did not require a showing of prejudice at all, but did note that prejudice is “evidentiary on the issue.”<sup>98</sup> In *Washington v. Strickland*, the Eleventh Circuit adopted a prejudice rule requiring defendants to show that their counsel’s errors “resulted in actual and substantial disadvantage to the course of [their] defense.”<sup>99</sup> If a defendant could prove prejudice sufficient to meet this standard, the Eleventh Circuit required its lower courts to reverse the judgment against the defendant, unless the state could show that the “error that did occur was harmless beyond a reasonable doubt.”<sup>100</sup>

By the time the Eleventh Circuit decided *Washington v. Strickland*, the right to counsel had ascended to its highest plateau—the third plateau. The Supreme Court’s recognition in *McMann* that defendants are entitled to the right to *effective* assistance of counsel heralded the Court’s arrival at the third plateau and benefited capital defendants. Regrettably, the third plateau was the zenith for the right to effective assistance of counsel.

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93. See Kirchmeier, *supra* note 67, at 432 n.39 (citing *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983)). Unlike the other circuits, the Second Circuit admitted dropping its “farce and mockery” standard to improve the quality of representation in federal courts. *Trapnell*, 725 F.2d at 155.

94. See Goldblatt, *supra* note 71, at 229 (noting a difference between a “prejudice rule” and “the automatic reversal rule” (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1340 (9th Cir. 1978) (Hufstедler, J., dissenting))).

95. Goldblatt, *supra* note 71, at 228–29.

96. Kirchmeier, *supra* note 67, at 433.

97. *Id.* at 433 n.47 (citing *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).

98. Goldblatt, *supra* note 71, at 229 (quoting *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970)).

99. *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. Unit B 1982); see *supra* note 23.

100. *Washington*, 693 F.2d at 1262.

## II. THE RIGHT TO COUNSEL TUMBLES DOWNWARD:

*STRICKLAND V. WASHINGTON*

Disagreement among the circuits on the weight and extent of the prejudice rule, and the fact that the Supreme Court had never directly decided whether the “reasonably effective assistance” standard was the proper standard, prompted the Supreme Court “to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel.”<sup>101</sup> Unfortunately for defendants, the Court’s reexamination resulted in *Strickland v. Washington*, a case that sent the right to counsel tumbling downward.

## A. Washington v. Strickland

Before reaching the Supreme Court, the Eleventh Circuit Court of Appeals heard *Strickland* en banc as *Washington v. Strickland*.<sup>102</sup> The case ultimately resulted in the execution of David Leroy Washington.

## 1. The Crime

David Leroy Washington committed *very* bad crimes. In September 1976, Washington went on a ten-day crime spree, committing “three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft.”<sup>103</sup> The spree began with the stabbing death of a minister, Daniel Pridgen.<sup>104</sup> According to their plan, Washington and an accomplice induced Pridgen to have sex, waited until he undressed, and then stabbed the minister to death.<sup>105</sup> Afterwards, Washington and his partner searched Pridgen’s apartment for money, painted slogans on Pridgen’s walls to suggest a gay lover murdered Pridgen, and stole his car.<sup>106</sup>

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101. *Strickland v. Washington*, 466 U.S. 668, 683–84 (1984).

102. *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc) *rev’d*, *Strickland v. Washington*, 466 U.S. 668, 701 (1984).

103. *Strickland*, 466 U.S. at 672.

104. *Washington*, 693 F.2d at 1247. The Court calls the victim “David Pridgen,” but most sources agree his first name was “Daniel.” *E.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, *Strickland v. Washington*, 466 U.S. 668 (1984) (No. 82-1554), available at <http://www.usdoj.gov/osg/briefs/1983/sg830192.txt> (Aug. 1983) [hereinafter Brief for the United States].

105. Brief for the United States, *supra* note 104.

106. *Id.*

Three days later, the duo broke into Mrs. Katrina Birk's house, tied up Birk and her three elderly sisters-in-law, and shot and stabbed each of them, killing Birk and blinding one sister-in-law.<sup>107</sup> Another sister-in-law "remained unconscious for over a year before she died" from her stab wounds.<sup>108</sup> Six days after Birk's murder, Washington "kidnapped Frank Meli, a twenty-year-old college student."<sup>109</sup> With the help of two accomplices, Washington tied Meli to a bed, sold Meli's car, and forced Meli to call his parents and ask for a ransom.<sup>110</sup> After three days, Washington stabbed Meli to death.<sup>111</sup> Washington never collected the ransom money, but used the proceeds of the sale of Meli's car to enjoy a day at the dog track.<sup>112</sup>

## 2. The Attorney, Plea, and Sentencing

After the police arrested David Leroy Washington's two accomplices in Meli's kidnapping and murder, Washington surrendered and confessed to the Meli crimes.<sup>113</sup> The State of Florida indicted Washington and appointed William Tunkey, "an experienced criminal lawyer," to defend him.<sup>114</sup> Against Tunkey's advice, Washington confessed to the Pridgen and Birk murders and pleaded guilty to all the charges against him before Judge Richard Fuller.<sup>115</sup> Also against Tunkey's advice, Washington waived his right to a jury for the sentencing phase of the trial.<sup>116</sup>

At Washington's sentencing hearing, Tunkey argued that his client should be spared death because Washington "was fundamentally a good person who had briefly gone badly wrong."<sup>117</sup> Tunkey noted that Washington did not have a "significant prior criminal record,"<sup>118</sup> and he committed the crimes because he was under the stress of having a new baby and no job.<sup>119</sup> He argued that Washington should be spared death because he had "surrendered, confessed, and offered to testify" against one of his

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107. *Washington*, 693 F.2d at 1247; Brief for the United States, *supra* note 104.

108. *Washington*, 693 F.2d at 1247 n.1.

109. *Id.* at 1247.

110. Brief for the United States, *supra* note 104.

111. *Id.*

112. *Id.*

113. *Washington*, 693 F.2d at 1247.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Strickland v. Washington*, 466 U.S. 668, 674 (1984).

118. *Washington*, 693 F.2d at 1247.

119. Brief for the United States, *supra* note 104.

accomplices.<sup>120</sup> In sum, Tunkey relied on the argument that Washington was sorry and cooperative.<sup>121</sup> Judge Fuller, unconvinced that Washington was “fundamentally a good person who had briefly gone badly wrong,” sentenced him to death.<sup>122</sup> To the judge, the aggravating factors in the case “clearly far outweigh[ed]” the mitigating factors presented by Tunkey.<sup>123</sup>

### 3. The Appeals at the State Level

On direct appeal, a Florida appellate court upheld David Leroy Washington’s death sentence.<sup>124</sup> Washington, represented by new counsel, sought post-conviction relief in state court.<sup>125</sup> In support of their motion, the attorneys attached fourteen affidavits from people willing to testify on Washington’s behalf, if Tunkey had asked them.<sup>126</sup> In addition, the attorneys attached two psychiatric reports indicating that Washington was in fact suffering from mental illness when he committed the murders.<sup>127</sup> The court denied Washington’s motion because he failed to meet Florida’s ineffective-assistance-of-counsel standard.<sup>128</sup> On appeal to the Florida Supreme Court, Washington’s lawyers again argued that their client’s death sentence should be overturned because Tunkey failed to investigate character evidence about Washington that might have been used as

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120. *Strickland*, 466 U.S. at 674.

121. *See Washington*, 693 F.2d at 1247 (noting counsel’s argument that Washington displayed “evident remorse”).

122. *Id.* at 1247.

123. *Strickland*, 466 U.S. at 674.

124. *Washington*, 693 F.2d at 1247.

125. *Id.* at 1247.

126. *Id.* at 1247–48.

127. *See id.* at 1248 (describing Washington’s depression and chronic frustration.).

128. *Id.* Florida’s ineffective-assistance-of-counsel standard was stricter than most standards at the time. In Florida, “a defendant [had] to prove that his attorney’s failure was a ‘substantial and serious deficiency measurably below that of competent counsel,’ and that the failure caused ‘prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.’” *Id.* (quoting *Knight v. State*, 394 So. 2d 997, 1001 (Fla. 1981)).



mitigating evidence before Judge Fuller.<sup>129</sup> Again, Florida denied David Leroy Washington relief.<sup>130</sup>

#### 4. The Panel Decision of the Eleventh Circuit

Finding no relief in the state courts, David Leroy Washington's post-conviction attorneys sought habeas corpus relief in the U.S. District Court for the Southern District of Florida.<sup>131</sup> Again Washington's lawyers argued that Tunkey's preparation for the sentencing trial constituted ineffective assistance of counsel.<sup>132</sup> To refute Washington's claim, the State called Judge Fuller to testify; the judge testified that the evidence in Washington's affidavits and doctors' reports would not have altered his decision to sentence Washington to death.<sup>133</sup> The district court found that Judge Fuller's testimony demonstrated that Tunkey's failure to seek character witnesses did not prejudice the outcome of Washington's sentencing hearing.<sup>134</sup>

Once again, Washington appealed; this time to a three-judge panel of the Eleventh Circuit.<sup>135</sup> The panel—which included Judge Vance—remanded the case, directing the district court to reevaluate Washington's sentence under a new standard of ineffective assistance of counsel.<sup>136</sup> First, the panel held that the lower court should review Washington's claim “without regard to the prejudicial effect that may have resulted from [Tunkey's] errors.”<sup>137</sup> Second, the panel directed the lower court to grant relief if Washington proves that but for Tunkey's errors, his trial would have been altered in his favor, “and the state fails to prove that the error was

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129. *Washington v. State*, 397 So. 2d 285, 286 (Fla. 1978). The court states:

Appellant raises a broadside of challenges to his sentence, of which the most critical is his claim of ineffective assistance of trial counsel because his attorney (1) failed to seek a continuance after the guilty plea to prepare a case for sentencing; (2) failed to obtain or request a psychiatric report; (3) failed to investigate and present character witnesses; (4) failed to request a presentence investigation report; (5) failed to present meaningful arguments to the sentencing judge; and (6) failed to investigate medical examiner's reports or to cross-examine those persons.

*Id.*

130. *Id.* at 287.

131. *Washington v. Strickland*, 693 F.2d at 1248.

132. *Id.* at 1248–49. The Eleventh Circuit's en banc opinion describes the winding path Washington's claim of ineffective assistance of counsel took.

133. *Id.* at 1249.

134. *See id.* (“Rather than deciding *vel non* whether Tunkey was ineffective, the court found that Washington was not prejudiced by Tunkey's error.”).

135. *Id.* at 1250.

136. *Id.*

137. *Id.*

harmless beyond a reasonable doubt.”<sup>138</sup> Third, the panel ordered the lower court to “disregard Judge Fuller’s testimony.”<sup>139</sup>

The Eleventh Circuit chose to rehear the case en banc.<sup>140</sup> Thus, the capital case of David Leroy Washington gave the Eleventh Circuit an opportunity to weigh in on the ineffective-assistance-of-counsel standard debate. And, ultimately, the State of Florida’s appeal from the en banc decision gave the Supreme Court the opportunity to resolve the disagreements in the lower courts regarding the role of prejudice in ineffective-assistance-of-counsel cases.

### 5. The Eleventh Circuit’s En Banc Decision

In considering *Washington v. Strickland*, the Eleventh Circuit must have felt it had a tricky case before it. The law as to what constituted ineffective assistance of counsel was in disarray.<sup>141</sup> Furthermore, William Tunkey’s defense of David Leroy Washington was neither clearly terrible, nor clearly terrific. On one hand, Florida appointed Tunkey to a hard case.<sup>142</sup> The crimes were truly gruesome, even in comparison to other murders.<sup>143</sup> To make matters worse, David Leroy Washington was not the most cooperative client. Against Tunkey’s sound advice, Washington confessed and pled guilty to the crimes and waived his right to a sentencing jury.<sup>144</sup> Despite these disabilities, Tunkey had some success with the case. Judge Fuller granted his motion to exclude Washington’s criminal record from evidence.<sup>145</sup> Tunkey prevented the prosecution from using the murder of Daniel Pridgen as an aggravating circumstance in the Birk and Meli murders.<sup>146</sup> He also attempted to use his knowledge that Judge Fuller had “a great deal of respect for people who are willing to step forward and admit their responsibility,” to convince the judge that his client was precisely that type of person.<sup>147</sup> Compared to drunk or sleeping capital defense lawyers, William Tunkey was arguably a professional.

On the other hand, while Tunkey successfully limited a couple of the prosecution’s aggravating circumstances during sentencing, he failed to

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138. *Id.*

139. *Id.*

140. *Id.*

141. *See supra* Part I.C.

142. William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 115 (1995).

143. *See supra* Part II.A.1.

144. *See supra* Part II.A.2.

145. *Washington*, 693 F.2d at 1247.

146. *Id.* at 1247 n.3.

147. *Strickland v. Washington*, 466 U.S. 668, 672–73 (1984).

provide decent mitigating evidence, such as character evidence.<sup>148</sup> Tunkey did not have to prepare for a guilt/innocence trial before a jury.<sup>149</sup> As a result of Washington's guilty pleas, all Tunkey had to do was investigate mitigating evidence and present it at sentencing to Judge Fuller.<sup>150</sup> This is where Tunkey's performance clearly fell short—he failed to investigate mitigating evidence:

In preparing for the sentencing hearing, counsel spoke with [Washington] about his background. He also spoke on the telephone with [Washington's] wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses . . . [n]or did he request a psychiatric examination . . . .<sup>151</sup>

As one *Strickland* critic suggests, William Tunkey “did virtually nothing with respect to the sentencing hearing.”<sup>152</sup>

The Eleventh Circuit avoided the tricky issues in Washington's claim by remanding the case for reexamination under a new standard for determining ineffective assistance of counsel, announced by Judge Vance.<sup>153</sup> In his opinion, Judge Vance laid out a two-part test to determine when the Constitution requires that a criminal defendant's sentence be overturned because his lawyer's performance was ineffective.<sup>154</sup> Under Judge Vance's test, to make a successful ineffective-assistance-of-counsel claim, a defendant must first show that counsel breached the duty to “conduct a reasonable amount of pretrial investigation.”<sup>155</sup> The duty requires that counsel's decisions must reflect “informed, professional deliberation.”<sup>156</sup> After showing that counsel breached the duty, the defendant must then show that counsel's errors “resulted in actual and substantial disadvantage to the course of his defense.”<sup>157</sup> Showing prejudice results in a reversal of the sentence, “unless the prosecution

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148. *See id.* at 673 (stating that after having no luck investigating, “[c]ounsel decided not . . . to look further for evidence concerning respondent's character . . .”).

149. Tunkey had no trial for which to prepare because Washington pled guilty. *See supra* Part II.A.2.

150. *Strickland*, 466 U.S. at 672.

151. *Id.* at 672–73.

152. *See Geimer, supra* note 142, at 115.

153. Professor Michael Mello, Judge Vance's former clerk, provides the best analysis of the judge's opinion in Michael Mello, *Rough Justice: Reflections on the Capital Habeas Corpus (Anti)Jurisprudence of Judge Robert S. Vance*, 42 ALA. L. REV. 1197, 1252–55 (1991).

154. *Washington v. Strickland*, 693 F.2d 1243, 1250–63.

155. *Id.* at 1251.

156. *Id.* (quoting *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978)).

157. *Id.* at 1262.

show[s] that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt.”<sup>158</sup>

The first part of Judge Vance’s test is to determine whether counsel breached the duty to investigate. To help lower courts make this determination, Judge Vance defined three categories of cases involving the duty to investigate.<sup>159</sup> First, in cases where there is only one plausible line of defense, an attorney breaches the duty to investigate if he or she fails “to conduct a reasonably substantial investigation” into that defense.<sup>160</sup> The same duty exists in a case where counsel chooses to rely on one major line of defense.<sup>161</sup>

Second, in a case where there is more than one plausible line of defense, “counsel should *ideally* conduct a substantial investigation into each potential line” to ascertain which defenses are most likely to succeed at trial.<sup>162</sup> When an attorney performs this duty, “courts will find ineffective assistance of counsel only if the choice was so patently unreasonable that no competent attorney would have made it.”<sup>163</sup> The attorney’s strategic choice in this type of case is given great deference. If, however, counsel does not conduct a substantial investigation into each line of a defense, where there is more than one plausible line of defense, the choice of defense will be “scrutinized more closely.”<sup>164</sup> Judicial deference to the attorney’s strategic choice is “eroded measurably” in these cases.<sup>165</sup> An attorney who narrows the scope of investigation to “fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable.”<sup>166</sup>

Third, if counsel fails to conduct a substantial investigation into any line of defense, or conducts a substantial investigation into several lines without regard to strategy, he or she breaches the duty to investigate.<sup>167</sup> But in cases where it is hard to tell whether the attorney acted on the basis of strategy or neglect, the courts must presume the attorney was competent.<sup>168</sup>

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158. *Strickland*, 466 U.S. at 682 (citing *Washington*, 693 F.2d at 1260–62).

159. See Mello, *supra* note 153, at 1253 (describing Vance’s scheme as “a typology”).

160. See *Washington*, 693 F.2d at 1252 (“When a defense counsel fails to investigate his client’s only possible defense . . . it can hardly be said that the defendant has had the effective assistance of counsel.” (quoting *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972)).

161. *Washington*, 693 F.2d at 1253.

162. *Id.* (emphasis added).

163. *Id.* at 1254.

164. *Id.* at 1255.

165. *Id.*

166. *Id.* at 1256.

167. *Id.* at 1257.

168. *Id.*

All three categories are based on the court's presumption that "[r]easonably effective assistance must be based on informed professional deliberation, and informed legal choices can be made only after investigating the options."<sup>169</sup>

The second part of Judge Vance's test is to determine whether counsel's errors prejudiced the defendant's case. The defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense."<sup>170</sup> Showing prejudice results in a reversal of the sentence, "unless the prosecution show[s] that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt."<sup>171</sup> Although Judge Vance's two-part test provided the Eleventh Circuit with a new standard worth trying out, it was overturned before it would ever be applied.

#### B. *Strickland v. Washington*

The State of Florida appealed the Eleventh Circuit's decision to remand David Leroy Washington's case for disposition under Judge Vance's standard of ineffective assistance of counsel. The Supreme Court granted certiorari "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."<sup>172</sup> In the decision, penned by Justice O'Connor, the Court created a two-prong test for determining when counsel's assistance is so deficient as to require a reversal of a death sentence: "[f]irst, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."<sup>173</sup> Applying this test, the Court reversed the Eleventh Circuit's ruling and denied Washington his writ of habeas corpus.<sup>174</sup> The State of Florida executed Washington two months later.<sup>175</sup>

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169. Mello, *supra* note 153, at 1253.

170. *Id.* at 1261–62.

171. *Strickland v. Washington*, 466 U.S. 668, 682 (1984) (citing *Washington*, 693 F.2d at 1260–62).

172. *Id.* at 684.

173. *Id.* at 687. The structure of the test followed the Eleventh Circuit's two-prong "reasonably effective assistance"/"prejudice rule" approach to the ineffective-assistance-of-counsel question. See *supra* Part II.A.5.

174. *Strickland*, 466 U.S. at 701.

175. The State of Florida executed Washington on July 13, 1984 in the electric chair. *Florida Killer Executed*, WASH. POST, July 14, 1984, at A6. Several hours before his execution, he held his twelve year-old daughter Florence on his knee and told her: "I'm the one who got me here. I want you to do better. I want you to set some goals for yourself, and I want you to hit the books." *Id.*

In the Court's decision, Justice O'Connor laid out the principle underlying its reasoning in *Strickland*. The purpose of requiring effective assistance of counsel is "to ensure a fair trial."<sup>176</sup> This is why the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>177</sup> Preventing "a breakdown in the adversarial process that our system counts on to produce just results" concerned the Court.<sup>178</sup> To address this concern, Justice O'Connor emphasized that the standard announced in *Strickland* "do[es] not establish mechanical rules. . . . [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."<sup>179</sup>

The *Strickland* test has two parts: a "performance" prong and a "prejudice" prong.<sup>180</sup> A defendant raising a claim of ineffective assistance of counsel must make a sufficient showing under both prongs, or lose the case.<sup>181</sup> To make a sufficient showing under the performance prong, a "defendant must show that counsel's representation fell below an objective standard of reasonableness."<sup>182</sup> Although the Court was reluctant to issue more specific guidelines than this language,<sup>183</sup> Justice O'Connor noted that "reasonableness" must be determined in comparison to "prevailing professional norms."<sup>184</sup> While the American Bar Association (ABA) and other groups provided standards for attorney performance, the Court noted these were not exhaustive lists of professional norms.<sup>185</sup> To the *Strickland* Court it was more important "simply to ensure that criminal defendants receive a fair trial" than "to improve the quality of legal representation" through establishing attorney performance expectations.<sup>186</sup>

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176. *Strickland*, 466 U.S. at 686.

177. *Id.*

178. *Id.* at 696.

179. *Id.*

180. *Id.* at 696–97.

181. *Id.* at 697. Justice O'Connor noted that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*

182. *Id.* at 688.

183. *See id.* ("More specific guidelines are not appropriate.")

184. *Id.*

185. *See id.* at 688–89 ("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.") (citation omitted).

186. *Id.* at 689. In 2003, the American Bar Association revised its standards of performance for counsel representing capital defendants. The guidelines set standards for virtually all aspects of representing capital defendants, including investigation duties. *See* AM. BAR ASS'N. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.7

In addition to holding that reasonableness is judged under a standard of prevailing professional norms, the Court held that judicial scrutiny of counsel's performance "must be highly deferential."<sup>187</sup> When evaluating claims of ineffectiveness, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . the defendant must overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'"<sup>188</sup> Under this standard, counsel does have a duty to investigate lines of defense but may make decisions that render investigation unnecessary, as long as those decisions are "reasonable."<sup>189</sup> Courts reviewing claims of ineffective assistance must apply a "heavy measure of deference to counsel's judgments."<sup>190</sup>

While the *Strickland* Court was concerned with eliminating the variation in the circuit courts' performance standards, it was more concerned with eliminating variation in their prejudice rules.<sup>191</sup> The Court ruled that to make a sufficient showing under *Strickland's* prejudice prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>192</sup> Unlike the federal district court that allowed Judge Fuller to testify as to whether evidence would have changed the result of Washington's case, Justice O'Connor eliminated inquiry into "the actual process of decision" by particular judges.<sup>193</sup> Instead, courts must assume "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."<sup>194</sup>

Applying the *Strickland* standard to Washington's claim of ineffective counsel, the Court found that Washington failed both the performance prong and the prejudice prong.<sup>195</sup> With respect to the performance component, the Court found that in not investigating character and

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(2003) (setting forth the duty to conduct thorough and independent investigations relating to the issues of both guilt and penalty), available at <http://www.abanet.org/deathpenalty/DPGuidelines42003.pdf>.

187. *Strickland*, 466 U.S. at 689.

188. *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

189. *Id.* at 691.

190. *Id.*

191. *Id.* at 696–97 (“[T]he minor differences in the lower courts’ precise formulations of the performance standard are insignificant: the different formulations are mere variations of the overarching reasonableness standard.”).

192. *Id.* at 694.

193. *Id.* at 695.

194. *Id.*

195. *Id.* at 698–99. “The facts . . . make clear that the conduct of respondent’s counsel at and before respondent’s sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.” *Id.*

psychological evidence for Washington, Tunkey made a strategic choice “well within the range of professionally reasonable judgments.”<sup>196</sup> With respect to the prejudice component, the Court found that, even if Tunkey had provided Judge Fuller with character and psychological evidence, the “overwhelming” aggravating circumstances in the case would outweigh these mitigating circumstances.<sup>197</sup> Lastly, relying on the underlying “fair trial” principle set forth by Justice O’Connor, Washington’s trial was fair because he “made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel’s assistance.”<sup>198</sup>

### III. REGAINING GROUND: *WIGGINS v. SMITH*

Recently the Supreme Court reexamined the minimum standards for appointed counsel. In *Wiggins v. Smith*, a capital case with facts similar to *Strickland*, the Supreme Court overturned a death sentence and remanded the case for a new sentencing hearing based on a capital defendant’s ineffective assistance of counsel claim.<sup>199</sup> This is only the second time the Court has invalidated a death sentence under *Strickland*.<sup>200</sup> The Court’s opinion, written by Justice O’Connor, held that under *Strickland*, a trial lawyer who failed to present mitigating evidence at sentencing performed below professional norms and, but for this below-average performance, the defendant would not have been sentenced to death.<sup>201</sup>

#### A. *The Facts of Wiggins*

In 1989, a Maryland judge convicted Kevin Wiggins of first-degree murder, robbery, and two counts of theft, for the robbery and death of seventy-seven year-old Florence Lacs.<sup>202</sup> Police found Lacs “drowned in the bathtub of her ransacked apartment.”<sup>203</sup> The State of Maryland

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196. *Id.* at 699.

197. *Id.* at 700.

198. *Id.*

199. *Wiggins v. Smith*, 539 U.S. 510, 538 (2003). For a nice analysis of *Wiggins*, see Terrence T. Eglund, Comment, *United States Supreme Court: Wiggins v. Smith*, 123 S. Ct. 2527 (2003), 16 CAP. DEF. J. 101 (2003).

200. See Marcia Coyle, *New Standards in Death Penalty Cases Predicted*, 173 N.J. L.J. 282 (2003) (noting that *Williams v. Taylor*, 529 U.S. 362 (2000), was the first death sentence the Supreme Court overturned under *Strickland*). For a full discussion of *Williams*, see Hall, *supra* note 17, at 227–30.

201. See *Wiggins*, 539 U.S. at 521–38 (applying the two-prong *Strickland* test).

202. *Id.* at 514–15.

203. *Id.* at 514.



appointed two public defenders, Carl Schlaich and Michelle Nethercott, to represent Wiggins.<sup>204</sup> A Baltimore County Circuit Court judge found Wiggins guilty.<sup>205</sup> A month before Wiggins' sentencing proceedings before a jury, counsel filed a motion for bifurcation of sentencing because they hoped to first prove that Wiggins did not actually kill Lacs, and then, if that defense failed, to present a mitigation case.<sup>206</sup> The court denied the motion.<sup>207</sup> At the sentencing proceedings, "counsel introduced no evidence of Wiggins' life history."<sup>208</sup> Instead, counsel attempted to prove someone else committed the crime by emphasizing conflicting evidence as to the time of Lacs' death, the lack of direct evidence pointing to Wiggins, and unexplained forensic evidence.<sup>209</sup> Counsel presented only one significant "mitigating factor—Wiggins' lack of prior convictions"—to the jury.<sup>210</sup> The jury sentenced Wiggins to death.<sup>211</sup>

On appeal Wiggins claimed his defense attorneys provided ineffective assistance of counsel because they "fail[ed] to investigate and present mitigating evidence of his dysfunctional background."<sup>212</sup> Clearly they failed to present evidence.<sup>213</sup> However, according to Justice O'Connor's opinion, the defense team did *investigate* Wiggins' past and learned quite a bit about him in the process.<sup>214</sup> At counsel's request, a psychologist conducted several tests on Wiggins and determined that the defendant "had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder."<sup>215</sup> With respect to Wiggins' background, counsel acquired a pre-sentence investigation report and several reports from the Baltimore City Department of Social Services (DSS).<sup>216</sup> The DSS reports revealed Wiggins' sad, dysfunctional childhood: Wiggins suffered through "physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation."<sup>217</sup> In addition, the DSS records revealed that "Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while

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204. *Id.*

205. *Id.* at 514–15.

206. *Id.* at 515.

207. *Id.*

208. *Id.*

209. *Id.* at 519.

210. *Id.* at 518.

211. *Id.* at 516.

212. *Id.* at 516.

213. *See id.* at 515 ("[C]ounsel introduced no evidence of Wiggins' life history.").

214. *See id.* at 523–25.

215. *Id.* at 523.

216. *Id.*

217. *Id.* at 518 (quoting *Wiggins v. State*, 724 A.2d 1, 15 (Md. 1999)).

there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food.”<sup>218</sup> In addition to these findings, the dissent, written by Justice Scalia and joined by Justice Thomas, notes that the defense team’s investigation turned up several other facts about Wiggins’ past.<sup>219</sup>

Because of this investigation, the Fourth Circuit held that it did not matter that counsel failed to *present* the mitigating evidence because they instead “made a reasonable strategic decision” to present evidence that the crime was committed by someone other than Wiggins.<sup>220</sup> Because the defense team found the background information they did, the appellate court was satisfied that counsel’s knowledge “was sufficient to make an informed strategic choice.”<sup>221</sup> To the surprise of many, the Supreme Court reversed this decision.<sup>222</sup>

### B. *The Key Difference Between Strickland and Wiggins*<sup>223</sup>

In both *Strickland* and *Wiggins*, counsel for defendants did not *present* mitigating background evidence to the sentencer.<sup>224</sup> However, there is a key difference between *Strickland* and *Wiggins*: in *Strickland*, counsel failed to present evidence because he completely failed to *investigate* evidence, and therefore did not have any evidence to present. In *Wiggins*, counsel failed to *present* the favorable mitigating evidence they found, even though they uncovered quite a bit of evidence during their investigation. Thus, it can be said that *Strickland* is a case about the failure to investigate evidence, while *Wiggins* is case about the failure to present evidence.<sup>225</sup>

This difference is significant: *Wiggins*, when read with *Strickland*, makes the *Strickland* performance component slightly less hostile to capital defendants. With respect to attorney performance, failing to investigate mitigating evidence—the issue in *Strickland*—is worse than failing to present mitigating evidence—the issue in *Wiggins*. Failing to investigate evidence is worse than failing to present evidence under *Strickland* because attorneys who fail to investigate cannot make “reasonable” strategic

218. *Id.* at 525.

219. *See id.* at 538–39 (Scalia, J., dissenting) (detailing additional findings that Wiggins’ defense counsel could have uncovered through investigation).

220. *Id.* at 519.

221. *Id.* (quoting *Wiggins v. Corcoran*, 288 F.3d 629, 641 (4th Cir. 2002)).

222. *Id.* at 538.

223. *See* Professor Michael Mello, Class Lecture at Vermont Law School (Sept. 18, 2003) (indicating that *Strickland* is a “failure to investigate” case while *Wiggins* is a “failure to present” case.) (lecture notes on file with the author).

224. *Id.*

225. *Id.*

decisions; they do not have enough information about their case to make a “reasonable” strategic decision.<sup>226</sup> *Wiggins* makes the *Strickland* performance component less hostile to capital defendants because *Wiggins* overturns a death sentence based on attorney performance that is *better* than the attorney performance in *Strickland*, where the Court upheld a death sentence.

### C. *Less in Wiggins Than Meets the Eye*

Although *Wiggins* is a small victory for defendants, it fails to make a measurable impact on the task of correcting the damage *Strickland* has done to the right to effective assistance of counsel for two reasons. First, *Wiggins* does not address the argument that the performance prong is too vague for courts to apply with consistency. *Wiggins* still requires courts to use *Strickland*'s performance prong and apply “an objective standard of reasonableness” in determining when an attorney’s performance is ineffective.<sup>227</sup> As Judge Bazelon complained, standards relying on words like “reasonable” are unhelpful to courts in deciding claims with consistency because they are merely “empty vessels into which content must be poured.”<sup>228</sup> While both *Strickland* and *Wiggins* suggest lower courts look to “prevailing professional norms” to determine when an attorney behaves unreasonably, they do not compel such an analysis.<sup>229</sup> Thus, while ABA standards define professional norms, courts may disregard them.<sup>230</sup> As a result, judges are free to deem clearly egregious attorney performance reasonable.<sup>231</sup>

Second, *Wiggins* does not change or invalidate in any way the *Strickland* prejudice prong; thus, it renders any improvement in the performance prong of the test virtually useless. Because *Strickland* is a two-prong test, and defendants must make sufficient showings under *both* prongs, altering one prong without altering the other will have little effect on the ultimate outcomes of cases. Even defendants who can make a sufficient showing under the relaxed performance prong must still face the formidable prejudice prong. *Wiggins* does nothing to make the reasonableness prong easier for the judiciary to apply. *Wiggins* also does nothing to lessen the formidable barrier of *Strickland*'s prejudice prong.

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226. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

227. *See Wiggins*, 539 U.S. at 521 (citing *Strickland*, 466 U.S. at 688).

228. Bazelon, *supra* note 25, at 820.

229. *Wiggins*, 539 U.S. at 521 (citing *Strickland*, 466 U.S. at 688).

230. *See supra* note 185 and accompanying text.

231. Judges disagree, for example, about whether attorneys who fall asleep during capital trials render effective assistance of counsel. Fogelman, *supra* note 11, at 84–93.

Therefore, most defendants will not benefit from the aspects of *Wiggins* that relax *Strickland* because *Wiggins* does not change or invalidate *Strickland*'s prejudice component.<sup>232</sup>

#### IV. A PATH FOR RETURNING TO THE THIRD PLATEAU

It is clear that the Supreme Court is trying to push right-to-counsel jurisprudence back up the slope toward its pre-*Strickland* place on Bazelon's third plateau. *Wiggins*, especially in light of Justice O'Connor's remarks on the crisis of the right to counsel in capital cases, is evidence that the Court is attempting to make this shift.<sup>233</sup> Nevertheless, without significantly altering *Strickland*, the Court will never achieve this worthwhile goal.<sup>234</sup> To correct the damage *Strickland* has done to the right to effective assistance of counsel, the Court will have to abandon efforts—such as *Wiggins*—to weaken *Strickland*. Instead, the Court should adopt a different test altogether for determining violations. Subtle changes in the way *one* prong of the standard is applied, as is the effect of *Wiggins*, will not fix *Strickland*'s problems. As critics of *Strickland* suggest, *both* prongs of *Strickland* are problematic.<sup>235</sup>

##### A. A New Performance Prong

There are plenty of pre-*Strickland* circuit court cases from which the Court could cull a new standard of effective assistance of counsel,<sup>236</sup> but a logical and fruitful place to start is Judge Vance's Eleventh Circuit opinion, *Washington v. Strickland*. Judge Vance's test for determining whether counsel breached the duty to investigate mitigating evidence is superior to *Strickland*'s performance prong. First, it does not rely on vague "reasonableness" language.<sup>237</sup> Instead, the test provides a practical

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232. One scholar calls *Wiggins* "a partial solution" because it fails to address *Strickland*'s prejudice prong. Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is it Possible to Keep Innocent People Off Death Row?*, 29 U. DAYTON L. REV. 319, 327 (2004). But Mickenberg concludes that *Wiggins* is a step in the right direction because the Court "legitimized the idea of examining a trial attorney's investigation and preparation before determining whether that lawyer's strategic choices were constitutionally ineffective." *Id.* at 326.

233. See discussion *supra* Part III.B.

234. I do not intend to imply that the third plateau is where the right-to-counsel jurisprudence should ultimately rest. A return to the third plateau, however, would be a step toward the fair adjudication of right-to-counsel claims. See *supra* text accompanying note 88.

235. See discussion *supra* Introduction.

236. See discussion *supra* Part I.C (detailing the post-*McMann* circuit cases and the various standards those cases suggest).

237. Professor Michael Mello calls Judge Vance's test a "typology" and "a common sense attempt to craft a workable doctrinal solution to a very real practical problem." Mello, *supra* note 153,

framework for judging counsel performance.<sup>238</sup> By tailoring what the duty to investigate requires of defense counsel to five different scenarios, the test acknowledges the reality that each case is different and requires differing amounts of investigation.<sup>239</sup>

Second, unlike *Strickland's* performance prong, Judge Vance's test does not automatically assign a high amount of deference to attorney performance in every case. This is perhaps the most important advantage *Washington* has over *Strickland*. Instead of *Strickland's* nearly impenetrable requirement that judicial scrutiny of counsel performance be "highly deferential," Judge Vance's test varies judicial deference depending on counsel's having met the proper duty to investigate.<sup>240</sup> For example, in a case where there is more than one plausible line of defense, counsel "ideally" would be required to conduct a "substantial investigation into each potential line."<sup>241</sup> If counsel met that ideal, courts would give counsel's performance great deference.<sup>242</sup> However, if counsel did not meet this ideal, counsel's performance would be "scrutinized more closely."<sup>243</sup> Both of these advantages protect defendants, without incapacitating their attorneys' ability to make tactical decisions freely, because both advantages take into account the reality that each case requires a different amount of investigation. Furthermore, both advantages promote judicial consistency by guiding judges to the right doors to walk through as they consider ineffective-assistance-of-counsel claims.

### B. A New Prejudice Prong

In addition to replacing *Strickland's* performance prong, the Supreme Court must replace *Strickland's* prejudice prong to return right-to-counsel jurisprudence to Bazelon's third plateau. Without addressing prejudice prong problems, any new performance test would fall victim to the same problems to which *Wiggins* is subject. Because defendants must make sufficient showings under *both* performance and prejudice prongs, altering

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at 1243, 1253. He calls *Strickland* "a denial of reality." *Id.* at 1243.

238. To review the details of Judge Vance's test, see discussion *supra* Part II.A.5.

239. For an analysis of how several cases would have been resolved applying the Vance test instead of *Strickland*, see Mello, *supra* note 153, at 1260–64 (expanding on Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 448–55 (1988)).

240. Compare *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (requiring judicial scrutiny of counsel performance to be "highly deferential"), with *Washington v. Strickland*, 693 F.2d 1243, 1252–57 (5th Cir. Unit B 1982) (varying the level of deference for different cases).

241. *Washington*, 693 F.2d at 1253.

242. *Id.* at 1254.

243. *Id.* at 1255.

one prong without altering the other will have little effect on the ultimate outcomes of cases.<sup>244</sup>

Judge Vance's prejudice prong does not differ enough from *Strickland's* to measurably benefit defendants.<sup>245</sup> However, various other circuit court cases from Bazelon's third plateau offer a wide variety of prejudice standards and language the Supreme Court could consider.<sup>246</sup> One such case, *Coles v. Peyton*, is well worth dusting off for review because it avoids the virtually insurmountable barriers defendants raising ineffective-assistance-of-counsel claims face today under *Strickland*.<sup>247</sup>

In *Coles v. Peyton*, the Fourth Circuit placed the burden on the state to show *lack* of prejudice once the defendant adduced evidence that counsel's performance failed to meet various right-to-counsel principles.<sup>248</sup> If counsel failed to live up to a right-to-counsel principle—by failing, for example, to “conduct appropriate investigations . . . to determine if matters of defense can be developed”—the court would find that the state violated the defendant's right to effective assistance of counsel.<sup>249</sup> Once a defendant established a violation, the court would shift the burden to the state to prove the violation did not cause prejudice to the defendant's case.<sup>250</sup> This burden-shifting device is *Cole's* prejudice test.

Shifting the burden of production from the defendant to the state once the defendant proves a violation occurred avoids the problems associated with requiring defendants to make showings under both performance and prejudice prongs. For example, burden-shifting addresses the concern Justice Marshall aired in his *Strickland* dissent, that having ineffective counsel—without an additional showing of prejudice—was enough to

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244. See discussion *supra* Part III.C.

245. Although Professor Mello suggests *Washington* provides a “more effective, functional and realistic approach” to prejudice than *Strickland*, Mello, *supra* note 153, at 1264, Judge Vance's standard does not differ enough from *Strickland* to measurably correct *Strickland's* damage to the right to effective assistance of counsel. Compare *Strickland*, 466 U.S. at 694 (requiring defendant show that “but for counsel's unprofessional errors, the result of the proceeding would have been different”), with *Washington*, 693 F.2d at 1262 (requiring defendant to show counsel's errors “resulted in actual and substantial disadvantage to the course of his defense”).

246. See discussion *supra* Part I.C (detailing the post-*McMann* circuit cases and the various prejudice tests those cases suggest).

247. See *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968) (granting accused rapist's petition for writ of habeas corpus because he was denied effective assistance of counsel when his appointed attorney failed to investigate possible defenses).

248. *Id.* “An omission or failure to abide by [various counsel] requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.” *Id.*

249. *Id.*

250. *Id.*

constitute a violation of the Sixth Amendment.<sup>251</sup> Although burden-shifting does not eliminate the prejudice test altogether—a move the *Strickland* majority would have disapproved—it does *lower* the barrier for defendants raising right-to-counsel claims. Lowering the barrier through burden-shifting might satisfy jurists like Justice Marshall and would represent a compromise to which most people could agree.

Furthermore, unlike *Strickland*'s assumption that “the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision,”<sup>252</sup> *Coles* assumes nothing and therefore allows the court hearing the claim to consider the fact that the decisionmaker at the trial may not have been fair.<sup>253</sup> By shifting the burden from the defendant to the state and requiring the state to share the costs of establishing right-to-counsel violations, the Fourth Circuit leveled the playing field for defendants.

The *Coles* prejudice test is a more balanced approach than the *Strickland* prejudice prong to resolving ineffective-assistance-of-counsel claims. Furthermore, Judge Vance's performance test is a much more workable standard than the vague language currently employed by *Strickland*. In combination, the two tests could provide the Supreme Court with a new and improved way to resolve ineffective-assistance-of-counsel claims and push right-to-counsel jurisprudence back up the slope toward its pre-*Strickland* place on Bazelon's third plateau.

#### CONCLUSION

It is clear that the Supreme Court is trying to restore the right-to-effective-assistance-of-counsel jurisprudence to its former, higher position on Bazelon's third plateau. Unfortunately, *Wiggins v. Smith* was merely a small move in that direction. If the Court is earnest about correcting the damage *Strickland v. Washington* has done to the right to effective assistance of counsel, the Court will abandon efforts—such as *Wiggins*—to weaken *Strickland* and will adopt a different test for determining violations. Pre-*Strickland* circuit court right-to-counsel decisions offer a starting point for developing a new standard of effective assistance of counsel.

*Kelly Green*

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251. *Strickland v. Washington*, 466 U.S. 668, 710, 712 (1984) (Marshall, J., dissenting).

252. *Id.* at 695.

253. *See Coles*, 389 F.2d at 226 (omitting any discussion of deference to trial judges).