JUSTIFICATION FOR PROFESSIONAL SERVICES FUNDING IN CAPITAL DEFENSE LITIGATION

1. The Constitutional Principles: The Fifth, Sixth, Eighth, and Fourteenth Amendments

A. The Fifth Amendment: Guarantees defendants the right to present a defense. In capital cases, this includes the right to present evidence to rebut the State's proof of aggravating circumstances.

B. The Sixth Amendment: Guarantees defendants the right to effective assistance of counsel. In capital cases especially, this includes an affirmative duty on defense counsel to conduct a through investigation into ***all*** plausible avenues of defense and mitigation. Trial strategy is not a defense to ineffective assistance of counsel if counsel has not conducted a thorough investigation into all plausible avenues of defense and mitigation.

C. The Eighth Amendment: Guarantees capital defendants the right to present all evidence that might mitigate against imposition of the death penalty. Any state laws, jury instructions, evidentiary rulings, prosecutorial argument, or ineffective assistance of counsel that is reasonably likely to preclude or hamper a jury's consideration of mitigation is unconstitutional under the Eight Amendment and grounds for reversal.

D. The Fourteenth Amendment: the due process clause of the Fourteenth Amendment makes all of the above federally guaranteed rights applicable to the States.

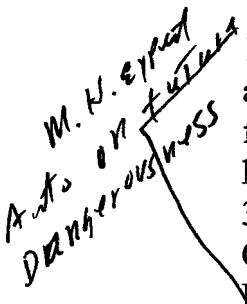
2. How the constitutional principles apply to funding for professional services in capital defense litigation.

A. A defendant has the right to present a defense, or multiple defenses, to charged crimes and aggravating circumstances. Additionally, "a capital sentencer may not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Boyd v. Ward*, 179 F.3d 904, 921 (10th Cir.1999) (quotation marks omitted), cert. denied, 528 U.S. 1167, 120 S.Ct. 1188, 145 L.Ed.2d 1093 (2000). Thus, the jury cannot be precluded from considering any "constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) (citations omitted).

B. Capital defense attorneys are constitutionally required, according to the United States Supreme Court, to thoroughly investigate ***all*** plausible avenues of mitigation and

defenses. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

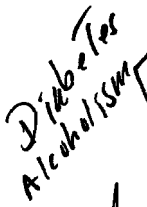
C.. Thorough investigation of defenses and mitigation requires expert assistance. Examples:



1. Defendant is entitled to mental health expert to rebut continuing threat aggravator if the State puts on any evidence, psychiatric or otherwise, of future dangerousness, so long as the defendant's mental condition would likely have been a significant mitigating factor. *See Liles v. Saffle*, 945 F.2d 333, 341 (10th Cir.1991); *Rogers v. Gibson*, 173 F.3d 1278, 1285 (10th Cir.1999). Oklahoma ultimately adopted this broader view in *Fitzgerald v. State*, 972 P.2d 1157, 1169 (Okla.Crim.App.1998). (Cases reversed);

2. Defense counsel should have investigated possibility of brain damage by having neuropsychological testing and evaluation conducted even though already had Defendant evaluated by another psychologist- *Hooper v. Mullin*, 314 F.3d 1163 (10th Cir. (Okla.), 2002)(Case reversed);

3. Defense counsel should have retained appropriate expert to conduct a social history regarding defendant's background even though defendant was evaluated by a psychologist. *Wiggins v. Smith*, 539 U.S. ____, 123 S.Ct. 2527 (2003)(Case reversed)



4. Defense should have been given funding to retain appropriate expert to evaluate the effects of alcohol and diabetes on Defendant's mental state, *Fitzgerald v. State*, 972 P.2d 1157, 1169 (Okla.Crim.App.1998)(Case reversed).

5. Defense should have retained expert to explain battered woman syndrome defense to the jury. *Paine v. Massie*, 339 F.3d 1194 (10th Cir. (Okla.) 2003); *Bechtel v. State*, 840 P.2d 1 (Okla.Crim.App.1992). (Cases reversed).

D. The only justification for failing to investigate is reasonable professional judgment by defense counsel that investigation is not necessary based on review of all available facts. The reasonableness of defense counsel's judgment is determined by prevailing professional norms.

E. Lack of funds to retain experts necessary to thorough investigation of defenses and mitigation is not legitimate justification for failure to investigate and will result in

reversal of convictions and sentences based on ineffective assistance of counsel, albeit state-induced.

In a nutshell: Defense attorneys are constitutionally required to investigate all plausible defenses and lines of mitigation. If an initial investigation reveals that the defendant's background is significant then the defense is required to have a social history conducted. If the investigation reveals that the defendant has neurological problems, then the defense is required to have the defendant evaluated by a neuropsychologist, and possibly have an MRI or PetScan or other testing performed to confirm or deny the indications. If the investigation reveals that the defendant may be mentally ill, then the defense is required to have him evaluated for mental illness. If the investigation reveals that drugs, alcohol, or abuse is a significant factor in defending against the charged crimes or presenting mitigation, then the defense is required to retain an expert to explain the effects of those circumstances on the defendant's state of mind. And so on. The type of experts needed is dictated by the facts uncovered in an initial investigation.

Defense counsel cannot avoid a more thorough investigation that includes use of experts, by not conducting an initial investigation that may reveal the necessity for expert assistance. In Battenfield v. Gibson, defense counsel conducted no investigation, and the Tenth Circuit reversed on that basis. Consequently, defense counsel must be provided funding to retain experts to explore defenses and lines of mitigation, regardless of whether they actually use them at trial, or convictions and sentences will not withstand appellate scrutiny.

3. Consequences of not providing capital defendants with funding for expert assistance.

A. Reversal of convictions and sentences. The caselaw is clear that the lynchpin of analysis of many ineffective assistance of counsel claims is whether or not counsel thoroughly investigated defenses and mitigation. If counsel is denied the resources to thoroughly investigate defenses and mitigation, then counsel is ineffective. The remedy is reversal for new trial.

B. Additional expenditure. Failure to provide adequate funding that enables defense counsel to conduct constitutionally required investigation, will result in retrying a case that was not properly tried the first time. Upon reversal, the funding that was originally denied will ultimately be granted so that a thorough investigation can be conducted. In addition to the funding for investigation that was constitutionally required initially, more money will be expended from the coffers of the district attorneys' offices, OIDS, and court funds to retry the old cases. Consequently, the money originally withheld will have to be provided, and the State will incur the additional expense of retrying the case. The result will end up

costing almost twice as much as it would have had the money for expert assistance been provided in the first instance.

C. Lack of Finality, undermined confidence in outcomes, and impaired functioning of criminal justice system. In addition to the increased financial burden of retrying cases, the lack of funding for experts and subsequent retrials that would inevitably follow would undermine public confidence in our criminal justice system. The lack of finality in convictions and sentences, particularly in capital cases, is especially painful for victims' family members and frustrating for communities trying to put specific violent crimes behind them. Additionally, the passage of time that necessarily occurs when cases must be retried after reversal on appeal, results in difficulty locating witnesses and memory loss of people involved for both prosecution and defense. The passage of time can result in an inability for the prosecution or defense to effectively present its case, compromising the effectiveness of the criminal justice process and undermining confidence in its results.

104 S.Ct. 2052
80 L.Ed.2d 674
(Cite as: 466 U.S. 668, 104 S.Ct. 2052)

Briefs and Other Related Documents

Supreme Court of the United States

Charles E. STRICKLAND, Superintendent, Florida State Prison, et al.,
Petitioners
v.
David Leroy WASHINGTON.

No. 82-1554.

Argued Jan. 10, 1984.
Decided May 14, 1984.
Rehearing Denied June 25, 1984.

See 467 U.S. 1267, 104 S.Ct. 3562.

Defendant, who received death penalty for murder conviction, filed petition for writ of habeas corpus. The United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, denied relief, and the Court of Appeals, 673 F.2d 879, affirmed in part and vacated in part. On rehearing en banc, 693 F.2d 1243, the Court of Appeals, Vance, Circuit Judge, reversed and remanded. On certiorari, the Supreme Court, Justice O'Connor, held that: (1) proper standard for attorney performance is that of reasonably effective assistance; (2) defense counsel's strategy at sentencing hearing was reasonable and, thus, defendant was not denied effective assistance of counsel; and (3) even assuming challenged conduct of counsel was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence.

Reversed.

Justice Brennan concurred in part and dissented in part and filed opinion.

Justice Marshall dissented and filed opinion.

West Headnotes

[1] Habeas Corpus ⚿352
197k352 Most Cited Cases
(Formerly 197k45.3(1.20), 197k45.3(1))

Rule requiring dismissal of mixed habeas corpus petitions containing exhausted and unexhausted claims, though to be strictly enforced, is not jurisdictional.

[2] Criminal Law ⚿641.12(1)
110k641.12(1) Most Cited Cases

Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

[4] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

A capital sentencing proceeding is sufficiently like a trial in its adversarial format and in existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial, which is to ensure that adversarial testing process works to produce a just result under standards governing decision. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⚿1166.10(1)
110k1166.10(1) Most Cited Cases
(Formerly 110k1166.11(5), 110k1166.11)

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components: first, defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. U.S.C.A.

Const.Amend. 6.

[6] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Proper standard for attorney performance is that of reasonably effective assistance. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⚿641.5(.5)
110k641.5(.5) Most Cited Cases
(Formerly 110k641.5)

Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest. U.S.C.A. Const.Amend. 6.

[8] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution. U.S.C.A. Const.Amend. 6.

[9] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Defense counsel has duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. U.S.C.A. Const.Amend. 6.

[10] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or of the range of legitimate decisions regarding how best to represent a criminal defendant; any set of rules would interfere with constitutionally protected independence of counsel and restrict wide latitude counsel must have in making tactical decisions, and could distract counsel from the overriding mission of vigorous advocacy of defendant's cause. U.S.C.A. Const.Amend. 6.

[11] Criminal Law ⚿1144.10
110k1144.10 Most Cited Cases

Court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; that is, defendant must overcome presumption that, under those circumstances, challenged action might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

[12] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

A convicted defendant making a claim of ineffective assistance must identify acts or omissions of counsel that are alleged not to have been result of reasonable professional judgment and, then, court must determine whether, in light of all circumstances, identified acts or omissions were outside wide range of professional competent assistance; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in the particular case. U.S.C.A. Const.Amend. 6.

[13] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

[14] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

[14] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

Inquiry into counsel's conversations with defendant may be critical to proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. U.S.C.A. Const.Amend. 6.

[15] Criminal Law ⚿1166.10(1)
110k1166.10(1) Most Cited Cases
(Formerly 110k1166.11(5), 110k1166.11)

An error by counsel, even if professionally unreasonable, does not warrant setting aside

judgment in a criminal proceeding if the error had no effect on the judgment. U.S.C.A. Const.Amend. 6.

[16] Criminal Law ⚿1163(2)
110k1163(2) Most Cited Cases

Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. U.S.C.A. Const.Amend. 6.

[17] Criminal Law ⚿1163(2)
110k1163(2) Most Cited Cases

As relating to Sixth Amendment claims of ineffective assistance of counsel, prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. U.S.C.A. Const.Amend. 6.

[18] Criminal Law ⚿1163(2)
110k1163(2) Most Cited Cases

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to general requirement that defendant affirmatively prove prejudice. U.S.C.A. Const.Amend. 6.

[19] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

[20] Criminal Law ⚿1163(2)
110k1163(2) Most Cited Cases

In making determination whether specified errors of counsel resulted in required prejudice for a defendant to succeed on a Sixth Amendment claim, a court should presume, absent challenge to judgment on grounds of evidentiary insufficiency, that judge or jury acted according to law. U.S.C.A. Const.Amend. 6.

[21] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

When a defendant challenges a death sentence on ground of ineffective assistance of counsel, question is whether there is a reasonable probability that, absent the errors, sentencer, including appellate court, to extent it independently reweighs the evidence, would have concluded that balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

[22] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

In determining whether defendant was denied effective assistance of counsel in death sentence case, court must consider totality of the evidence before judge or jury. U.S.C.A. Const.Amend. 6.

[23] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

A court need not determine whether counsel's performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies. U.S.C.A. Const.Amend. 6.

[24] Habeas Corpus ⚿486(1)
197k486(1) Most Cited Cases
(Formerly 197k25.1(6))

Since fundamental fairness is central concern of writ of habeas corpus, no special standards ought to apply to claims of ineffective assistance of counsel made in habeas proceedings. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

[25] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Ineffectiveness of counsel is not a question of basic, primary, or historic fact but, rather, is a mixed question of law and fact. U.S.C.A. Const.Amend. 6.

[26] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

In capital murder case, defense counsel's strategy at sentencing hearing of not seeking out character witnesses or requesting a psychiatric examination or presentence report was reasonable and, thus,

defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

[27] Criminal Law ⇐1166.10(1)
110k1166.10(1) Most Cited Cases
(Formerly 110k1166.11(5), 110k1166.11)

Even assuming challenged conduct of defense counsel at sentencing hearing was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence because, given overwhelming aggravating factors, there was no reasonable probability that omitted evidence would have changed conclusion that aggravating circumstances outweighed mitigating circumstances and, hence, sentence imposed. U.S.C.A. Const.Amend. 6.

Syllabus [FNa1]

FNa1. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility." In preparing for the sentencing hearing, defense counsel spoke with respondent about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his judgment that it **2055 was advisable to rely on the plea colloquy for evidence as to such matters, thus preventing the State from cross-examining respondent and from presenting psychiatric evidence of its own. Counsel did not request a presentence report because it would have included respondent's criminal history and thereby would have undermined the claim of no significant prior criminal record. Finding numerous aggravating circumstances and no mitigating circumstance, the trial judge sentenced respondent to death on each of the murder counts. The Florida Supreme Court affirmed, and respondent then sought collateral relief in state court on the ground, inter alia, that counsel had rendered ineffective assistance at the sentencing proceeding in several respects, including his failure to request a psychiatric report, to investigate and present character witnesses, and to seek a presentence report. The trial court denied relief, and the Florida Supreme Court affirmed. Respondent then filed a habeas corpus petition in Federal District Court advancing numerous grounds for relief, including the claim of ineffective assistance of counsel. After an evidentiary hearing, the District Court denied relief, concluding that although counsel made errors in judgment in failing to investigate mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. The Court of Appeals ultimately reversed, stating that the Sixth Amendment accorded criminal defendants a right *669 to counsel rendering "reasonably effective assistance given the totality of the circumstances." After outlining standards for judging whether a defense counsel fulfilled the duty to investigate nonstatutory mitigating circumstances and whether counsel's errors were sufficiently prejudicial to justify reversal, the Court of Appeals remanded the case for application of the standards.

Held:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and 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. The same principle applies to a capital sentencing proceeding--such as the one provided by Florida law--that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 2063-2064.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the

deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 2064-2069.

(a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. Pp. 2064-2067.

(b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of ****2056** the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 2067-2069.

***670** 3. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. And in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d), but is a mixed question of law and fact. Pp. 2069-2070.

4. The facts of this case make it clear that counsel's conduct at and before respondent's sentencing proceeding cannot be found unreasonable under the above standards. They also make it clear that, even assuming counsel's conduct was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence. Pp. 2070-2071.

693 F.2d 1243 (5th Cir.1982), reversed.

Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for petitioners. On the briefs were *Jim Smith,* Attorney General, and *Calvin L. Fox,* Assistant Attorney General.

Richard E. Shapiro argued the cause for respondent. With him on the brief was *Joseph H. Rodriguez.**

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Edwin S. Kneedler;* for the State of Alabama et al. by *Mike Greely,* Attorney General of Montana, and *John H. Maynard,* Assistant Attorney General, *Charles A. Graddick,* Attorney General of Alabama, *Robert K. Corbin,* Attorney General of Arizona, *John Steven Clark,* Attorney General of Arkansas, *John Van de Kamp,* Attorney General of California, *Duane Woodard,* Attorney General of Colorado, *Austin J. McGuigan,* Chief State's Attorney of Connecticut, *Michael J. Bowers,* Attorney General of Georgia, *Tany S. Hong,* Attorney General of Hawaii, *Jim Jones,* Attorney General of Idaho, *Linley E. Pearson,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, *Steven L. Beshear,* Attorney General of Kentucky, *William J. Guste, Jr.,* Attorney General of Louisiana, *James E. Tierney,* Attorney General of Maine, *Stephen H. Sachs,* Attorney General of Maryland, *Francis X. Bellotti,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *William A. Allain,* Attorney General of Mississippi,

John D. Ashcroft, Attorney General of Missouri, *Paul L. Douglas,* Attorney General of Nebraska, *Brian McKay,* Attorney General of Nevada, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Paul Bardacke,* Attorney General of New Mexico, *Rufus L. Edmisten,* Attorney General of North Carolina, *Robert Wefald,* Attorney General of North Dakota, *Anthony Celebrezze, Jr.,* Attorney General of Ohio, *Michael Turpen,* Attorney General of Oklahoma, *Dave Frohnmayer,* Attorney General of Oregon, *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Dennis J. Roberts II,* Attorney General of Rhode Island, *T. Travis Medlock,* Attorney General of South Carolina, *Mark V. Meierhenry,* Attorney General of South Dakota, *William M. Leech, Jr.,* Attorney General of Tennessee, *David L. Wilkinson,* Attorney General of Utah, *John J. Easton,* Attorney General of Vermont, *Gerald L. Baliles,* Attorney General of Virginia, *Kenneth O. Eikenberry,* Attorney General of Washington, *Chauncey H. Browning,* Attorney General of West Virginia, and *Archie G. McClintock,* Attorney General of Wyoming; and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar,* and *Nicholas E. Calio.*

Richard J. Wilson, Charles S. Sims, and *Burt Neuborne* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging affirmance.

***671** Justice O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I
A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included ***672** three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50-53. He also stated, however, that he accepted responsibility for the crimes. E.g., id., at 54, 57. The trial judge ****2057** told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision. Id., at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on ***673** the telephone with respondent'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 for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. Id., at

A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See id., at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross- examining respondent on his claim and from putting on psychiatric evidence of its own. Id., at A223-A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Id., at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227-A228, A265-A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Id., at A265- A266. Counsel also argued that respondent had no history of criminal activity and that respondent committed ***674** the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and ****2058** shooting the murder victim's sisters-in-law, who sustained severe--in one case, ultimately fatal--injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's ***675** participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." See Washington v. State, 362 So.2d 658, 663- 664

(Fla.1978), (quoting trial court findings), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence ***676** of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes. App. 7; see also id., at 14.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. App. to Pet. for Cert. A206-A243. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. Id., at A218-A220. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent's "rap sheet" and thus would have undermined his assertion of no significant history of criminal activity. Id., at A226-A228. Third, the argument and memorandum given to the sentencing judge were "admirable" in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. Id., at A228. Fourth, there was no error in failure to examine the medical ****2059** examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence. Id., at A229.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three ***677** reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral

attack.

Applying the standard for ineffectiveness claims articulated by the Florida Supreme Court in Knight v. State, 394 So.2d 997 (1981), the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. The court specifically found: "[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the ... things [that respondent alleged counsel had failed to do] ***678** at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming...." App. to Pet. for Cert. A230.

The Florida Supreme Court affirmed the denial of relief. Washington v. State, 397 So.2d 285 (1981). For essentially the reasons given by the trial court, the State Supreme Court concluded that respondent had failed to make out a prima facie case of either "substantial deficiency or possible prejudice" and, indeed, had "failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief...." Id., at 287. Respondent's claims were "shown conclusively to be without merit so as to obviate the need for an evidentiary hearing." Id., at 286.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors, except for the failure to move for a continuance,****2060** as those he had identified in state court. The District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. Respondent offered the affidavits and reports he had submitted in the state collateral proceedings; he also called his trial counsel to testify. The State of Florida, over respondent's objection, called the trial judge to testify.

The District Court disputed none of the state court factual findings concerning trial counsel's assistance and made findings of its own that are consistent with the state court findings. The account of trial counsel's actions and decisions given above reflects the combined findings. On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made errors in judgment in failing to ***679** investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. Relying in part on the trial judge's testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that "there does not appear to be a likelihood, or even a significant possibility," that any errors of trial counsel had affected the outcome of the sentencing proceeding. App. to Pet. for Cert. A285-A286. The District Court went on to reject all of respondent's other grounds for relief, including one not exhausted in state court, which the District Court considered because, among other reasons, the State urged its consideration. Id., at A286-A292. The court accordingly denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. 673 F.2d 879 (5th Cir.1982). The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. 679 F.2d 23 (1982). The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F.2d 1243 (1982).

The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is "a matter of comity rather than a matter of jurisdiction" and hence admitted of exceptions. The court agreed with the District Court that this case

came within an exception to the mixed petition rule. 693 F.2d, at 1248, n. 7.

***680** Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Id., at 1250. The court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. Id., at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective because counsel breached his duty to investigate nonstatutory mitigating circumstances.

The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he ****2061** amount of pretrial investigation that is reasonable defies precise measurement." Id., at 1251. Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial.

If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. Id., at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must include " 'an independent examination of the facts, circumstances, pleadings and laws involved.' " Id., at 1253 (quoting Rummel v. Estelle, 590 F.2d 103, 104 (CA5 1979)). The scope of the duty, however, depends ***681** on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F.2d, at 1253, n. 16.

If there is more than one plausible line of defense, the court held, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result "will seldom if ever" be found wanting. Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. Id., at 1254.

If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. Id., at 1257-1258. Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence. Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. Thus, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." Id., at 1255 (footnote omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. Id., at 1256-1257, n. 23.

Having outlined the standards for judging whether defense counsel fulfilled the duty to investigate, the Court of Appeals turned its attention to the question of the prejudice to the ***682** defense that must be shown before counsel's errors justify reversal of the judgment. The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made. Id., at 1258-1259. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies and where evidence of deficiency may

be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." Id., at 1262. This standard, the Court of Appeals reasoned, is compatible with the "cause and prejudice" standard for overcoming procedural defaults in federal collateral proceedings and discourages insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. The specified showing of prejudice ****2062** would result in reversal of the judgment, the court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt. Id., at 1260- 1262.

The Court of Appeals thus laid down the tests to be applied in the Eleventh Circuit in challenges to convictions on the ground of ineffectiveness of counsel. Although some of the judges of the court proposed different approaches to judging ineffectiveness claims either generally or when raised in federal habeas petitions from state prisoners, id., at 1264-1280 (opinion of Tjoflat, J.); id., at 1280 (opinion of Clark, J.); id., at 1285-1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); id., at 1288-1291 (opinion of Hill, J.), and although some believed that no remand was necessary in this case, id., at 1281-1285 (opinion of Johnson, J., joined by Anderson, J.); id., at 1285-1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); id., at 1288-1291 (opinion of Hill, J.), a majority ***683** of the judges of the en banc court agreed that the case should be remanded for application of the newly announced standards. Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. On remand, the court finally ruled, the state trial judge's testimony, though admissible "to the extent that it contains personal knowledge of historical facts or expert opinion," was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing decision. Id., at 1262-1263; see Fayerweather v. Ritch, 195 U.S. 276, 306-307, 25 S.Ct. 58, 67-68, 49 L.Ed. 193 (1904).

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. E.g., United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657. With the exception of Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. Cf. United States v. Agurs, 427 U.S. 97, 102, n. 5, 96 S.Ct. 2392, 2397, n. 5, 49 L.Ed.2d 342 (1976).

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. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, supra, at pp. 3a-6a; Sarno, ***684** Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A.L.R. 4th 99-157, §§ 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, 7a-10a; Sarno, supra, at 83-99, § 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S.App.D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified ****2063** deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262.

[1] For these reasons, we 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. 462 U.S. 1105, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515-520, 102 S.Ct., at 1201-04. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through ***685** the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942); see Powell v. Alabama, supra, 287 U.S. at 68-69, 53 S.Ct. 63-64.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

[2] ***686** For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); ****2064**Brooks v. Tennessee, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344, 100 S.Ct., at 1716. Id., at 345-350, 100 S.Ct., at 1716- 1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

[3] The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases--that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we

must take its purpose--to ensure a fair trial--as the guide. 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.

[4] The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see ***687**Barclay v. Florida, 463 U.S. 939, 952-954, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

[5] A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

[6] As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, 397 U.S., at 770, 771, 90 S.Ct., at 1448, 1449, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, 446 U.S., at 344, 100 S.Ct., at 1716. When a convicted defendant ***688** complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies ****2065** instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michel v. Louisiana, 350 U.S. 91, 100-101, 76 S.Ct. 158, 163-164, 100 L.Ed. 83 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

[7][8][9] Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68-69, 53 S.Ct., at 63-64.

[10] These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's

assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4- 1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take ***689** account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S.App.D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

[11] Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See ***690**2066** Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

[12] Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

[13] These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic ***691** choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

[14] The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B

[15] An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. ****2067**United States v. Morrison, 449 U.S. 361, 364-365, 101 S.Ct. 665, 667- 668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure ***692** that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

[16] In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658, 104 S.Ct., at 2046. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

[17] One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

[18] ***693** Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just

what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela- Bernal, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are ****2068** sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. ***694** Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

[19] Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104, 112- 113, 96 S.Ct., at 2397, 2401-2402, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, 458 U.S., at 872-874, 102 S.Ct., at 3449-3450. The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[20] In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. ***695** An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices,

should not be considered in the prejudice determination.

[21] The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a ****2069** reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

[22][23] In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to ***696** be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different ***697** formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, 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. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

****2070** [24] The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming

procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See United States v. Frady, 456 U.S. 152, 162-169, 102 S.Ct. 1584, 1591-1595, 71 L.Ed.2d 816 (1982); Engle v. Isaac, 456 U.S. 107, 126-129, 102 S.Ct. 1558, 1570-1572, 71 L.Ed.2d 783 (1982). An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, see ***698**id., at 126, 102 S.Ct., at 1570, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

[25] Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," Townsend v. Sain, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See Cuyler v. Sullivan, 446 U.S., at 342, 100 S.Ct., at 1714. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See Pullman-Standard v. Swint, 456 U.S. 273, 291-292, 102 S.Ct. 1781, 1791-1792, 72 L.Ed.2d 66 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, see supra, at 2056-2060, 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 ***699** challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

[26] With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, see App. 383-384, 400-401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well ****2071** known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

[27] With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the ***700** sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted supra, at 2069, that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has 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. Respondent's sentencing proceeding was not fundamentally unfair.

***701** We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

Justice BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see Gregg v. Georgia, 428 U.S. 153, 227, 96 S.Ct. 2909, 2971, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further proceedings. [FN1]

FN1. The Court's judgment leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. Pulley v. Harris, 465 U.S. 37, 59, 104 S.Ct. 871, 886, 79 L.Ed.2d 29 (1984) (BRENNAN, J., dissenting). The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see Furman v. Georgia, 408 U.S. 238, 274-277, 92 S.Ct. 2726, 2744-2746, 33 L.Ed.2d 346 (1972) (BRENNAN, J., concurring); McGautha v. California, 402 U.S. 183, 248-312, 91 S.Ct. 1454, 1487-1520, 28 L.Ed.2d 711 (1971) (BRENNAN, J., dissenting), is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions. See Wainwright v. Adams, 466 U.S. 964, 965, 104 S.Ct. 2183, 2184, 80 L.Ed.2d 809

(1984) (MARSHALL, J., dissenting) (stating that "haste and confusion surrounding ... decision [to vacate stay] is itself degrading to our role as judges"); Autry v. McKaskle, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984) (MARSHALL, J., dissenting) (criticizing Court for "dramatically expediting its normal deliberative processes to clear the way for an impending execution"); Stephens v. Kemp, 464 U.S. 1027, 1032, 104 S.Ct. 562, 565, 78 L.Ed.2d 370 (1983) (POWELL, J., dissenting) (contending that procedures by which stay applications are considered "undermines public confidence in the courts and in the laws we are required to follow"); Sullivan v. Wainwright, 464 U.S. 109, 112, 104 S.Ct. 450, 465, 78 L.Ed.2d 210 (1983) (BURGER, C.J., concurring) (accusing lawyers seeking review of their client's death sentences of turning "the administration of justice into [a] sporting contest"); Autry v. Estelle, 464 U.S. 1, 6, 104 S.Ct. 20, 23, 78 L.Ed.2d 1 (1983) (STEVENS, J., dissenting) (suggesting that Court's practice in reviewing applications in death cases "injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error"). It is difficult to believe that the decision whether to put an individual to death generates any less emotional pressure among juries, trial judges, and appellate courts than it does among Members of this Court.

****2072 *702 I**

This case and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657, present our first occasions to elaborate the appropriate standards for judging claims of ineffective assistance of counsel. In Cronic, the Court considers such claims in the context of cases "in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial," at 661, 104 S.Ct., at 2048. This case, in contrast, concerns claims of ineffective assistance based on allegations of specific errors by counsel--claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding. Accordingly, a defendant making a claim of this kind must show not only that his lawyer's performance was inadequate but also that he was prejudiced thereby. See also Cronic, at 659, n. 26, 104 S.Ct., at 2047, n. 26.

I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law. Like all federal courts and most state courts that have previously addressed the matter, see ante, at 2062, the Court concludes that "the proper standard for attorney performance is that of reasonably effective assistance." Ante, at 2064. And, ***703** rejecting the strict "outcome-determinative" test employed by some courts, the Court adopts as the appropriate standard for prejudice a requirement that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ante, at 2068. I believe these standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of situations giving rise to claims of this kind.

****2073** With respect to the performance standard, I agree with the Court's conclusion that a "particular set of detailed rules for counsel's conduct" would be inappropriate. Ante, at 2065. Precisely because the standard of "reasonably effective assistance" adopted today requires that counsel's performance be measured in light of the particular circumstances of the case, I do not believe our decision "will stunt the development of constitutional doctrine in this area," post, at 2076 (MARSHALL, J., dissenting). Indeed, the Court's suggestion that today's decision is largely consistent with the approach taken by the lower courts, ante, at 2069, simply indicates that

those courts may continue to develop governing principles on a case-by-case basis in the common-law tradition, as they have in the past. Similarly, the prejudice standard announced today does not erect an insurmountable obstacle to meritorious claims, but rather simply requires courts carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case. Ante, at 2069. [FN2]

FN2. Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. See Cronic, 466 U.S., at 659-660, 104 S.Ct., at 2047; Javor v. United States, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

***704** II

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must attend review of counsel's performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater. Recognizing the unique seriousness of such a proceeding, we have repeatedly emphasized that " 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " Zant v. Stephens, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983) (quoting Gregg v. Georgia, 428 U.S., at 188-189, 96 S.Ct., at 2932-2933 (opinion of Stewart, POWELL, and STEVENS, JJ.)).

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding. As Justice MARSHALL emphasized last Term:

> "This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), it recognized that right in capital cases, Powell v. Alabama, 287 U.S. 45, 71-72, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). Time ***705** and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, e.g., Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)....
> ****2074** "Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' Ibid." Barefoot v. Estelle, 463 U.S. 880, 913-914, 103 S.Ct. 3383, 3405, 77 L.Ed.2d 1090 (1983) (dissenting opinion).

See also id., at 924, 103 S.Ct., at 3405 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and

STEVENS, JJ.). For that reason, we have repeatedly insisted that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S., at 112, 102 S.Ct., at 875. In fact, as Justice O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." Id., at 117, n., and 119, 102 S.Ct., at 877, n., and 878 (O'CONNOR, J., concurring).

***706** Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Comment, 83 Colum.L.Rev. 1544, 1549 (1983). See, e.g., Burger v. Zant, 718 F.2d 979 (CA11 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, 466 U.S. 902, 104 S.Ct. 1676, 80 L.Ed.2d 151 (1984). Accordingly, counsel's general duty to investigate, ante, at 2066, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that " 'the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " Eddings v. Oklahoma, supra, 455 U.S., at 112, 102 S.Ct., at 875 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance ***707** of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, n. 14, 25 L.Ed.2d 763 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate ****2075** assistance. [FN1] Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

FN1. See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster, 93 Harv.L.Rev. 752, 756-758 (1980); Note, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U.Chi.L.Rev. 1380, 1386-1387, 1399-1401, 1408-1410 (1983).

I

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." Ante, at 2065. Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds

for overturning a conviction. Ante, at 2068. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave ***708** "reasonably" and must act like "a reasonably competent attorney," ante, at 2065, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale? [FN2] The majority offers no clues as to the proper responses to these questions.

FN2. Cf., e.g., Moore v. United States, 432 F.2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as "the exercise of the customary skill and knowledge which normally prevails at the time and place").

The majority defends its refusal to adopt more specific standards primarily on the ground that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take ***709** account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." ****2076** Ante, at 2065. I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, see ante, at 2065; cf. infra, at 2077-2078, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F.2d 1243, 1251-1258 (CA5 1982) (en banc). For other, generally consistent efforts, see United States v. Decoster, 159 U.S.App.D.C. 326, 333-334, 487 F.2d 1197, 1203-1204 (1973), disapproved on rehearing, 199 U.S.App.D.C. 359, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Coles v. Peyton, 389 F.2d 224, 226 (CA4), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); People v. Pope, 23 Cal.3d 412, 424-425, 590 P.2d 859, 866, 152 Cal.Rptr. 732, 739 (1979); State v. Harper, 57 Wis.2d 543, 55-557, 205 N.W.2d 1, 6-9 (1973). [FN3] By refusing to address the merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

FN3. For a review of other decisions attempting to develop guidelines for assessment of ineffective-assistance-of-counsel claims,

see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am.Crim.L.Rev. 233, 242-248 (1979). Many of these decisions rely heavily on the standards developed by the American Bar Association. See ABA Standards for Criminal Justice 4-1.1-4-8.6 (2d ed. 1981).

***710 B**

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. [FN4] In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

FN4. Cf. United States v. Ellison, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed:
[T]he evil ... is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." Holloway v. Arkansas, 435 U.S. 475, 490-491, 98 S.Ct. 1173, 1181-1182, 55 L.Ed.2d 426 (1978) (emphasis in original). When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

****2077 *711** Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. [FN5] The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

FN5. See United States v. Decoster, 199 U.S.App.D.C. 359, 454-457, 624 F.2d 196, 291-294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Note, 93 Harv.L.Rev., at 767-770.

In Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is the right to the assistance of counsel at trial. Id., at

23, n. 8, 87 S.Ct., at 827, n. 8; see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). [FN6] In my view, the right ***712** to effective assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter. [FN7] I would thus hold that 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.

FN6. In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In Glasser v. United States, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467-468, 86 L.Ed. 680 (1942), for example, we held:
"To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."
As the Court today acknowledges, United States v. Cronic, 466 U.S., at 662, n. 31, 104 S.Ct., at 2048, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.

FN7. See United States v. Yelardy, 567 F.2d 863, 865, n. 1 (CA6), cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978); Beasley v. United States, 491 F.2d 687, 696 (CA6 1974); Commonwealth v. Badger, 482 Pa. 240, 243-244, 393 A.2d 642, 644 (1978).

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of "a range of legitimate" responses. Ante, at 2065. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. Ibid. The majority goes on, however, to suggest that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, ibid.; see ante, at 2066, 2069, and should "appl[y] a heavy measure of deference to counsel's judgments," ante, at 2066.

****2078** I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I ***713** would agree. See United States v. Cronic, 466 U.S., at 658, 104 S.Ct., at 2046. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional norms," ante, at 2065, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to

raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. See ante, at 2066. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

B

For many years the lower courts have been debating the meaning of "effective" assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving "farce-and-mockery" standard, [FN8] while others have adopted various versions of ***714** the "reasonable competence" standard. [FN9] On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent "outcome-determinative" test, [FN10] to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant. [FN11]

FN8. See, e.g., State v. Pacheco, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); Hoover v. State, 270 Ark. 978, 980, 606 S.W.2d 749, 751 (1980); Line v. State, 272 Ind. 353, 354-355, 397 N.E.2d 975, 976 (1979).

FN9. See, e.g., Trapnell v. United States, 725 F.2d 149, 155 (CA2 1983); Cooper v. Fitzharris, 586 F.2d 1325, 1328-1330 (CA9 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

FN10. See, e.g., United States v. Decoster, 199 U.S.App.D.C., at 370, and n. 74, 624 F.2d, at 208, and n. 74 (plurality opinion); Knight v. State, 394 So.2d 997, 1001 (Fla.1981).

FN11. See n. 7, supra.

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, ante, at 2064- 2067, and so affects the trial that there is a "reasonable probability" that, absent counsel's error, the outcome would have been different, ante, at 2067-2069.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See ante, at 2069. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluctance ****2079** to acknowledge that today's decision will require a reassessment of many previously rejected ineffective-assistance-of-counsel claims. The majority's unhappiness on this score is understandable, but its efforts to mitigate the perceived problem will be ineffectual. Nothing the majority says can relieve lower courts that hitherto ***715** have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today.

III

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." Ante, at 2064. I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that

qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion) (footnote omitted). [FN12]

FN12. See also Zant v. Stephens, 462 U.S. 862, 884-885, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 873-875, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion).

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The job of amassing that information and presenting it ***716** in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts, [FN13] combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings. [FN14]

FN13. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 303 (1983).

FN14. As Justice BRENNAN points out, ante, at 2073, an additional reason for examining especially carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetent in the liability phase of a trial.

It matters little whether strict scrutiny of a claim that ineffectiveness of counsel resulted in a death sentence is achieved through modification of the Sixth Amendment standards or through especially careful application of those standards. Justice BRENNAN suggests that the necessary adjustment of the level of performance required of counsel in capital sentencing proceedings can be effected simply by construing the phrase, "reasonableness under prevailing professional norms," in a manner that takes into account the nature of the impending penalty. Ante, at 2073-2074. Though I would prefer a more specific iteration of counsel's duties in this special context, [FN15] I can accept that proposal. However, when instructing lower courts regarding ****2080** the probability of impact upon the outcome that requires a resentencing, I think the Court would do best explicitly to modify the legal standard itself. [FN16] In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a "reasonable probability" ***717** that he would have been given a life sentence if his lawyer had been competent, see ante, at 2068; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate. Cf. United States v. Agurs, 427 U.S. 97, 121-122, 96 S.Ct. 2392, 2405-2406, 49 L.Ed.2d 342 (1976) (MARSHALL, J., dissenting). [FN17]

FN15. See Part I-A, supra. For a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings, see Goodpaster, supra, at 343-345, 360-362.

FN16. For the purposes of this and the succeeding section, I assume, solely for the sake of argument, that some showing of prejudice is necessary to state a violation of the Sixth Amendment. But cf. Part I-B, supra.

FN17. As I read the opinion of the Court, it does not preclude this kind of adjustment of the legal standard. The majority defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ante, at 2068. In view of the nature of the sanction at issue, and the difficulty of determining how a sentencer would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of a capital sentencing proceeding was influenced by attorney error is sufficient to "undermine confidence" in that outcome than would be true in an ordinary criminal case.

IV

The views expressed in the preceding section oblige me to dissent from the majority's disposition of the case before us. [FN18] It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, non-violent man, devoted to his family, and active in the affairs of his church. See App. 338-365. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

FN18. Adhering to my view that the death penalty is unconstitutional under all circumstances, Gregg v. Georgia, 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976) (MARSHALL, J., dissenting), I would vote to vacate respondent's sentence even if he had not presented a substantial Sixth Amendment claim.

***718** Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 300-303, 334-335 (1983). The State makes a colorable--though in my view not compelling--argument that defense counsel in this case might have made a reasonable "strategic" decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgment of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsibility for their actions. [FN19] But however justifiable ****2081** such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely cannot be described as "reasonable." Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life, see App. 383-384, 400- 401.

FN19. Two considerations undercut the State's explanation of counsel's decision. First, it is not apparent why adducement of evidence pertaining to respondent's character and familial connections would have been inconsistent with respondent's acknowledgement that he was responsible for his behavior. Second, the Florida Supreme Court possesses--and frequently exercises--the power to overturn death sentences it deems unwarranted by the facts of a case. See State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Even if counsel's decision not to try to humanize respondent for the benefit of the trial judge were deemed reasonable, counsel's failure to create a record for the benefit of the State Supreme Court might well be deemed unreasonable.

***719** That the aggravating circumstances implicated by respondent's criminal conduct were substantial, see ante, at 2071, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life. [FN20] Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges and the Florida Supreme Court sometimes refuse to impose death sentences in cases "in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3431, 77 L.Ed.2d 1134 (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

FN20. See, e.g., Farmer & Kinard, The Trial of the Penalty Phase (1976), reprinted in 2 California State Public Defender, California Death Penalty Manual N-33, N-45 (1980).

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

104 S.Ct. 2052, 466 U.S. 668, 80 L.Ed.2d 674

Briefs and Other Related Documents (Back to top)

• 1983 WL 482734 (Appellate Brief) Brief of Petitioner (Aug. 18, 1983)

• 1983 WL 482731 (Appellate Brief) Respondent's Brief in Opposition (May. 11, 1983)

• 1983 WL 482732 (Appellate Brief) Brief Amici Curiae of the States of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Mo ntana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming, in Support of Petition (Apr. 22, 1983)

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156 L.Ed.2d 471, 71 USLW 4560, 3 Cal. Daily Op. Serv. 5586, 2003 Daily Journal D.A.R. 7015, 16 Fla. L. Weekly Fed. S 459
(Cite as: 123 S.Ct. 2527)

Briefs and Other Related Documents

Supreme Court of the United States

Kevin WIGGINS, Petitioner,
v.
Sewall SMITH, Warden, et al.

No. 02-311.

Argued March 24, 2003.
Decided June 26, 2003.

Petitioner, convicted in state court of murder and sentenced to death, having exhausted state-court appeals, 324 Md. 551, 597 A.2d 1359, and postconviction remedies, 352 Md. 580, 724 A.2d 1, sought federal habeas relief. The United States District Court for the District of Maryland, J. Frederick Motz, J., 164 F.Supp.2d 538, granted petition. The United States Court of Appeals for the Fourth Circuit, 288 F.3d 629, reversed. On writ of certiorari, the Supreme Court, Justice O'Connor, held that: (1) decision of counsel not to expand their investigation of petitioner's life history for mitigating evidence beyond presentence investigation (PSI) report and department of social services records fell short of prevailing professional standards, and (2) inadequate investigation by counsel prejudiced petitioner.

Reversed.

Justice Scalia filed dissenting opinion, in which Justice Thomas joined.

West Headnotes

[1] Habeas Corpus ⇐450.1
197k450.1 Most Cited Cases

"Unreasonable application" prong of habeas corpus statute permits federal habeas court to grant writ if state court identifies correct governing legal principle from Supreme Court's decisions but unreasonably applies that principle to facts of petitioner's case. 28 U.S.C.A. § 2254(d)(1).

[2] Habeas Corpus ⇐450.1
197k450.1 Most Cited Cases

Federal court may grant habeas relief under "unreasonable application" prong of habeas corpus statute when state court has misapplied governing legal principle to set of facts different from those of case in which principle was announced. 28 U.S.C.A. § 2254(d)(1).

[3] Habeas Corpus ⇐450.1
197k450.1 Most Cited Cases

For federal court to find state court's application of Supreme Court precedent "unreasonable," warranting federal habeas relief, state court's decision must have been more than incorrect or erroneous; state court's application must have been objectively unreasonable. 28 U.S.C.A. § 2254(d)(1) .

[4] Criminal Law ⇐641.13(1)
110k641.13(1) Most Cited Cases

Ineffective assistance of counsel claim has two components: petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⇐641.13(1)
110k641.13(1) Most Cited Cases

To establish deficient performance, as required to support claim of ineffective assistance of counsel, petitioner must demonstrate that counsel's representation fell below objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⇐641.13(1)
110k641.13(1) Most Cited Cases

On claim of ineffective assistance of counsel, proper measure of counsel's performance is simply reasonableness under prevailing professional norms. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⇐641.13(2.1)
110k641.13(2.1) Most Cited Cases

Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible

options are virtually unchallengeable on claim of ineffective assistance. U.S.C.A. Const.Amend. 6.

[8] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

Counsel's strategic choices made after less than complete investigation are considered reasonable, on claim of ineffective assistance, precisely to extent that reasonable professional judgments support limitations on investigation. U.S.C.A. Const.Amend. 6.

[9] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

Counsel has duty to make reasonable investigations or to make reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

[10] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

On any claim of ineffective assistance of counsel based on failure to investigate, particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying heavy measure of deference to counsel's judgments. U.S.C.A. Const.Amend. 6.

[11] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

Decision of counsel not to expand their investigation of petitioner's life history for mitigating evidence for penalty phase of petitioner's murder trial beyond presentence investigation (PSI) report and department of social services records fell short of prevailing professional standards in capital cases, as required to support claim of ineffective assistance; despite well-defined norms which provided that investigation into mitigating evidence should have comprised efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from narrow set of sources. U.S.C.A. Const.Amend. 6.

[12] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

In assessing reasonableness of attorney's investigation, court must consider not only quantum of evidence already known to counsel, but also whether known evidence would lead reasonable attorney to investigate further. U.S.C.A. Const.Amend. 6.

[13] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

To establish prejudice, as required to support claim of ineffective assistance of counsel, defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different. U.S.C.A. Const.Amend. 6.

[14] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different, demonstrating prejudice required to support claim of ineffective assistance, is probability sufficient to undermine confidence in outcome. U.S.C.A. Const.Amend. 6.

[15] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

In assessing prejudice resulting from alleged ineffective assistance of counsel at penalty phase of capital trial, court reweighs evidence in aggravation against totality of available mitigating evidence. U.S.C.A. Const.Amend. 6.

[16] Habeas Corpus ⚿773
197k773 Most Cited Cases

Supreme Court's review of prejudice resulting from counsels' inadequate investigation of petitioner's life history for mitigating evidence for penalty phase of petitioner's murder trial on petition for federal habeas relief based on claim of ineffective assistance was not circumscribed by state courts' conclusions with respect to prejudice, since state courts did not reach prejudice prong of *Strickland* analysis. U.S.C.A. Const.Amend. 6.

[17] Criminal Law ⚖641.13(7)
110k641.13(7) Most Cited Cases

Inadequate investigation of petitioner's life history for mitigating evidence for penalty phase of petitioner's murder trial prejudiced petitioner, and thus constituted ineffective assistance of counsel; mitigating evidence counsel failed to discover and present was powerful, showing that petitioner had experienced severe privation and abuse in first six years of his life while in custody of his alcoholic, absentee mother, and had suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care, and had jury been confronted with evidence, there was reasonable probability that it would have returned with different sentence. U.S.C.A. Const.Amend. 6.

***2529** *Syllabus* [FN*]

> FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In 1989, petitioner Wiggins was convicted of capital murder by a Maryland judge and subsequently elected to be sentenced by a jury. His public defenders, Schlaich and Nethercott, moved to bifurcate the sentencing, representing that they planned to prove that Wiggins did not kill the victim by his own hand and then, if necessary, to present a mitigation case. The court denied the motion. At sentencing, Nethercott told the jury in her opening statement that they would hear, among other things, about Wiggins' difficult life, but such evidence was never introduced. Before closing arguments and outside the presence of the jury, Schlaich made a proffer to the court to preserve the bifurcation issue for appeal, detailing the mitigation case counsel would have presented. Schlaich never mentioned Wiggins' life history or family background. The jury sentenced Wiggins to death, and the Maryland Court of Appeals affirmed. Represented by new counsel, Wiggins sought postconviction relief, arguing that his trial counsel had rendered ineffective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. He presented expert testimony by a forensic social worker about the severe physical and sexual abuse he had suffered at the hands of his mother and while under the care of a series of foster parents. Schlaich testified that he did not remember retaining a forensic social worker to prepare a social history before sentencing, even though state funds were available for that purpose, and explained that he and Nethercott had decided to focus on retrying the factual case and disputing Wiggins' direct responsibility for the murder. The trial court denied the petition, and the State Court of Appeals affirmed, concluding that trial counsel had made a reasoned choice to proceed with what they considered their best defense. Subsequently, the Federal District Court granted Wiggins relief on his federal habeas petition, holding that the Maryland courts' rejection of his ineffective assistance claim involved an unreasonable application of clearly established federal law. In reversing, the Fourth Circuit found trial counsel's strategic decision to focus on Wiggins' direct responsibility to be reasonable.

Held: The performance of Wiggins' attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel. Pp. 2534-2544.

(a) A federal writ can be granted only if a state court decision "was contrary to, or involved an unreasonable application of, clearly established" precedents of this Court. 28 U.S.C. § 2254(d)(1). This "unreasonable application" prong permits the writ to be granted when a state court identifies the correct governing legal principle but unreasonably applies it to the facts of a petitioner's case. *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389. For this standard to be satisfied, the state court decision must have been "objectively unreasonable," *id.,* at 409, 120 S.Ct. 1495, not just incorrect or erroneous. An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Performance is deficient if it falls below an objective standard of reasonableness, which is defined in terms of ***2530** prevailing professional norms. *Id.,* at 688, 104 S.Ct. 2052. Here, as in *Strickland,* counsel claim that their limited investigation into petitioner's background reflected a tactical judgment not to

present mitigating evidence and to pursue an alternative strategy instead. In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting their decision not to introduce mitigating evidence of Wiggins' background was *itself reasonable.* The Court thus conducts an objective review of their performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time of that conduct. *Id.,* at 688, 689, 104 S.Ct. 2052. Pp. 2534-2536.

(b) Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigating when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins' background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. The record of the sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly stemmed from inattention, not strategic judgment. Until the trial court denied their bifurcation motion, they had had every reason to develop the most powerful mitigation case possible. During the sentencing process itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder; rather they put on a halfhearted mitigation case instead. The Maryland Court of Appeals' assumption that counsel's investigation was adequate reflected an unreasonable application of *Strickland.* In deferring to counsel's decision not to present every conceivable mitigation defense despite the fact that counsel based their alleged choice on an inadequate investigation, the Maryland Court of Appeals further unreasonably applied *Strickland.* And the court's conclusion that the social services records revealed incidences of sexual abuse, when they in fact did not, reflects "an unreasonable determination of the facts in light of evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Contrary to the State's and the United States' contention, the record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one this Court describes. Ultimately, this Court's conclusion that counsel's investigation was inadequate does not mean that *Strickland* requires counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require counsel to present such evidence at sentencing in every case. Rather, the conclusion is based on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable *2531 professional judgments support the limitations on investigation." *Strickland, supra,* at 690-691, 104 S.Ct. 2052. Pp. 2536- 2542.

(c) Counsel's failures prejudiced Wiggins' defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Strickland, supra,* at 694, 104 S.Ct. 2052. This Court assesses prejudice by reweighing the aggravating evidence against the totality of the mitigating evidence adduced both at trial and in the habeas proceedings. *Williams v. Taylor, supra,* at 397-398, 120 S.Ct. 1495. The mitigating evidence counsel failed to discover and present here is powerful. Wiggins experienced severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care. His time spent homeless

and his diminished mental capacities further augment his mitigation case. He thus has the kind of troubled history relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256. Given the nature and extent of the abuse, there is a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing, and that a jury confronted with such mitigating evidence would have returned with a different sentence. The only significant mitigating factor the jury heard was that Wiggins had no prior convictions. Had it been able to place his excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Wiggins had no record of violent conduct that the State could have introduced to offset this powerful mitigating narrative. Thus, the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of his moral culpability. Pp. 2542-2544.

288 F.3d 629, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER , JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

Donald B. Verrilli, Jr., Washington, DC, for petitioner.

Gary E. Bair, Baltimore, MD, for respondents.

Dan Himmelfarb, for United States as amicus curiae, by special leave of the Court, supporting the respondents.

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J. Joseph Curran, Jr., Attorney General, Gary E. Bair, Kathryn Grill Graeff, Ann N. Bosse, Assistant Attorneys General Office, Baltimore, Maryland, for Respondents.

Justice O'CONNOR delivered the opinion of the Court.

Petitioner, Kevin Wiggins, argues that his attorneys' failure to investigate his background and present mitigating evidence of his unfortunate life history at his capital sentencing proceedings violated his Sixth Amendment right to counsel. In this case, we consider whether the United States Court of Appeals for the Fourth Circuit erred in upholding the Maryland Court of Appeals' rejection of this claim.

I

A

On September 17, 1988, police discovered 77-year-old Florence Lacs drowned in the bathtub of her ransacked apartment in ***2532** Woodlawn, Maryland. *Wiggins v. State,* 352 Md. 580, 585, 724 A.2d 1, 5 (1999). The State indicted petitioner for the crime on October 20, 1988, and later filed a notice of intention to seek the death penalty. Two Baltimore County public defenders, Carl Schlaich and Michelle Nethercott, assumed responsibility for Wiggins' case. In July 1989, petitioner elected to be tried before a judge in Baltimore County Circuit Court. *Ibid.* On August 4, after a 4-day trial, the court found petitioner guilty of first-degree murder, robbery, and two counts of theft. App. 32.

After his conviction, Wiggins elected to be sentenced by a jury, and the trial court scheduled the proceedings to begin on October 11, 1989. On September 11, counsel filed a motion for bifurcation of sentencing in hopes of presenting Wiggins' case in two phases. *Id.,* at 34. Counsel intended first to prove that Wiggins did not act as a "principal in the first degree," *ibid.--i.e.,* that he did not kill the victim by his own hand. See Md. Ann.Code, Art. 27, § 413 (1996) (requiring proof of direct responsibility for death eligibility). Counsel then intended, if necessary, to present a mitigation case. In the memorandum in support of their motion, counsel argued that bifurcation would enable them to present each case in its best light; separating the two cases would prevent the introduction of mitigating evidence from diluting their claim that Wiggins was not directly responsible for the murder. App. 36-42, 37.

On October 12, the court denied the bifurcation

motion, and sentencing proceedings commenced immediately thereafter. In her opening statement, Nethercott told the jurors they would hear evidence suggesting that someone other than Wiggins actually killed Lacs. *Id.,* at 70-71. Counsel then explained that the judge would instruct them to weigh Wiggins' clean record as a factor against a death sentence. She concluded: "You're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no convictions for prior crimes of violence and no convictions, period .... I think that's an important thing for you to consider." *Id.,* at 72. During the proceedings themselves, however, counsel introduced no evidence of Wiggins' life history.

Before closing arguments, Schlaich made a proffer to the court, outside the presence of the jury, to preserve bifurcation as an issue for appeal. He detailed the mitigation case counsel would have presented had the court granted their bifurcation motion. He explained that they would have introduced psychological reports and expert testimony demonstrating Wiggins' limited intellectual capacities and childlike emotional state on the one hand, and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world on the other. See *id.,* at 349-351. At no point did Schlaich proffer any evidence of petitioner's life history or family background. On October 18, the court instructed the jury on the sentencing task before it, and later that afternoon, the jury returned with a sentence of death. *Id.,* at 409-410. A divided Maryland Court of Appeals affirmed. *Wiggins v. State,* 324 Md. 551, 597 A.2d 1359 (1991), cert. denied, 503 U.S. 1007, 112 S.Ct. 1765, 118 L.Ed.2d 427 (1992).

B

In 1993, Wiggins sought postconviction relief in Baltimore County Circuit Court. With new counsel, he challenged the adequacy of his representation at sentencing, arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. App. to Pet. for Cert. 132a. To support his claim, petitioner presented testimony by Hans Selvog, a licensed social worker certified as an expert by the court. App. 419. Selvog testified concerning an elaborate *2533 social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents. Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, Selvog chronicled petitioner's bleak life history. App. to Pet. for Cert. 163a.

According to Selvog's report, petitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. *Id.,* at 166a-167a. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner--an incident that led to petitioner's hospitalization. *Id.,* at 167a-171a. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, *id.,* at 175a-176a, and, as petitioner explained to Selvog, the father in his second foster home repeatedly molested and raped him. *Id.,* at 176a-179a. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. *Id.,* at 190a. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor. *Id.,* at 192a.

During the postconviction proceedings, Schlaich testified that he did not remember retaining a forensic social worker to prepare a social history, even though the State made funds available for that purpose. App. 487-488. He explained that he and Nethercott, well in advance of trial, decided to focus their efforts on "retry[ing] the factual case" and disputing Wiggins' direct responsibility for the murder. *Id.,* at 485-486. In April 1994, at the close of the proceedings, the judge observed from the bench that he could not remember a capital case in which counsel had not compiled a social history of

the defendant, explaining, "[n]ot to do a social history, at least to see what you have got, to me is absolute error. I just--I would be flabbergasted if the Court of Appeals said anything else." *Id.,* at 605. In October 1997, however, the trial court denied Wiggins' petition for postconviction relief. The court concluded that "when the decision not to investigate ... is a matter of trial tactics, there is no ineffective assistance of counsel." App. to Pet. for Cert. 155a-156a.

The Maryland Court of Appeals affirmed the denial of relief, concluding that trial counsel had made "a deliberate, tactical decision to concentrate their effort at convincing the jury" that appellant was not directly responsible for the murder. *Wiggins v. State,* 352 Md., at 608, 724 A.2d, at 15. The court observed that counsel knew of Wiggins' unfortunate childhood. They had available to them both the presentence investigation (PSI) report prepared by the Division of Parole and Probation, as required by Maryland law, Md. Ann.Code, Art. 41, § 4-609(d) (1988), as well as "more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation." 352 Md., at 608-609, 724 A.2d, at 15. The court acknowledged that this evidence was neither as detailed nor as graphic as the history elaborated in the Selvog report but emphasized that "counsel *did* investigate and *were* aware of appellant's background." *Id.,* at 610, 724 A.2d, at 16 (emphasis in original). Counsel knew that at least one uncontested mitigating factor-- Wiggins' lack of prior convictions--would be before the jury should their attempt to disprove Wiggins' direct responsibility for the murder fail. As a result, the court concluded, Schlaich and Nethercott "made a reasoned choice to proceed with what ***2534** they thought was their best defense." *Id.,* at 611-612, 724 A.2d, at 17.

C

In September 2001, Wiggins filed a petition for writ of habeas corpus in Federal District Court. The trial court granted him relief, holding that the Maryland courts' rejection of his ineffective assistance claim "involved an unreasonable application of clearly established federal law." *Wiggins v. Corcoran,* 164 F.Supp.2d 538, 557 (2001) (citing *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). The court rejected the State's defense of counsel's "tactical" decision to " 'retry guilt,' " concluding that for a strategic decision to be reasonable, it must be "based upon information the attorney has made after conducting a reasonable investigation." 164 F.Supp.2d, at 558. The court found that though counsel were aware of some aspects of Wiggins' background, that knowledge did not excuse them from their duty to make a "fully informed and deliberate decision" about whether to present a mitigation case. In fact, the court concluded, their knowledge triggered an obligation to look further. *Id.,* at 559.

Reviewing the District Court's decision *de novo,* the Fourth Circuit reversed, holding that counsel had made a reasonable strategic decision to focus on petitioner's direct responsibility. *Wiggins v. Corcoran,* 288 F.3d 629, 639- 640 (2002). The court contrasted counsel's complete failure to investigate potential mitigating evidence in *Wiggins,* 288 F.3d, at 640, with the fact that Schlaich and Nethercott knew at least some details of Wiggins' childhood from the PSI and social services records, *id.,* at 641. The court acknowledged that counsel likely knew further investigation "would have resulted in more sordid details surfacing," but agreed with the Maryland Court of Appeals that counsel's knowledge of the avenues of mitigation available to them "was sufficient to make an informed strategic choice" to challenge petitioner's direct responsibility for the murder. *Id.,* at 641-642. The court emphasized that conflicting medical testimony with respect to the time of death, the absence of direct evidence against Wiggins, and unexplained forensic evidence at the crime scene supported counsel's strategy. *Id.,* at 641.

We granted certiorari, 537 U.S. 1027, 123 S.Ct. 556, 154 L.Ed.2d 441 (2002), and now reverse.

II

A

[1][2][3] Petitioner renews his contention that his attorneys' performance at sentencing violated his Sixth Amendment right to effective assistance of counsel. The amendments to 28 U.S.C. § 2254, enacted as part of the Antiterrorism and Effective

Death Penalty Act of 1996 (AEDPA), circumscribe our consideration of Wiggins' claim and require us to limit our analysis to the law as it was "clearly established" by our precedents at the time of the state court's decision. Section 2254 provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding."

We have made clear that the "unreasonable application" prong of § 2254(d)(1) permits a federal habeas court to "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies *2535 that principle to the facts" of petitioner's case. *Williams v. Taylor, supra,* at 413, 120 S.Ct. 1495; see also *Bell v. Cone,* 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). In other words, a federal court may grant relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade,* 538 U.S. ----, ----, 123 S.Ct. 1166, 1175, 155 L.Ed.2d 144 (2003) (citing *Williams v. Taylor, supra,* at 407, 120 S.Ct. 1495). In order for a federal court to find a state court's application of our precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. See *Lockyer, supra,* at ----, 123 S.Ct. 1166 (slip op., at 11). The state court's application must have been "objectively unreasonable." See *Williams v. Taylor, supra,* at 409, 120 S.Ct. 1495.

[4][5][6] We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.,* at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.,* at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Ibid.*

[7][8][9][10] In this case, as in *Strickland,* petitioner's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. *Id.,* at 673, 104 S.Ct. 2052. Here, as in *Strickland,* counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternate strategy instead. In rejecting Strickland's claim, we defined the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.,* at 690-691, 104 S.Ct. 2052.

Our opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." 529 U.S., at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4- 55 (2d ed.1980)). While *Williams* had not yet

been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, cf. *post,* at 2546 (SCALIA, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, *ibid.,* we therefore made no new law in resolving Williams' ineffectiveness claim. See *Williams,* 529 U.S., at 390, 120 S.Ct. 1495 (noting that the merits of Williams' ***2536** claim "are squarely governed by our holding in *Strickland*"); see also *id.,* at 395, 120 S.Ct. 1495 (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland*'s performance prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today. Cf. *Strickland,* 466 U.S., at 690-691, 104 S.Ct. 2052 (establishing that "thorough investigation[s]" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also *id.,* at 688-689, 104 S.Ct. 2052 ("Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable").

In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable professional judgmen[t]," *id.,* at 691, 104 S.Ct. 2052, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable. Ibid.* Cf. *Williams v. Taylor, supra,* at 415, 120 S.Ct. 1495 (O'CONNOR, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland,* 466 U.S., at 688, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id.,* at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").

B

[11] The record demonstrates that counsel's investigation drew from three sources. App. 490-491. Counsel arranged for William Stejskal, a psychologist, to conduct a number of tests on petitioner. Stejskal concluded that petitioner had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.,* at 44- 45, 349-351. These reports revealed nothing, however, of petitioner's life history. Tr. of Oral Arg. 24-25.

With respect to that history, counsel had available to them the written PSI, which included a one-page account of Wiggins' "personal history" noting his "misery as a youth," quoting his description of his own background as " 'disgusting,' " and observing that he spent most of his life in foster care. App. 20-21. Counsel also "tracked down" records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system. *Id.,* at 490; Lodging of Petitioner. In describing the scope of counsel's investigation into petitioner's life history, both the Fourth Circuit and the Maryland Court of Appeals referred only to these two sources of information. See 288 F.3d, at 640-641; *Wiggins v. State,* 352 Md., at 608-609, 724 A.2d, at 15.

Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. App. 488. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. *Id.,* at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American ***2537** Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra,* at 688, 104 S.Ct. 2052; *Williams v. Taylor, supra,* at 396, 120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by

the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.,* 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").

The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records. The records revealed several facts: Petitioner's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while 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. See Lodging of Petitioner 54-95, 126, 131-136, 140, 147, 159-176. As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background. 164 F.Supp.2d, at 559. Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable. See, *e.g., Strickland,* 466 U.S., at 699, 104 S.Ct. 2052 (concluding that counsel could "reasonably surmise ... that character and psychological evidence would be of little help"); *Burger v. Kemp,* 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden v. Wainwright,* 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail). Had counsel investigated further, they may well have discovered the sexual abuse later revealed during state postconviction proceedings.

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. See *supra,* at 2532. On the eve of sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, App. 45, and that they intended to present such evidence in the event the court granted their motion to bifurcate. ***2538** In other words, prior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible.

What is more, during the sentencing proceeding itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder. After introducing that issue in her opening statement, *id.,* at 70-71, Nethercott entreated the jury to consider not just what Wiggins "is found to have done," but also "who [he] is." *Id.,* at 70. Though she told the jury it would "hear that Kevin Wiggins has had a difficult life," *id.,* at 72, counsel never followed up on that suggestion with details of Wiggins' history. At the same time, counsel called a criminologist to testify that inmates serving life sentences tend to adjust well and refrain from further violence in prison-- testimony with no bearing on whether petitioner committed the murder by his own hand. *Id.,* at 311-312. Far from focusing exclusively on petitioner's direct responsibility, then, counsel put on a halfhearted mitigation case, taking precisely

the type of "shotgun" approach the Maryland Court of Appeals concluded counsel sought to avoid. *Wiggins v. State,* 352 Md., at 609, 724 A.2d, at 15. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.

[12] In rejecting petitioner's ineffective assistance claim, the Maryland Court of Appeals appears to have assumed that because counsel had *some* information with respect to petitioner's background--the information in the PSI and the DSS records--they were in a position to make a tactical choice not to present a mitigation defense. *Id.,* at 611-612, 724 A.2d, at 17 (citing federal and state precedents finding ineffective assistance in cases in which counsel failed to conduct an investigation of any kind). In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming Schlaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy. 466 U.S., at 691, 104 S.Ct. 2052.

The Maryland Court of Appeals' application of *Strickland*'s governing legal principles was objectively unreasonable. Though the state court acknowledged petitioner's claim that counsel's failure to prepare a social history "did not meet the minimum standards of the profession," the court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the PSI and the DSS records actually demonstrated reasonable professional judgment. *Wiggins v. State,* 352 Md., at 609, 724 A.2d, at 16. The state court merely assumed that the investigation was adequate. In light of what the PSI and the DSS records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible. The Court of Appeals' assumption that the investigation was adequate, *ibid.,* thus reflected an unreasonable application of *Strickland.* 28 U.S.C. § 2254(d)(1). As a result, the court's subsequent deference to counsel's strategic decision not "to present every conceivable mitigation defense," 352 Md., at 610, 724 A.2d, at 16, despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable. As we established in ***2539** *Strickland,* "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S., at 690-691, 104 S.Ct. 2052.

Additionally, the court based its conclusion, in part, on a clear factual error--that the "social service records ... recorded incidences of ... sexual abuse." 352 Md., at 608-609, 724 A.2d, at 15. As the State and the United States now concede, the records contain no mention of sexual abuse, much less of the repeated molestations and rapes of petitioner detailed in the Selvog report. Brief for Respondents 22; Brief for United States as *Amicus Curiae* 26; App. to Pet. for Cert. 175a-179a, 190a. The state court's assumption that the records documented instances of this abuse has been shown to be incorrect by "clear and convincing evidence," 28 U.S.C. § 2254(e)(1), and reflects "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision.

The dissent insists that this Court's hands are tied, under § 2254(d), "by the state court's factual determinations that Wiggins' trial counsel '*did* investigate and *were* aware of [Wiggins'] background,' " *post,* at 2550. But as we have made clear, the Maryland Court of Appeals' conclusion that the *scope* of counsel's investigation into petitioner's background met the legal standards set in *Strickland* represented an objectively unreasonable application of our precedent. § 2254(d)(1). Moreover, the court's assumption that counsel learned of a major aspect of Wiggins' background, *i.e.,* the sexual abuse, from the DSS records was clearly erroneous. The requirements of

§ 2254(d) thus pose no bar to granting petitioner habeas relief.

2

In their briefs to this Court, the State and the United States contend that counsel, in fact, conducted a more thorough investigation than the one we have just described. This conclusion, they explain, follows from Schlaich's postconviction testimony that he knew of the sexual abuse Wiggins suffered, as well as of the hand-burning incident. According to the State and its *amicus,* the fact that counsel claimed to be aware of this evidence, which was not in the social services records, coupled with Schlaich's statement that he knew what was in "other people's reports," App. 490-491, suggests that counsel's investigation must have extended beyond the social services records. Tr. of Oral Arg. 31-36; Brief for United States as *Amicus Curiae* 26-27, n. 4; Brief for Respondents 35. Schlaich simply "was not asked to and did not reveal the source of his knowledge" of the abuse. Brief for United States as *Amicus Curiae* 27, n. 4.

In considering this reading of the state postconviction record, we note preliminarily that the Maryland Court of Appeals clearly assumed both that counsel's investigation began and ended with the PSI and the DSS records and that this investigation was sufficient in scope to satisfy *Strickland*'s reasonableness requirement. See *Wiggins v. State,* 352 Md., at 608, 724 A.2d, at 15. The court also assumed, erroneously, that the social services records cited incidences of sexual abuse. See *id.,* at 608-609, 724 A.2d, at 15. Respondents' interpretation of Schlaich's postconviction testimony therefore has no bearing on whether the Maryland Court of Appeals' decision reflected an objectively unreasonable application of *Strickland.*

In its assessment of the Maryland Court of Appeals' opinion, the dissent apparently does not dispute that if counsel's investigation in this case had consisted exclusively of the PSI and the DSS records, the court's decision would have constituted an unreasonable application of *Strickland.* See *post,* at 2547. Of necessity, then, the ***2540** dissent's primary contention is that the Maryland Court of Appeals *did* decide that Wiggins' counsel looked beyond the PSI and the DSS records and that we must therefore defer to that finding under § 2254(e)(1). See *post,* at 2547-2550. *Had* the court found that counsel's investigation extended beyond the PSI and the DSS records, the dissent, of course, would be correct that § 2254(e) would require that we defer to that finding. But the state court made no such finding.

The dissent bases its conclusion on the Maryland Court of Appeals' statements that "[c]ounsel were aware that appellant had a most unfortunate childhood," and that "counsel *did* investigate and *were* aware of appellant's background." See *post,* at 2545, 2547 (quoting *Wiggins v. State, supra,* at 608, 610, 724 A.2d, at 15, 16). But the state court's description of how counsel learned of petitioner's childhood speaks for itself. The court explained: "Counsel were aware that appellant had a most unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation report ... but also more detailed social service records." See 352 Md., at 608-609, 724 A.2d, at 15. This construction reflects the state court's understanding that the investigation consisted of the two sources the court mentions. Indeed, when describing counsel's investigation into petitioner's background, the court never so much as implies that counsel uncovered any source other than the PSI and the DSS records. The court's conclusion that counsel were aware of "incidences ... of sexual abuse" does not suggest otherwise, cf. *post,* at 2547, because the court assumed that counsel learned of such incidents from the social services records. *Wiggins v. State,* 352 Md., at 608-609, 724 A.2d, at 15.

The court's subsequent statement that, "as noted, counsel *did* investigate and *were* aware of appellant's background," underscores our conclusion that the Maryland Court of Appeals assumed counsel's investigation into Wiggins' childhood consisted of the PSI and the DSS records. The court's use of the phrase "as noted," which the dissent ignores, further confirms that counsel's investigation consisted of the sources previously described, *i.e.,* the PSI and the DSS records. It is the dissent, therefore, that "rests upon a fundamental fallacy," *post,* at 2547,--that the Maryland Court of Appeals determined that Schlaich's investigation extended beyond the PSI and the DSS records.

We therefore must determine, *de novo,* whether counsel reached beyond the PSI and the DSS records in their investigation of petitioner's background. The record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one we have described. The dissent, like the State and the United States, relies primarily on Schlaich's postconviction testimony to establish that counsel investigated more extensively. But the questions put to Schlaich during his postconviction testimony all referred to what he knew from the social services records; the line of questioning, after all, first directed him to his discovery of those documents. His subsequent reference to "other people's reports," made in direct response to a question concerning petitioner's mental retardation, appears to be an acknowledgement of the psychologist's reports we know counsel commissioned--reports that also revealed nothing of the sexual abuse Wiggins experienced. App. 349. As the state trial judge who heard this testimony concluded at the close of the proceedings, there is "*no reason to believe* that [counsel] did have all of this information." *Id.,* at 606, 724 A.2d 1 (emphasis added).

The State maintained at oral argument that Schlaich's reference to "other people's reports" indicated that counsel learned of the sexual abuse from sources other than the PSI and the DSS records. Tr. of Oral Arg. 31, 33, 35. But when pressed repeatedly to identify the sources counsel ***2541** might have consulted, the State acknowledged that no written reports documented the sexual abuse and speculated that counsel must have learned of it through "[o]ral reports" from Wiggins himself. *Id.,* at 36. Not only would the phrase "other people's reports" have been an unusual way for counsel to refer to conversations with his client, but the record contains no evidence that counsel ever pursued this line of questioning with Wiggins. See *id.,* at 24. For its part, the United States emphasized counsel's retention of the psychologist. *Id.,* at 51; Brief for United States as *Amicus Curiae* 27. But again, counsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background. Though Stejskal based his conclusions on clinical interviews with Wiggins, as well as meetings with Wiggins' family members, Lodging of Petitioner, his final report discussed only petitioner's mental capacities and attributed nothing of what he learned to Wiggins' social history.

To further underscore that counsel did not know, prior to sentencing, of the sexual abuse, as well as of the other incidents not recorded in the DSS records, petitioner directs us to the content of counsel's October 17, 1989, proffer. Before closing statements and outside the presence of the jury, Schlaich proffered to the court the mitigation case counsel would have introduced had the court granted their motion to bifurcate. App. 349-351. In his statement, Schlaich referred only to the results of the psychologist's test and mentioned nothing of Wiggins' troubled background. Given that the purpose of the proffer was to preserve their pursuit of bifurcation as an issue for appeal, they had every incentive to make their mitigation case seem as strong as possible. Counsel's failure to include in the proffer the powerful evidence of repeated sexual abuse is therefore explicable only if we assume that counsel had no knowledge of the abuse.

Contrary to the dissent's claim, see *post,* at 2548, we are not accusing Schlaich of lying. His statements at the postconviction proceedings that he knew of this abuse, as well as of the hand-burning incident, may simply reflect a mistaken memory shaped by the passage of time. After all, the state postconviction proceedings took place over four years after Wiggins' sentencing. Ultimately, given counsel's likely ignorance of the history of sexual abuse at the time of sentencing, we cannot infer from Schlaich's postconviction testimony that counsel looked further than the PSI and the DSS records in investigating petitioner's background. Indeed, the record contains no mention of sources other than those it is undisputed counsel possessed, see *supra,* at 2536. We therefore conclude that counsel's investigation of petitioner's background was limited to the PSI and the DSS records.

3

In finding that Schlaich and Nethercott's investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at

sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland,* 466 U.S., at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.,* at 690-691, 104 S.Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.,* at 691, 104 S.Ct. 2052.

Counsel's investigation into Wiggins' background did not reflect reasonable ***2542** professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records--evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland.* Furthermore, the court partially relied on an erroneous factual assumption. The requirements for habeas relief established by 28 U.S.C. § 2254(d) are thus satisfied.

III

[13][14][15][16] In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland,* 466 U.S., at 692, 104 S.Ct. 2052. In *Strickland,* we made clear that, to establish prejudice, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* at 694, 104 S.Ct. 2052. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence. In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.

[17] The mitigating evidence counsel failed to discover and present in this case is powerful. As Selvog reported based on his conversations with Wiggins and members of his family, see Reply Brief for Petitioner 18-19, Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (" '[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse' "); see also *Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (noting that consideration of the offender's life history is a " 'part of the process of inflicting the penalty of death' "); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background).

Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form. While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive. Moreover, given the strength of the available evidence, a reasonable attorney may well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double

edge we have found to justify limited investigations in other cases. Cf. *2543*Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987); *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

The dissent nevertheless maintains that Wiggins' counsel would not have altered their chosen strategy of focusing exclusively on Wiggins' direct responsibility for the murder. See *post,* at 2552. But as we have made clear, counsel were not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable. See *supra,* at 2536-2538. Moreover, as we have noted, see *supra,* at 2537-2538, Wiggins' counsel did *not* focus solely on Wiggins' direct responsibility. Counsel told the sentencing jury "you're going to hear that Kevin Wiggins has had a difficult life," App. 72, but never followed up on this suggestion.

We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence. In reaching this conclusion, we need not, as the dissent suggests, *post,* at 2552-2553, make the state-law evidentiary findings that would have been at issue at sentencing. Rather, we evaluate the totality of the evidence--"both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*" *Williams v. Taylor,* 529 U.S., at 397-398, 120 S.Ct. 1495.(emphasis added).

In any event, contrary to the dissent's assertion, it appears that Selvog's report may have been admissible under Maryland law. In *Whittlesey v. Maryland,* 340 Md. 30, 665 A.2d 223 (1995), the Maryland Court of Appeals vacated a trial court decision excluding, on hearsay grounds, testimony by Selvog himself. The court instructed the trial judge to exercise its discretion to admit "any relevant and reliable mitigating evidence, including hearsay evidence that might not be admissible in the guilt-or-innocence phase of the trial." *Id.,* at 73, 665 A.2d, at 244. This "relaxed standard," the court observed, would provide the factfinder with "the opportunity to consider 'any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.' " *Ibid.* See also *Ball v. State,* 347 Md. 156, 172-173, 699 A.2d 1170, 1177 (1997) (noting that the trial judge had admitted Selvog's social history report on the defendant). While the dissent dismisses the contents of the social history report, calling Wiggins a "liar" and his claims of sexual abuse "uncorroborated gossip," *post,* at 2552, 2553, Maryland appears to consider this type of evidence relevant at sentencing, see *Whittlesey, supra,* at 71, 665 A.2d, at 243 ("The reasons for relaxing the rules of evidence apply with particular force in the death penalty context"). Not even the State contests that Wiggins suffered from the various types of abuse and neglect detailed in the PSI, the DSS records, and Selvog's social history report.

Wiggins' sentencing jury heard only one significant mitigating factor--that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Cf. *Borchardt v. Maryland,* 367 Md. 91, 139-140, 786 A.2d 631, 660 (2001) (noting that as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed); App. 369 (instructing the jury: "If you unanimously find that the State has proven by a preponderance of the evidence that the aggravating circumstance does outweigh the mitigating circumstances, then consider whether death is the appropriate sentence").

Moreover, in contrast to the petitioner in *Williams v. Taylor, supra,* Wiggins does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative. Cf. *id.,* at 418, 120 S.Ct. 1495 *2544 (REHNQUIST, C. J., dissenting) (noting that Williams had savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a fellow prisoner's jaw). As the Federal District Court found, the mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams,* where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence. *Id.,* at 399, 120 S.Ct. 1495. We thus conclude that the available mitigating

evidence, taken as a whole, "might well have influenced the jury's appraisal" of Wiggins' moral culpability. 529 U.S., at 398, 120 S.Ct. 1495. Accordingly, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

The Court today vacates Kevin Wiggins' death sentence on the ground that his trial counsel's investigation of potential mitigating evidence was "incomplete." *Ante,* at 2540. Wiggins' trial counsel testified under oath, however, that he was aware of the basic features of Wiggins' troubled childhood that the Court claims he overlooked. App. 490-491. The Court chooses to disbelieve this testimony for reasons that do not withstand analysis. Moreover, even if this disbelief could plausibly be entertained, that would certainly not establish (as 28 U.S.C. § 2254(d) requires) that the Maryland Court of Appeals was *unreasonable* in believing it, and in therefore concluding that counsel adequately investigated Wiggins' background. The Court also fails to observe § 2254(e)(1)'s requirement that federal habeas courts respect state-court factual determinations not rebutted by "clear and convincing evidence." The decision sets at naught the statutory scheme we once described as a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy,* 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). I respectfully dissent.

I

Wiggins claims that his death sentence violates *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because his trial attorneys, had they further investigated his background, would have learned--and could have presented to the jury--the following evidence: (1) According to family members, Wiggins' mother was an alcoholic who neglected her children and failed to feed them properly, App. to Pet. for Cert. 165a-169a; (2) according to Wiggins and his sister India, Wiggins' mother intentionally burned 5-year-old Wiggins' hands on a kitchen stove as punishment for playing with matches, *id.,* at 169a-171a; (3) Wiggins was placed in foster care at age six because of his mother's neglect, and was moved in and out of various foster families, *id.,* at 173a-192a; (4) According to Wiggins, one of his foster parents sexually abused him " 'two or three times a week, sometimes every day,' " when he was eight years old, *id.,* at 177a-179a; (5) According to Wiggins, at age 16 he was knocked unconscious and raped by two of his foster mother's teenage children, *id.,* at 190a; (6) According to Wiggins, when he joined the Job Corps at age 18 a Job Corps administrator " 'made sexual advances ... and they became sexually involved," *id.,* at 192a-193a (later, according to Wiggins, the Job Corps supervisor drugged him and when Wiggins woke up, he "knew he had been anally penetrated," *id.,* at 193a); and (7) Wiggins is "borderline" mentally retarded, *id.,* at 193a-194a. All this information is contained in a "social history" report prepared by social worker Hans Selvog for use in the state postconviction proceedings.

In those proceedings, Carl Schlaich (one of Wiggins' two trial attorneys) testified ***2545** that, although he did not retain a social worker to assemble a "social history" report, he nevertheless had detailed knowledge of Wiggins' background:

" 'Q But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?
" 'A I believe that we tracked all of that down.
" 'Q You got the Social Service records?
" 'A That is what I recall.
" 'Q That was in the Social Service records? " 'A Yes.
" 'Q So you knew that?
" 'A Yes.
" 'Q You also knew that where *[sic]* were reports of sexual abuse at one of his foster homes?
" 'A Yes.
" 'Q Okay. You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?
" 'A Yes.
" 'Q You also knew about homosexual overtures made toward him by his Job Corp supervisor?

" 'A Yes.
" 'Q And you also knew that he was borderline mentally retarded?
" 'A Yes.
" 'Q You knew all--
" 'A At least I knew that as it was reported in other people's reports, yes.
" 'Q But you knew it?
" 'A Yes.' " App. 490-491.

In light of this testimony, the Maryland Court of Appeals found that "counsel *did* investigate and *were* aware of [Wiggins'] background," *Wiggins v. State,* 352 Md. 580, 610, 724 A.2d, 1, 16 (1999) (emphasis in original), and, specifically, that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.,* at 608, 724 A.2d, at 15. These state-court determinations of factual issues are binding on federal habeas courts, including this Court, unless rebutted by clear and convincing evidence. [FN1] Relying on these factual findings, the Maryland Court of Appeals rejected Wiggins' claim that his trial attorneys failed adequately to investigate potential mitigating evidence. Wiggins' trial counsel, it said, "did not have as detailed or graphic a history as was prepared by Mr. Selvog, but that is not a Constitutional deficiency. *See Gilliam v. State,* 331 Md. 651, 680-82, 629 A.2d 685, 700-02 (1993), *cert. denied,* 510 U.S. 1077[, 114 S.Ct. 891, 127 L.Ed.2d 84] ... (1994); *Burger v. Kemp,* 483 U.S. 776, 788-96[, 107 S.Ct. 3114, 97 L.Ed.2d 638] ... (1987)." *Id.,* at 610, 724 A.2d, at 16.

> FN1. 28 U.S.C. § 2254(e)(1) provides:
> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

The state court having adjudicated Wiggins' Sixth Amendment claim on the merits, 28 U.S.C. § 2254(d) bars habeas relief unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). The Court concludes without foundation that the Maryland Court of Appeals decision failed both these tests. I shall discuss each in turn.

A

In concluding that the Maryland Court of Appeals *unreasonably* applied our clearly established precedents, the Court disregards § 2254(d)(1)'s command that only ***2546** "clearly established Federal law, as determined by the Supreme Court of the United States" be used in assessing the reasonableness of state-court decisions. Further, the Court misdescribes the state court's opinion while ignoring § 2254(e)(1)'s requirement that federal habeas courts respect state-court factual determinations.

1

We have defined "clearly established Federal law, as determined by the Supreme Court of the United States" to encompass "the holdings ... of this Court's decisions *as of the time of the relevant state-court decision.*" *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (emphasis added). Yet in discussing what our precedents have "clearly established" with respect to ineffectiveness claims, the Court relies upon a case--*Williams v. Taylor, supra*--that *postdates* the Maryland court's decision rejecting Wiggins' Sixth Amendment claim. See *ante,* at 2535. The Court concedes that *Williams* was not "clearly established Federal law" at the time of the Maryland Court of Appeals' decision, *ante,* at 2535, yet believes that it may ignore § 2254(d)'s strictures on the ground that "Williams' case was before us on habeas review, and we therefore made no new law in resolving his ineffectiveness claim," *ibid.* The Court is wrong--in both its premise and its conclusion.

Although *Williams* was a habeas case, we reviewed the *first* prong of the habeas petitioner's *Strickland* claim--the inadequate-performance question-- *de novo.* Williams had surmounted § 2254(d)'s bar to habeas relief because we held that the Virginia

Supreme Court's analysis with respect to *Strickland's* second prong--the *prejudice* prong--was both "contrary to," and "an unreasonable application of," our clearly established precedents. See *Williams, supra,* at 393-394, 397, 120 S.Ct. 1495. That left us free to provide habeas relief--and since the State had not raised a *Teague* defense, see *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), we proceeded to analyze the inadequate-performance contention *de novo,* rather than under "clearly established" law. That is clear from the fact that we cited no cases in our discussion of the inadequate-performance question, see 529 U.S., at 395-396, 120 S.Ct. 1495. The Court is mistaken to assert that this discussion "made no new law," *ante,* at 2535. There was nothing in *Strickland,* or in any of our "clearly established" precedents at the time of the Virginia Supreme Court's decision, to support *Williams* ' statement that trial counsel had an "obligation to conduct a thorough investigation of the defendant's background," 529 U.S., at 396, 120 S.Ct. 1495. That is why the citation supporting the statement is not one of our opinions, but rather standards promulgated by the American Bar Association, *ibid.* (citing ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). Insofar as this Court's cases were concerned, *Burger v. Kemp,* 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), had *rejected* an ineffective- assistance claim even though acknowledging that trial counsel "could well have made a more thorough investigation than he did." And *Strickland* had eschewed the imposition of such "rules" on counsel, 466 U.S., at 688-689, 104 S.Ct. 2052, specifically stating that the very ABA standards upon which *Williams* later relied "are guides to determining what is reasonable, *but they are only guides.*" 466 U.S., at 688, 104 S.Ct. 2052 (emphasis added). *Williams did* make new law--law that was *not* "clearly established" at the time of the Maryland Court of Appeals' decision.

But even if the Court were correct in its characterization of *Williams,* that *still* cannot justify its decision to ignore an Act of Congress. Whether Williams "made new law" or not, what *Williams* held was not clearly established Supreme Court precedent *as of the time of the state court's decision,* and cannot be used to find fault in the state court opinion. § 2254(d)(1) ***2547** means what it says, and the Court simply defies the congressionally imposed limits on federal habeas review.

2

The Court concludes that *Strickland* was applied unreasonably (and § 2254(d)(1) thereby satisfied) because the Maryland Court of Appeals' conclusion that trial counsel adequately investigated Wiggins' background, see *Wiggins,* 352 Md., at 610, 724 A.2d, at 16, was unreasonable. That assessment cannot possibly be sustained, particularly in light of the state court's factual determinations that bind this Court under § 2254(e)(1). The Court's analysis of this point rests upon a fundamental fallacy: that the state court "clearly assumed that counsel's investigation began and ended with the PSI and the DSS records," *ante,* at 2539. That is demonstrably not so. The state court did observe that Wiggins' trial attorneys "had available" the presentence investigation (PSI) report and the Maryland Department of Social Services (DSS) reports, *Wiggins, supra,* at 608-609, 724 A.2d, at 15-16, but there is absolutely nothing in the state-court opinion that says (or assumes) that these were the *only* sources on which counsel relied. It is rather *this* Court that makes such an assumption--or rather, such a bald assertion, see *ante,* at 2538 (asserting that counsel "cease[d] all investigation" upon receipt of the PSI and DSS reports); *ante,* at 2536 (referring to "[c]ounsel's decision not to expand their investigation beyond the PSI and DSS records").

Nor *could* the Maryland Court of Appeals have "assumed" that Wiggins' trial counsel looked no further than the PSI and DSS reports, because the state-court record is clear that Wiggins' trial attorneys had investigated well beyond these sources. Public-defender investigators interviewed Wiggins' family members, see Defendant's Supplemental Answer to State's Discovery Request filed in No. 88-CR-5464 (Cir. Ct. Baltimore Cty., Md., Sept. 18, 1989), Lodging of Respondents, and Wiggins' trial attorneys hired a psychologist, Dr. William Stejskal (who reviewed the DSS records, conducted clinical interviews, and performed six different psychological tests of Wiggins, *ibid.;* App. 349- 351), and a criminologist, Dr. Robert Johnson (who interviewed Wiggins and testified that Wiggins would adjust adequately to life in

prison, *id.,* at 319-321). Schlaich also testified in the state postconviction proceedings that he knew information about Wiggins' background that was not contained in the DSS or PSI reports--such as the allegation that Wiggins' mother burned his hands as a child, *id.,* at 490--so Schlaich *must* have investigated sources beyond these reports.

As the Court notes, *ante,* at 2539-2540, the Maryland Court of Appeals did not expressly state that counsel's investigation extended beyond the PSI and DSS records. There was no reason whatever to do so, since it had found that "counsel *did* investigate and *were* aware of appellant's background," *Wiggins, supra,* at 610, 724 A.2d, at 16, and since that finding was based on a state-court record that clearly demonstrates investigation beyond the PSI and DSS reports. The court's failure to recite what is obvious from the record surely provides no basis for believing that it stupidly "assumed" the opposite of what is obvious from the record.

Once one eliminates the Court's mischaracterization of the state-court opinion--which did not and could not have "assumed" that Wiggins' counsel knew only what was contained in the DSS and PSI reports--there is no basis for finding it "unreasonable" to believe that counsel's investigation was adequate. As noted earlier, Schlaich testified in the state postconviction proceedings that he was aware of the essential items contained in the later- prepared "social history" report. He knew that Wiggins was subjected to neglect and abuse from his mother, App. 490, that there were reports of sexual abuse at one ***2548** of his foster homes, *ibid.,* that his mother had burned his hands as a child, *ibid.,* that a Job Corps supervisor had made homosexual overtures towards him, *id.,* at 490-491, and that Wiggins was " 'borderline' " mentally retarded, *id.,* at 491. [FN2] Schlaich explained that, although he was aware of all this potential mitigating evidence, he chose not to present it to the jury for a strategic reason--namely, that it would conflict with his efforts to persuade the jury that Wiggins was not a "principal" in Mrs. Lacs' murder (*i.e.* that he did not kill Lacs by his own hand). *Id.,* at 504-505.

FN2. The only incident contained in the "social history" report about which Schlaich did not confirm knowledge was the occurrence of sexual abuse in *more than one* of Wiggins' foster homes. And *that* knowledge remained unconfirmed only because the question posed asked him whether he knew of reports of abuse at " 'one' " of the foster homes. App. 490. The record does not show that Schlaich knew of all these incidents in the degree of detail contained in the "social history" report--but it does not show that he did *not,* either. In short, given Schlaich's testimony there is *no basis* for finding that he was without knowledge of *anything* in the "social history" report.

There are only two possible responses to this testimony that might salvage Wiggins' ineffective-assistance claim. The first would be to declare that Schlaich had an inescapable *duty* to hire a social worker to construct a so-called "social history" report, *regardless* of Schlaich's pre-existing knowledge of Wiggins' background. Petitioner makes this suggestion, see Brief for Petitioner 32, n. 8 (asserting that it was " 'a normative standard' " at the time of Wiggins' case for capital defense lawyers in Maryland to obtain a social history); and the Court flirts with accepting it, see *ante,* at 2536 ("professional standards that prevailed in Maryland ... at the time of Wiggins' trial" included, for defense of capital cases, "the preparation of a social history report"); *ante,* at 2537 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989) (hereinafter ABA Guidelines), which says that counsel should make efforts " 'to discover *all reasonably available* mitigating evidence' " (emphasis added by the Court)). To think that the requirement of a "social history" was part of "clearly established Federal law" (which is what § 2254(d) requires) when the events here occurred would be absurd. Nothing in our clearly established precedents requires counsel to retain a social worker when he is already largely aware of his client's background. To the contrary, *Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," 466 U.S., at 689, 104 S.Ct. 2052, and further states that "[p]revailing 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,*" *id.,* at 688, 104 S.Ct. 2052. Cf. *ante,* at 2537 (treating the ABA Guidelines as "well-defined norms"). It is inconceivable that Schlaich, assuming he testified truthfully regarding his detailed knowledge of Wiggins' troubled childhood, App. 490-491, would need to hire a social worker to comport with *Strickland*'s competence standards. And it certainly would not have been *unreasonable* for the Maryland Court of Appeals to conclude otherwise.

The second possible response to Schlaich's testimony about his extensive awareness of Wiggins' background is to assert that Schlaich lied. The Court assumes *sub silentio* throughout its opinion that Schlaich was not telling the truth when he testified that he knew of reports of sexual abuse in one of Wiggins' foster homes, see, *e.g., ante,* at 2537 ("Had counsel investigated further, they may well have discovered the sexual abuse later revealed during state postconviction proceedings"), and eventually declares straight-out that it disbelieves Schlaich, *ante,* at 2540-2541. This conclusion rests upon a blatant mischaracterization of the record, and an improper shifting of the burden of proof to the State to demonstrate Schlaich's awareness ***2549** of Wiggins' background, rather than requiring Wiggins to prove Schlaich's ignorance of it. But, more importantly, it is simply not enough for the Court to conclude, *ante,* at 2541, that it "cannot infer from Schlaich's postconviction testimony that counsel looked further than the PSI and DSS reports in investigating petitioner's background." If it is at least *reasonable* to believe Schlaich told the truth, then it could not have been *unreasonable* for the Maryland Court of Appeals to conclude that Wiggins' trial attorneys conducted an adequate investigation into his background. See 28 U.S.C. § 2254(d)(1).

Schlaich's testimony must have been false, the Court insists, because the social services records do not contain any evidence of sexual abuse, and "[t]he questions put to Schlaich during his postconviction testimony all referred to what he knew from the social services records." *Ante,* at 2540. That is not true. Schlaich was *never* asked "what he knew from the social services records." With regard to the alleged sexual abuse in particular, Schlaich answered " '[y]es' " to the following question: " 'You also knew that where *[sic]* were reports of sexual abuse at one of his foster homes?' " This question did not "refe[r] to what [Schlaich] knew from the social services records," as the Court declares; and neither, by the way, did *any* of the other questions put to Schlaich regarding his knowledge of Wiggins' background. See App. 490-491. Wiggins' postconviction counsel simply never asked Schlaich to reveal the source of his knowledge.

Schlaich's most likely source of knowledge of the alleged sexual abuse was Wiggins himself; even Hans Selvog's extensive "social history" report unearthed no documentation or corroborating witnesses with respect to that claim. *Id.,* at 464; see App. to Pet. for Cert. 177a, 193a. The Court, however, dismisses this possibility for two reasons. First, because " 'the record contains no evidence that counsel ever pursued this line of questioning with Wiggins.' " *Ante,* at 2541. This statement calls for a time-out to get our bearings: The burden of proof here is on *Wiggins* to show that counsel made their decision without adequate knowledge. See *Strickland,* 466 U.S., at 687, 104 S.Ct. 2052. And when counsel has testified, under oath, that he *did* have particular knowledge, the burden is not on counsel to show how he obtained it, but on *Wiggins* (if he wishes to impeach that testimony) to show that counsel could not have obtained it. Thus, the absence of evidence in the record as to whether or not Schlaich pursued this line of questioning with Wiggins dooms, rather than fortifies, Wiggins' ineffective-assistance claim. Wiggins has produced no evidence that *anything* in Hans Selvog's "social history" report was unknown to Schlaich, and no evidence that any source on which Selvog relied was not used by Schlaich.

The Court's second reason for rejecting the possibility that Schlaich learned of the alleged sexual abuse from Wiggins is even more incomprehensible. The Court claims that "the phrase 'other people's reports' [would] have been an unusual way for counsel to refer to conversations with his client." *Ante,* at 2541. But Schlaich never used the phrase "other people's reports" in describing how he learned of the alleged sexual abuse in Wiggins' foster homes. Schlaich testified only that he learned of Wiggins' *borderline mental*

retardation as it was reported in "other people's reports":

" 'Q And you also knew that he was borderline mentally retarded?
" 'A Yes.
" 'Q You knew all--
" 'A At least I knew *that* as it was reported *in other people's reports,* yes.
" 'Q But you knew it?
" 'A Yes.' " App. 490-491 (emphasis added).

It is clear that when Schlaich said, " 'At least I knew *that* as it was reported in other people's reports,' " *Id.,* at 491 (emphasis*2550 added), the " 'that' " to which he referred was the fact that Wiggins was borderline mentally retarded--not the other details of Wiggins' background which Schlaich had previously testified he knew.

The Court's final reason for disbelieving Schlaich's sworn testimony is his failure to mention the alleged sexual abuse in the proffer of mitigating evidence he would introduce if the trial court granted his motion to bifurcate. "Counsel's failure to include in the proffer the powerful evidence of repeated sexual abuse is ... explicable only if we assume that counsel had no knowledge of the abuse." *Ante,* at 2541. But because the *only* evidence of sexual abuse consisted of Wiggins' own assertions, see App. 464; App. to Pet. for Cert. 177a, 193a (evidence not exactly worthy of the Court's flattering description as "powerful"), *there was nothing to proffer unless Schlaich declared an intent to put Wiggins on the stand.* Given counsel's chosen trial strategy to prevent Wiggins from testifying during the sentencing proceedings, the decision not to mention sexual abuse in the proffer is perfectly consistent with counsel's claimed knowledge of the alleged abuse.

Of course these reasons the Court offers--which range from the incredible up to the feeble--are used only in support of the Court's conclusion that, *in its independent judgment,* Schlaich was lying. The Court does not even attempt to establish (as it must) that it was *objectively unreasonable* for the state court to believe Schlaich's testimony and therefore conclude that he conducted an adequate investigation of Wiggins' background. It could not possibly make this showing. Wiggins has not produced any direct evidence that his attorneys were uninformed with respect to *anything* in his background, and the Court can muster no circumstantial evidence beyond the powerfully unconvincing fact that Schlaich failed to mention the allegations of sexual abuse in his proffer. To make things worse, the Court is *still* bound (though one would not know it from the opinion) by the state court's factual determinations that Wiggins' trial counsel "*did* investigate and *were* aware of [Wiggins'] background," *Wiggins,* 352 Md., at 610, 724 A.2d, at 16 (emphasis in original), and that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.,* at 608, 724 A.2d, at 15. See 28 U.S.C. § 2254(e)(1). [FN3] Because it is at least reasonable to believe Schlaich's testimony, and because § 2254(e)(1) requires us to respect the state court's factual determination that Wiggins' trial attorneys were aware of Wiggins' background, the Maryland Court of Appeals' legal conclusion--that trial counsel "did not have as detailed or graphic a history as was prepared by Mr. Selvog, *but that is not a Constitutional deficiency,*" *Wiggins, supra,* at 610, 724 A.2d, at 16 (emphasis added)--is unassailable under § 2254(d)(1).

FN3. The Court defends its refusal to adhere to these state-court factual determinations on the ground that "the Maryland Court of Appeals' conclusion that the *scope* of counsel's investigation ... met the legal standards set forth in *Strickland* represented an objectively unreasonable application of our precedent." *Ante,* at 2539. That is an inadequate response, for several reasons. First, because in the very course of determining *what was* the scope of counsel's investigation the Court was bound to accept (as it did not) the Maryland Court of Appeals' factual findings that counsel knew of Wiggins' background, including his "most unfortunate childhood." And it is an inadequate response, secondly, because even after the Court concludes that the petitioner has avoided § 2254(d)'s bar to relief because of that misapplication of *Strickland* (or because of the alleged mistaken factual assumption "that counsel learned of ... sexual abuse ... from the DSS records," *ante,* at 2539), it *still* must

observe § 2254(e)(1)'s presumption of correctness in deciding the merits of the habeas question. See *Miller-El v. Cockrell,* 537 U.S. 322, 341, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

B

The Court holds in the alternative that Wiggins has satisfied § 2254(d)(2), which allows a habeas petitioner to escape ***2551** § 2254(d)'s bar to relief when the state court's adjudication of his claim "resulted in a decision that was *based on an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding," (emphasis added). This is so, the Court says, because the Maryland Court of Appeals wrongly claimed that Wiggins' social service records "recorded incidences of ... sexual abuse." 352 Md., at 608-609, 724 A.2d, at 15.

That it made that claim is true enough. And I will concede that Wiggins has rebutted the presumption of correctness by the "clear and convincing evidence" that § 2254(e)(1) requires. It is both clear and convincing from reading the DSS records that they contain no evidence of sexual abuse. I will also assume, *arguendo,* that the state court's error was "unreasonable" in light of the evidence presented in the state-court proceeding.

Given all that, the Court's conclusion that a § 2254(d)(2) case has been made out still suffers from the irreparable defect that the Maryland Court of Appeals' decision was not "based on" this mistaken factual determination. What difference did it make whether the social services records contained evidence of sexual abuse? Even if they did not, the court's decision would have been the same in light of Schlaich's sworn testimony that he was aware of the alleged sexual abuse. The *source* of Schlaich's knowledge--whether he obtained it from the DSS reports or from Wiggins himself--was of no consequence. The only thing that mattered was that Schlaich *knew,* and testified under oath that he knew, enough about Wiggins' background to make it reasonable to proceed without a report by a social worker. The Court's opinion does not even discuss this requirement of § 2254(d)(2), that the unreasonable determination of facts be one on which the state-court decision was *based.*

II

The Court's indefensible holding that Wiggins has avoided § 2254(d)'s bar to relief is not alone enough to entitle Wiggins to habeas relief on his Sixth Amendment claim. Wiggins *still* must establish that he was "prejudiced" by his counsel's alleged "error." *Strickland,* 466 U.S., at 691-696, 104 S.Ct. 2052. Specifically, Wiggins must demonstrate that, if his trial attorneys had retained a licensed social worker to assemble a "social history" of their client, there is a "reasonable probability" that (1) his attorneys would have chosen to present the social history evidence to the jury, *and* (2) upon hearing that evidence, the jury would have spared his life. The Court's analysis on these points continues its disregard for the record in a determined procession towards a seemingly preordained result.

There is no "reasonable probability" that a social-history investigation would have altered the chosen strategy of Wiggins' trial counsel. As noted earlier, Schlaich was well aware--without the benefit of a "social history" report--that Wiggins had a troubled childhood and background. And the Court remains bound, *even after* concluding that Wiggins has satisfied the standards of §§ 2254(d)(1) and (d)(2), by the state court's factual determination that Wiggins' trial attorneys "*were* aware of [Wiggins'] background," *Wiggins,* 352 Md., at 610, 724 A.2d, at 16, and "were aware that Wiggins had a most unfortunate childhood," *id.,* at 608, 724 A.2d, at 15. See 28 U.S.C. § 2254(e)(1). Wiggins' trial attorneys chose, however, not to present evidence of Wiggins' background to the jury because of their "deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs." *Wiggins, supra,* at 608, 724 A.2d, at 15.

Wiggins has not shown that the incremental information in Hans Selvog's social-history report would have induced counsel to change this course. Schlaich testified under oath that presenting the type of evidence in Selvog's report would have ***2552** conflicted with his chosen defense strategy to raise doubts as to Wiggins' role as a principal, and that he wanted to avoid a "shotgun approach" with the jury. App. 504-505. [FN4] (This testimony is

entirely unrefuted by the Court's statement that *at the time of trial* counsel "were not in a position to make a reasonable strategic choice," because of their alleged inadequate investigation, *ante,* at 2543. Schlaich presented this testimony in state postconviction proceedings, when *there was no doubt* he was fully aware of the details of Wiggins' background. See App. 490-491.) It is irrelevant whether a hypothetical "reasonable attorney" might have introduced evidence of alleged sexual abuse, *ante,* at 2540-2541; *Wiggins'* attorneys would *not* have done so, and therefore Wiggins was not prejudiced by their allegedly inadequate investigation. There is simply *nothing* to show (and the Court does not even dare to *assert*) that there is a "reasonable probability" this evidence would have been introduced *in this case. Ante,* at 2540-2541.

> FN4. Introducing evidence that Wiggins suffered semiweekly (or perhaps daily) sexual abuse as a child, for example, could have led the jury to conclude that this horrible experience made Wiggins precisely the type of person who could perpetrate this bizarre crime--in which a 77-year- old woman was found drowned in the bathtub of her apartment, clothed but missing her underwear, and sprayed with Black Flag Ant and Roach Killer.

What is more, almost all of Selvog's social-history evidence was *inadmissible* at the time of Wiggins' trial. Maryland law provides that evidence in a capital sentencing proceeding must be "reliable" to be admissible, see *Whittlesey v. State,* 340 Md. 30, 70, 665 A.2d 223, 243 (1995), and many of the anecdotes regarding Wiggins' childhood consist of the baldest hearsay--statements that have been neither taken in court, nor given under oath, nor subjected to cross-examination, nor even submitted in the form of a signed affidavit. Consider, for example, the allegation that Wiggins' foster father sexually abused him " 'two or three times a week, sometimes everyday,' " App. to Pet. for Cert. 177a. The *only* source of that information was Wiggins himself, in his unsworn and un-cross-examined interview with Hans Selvog. There is absolutely no documentation or corroboration of the claim, App. 464, and the allegedly abusive foster parent is apparently deceased. *Id.,* at 470. Wiggins was, however, examined by a pediatrician during the time that this supposed biweekly or daily sexual abuse occurred, and the pediatrician's report mentioned no signs of sexual abuse. App. to Pet. for Cert. 181a; App. 464.

Much of the other "evidence" in Selvog's report (including Wiggins' claim that he was drugged by his Job Corps supervisor and raped while unconscious, and that he was raped by the teenage sons at his fourth foster home) was also undocumented and based entirely on Wiggins' say-so. The Court treats all this uncorroborated gossip as established fact, [FN5] *ante,* at 2542--indeed, even refers to it as "powerful" evidence, *ibid.*--and assumes that Wiggins' lawyers could have simply handed Hans Selvog's report to the jury. Nothing could be further from the truth. As the State Circuit Court explained in rejecting Wiggins' Sixth Amendment claim, "Selvog's report would have had a great deal of difficulty in getting into evidence in Maryland. He was not licensed in Maryland, the report contains multiple instances of hearsay, it contains many opinions in the nature of diagnosis of a ***2553** medical nature." App. to Pet. for Cert. 156a.

> FN5. Wiggins' postconviction lawyers could have increased the credibility of these anecdotes, and assisted this Court's prejudice determination, by at least having Wiggins testify under oath in the state postconviction proceedings as to his allegedly abusive childhood. They did not do that--perhaps anticipating, correctly alas, that they could succeed in getting this Court to vacate a jury verdict of death on the basis of rumor and innuendo in a "social history" report that would never be admissible in a court of law.

The Court contends that Selvog's report "may have been admissible," *ante,* at 2543--relying for that contention upon *Whittlesey v. State, supra. Whittlesey,* however, merely *vacated* the trial judge's decision that a social-history report assembled by Selvog was *per se* inadmissible on hearsay grounds and remanded for a determination

of whether the hearsay evidence was "reliable." *Id.,* at 71-72, 665 A.2d, at 243. Thus, unless the Court is prepared to make the implausible contention that Wiggins' hearsay statements in Selvog's report are "reliable" under Maryland law, there is no basis for its conclusion that Maryland "considers this type of evidence at sentencing," *ante,* at 2543. The State Circuit Court in the present case, in its decision that postdated *Whittlesey,* certainly did not think Selvog's report met the standard of reliability, App. to Pet. for Cert. 156a, and that court's assessment was undoubtedly correct. Wiggins' accounts of his background, as reported by Selvog, are the hearsay statements of a convicted murderer and, as the trial testimony in this case demonstrates, a serial liar. Wiggins lied to Geraldine Armstrong when he told her that Mrs. Lacs' car belongs to " 'a buddy of min[e],' " App. 179. He lied when he told the police that he had obtained Mrs. Lacs' car and credit cards on Friday in the afternoon, rather than Thursday, *id.,* at 180. He lied to Armstrong about how he obtained Mrs. Lacs' ring, *ibid.* And, knowing that the information he provided to Selvog would be used to attack his death sentence, Wiggins had every incentive to lie again about the supposed abuse he suffered. The hearsay statements in Selvog's report pertaining to the alleged sexual abuse were of especially dubious reliability; Maryland courts have consistently refused to allow hearsay evidence regarding alleged sexual abuse, except for statements provided by the victim to a treating physician. See *Bohnert v. State,* 312 Md. 266, 276, 539 A.2d 657, 662 (1988) (refusing to admit into evidence a social worker's opinion, based on a child's "unsubstantiated averments," that the child had been sexually abused); *Nixon v. State,* 140 Md.App. 170, 178-188, 780 A.2d 344, 349-354 (2001) (child protective services agent's testimony that retarded teenager told agent she had been sexually abused was inadmissible hearsay); *Low v. State,* 119 Md.App. 413, 424-426, 705 A.2d 67, 73-74 (1998) (refusing to admit into evidence examining physician's testimony regarding a child's statements of sexual abuse).

Given that the anecdotes in Selvog's report were unreliable, and therefore inadmissible, the only way Wiggins' trial attorneys could have presented these allegations to the jury would have been to place Wiggins on the witness stand. Wiggins has not established (and the Court does not assert) any "reasonable probability" that they would have done this, given the dangers they saw in exposing their client to cross-examination over a wide range of issues. See App. 353 (Wiggins' trial attorneys advising him in open court: " 'Kevin, if you do take the witness stand, you must answer any question that's asked of you. If it is a question the judge rules is a permissible question, you would have to answer' "). Their perception of those dangers must surely have been heightened by their observation of Wiggins' volatile and obnoxious behavior throughout the trial. See, *e.g., id.,* at 32 (Wiggins interrupting the judge's statement of the verdict to say: "He can't tell me I did it. I'm going to go out .... I didn't do it. He can't tell me I did it"); *id.,* at 56 (Wiggins interrupting the prosecutor's opening argument to say: " 'I'm not going to take that because I didn't kill that lady. I'm not going to sit there and take that' ").

But even indulging, for the sake of argument, the Court's belief that Selvog's report "may" have been admissible, *ante,* at 2543, the Court's prejudice discussion simply assumes without analysis that the ***2554** sentencing jury would have believed the report's hearsay accounts of Wiggins' statements. *Ante,* at 2543. Yet that same jury would have learned during the guilt phase of the trial that Wiggins is a proven liar, see App. 179-180, and Wiggins would not have aided his credibility with the jury by avoiding the witness stand and funneling his story through a social worker. I doubt very much that Wiggins' jury would have shared the Court's uncritical and wholesale acceptance of these hearsay claims.

* * *

Today's decision is extraordinary--even for our "death is different" jurisprudence. See *Simmons v. South Carolina,* 512 U.S. 154, 185, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (SCALIA, J., dissenting). It fails to give effect to § 2254(e)(1)'s requirement that state court factual determinations be presumed correct, and disbelieves the sworn testimony of a member of the bar while treating hearsay accounts of statements of a convicted murderer as established fact. I dissent.

123 S.Ct. 2527, 156 L.Ed.2d 471, 71 USLW 4560, 3 Cal. Daily Op. Serv. 5586, 2003 Daily Journal D.A.R. 7015, 16 Fla. L. Weekly Fed. S 459

Briefs and Other Related Documents (Back to top)

• 2003 WL 1699820, 71 USLW 3638 (Oral Argument) Oral Argument (Mar. 24, 2003)

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146 L.Ed.2d 389, 68 USLW 4263, 2000 Daily Journal D.A.R. 3949, 00 CJ C.A.R. 2064, 13 Fla. L. Weekly Fed. S 225
(Cite as: 529 U.S. 362, 120 S.Ct. 1495)

Briefs and Other Related Documents

Supreme Court of the United States

Terry WILLIAMS, Petitioner,
v.
John TAYLOR, Warden.

No. 98-8384.

Argued Oct. 4, 1999.
Decided April 18, 2000.

After affirmance of conviction for capital murder and imposition of death penalty, 360 S.E.2d 361, and denial of his state petition for habeas corpus, 254 Va. 16, 487 S.E.2d 194, petitioner sought federal habeas relief. The United States District Court for the Eastern District of Virginia, James C. Cacheris, Senior District Judge, granted writ in part, and dismissed petitioner's remaining allegations, and cross-appeals were taken. The United States Court of Appeals for the Fourth Circuit, 163 F.3d 860 Williams, Circuit Judge, reversed, and petition for certiorari was filed. The Supreme Court, per Justice Stevens, held that: (1) petitioner was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial, and, per Justice O'Connor, held that: (2) Antiterrorism and Effective Death Penalty Act (AEDPA) placed new constraint on power of federal habeas court to grant state prisoner's application for writ of habeas corpus with respect to claims adjudicated on merits in state court, limiting issuance of writ to circumstances in which one of the two conditions is satisfied.

Reversed and remanded.

Justice O'Connor filed opinion concurring in part, and concurring in the judgment in which Justice Kennedy joined, Chief Justice Rehnquist and Justice Thomas joined in part, and Justice Scalia joined in part except as to footnote.

Chief Justice Rehnquist filed opinion concurring in part and dissenting in part in which Justice Scalia and Justice Thomas joined.

West Headnotes

[1] Habeas Corpus ⇐486(5)
197k486(5) Most Cited Cases

Defendant's constitutionally guaranteed right to the effective assistance of counsel was "clearly established" at the time his state-court conviction became final, and therefore he was entitled to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA) if his trial lawyers' failure to investigate and to present substantial mitigating evidence to the sentencing jury was either "contrary to, or involved an unreasonable application of," that established law. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

[2] Criminal Law ⇐641.13(1)
110k641.13(1) Most Cited Cases

To establish ineffectiveness, a defendant must show that counsel's representation fell below an objective standard of reasonableness, and to establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⇐641.13(7)
110k641.13(7) Most Cited Cases

Defendant was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial; the omitted evidence included a description of mistreatment, abuse, and neglect during defendant's early childhood, as well as testimony that he was "borderline mentally retarded," and that experts believed that defendant, if kept in a "structured environment," would not pose a future danger to society, and counsel's error prejudiced defendant since the omitted evidence might have influenced jury's appraisal of defendant's moral culpability. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[4] Habeas Corpus ⚿450.1
197k450.1 Most Cited Cases

[4] Habeas Corpus ⚿452
197k452 Most Cited Cases

Antiterrorism and Effective Death Penalty Act (AEDPA) placed a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court, limiting issuance of the writ to circumstances in which one of two conditions is satisfied: the state-court adjudication resulted in a decision that (1) "was contrary to clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1).

[5] Habeas Corpus ⚿452
197k452 Most Cited Cases

Under the "contrary to" test, a federal habeas court may grant writ of habeas corpus with respect to claims adjudicated on the merits in state court if the state court arrives at a conclusion opposite to that reached by Supreme Court on a question of law or if the state court decides a case differently than Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1).

[6] Habeas Corpus ⚿450.1
197k450.1 Most Cited Cases

Under the "unreasonable application" test, a federal habeas court may grant writ of habeas corpus with respect to claims adjudicated on the merits in state court if the state court identifies the correct governing legal principle from Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d)(1).

****1496** Opinion of Justice O'Connor
Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

A Virginia jury convicted petitioner Williams of robbery and capital murder, and, after a sentencing hearing, found a probability of future dangerousness and unanimously fixed his punishment at death. Concluding that such punishment was "proper" and "just," the trial judge imposed the death sentence. The Virginia Supreme Court affirmed. In state habeas corpus proceedings, the same trial judge found, on the evidence adduced after hearings, that Williams' conviction was valid, but that his counsel's failure to discover and present significant mitigating evidence violated his right to the effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In rejecting the trial judge's recommendation that Williams be resentenced, the State Supreme Court held, *inter alia,* that the trial judge had failed to recognize that *Strickland* had been modified by *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180, and that Williams had not suffered sufficient prejudice to warrant relief. In habeas corpus proceedings under 28 U.S.C. § 2254, the federal trial judge agreed with the state trial judge that the death sentence was constitutionally infirm on ineffective-assistance grounds. The federal judge identified five categories of mitigating evidence that counsel had failed to introduce and rejected the argument that such failure had been a strategic decision to rely primarily on the fact that Williams had confessed voluntarily. As to prejudice, the judge determined, among other things, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would ****1497** have been different, see *Strickland,* 466 U.S., at 694, 104 S.Ct. 2052. Applying an amended version of § 2254(d)(1) enacted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the judge concluded that the Virginia Supreme 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." The Fourth Circuit reversed, construing § 2254(d)(1) to prohibit federal habeas relief unless the state court had interpreted or

applied the relevant precedent in a manner that reasonable jurists would all agree is unreasonable. The court declared that it could not say that the Virginia Supreme Court's decision on prejudice was an unreasonable application of the *Strickland* or *Lockhart* standards established by the Supreme Court.

***363** *Held:* The judgment is reversed, and the case is remanded.

163 F.3d 860, reversed and remanded.

Justice STEVENS delivered the opinion of the Court as to Parts I, III, and IV, concluding that Williams was denied his constitutionally guaranteed right to the effective assistance of counsel, as defined in *Strickland,* when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury. Pp. 1511-1516.

(a) The threshold question under AEDPA--whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final--is easily answered because the merits of his claim are squarely governed by *Strickland.* To establish ineffective assistance of counsel, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness, 466 U.S., at 688, 104 S.Ct. 2052; and (2) that the deficient performance prejudiced the defense, which requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, *id.,* at 694, 104 S.Ct. 2052. Because the *Strickland* test qualifies as "clearly established Federal law, as determined by the Supreme Court," this Court's precedent "dictated" that the Virginia Supreme Court apply that test in entertaining Williams' ineffective-assistance claim. See *Teague v. Lane,* 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334. Pp. 1511-1512.

(b) Williams is entitled to relief because the Virginia Supreme Court's decision rejecting his ineffective-assistance claim both is "contrary to, [and] involved an unreasonable application of, clearly established Federal law." *Strickland* provides sufficient guidance for resolving virtually all ineffective-assistance claims, and the Virginia Supreme Court erred in holding that *Lockhart* modified or in some way supplanted *Strickland.* Although there are a few situations in which the overriding focus on fundamental fairness may affect the analysis, see *Strickland,* 466 U.S., at 692, 104 S.Ct. 2052, cases such as *Lockhart* and *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123, do not justify a departure from a straightforward application of *Strickland* when counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him. Here, Williams had a constitutionally protected right to provide mitigating evidence that his trial counsel either failed to discover or failed to offer. Moreover, the Virginia trial judge correctly applied both components of the *Strickland* standard to Williams' claim. The record establishes that counsel failed to prepare for sentencing until a week beforehand, to uncover extensive records graphically describing Williams' nightmarish childhood, to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade, to seek prison records recording Williams' commendations for ***364** helping to crack a prison drug ring and for returning a guard's missing wallet, and to discover the testimony of prison officials who described Williams as ****1498** among the inmates least likely to act violently, dangerously, or provocatively, and of a prison minister that Williams seemed to thrive in a more regimented environment. Although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background. Moreover, counsel's unprofessional service prejudiced Williams within *Strickland's* meaning. The Virginia Supreme Court's prejudice analysis was unreasonable in at least two respects: (1) It was not only "contrary to," but also--inasmuch as it relied on the inapplicable *Lockhart* exception--an "unreasonable application of," the clear law as established in *Strickland;* and (2) it failed to evaluate the totality of, and to accord appropriate weight to, the available mitigation evidence. Pp. 1512-1516.

Justice O'CONNOR delivered the opinion of the Court as to Part II (except as to the footnote),

concluding that § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant relief to a state prisoner with respect to claims adjudicated on the merits in state court: The habeas writ may issue only if the state-court adjudication (1) "was contrary to," or (2) "involved an unreasonable application of ..." clearly established Federal law, as determined by the Supreme Court of the United States. Pp. 1518-1523.

(a) Because Williams filed his petition in 1997, his case is not governed by the pre-1996 version of the federal habeas statute, but by the statute as amended by AEDPA. Accordingly, for Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the previously settled rule of independent federal review of state prisoners' habeas petitions in order to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. In light of the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute, this Court must give independent meaning to both the "contrary to" and "unreasonable application" clauses of § 2254(d)(1). Given the commonly understood definitions of "contrary" as "diametrically different," "opposite in character or nature," or "mutually opposed," § 2254(d)(1)'s first clause must be interpreted to mean that a federal habeas court may grant relief if the state court (1) arrives at a conclusion opposite to that reached by this Court on a question of law or (2) decides a case differently ***365** than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Pp. 1518-1521.

(b) In defining what qualifies as an "unreasonable application of ... clearly established Federal law," the Fourth Circuit erred in holding that a state- court decision involves such an application only if the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable. That standard would tend to mislead federal habeas courts by focusing on a subjective inquiry. Rather, the federal court should ask whether the state court's application of clearly established federal law was objectively unreasonable. Cf. *Wright v. West,* 505 U.S. 277, 304, 112 S.Ct. 2482, 120 L.Ed.2d 225. Although difficult to define, "unreasonable" is a common legal term familiar to federal judges. For present purposes, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. See, *e.g., id.,* at 305, 112 S.Ct. 2482. Because Congress specifically used the word "unreasonable," and not a term ****1499** like "erroneous" or "incorrect," a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable. Finally, the phrase "clearly established Federal law, as determined by [this] Court" refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. In this respect, the quoted phrase bears only a slight connection to this Court's jurisprudence under *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334. Whatever would qualify as an "old rule" under *Teague* will constitute "clearly established Federal law, as determined by [this] Court," see, *e.g., Stringer v. Black,* 503 U.S. 222, 228, 112 S.Ct. 1130, 117 L.Ed.2d 367, but with one caveat: Section 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence. Pp. 1521-1523.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts II and V, in which SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., delivered the opinion of the Court with respect to Part II (except as to the footnote), in which REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., joined, and in which SCALIA, J. joined, except as to the footnote, and an opinion concurring in part and ***366** concurring in the judgment, in which KENNEDY, J., joined, *post,* p. 1516. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined, *post,* p. 1525.

John J. Gibbons, for petitioner.

Robert Q. Harris, for respondent.

***367** Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts, I, III, and IV, and an opinion with respect to Parts II and V. [FN*]

> FN* Justice SOUTER, Justice GINSBURG, and Justice BREYER join this opinion in its entirety. Justice O'CONNOR and Justice KENNEDY join Parts I, III, and IV of this opinion.

The questions presented are whether Terry Williams' constitutional right to the effective assistance of counsel as defined in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was violated, and whether the judgment of the Virginia Supreme Court refusing to set aside his death sentence "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III). We answer both questions affirmatively.

I

On November 3, 1985, Harris Stone was found dead in his residence on Henry Street in Danville, Virginia. Finding no indication of a struggle, local officials determined that the cause of death was blood alcohol poisoning, and the case was considered closed. Six months after Stone's death, Terry Williams, who was then incarcerated in the "I" unit of the city jail for an unrelated offense, wrote a letter to the police stating that he had killed " 'that man down on Henry Street' " and also stating that he " 'did it' " to that " 'lady down on West Green Street' " and was " 'very sorry.' " The letter was unsigned, but it closed with a reference to "I cell." App. 41. The police readily identified Williams as its author, and, on April 25, 1986, they obtained several statements from him. In one Williams admitted that, after Stone refused to lend him " 'a couple of dollars,' " he had killed Stone with a ***368** mattock and taken the money from his wallet. [FN1] *Id.,* at ****1500** 4. In September 1986, Williams was convicted of robbery and capital murder.

> FN1. " 'I had gone to Dee Dee Stone's house on Henry Street, Dee Dee's father was there. No one else was there except him. He had been drinking a lot. He was on the bed. He asked me if I wanted a drink. I told him, 'No.' I asked him if I could borrow a couple of dollars and he told me, 'No.' We started arguing and things started going around in my head. I just wanted to get back at him. I don't know what. He just laid back like he had passed out. He was laying there talking and moaning to himself. I went into the kitchen. I saw the butcher knife. I didn't want to use it. I was looking for something to use. I went into the bathroom and I saw the mattock. I picked up the mattock and I came back into the room where he was at. He was laying on the bed. He was laying on his back. I took the mattock and I hit him on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the mattock. He fell back on the bed. I went and put the mattock back in the bathroom. I came back into the room. I took his wallet from his pocket. He had three dollars in it. I got the three dollars from it. I left him there. He was still grasping for breath.' " App. 4-5.

At Williams' sentencing hearing, the prosecution proved that Williams had been convicted of armed robbery in 1976 and burglary and grand larceny in 1982. The prosecution also introduced the written confessions that Williams had made in April. The prosecution described two auto thefts and two separate violent assaults on elderly victims perpetrated after the Stone murder. On December 4, 1985, Williams had started a fire outside one victim's residence before attacking and robbing him. On March 5, 1986, Williams had brutally assaulted an elderly woman on West Green Street--an incident he had mentioned in his letter to the police. That confession was particularly

damaging because other evidence established that the woman was in a "vegetative state" and not expected to recover. *Id.,* at 60. Williams had also been convicted of arson for setting a fire in the jail while awaiting trial in this case. Two expert witnesses employed by the State testified that there was a "high probability" ***369** that Williams would pose a serious continuing threat to society. *Id.,* at 89.

The evidence offered by Williams' trial counsel at the sentencing hearing consisted of the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist. One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot. The three witnesses briefly described Williams as a "nice boy" and not a violent person. *Id.,* at 124. The recorded psychiatrist's testimony did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.

In his cross-examination of the prosecution witnesses, Williams' counsel repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of the recent assaults, as well as the car thefts. In closing argument, Williams' counsel characterized Williams' confessional statements as "dumb," but asked the jury to give weight to the fact that he had "turned himself in, not on one crime but on four ... that the [police otherwise] would not have solved." *Id.,* at 140. The weight of defense counsel's closing, however, was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life. [FN2]

> FN2. In defense counsel's words: "I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself. I doubt very seriously that he thought much about mercy when he was in Mr. Stone's bedroom that night with him. I doubt very seriously that he had mercy very highly on his mind when he was walking along West Green and the incident with Alberta Stroud. I doubt very seriously that he had mercy on his mind when he took two cars that didn't belong to him. Admittedly it is very difficult to get us and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would." *Id.,* at 132-133.

***370** The jury found a probability of future dangerousness and unanimously fixed Williams' punishment at death. The trial ****1501** judge concluded that such punishment was "proper" and "just" and imposed the death sentence. *Id.,* at 154. The Virginia Supreme Court affirmed the conviction and sentence. *Williams v. Commonwealth,* 234 Va. 168, 360 S.E.2d 361 (1987), cert. denied, *Williams v. Virginia,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). It rejected Williams' argument that when the trial judge imposed sentence, he failed to give mitigating weight to the fact that Williams had turned himself in. 234 Va., at 181-182, 360 S.E.2d, at 369-370.

State Habeas Corpus Proceedings

In 1988 Williams filed for state collateral relief in the Danville Circuit Court. The petition was subsequently amended, and the Circuit Court (the same judge who had presided over Williams' trial and sentencing) held an evidentiary hearing on Williams' claim that trial counsel had been ineffective. [FN3] Based on the evidence adduced after two days of hearings, Judge Ingram found that Williams' conviction was valid, but that his trial attorneys had been ineffective during sentencing. Among the evidence reviewed that had not been presented at trial were documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was "borderline mentally retarded," had suffered repeated head injuries, and might have mental impairments organic in origin. App. 528-529, 595. The habeas hearing also revealed ***371** that the same experts who had testified on the State's behalf at trial believed that Williams, if kept in a "structured environment," would not pose a future

danger to society. *Id.,* at 313-314.

> FN3. While Williams' petition was pending before the Circuit Court, Virginia amended its state habeas statute to vest in the State Supreme Court exclusive jurisdiction to award writs of habeas corpus in capital cases. Va.Code Ann. § 8.01-654(C)(1) (Supp.1999). Shortly after the Circuit Court held its evidentiary hearing, the Supreme Court assumed jurisdiction over Williams' petition and instructed the Circuit Court to issue findings of fact and legal recommendation regarding Williams' ineffective-assistance claims.

Counsel's failure to discover and present this and other significant mitigating evidence was "below the range expected of reasonable, professional competent assistance of counsel." *Id.,* at 424. Counsel's performance thus "did not measure up to the standard required under the holding of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and [if it had,] there is a reasonable probability that the result of the sentencing phase would have been different." *Id.,* at 429. Judge Ingram therefore recommended that Williams be granted a rehearing on the sentencing phase of his trial.

The Virginia Supreme Court did not accept that recommendation. *Williams v. Warden,* 254 Va. 16, 487 S.E.2d 194 (1997). Although it assumed, without deciding, that trial counsel had been ineffective, *id.,* at 23-26, 487 S.E.2d, at 198, 200, it disagreed with the trial judge's conclusion that Williams had suffered sufficient prejudice to warrant relief. Treating the prejudice inquiry as a mixed question of law and fact, the Virginia Supreme Court accepted the factual determination that available evidence in mitigation had not been presented at the trial, but held that the trial judge had misapplied the law in two respects. First, relying on our decision in *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), the court held that it was wrong for the trial judge to rely " 'on mere outcome determination' " when assessing prejudice, 254 Va., at 23, 487 S.E.2d, at 198 (quoting *Lockhart,* 506 U.S., at 369, 113 S.Ct. 838). Second, it construed the trial judge's opinion as having "adopted a *per se* approach" that would establish prejudice whenever any mitigating evidence was omitted. 254 Va., at 26, 487 S.E.2d, at 200.

The court then reviewed the prosecution evidence supporting the "future dangerousness" aggravating circumstance, reciting ****1502** Williams' criminal history, including the several ***372** most recent offenses to which he had confessed. In comparison, it found that the excluded mitigating evidence-- which it characterized as merely indicating "that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment," *ibid.* --"barely would have altered the profile of this defendant that was presented to the jury," *ibid.* On this basis, the court concluded that there was no reasonable possibility that the omitted evidence would have affected the jury's sentencing recommendation, and that Williams had failed to demonstrate that his sentencing proceeding was fundamentally unfair.

Federal Habeas Corpus Proceedings

Having exhausted his state remedies, Williams sought a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 ed. and Supp. III). After reviewing the state habeas hearing transcript and the state courts' findings of fact and conclusions of law, the federal trial judge agreed with the Virginia trial judge: The death sentence was constitutionally infirm.

After noting that the Virginia Supreme Court had not addressed the question whether trial counsel's performance at the sentencing hearing fell below the range of competence demanded of lawyers in criminal cases, the judge began by addressing that issue in detail. He identified five categories of mitigating evidence that counsel had failed to introduce, [FN4] ***373** and he rejected the argument that counsel's failure to conduct an adequate investigation had been a strategic decision to rely almost entirely on the fact that Williams had voluntarily confessed.

> FN4. "(i) Counsel did not introduce evidence of the Petitioner's background.... (ii) Counsel did not introduce evidence that Petitioner was abused by his father. (iii) Counsel did not introduce testimony from correctional officers who were willing to testify that defendant would not pose a danger while incarcerated. Nor did counsel offer prison commendations awarded to Williams for his help in breaking up a prison drug ring and for returning a guard's missing wallet. (iv) Several character witnesses were not called to testify.... [T]he testimony of Elliott, a respected CPA in the community, could have been quite important to the jury.... (v) Finally, counsel did not introduce evidence that Petitioner was borderline mentally retarded, though he was found competent to stand trial." App. 465-469.

According to Williams' trial counsel's testimony before the state habeas court, counsel did not fail to seek Williams' juvenile and social services records because he thought they would be counterproductive, but because counsel erroneously believed that " 'state law didn't permit it.' " App. 470. Counsel also acknowledged in the course of the hearings that information about Williams' childhood would have been important in mitigation. And counsel's failure to contact a potentially persuasive character witness was likewise not a conscious strategic choice, but simply a failure to return that witness' phone call offering his service. *Id.,* at 470-471. Finally, even if counsel neglected to conduct such an investigation at the time as part of a tactical decision, the District Judge found, tactics as a matter of reasonable performance could not justify the omissions.

Turning to the prejudice issue, the judge determined that there was " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052." *Id.,* at 473. He found that the Virginia Supreme Court had erroneously assumed that *Lockhart* had modified the *Strickland* standard for determining prejudice, and that it had made an important error of fact in discussing its finding of no prejudice. [FN5] ****1503** Having introduced his analysis of Williams' claim ***374** with the standard of review applicable on habeas appeals provided by 28 U.S.C. § 2254(d) (1994 ed., Supp. III), the judge concluded that those errors established that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" within the meaning of § 2254(d)(1).

> FN5. "Specifically, the Virginia Supreme Court found no prejudice, reasoning: 'The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment.' *Williams,* 487 S.E.2d at 200. The Virginia Supreme Court ignored or overlooked the evidence of Williams' difficult childhood and abuse and his limited mental capacity. It is also unreasonable to characterize the additional evidence as coming from 'mostly relatives.'
>
> As stated, *supra,* Bruce Elliott, a respected professional in the community, and several correctional officers offered to testify on Williams behalf." *Id.,* at 476.

The Federal Court of Appeals reversed. 163 F.3d 860 (C.A.4 1998). It construed § 2254(d)(1) as prohibiting the grant of habeas corpus relief unless the state court " 'decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.' " *Id.,* at 865 (quoting *Green v. French,* 143 F.3d 865, 870 (C.A.4 1998)). Applying that standard, it could not say that the Virginia Supreme Court's decision on the prejudice issue was an unreasonable application of the tests developed in either *Strickland* or *Lockhart.* [FN6] It explained that the evidence that Williams presented a future danger to society was "simply overwhelming," 163 F.3d, at 868, it endorsed the Virginia Supreme Court's interpretation of *Lockhart*

, 163 F.3d, at 869, and it characterized the state court's understanding of the facts in this case as "reasonable," *id.,* at 870.

FN6. Like the Virginia Supreme Court, the Court of Appeals assumed, without deciding, that the performance of trial counsel fell below an objective standard of reasonableness. 163 F.3d, at 867.

We granted certiorari, 526 U.S. 1050, 119 S.Ct. 1355, 143 L.Ed.2d 516 (1999), and now reverse.

II

In 1867, Congress enacted a statute providing that federal courts "shall have power to grant writs of habeas corpus in ***375** all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. ..." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Over the years, the federal habeas corpus statute has been repeatedly amended, but the scope of that jurisdictional grant remains the same. [FN7] It is, of course, well settled that the fact that constitutional error occurred in the proceedings that led to a state-court conviction may not alone be sufficient reason for concluding that a prisoner is entitled to the remedy of habeas. See, *e.g., Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). On the other hand, errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ. See, *e.g., Teague v. Lane,* 489 U.S. 288, 311-314, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (quoting *Mackey v. United States,* 401 U.S. 667, 692-694, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part), and quoting *Rose v. Lundy,* 455 U.S. 509, 544, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting)). The ****1504** deprivation of the right to the effective assistance of counsel recognized in *Strickland* is such an error. *Strickland,* 466 U.S., at 686, 697-698, 104 S.Ct. 2052.

FN7. By Act of Congress: "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions ... .(c) The writ of habeas corpus shall not extend to a prisoner unless--... (3) He is in custody in violation of the Constitution or laws or treaties of the United States ... ." 28 U.S.C. § 2241(c)(3). In parallel, § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The warden here contends that federal habeas corpus relief is prohibited by the amendment to 28 U.S.C. § 2254 (1994 ed., Supp. III), enacted as a part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The relevant portion of that amendment provides:

***376** "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...."

In this case, the Court of Appeals applied the construction of the amendment that it had adopted in its earlier opinion in *Green v. French,* 143 F.3d 865 (C.A.4 1998). It read the amendment as prohibiting federal courts from issuing the writ unless:

"(a) the state court decision is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, 'the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively

unreasonable application of established principles to new facts,' " 163 F.3d, at 865 (quoting *Green,* 143 F.3d, at 870).

Accordingly, it held that a federal court may issue habeas relief only if " 'the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable,' " 163 F.3d, at 865. *[FN8]*

FN8. The warden's view is narrower. He argues that 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III) establishes a new general rule that prohibits federal courts from granting habeas corpus relief on the basis of any claim that a state court has adjudicated on the merits, and that § 2254(d)(1) merely identifies two narrow exceptions to the general rule-- when a state court has issued a decision "contrary to" or an "unreasonable application of" clearly established federal law. Brief for Respondent 14- 15. The first, "contrary to" exception, in his view, applies only to "starkly unreasonable" errors of law. The first category thus imposes "a standard of review far more limited than 'de novo,' 'independent' or 'plenary' review." *Id.,* at 24. The state-court judgment must thus be so far afield "as to make the 'unlawfulness' of the state court decision 'apparent.' " *Id.,* at 25. The second exception likewise replaces the "de novo" standard of reviewing mixed questions of law and fact with the standard of "objective reasonableness" as formulated by the Court of Appeals. *Id.,* at 30-31.

***377** We are convinced that that interpretation of the amendment is incorrect. It would impose a test for determining when a legal rule is clearly established that simply cannot be squared with the real practice of decisional law. [FN9] It would apply a standard for determining the "reasonableness" of state-court decisions that is not contained in the statute itself, and that Congress surely did not intend. And it ****1505** would wrongly require the federal courts, including this Court, to defer to state judges' interpretations of federal law.

FN9. Although we explain our understanding of "clearly established law," *infra,* at 1505-1508, we note that the Fourth Circuit's construction of the amendment's inquiry in this respect is especially problematic. It separates cases into those for which a "controlling decision" exists and those for which no such decision exists. The former category includes very few cases, since a rule is "controlling" only if it matches the case before the court both "as to law and fact," and most cases are factually distinguishable in some respect. A literal application of the Fourth Circuit test would yield a particularly perverse outcome in cases involving the *Strickland* rule for establishing ineffective assistance of counsel, since that case, which established the "controlling" rule of law on the issue, contained facts insufficient to show ineffectiveness.

As the Fourth Circuit would have it, a state-court judgment is "unreasonable" in the face of federal law only if all reasonable jurists would agree that the state court was unreasonable. Thus, in this case, for example, even if the Virginia Supreme Court misread our opinion in *Lockhart,* we could not grant relief unless we believed that none of the judges who agreed with the state court's interpretation of that case was a "reasonable jurist." But the statute says ***378** nothing about "reasonable judges," presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as "unreasonable." Indeed, it is most unlikely that Congress would deliberately impose such a requirement of unanimity on federal judges. As Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.

The inquiry mandated by the amendment relates to the way in which a federal habeas court exercises its duty to decide constitutional questions; the

amendment does not alter the underlying grant of jurisdiction in § 2254(a), see n. 7, *supra.* [FN10] When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803). At the core of this ***379** power is the federal courts' independent responsibility--independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States--to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.

> FN10. Indeed, Congress roundly rejected an amendment to the bill eventually adopted that directly invoked the text of the jurisdictional grant, 28 U.S.C. § 2254(a) (providing that the federal courts " *shall entertain* an application for a writ of habeas corpus" (emphasis added)). The amendment read: "Notwithstanding any other provision of law, an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment or order of a State court *shall not be entertained* by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." 141 Cong. Rec. 14991 (1995) (amendment of Sen. Kyl) (emphasis added). In speaking against the Kyl amendment, Senator Specter (a key proponent of the eventual habeas reform) explained that when "dealing with the question of jurisdiction of the Federal courts to entertain questions on Federal issues, on constitutional issues, I believe it is necessary that the Federal courts retain that jurisdiction as a constitutional matter." *Id.,* at 15050.

This basic premise informs our interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law. We address each part in turn.

The "clearly established law" requirement

In *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying ****1506** on a rule of federal law that had not been announced until after his state conviction became final. The antiretroactivity rule recognized in *Teague,* which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague*--which remains the law--and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress ***380** had congruent concepts in mind. [FN11] It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final. [FN12]

> FN11. It is not unusual for Congress to codify earlier precedent in the habeas context. Thus, for example, the exhaustion rule applied in *Ex parte Hawk,* 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944) *(per curiam),* and the abuse of the writ doctrine applied in *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), were later codified. See 28 U.S.C. § 2254(b) (1994 ed., Supp. III) (exhaustion requirement); 28 U.S.C. § 2254, Rule 9(b), Rules Governing § 2254 Cases in the United States District Courts. A previous version of § 2254, as we stated in *Miller v. Fenton,* 474 U.S. 104, 111,

106 S.Ct. 445, 88 L.Ed.2d 405 (1985), "was an almost verbatim codification of the standards delineated in *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), for determining when a district court must hold an evidentiary hearing before acting on a habeas petition."

FN12. We are not persuaded by the argument that because Congress used the words "clearly established law" and not "new rule," it meant in this section to codify an aspect of the doctrine of executive qualified immunity rather than *Teague's* antiretroactivity bar. Brief for Respondent 28- 29, n. 19. The warden refers us specifically to § 2244(b)(2)(A) and 28 U.S.C. § 2254(e)(2) (1994 ed., Supp. III), in which the statute does in so many words employ the "new rule" language familiar to *Teague* and its progeny. Congress thus knew precisely the words to use if it had wished to codify *Teague per se.* That it did not use those words in § 2254(d) is evidence, the argument goes, that it had something else in mind entirely in amending that section. We think, quite the contrary, that the verbatim adoption of the *Teague* language in these other sections bolsters our impression that Congress had *Teague*--and not any unrelated area of our jurisprudence--specifically in mind in amending the habeas statute. These provisions, seen together, make it impossible to conclude that Congress was not fully aware of, and interested in codifying into law, that aspect of this Court's habeas doctrine. We will not assume that in a single subsection of an amendment entirely devoted to the law of habeas corpus, Congress made the anomalous choice of reaching into the doctrinally distinct law of qualified immunity for a single phrase that just so happens to be the conceptual twin of a dominant principle in habeas law of which Congress was fully aware.

Teague's core principles are therefore relevant to our construction of this requirement. Justice Harlan recognized ***381** the "inevitable difficulties" that come with "attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.' " *Mackey,* 401 U.S., at 695, 91 S.Ct. 1160 (quoting *Desist v. United States,* 394 U.S. 244, 263, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969)). But *Teague* established some guidance for making this determination, explaining that a federal habeas court operates within the bounds of comity and finality if it applies a rule "dictated by precedent existing at the time the defendant's conviction became final." 489 U.S., at 301, 109 S.Ct. 1060 (emphasis deleted). A rule that "breaks new ground or imposes a new obligation on the States or the Federal Government," *ibid.,* falls outside this universe of federal law.

To this, AEDPA has added, immediately following the "clearly established law" requirement, a clause limiting the area of relevant law to that "determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III). If this Court has not broken sufficient ****1507** legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar. In this respect, we agree with the Seventh Circuit that this clause "extends the principle of *Teague* by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ." *Lindh v. Murphy,* 96 F.3d 856, 869 (1996). As that court explained:

"This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty in this portion of § 2254(d)(1) is not the 'contrary to' part but the reference to 'Federal law, as *determined by the Supreme Court of the United States* ' (emphasis added). This extends the principle of *Teague [v.Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989),] by limiting the ***382** source of doctrine on which a federal court may rely in addressing the application for a writ. It

> does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions." *Ibid.*

A rule that fails to satisfy the foregoing criteria is barred by *Teague* from application on collateral review, and, similarly, is not available as a basis for relief in a habeas case to which AEDPA applies.

In the context of this case, we also note that, as our precedent interpreting *Teague* has demonstrated, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule. As Justice KENNEDY has explained:

> "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West,* 505 U.S. 277, 308-309, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (opinion concurring in judgment).

Moreover, the determination whether or not a rule is clearly established at the time a state court renders its final judgment of conviction is a question as to which the "federal courts must make an independent evaluation." *Id.,* at 305, 109 S.Ct. 1060 (O'CONNOR, J., concurring in judgment); accord, *id.,* at 307, 109 S.Ct. 1060 (KENNEDY, J., concurring in judgment).

It has been urged, in contrast, that we should read *Teague* and its progeny to encompass a broader principle of deference requiring federal courts to "validat[e] 'reasonable, good-faith interpretations' of the law" by state courts. ***383** Brief for California et al. as *Amici Curiae* 6 (quoting *Butler v. McKellar,* 494 U.S. 407, 414, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)). The position has been bolstered with references to our statements elucidating the "new rule" inquiry as one turning on whether "reasonable jurists" would agree the rule was not clearly established. *Sawyer v. Smith,* 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). This presumption of deference was in essence the position taken by three Members of this Court in *Wright,* 505 U.S., at 290-291, 112 S.Ct. 2482 (opinion of THOMAS, J.) ("[A] federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable' ") (quoting *Butler,* 494 U.S., at 422, 110 S.Ct. 1212 (Brennan, J., dissenting)).

Teague, however, does not extend this far. The often repeated language that *Teague* endorses "reasonable, good-faith interpretations" by state courts is an explanation of policy, not a statement of law. The *Teague* cases reflect this Court's view ****1508** that habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals. On the contrary, we have long insisted that federal habeas courts attend closely to those considered decisions, and give them full effect when their findings and judgments are consistent with federal law. See *Thompson v. Keohane,* 516 U.S. 99, 107- 116, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). But as Justice O'CONNOR explained in *Wright:*

> "[T]he duty of the federal court in evaluating whether a rule is 'new' is not the same as deference; ... *Teague* does not direct federal courts to spend less time or effort scrutinizing the existing federal law, on the ground that they can assume the state courts interpreted it properly....
> "[T]he maxim that federal courts should 'give great weight to the considered conclusions of a coequal state judiciary' ... does not mean that we have held in the past that federal courts must presume the correctness ***384** of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." 505 U.S., at 305, 112 S.Ct. 2482 (opinion concurring in judgment).

We are convinced that in the phrase, "clearly established law," Congress did not intend to modify that independent obligation.

The "contrary to, or an unreasonable application of," requirement

The message that Congress intended to convey by

using the phrases "contrary to" and "unreasonable application of" is not entirely clear. The prevailing view in the Circuits is that the former phrase requires *de novo* review of "pure" questions of law and the latter requires some sort of "reasonability" review of so-called mixed questions of law and fact. See, *e.g., Neelley v. Nagle,* 138 F.3d 917 (C.A.11 1998); *Drinkard v. Johnson,* 97 F.3d 751 (C.A.5 1996); *Lindh v. Murphy,* 96 F.3d 856 (C.A.7 1996) (en banc), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

We are not persuaded that the phrases define two mutually exclusive categories of questions. Most constitutional questions that arise in habeas corpus proceedings--and therefore most "decisions" to be made--require the federal judge to apply a rule of law to a set of facts, some of which may be disputed and some undisputed. For example, an erroneous conclusion that particular circumstances established the voluntariness of a confession, or that there exists a conflict of interest when one attorney represents multiple defendants, may well be described either as "contrary to" or as an "unreasonable application of" the governing rule of law. Cf. *Miller v. Fenton,* 474 U.S. 104, 116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); *Cuyler v. Sullivan,* 446 U.S. 335, 341-342, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). In constitutional adjudication, as in the common law, rules of law often develop ***385** incrementally as earlier decisions are applied to new factual situations. See *Wright,* 505 U.S., at 307, 112 S.Ct. 2482 (KENNEDY, J., concurring in judgment). But rules that depend upon such elaboration are hardly less lawlike than those that establish a bright-line test.

Indeed, our pre-AEDPA efforts to distinguish questions of fact, questions of law, and "mixed questions," and to create an appropriate standard of habeas review for each, generated some not insubstantial differences of opinion as to which issues of law fell into which category of question, and as to which standard of review applied to each. See *Thompson,* 516 U.S., at 110-111, 116 S.Ct. 457 (acknowledging " 'that the Court has not charted an entirely clear course in this area' " and that "the proper characterization of a question as one of fact or law is sometimes slippery") (quoting ****1509** *Miller,* 474 U.S., at 113, 106 S.Ct. 445). We thus think the Fourth Circuit was correct when it attributed the lack of clarity in the statute, in part, to the overlapping meanings of the phrases "contrary to" and "unreasonable application of." See *Green,* 143 F.3d, at 870.

The statutory text likewise does not obviously prescribe a specific, recognizable standard of review for dealing with either phrase. Significantly, it does not use any term, such as *"de novo"* or "plain error," that would easily identify a familiar standard of review. Rather, the text is fairly read simply as a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case. The suggestion that a wrong state-court "decision"--a legal judgment rendered "after consideration of *facts, and ... law,*" Black's Law Dictionary 407 (6th ed.1990) (emphasis added)--may no longer be redressed through habeas (because it is unreachable under the "unreasonable application" phrase) is based on a mistaken insistence that the § 2254(d)(1) phrases have not only independent, but mutually exclusive, meanings. Whether or not a federal court can issue the writ "under [the] 'unreasonable application' clause," the statute is ***386** clear that habeas may issue under § 2254(d)(1) if a state-court "decision" is "contrary to ... clearly established Federal law." We thus anticipate that there will be a variety of cases, like this one, in which both phrases may be implicated.

Even though we cannot conclude that the phrases establish "a body of rigid rules," they do express a "mood" that the Federal Judiciary must respect. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487, 71 S.Ct. 456, 95 L.Ed. 456 (1951). In this respect, it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ. Likewise, the statute in a separate provision provides for the habeas remedy when a 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) (1994 ed., Supp. III) (emphasis added). While this provision is not before us in this case, it provides relevant context for our

interpretation of § 2254(d)(1); in this respect, it bolsters our conviction that federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a "mixed question" that rests on a finding of fact. AEDPA plainly sought to ensure a level of "deference to the determinations of state courts," provided those determinations did not conflict with federal law or apply federal law in an unreasonable way. H.R. Conf. Rep. No. 104-518, p. 111 (1996). Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so.

On the other hand, it is significant that the word "deference" does not appear in the text of the statute itself. Neither the legislative history nor the statutory text suggests ***387** any difference in the so-called "deference" depending on which of the two phrases is implicated. [FN13] Whatever "deference" Congress had in mind with respect ****1510** to both phrases, it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error. As Judge Easterbrook noted with respect to the phrase "contrary to":

> FN13. As Judge Easterbrook has noted, the statute surely does not require the kind of "deference" appropriate in other contexts: "It does not tell us to 'defer' to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), depends on delegation. See *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). Congress did not delegate either interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. 'Deference' to the jurisdictions bound by those constraints is not sensible." *Lindh v. Murphy,* 96 F.3d 856, 868 (C.A.7 1996) (en banc), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

"Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." *Lindh,* 96 F.3d, at 869. [FN14]

> FN14. The Court advances three reasons for adopting its alternative construction of the phrase "unreasonable application of." First, the use of the word "unreasonable" in the statute suggests that Congress was directly influenced by the "patently unreasonable" standard advocated by Justice THOMAS in his opinion in *Wright v. West,* 505 U.S. 277, 287, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), *post,* at 1522-1523; second, the legislative history supports this view, see *post,* at 1521, n.; and third, Congress must have intended to change the law more substantially than our reading of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp.III) permits.
> None of these reasons is persuasive. First, even though, as the Court recognizes, the term "unreasonable" is "difficult to define," *post,* at 1522, neither the statute itself nor the Court's explanation of it suggests that AEDPA's "unreasonable application of" has the same meaning as Justice THOMAS' " 'patently unreasonable' " standard mentioned in his dictum in *Wright.* 505 U.S., at 291, 112 S.Ct. 2482 (quoting *Butler* v. *McKellar,* 494 U.S. 407, 422, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990) (Brennan, J., dissenting)). To the extent the "broader debate" in *Wright* touched upon the Court's novel distinction today between what is "wrong" and what is "unreasonable," it was in the context of a discussion not

about the *standard of review* habeas courts should use for law- application questions, but about whether a rule is "new" or "old" such that *Teague's* retroactivity rule would bar habeas relief; Justice THOMAS contended that *Teague* barred habeas "whenever the state courts have interpreted old precedents *reasonably,* not [as Justice O'CONNOR suggested] only when they have done so 'properly.' " 505 U.S., at 291- 292, n. 8, 112 S.Ct. 2482. *Teague,* of course, as Justice O'CONNOR correctly pointed out, "did not establish a standard of review at all," 505 U.S., at 303-304, 112 S.Ct. 2482; rather than instructing a court *how* to review a claim, it simply asks, in absolute terms, *whether* a rule was clear at the time of a state-court decision. We thus do not think *Wright* "confirms" anything about the meaning of § 2254(d)(1) , which is, as our division reflects, anything but "clear." *Post,* at 1523.

As for the other bases for the Court's view, the only two specific citations to the legislative history upon which it relies, *post,* at 1520- 1521, do no more than beg the question. One merely quotes the language of the statute without elaboration, and the other goes to slightly greater length in stating that state-court judgments must be upheld unless "unreasonable." Neither sheds any light on what the content of the hypothetical category of "decisions" that are wrong but nevertheless not "unreasonable." Finally, while we certainly agree with the Court, *post,* at 1518, that AEDPA wrought substantial changes in habeas law, see *supra,* at 1509; see also, *e.g.,* 28 U.S.C. § 2244(b) (1994 ed., Supp. III) (strictly limiting second or successive petitions); § 2244(d) (1- year statute of limitations for habeas petitions); § 2254(e)(2) (limiting availability of evidentiary hearings on habeas); §§ 2263, 2266 (strict deadlines for habeas court rulings), there is an obvious fallacy in the assumption that because the statute changed pre-existing law in some respects, it must have rendered this specific change here.

***388** Our disagreement with the Court about the precise meaning of the phrase "contrary to," and the word "unreasonable," is, of course, important, but should affect only a narrow category of cases. The simplest and first definition of "contrary to" as a phrase is "in conflict with." Webster's ***389** Ninth New Collegiate Dictionary 285 (1983). In this sense, we think the phrase surely capacious enough to include a finding that the state-court "decision" is simply "erroneous" or wrong. (We hasten to add that even "diametrically different" from, or "opposite" to, an established federal law would seem to include ****1511** "decisions" that are wrong in light of that law.) And there is nothing in the phrase "contrary to"--as the Court appears to agree--that implies anything less than independent review by the federal courts. Moreover, state-court decisions that do not "conflict" with federal law will rarely be "unreasonable" under either the Court's reading of the statute or ours. We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated. Our difference is as to the cases in which, at first blush, a state-court judgment seems entirely reasonable, but thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error. In our view, such an erroneous judgment is "unreasonable" within the meaning of the Act even though that conclusion was not immediately apparent.

In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody--or, as in this case, his sentence of death--violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well- recognized interest in ensuring that federal courts interpret federal law in a uniform ***390** way, [FN15] we are convinced that Congress did not intend the statute to produce such a result.

FN15. See, *e.g., Mackey v. United States,* 401 U.S. 667, 689, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971); *Felker v. Turpin,* 518 U.S. 651, 667, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (SOUTER, J., concurring). Indeed, a contrary rule would be in substantial tension with the interest in uniformity served by Congress' modification in AEDPA of our previous *Teague* jurisprudence--now the law on habeas review must be "clearly established" by this Court alone. See *supra,* at 1506-1507. It would thus seem somewhat perverse to ascribe to Congress the entirely inconsistent policy of perpetuating disparate readings of our decisions under the guise of deference to anything within a conceivable spectrum of reasonableness.

III

[1] In this case, Williams contends that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury. The threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final. That question is easily answered because the merits of his claim are squarely governed by our holding in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] We explained in *Strickland* that a violation of the right on which Williams relies has two components:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.,* at 687, 104 S.Ct. 2052.

To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of ***391** reasonableness." *Id.,* at 688, 104 S.Ct. 2052. To establish prejudice he "must ****1512** show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* at 694, 104 S.Ct. 2052.

It is past question that the rule set forth in *Strickland* qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case-by- case examination of the evidence," *Wright,* 505 U.S., at 308, 112 S.Ct. 2482 (KENNEDY, J., concurring in judgment), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective- assistance claim. *Teague,* 489 U.S., at 301, 109 S.Ct. 1060. And it can hardly be said that recognizing the right to effective counsel "breaks new ground or imposes a new obligation on the States," *ibid.* Williams is therefore entitled to relief if the Virginia Supreme Court's decision rejecting his ineffective-assistance claim was either "contrary to, or involved an unreasonable application of," that established law. It was both.

IV

[3] The Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), modified or in some way supplanted the rule set down in *Strickland.* It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed. 466 U.S., at 692, 104 S.Ct. 2052. And, on the other hand, there are also situations in which it would be unjust to characterize the ***392** likelihood of a different outcome as legitimate

"prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *Nix v. Whiteside,* 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

Similarly, in *Lockhart,* we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in *Strickland.* The death sentence that Arkansas had imposed on Bobby Ray Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). Shortly before the trial, the United States Court of Appeals for the Eighth Circuit had held that such "double counting" was impermissible, see *Collins v. Lockhart,* 754 F.2d 258, 265 (1985), but Fretwell's lawyer (presumably because he was unaware of the *Collins* decision) failed to object to the use of the pecuniary gain aggravator. Before Fretwell's claim for federal habeas corpus relief reached this Court, the *Collins* case was overruled. [FN16] Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the State had a right to rely on the disputed aggravating circumstance. Because the ineffectiveness of ****1513** Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his ***393** claim did not satisfy the "prejudice" component of the *Strickland* test. [FN17]

FN16. In *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) , we held that an aggravating circumstance may duplicate an element of the capital offense if the class of death-eligible defendants is sufficiently narrowed by the definition of the offense itself. In *Perry v. Lockhart,* 871 F.2d 1384 (1989), the Eighth Circuit correctly decided that our decision in *Lowenfield* required it to overrule *Collins.*

FN17. "But the 'prejudice' component of the *Strickland* test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. [466 U.S., at 687, 104 S.Ct. 2052]; see *Kimmelman,* 477 U.S., at 393, 106 S.Ct. 2574 (Powell, J., concurring). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. As we have noted, it was the premise of our grant in this case that *Perry* was correctly decided, *i.e.,* that respondent was not entitled to an objection based on 'double counting.' Respondent therefore suffered no prejudice from his counsel's deficient performance." *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Cases such as *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him. [FN18] In the instant case, it is undisputed that Williams had a right--indeed, a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.

FN18. In her concurring opinion in *Lockhart,* Justice O'CONNOR stressed this precise point. "I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The determinative question--whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

> different,' *id.*, at 694, 104 S.Ct. 2052 --remains unchanged. This case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.*, at 373, 113 S.Ct. 838.

Nevertheless, the Virginia Supreme Court read our decision in *Lockhart* to require a separate inquiry into fundamental fairness even when Williams is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding. It wrote:

> ***394** " 'The prisoner argues there 'is a "reasonable probability" that at least one juror would have been moved to spare Petitioner's life had he heard' the mitigation evidence developed at the habeas hearing that was not presented at the trial. Summarizing, he contends there 'is a "reasonable probability" that had at least one juror heard *any* of this evidence--let alone all of this evidence--the outcome of this case would have been different.'
> "We reject these contentions. The prisoner's discussion flies in the face of the Supreme Court's admonition in *Lockhart, supra,* that 'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.' " 254 Va., at 25, 487 S.E.2d, at 199.

Unlike the Virginia Supreme Court, the state trial judge omitted any reference to *Lockhart* and simply relied on our opinion in *Strickland* as stating the correct standard for judging ineffective-assistance claims. With respect to the prejudice component, he wrote:

> "Even if a Petitioner shows that counsel's performance was deficient, however, he must also show prejudice. Petitioner must show 'that there is a reasonable probability that but for counsel's unprofessional errors, the result ... would have been different.' *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. 'A reasonable probability is a probability sufficient to undermine confidence ****1514** in the outcome.' *Id.* Indeed, it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693, 104 S.Ct. 2052. The petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." App. 417.

***395** The trial judge analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not.

We are likewise persuaded that the Virginia trial judge correctly applied both components of that standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards--a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. *Id.*, at 207, 227. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, [FN19] that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

> FN19. Juvenile records contained the following description of his home:
> "The home was a complete wreck.... There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash.... The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any

> clothes for the children, nor were they able to put the clothes on them.... The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." App. 528-529.

***396** Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. *Id.,* at 595. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." *Id.,* at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison. *Id.,* at 563-566.

Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system--for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. *Id.,* at 534-536. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate ****1515** that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980).

We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of *Strickland.* After hearing the additional evidence developed in the postconviction proceedings, the very judge who presided at Williams' trial, and who once ***397** determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. App. 429. We do not agree with the Virginia Supreme Court that Judge Ingram's conclusion should be discounted because he apparently adopted "a *per se* approach to the prejudice element" that placed undue "emphasis on mere outcome determination." 254 Va., at 26-27, 487 S.E.2d, at 200. Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgment rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.

The Virginia Supreme Court's own analysis of prejudice reaching the contrary conclusion was thus unreasonable in at least two respects. First, as we have already explained, the State Supreme Court mischaracterized at best the appropriate rule, made clear by this Court in *Strickland,* for determining whether counsel's assistance was effective within the meaning of the Constitution. While it may also have conducted an "outcome determinative" analysis of its own, 254 Va., at 27, 487 S.E.2d, at 200, it is evident to us that the court's decision turned on its erroneous view that a "mere" difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel. See *supra,* at 1511. Its analysis in this respect was thus not only "contrary to," but also, inasmuch as the Virginia Supreme Court relied on the inapplicable exception recognized in *Lockhart,* an "unreasonable application of" the clear law as established by this Court.

Second, the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding ***398** in reweighing it against the evidence in aggravation. See *Clemons v. Mississippi,* 494 U.S. 738, 751-752, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). This error is apparent in its consideration of the additional mitigation evidence developed in the

postconviction proceedings. The court correctly found that as to "the factual part of the mixed question," there was "really ... n[o] ... dispute" that available mitigation evidence was not presented at trial. 254 Va., at 24, 487 S.E.2d, at 198. As to the prejudice determination comprising the "legal part" of its analysis, *id.,* at 23-25, 487 S.E.2d, at 198-199, it correctly emphasized the strength of the prosecution evidence supporting the future dangerousness aggravating circumstance.

But the state court failed even to mention the sole argument in mitigation that trial counsel did advance--Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. See *Boyde v. California,* 494 U.S. 370, 387, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). The circumstances recited in his ****1516** several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

V

In our judgment, the state trial judge was correct both in his recognition of the established legal standard for determining ***399** counsel's effectiveness, and in his conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence. It follows that the Virginia Supreme Court rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Williams' constitutional right to the effective assistance of counsel as defined in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was violated.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice O'CONNOR delivered the opinion of the Court with respect to Part II (except as to the footnote), concurred in part, and concurred in the judgment. [FN*]

> FN* Justice KENNEDY joins this opinion in its entirety. THE CHIEF JUSTICE and Justice THOMAS join this opinion with respect to Part II. Justice SCALIA joins this opinion with respect to Part II, except as to the footnote, *infra,* at 1521.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). In that Act, Congress placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners. The relevant provision, 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Court holds today that the Virginia Supreme Court's adjudication ***400** of Terry Williams' application for state habeas corpus relief resulted in just such a decision. I agree with that determination and join Parts I, III, and IV of the Court's opinion. Because I disagree, however, with the interpretation of § 2254(d)(1) set forth in Part II of Justice STEVENS' opinion, I write separately to explain my views.

I

Before 1996, this Court held that a federal court entertaining a state prisoner's application for habeas relief must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (*i.e.,* application of constitutional law to fact). See, *e.g., Miller v. Fenton,* 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). In other words, a federal habeas court owed no deference to a state court's resolution of such questions of law or mixed questions. In 1991, in the case of *Wright v. West,* 502 U.S. 1021, 112 S.Ct. 672, 116 L.Ed.2d 763, we revisited our prior holdings by asking the parties to address the following question in their briefs:

> "In determining whether to grant a petition for writ of habeas corpus by a person ****1517** in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo?*" *Ibid.*

Although our ultimate decision did not turn on the answer to that question, our several opinions did join issue on it. See *Wright v. West,* 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992).

Justice THOMAS, announcing the judgment of the Court, acknowledged that our precedents had "treat[ed] as settled the rule that mixed constitutional questions are 'subject to plenary federal review' on habeas." *Id.,* at 289, 112 S.Ct. 2482 (quoting *Miller, supra,* at 112, 106 S.Ct. 445). He contended, nevertheless, that those decisions did not foreclose the Court from applying a rule of deferential review for reasonableness in future cases. ***401** See 505 U.S., at 287-290, 112 S.Ct. 2482. According to Justice THOMAS, the reliance of our precedents on *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), was erroneous because the Court in *Brown* never explored in detail whether a federal habeas court, to deny a state prisoner's application, must conclude that the relevant state-court adjudication was "correct" or merely that it was "reasonable." *Wright, supra,* at 287, 112 S.Ct. 2482. Justice THOMAS suggested that the time to revisit our decisions may have been at hand, given that our more recent habeas jurisprudence in the nonretroactivity context, see, *e.g., Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), had called into question the then-settled rule of independent review of mixed constitutional questions. *Wright,* 505 U.S., at 291-292, 294, 112 S.Ct. 2482.

I wrote separately in *Wright* because I believed Justice THOMAS had "understate[d] the certainty with which *Brown v. Allen* rejected a deferential standard of review of issues of law." *Id.,* at 300, 112 S.Ct. 2482. I also explained that we had considered the standard of review applicable to mixed constitutional questions on numerous occasions and each time we concluded that federal habeas courts had a duty to evaluate such questions independently. *Id.,* at 301-303, 112 S.Ct. 2482. With respect to Justice THOMAS' suggestion that *Teague* and its progeny called into question the vitality of the independent-review rule, I noted that " *Teague* did not establish a 'deferential' standard of review" because "[i]t did not establish a standard of review at all." 505 U.S., at 303-304, 112 S.Ct. 2482. While *Teague* did hold that state prisoners could not receive "the retroactive benefit of new rules of law," it "did *not* create any deferential standard of review with regard to old rules." 505 U.S., at 304, 112 S.Ct. 2482 (emphasis in original).

Finally, and perhaps most importantly for purposes of today's case, I stated my disagreement with Justice THOMAS' suggestion that *de novo* review is incompatible with the maxim that federal habeas courts should "give great weight to the considered conclusions of a coequal state judiciary," *Miller, supra,* at 112, 106 S.Ct. 445. Our statement in *Miller* signified ***402** only that a state-court decision is due the same respect as any other "persuasive, well-reasoned authority." *Wright,* 505 U.S., at 305, 112 S.Ct. 2482. "But this does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Ibid.* Under the federal habeas statute as it stood in 1992, then, our precedents dictated that a federal court should grant a state prisoner's petition for habeas relief if that court were to conclude in its independent judgment that the relevant state court had erred on a question of

constitutional law or on a mixed constitutional question.

****1518** If today's case were governed by the federal habeas statute prior to Congress' enactment of AEDPA in 1996, I would agree with Justice STEVENS that Williams' petition for habeas relief must be granted if we, in our independent judgment, were to conclude that his Sixth Amendment right to effective assistance of counsel was violated. See *ante,* at 1511.

II
A

[4] Williams' case is *not* governed by the pre-1996 version of the habeas statute. Because he filed his petition in December 1997, Williams' case is governed by the statute as amended by AEDPA. Section 2254 now provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established ***403** Federal law, as determined by the Supreme Court of the United States."

Accordingly, for Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the role of federal habeas courts in reviewing petitions filed by state prisoners.

Justice STEVENS' opinion in Part II essentially contends that § 2254(d)(1) does not alter the previously settled rule of independent review. Indeed, the opinion concludes its statutory inquiry with the somewhat empty finding that § 2254(d)(1) does no more than express a " 'mood' that the Federal Judiciary must respect." *Ante,* at 1509. For Justice STEVENS, the congressionally enacted "mood" has two important qualities. First, "federal courts [must] attend to every state-court judgment with utmost care" by "carefully weighing all the reasons for accepting a state court's judgment." *Ante,* at 1511. Second, if a federal court undertakes that careful review and yet remains convinced that a prisoner's custody violates the Constitution, "that independent judgment should prevail." *Ibid.*

One need look no further than our decision in *Miller* to see that Justice STEVENS' interpretation of § 2254(d)(1) gives the 1996 amendment no effect whatsoever. The command that federal courts should now use the "utmost care" by "carefully weighing" the reasons supporting a state court's judgment echoes our pre-AEDPA statement in *Miller* that federal habeas courts "should, of course, give great weight to the considered conclusions of a coequal state judiciary." 474 U.S., at 112, 106 S.Ct. 445. Similarly, the requirement that the independent judgment of a federal court must in the end prevail essentially repeats the conclusion we reached in the very next sentence in *Miller* with respect to the specific issue presented there: "But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible ***404** with the requirements of the Constitution *is a matter for independent federal determination.*" *Ibid.* (emphasis added).

That Justice STEVENS would find the new § 2254(d)(1) to have no effect on the prior law of habeas corpus is remarkable given his apparent acknowledgment that Congress wished to bring change to the field. See *ante,* at 1509 ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"). That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved.

****1519** Justice STEVENS arrives at his erroneous interpretation by means of one critical misstep. He fails to give independent meaning to both the "contrary to" and "unreasonable application" clauses of the statute. See, *e.g., ante,* at 1508 ("We are not persuaded that the phrases define two mutually exclusive categories of questions"). By reading § 2254(d)(1) as one general restriction on the power of the federal habeas court, Justice STEVENS manages to avoid confronting the specific meaning of the statute's "unreasonable application" clause and its ramifications for the independent- review rule. It is, however, a cardinal principle of statutory construction that we must "

'give effect, if possible, to every clause and word of a statute.' " *United States v. Menasche,* 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (quoting *Inhabitants of Montclair Tp. v. Ramsdell,* 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883)). Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) " *contrary to* ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* ... clearly ***405** established Federal law, as determined by the Supreme Court of the United States." (Emphases added.)

[5] The Court of Appeals for the Fourth Circuit properly accorded both the "contrary to" and "unreasonable application" clauses independent meaning. The Fourth Circuit's interpretation of § 2254(d)(1) in Williams' case relied, in turn, on that court's previous decision in *Green v. French,* 143 F.3d 865 (1998), cert. denied, 525 U.S. 1090, 119 S.Ct. 844, 142 L.Ed.2d 698 (1999). See 163 F.3d 860, 866 (C.A.4 1998) ("[T]he standard of review enunciated in *Green v. French* continues to be the binding law of this Circuit"). With respect to the first of the two statutory clauses, the Fourth Circuit held in *Green* that a state-court decision can be "contrary to" this Court's clearly established precedent in two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours. See 143 F.3d, at 869-870.

The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." Webster's Third New International Dictionary 495 (1976). The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court. The Fourth Circuit's interpretation of the "contrary to" clause accurately reflects this textual meaning. A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the ***406** prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different." *Id.,* at 694, 104 S.Ct. 2052. A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set ****1520** of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause. Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state-court decision as "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to *Strickland,* our clearly established precedent. Although the state-court decision may be contrary to the federal court's conception of how *Strickland*

ought to be applied in that particular case, the decision is not "mutually opposed" to *Strickland* itself.

***407** Justice STEVENS would instead construe § 2254(d)(1)'s "contrary to" clause to encompass such a routine state-court decision. That construction, however, saps the "unreasonable application" clause of any meaning. If a federal habeas court can, under the "contrary to" clause, issue the writ whenever it concludes that the state court's *application* of clearly established federal law was incorrect, the "unreasonable application" clause becomes a nullity. We must, however, if possible, give meaning to every clause of the statute. Justice STEVENS not only makes no attempt to do so, but also construes the "contrary to" clause in a manner that ensures that the "unreasonable application" clause will have no independent meaning. See *ante,* at 1509, 1510-1511. We reject that expansive interpretation of the statute. Reading § 2254(d)(1) 's "contrary to" clause to permit a federal court to grant relief in cases where a state court's error is limited to the manner in which it *applies* Supreme Court precedent is suspect given the logical and natural fit of the neighboring "unreasonable application" clause to such cases.

The Fourth Circuit's interpretation of the "unreasonable application" clause of § 2254(d)(1) is generally correct. That court held in *Green* that a state-court decision can involve an "unreasonable application" of this Court's clearly established precedent in two ways. First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. See 143 F.3d, at 869-870.

A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a ***408** particular prisoner's case certainly would qualify as a decision "involv[ing] an unreasonable application of ... clearly established Federal law." Indeed, we used the almost identical phrase "application of law" to describe a state court's application ****1521** of law to fact in the certiorari question we posed to the parties in *Wright.* [FN*]

> FN* The legislative history of § 2254(d)(1) also supports this interpretation. See, *e.g.,* 142 Cong. Rec. 7799 (1996) (remarks of Sen. Specter) ("[U]nder the bill deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld"); 141 Cong. Rec. 14666 (1995) (remarks of Sen. Hatch) ("[W]e allow a Federal court to overturn a State court decision only if it is contrary to clearly established Federal law or if it involves an 'unreasonable application' of clearly established Federal law to the facts").

The Fourth Circuit also held in *Green* that state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s "unreasonable application" clause. See 143 F.3d, at 869-870. Although that holding may perhaps be correct, the classification does have some problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that "arrives at a conclusion opposite to that reached by this Court on a question of law,"

supra, at 1519. Today's case does not require us to decide how ***409** such "extension of legal principle" cases should be treated under § 2254(d)(1). For now it is sufficient to hold that when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's "unreasonable application" clause.

B

[6] There remains the task of defining what exactly qualifies as an "unreasonable application" of law under § 2254(d)(1). The Fourth Circuit held in *Green* that a state-court decision involves an "unreasonable application of ... clearly established Federal law" only if the state court has applied federal law "in a manner that reasonable jurists would all agree is unreasonable." 143 F.3d, at 870. The placement of this additional overlay on the "unreasonable application" clause was erroneous. It is difficult to fault the Fourth Circuit for using this language given the fact that we have employed nearly identical terminology to describe the related inquiry undertaken by federal courts in applying the nonretroactivity rule of *Teague.* For example, in *Lambrix v. Singletary,* 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997), we stated that a new rule is not dictated by precedent unless it would be "apparent to *all reasonable jurists.*" *Id.,* at 528, 117 S.Ct. 1517 (emphasis added). In *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), another nonretroactivity case, we employed similar language, stating that we could not say "that *all reasonable jurists* would have deemed themselves compelled to accept Graham's claim in 1984." *Id.,* at 477, 113 S.Ct. 892 (emphasis added).

Defining an "unreasonable application" by reference to a "reasonable jurist," however, is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court ***410** should not transform the inquiry into a ****1522** subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its "reasonable jurist" standard in just such a subjective manner. See *Drinkard v. Johnson,* 97 F.3d 751, 769 (1996) (holding that state court's application of federal law was not unreasonable because the Fifth Circuit panel split 2-1 on the underlying mixed constitutional question), cert. denied, 520 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997). As I explained in *Wright* with respect to the "reasonable jurist" standard in the *Teague* context, "[e]ven though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." 505 U.S., at 304, 112 S.Ct. 2482 (citation omitted).

The term "unreasonable" is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Our opinions in *Wright,* for example, make that difference clear. Justice THOMAS' criticism of this Court's subsequent reliance on *Brown* turned on that distinction. The Court in *Brown,* Justice THOMAS contended, held only that a federal habeas court must determine whether the relevant state-court adjudication resulted in a " 'satisfactory conclusion.' " 505 U.S., at 287, 112 S.Ct. 2482 (quoting *Brown,* 344 U.S., at 463, 73 S.Ct. 397). In Justice THOMAS' view, *Brown* did not answer "the question whether a 'satisfactory' conclusion was one that the habeas court considered ***411** *correct,* as opposed to merely *reasonable.*" 505 U.S., at 287, 112 S.Ct. 2482 (emphases in original). In my separate opinion in *Wright,* I made the same distinction, maintaining that "a state court's *incorrect* legal determination has [never] been allowed to stand because it was *reasonable.* We have always

held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.,* at 305, 112 S.Ct. 2482 (emphases added). In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Justice STEVENS turns a blind eye to the debate in *Wright* because he finds no indication in § 2254(d)(1) itself that Congress was "directly influenced" by Justice THOMAS' opinion in *Wright. Ante,* at 1510, n. 14. As Justice STEVENS himself apparently recognizes, however, Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision. See *ante,* at 1506, n. 11. In any event, whether Congress intended to codify the standard of review suggested by Justice THOMAS in *Wright* is beside the point. *Wright* is important for the light it sheds on § 2254(d)(1)'s requirement that a federal habeas court inquire into the reasonableness of a state court's application of clearly established federal law. The separate opinions in *Wright* concerned the very issue addressed by § 2254(d)(1)'s "unreasonable application" clause--whether, in reviewing a state-court decision on a state prisoner's claims under federal law, a federal ****1523** habeas court should ask whether the state-court decision was correct or simply whether it was reasonable. Justice STEVENS' claim that the debate in *Wright* concerned only the meaning of the *Teague* nonretroactivity ***412** rule is simply incorrect. See *ante,* at 1510, n. 14. As even a cursory review of Justice THOMAS' opinion and my own opinion reveals, both the broader debate and the specific statements to which we refer, see *supra,* at 1522, concerned precisely the issue of the standard of review to be employed by federal habeas courts. The *Wright* opinions confirm what § 2254(d)(1)'s language already makes clear--that an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law.

Throughout this discussion the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. In this respect, the "clearly established Federal law" phrase bears only a slight connection to our *Teague* jurisprudence. With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1). See, *e.g., Stringer v. Black,* 503 U.S. 222, 228, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (using term "old rule"). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.

In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" ***413** clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

III

Although I disagree with Justice STEVENS concerning the standard we must apply under § 2254(d)(1) in evaluating Terry Williams' claims on habeas, I agree with the Court that the Virginia Supreme Court's adjudication of Williams' claim of

ineffective assistance of counsel resulted in a decision that was both contrary to and involved an unreasonable application of this Court's clearly established precedent. Specifically, I believe that the Court's discussion in Parts III and IV is correct and that it demonstrates the reasons that the Virginia Supreme Court's decision in Williams' case, even under the interpretation of § 2254(d)(1) I have set forth above, was both contrary to and involved an unreasonable application of our precedent.

First, I agree with the Court that our decision in *Strickland* undoubtedly qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of § 2254(d)(1). See *ante,* at 1512. Second, I agree that the Virginia Supreme Court's decision was contrary to that clearly established ****1524** federal law to the extent it held that our decision in *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), somehow modified or supplanted the rule set forth in *Strickland.* See *ante,* at 1512-1513, 1515. Specifically, the Virginia Supreme Court's decision was contrary to *Strickland* itself, where we held that a defendant demonstrates prejudice by showing "that there is a reasonable ***414** probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694, 104 S.Ct. 2052. The Virginia Supreme Court held, in contrast, that such a focus on outcome determination was insufficient standing alone. See *Williams v. Warden of Mecklenburg Correctional Center,* 254 Va. 16, 25, 27, 487 S.E.2d 194, 199, 200 (1997). *Lockhart* does not support that broad proposition. As I explained in my concurring opinion in that case, "in the vast majority of cases ... [t]he determinative question--whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'--remains unchanged." 506 U.S., at 373, 113 S.Ct. 838 (quoting *Strickland,* 466 U.S., at 694, 104 S.Ct. 2052). In his attempt to demonstrate prejudice, Williams did not rely on any "considerations that, as a matter of law, ought not inform the [prejudice] inquiry." *Lockhart, supra,* at 373, 113 S.Ct. 838 (O'CONNOR, J., concurring). Accordingly, as the Court ably explains, the Virginia Supreme Court's decision was contrary to *Strickland.*

To be sure, as THE CHIEF JUSTICE notes, *post,* at 1525-1526 (opinion concurring in part and dissenting in part), the Virginia Supreme Court did also inquire whether Williams had demonstrated a reasonable probability that, but for his trial counsel's unprofessional errors, the result of his sentencing would have been different. See 254 Va., at 25-26, 487 S.E.2d, at 199-200. It is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that Williams suffered no prejudice. For example, at the conclusion of its discussion of whether Williams had demonstrated a reasonable probability of a different outcome at sentencing, the Virginia Supreme Court faulted the Virginia Circuit Court for its "emphasis on mere outcome determination, without proper attention to whether the result of the criminal proceeding was fundamentally unfair or unreliable." 254 Va., at 27, 487 S.E.2d, at 200. As the Court explains, ***415** however, see *ante,* at 1513, Williams' case did not implicate the unusual circumstances present in cases like *Lockhart* or *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Accordingly, for the very reasons I set forth in my *Lockhart* concurrence, the emphasis on outcome was entirely appropriate in Williams' case.

Third, I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland,* its application was unreasonable. See *ante,* at 1514-1516. As the Court correctly recounts, Williams' trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation evidence. See *ante,* at 1514-1515. For example, speaking only of that evidence concerning Williams' "nightmarish childhood," *ante,* at 1514, the mitigation evidence that trial counsel failed to present to the jury showed that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his

parents' custody," *ibid.* (footnote omitted). See also *ante,* at 1514, n. 19. The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal ****1525** circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life. More generally, the Virginia Circuit Court found that Williams' trial counsel failed to present evidence showing that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; ... that he was borderline mentally retarded;" and that "[his] conduct had been good in certain structured settings in his life (such as when he was incarcerated)." App. 422-423. In addition, the Circuit ***416** Court noted the existence of "friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities." *Id.,* at 423. Based on its consideration of all of this evidence, the same trial judge that originally found Williams' death sentence " 'justified and warranted,' " *id.,* at 155, concluded that trial counsel's deficient performance prejudiced Williams, *id.,* at 424, and accordingly recommended that Williams be granted a new sentencing hearing, *ibid.* The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. See 254 Va., at 26, 487 S.E.2d, at 200 ("At most, this evidence would have shown that numerous people, mostly relatives, thought that [Williams] was nonviolent and could cope very well in a structured environment"). For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court's decision "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States."

Accordingly, although I disagree with the interpretation of § 2254(d)(1) set forth in Part II of Justice STEVENS' opinion, I join Parts I, III, and IV of the Court's opinion and concur in the judgment of reversal.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring in part and dissenting in part.

I agree with the Court's interpretation of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III), see *ante,* at 1517-1523 (opinion of O'CONNOR, J.), but disagree with its decision to grant habeas relief in this case.

There is "clearly established Federal law, as determined by [this Court]" that governs petitioner's claim of ineffective assistance of counsel: *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, we must determine whether the Virginia ***417** Supreme Court's adjudication was "contrary to" or an "unreasonable application of" *Strickland.*

Generally, in an ineffective-assistance-of-counsel case where the state court applies *Strickland,* federal habeas courts can proceed directly to "unreasonable application" review. But, according to the substance of petitioner's argument, this could be one of the rare cases where a state court applied the wrong Supreme Court precedent, and, consequently, reached an incorrect result. Petitioner argues, and the Court agrees, that the Virginia Supreme Court improperly held that *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), "modified or in some way supplanted" the rule set down in *Strickland.* See *ante,* at 1512. I agree that such a holding would be improper. But the Virginia Supreme Court did not so hold as it did not rely on *Lockhart* to reach its decision.

Before delving into the evidence presented at the sentencing proceeding, the Virginia Supreme Court stated:

> "We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a 'reasonable probability' that the result of the proceeding would have been different, ****1526** nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused." *Williams v. Warden,* 254 Va. 16, 25, 487 S.E.2d 194, 199 (1997).

While the first part of this statement refers to *Lockhart,* the rest of the statement is straight out of *Strickland.* Indeed, after the initial allusion to

Lockhart, the Virginia Supreme Court's analysis explicitly proceeds under *Strickland* alone. [FN*] ***418** See 254 Va., at 26-27, 487 S.E.2d, at 200. Because the Virginia Supreme Court did not rely on *Lockhart* to make its decision, and, instead, appropriately relied on *Strickland,* that court's adjudication was not "contrary to" this Court's clearly established precedent.

FN* In analyzing the evidence that was presented to the sentencing jury, the Virginia Supreme Court stated: "Drawing on *Strickland,* we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner 'suffered insufficient prejudice to warrant setting aside his death sentence,' " 254 Va., at 26, 487 S.E.2d, at 200 (quoting *Strickland v. Washington,* 466 U.S. 668, 698-699, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); "[w]hat the Supreme Court said in *Strickland* applies with full force here: 'Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed;' " 254 Va., at 26, 487 S.E.2d, at 200 (quoting *Strickland, supra,* at 700, 104 S.Ct. 2052); and "[i]n conclusion, employing the language of *Strickland,* the prisoner 'has 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. [The prisoner's] sentencing proceeding was not fundamentally unfair,' " 254 Va., at 27, 487 S.E.2d, at 200 (quoting *Strickland, supra,* at 700, 104 S.Ct. 2052).

The question then becomes whether the Virginia Supreme Court's adjudication resulted from an "unreasonable application of" *Strickland.* In my view, it did not.

I, like the Virginia Supreme Court and the Federal Court of Appeals below, will assume without deciding that counsel's performance fell below an objective standard of reasonableness. As to the prejudice inquiry, I agree with the Court of Appeals that evidence showing that petitioner presented a future danger to society was overwhelming. As that court stated:

> "The murder of Mr. Stone was just one act in a crime spree that lasted most of Williams's life. Indeed, the jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." 163 F.3d 860, 868 (C.A.4 1998).

***419** In *Strickland,* we said that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. 466 U.S., at 698, 104 S.Ct. 2052. It is with this kind of a question that the "unreasonable application of" clause takes on meaning. While the determination of "prejudice" in the legal sense may be a question of law, the subsidiary inquiries are heavily factbound.

Here, there was strong evidence that petitioner would continue to be a danger to society, both in and out of prison. It was not, therefore, unreasonable for the Virginia Supreme Court to decide that a jury would not have been swayed by evidence demonstrating that petitioner had a terrible childhood and a low IQ. See *ante,* at 1514. The potential mitigating evidence that may have countered the finding that petitioner was a future danger was testimony that petitioner was not dangerous ****1527** while in detention. See *ibid.* But, again, it is not unreasonable to assume that the jury would have viewed this mitigation as unconvincing upon hearing that petitioner set fire to his cell while awaiting trial for the murder at hand and has repeated visions of harming other inmates.

Accordingly, I would hold that habeas relief is barred by 28 U.S.C. § 2254(d) (1994 ed., Supp. III).

120 S.Ct. 1495, 529 U.S. 362, 146 L.Ed.2d 389, 68 USLW 4263, 2000 Daily Journal D.A.R. 3949, 00 CJ C.A.R. 2064, 13 Fla. L. Weekly Fed. S 225

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• 1999 WL 642451 (Appellate Brief) BRIEF OF RESPONDENT (Aug. 20, 1999)

• 1999 WL 682881 (Appellate Brief) BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW M EXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, AND WEST VIRGINIA IN SUPPORT OF RESPONDENTS (Aug. 20, 1999)

• 1999 WL 642399 (Appellate Brief) BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT (Aug. 19, 1999)

• 1999 WL 446425 (Appellate Brief) BRIEF OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA TRIAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER (Jun. 28, 1999)

• 1999 WL 446427 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF PROFESSORS LANCE G. BANNING, JACK N. RAKOVE, WILLIAM W. VAN ALSTYNE, AND GORDON G. YOUNG IN SUPPORT OF PETITIONER (Jun. 28, 1999)

• 1999 WL 459574 (Appellate Brief) BRIEF FOR PETITIONER (Jun. 28, 1999)

• 1999 WL 446423 (Appellate Brief) MOTION OF MARVIN E. FRANKEL, JAMES K. LOGAN, LAWRENCE W. PIERCE, GEORGE C. PRATT AND HAROLD R. TYLER FOR LEAVE TO APPEAR AS AMICI CURIAE AND BRIEF IN SUPPORT OF PETITIONER (Jun. 25, 1999)

• 1999 WL 446430 (Appellate Brief) BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Jun. 24, 1999)

• 1999 WL 420503 (Appellate Brief) BRIEF OF AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER (Jun. 21, 1999)

• 1999 WL 420462 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER (Jun. 18, 1999)

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H

United States Court of Appeals,
Tenth Circuit.

Michael Edward HOOPER,
Petitioner-Appellant-Cross-Appellee,
v.
Mike MULLIN, [FN*] Warden, Oklahoma State Penitentiary, Respondent-Appellee-Cross-Appellant.

FN* Mike Mullin replaced Gary Gibson as Warden of the Oklahoma State Penitentiary effective March 25, 2002.

Nos. 01-6238, 01-6242.

Dec. 19, 2002.

Petitioner, convicted in state court of three counts of first degree murder and sentenced to death, having exhausted state-court appeals, 947 P.2d 1090, and postconviction relief, 957 P.2d 120, sought federal habeas relief. The United States District Court for the Western District of Oklahoma, Vicki Miles- LaGrange, J., granted petition in part and denied in part. Petitioner and state cross appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) petitioner was prejudiced by counsel's conduct at penalty phase of trial; (2) counsel's conduct at penalty phase was constitutionally deficient; (3) prosecutor's remarks during closing argument at guilt phase were reasonable inferences drawn from record; (4) prosecutor's remarks during closing argument at penalty phase, which improperly solicited sympathy for victims, did not result in fundamentally unfair proceeding; (5) trial court's erroneous admission of victim-impact evidence at penalty phase was harmless; (6) defendant was not prejudiced by counsel's alleged deficiencies at guilt phase; and (7) cumulative effect of individual harmless errors did not render petitioner's trial unfair.

Affirmed.

Paul J. Kelly, Jr., Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Criminal Law ⇦641.13(1)
110k641.13(1) Most Cited Cases

Benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced just result. U.S.C.A. Const.Amend. 6.

[2] Criminal Law ⇦641.13(7)
110k641.13(7) Most Cited Cases

Defendant was prejudiced by counsel's use of psychological evidence at sentencing phase of defendant's trial for murders of his ex-girlfriend and her two children, as required to support claim for ineffective assistance of counsel, since neither psychologist called by counsel offered any mitigating evidence and their combined testimony was disastrous for defense; jury was left with unchallenged expert opinions that defendant did not suffer from brain damage, had no particular trouble controlling his temper, and that his learning disability would not have affected his capacity for violence or ability to reason in adverse circumstances. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⇦641.13(7)
110k641.13(7) Most Cited Cases

Counsel pursued strategy of presenting evidence at penalty phase of defendant's trial for murders of his ex-girlfriend and her two children suggesting that defendant's possible brain damage and frustration with his mental limitations could have produced violent conduct culminating in murders without conducting thorough investigation, and proceeded in unprepared and ill-informed manner, and thus, counsel's conduct was constitutionally deficient, as required to support claim for ineffective assistance of counsel; counsel failed to have psychologist who suggested that defendant might have had brain damage conduct more comprehensive examination, for fear that examination would have determined that defendant did not have brain damage, and counsel never spoke to either of two psychologists he called to testify, and had no idea what they were going to say on witness stand. U.S.C.A. Const.Amend. 6.

[4] Criminal Law ⇦641.13(1)
110k641.13(1) Most Cited Cases

In reviewing claim of ineffective assistance of counsel, court considers whether counsel's conduct was result of reasonable trial strategy, rather than product of neglectful or otherwise erroneous representation. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

In reviewing claim of ineffective assistance of counsel, court must consider whether counsel's strategy was objectively reasonable. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable on claim for ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[7] Habeas Corpus ⚿497
197k497 Most Cited Cases

Where prosecutor's allegedly improper remarks during closing argument do not implicate specific constitutional right, petitioner is entitled to habeas relief only if he can establish that argument, viewed in light of trial as whole, resulted in fundamentally unfair proceeding.

[8] Criminal Law ⚿720(9)
110k720(9) Most Cited Cases

Prosecutor's remarks during closing argument at guilt phase of defendant's trial for murders of his ex-girlfriend and her two children describing how defendant had chased one child who had escaped while defendant shot girlfriend and other child, caught child and shot her twice in face and head and left her to die, were reasonable inferences drawn from record, even though no eyewitnesses observed murders, and thus, remarks did not render trial unfair; physical evidence supported prosecutor's argument.

[9] Criminal Law ⚿720(6)
110k720(6) Most Cited Cases

Prosecutor possesses reasonable latitude in drawing inferences from record in closing argument.

[10] Sentencing and Punishment ⚿1780(2)
350Hk1780(2) Most Cited Cases

Even though prosecutor's remarks during closing argument at penalty phase of defendant's trial for murders of his former girlfriend and her two children improperly solicited sympathy for victims through description of horror felt by one child who had escaped while defendant shot girlfriend and other child, and while defendant chased her, caught her, and shot her twice in face and head, remarks did not result in fundamentally unfair proceeding; facts of crime itself invoked sympathy even absent prosecutorial argument, prosecutor's theory of murders was based on substantial evidence, and trial court instructed jury to base its decision only on evidence received, and not to allow sympathy to affect its deliberations.

[11] Habeas Corpus ⚿508
197k508 Most Cited Cases

[11] Sentencing and Punishment ⚿1758(1)
350Hk1758(1) Most Cited Cases

Trial court's erroneous admission at penalty phase of defendant's capital trial for murders of his ex-girlfriend and her two children of testimony from victims' family members expressing opinion that defendant deserved to die, in violation of Eighth Amendment, was harmless, and thus did not warrant federal habeas relief, since evidence did not have substantial and injurious effect or influence in determining jury's verdict. U.S.C.A. Const.Amend. 8.

[12] Sentencing and Punishment ⚿1758(1)
350Hk1758(1) Most Cited Cases

[12] Sentencing and Punishment ⚿1760
350Hk1760 Most Cited Cases

[12] Sentencing and Punishment ⚿1768
350Hk1768 Most Cited Cases

Eighth Amendment prohibits family members of murder victim from stating characterizations and opinions about crime, defendant, and appropriate sentence, during penalty phase of capital trial. U.S.C.A. Const.Amend. 8.

[13] Constitutional Law ⚿270(2)
92k270(2) Most Cited Cases

[13] Sentencing and Punishment ⚿1763
350Hk1763 Most Cited Cases

Victim-impact evidence that is so unduly prejudicial that it renders trial fundamentally unfair deprives capital defendant of due process. U.S.C.A. Const.Amend. 14.

[14] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Criminal defendant is deprived of his Sixth Amendment right to effective representation if counsel entirely fails to subject prosecution's case to meaningful adversarial testing, making adversary process itself presumptively unreliable. U.S.C.A. Const.Amend. 6.

[15] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

Prejudice supporting claim for ineffective assistance of counsel will be presumed under *Cronic* only if counsel entirely fails to subject prosecution's case to meaningful adversarial testing. U.S.C.A. Const.Amend. 6.

[16] Criminal Law ⚿641.13(2.1)
110k641.13(2.1) Most Cited Cases

Record did not support defendant's conclusion that defense counsel entirely failed to subject prosecution's case to meaningful adversarial testing, or that counsel believed defendant should have been convicted, as required to presume prejudice supporting claim for ineffective assistance of counsel under *Cronic*; defense counsel cross-examined state's guilt-stage witnesses, made objections to state's evidence, presented some evidence in defense, and made opening and closing arguments. U.S.C.A. Const.Amend. 6.

[17] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

Defendant was not prejudiced by counsel's failure to move to quash defendant's arrest warrant for murder of his ex-girlfriend and her two children, and to suppress evidence seized as result of arrest, as required to support claim for ineffective assistance of counsel; affidavit accompanying warrant provided enough information to form substantial basis for probable cause to arrest defendant. U.S.C.A. Const.Amend. 6.

[18] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

Defendant was not prejudiced by counsel's waiver of previously preserved objections to prosecution's introduction of photographs of victims' bodies at grave site at defendant's trial for murder of his ex-girlfriend and her two children, as required to support claim for ineffective assistance of counsel; defendant never attempted to challenge admission of photographs on direct appeal. U.S.C.A. Const.Amend. 6.

[19] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

Defendant was not prejudiced by counsel's handling and presentation of DNA evidence at defendant's trial for murder of his ex-girlfriend and her two children, which resulted in defense expert giving testimony bolstering state's DNA evidence, as required to support claim for ineffective assistance of counsel; state's expert had already established that blood consistent with girlfriend's was on one of defendant's shoes, and thus defense expert's testimony that girlfriend's blood also might have been on defendant's other shoe failed to add anything more to state's case, and great deal of other evidence linked defendant to killings. U.S.C.A. Const.Amend. 6.

[20] Criminal Law ⚿641.13(6)
110k641.13(6) Most Cited Cases

Defendant was not prejudiced by counsel's cross-examination of defendant's ex- wife at defendant's trial for murder of his ex-girlfriend and her two children, which opened door for prosecution to elicit testimony on redirect that defendant had tried to kill ex-wife on several occasions, as required to support claim for ineffective assistance of counsel; record already included great deal of evidence linking defendant to murders and detailing his pattern of violence toward ex-girlfriend. U.S.C.A. Const.Amend. 6.

[21] Criminal Law ⚿1186.1
110k1186.1 Most Cited Cases

Cumulative-error analysis aggregates all errors that individually have been found to be harmless, and

therefore not reversible, and analyzes whether their cumulative effect on outcome of trial is such that collectively they can no longer be determined to be harmless.

[22] Habeas Corpus ⇐461
197k461 Most Cited Cases

Cumulative effect of individual harmless errors did not render defendant's trial for murder of his ex-girlfriend and her two children unfair, so as to warrant federal habeas relief, given extensive evidence supporting jury's finding of guilt.

***1165** Mark L. Henricksen (Lanita Henricksen with him on the brief), of Henricksen & Henricksen Lawyers, Inc., El Reno, OK, for Petitioner-Appellant-Cross-Appellee.

Robert L. Whittaker, Assistant Attorney General (W.A. Drew Edmondson, Attorney General of Oklahoma, with him on the brief), Oklahoma City, OK, for Respondent-Appellee-Cross-Appellant.

Before SEYMOUR, BALDOCK, and KELLY, Circuit Judges.

BALDOCK, Circuit Judge.

An Oklahoma jury convicted Petitioner Michael Edward Hooper on three counts of first degree murder in the shooting deaths of his twenty-three-year- old former girlfriend, Cynthia Jarman, and her two children, Tonya Kay Jarman and Timmy Glen Jarman. The jury imposed the death sentence for each count. The Oklahoma Court of Criminal Appeals affirmed Petitioner's convictions and sentences on direct appeal and denied post-conviction relief. *See Hooper v. State,* 947 P.2d 1090 (Okla.Crim.App.1997); *Hooper v. State,* 957 P.2d 120 (Okla.Crim.App.), *cert. denied,* 524 U.S. 943, 118 S.Ct. 2353, 141 L.Ed.2d 722 (1998). On habeas review, the federal district court granted Petitioner relief from his death sentences after concluding defense ***1166** counsel's representation during the capital sentencing proceeding was constitutionally ineffective. *See* 28 U.S.C. § 2254. The court denied relief on numerous other claims in which Petitioner challenged both his convictions and his sentences. Petitioner appealed the district court's denial of habeas relief on his remaining claims. The State cross-appealed the district court's grant of habeas relief from the death sentences. The district court granted a certificate of appealability as to three of Petitioner's claims. This Court granted a COA as to two additional claims. [FN2] We have jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253. We affirm.

FN2. Because Petitioner filed his appeal after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we address only claims for which a COA has been granted. 28 U.S.C. § 2253(c)(1). A COA is not required for the State or its representative to appeal a district court order granting relief. Fed. R.App. P. 22(b)(3).

I.

Petitioner met Cynthia Jarman in early 1992, and they dated through the summer of 1993. Their relationship was physically violent, and Petitioner threatened to kill Jarman on several occasions. In July 1993, Jarman began dating Petitioner's friend, Bill Stremlow. In November, three weeks before the murders, Jarman began living with Stremlow. Before moving in with Stremlow, Jarman confided in a friend that Petitioner had previously threatened to kill her if she ever lived with another man.

On December 6, 1993, Jarman confided in a friend that she wanted to see Petitioner one last time. On the morning of December 7, 1993, Jarman dropped Stremlow off at work and borrowed his truck for the rest of the day. Jarman picked up her daughter, Tonya, at school that afternoon. At that time, Tonya's teacher saw Tonya get into Stremlow's truck next to a white man who was not Stremlow. Jarman failed to pick up Stremlow from work that evening as planned. Later that night, Stremlow's truck was found burning in a field. The truck's windows were broken out. An accelerant had been used to set the truck on fire.

On December 10, a farmer and police officers discovered the bodies of Jarman and her two children buried in a shallow grave in another field. At the grave site, police found broken glass, tire tracks, a footprint, shell casings, a child's bloody

sock, and a pool of blood near a tree with a freshly broken branch. On top of the grave, police found a tree branch in which a nine millimeter bullet was embedded. The bullet pinned white fibers to the branch. The fibers were consistent with the white fibers in Tonya Jarman's jacket. The jacket had a charred hole in the hood. The branch appeared to have been broken off of a tree near the pool of blood. Each victim had suffered two gunshot wounds to the face or head. Although investigators never recovered the bullets, the wounds were consistent with nine millimeter ammunition.

Police arrested Petitioner and searched his parents' home. The police recovered a nine millimeter weapon Petitioner had purchased several months prior to the murders. Police also recovered two shovels with soil consistent with soil from the grave site, two gas cans, and broken glass consistent with glass found in Tonya's coat and near the gate at the field. Police officers also seized Petitioner's tennis shoes. The shoes made prints similar to those found at the murder scene, and DNA tests revealed the presence of blood consistent with Cynthia Jarman's blood on the shoes. At trial, a ballistics expert testified that shell casings from the crime scene matched casings fired from Petitioner's ***1167** weapon. Petitioner's former wife testified that Petitioner was familiar with the field where the bodies were found, and that he previously had visited the field with her on several occasions.

Based on this evidence, the jury convicted Petitioner of three counts of first degree murder. During the capital sentencing proceeding, the jury found two aggravating factors existed with respect to all three victims: (1) Petitioner had created a great risk of death to more than one person, and (2) Petitioner was a continuing threat to society. Additionally, the jury found a third aggravating factor existed with respect to Tonya Jarman: Petitioner had committed the murder to avoid arrest or prosecution for the murder of Cynthia Jarman. After considering Petitioner's mitigating evidence, the jury imposed the death sentence for each count.

Petitioner asserts (1) he was denied effective assistance of counsel during sentencing; (2) prosecutorial misconduct prejudiced the jury's deliberations at both the guilt and sentencing stages; (3) his constitutional rights were violated by the State Court's admission of victim impact statements; (4) he was denied effective assistance of counsel during the guilt stage of his trial; and (5) the accumulation of errors in this case so infected the proceedings with unfairness that he was deprived of a fair and reliable trial and sentencing.

II.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if a claim is adjudicated on its merits in state court, a petitioner is entitled to federal habeas relief only if he can establish the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). We presume state court factual findings are correct, and place the burden on the petitioner to rebut that presumption with clear and convincing evidence. *Id.* § 2254(e)(1). If the state courts did not decide a claim on its merits and the claim is not procedurally barred, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *Hooker v. Mullin,* 293 F.3d 1232, 1237 (10th Cir.2002).

A.

Petitioner contends his two defense attorneys, Richard Krogh and Mitchell Lee, were constitutionally ineffective in their development and use of psychological evidence during the capital sentencing proceeding. The Oklahoma Court of Criminal Appeals (OCCA), applying *Strickland,* found counsels' actions prejudicial, but determined that Petitioner had not demonstrated deficient performance based on the facts contained in the record. OCCA denied Petitioner's request for an evidentiary hearing. On habeas review, the federal district court agreed Petitioner established prejudice and granted an evidentiary hearing limited to the issue of counsel's performance at sentencing. After the evidentiary hearing, the district court found counsel's performance constitutionally deficient, and granted Petitioner relief from his death sentences. The Government cross-appeals this portion of the district court's order.

1.

Prior to the Jarman murders, Petitioner received

anger management counseling. In April 1993, after six months of counseling, Russell Adams, Ph.D., gave Petitioner several neuropsychological tests to diagnose possible learning disabilities and to assist Petitioner in making career and educational*1168 plans. According to Dr. Adams' report, Petitioner's cognitive functioning was "largely adequate" and his intelligence average, but his difficulty spelling might be evidence of a learning disability. The tests also indicated that Petitioner had some emotional and psychological problems, and that he had difficulty controlling his anger and coping with everyday problems. The report noted that Petitioner's ability to remain controlled in stressful situations was "greatly improved."

In August 1994, defense counsel retained a psychologist, Philip Murphy, Ph.D., to review Dr. Adams' report. Based solely on Dr. Adams' findings, Dr. Murphy prepared a one-page summary report. In his report, Dr. Murphy indicated there was evidence of "mild but probable brain damage" that could increase the likelihood of violence, especially if Petitioner was under the influence of alcohol or other substances. In addition, Dr. Murphy noted Petitioner might suffer from a "serious psychiatric thought disorder." Petitioner had a psychological "profile often ... associated with psychotic behavior ... [and] definite difficulties with interpersonal relationships." Dr. Murphy qualified his "impressions" by noting that both "possible disorders require further diagnostic investigation to confirm."

Dr. Murphy sent this report to defense counsel in December 1994. He did not hear from defense counsel again until June 1995, after the jury found Petitioner guilty of murdering Jarman and her two children. That afternoon, trial counsel Lee called Dr. Murphy to request his testimony at the capital sentencing proceeding scheduled for the following day. Dr. Murphy informed counsel he ethically could not testify because he had never personally evaluated Petitioner. He also informed counsel that what he could say about Petitioner likely would be aggravating rather than mitigating. On the phone, defense counsel agreed Dr. Murphy would not testify. But later that day, the defense subpoenaed him to testify the following morning.

During an in camera hearing, counsel explained that they wanted Dr. Murphy to authenticate his report so they could admit into evidence both his report, and the report of Dr. Adams' on which he relied. Defense counsel requested permission to treat Dr. Murphy as a hostile witness in light of the extreme hostility Dr. Murphy directed toward defense counsel and court personnel. Counsel also admitted they were afraid of what Dr. Murphy might say on the witness stand. Defense counsel never spoke with either Dr. Murphy or Dr. Adams about the reports prior to the sentencing phase.

During the capital sentencing proceeding, Dr. Murphy identified both reports and the trial judge admitted each into evidence. Dr. Murphy told jurors he did not put "enormous stock" in his conclusions because he did not personally evaluate Petitioner. He further testified that Dr. Adams, having evaluated Petitioner in person, would be in the best position to address whether Petitioner had brain damage. The State then called Dr. Adams in rebuttal. Contrary to Dr. Murphy's limited assertions, Dr. Adams testified Petitioner had a mild learning disability, but no brain damage. In addition, Dr. Adams asserted that, although Petitioner had some psychological problems, those problems would not cause him to lose touch with reality or make him incapable of controlling himself or his anger. Dr. Adams found "no special problems."

2.

[1] To succeed on an ineffective assistance claim, Petitioner must establish both that his attorneys' representation was deficient and that this deficient performance *1169 prejudiced his defense. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "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." *Id.* at 686, 104 S.Ct. 2052. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding." *Id.* at 696, 104 S.Ct. 2052. AEDPA, however, further circumscribes our habeas review. *See Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Because the OCCA applied the correct federal law, *Strickland,* to deny Petitioner relief on this claim, we consider only whether the OCCA did so in an objectively reasonable manner. *See* 28 U.S.C. § 2254(d)(1); *see also Cone,* 122 S.Ct. at 1852.

[2] In denying Petitioner relief, the OCCA first addressed *Strickland's* prejudice inquiry, finding counsel's use of this psychological evidence prejudiced Petitioner's defense. We agree. Neither Dr. Murphy nor Dr. Adams offered any mitigating evidence and their combined testimony was disastrous for Petitioner's defense. The jury was left with unchallenged expert opinions that Petitioner did not suffer from brain damage, had no particular trouble controlling his temper, and that his learning disability would not have affected his capacity for violence or ability to reason in adverse circumstances.

[3] The determinative issue in this appeal is whether the OCCA applied *Strickland* in an objectively reasonable manner in concluding Petitioner did not establish counsels' performance was constitutionally deficient. Although the OCCA determined the testimony of Drs. Murphy and Adams "was disastrous for Petitioner," that counsel's failure to talk to Dr. Adams prior to his trial testimony was "inexplicable" and "overwhelmingly prejudicial," and that Petitioner had raised "serious questions about trial counsel's decisions to call Dr. Murphy and admit the two medical reports," the OCCA found trial counsel's performance was not constitutionally deficient. The court noted that Petitioner had not shown why counsel's reasons for presenting the psychological evidence, or for failing to speak with Dr. Murphy or Dr. Adams regarding the reports, amounted to ineffective assistance. In denying relief, the OCCA also denied Petitioner's request for an evidentiary hearing during which Petitioner could have explored and challenged trial counsel's reasons for the prejudicial acts and omissions.

[4][5] On habeas review, the federal district court found the OCCA's application of *Strickland* objectively unreasonable. In light of the record, we agree with the district court. We recognize "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689, 104 S.Ct. 2052. Accordingly, we consider whether counsels' investigation and presentation of the psychological evidence during Petitioner's capital sentencing proceeding were the result of reasonable trial strategy, rather than the product of "neglectful" or otherwise erroneous representation. *Sallahdin v. Gibson,* 275 F.3d 1211, 1240 (10th Cir.2002). In doing so, we review counsel's performance with great deference. We consider all the circumstances, making every effort to "eliminate the distorting effects of hindsight," and to "evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* But "the mere incantation of 'strategy' does not insulate attorney behavior from review." ***1170***Fisher v. Gibson,* 282 F.3d 1283, 1296 (10th Cir.2002). We must consider whether that strategy was objectively reasonable. *See id.* at 1305; *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). [FN3]

FN3. The dissent suggests that trial counsel's strategy cannot be deemed objectively unreasonable, and thus deficient, unless "*no* competent counsel would have preceded the way Mr. Hooper's counsel did," citing *Cone,* 122 S.Ct. at 1854, and *Bullock v. Carver,* 297 F.3d 1036, 1049 (10th Cir.2002). Neither *Cone* nor *Bullock* stand for the proposition cited by the dissent. *Cone* reiterates *Strickland's* strong presumption that counsel's conduct was reasonable, but does not contain any reference to the no-competent-counsel standard. The quoted language appears in *Bullock* in a parenthetical to an Eleventh Circuit case citation. The no-competent counsel language in *Bullock* clearly is dicta as *Bullock* applies the *Strickland* objectively reasonable standard in reaching its holding. AEDPA mandates this court to consider whether the OCCA applied clearly established Supreme Court precedent. *Strickland's* objectively reasonable standard is the clearly established Supreme Court precedent for ineffective assistance claims, not the "no-competent-counsel" standard.

[6] Defense counsel's penalty-stage strategy was to present evidence suggesting Petitioner might have brain damage which could have produced violent conduct. Counsel also argued Petitioner's frustration with his mental limitations resulted in a

violent eruption culminating in the murder of his former girlfriend and her two children. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. Here, however, defense counsel deliberately pursued this strategy without conducting a thorough investigation.

Mr. Lee testified at the federal evidentiary hearing that he intentionally did not have Dr. Murphy further evaluate Petitioner. Lee claimed he feared the result of such an evaluation would be more harmful than helpful because a more comprehensive examination might establish conclusively that Petitioner did not suffer from brain damage. Lee reasoned that, by relying instead only on Dr. Murphy's report suggesting Petitioner *might* have brain damage, the defense could still argue that possibility in mitigation. He testified that he thought Dr. Murphy's one-page report "was going to be as good as it was going to get," but acknowledged that further psychological testing could have provided mitigating evidence. [FN4]

> FN4. While not making an explicit credibility finding, the district court questioned lead counsel's testimony about strategy: "Upon reflection of the record in this case, the questions asked by the parties, and the Court's observations of Mr. Lee's demeanor at the evidentiary hearing, the Court is not convinced Mr. Lee's answers on cross-examination regarding his 'tactical decision' to not investigate and pursue further psychological testing were his opinions at the time of Petitioner's trial."

Defense counsel's strategic decision was not based on a "thorough investigation of law and facts relevant to plausible options." *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91, 104 S.Ct. 2052. Under the specific facts of this case, counsel's judgment was not objectively reasonable. [FN5] "A decision ***1171** not to investigate cannot be deemed reasonable if it is uninformed." *Fisher,* 282 F.3d at 1296 (citing *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052); *see also Battenfield v. Gibson,* 236 F.3d 1215, 1229 (10th Cir.2001) (holding defense counsel's failure to investigate rendered any resulting strategy unreasonable). Although defense counsel feared further investigation might prevent his arguing to the jury that Petitioner might have brain damage, Lee also admitted that he had no idea what additional testing might reveal. Lee was aware of Petitioner's background, including Petitioner's abduction at an early age, previous suicide attempts, and several visits to mental health professionals, which strongly suggested Petitioner had psychological problems. Dr. Murphy's report also suggested Petitioner suffered from psychological problems. The report specifically recommended further diagnostic investigation.

> FN5. We specifically do not address under what circumstances constitutionally competent counsel must seek psychological evaluation of a capital defendant. In this case, defense counsel specifically chose a defense strategy that required presentation of psychological evidence in mitigation. Having made that strategic decision, counsel's presentation of evidence without further investigation and in an ill-informed and unprepared manner resulted in constitutionally ineffective assistance.

Defense counsel specifically chose to present, as mitigating evidence, the possibility that Petitioner might have brain damage and other psychological problems. Having made that strategic decision, however, Petitioner's counsel then presented this evidence without any further investigation, in an unprepared and ill-informed manner. As a result, defense counsel's examination of Drs. Murphy and Adams was disastrous. Defense counsel never spoke to either Dr. Murphy or Dr. Adams prior to trial and had no idea what these experts would say on the witness stand. *See Fisher,* 282 F.3d at 1294, 1295 (granting habeas relief where, among other things, trial transcript revealed that "throughout most of [defense counsel's] examination of witnesses ... he had no idea what answers he would receive to his questions;" as a result, defense counsel's questions "essentially undermined" petitioner's defense). A "decision not to undertake

substantial pretrial investigation and instead to 'investigate' the case *during* the trial [i]s not only uninformed, it [i]s patently unreasonable." *Fisher,* 282 F.3d at 1296.

In addition, although the defense did not intend to call Dr. Adams as a mitigation witness, defense counsel should have foreseen that the State might use him in rebuttal after the defense specifically relied on his report as mitigating evidence. Had counsel not offered this testimony, Dr. Adams report would have remained privileged and inadmissible.

Under the facts of this case, we conclude defense counsel made an objectively unreasonable decision to rely on Dr. Murphy's testimony and Dr. Murphy's and Dr. Adams' reports, without adequately investigating that evidence. [FN6] Further, defense counsel presented this evidence in an unprepared, uninformed, and disastrous manner. For these reasons, we agree with the federal district court that Petitioner's defense attorneys' performance was objectively unreasonable and, thus, constitutionally deficient. The OCCA's contrary conclusion constitutes an objectively unreasonable application of *Strickland.* We therefore affirm the district court's decision granting Petitioner habeas relief from his death sentences. [FN7]

FN6. The dissent asserts that defense counsel's decision to present this evidence cannot be deficient because the decision does not "so clearly outweigh[ ]" the alternative of not presenting the evidence. That would be an appropriate inquiry if counsel were making a fully informed choice between several plausible alternatives. *See Cone,* 122 S.Ct. at 1853-54. Here, however, Defense counsel made an uninformed strategic choice. The decision to present the evidence was influenced by counsel's inadequate investigation and preparation, rather than by strategic considerations.

FN7. Given our resolution of this claim, we need not address Petitioner's remaining claims challenging counsel's effectiveness at sentencing. *See, e.g., Fisher,* 282 F.3d at 1289-90.

***1172 B.**

[7] Petitioner also asserts the prosecutor's closing argument, during both the trial's guilt and penalty stages, was improper because (1) the prosecutor misstated the evidence by arguing Tonya escaped and Petitioner chased her down and coldly shot her in the face; (2) the prosecutor impermissibly solicited sympathy for the victims by elaborating on this theory; and (3) the prosecutor's comments, when combined with victim impact testimony, were so egregious that Petitioner is entitled to relief without any further showing of prejudice. [FN8] Because these challenged remarks do not implicate a specific constitutional right, Petitioner is entitled to habeas relief only if he can establish that the prosecutor's argument, viewed in light of the trial as a whole, resulted in a fundamentally unfair proceeding. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Neill v. Gibson,* 278 F.3d 1044, 1058 (10th Cir.2001), *cert. denied,* --- U.S. ----, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002).

FN8. Although we affirm the district court's order granting Petitioner habeas relief from his death sentences, we address Petitioner's challenges to the prosecutor's remarks made during the capital sentencing proceeding. This issue may arise again during resentencing and, in any event, is intertwined with Petitioner's challenge to the victim-impact evidence, another second-stage claim we also must address. *See, e.g., Battenfield,* 236 F.3d at 1225, 1235-36 (addressing propriety of prosecutor's second-stage argument, despite granting petitioner habeas relief from his death sentence because his attorney's representation was constitutionally deficient).

[8] During the guilt-stage closing argument, the prosecutor argued that when Petitioner shot Cynthia and Timmy Jarman, Tonya Jarman escaped from the truck and fled. The prosecutor asserted that Petitioner chased Tonya, firing a shot that missed the child but pierced her jacket hood, and then catching her, shot her twice in the face and head. The prosecutor also asserted that Tonya "was left to die there in the woods while her blood was spilling

onto the ground." Petitioner argues that because no eyewitnesses observed the murders, the prosecutor's argument went beyond the evidence admitted at trial.

[9] The OCCA and the district court held these remarks were reasonable inferences drawn from the record. We agree. The prosecutor presented evidence that police located a pool of blood some distance from the tire tracks and broken glass, and a short distance from the grave. Fibers consistent with Tonya's jacket were found near the pool of blood. DNA experts could not exclude Tonya or Cynthia as the source of the blood. Police found a spent casing matching the bullets in Petitioner's gun near the pool of blood. A branch on top of the grave was embedded with a bullet fired from Petitioner's gun. The embedded bullet had pinned fibers consistent with Tonya's jacket into the branch. Tonya's coat had a hole in the hood which appeared to be caused by a hot object going through it. This evidence collectively supported the prosecutor's argument. The prosecutor properly may comment on the circumstances of the crime made known to the jury during trial. *See Fowler v. Ward,* 200 F.3d 1302, 1312 (10th Cir.2000), *overruled on other grounds by Slack v. McDaniel,* 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *see also, Clayton v. Gibson,* 199 F.3d 1162, 1174 (10th Cir.1999); *Moore v. Gibson,* 195 F.3d 1152, 1172 (10th Cir.1999). The prosecutor also possesses reasonable latitude in drawing inferences from the record. *See Duvall v. Reynolds,* 139 F.3d 768, 795 (10th Cir.1998); *Moore,* 195 F.3d at 1172. The prosecutor's argument was a fair comment on the evidence, ***1173** and we affirm the district court on this issue.

[10] Petitioner next argues the prosecutor improperly solicited sympathy for the victims. During the second-stage closing argument, the prosecutor argued more dramatically and in more detail that Tonya escaped and Petitioner hunted her down and callously shot her. The prosecutor stated:

> At some point, Tonya managed to get away and flee into the woods. The moment Tonya stepped from that truck and headed for the woods, everyone's worst nightmare came true for her. If you think back, many of us children had the nightmare that I'm referring to, the nightmare of running from something that you cannot get away from. As children, many of us in those dreams in those nightmares were being chased by an evil monster. Tonya Jarman, on that night, had this nightmare become a reality for her. She was being chased through the woods by an evil monster bent on killing her, which he did, this Defendant did. I want you to imagine with me for a moment what that little girl went through as she moved from the car and ran through the woods with the Defendant after her. It was obvious from the evidence that she did not get very far before, at some point, she was fired at, and that bullet went whizzing through her coat, through the hood of her coat and into a tree branch. Now, we don't know how long a time passed between the time she was shot and the time she was caught, but it must have seemed like a terribly, terribly, terribly long time. Imagine the horror that Tonya felt when, as she ran from the Defendant, she was caught and turned around and he once again looked that little girl in the face and shot her just below her left eye. After that, he then executes her as well with the second shot and then left that little girl to die alone in the woods with her blood spilling onto the ground.

Petitioner also challenges the prosecutor's statements that "[t]o understand why this Defendant murdered two young, innocent children is to fully realize the depth of his ruthlessness behind his stone cold, evil eyes," and "[s]ome of us may never be able to escape the haunting images of the photographs of Cynthia and Tonya and Timmy, which show what this Defendant did and what he's capable of doing in the future."

The OCCA held that this "expanded ... argument approaches improper solicitation of sympathy for the victim, but it is based on the evidence presented" and, therefore, did not warrant relief. The district court held OCCA's decision was reasonable. *See* 28 U.S.C. § 2254(d). We agree. Although the prosecutors remarks were improper, the argument, viewed in light of the trial as a whole, did not result in a fundamentally unfair proceeding. The facts of the crime itself invoke sympathy even absent prosecutorial argument. *See Moore,* 195 F.3d at 1172; *Duvall,* 139 F.3d at 795. The prosecution's theory of the murders was based on substantial evidence. In addition, the court instructed the jury to base its decision only on the evidence received, and not to allow sympathy to affect its deliberations. We presume the jury followed these instructions. *See Hale v. Gibson,* 227 F.3d 1298, 1325 (10th Cir.2000).

Finally, Petitioner asserts the prosecutor's

comments were so egregious, particularly when considered with the victim-impact evidence, that he should be entitled to relief without requiring any further showing of prejudice. *See Brecht v. Abrahamson,* 507 U.S. 619, 638 n. 9, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *Brecht* did not "foreclose the possibility that in an unusual case, a deliberate and especially egregious ***1174** error ... might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Id.* But, as we stated above, the prosecutor's remarks are largely based on reasonable inferences from the evidence. Any error was not sufficiently egregious to warrant habeas relief.

C.

[11] We next address Petitioner's claim the trial court erred by admitting victim-impact testimony during the capital sentencing proceeding. Pursuant to 22 Okla. Stat. § 984(1), the trial court permitted three members of the victims' families to testify at the capital sentencing proceeding that they believed Petitioner deserved to die. Although the OCCA concluded the trial court properly admitted this testimony, we agree with Petitioner that the trial court's decision to admit the testimony is contrary to clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

[12] The Supreme Court has held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). In so holding, the Court overruled its earlier decisions in *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers,* 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). *See Payne,* 501 U.S. at 811, 817, 830, 111 S.Ct. 2597. Nonetheless, we have recognized that " *Payne* left one significant portion of *Booth* untouched.... [T]he portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid.' " *Hain,* 287 F.3d at 1238-39 (quoting *Payne,* 501 U.S. at 830 n. 2, 111 S.Ct. 2597). Therefore, the trial court erred by admitting this victim-impact testimony during Petitioner's capital sentencing proceeding. *See id.* at 1239. Nonetheless, this constitutional error was harmless because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 637, 113 S.Ct. 1710 (further quotation omitted); *see also Willingham,* 296 F.3d at 931 (applying *Brecht's* harmless-error analysis to similar claim).

[13] *Payne* also provides that victim-impact evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" deprives a capital defendant of due process. 501 U.S. at 825, 111 S.Ct. 2597. Because the victim-impact evidence did not have that effect here, however, the OCCA reasonably denied Petitioner relief on this due-process claim. *See Willingham,* 296 F.3d at 931; *United States v. Chanthadara,* 230 F.3d 1237, 1273-74 (10th Cir.2000).

Finally, because the trial court's constitutional error in admitting this victim-impact evidence was harmless, and this evidence did not otherwise result in a fundamentally unfair trial, defense counsel were not constitutionally ineffective for failing to object to it. Accordingly, the OCCA also reasonably denied Petitioner relief on this ineffective-assistance claim.

D.

Petitioner also argues that his defense attorneys abandoned his defense during the guilt stage and were otherwise ineffective under *Strickland.* Relying on *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), Petitioner first argues defense counsel abandoned ***1175** Petitioner's defense, warranting habeas relief without the need for him to show any resulting prejudice. Because the OCCA did not specifically address this claim, we review it *de novo. See Romano,* 278 F.3d at 1150.

[14][15] A criminal defendant is deprived of his Sixth Amendment right to effective representation "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, ... mak[ing] the adversary process itself presumptively unreliable." *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039; *Cone,* 122 S.Ct. at 1850-51. "[A]n attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.' "

Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir.1988) (quoting *Cronic,* 466 U.S. at 666, 104 S.Ct. 2039). Nonetheless, prejudice will be presumed under *Cronic* only " 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.' " *Cone,* 122 S.Ct. at 1851 (quoting *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039; emphasis added).

[16] The record does not support the conclusion that defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or that counsel turned on Petitioner or believed he should have been convicted. Defense counsel cross-examined the State's guilt-stage witnesses, made objections to the State's evidence, presented some evidence in Petitioner's defense, and made opening and closing arguments. *See Cooks v. Ward,* 165 F.3d 1283, 1296 (10th Cir.1998) (holding counsel's performance did not amount to actual or constructive denial of counsel such that prejudice should be presumed where defense counsel conducted limited cross-examination, made evidentiary objections and gave closing argument). Petitioner's defense attorneys did not "abandon [their] duty of loyalty ... effectively joining the state in an effort to attain [a] conviction," such that counsel's performance can be deemed per se ineffective. *Davis v. Executive Dir. of Dep't of Corr.,* 100 F.3d 750, 756-57 & 757 n. 3 (10th Cir.1996) (further quotation omitted).

Petitioner next contends that even if his attorneys did not completely abandon his defense, their guilt-stage representation was still constitutionally ineffective. To succeed on these claims, Petitioner must establish both that his attorneys' representation was deficient and that the deficiency prejudiced his defense. *See Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, Petitioner must show "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S.Ct. 2052. Because the OCCA applied the appropriate standard, *Strickland,* in denying these claims, AEDPA further circumscribes our review. *See Cone,* 122 S.Ct. at 1852. Under AEDPA, we consider only whether the OCCA applied *Strickland* in an objectively reasonable manner. *See Cone,* 122 S.Ct. at 1852. Petitioner raises several examples of his counsel's alleged ineffectiveness during the guilt stage. We examine each in turn.

[17] Petitioner first argues his counsel failed to move to quash his arrest warrant and suppress the evidence seized as a result of that arrest. Although *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) generally precludes a federal habeas court from reviewing a state court's resolution of a Fourth Amendment challenge to the lawfulness of a search or seizure, we will consider whether defense counsel was ineffective for failing to assert such a Fourth Amendment challenge in the first place. *See Kimmelman v. Morrison,* 477 U.S. 365, 368, 382-83, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). To establish *Strickland* prejudice ***1176** on this claim, Petitioner must show both that his Fourth Amendment claim challenging the arrest warrant is meritorious and that a reasonable probability exists that the verdict would have been different absent the excludable evidence. *Id.* at 375, 106 S.Ct. 2574. The OCCA held defense counsel was not constitutionally ineffective for failing to challenge the arrest warrant because the affidavit accompanying the warrant provided enough information to form a substantial basis for probable cause. The district court found this conclusion was objectively reasonable. We agree. The affidavit is a four-page, single-spaced document containing dates of interviews and describing the investigation. The sworn affidavit names all informants. The information contained therein connected Petitioner to the crimes with sufficient particularity to satisfy the probable cause standard. We have little difficulty affirming the district court's denial of relief on this point, particularly because Petitioner fails to identify any reason why the warrant was defective.

[18] Petitioner next argues his counsel was ineffective for waiving the issue of whether the trial court improperly admitted photographs of the graves. Over defense counsel's objection, the trial court admitted photographs of the victims' bodies at the grave site and further permitted the State to use a slide projector to show the jury these photographs. Later, however, defense counsel concurred in the trial judge's observation, made outside the jury's presence, that he did not observe any "reactions that were out of the ordinary by the jury in looking at these pictures. I don't think they were offended in any way." Defense counsel also noted for the record that the trial court's decision permitting the State to use the slide projector was appropriate.

Petitioner now asserts that defense counsel, with

these remarks, was constitutionally ineffective in waiving the previously preserved objections. The OCCA held Petitioner failed to show any prejudice because Petitioner never attempted to challenge these photographs on direct appeal. The district court found this conclusion reasonable, and we concur. Defense counsel's challenged comments did not waive any claim Petitioner later sought to pursue. Nor did the jury hear these comments, which counsel made at sidebar. Thus, Petitioner has failed to demonstrate any prejudice from his counsel's comments.

[19] Petitioner also alleges his counsel ineffectively handled the testing and presentation of DNA evidence. When the police arrested Petitioner, the officers noticed what appeared to be blood stains on his left shoe. The State's DNA expert was unable to recover any blood from the left shoe, however, the expert found blood on Petitioner's right shoe that was consistent with Cynthia Jarman's blood and inconsistent with 99.999% of the rest of the Caucasian population.

At the defense attorneys' request, the defense DNA expert tested only Petitioner's *left* shoe. Unlike the State's DNA expert, the defense expert found blood on the left shoe. The blood was not Petitioner's, but could have been Cynthia Jarman's. In addition, the defense expert found another, unidentified person's blood on that shoe. Because defense counsel asked the defense expert to compare the blood she found on the left shoe only to Petitioner and Cynthia Jarman, the defense expert testified she could not eliminate either Tonya or Timmy Jarman as the source of this other blood.

Petitioner argues his defense expert's testimony failed to support his defense and, instead, bolstered the State's DNA evidence. He also argues defense counsel failed to seek adequate state funds to insure ***1177** thorough DNA testing, and defense counsel erred in selecting a DNA expert who was underqualified. The OCCA denied Petitioner relief because the defense's presentation of its DNA evidence did not prejudice Petitioner. The district court concluded this determination was reasonable. We agree. The State's expert already established that blood consistent with Cynthia Jarman's blood was on one of Petitioner's shoes. The defense expert's testimony that Cynthia Jarman's blood also might have been on the other shoe fails to add anything more to the State's case. In addition, a great deal of other evidence linked Petitioner to the killings. Therefore, no reasonable probability exists that the jury would have acquitted Petitioner had the defense expert not testified that blood consistent with Cynthia Jarman's blood was on both Petitioner's left and right shoe. Moreover, Petitioner fails to assert any additional or different DNA evidence that could have been presented in his defense, nor how a more qualified DNA expert would have assisted in his defense.

Petitioner also argues defense counsel was ineffective for failing to question the medical examiner concerning the exact time the victims died. Petitioner contends trial counsel failed to explore the defense that he did not have enough time to commit the murders. Contrary to Petitioner's assertions, defense counsel questioned the medical examiner on this point, and the medical examiner was unable to give a definite answer. Further, Petitioner's counsel did argue that Petitioner did not have time to commit the murders. During trial, counsel elicited testimony from Petitioner's stepfather that he saw Petitioner at home at 3:20 p.m., and that Petitioner returned home around 6:30 p.m. The victims were last seen around 3:45 p.m., and Stremlow's burning truck was discovered around 9:00 p.m. that evening. During guilt stage closing arguments, Petitioner's counsel argued that Petitioner did not have enough time to kill the victims, move the truck, and walk the seven and a half miles back to his house in three hours. Thus, contrary to Petitioner's assertions, his counsel explored this theory. Simply because the jury did not accept the defense's version of the facts does not mean counsel was ineffective.

[20] Finally, Petitioner asserts defense counsel ineffectively cross- examined State witnesses. Petitioner specifically challenges only counsel's guilt-stage cross-examination of Petitioner's former wife, Stephanie Duncan. The State called Duncan to testify that she and Petitioner had visited the field where the bodies were found on several previous occasions. On cross- examination, however, defense counsel elicited Duncan's testimony that Petitioner had physically abused her during their marriage. This opened the door for the State's inquiry resulting in Duncan's testimony that Petitioner had tried to kill her on several occasions.

Regardless of whether defense counsel's performance was constitutionally deficient in

eliciting this testimony, no reasonable probability exists that had jurors not heard Duncan's testimony, they would have acquitted Petitioner. The record already included a great deal of evidence linking Petitioner to the Jarman murders and detailing Petitioner's pattern of violence toward Cynthia Jarman. *See Moore v. Marr,* 254 F.3d 1235, 1241 (10th Cir.2001) *cert. denied,* 534 U.S. 1068, 122 S.Ct. 670, 151 L.Ed.2d 584 (2001) (Defendant was not denied effective assistance of counsel as result of counsel's failure to impeach witness where there was overwhelming evidence against defendant, independent of witness' testimony). Likewise, no reasonable probability exists that the jury would have acquitted Petitioner if defense counsel had impeached Duncan's credibility with evidence that she had been ***1178** accused of stealing from Petitioner's friend, had been arrested in 1992 for embezzlement, had initiated fights and physically beaten Petitioner during their relationship, and had struck her own mother. We agree with the district court that Petitioner cannot establish the prejudice component of *Strickland* and that the OCCA reasonably denied relief on this claim.

E.

[21] Finally, Petitioner claims cumulative error warrants habeas relief. Because we affirm the district court's order granting Petitioner relief from his death sentences, however, we consider Petitioner's cumulative- error argument only with respect to the trial's guilt stage. Although we found the trial errors Petitioner identified individually harmless, the "cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *Duckett v. Mullin* 306 F.3d 982, 992 (10th Cir.2002) (quoting *United States v. Rivera,* 900 F.2d 1462, 1469 (10th Cir.1990)). "A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Id.*

[22] The errors Petitioner identified did not, even when accumulated, have a sufficient prejudicial effect to deny Petitioner a fair trial. Extensive evidence supported the jury's finding of guilt. No reasonable probability exists that the jury would have acquitted Petitioner absent the errors. We agree with the district court that Petitioner is not entitled to relief based on cumulative error and that the OCCA reasonably denied relief on this claim.

III.

In light of defense counsel's constitutionally ineffective handling of the defense's mitigating psychological evidence, we AFFIRM the district court order granting Petitioner relief from his death sentences. We also AFFIRM the district court's denial of any further habeas relief.

PAUL KELLY, JR., Circuit Judge, concurring in part and dissenting in part.

I concur in the court's opinion, with the exception of the resolution of the claim of ineffective representation during sentencing. I respectfully dissent from this court's holding that the OCCA's determination that Mr. Hooper's counsel did not render deficient performance constitutes an unreasonable application of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See* 28 U.S.C. § 2254(d)(1). The record fully supports the OCCA's holding on the lack of deficient performance so it cannot be an unreasonable application of *Strickland.* There are two levels of deference here. First, only if we could conclude that the OCCA's application of *Strickland* was objectively unreasonable--not merely erroneous, incorrect, or contrary to what we might decide on direct appeal--is habeas relief on this claim warranted. *See Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002); *Williams v. Taylor,* 529 U.S. 362, 410-11, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). That is because "[t]he federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Woodford v. Visciotti,* --- U.S. ---, 123 S.Ct. 357, 361, 154 L.Ed.2d 279 (2002) (per curiam). Second, under *Strickland,* a reviewing court presumes that counsel's decisions were an exercise of reasonable professional ***1179** judgment and considers all of the circumstances, keeping in mind that the ultimate inquiry is whether the trial is a "reliable adversarial testing process." 466 U.S. at 688, 688-90, 104 S.Ct. 2052.

Applying these standards, counsel made a reasonable strategic choice after less than full investigation given the facts. The trial record suggests scant evidence that Mr. Hooper suffered from brain damage or a learning disability that might have somehow contributed to his calculated and vicious murder of the victim and her two children. Mr. Hooper's counsel subjected the state's case to close scrutiny and the choices made by counsel were, under the circumstances, about as good as could be expected.

Essentially, this court determines that counsel's attempt to get before the sentencing jury evidence of Mr. Hooper's mental limitations, without first determining the likelihood of success after additional investigation, constitutes deficient performance. Dr. Murphy's summary indicating that he "believed Dr. Adams found evidence of 'mild but probable brain damage,' " was placed before the jury by counsel. *Hooper v. State,* 947 P.2d 1090, 1114 (Okla.Ct.Crim.App.1997). Had counsel not placed the substance of the report in evidence (because there was scant evidence to support it), would counsel have been deemed ineffective?

Obviously, Dr. Murphy is a defense-oriented professional expert witness. Was he caught in his own embellishment of Dr. Adams' report? Dr. Adams testified on rebuttal that "he found no evidence of brain damage." *Hooper,* 947 P.2d at 1114. Although the OCCA held that counsel's actions in calling Dr. Murphy and having the two medical reports admitted was "disastrous" and constituted *Strickland* prejudice, *Hooper,* 947 P.2d at 1115, it was only so because it was apparent that Mr. Hooper had no mental impairments in any way responsible for the offense. Had counsel's efforts succeeded, or had the state been unable to bring Dr. Adams forward in rebuttal, counsel would have been able to present the jury another argument in support of mitigation.

The decision of the OCCA simply is not an unreasonable application of *Strickland* because it correctly considered the entire sentencing proceeding and concluded that counsel did present a mitigation case, just not the one Mr. Hooper, with 20-20 hindsight, would have selected. *Hooper,* 947 P.2d at 1115. The OCCA's conclusion that any deficiencies of counsel on this score simply did not constitute a complete breakdown of the adversarial testing process (and therefore did not constitute deficient performance) is correct. This is not a case where the option contended for (not calling Dr. Murphy and not introducing the medical reports *after* further investigation) "so clearly outweighs" the course taken by defense counsel as to render the OCCA's decision objectively unreasonable. *Bell,* 122 S.Ct. at 1854 (on collateral review, a failure to put on mitigating evidence in sentencing phase and waiver of closing was not deficient performance).

Counsel's effort to raise "mental impairment" was but one of several mitigation attempts, all of which were ultimately unsuccessful. The trial of a case is not a "do it by the numbers" exercise, rather it is uncertain and one uses what one has. Sometimes it works, and sometimes not, but no experienced trial counsel could say that *no* competent counsel would have proceeded the way Mr. Hooper's counsel did. *See id.; Bullock v. Carver,* 297 F.3d 1036, 1048-49 (10th Cir.2002) (applying objective reasonableness standard in *Strickland* deficient performance analysis and suggesting that to establish deficient performance, habeas petitioner must successfully urge that no competent counsel would have proceeded ***1180** in the manner that his counsel did). The " 'no competent counsel' standard" identified by the court is mere description--no one disputes that the ultimate inquiry in the *Strickland* deficient performance analysis performed by the OCCA is whether counsel's representation was objectively reasonable. In concluding that "counsel's representation did not fall below an objective standard of reasonableness," *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052, the OCCA's decision is not objectively unreasonable precisely because the OCCA considered the representation as a whole and determined that counsel's representation was within that "wide range" of competence satisfying the Sixth Amendment, i.e. "mak[ing] the adversarial testing process work in the particular case." *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052; *Hooper,* 947 P.2d at 1115. As recently articulated by the Supreme Court in a similar case reversing a habeas grant by the Ninth Circuit, a state court's determination must be "given the benefit of the doubt" and "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state- court decision applied *Strickland* incorrectly." *Visciotti,* 123 S.Ct. at 360. Here, the OCCA carefully applied *Strickland* from start to finish, finding prejudice, but not deficient

performance--what we have is a mere disagreement. Accordingly, I would reverse the district court's grant of habeas relief.

314 F.3d 1162

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(Cite as: 236 F.3d 1215)

United States Court of Appeals,
Tenth Circuit.

Billy Ray BATTENFIELD, Petitioner-Appellant,
v.
Gary L. GIBSON, Warden, Oklahoma State Penitentiary, Respondent-Appellee.

No. 99-7096.

Jan. 3, 2001.

After his first-degree murder conviction and death sentence were upheld on direct appeal, 816 P.2d 555, and his petition for rehearing was denied, 826 P.2d 612, petitioner sought federal habeas corpus relief. The United States District Court for the Eastern District of Oklahoma, Michael Burrage, J., denied petition. Petitioner appealed. The Court of Appeals, Briscoe, Circuit Judge, held that: (1) potential juror's removal for cause did not warrant habeas relief; (2) prosecutor's improper comment on defendant's right to remain silent was harmless; (3) counsel's preparation for penalty phase of trial was constitutionally deficient; (4) petitioner's waiver of right to present mitigating evidence during penalty phase of trial was not knowing and intelligent; (5) counsel's failure to present mitigating evidence during penalty phase was constitutionally deficient; and (6) petitioner was prejudiced by defense counsel's inadequate performance during penalty phase of trial.

Reversed and remanded with instructions.

Kelly, Circuit Judge, concurred in part and dissented in part and filed a separate opinion.

West Headnotes

[1] Habeas Corpus ⚿766
197k766 Most Cited Cases

[1] Habeas Corpus ⚿842
197k842 Most Cited Cases

[1] Habeas Corpus ⚿846
197k846 Most Cited Cases

Under Antiterrorism and Effective Death Penalty Act (AEDPA), if a habeas claim was not decided on the merits by state courts, and is not otherwise procedurally barred, Court of Appeals may exercise its independent judgment in deciding claim; in doing so, Court of Appeals reviews federal district court's conclusions of law de novo and its findings of fact, if any, for clear error. 28 U.S.C.A. § 2254.

[2] Habeas Corpus ⚿450.1
197k450.1 Most Cited Cases

[2] Habeas Corpus ⚿452
197k452 Most Cited Cases

If federal claim was adjudicated on its merits by state courts, federal habeas court may grant the writ if it finds the state court arrived at conclusion opposite to that reached by the United States Supreme Court on a question of law, decided the case differently than the Supreme Court has on a set of materially indistinguishable facts, or unreasonably applied the governing legal principle to the facts of petitioner's case. 28 U.S.C.A. § 2254(d)(1, 2).

[3] Jury ⚿108
230k108 Most Cited Cases

In applying Sixth Amendment standard for determining whether venire member's views on capital punishment warrant challenge for cause, by preventing or substantially impairing venire member's performance of his duties in accordance with instructions and oath, venire member's bias need not be proved with unmistakable clarity; rather, it is sufficient if trial judge is left with definite impression that prospective juror would be unable faithfully and impartially to apply the law. U.S.C.A. Const.Amend. 6.

[4] Habeas Corpus ⚿770
197k770 Most Cited Cases

On federal habeas review, trial judge's determination of venire member's bias under standard for determining whether venire member's views on capital punishment warrant challenge for cause is factual finding entitled to presumption of correctness.

[5] Habeas Corpus ⚿496
197k496 Most Cited Cases

[5] Habeas Corpus ⚿770
197k770 Most Cited Cases

Federal habeas petitioner failed to rebut presumption that trial court correctly found that potential juror's views on death penalty would have prevented or substantially impaired performance of his duties as juror in capital case, and state appellate court's decision to uphold juror's removal for cause was not contrary to or unreasonable application of Supreme Court precedent; therefore, juror's removal did not warrant habeas relief. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1), (e).

[6] Habeas Corpus ⚿770
197k770 Most Cited Cases

Propriety of questions used by state trial court in determining whether prospective juror's death penalty views rendered him biased was but one factor in determining whether petitioner sufficiently rebutted presumption of correctness afforded, on federal habeas review, to trial court's ultimate finding of bias. 28 U.S.C.A. § 2254(e)(1).

[7] Criminal Law ⚿721(1)
110k721(1) Most Cited Cases

It is improper for a prosecutor to comment on a defendant's decision to refrain from testifying at trial.

[8] Criminal Law ⚿721(6)
110k721(6) Most Cited Cases

[8] Criminal Law ⚿721.5(1)
110k721.5(1) Most Cited Cases

If prosecutor's remarks concern matters that could have been explained only by defendant, they give rise to innuendo that matters were not explained because defendant did not testify, and thus amount to indirect comment on defendant's failure to testify; prosecutor, however, is otherwise free to comment on defendant's failure to call certain witnesses or present certain testimony. U.S.C.A. Const.Amend. 5.

[9] Criminal Law ⚿720(1)
110k720(1) Most Cited Cases

In addressing whether prosecutor improperly commented on defendant's right to remain silent, question is whether language used by prosecutor was manifestly intended or was of such character that jury would naturally and necessarily take it to be a comment on defendant's right to remain silent. U.S.C.A. Const.Amend. 5

[10] Habeas Corpus ⚿497
197k497 Most Cited Cases

On federal habeas review, error in permitting prosecutor to comment upon petitioner's right to silence is subject to a harmless error analysis. U.S.C.A. Const.Amend. 5.

[11] Criminal Law ⚿721(6)
110k721(6) Most Cited Cases

Prosecutor did not improperly comment on defendant's failure to testify when, in closing arguments during guilt stage of capital trial, he noted absence of evidence placing murder victim near location at which his keys were found and of evidence that defendant and cohort had observable injuries on night of killing; comments, which were intended to note defendant's failure to call certain witnesses or present certain testimony, did not concern matters which could only have been explained by defendant. U.S.C.A. Const.Amend. 5.

[12] Sentencing and Punishment ⚿1780(2)
350Hk1780(2) Most Cited Cases

Prosecutor improperly commented on defendant's failure to testify when, in penalty phase of capital trial, he noted absence of evidence that defendant, after striking murder victim, did nothing to intervene and save victim's life, inasmuch as comment concerned matters that could have been explained only by defendant or cohort, who asserted right to remain silent at trial. U.S.C.A. Const.Amend. 5.

[13] Criminal Law ⚿1144.15
110k1144.15 Most Cited Cases

There is a general presumption that jury follows trial court's instructions.

[14] Sentencing and Punishment ⚿1789(9)
350Hk1789(9) Most Cited Cases

Prosecutor's improper comment on defendant's right

to remain silent, during closing arguments in penalty phase of capital trial, was harmless, inasmuch as trial court's admonition instructing jury to disregard comment was sufficient to cure any error arising from comment. U.S.C.A. Const.Amend. 5.

[15] Criminal Law ⚿641.13(1)
110k641.13(1) Most Cited Cases

To prevail on claim of ineffective assistance of counsel, defendant must demonstrate that (1) defense counsel's performance was constitutionally deficient, in that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. U.S.C.A. Const.Amend. 6.

[16] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

Defense counsel's obligation to conduct reasonable investigations extends to matters related to the sentencing phase of trial. U.S.C.A. Const.Amend. 6.

[17] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

When defense counsel's alleged failure to investigate and present evidence pertains to sentencing phase of capital trial, prejudice inquiry is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

[18] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

Defense counsel's preparation for penalty phase of capital trial was constitutionally deficient, given counsel's failure to interview anyone, including defendant, regarding possible mitigating aspects of defendant's background, which hampered counsel's ability to make reasonable strategic decisions and to advise defendant competently regarding meaning of mitigation evidence and availability of possible mitigation strategies. U.S.C.A. Const.Amend. 6.

[19] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

Defense attorney in capital case has a duty to conduct reasonable investigation, including investigation of defendant's background, for possible mitigating evidence. U.S.C.A. Const.Amend. 6.

[20] Sentencing and Punishment ⚿1782
350Hk1782 Most Cited Cases

Capital defendant's waiver of right to present mitigating evidence during penalty phase of trial was not knowing and intelligent, given defense counsel's failure to investigate and prepare adequately for penalty phase and to advise defendant competently as to meaning, nature, and availability of mitigating evidence, and given trial court's failure to inquire adequately into waiver decision by ensuring that defendant had been provided with sufficient information to make knowing choice.

[21] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

Defense counsel's failure to present mitigating evidence during penalty phase of capital trial was constitutionally deficient, notwithstanding contention that such failure resulted from defendant's refusal to testify and allow his parents to testify, given that, had counsel adequately investigated and prepared for penalty phase, he would have had variety of witnesses from whom to choose. U.S.C.A. Const.Amend. 6.

[22] Criminal Law ⚿641.13(7)
110k641.13(7) Most Cited Cases

Capital defendant was prejudiced by defense counsel's inadequate performance during penalty phase of trial, as required to prevail on claim of ineffective assistance of counsel, inasmuch as death sentence rested on aggravating circumstance that defendant presented continuing threat to society, based on prior conviction for violent felony, and mitigating evidence existed with respect to prior conviction and defendant's personality which could have led jury to reach different sentencing result. U.S.C.A. Const.Amend. 6.

***1218** Robert W. Jackson (Steven M. Presson with him on the brief), Jackson & Presson, P.C.,

Norman, OK, for the appellant.

Seth S. Branham, Assistant Attorney General (W.A. Drew Edmondson, Attorney General, with him on the brief), Oklahoma City, OK, for the appellee.

Before KELLY, BRISCOE, and LUCERO, Circuit Judges.

BRISCOE, Circuit Judge.

Petitioner Billy Ray Battenfield, an Oklahoma state prisoner convicted of first degree murder and sentenced to death, appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and reverse and remand with instructions to grant the writ as to Battenfield's death sentence, subject to the state district court conducting a new sentencing trial or vacating Battenfield's death sentence and imposing a lesser sentence consistent with law.

I.

On the evening of April 22, 1984, Battenfield and his girlfriend Virginia Jackson, accompanied by Jackson's sixteen-year-old son B.G., went to the 108 Club in Muskogee, Oklahoma, and joined a group of people consisting of Donald Cantrell, brothers William and Robert Bechtol, Robert Bechtol's daughter Linda Bechtol, her common-law husband Melvin Battiest, and Grace Alford. Cantrell used money from a bank bag to purchase beer for several people in the group. At approximately 10:00 p.m., most of the group decided to continue their partying at nearby Fort Gibson Lake. Battenfield, Battiest, and Cantrell left in Cantrell's truck, with Cantrell driving. Jackson, B.G., Alford, and Linda Bechtol followed in Battenfield's car.

The group stopped at a convenience store to purchase more beer and then drove to an area of the lake known as Wahoo Bay. Battenfield, Battiest, and Cantrell got out of the truck and stood outside drinking beer. Cantrell walked to the passenger side of Battenfield's car and encouraged the occupants to get out and join the party, but they declined because it was cold. Battenfield walked to the driver's side of the car and spoke to Jackson, who handed something to Battenfield. Battenfield walked to the rear of the car, apparently opened and closed the trunk, and then returned to the driver's side of the car and handed something to Jackson. There is also evidence that at this approximate time, Battiest approached the passenger side of the car and briefly spoke to Bechtol. Shortly thereafter, the occupants of the car drove some distance away from the truck to restroom facilities. Alford and Bechtol spent approximately ten minutes inside the restroom. After they returned to the car, the occupants sat in the car for approximately five minutes before slowly driving toward the truck, stopping once on the way for another ten to fifteen minutes.

There is conflicting evidence concerning what transpired when the occupants of the car returned. Jackson testified that she observed Battenfield standing beside the truck, but did not see Battiest or Cantrell. Bechtol testified that she observed Battiest standing by the truck, but did not see Battenfield or Cantrell. According to Alford, none of the men were in sight when they first returned to the truck. All of the occupants of the car agreed that, after approximately five to ten minutes, Battenfield came running toward the car and told Jackson: "We're going to Tulsa. Take her [Alford] home. He [Cantrell] passed out." Tr. at 1164. Battenfield and Battiest got into Cantrell's truck, with Battenfield on the driver's side. Cantrell was not in sight.

On the way back to Muskogee, the vehicles stopped at a convenience store where ***1219** Battenfield purchased gasoline for both vehicles and either Bechtol or Battiest purchased some beer (neither of these two individuals had money prior to driving to Wahoo Bay). After dropping off Alford, Bechtol, and Battiest at their homes, Battenfield, Jackson and B.G. left Muskogee, with Battenfield again driving Cantrell's truck and Jackson again driving the car. They stopped at another convenience store and B.G., at Battenfield's direction, purchased one dollar's worth of gasoline in a jug. They then drove to Broken Arrow, Oklahoma, where Battenfield abandoned Cantrell's truck and, using the gasoline from the jug, set the truck on fire. The car broke down on the way back to Muskogee and a highway patrol officer helped

Battenfield jump-start the car.

Cantrell's body was found the next day at Wahoo Bay. According to the autopsy results, Cantrell sustained at least three blunt-force injuries to the head and chest, consistent with blows from a stick, brick, rock, foot, or tire iron. An injury to the left side of his forehead caused multiple fractures to Cantrell's skull bone, as well as bruising and subsequent hemorrhaging of his brain. According to the forensic pathologist who performed the autopsy, the injury would likely have rendered Cantrell unconscious. An injury to the right side of Cantrell's back involved multiple rib fractures and a punctured lung. The autopsy results indicate Cantrell likely died within minutes of sustaining this latter injury. The autopsy results also indicated Cantrell suffered various post-mortem abrasions (perhaps from being dragged along the ground from one area to another).

The highway patrol officer who helped Battenfield jump-start the car testified that Battenfield was wearing Cantrell's coat. On April 23, 1984, Battenfield was again observed wearing Cantrell's coat, and he allegedly admitted to B.G. that he hit Cantrell one time on the head with a tire iron. Battenfield was arrested for the murder of Cantrell on April 24, 1984. Hairs from Cantrell's head were found on Battenfield's jeans and stocking cap (both of which Battenfield was wearing on the night of the murder).

Battenfield's jury trial began on February 25, 1985. Battenfield did not testify or present any evidence in his defense. The jury was instructed on the lesser included offenses of second degree murder and first degree manslaughter, but found Battenfield guilty of first degree murder. The state asserted the existence of four aggravating factors in the second stage of trial: (1) Battenfield's previous felony conviction involved the use or threat of violence to the person; (2) the murder was especially heinous, atrocious, or cruel; (3) the murder and the destruction of Cantrell's truck were effected for the purpose of avoiding or preventing lawful arrest or prosecution; and (4) there was a probability that Battenfield would constitute a continuing threat to society. The state incorporated by reference the evidence presented during the first stage of trial. The only additional evidence presented by the prosecution was a copy of a judgment outlining a previous conviction in 1978 for assault and battery with a deadly weapon. Battenfield presented no evidence in mitigation. After deliberating for approximately one hour and forty-five minutes, the jury fixed Battenfield's sentence at death. In doing so, the jury found the existence of two aggravating factors: (1) the murder was heinous, atrocious, or cruel, and (2) Battenfield was a continuing threat to society. On March 19, 1985, the trial court formally sentenced Battenfield to death. [FN1]

> FN1. Battiest was also charged, tried, and convicted for the first- degree murder of Cantrell. He received a life sentence. His conviction and sentence were affirmed on direct appeal by the OCCA. *Battiest v. State,* 755 P.2d 688 (Okla.Crim.App.1988) . Although Battiest apparently confessed to the murder, the details of that confession are not outlined in the OCCA's opinion, and it remains unclear precisely what role each of the co-defendants (Battenfield and Battiest) played in the death of Cantrell.

Battenfield, represented by new counsel, filed a direct appeal asserting twelve propositions ***1220** of error. The Oklahoma Court of Criminal Appeals (OCCA) affirmed Battenfield's conviction and sentence. *Battenfield v. State,* 816 P.2d 555 (Okla.Crim.App.1991) (*Battenfield I*), *cert. denied,* 503 U.S. 943 (1992). In doing so, the OCCA found there was insufficient evidence to support the jury's finding that the murder was especially heinous, atrocious, or cruel. However, after reweighing the remaining valid aggravating factor (the continuing threat factor) against the mitigating evidence, the OCCA affirmed Battenfield's death sentence. Battenfield's petition for rehearing was denied. *Battenfield v. State,* 826 P.2d 612 (Okla.Crim.App.1991) (*Battenfield II*). Battenfield's petition for writ of certiorari was denied on March 23, 1992. *Battenfield v. Oklahoma,* 503 U.S. 943, 112 S.Ct. 1491, 117 L.Ed.2d 632 (1992).

On February 14, 1995, Battenfield filed an application for post-conviction relief with the state trial court, asserting twelve grounds for relief. In November and December 1996, the court conducted an evidentiary hearing on two of the issues asserted

by Battenfield, including his claim that his trial counsel was ineffective for failing to investigate and present mitigating evidence during the penalty phase of trial. The court ultimately denied the application for post-conviction relief on May 13, 1997. Battenfield's appeal of the decision was denied on January 21, 1998. *Battenfield v. State,* 953 P.2d 1123 (Okla.Crim.App.1998) (*Battenfield III*).

In February 1996, Battenfield filed a motion in federal district court requesting appointment of counsel to represent him in a federal habeas proceeding and seeking authorization for legal research expenses. Nearly two years later, on January 26, 1998, Battenfield filed a second motion for appointment of counsel. [FN2] The motions were granted on February 9, 1998, and Battenfield's petition for writ of habeas corpus was filed on June 15, 1998. On May 5, 1999, the district court denied Battenfield's petition. Pursuant to Battenfield's request, the district court granted him a certificate of appealability (COA) with respect to four issues: (1) ineffective assistance of trial counsel during the second stage proceedings; (2) improper removal of a venire person by the trial court for cause; (3) prosecutorial misconduct; and (4) cumulative assessment of any of these errors. This court has granted a COA on an additional issue: whether the evidence presented at trial was sufficient to prove that Battenfield was a continuing threat to society.

> FN2. Neither motion is included in the record on appeal. According to the district court's docket sheet, the case was considered "filed" as of January 26, 1998.

II.

[1][2] Because Battenfield's federal habeas petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it is governed by the provisions of the AEDPA. *Wallace v. Ward,* 191 F.3d 1235, 1240 (10th Cir.1999), *cert. denied,* 120 S.Ct. 2222 (2000). Under the AEDPA, the appropriate standard of review for a particular claim hinges on the treatment of that claim by the state courts. If a claim was not decided on the merits by the state courts (and is not otherwise procedurally barred), we may exercise our independent judgment in deciding the claim. *See LaFevers v. Gibson,* 182 F.3d 705, 711 (10th Cir.1999). In doing so, we review the federal district court's conclusions of law de novo and its findings of fact, if any, for clear error. *Id.* If a claim was adjudicated on its merits by the state courts, the petitioner will be entitled to federal habeas relief only if he can establish that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). "Thus, we may grant the writ if we find ***1221** the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the facts of the prisoner's case." *Van Woudenberg v. Gibson,* 211 F.3d 560, 566 (10th Cir.2000) (citing *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000)).

III.

Improper removal of a venire person by the trial court for cause

Battenfield alleges the trial court violated his Sixth and Fourteenth Amendment right to trial by an impartial jury when it excused for cause a venire member who stated in response to voir dire questioning by the trial court that he could not impose the death penalty "without doing violence to his conscience." Tr. at 37.

[3][4] In *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court held that a state "infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." *See Wainwright v. Witt,* 469 U.S. 412, 416, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The Court also recognized a "State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death

penalty scheme." *Id.* Balancing these interests, the Court has held "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 420, 105 S.Ct. 844. In applying this standard, a venire member's bias need not "be proved with 'unmistakable clarity.' " Id. at 424, 105 S.Ct. 844. Rather, it is sufficient if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426, 105 S.Ct. 844. A trial judge's determination of a venire member's bias under this standard is a factual finding entitled to a presumption of correctness. *See id.* at 428-29, 105 S.Ct. 844 (pre-AEDPA case); *Moore v. Gibson,* 195 F.3d 1152, 1168 (10th Cir .1999) (AEDPA case), *cert. denied,* --- U.S. ----, 120 S.Ct. 2206, 147 L.Ed.2d 239 (2000).

Here, the trial court asked each potential juror the following question: "If selected as a juror in a case where the law and the evidence warrants, could you, without doing violence to your [conscience], recommend the death penalty?" Tr. at 24. All of the venire members except Robert Elliott answered in the affirmative. The following colloquy occurred between the trial court and Elliott:

> THE COURT: Sir, you understand that the Defendant is charged with Murder in the First Degree. The law provides that a person convicted of Murder in the First Degree shall be punished by death or by imprisonment for life. It is your duty to determine whether the Defendant is not guilty or guilty of Murder in the First Degree. If you find the Defendant guilty of Murder in the First Degree, your duty is to determine whether or not, considering the evidence, you should recommend death. If selected as a juror in a case where the law and the evidence warrants, could you, without doing violence to your [conscience], recommend the death penalty?
> MR. ELLIOTT: No, sir.
> THE COURT: You understand that if the evidence is such, and what this instruction is saying, that if the law says that it's to be considered one way or the other, your statement is that you just can't consider the death penalty at all?
> MR. ELLIOTT: Yes, sir.

Id. at 37-38. Based upon this discussion, the following proceedings were conducted ***1222** outside the hearing of the prospective jurors:

> THE COURT: You move for cause?
> MR. SPERLING [the prosecutor]: (Nods his head in the affirmative .)
> THE COURT: You want to make a record?
> MR. SHOOK [defense counsel]: Your Honor, we would object and request that we be allowed to voir dire the witness concerning his ability.
> THE COURT: You may. Mr. Shook, I will allow you to ask a few voir dire questions.

Id. at 38. The following proceedings then occurred:

> MR. SHOOK: Mr. Elliott, to begin with I'm sorry but I didn't catch your address where you live.
> MR. ELLIOTT: Coweta.
> THE COURT: Now, if you wish, just ask as to the question that was asked by the Court. I'm not just tendering the prospective juror for just general voir dire questions. It has to do with the question that was asked by the Court.
> MR. SHOOK: I will, Your Honor.
> THE COURT: Okay.
> MR. SHOOK: Do you understand, sir, that you will receive a set of instructions, if the trial gets to a second stage, if you would find the Defendant guilty of Murder in the First Degree, there are alternative forms of punishment. Did you understand that?
> MR. ELLIOTT: Yes, sir.
> MR. SHOOK: One of those alternatives being life in prison, one of those alternatives being the death penalty?
> MR. ELLIOTT: Yes, sir.
> MR. SHOOK: Now, you understand that the instructions are the law that you're to apply in this case?
> MR. ELLIOTT: Yes, sir.
> MR. SHOOK: Okay. Can you consider the law that the Court submits to you?
> MR. ELLIOTT: Yes, sir.
> MR. SHOOK: Okay. Can you consider alternative forms of punishment that the Court instructs you on?
> MR. ELLIOTT: Yes, sir.
> MR. SHOOK: Can you follow that instruction? Can you follow the law where the facts warrant them?
> MR. ELLIOTT: Yes, sir.
> MR. SHOOK: Okay. Knowing that, can you

> consider the death penalty as an alternative to punishment if you're so instructed?
> MR. ELLIOTT: I don't know if I understand. If the law says death, and I would agree with that, or--
> MR. SHOOK: No. Can you consider the instruction on the death penalty that the Court may or may not submit?
> MR. ELLIOTT: I could consider it, yes.
> MR. SHOOK: Okay. Nothing further.
> THE COURT: Any questions?
> MR. SPERLING: None, Your Honor.
> THE COURT: My question to you again is: Sir, if you find the Defendant guilty of Murder in the First Degree, your duty is to determine whether or not, considering the evidence, you should recommend death. If selected as a juror in a case where the law and the evidence warrants--that's just what Mr. Shook asked--could you, without doing violence to your [conscience], recommend the death penalty?
> MR. ELLIOTT: No, sir, I couldn't.
> THE COURT: You may step down for cause. Exception allowed to the Defendant.

Id. at 38-40.

On direct appeal, Battenfield asserted that the trial court erred by striking Elliott from the jury panel. The OCCA rejected this assertion on the following grounds:

> We agree with [Battenfield's] counsel that trial judges should avoid asking a potential juror whether he or she could recommend the death penalty "without ***1223** doing violence to your conscience." The use of such terms is at best confusing. While the trial judge's question to Elliott "may not have been ideal, we cannot conclude that it was inconsistent with the 'substantial impairment' test articulated in *Witt*." Despite the trial judge's use of the confusing phrase "without doing violence to your conscience," he inquired further into the depth of Elliott's convictions by asking whether Elliott's position was that he could not "consider the death penalty at all?" to which Elliott responded, "Yes, sir." We recognize that "not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." However, at no point in time did Mr. Elliott state, nor was he asked by defense counsel, whether he could temporarily set aside his personal beliefs in deference to the law and recommend the death penalty where appropriate under the facts and the law. Considering the entire record surrounding Elliott's exclusion, including trial counsel's attempted rehabilitation, and giving appropriate deference to the trial judge, we hold that Elliott's responses "sufficiently demonstrated that his beliefs about capital punishment would 'substantially impair' his ability to serve as a juror."

Battenfield I, 816 P.2d at 559 (internal citations omitted).

We previously have addressed the striking of venire members based upon questions and answers similar to those employed here. In *Coleman v. Brown,* 802 F.2d 1227 (10th Cir.1986), the state trial court excused a prospective juror for cause based upon his answers to questions:

> Court: [I]f you were sitting on a jury and in a case where the law and the evidence warranted and you were told it was a proper case to consider the death penalty, could you, if you felt it was proper, agree to a death penalty ... without doing violence to your own conscience?
> Juror: No, I don't think I could.
> Court: In other words, you're telling me that if you find beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree and if under the law and the evidence and all the circumstances you could consider a death penalty, you tell me that you have such reservations that you just simply could under no circumstances impose a death penalty upon another human being?
> Juror: I don't think I could, no.

Id. at 1232. Applying the standard announced by the Supreme Court in *Witt,* we found "no grounds for overturning the trial judge's decision." *Id.*

Similarly, in *Davis v. Maynard,* 869 F.2d 1401, 1408 (10th Cir .1989), *vacated on other grounds sub nom. Saffle v. Davis,* 494 U.S. 1050, 110 S.Ct. 1516, 108 L.Ed.2d 756 (1990), the state trial court asked each potential juror the following question: "In a case where the law and evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?" If a venire member did not answer

"yes," the trial court asked:

> If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

Id. We characterized the voir dire as "troublesome," noting the trial court's "first question to the venire members [wa]s of little relevance," and the second question, "while a better attempt to incorporate the proper standard, [wa]s confusing, and ... invite[d] ambiguous answers." ***1224** *Id.* Nevertheless, affording the trial court's findings a presumption of correctness, we concluded that the trial court "properly found the challenged venire members' view likely to 'prevent or substantially impair' the performance of their duties as jurors." *Id.* at 1409.

[5][6] Like the state trial courts' factual findings at issue in *Davis* and *Coleman,* the trial court's finding of bias on the part of Elliott is entitled to a presumption of correctness. [FN3] *See* 28 U.S.C. § 2254(e)(1). The issue is whether Battenfield has met his burden of rebutting this presumption by clear and convincing evidence. *Id.* It is true, as argued by Battenfield, that the trial court's first and last questions to Elliott were inconsistent with the standard announced in *Witt* and therefore must be considered "of little relevance." *Davis,* 869 F.2d at 1408. If these were the only questions posed to Elliott, there might be a basis for rejecting the trial court's finding of bias. However, the trial court's second question to Elliott ("[Y]our statement is that you just can't consider the death penalty at all?"), and Elliott's response ("Yes, sir."), provide a sufficient basis for the trial court's finding that Elliott was biased. Defense counsel's follow-up questioning, although apparently aimed at rehabilitating Elliott, did little to demonstrate that Elliott could "faithfully and impartially apply the law."

> FN3. Battenfield argues that "this case does not turn on the trial court's factual determinations, but on the legal standard it applied ." Battenfield's Opening Brief at 21. What he fails to acknowledge, however, is that the trial court ultimately made a factual determination that Elliott was biased, and it is that factual determination we are called upon to review in this federal habeas case. The fact that the trial judge employed questions which may have been inconsistent with the legal standard announced in *Witt* does not mean that Battenfield is automatically entitled to relief. Rather, the propriety of the questions utilized by the trial court is but one factor in determining whether Battenfield has sufficiently rebutted the presumption of correctness afforded under § 2254(e)(1).

We conclude Battenfield has failed to rebut the presumption that the trial court was correct in finding that Elliott's views would have prevented or substantially impaired the performance of his duties as a juror. Further, we conclude the OCCA's resolution of this issue (i.e., its determination that Elliott's answers clearly indicated he could not consider imposing the death penalty regardless of the evidence and the instructions) was not contrary to or an unreasonable application of *Witt.*

Prosecutorial misconduct

Battenfield contends the prosecutor, during closing arguments in both the first and second stages of trial, improperly commented on Battenfield's constitutional right not to testify. During the first-stage closing arguments, the prosecutor stated to the jury: "There is no one, I repeat, there is no one who took the stand and testified that the victim, Don Cantrell, was ever anywhere near these keys [the keys to his truck which were found by a boat dock area after the murder]," Tr. at 1323, and "There wasn't a single witness that took the stand that indicated that there was any kind of injury to Mel Battiest or to this Defendant, Billy Ray Battenfield." *Id.* at 1403. During closing arguments in the penalty phase, the prosecutor made a similar statement: "Have you heard, Ladies and Gentleman, any evidence whatsoever during the course of this trial that indicates that this Defendant, Billy Ray Battenfield, after he struck that first blow, did anything to intervene to save Don Cantrell's life?" *Id.* at 1453. Battenfield objected to all of

these comments during trial. The trial court overruled the objection to the first-stage comments, but sustained the objection to the second-stage comment.

As part of a general challenge to a variety of comments made by the prosecutor during trial, Battenfield raised this issue on direct appeal. The OCCA rejected the issue:

> Most of the comments complained of were not objected to and, in several instances where defense counsel's objections ***1225** were sustained, the comment was stricken or the jury was admonished. Appellant attempts to characterize this case as one falling within the fundamental error rule where the combined effect of the prosecutor's actions "was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings and mandate a new trial ." While some of the comments complained of were improper and not to be condoned, most of the comments when taken in context were within the bounds of reasonable argumentation, and we cannot agree they were so grossly improper as to require reversal or modification.

Battenfield I, 816 P.2d at 562 (internal citations omitted).

[7][8][9][10] It is improper for a prosecutor to comment on a defendant's decision to refrain from testifying at trial. *See Griffin v. California,* 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). If a prosecutor's remarks " 'concern matters that could have been explained only by the accused, ... [they] give rise to an innuendo that the matters were not explained because [petitioner] did not testify' and, thus, amount to indirect comment on the defendant's failure to testify." *Pickens v. Gibson,* 206 F.3d 988, 999 (10th Cir.2000) (quoting *United States v. Barton,* 731 F.2d 669, 674 (10th Cir.1984)). "A prosecutor, however, 'is otherwise free to comment on a defendant's failure to call certain witnesses or present certain testimony." *Id.* (quoting *Trice v. Ward,* 196 F.3d 1151, 1167 (10th Cir.1999), *cert. denied,* --- U.S. ----, 121 S.Ct. 93, 148 L.Ed.2d 53 (2000)). The question is " 'whether the language used [by the prosecutor] was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent.' " *Id.* at 998 (quoting *United States v. Toro-Pelaez,* 107 F.3d 819, 826-27 (10th Cir.1997)). "Error in permitting the prosecutor to comment upon petitioner's right to silence is subject to a harmless error analysis." *Id.* (citing *Brecht v. Abrahamson,* 507 U.S. 619, 628-29, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

[11] The first-stage comments were proper. Although both were clearly intended as comments on Battenfield's failure to call certain witnesses or present certain testimony, neither concerned matters that could have been explained only by Battenfield. For example, Cantrell's whereabouts in the Wahoo Bay area on the night of the murder, including whether he was ever in close proximity to the boat dock where his keys were ultimately found, could arguably have been discussed by any of the persons who were present that evening. Likewise, those same witnesses, as well as other persons who observed Battenfield and Battiest after Cantrell's murder, could have testified regarding whether Battenfield or Battiest had any observable injuries.

[12][13][14] The prosecutor's second-stage comment is more problematic. Like the two first-stage comments, this comment was aimed at Battenfield's failure to present evidence on a particular issue. However, the closing-stage comment differed from the first-stage comments in that it concerned matters that could have been explained only by Battenfield or Battiest (who was called by the prosecution at trial and asserted his right to remain silent). Notwithstanding the impropriety of this comment, the OCCA did not unreasonably apply controlling Supreme Court precedent in determining that the effect of the comment was harmless. Battenfield's counsel posed a timely objection to the prosecutor's second-stage comment, and the trial court sustained the objection and admonished the jury to disregard the comment. In light of the general presumption that a jury follows a trial court's instructions, *see Weeks v. Angelone,* 528 U.S. 225, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000), we are persuaded that the trial court's admonition was sufficient to cure any error arising out of the prosecutor's comment.

***1226** *Ineffective assistance of counsel*

Battenfield contends his trial counsel, Dennis Shook, rendered ineffective assistance during the penalty phase of trial because he failed to

adequately prepare or present any mitigating evidence. According to Battenfield, a variety of mitigating evidence was available, including (a) evidence that Battenfield's father and grandfather were involved in moonshining, (b) Battenfield's involvement in a serious car accident at age 18, during which he sustained a serious head injury and after which he heavily used alcohol and drugs, (c) Battenfield's family history of alcoholism and possible drug addiction, (d) mental health evidence, including evidence that Battenfield suffered from substance addiction, (e) the underlying circumstances of Battenfield's previous conviction for assault and battery, which allegedly occurred while he was under the influence of drugs and alcohol and was an act of self-defense, (f) evidence from family members and friends indicating that Battenfield was known for his compassion, gentleness, and lack of violence, even when provoked, and (g) testimony of prison personnel describing the security where Battenfield would be incarcerated if given a life sentence. Although Battenfield acknowledges that he informed Shook and the trial court prior to the beginning of the penalty phase that he did not want to present any mitigating evidence, he argues that he did not knowingly and intelligently waive his right to present such evidence. Specifically, Battenfield argues that prior to the waiver, neither Shook nor the trial court adequately informed him of the nature or purpose of mitigating evidence.

[15][16][17] Battenfield's claim of ineffective assistance is governed by the familiar two-part test announced in *Strickland v. Washington,* 466 U.S. 668, 688-89, 675, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under that test, Battenfield must demonstrate that (1) defense counsel's performance was constitutionally deficient (i.e., it fell below an objective standard of reasonableness), and (2) there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different.

> Because [the adversarial] testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, [the Supreme Court has] noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (quoting *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052). Unquestionably, counsel's obligation to conduct reasonable investigations extends to matters related to the sentencing phase of trial. *See Cooks v. Ward,* 165 F.3d 1283, 1294 (10th Cir.1998), *cert. denied,* 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999). "Indeed, we have recognized a need to apply even closer scrutiny when reviewing attorney performance during the sentencing phase of a capital case." *Id.* Where counsel's alleged failure to investigate and present evidence pertains to the sentencing phase of trial, the prejudice inquiry is whether there is a "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052; *see also Cooks,* 165 F.3d at 1296 (requiring court to consider strength of government's case and aggravating factors jury found to exist, as well as mitigating factors that might have been presented).

Battenfield first raised his claim regarding counsel's failure to adequately prepare and present mitigating evidence in his application for post-conviction relief. Although the state district court conducted an evidentiary hearing, it ultimately denied the application in its entirety, concluding in part that Battenfield knowingly waived his right to present mitigating evidence ***1227** during the penalty phase of trial. [FN4] The OCCA affirmed the denial of Battenfield's application for post-conviction relief. In rejecting Battenfield's ineffective assistance claim, the OCCA relied heavily on Battenfield's alleged waiver of his right to present mitigating evidence:

> FN4. The state district court also concluded the ineffective assistance claim could have been raised by Battenfield on direct appeal and was thus procedurally barred. However, the OCCA did not affirm on this basis, and the State has not asserted procedural bar in this federal habeas proceeding.

Battenfield now argues that he did not have a thorough understanding of mitigation and did not realize it encompassed more than familial testimony. Although his waiver was not as good

> as it might have been, it appears to have been made knowingly and voluntarily. (Footnote omitted.) Even without the waiver, however, Battenfield has failed to show that trial counsel was ineffective by not presenting mitigating evidence. We have reviewed the Affidavits attached to Petitioner's Application and find they all contain evidence that Battenfield and his family could have presented to the jury had Battenfield cooperated with his attorney. Thus, the ... allegations of ineffective assistance of trial counsel are a direct result of Battenfield's own refusal to testify and allow his parents to testify. We will not hold counsel responsible for a client's obstinate behavior.

Battenfield III, 953 P.2d at 1127. The OCCA also independently addressed Battenfield's assertion that his trial counsel should have gathered and presented mental health evidence during the penalty phase:

> This leaves only the ... failure to present mental health evidence as a possible instance of ineffectiveness of counsel. However, Battenfield has failed to show that such expert testimony was necessary. He did not then and does not now suffer from mental illness, mental infirmity, or incompetence to stand trial.
>
> Furthermore, Battenfield has failed to show prejudice. The psychologist's conclusion that Battenfield was chemically dependent does nothing to undermine our confidence in the jury's determination that he constitutes a continuing threat to society. Accordingly, Battenfield has failed to show that his 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."

Id. (footnotes omitted).

The overriding question is whether the OCCA reasonably applied *Strickland* in rejecting Battenfield's ineffective assistance claim. *See generally Brecheen v. Reynolds,* 41 F.3d 1343, 1366 (10th Cir.1994) (holding that, in pre-AEDPA case, state court conclusion that counsel rendered effective assistance is a mixed question of law and fact). Because the OCCA's decision was based on the state district court's finding that Battenfield knowingly waived his right to present mitigating evidence, we must examine the propriety of that finding. In performing our analysis, it is necessary to review several factors, including the investigative efforts of defense counsel prior to the beginning of the penalty phase, his penalty phase strategy, the advice he rendered to Battenfield prior to Battenfield's alleged decision to waive the presentation of mitigating evidence, and the trial court's examination of Battenfield regarding his alleged waiver.

[18] Shook received his Oklahoma law license in October 1980. He worked as an assistant district attorney in Wagoner County, Oklahoma, from October 1980 until December 31, 1982, and tried 10-15 felony cases. On January 1, 1983, he entered private practice in Wagoner County. The trial court appointed Shook to represent Battenfield and Shook received a total of $2,500.

The evidence presented at the state court evidentiary hearing indicates Shook spent very little time investigating possible ***1228** mitigating evidence or developing mitigation strategies. Although Shook allegedly spent over 100 hours preparing for the trial, only 20 of those hours were spent interviewing potential witnesses. Of those 20 hours, it is unclear how many were devoted to penalty phase preparation. According to Shook, he "spent very little time developing mitigation," and the only mitigation strategy he considered was to invoke the jury's sympathy and mercy. Shook Aff. His alleged plan was to present the testimony of Battenfield's parents "to kind of describe Billy's background; I wanted to bring out the positive things, the positive aspects of Billy's life; and most importantly, I wanted the parents to be able to ask the jury not to impose the death penalty." Evidentiary Hearing Tr., Vol. II at 118-19. However, the evidence indicates that although Shook may have briefly spoken to Battenfield's parents prior to and during trial, he never interviewed them regarding Battenfield's background and, indeed, was unaware of many, if not most, of the mitigating factors now cited by Battenfield. Further, although Shook testified that he spoke with Battenfield on several occasions regarding the possibility of a penalty phase, there is no indication that he ever interviewed Battenfield regarding his background. *See* Battenfield Aff. ¶ 3 ("Dennis Shook ... never talked to me about my childhood or past."). Finally, there is no evidence that Shook spoke to any of Battenfield's friends or relatives (other than his parents), to any mental health experts [FN5], or to any other potential mitigation witnesses (e.g., persons familiar with

Battenfield's personality and temperament, persons familiar with the underlying facts of Battenfield's previous conviction [FN6], persons familiar with incarceration and security in Oklahoma state prisons).

FN5. Shook testified that, at some point during trial, he informally spoke to the trial judge about the possibility of receiving funding to hire a mental health expert to use during the mitigation phase. The judge indicated there was no funding available and Shook did not file a formal motion because, in part, he found no authority for the appointment of a court-paid expert.

FN6. Shook knew the state intended to rely on evidence of Battenfield's previous conviction for assault and battery with a dangerous weapon and should have performed some type of investigation to determine the underlying facts of that conviction. Based upon the evidence presented by Battenfield in connection with his post-conviction application, it appears there were mitigating aspects to that prior crime that could have been presented to the jury (i.e., the fact Battenfield may have acted in self-defense, and the fact he was under the influence of drugs and alcohol at the time of the incident).

[19] Based upon this evidence, we conclude that Shook's penalty phase preparation was constitutionally deficient. [FN7] The Supreme Court has emphasized that the reliability of a capital sentencing proceeding hinges upon the jury making an individualized determination based, in part, upon "the particularized characteristics of the individual defendant." *Gregg v. Georgia,* 428 U.S. 153, 206, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). A defense attorney "has a *duty* to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.' " *Brecheen,* 41 F.3d at 1366 (quoting *Middleton v. Dugger,* 849 F.2d 491, 493 (11th Cir.1988)); *see also Stouffer v. Reynolds,* 168 F.3d 1155, 1167 (10th Cir.1999) (noting that defense counsel has a duty to investigate all possible lines of defense). Here, Shook violated that duty by failing to interview anyone, including Battenfield himself, regarding possible mitigating aspects of Battenfield's background. *See, e.g., Clayton v. Gibson,* 199 F.3d 1162, 1178 (10th Cir.1999) (assuming, ***1229** without deciding, that defense counsel "rendered deficient assistance by not contacting family members during the course of conducting a second stage investigation"), *cert. denied,* --- U.S. ----, 121 S.Ct. 100, 148 L.Ed.2d 59 (2000); *Baxter v. Thomas,* 45 F.3d 1501, 1513 (11th Cir.1995) (concluding that reasonable investigation would have included interviews with defendant's sister and neighbor, as well as defendant's mother and brother); *Stafford v. Saffle,* 34 F.3d 1557, 1563 (10th Cir.1994) (concluding that counsel's penalty- phase performance was deficient where counsel explored defendant's "background to some degree," but "conducted no specific investigation for mitigation evidence"); *Blanco v. Singletary,* 943 F.2d 1477, 1501-02 (11th Cir.1991) (concluding defense counsel was ineffective for failing to contact defendant's relatives and acquaintances prior to trial); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir.1989) (concluding defense counsel's performance was deficient where "neither lawyer ... investigated [the defendant's] background, leading to their total--and admitted--ignorance about the type of mitigation evidence available to them"); Stephen B. Bright, *Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting,* 36 Santa Clara L.Rev. 1069, 1085-86 (1996) ("The responsibility of the lawyer is to walk a mile in the shoes of the client, to see who he is, to get to know his family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community."). The result was that Shook was unaware at the time of trial of various mitigation strategies and accompanying pieces of evidence that could have been presented during the mitigation phase by Battenfield or his friends and family. Further, Shook was wholly unprepared to rebut the aggravating factors argued by the prosecution.

FN7. In disposing of Battenfield's ineffective assistance claim, the OCCA

> made no mention of Shook's investigative efforts. Thus, we are free to exercise our independent judgment in determining whether Shook's investigative efforts were constitutionally deficient. Even assuming, arguendo, the OCCA intended to indicate that Shook's investigative efforts were sufficient, we would conclude the OCCA unreasonably applied *Strickland.*

We have no doubt that Shook's failure to conduct an adequate investigation hampered his ability to make strategic decisions regarding the penalty phase of trial. In *Strickland,* the Supreme Court emphasized that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91, 104 S.Ct. 2052; *see also Duvall v. Reynolds,* 131 F.3d 907, 917 (10th Cir.1997) ("The duty to present mitigating evidence, of course, is not independent of the duty to investigate and prepare."), *cert. denied,* 525 U.S. 933, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998); *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir.1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."). Shook's failure to investigate Battenfield's background, and his failure to explore other readily apparent mitigation possibilities, rendered unreasonable his alleged penalty-phase strategy of focusing on sympathy and mercy. In other words, contrary to the dissent's suggestion, there was no strategic decision at all because Shook was ignorant of various other mitigation strategies he could have employed.

In addition to hampering his ability to make strategic decisions, Shook's failure to investigate clearly affected his ability to competently advise Battenfield regarding the meaning of mitigation evidence and the availability of possible mitigation strategies. Shook testified that, prior to trial, he had "numerous conversations [with Battenfield] about the possibility of having a second stage." Evidentiary Hearing Tr., Vol. II at 115. Whatever those conversations may have entailed, there is no indication Shook ever explained the general meaning of mitigation evidence to Battenfield or what specific mitigation evidence was available. Shook acknowledged he never advised Battenfield that mitigation evidence might include evidence about Battenfield's substance abuse problems. At best, the evidence indicates that at ***1230** some point during the trial proceedings, Shook discussed with Battenfield his plan to present Battenfield's parents as second-stage witnesses and his strategy to have Battenfield's parents beg for Battenfield's life. In an affidavit submitted in connection with his application for post-conviction relief, Battenfield indicated that Shook never explained to him "the importance of mitigation or ... what mitigation actually [wa]s." Battenfield Aff. ¶ 2.

[20] Shook's deficient performance culminated in Battenfield waiving the right to present mitigating evidence. The jury returned its first-stage verdict at approximately 11:20 a.m. on the last day of trial. After receiving this verdict, the trial court took an hour and twenty-minute lunchtime recess. According to Shook, Battenfield "was quite upset and, in my opinion, pretty irrational at that point in time." Evidentiary Hearing Tr., Vol. II at 116. Shook testified that during the recess, Battenfield "instructed [him] that he did not want to put on evidence in mitigation for the second stage." *Id.* Although Shook allegedly advised Battenfield that they "should proceed with the mitigating evidence," Battenfield again indicated that he did not want to proceed with the mitigation evidence proposed by Shook. *Id.* at 117. According to Battenfield, he "did not know what mitigation was [at that point], [he] just did not want [his] mom and dad to testify." Battenfield Aff. ¶ 5. More specifically, Battenfield stated:

> After I was convicted of first degree murder and before second stage deliberations began, my attorney asked me as to whether or not I wanted to have my parents testify. Dennis Shook never talked to me about any other people [testifying]. I did not want my parents to testify because I did not want to cause them anymore grief and sadness. I personally witnessed my father crying and sobbing for the first time in my life after I was convicted. My dad was always rock solid and seeing him cry was so out of character for him that it made me feel that I had to spare him and my mom from any more stress.

Id. ¶ 4.

At the conclusion of the court recess for lunch, Shook asked the trial court to make a record outside

the hearing of the jury. The following discussion took place between Shook, Battenfield, and the trial judge:

> THE COURT: Let the record show the Defendant is present with his attorney, Mr. Shook. The State is represented by Assistant District Attorney Mr. Langley and Mr. Sperling. I have been advised by Mr. Shook that the defendant wants to make a record.
> MR. SHOOK: That is correct, Judge. I have just spoken with Mr. Battenfield, along with Joe Robertson who is the attorney for the co-defendant, Melvin Battiest. The defendant, Billy Ray Battenfield, has informed me that he does not wish to take the stand and testify in this matter. It's my advice that he do so. Billy, I would like for you to comment on that.
> THE DEFENDANT: I'm going against my attorney's advice and not taking the stand.
> THE COURT: All right. Are you being abused, mistreated or forced to make you go against his advice?
> THE DEFENDANT: No, sir.
> THE COURT: It was my understanding that from visiting with Mr. Shook that you don't even want to put on any evidence as to mitigation; is that correct?
> THE DEFENDANT: You mean my parents and stuff?
> THE COURT: Yes.
> THE DEFENDANT: No, sir, they have been through enough.
> THE COURT: You're not going to present any testimony as to mitigation?
> THE DEFENDANT: No, sir.
> THE COURT: You understand you have that right?
> ***1231** THE DEFENDANT: Yes, sir.
> THE COURT: All right, then we will proceed.

Trial Tr. at 1421-22

Although the state district court found, and the OCCA agreed, that the waiver was knowing and intelligent, we conclude the above-outlined evidence is more than sufficient to overcome any presumption of correctness afforded to this finding. [FN8] When the above-quoted colloquy took place, Battenfield did not have a proper understanding of the general nature of mitigating evidence or the specific types of mitigating evidence that might be available for presentation. He only knew that Shook intended to put his parents on the witness stand and have them beg for the jury's mercy and sympathy. Battenfield's narrow conception of what mitigation meant is evidenced by his response to the trial judge's questioning ("You mean my parents and stuff?"). Finally, the trial judge's questioning of Battenfield regarding his decision to waive was brief and, in our view, inadequate. The trial court failed to adequately determine that Battenfield had been provided sufficient information from Shook to make a knowing choice.

FN8. Although there are numerous published cases (both federal and state) where a capital defendant has waived the right to present mitigating evidence, very few have actually addressed whether the propriety of the waiver is purely a factual issue or a mixed question of fact and law. Of the few cases that have addressed this issue, the holdings appear conflicting. *Compare Singleton v. Lockhart,* 962 F.2d 1315, 1321 (8th Cir.1992) (treating as a factual finding the question of whether the defendant knowingly and intelligently waived his right to present mitigating evidence), *and State v. Ashworth,* 85 Ohio St.3d 56, 706 N.E.2d 1231, 1237 (1999) (indicating a trial court in a capital case must "make findings of fact as to the defendant's understanding and waiver of" his right to present mitigating evidence), *with Wilkins v. Bowersox,* 145 F.3d 1006, 1015-16 (8th Cir.1998) (suggesting that whether a defendant knowingly and intelligently waived his right to present mitigating evidence is a mixed question of fact and law), *cert. denied,* 525 U.S. 1094, 119 S.Ct. 852, 142 L.Ed.2d 705 (1999), *and Snell v. Lockhart,* 14 F.3d 1289, 1302-03 (8th Cir.1994) (same). Likewise, the courts have differed in their characterizations of other types of waivers. *See, e.g., Tacon v. Arizona,* 410 U.S. 351, 352, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973) (concluding that whether petitioner's conduct amounted to a knowing and intelligent waiver of the right to be present at trial was "primarily a factual issue"); *United States v. Burson,* 952 F.2d 1196, 1199 (10th Cir.1991) (concluding that question of whether waiver of right to

> counsel was knowing and voluntary is a mixed question of fact and law); *Meeks v. Cabana,* 845 F.2d 1319, 1323 (5th Cir.1988) (holding that "[t]he state court's finding of waiver [of the right to appeal] involves a pure question of fact"). We find it unnecessary to definitively characterize the waiver as either a factual issue or a mixed question of fact and law because the outcome of the appeal would be the same regardless. In other words, if it is characterized as a mixed question of fact and law, we would conclude that the OCCA unreasonably determined Battenfield's waiver was knowing and intelligent. If the issue is characterized as a question of fact, we would conclude the state district court's finding on this issue was unreasonable in light of the evidence presented during the evidentiary hearing on Battenfield's application for post-conviction relief.

In determining that Battenfield's alleged waiver was knowing when that issue was raised in Battenfield's application for post-conviction relief, the state district court relied heavily on the evidentiary hearing testimony of the judge who presided over Battenfield's trial. A review of that testimony, however, suggests it is of questionable value in determining whether Battenfield's waiver was knowing and voluntary. Under cross-examination by Battenfield's counsel, the trial judge acknowledged that mitigating evidence could include more than calling a capital defendant's parents to the witness stand. In particular, the trial judge acknowledged that mitigating evidence could include information about a defendant's family history, psychological information, evidence of alcoholism, or a family history of alcoholism. The following series of questions and answers then took place between Battenfield's attorney and the trial judge:

> Q. Would you agree with me, Judge, that when you responded "Yes" to Mr. Battenfield saying, "You mean my parents ***1232** and stuff?" that he might not have ... a full and fair understanding on his part about what mitigation was?
> A. Well, I don't agree with you.
> Q. Okay. Explain to me why that might be.
> A. Well, I mean, you're talking about when he says family and stuff?
> Q. Uh-huh.
> A. Well, what you've gone back over, alcoholism and all these other things that you've named off, social problems and all this, that would cover it under family and stuff. But it was my understanding they [Battenfield and Shook] had discussed it, talked about it, and that was--but he did not want to put on any evidence.
> Q. Judge, do you recall--well, if I were to tell you that Mr. Shook had spent, according to evidence that we have in the record, had spent virtually no time discussing the concept of mitigation with Mr. Battenfield or with his parents, would you have any reason to believe that Mr. Shook could have given adequate advice to Mr. Battenfield about what that evidence might have been?
> A. Sir, I don't really understand your question.
> * * *
> Q. If the evidence in the record is that Mr. Shook had really spent no time discussing with Mr. Battenfield what mitigation was, and had spent no time preparing for a mitigation case, then do you know of any reason why Mr. Shook's advice to Mr. Battenfield about what mitigation was would be adequate?
> A. Well, I don't know why the--the record, you say, is silent as to that?
> Q. No. Actually, the record affirmatively, I think, demonstrates that Mr. Shook didn't undertake a mitigation investigation. So my concern is, as a trial judge--
> A. Well, wait just a minute. You're saying that he did not discuss this mitigation procedure with him at all?
> Q. I'm saying we have evidence in the record that would indicate that that's the case. And that he did not investigate the mitigation phase of the case. He had done no investigation of the social history of Mr. Battenfield, he had done no real family investigation. My only question to you is: As a trial judge, if you had been aware of that would you have been less comfortable about concluding that Mr. Battenfield was adequately informed as to what mitigation was?
> A. I don't--I think you're asking me a question that does not properly reflect what transpired in this case. I think Mr. Shook and him did discuss it. I was satisfied at the time that they had discussed it, from visiting with Mr. Shook. That's the reason they asked to make a record and come to the bench--or to do that and make that record.

> You're asking me to suppose that certain things did or did not happen. And sir, I'm satisfied that it did happen the way the record reflects from the standpoint of him knowing about mitigation. The bill of particulars was filed. They had them and I assumed had gone over them. He indicated that they had, that they knew what he--he knew what he was doing in the courtroom that day.

Evidentiary Hearing Tr., Vol. I at 114-16. Obviously, the trial judge's assumptions about what transpired between Shook and Battenfield prior to the waiver are not borne out by the record. In particular, the record is clear that Shook did not adequately apprise Battenfield of the meaning of mitigation evidence or what particular mitigating evidence was available in his case. Further, it is apparent the trial judge failed, at the time he questioned Battenfield on the record, to ensure that Battenfield had sufficient information to knowingly waive his right to present mitigation evidence. [FN9]

> FN9. The dissent suggests the state courts could have decided that the testimony of Shook and the trial judge was more credible than that of Battenfield. We disagree. Shook never directly controverted Battenfield's statements. As for the trial judge, a careful examination of his testimony reveals that he had little, if any, factual basis for determining whether Shook adequately advised Battenfield regarding mitigation evidence and strategy.

Less than a month after Battenfield's trial, the OCCA established guidelines for ***1233** trial courts to follow "when a defendant refuses to allow the presentation of mitigating evidence in the sentencing stage." *Wallace v. State,* 893 P.2d 504, 512 (Okla.Crim.App.1995). Those guidelines, intended to ensure that a defendant "has an understanding of his or her rights ... in the sentencing process," require a trial court to: (1) inform the defendant of the right to present mitigating evidence, and what mitigating evidence is; (2) inquire both of the defendant and his attorney (if not pro se) whether he or she understands these rights; (3) inquire of the attorney if he or she has attempted to determine from the defendant whether any mitigating evidence exists; (4) inquire what that mitigating evidence is (if the defendant has refused to cooperate, the attorney must relate that to the court); (5) inquire of a defendant and make a determination on the record whether the defendant understands the importance of mitigating evidence in a capital sentencing scheme, understands such evidence could be used to offset the aggravating circumstances proven by the prosecution in support of the death penalty, and the effect of failing to present that evidence; (6) after being assured the defendant understands these concepts, inquire of the defendant whether he or she desires to waive the right to present such mitigating evidence; and (7) make findings of fact regarding the defendant's understanding and waiver of rights. *Id.* at 512-13. The trial judge in Battenfield's case failed to satisfy any of these requirements.

Although the State correctly argues that *Wallace* "was not the law at the time of Appellant's 1985 trial," State's Appellate Br. at 30 n. 3, the guidelines set forth in *Wallace* are, in our view, little more than commonsense and should have been substantially followed by the trial court. We emphasize that our conclusion regarding the inadequacy of the trial court's inquiry does not hinge in any way upon the holding in *Wallace.* Instead, we simply find it useful, for analytical purposes, to contrast the trial court's inquiry in this case with the guidelines set forth by the OCCA in *Wallace.*

[21] Given our conclusion that Battenfield's waiver was neither knowing nor intelligent, the next question is whether Shook was ineffective for failing to present any mitigating evidence. Although the OCCA determined that Battenfield's waiver was knowing and intelligent (a determination we have already rejected under the AEDPA standards of review), it alternatively determined that "[e]ven without the waiver, ... Battenfield ha[d] failed to show that [Shook] was ineffective by not presenting mitigating evidence." *Battenfield III,* 953 P.2d at 1127. According to the OCCA, most of the mitigating evidence to which Battenfield pointed in his application for post-conviction relief could have been presented by "Battenfield and his family ... had Battenfield cooperated with his attorney." *Id.* In other words, the OCCA determined, Shook's failure to present mitigating evidence was "a direct result of Battenfield's own refusal to testify and allow his parents to testify." *Id.*

In our view, this is a patently unreasonable application of *Strickland.* We see no difference between Battenfield's purported waiver and his so-called "lack of cooperation." If the waiver is found to be neither knowing nor intelligent, the so-called lack of cooperation must fall by the wayside. Even ignoring this flaw in the OCCA's reasoning, we fail to see how Battenfield can be held responsible for Shook's failure to present mitigating evidence unknown to Shook. [FN10] Had Shook conducted a constitutionally ***1234** adequate investigation of potential mitigating evidence, he would have had a variety of witnesses from whom to choose.

> FN10. The dissent suggests that, "[h]ad Mr. Battenfield cooperated with Mr. Shook's second-stage strategy, evidence that he 'was known for his compassion, gentleness, and lack of violence even when provoked,' ... surely would have been brought out, even without an extensive investigation." We strongly disagree. Because Shook never conducted any investigation into the potentially mitigating aspects of Battenfield's life or personality (e.g., his apparent lack of propensity for violence), we fail to understand how Shook would have known to elicit such evidence from Battenfield or his parents during the second-stage proceedings.

We conclude that Battenfield was deprived of effective assistance of counsel during the penalty phase of trial. Shook failed to conduct a constitutionally adequate pretrial investigation into potential mitigation evidence which, in turn, hampered his ability to make strategic choices regarding the second-stage proceedings and competently advise his client regarding those proceedings. Because Battenfield did not receive competent advice from Shook regarding the second-stage proceedings, and because the trial court failed to conduct an adequate inquiry into his decision to waive mitigation evidence, we conclude Battenfield's purported waiver was neither knowing nor voluntary. Finally, we conclude Shook was ineffective for failing to present any mitigation evidence during the second-stage proceedings.

[22] The remaining question is whether Battenfield was prejudiced by Shook's inadequate performance. Because the OCCA never addressed this issue [FN11], we are free to exercise our independent judgment. Battenfield must "affirmatively prove actual prejudice by demonstrating 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Cooks,* 165 F.3d at 1296 (quoting *Strickland,* 466 U.S. at 693-94, 104 S.Ct. 2052). "As applied to the sentencing stage of his trial, [Battenfield] must demonstrate 'a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Id.* (quoting *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052).

> FN11. The OCCA did discuss whether Battenfield was prejudiced by Shook's failure to present expert mental health testimony indicating that Battenfield was chemically dependent. *Battenfield III,* 953 P.2d at 1127. However, we find that analysis irrelevant because we are not persuaded Shook was ineffective for failing to obtain and present expert mental health testimony. Our prejudice inquiry focuses instead on Shook's failure to obtain and present the various other types of mitigating evidence pointed to by Battenfield.

"In evaluating prejudice, we must keep in mind the strength of the government's case and the aggravating [circumstances] the jury found as well as the mitigating factors that might have been presented." *Castro v. Ward,* 138 F.3d 810, 832 (10th Cir.) (internal quotations omitted), *cert. denied,* 525 U.S. 971, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998). Here, the jury found two aggravating circumstances to support Battenfield's death sentence: (1) the heinous, atrocious, or cruel nature of Cantrell's murder; and (2) the continuing threat Battenfield presented to society. However, the OCCA on direct appeal struck the heinous, atrocious, or cruel factor on the grounds that it was not supported by the evidence. *See Battenfield I,* 816 P.2d at 565 (noting that the blow to Cantrell's head would likely have rendered him immediately

unconscious). Thus, only the continuing threat circumstance remains to support Battenfield's death sentence. The state argued that Battenfield had twice been convicted of violent felonies: once for the 1978 assault and battery with a dangerous weapon conviction, and again in 1985 for the murder of Cantrell. [FN12] When the OCCA reweighed the aggravating and mitigating circumstances on direct appeal, it concluded the continuing threat factor was supported by the "calloused nature" of Cantrell's murder and by the fact that Battenfield had previously been convicted of a violent felony. *Battenfield I,* 816 P.2d at 566.

> FN12. During the penalty phase, the state incorporated by reference the evidence presented during the guilt phase. Aside from that, the only additional evidence presented by the state was a copy of the 1978 judgment of conviction.

Battenfield had available a variety of mitigating evidence to counterbalance this ***1235** single aggravating factor. Although the underlying facts of his 1978 conviction are somewhat sketchy, the record suggests it may have been an act of self defense on the part of Battenfield. In particular, the evidence indicates Battenfield "was playing pool in a bar when a 'drunk Indian' fell or knocked into the pool table. Words were exchanged, the Indian pulled a gun, and [Battenfield] defended himself with a knife." St. Peter Aff. ¶ 17. Both the 1978 crime and the murder of Cantrell were committed when Battenfield was under the influence of drugs or alcohol. Arguably, this evidence could be viewed in a mitigating light, particularly if combined with evidence that Battenfield would have little or no access to drugs or alcohol while in prison, or evidence that Battenfield was amenable to treatment for his substance abuse problems (or even perhaps evidence indicating that Battenfield's reliance on drugs and alcohol dramatically worsened after his 1970 car accident). Battenfield's family members and friends would have testified that Battenfield "was known for his compassion, gentleness, and lack of violence even when provoked." *Id.* Further, persons familiar with the Oklahoma correctional system could have testified about Battenfield's chances of parole and the limitations that would be placed on his access to alcohol and drugs.

Without discounting the calloused nature of Cantrell's murder, we conclude there is a reasonable probability that this mitigating evidence would have led the jury to reach a different sentencing result. We emphasize that, because of Shook's failure to present any mitigating evidence during the penalty phase, the jury sentenced Battenfield knowing only that he was involved in the murder of Cantrell and previously had been convicted of assault and battery with a dangerous weapon. Had they been given more information about Battenfield's background, personality, and the facts of his prior conviction, we conclude there is a reasonable probability they would have determined the mitigating circumstances outweighed the single aggravating circumstance. *See generally Mayes v. Gibson,* 210 F.3d 1284, 1288 (10th Cir.2000) (noting the "overwhelming importance" of mitigation evidence in humanizing a criminal defendant and explaining his conduct). Alternatively, we conclude there is a reasonable probability they would have determined Battenfield did not represent a continuing threat to society. [FN13] For these reasons, we conclude that Shook's deficient conduct "so undermined the proper functioning of the adversarial process that the [penalty phase of] the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686, 104 S.Ct. 2052.

> FN13. The dissent asserts that we are speculating regarding the likely effect the available mitigating evidence would have had on the jury's second-stage verdict. Under the circumstances of this case, where we are faced with a determination of whether Battenfield was prejudiced by his counsel's inadequate second-stage performance, we have little choice. Indeed, the dissent must also speculate by suggesting that Battenfield would not have allowed witnesses other than his parents to testify and in assuming the available mitigating evidence would not have altered the second-stage outcome.

IV.

We REVERSE the judgment of the district court

and REMAND with instructions that the district court grant the writ as to Battenfield's death sentence, subject to the state district court conducting a new sentencing trial or vacating Battenfield's death sentence and imposing a lesser sentence consistent with law. *See Richmond v. Lewis,* 506 U.S. 40, 52, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992) (utilizing conditional issuance of writ of habeas corpus to require constitutional compliance by state courts); *Pickens,* 206 F.3d at 1003 (10th Cir .2000) (same); *see also Smith v. Lucas,* 9 F.3d 359, 367 (5th Cir.1993) (noting that the "real thrust" of a federal court's conditional issuance of a writ of habeas corpus "is to alert the state court to the constitutional problem and notify it that the infirmity must be remedied"). In light of this ***1236** determination, we find it unnecessary to address Battenfield's remaining contention that the evidence presented during the sentencing phase was insufficient to support the jury's finding that he represented a continuing threat to society.

KELLY, Circuit Judge, concurring in part and dissenting in part.

While I concur in the court's opinion to the extent it affirms the district court's denial of habeas relief, I dissent from reversal and remand of Mr. Battenfield's ineffective assistance of counsel claim. In my view, the court's resolution of this claim does not comport with either the proper standard of review or the principles governing ineffectiveness claims.

On collateral review, we may only grant relief if the state court's adjudication of a federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). State court factual findings are presumed correct, and one seeking federal habeas relief "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." § 2254(e)(1).

Ineffective assistance of counsel requires a petitioner to demonstrate deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As mixed questions of law and fact, we do not afford a presumption of correctness to State court determinations on these issues. *Herrera v. Lemaster,* 225 F.3d 1176, 1178- 79 (10th Cir.2000) . However, we do accord a presumption of correctness to state court findings of historical fact underlying these issues. *Brecheen v. Reynolds,* 41 F.3d 1343, 1366 (10th Cir.1994). Moreover, merely because we may have come to a different resolution on the same facts does not warrant habeas relief. An unreasonable application of federal law means something beyond what we may perceive in our independent judgment as an erroneous or incorrect application of clearly established federal law. *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1522, 146 L.Ed.2d 389 (2000).

In deciding that the Oklahoma Court of Criminal Appeals ("OCCA") unreasonably applied *Strickland,* the court determines that Mr. Battenfield has proven that his trial counsel, Mr. Shook, rendered deficient performance because he failed to adequately investigate potential mitigation evidence in the second stage of the trial. According to the court, this "hampered" Mr. Shook's ability to make strategic choices about the penalty phase and to competently advise his client. This incompetent advice, coupled with the trial court's inadequate inquiry into Mr. Battenfield's decision to forego mitigating evidence, resulted in a waiver that was neither knowing nor voluntary.

The claim in this case is merely a vehicle to correct an error in judgment by Mr. Battenfield, specifically his decision to waive his right to present mitigating evidence. The proper, and properly limited, function of a federal habeas court in this context is to insure that the death penalty is not imposed in violation of the Constitution. *Herrera v. Collins,* 506 U.S. 390, 400-01, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). If Mr. Battenfield made a knowing and intelligent waiver of his right to present mitigation evidence, then his counsel cannot have been ineffective for failing to develop such evidence. *See Wallace v. Ward,* 191 F.3d 1235, 1247-48 (10th Cir.1999).

The failure to present mitigating evidence is not per se ineffective assistance of counsel. *Brecheen,* 41 F.3d at 1368. The reason why no mitigating evidence was presented matters greatly. *Id.* Here, the OCCA affirmed the state post-conviction trial court's express determinations, made after an evidentiary hearing, that Mr. Battenfield knowingly and intelligently waived ***1237** that right. *Battenfield v. State,* 953 P.2d 1123, 1127 (Okla.Crim.App.1998), *aff'g Battenfield v. State,* No. CF-84-73, Findings of Fact and Conclusions of Law and Order Denying Post-Conviction Relief at 6 (Wagoner County Dist. Ct. May 13, 1997) ("It was the opinion of the trial Court that the petitioner knowingly waived his right to present mitigating evidence and this Court agrees."). Though this court reweighs the evidence and comes to a different conclusion, the record evidence fully supports the state courts' determination on this point.

Mr. Shook testified that he had "numerous conversations [with Mr. Battenfield] about the possibility of having a second stage," and that most of those conversations took place prior to trial. Hr'g Tr. at 2:115-16. He also testified that, having previously discussed second-stage proceedings with Mr. Battenfield, Mr. Battenfield's decision at trial happened completely without warning. *Id.* at 134. It is uncontroverted that Mr. Shook advised Mr. Battenfield to present mitigating evidence and that Mr. Battenfield declined Mr. Shook's advice. Trial Tr. at 1421; Hr'g Tr. at 2:117-18. Mr. Battenfield not only declined to testify on his own behalf, but also to put on any other mitigating evidence ("my parents and stuff"). Trial Tr. at 1421-22; Hr'g Tr. at 2:117-18. This was not for want of adequate investigation or lack of a second-stage strategy by Mr. Shook, or improper safeguards by the state district court on waiver. Rather, it was due to Mr. Battenfield's conscious choice.

By affidavit and testimony, Mr. Shook indicated that Mr. Battenfield was angry about the outcome of the first stage.

> Mr. Battenfield waived his right to testify and did not want me to put his parents on the stand. If I had been permitted to present his parents, I would have had them testify as to his good character[ ]. His decision to waive mitigation occurred immediately after the jury found him guilty. He was angry, upset, depressed, and stated that the jury could do whatever they wanted. Basically, he just gave up.

Shook Aff. at 1-2. Although Mr. Shook felt that Mr. Battenfield "was not in a condition to knowingly waive this vital stage of the trial," Mr. Shook followed the wishes of his client:

> When Mr. Battenfield told me he did not want to put any mitigation on in the second stage, I was not expecting it. I had never encountered a situation such as this, and was not sure of what action to take. I followed Mr. Battenfield's wishes even though I knew it was the wrong action to take. If I knew that I could have continued with the second stage as I had planned despite Mr. Battenfield's attitude, I would have done so.

Id. at 2; *accord* Hr'g Tr. at 2:116-17.

The state courts could certainly reject Mr. Battenfield's post-conviction assertion that Mr. Shook never explained "the importance of mitigation or ... what mitigation actually is." Battenfield Aff. ¶ 2. They could instead decide that the testimony of Mr. Shook and the original trial judge to the contrary was more credible. *E.g.,* Hr'g Tr. at 1:116, 119-20; *see also id.* at 2:120 (direct examination of Mr. Shook) (Q: "Had you explained to the defendant the meaning of mitigating evidence and what you intended to present? A: Yes."). Despite a vigorous cross-examination at the state post-conviction hearing, the trial judge was steadfast in his belief (then and at the hearing) that Mr. Shook had discussed mitigation with his client. *Id.* at 1:116. He based this belief upon his visits with Mr. Shook, the request by the defense to make a record on the issue, and the furnishing of the bill of particulars to the defense. *Id.* The fact that the OCCA would later issue guidelines governing the waiver of the right to put on mitigating evidence should not cause us to disregard the careful inquiry at the state post-conviction evidentiary hearing. *Cf. Wallace v. State,* 893 P.2d 504, 512 (Okla.Crim.App.1995).

Plainly, the reasonableness of Mr. Shook's actions must be judged against the firm desires of his client. *See* ***1238***Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. We have held that a defendant may waive the right to put on mitigating evidence. *Wallace,* 191 F.3d at 1247-48. There is little reason to believe that Mr. Battenfield would have allowed the presentation of mitigating evidence at his trial, even if that evidence came from sources other than

himself or his parents. Mr. Battenfield's expert testified that while defense counsel cannot compel a defendant to testify in the second stage, counsel that does not present mitigating evidence, even over the objection of his client, renders deficient performance. Hr'g Tr. at 1:22, 36. This is directly at odds with the client's right to participate in his own defense, let alone *Strickland. See Smith v. Massey*, 235 F.3d 1259 (10th Cir.2000) ("Although the legal expert who testified on behalf of Smith in her post- conviction proceedings testified that [Smith's trial attorney] should have pursued the 'architect' or 'manipulation' theory notwithstanding Smith's wishes, this testimony is clearly inconsistent with the Supreme Court's view of the attorney-client relationship.").

The premise of the court's decision, that Mr. Shook lacked an adequate mitigation strategy due to an inadequate investigation also is not supported. Mr. Shook testified that he visited with Mr. Battenfield's parents at court appearances and in his office, though he could not recall how many times, and that he conversed with them about the purpose of their potential second-stage testimony. Hr'g Tr. at 2:138. He was aware of Mr. Battenfield's troubled life, including his problems with substance abuse and his association with the "wrong crowd." *Id.* at 2:131, 135. He further testified that he intended to call Mr. Battenfield's parents and perhaps a sibling, as witnesses and that he had conversed with his client regarding the presentation of such evidence. *Id.* at 2:115. He intended to describe Mr. Battenfield's background, to bring out the positive aspects of his life, and to have his parents ask the jury not to impose the death penalty. *Id.* at 2:118-19, 138-39. This was a permissible trial strategy to which a reviewing court owes deference, notwithstanding that there may have been other ways to defend the case. *See Strickland,* 466 U.S. at 689-90, 104 S.Ct. 2052; *Mayes v. Gibson,* 210 F.3d 1284, 1288 (10th Cir.2000) (mitigation evidence serves to humanize and explain the defendant).

The mitigating evidence that the court views as significant is contained primarily in a social worker's assessment of Mr. Battenfield. It includes a double hearsay account of the circumstances of Mr. Battenfield's 1978 conviction, perhaps related by Mr. Battenfield himself. St. Peter Aff. ¶ 17 ("[Mr. Battenfield] states that all of this occurred while in a blackout so he only has others' descriptions to rely on as to what actually occurred."). The evidence of alcohol dependence came from a four-hour evaluation of Mr. Battenfield by a clinical psychologist. Hr'g Tr. at 2:48; Murphy Aff. at 2 ("His personality testing found that Mr. Battenfield suffers exclusively from alcohol dependence."). This court concludes that the "continuing threat" aggravator could have been mitigated with evidence that Mr. Battenfield would not have had access to alcohol in prison, that he may have been amenable to treatment, or that his alcoholism may have worsened as a result of a car accident occurring some eight years prior to the assault and battery conviction. Ct. Op. at 1235; *see also Boyd v.. Ward,* 179 F.3d 904, 918 (10th Cir.1999) (available mitigating evidence must be viewed against the strength of the State's case and the aggravators actually found), *cert. denied,* 509 U.S. 908 (2000). All of this is nothing more than speculation; the evidence about alcoholism just as easily could have had an unintended and negative effect upon the jury.

Regardless, the OCCA was unassailably correct in concluding that the substance of the mitigating evidence (which is largely historical data) could have been presented by Mr. Battenfield and his family, particularly his parents, had he heeded the advice of counsel. *Battenfield,* 953 P.2d at 1127. Had Mr. Battenfield cooperated with Mr. ***1239** Shook's second-stage strategy, evidence that he "was known for his compassion, gentleness, and lack of violence even when provoked," St. Peter Aff. ¶ 17, surely would have been brought out, even without an extensive investigation.

In sum, the court's decision is at odds with our current standard of review and with *Strickland.* Mr. Battenfield rejected the assistance his counsel offered. Moreover, the actions that counsel took prior to the waiver were reasonable under the circumstances. I respectfully dissent from this portion of the court's opinion and would affirm the district court's denial of the writ. [FN1]

FN1. Mr. Battenfield also argues that the evidence is insufficient to sustain the death penalty because the OCCA, in upholding the continuing threat aggravator, relied upon the 1978 conviction (for assault and battery with a dangerous weapon after

> former conviction of a felony), which the jury apparently rejected as a basis for a continuing threat aggravator. *See Battenfield v. State,* 816 P.2d 555, 566, *reh'g denied,* 826 P.2d 612, 613-14 (Okla.Crim.App.1991). The jury's rejection of the continuing threat aggravator described in the State's bill of particulars, however, cannot be viewed as a factual rejection of the 1978 conviction because the bill of particulars misdescribed the 1978 offense. *See Battenfield,* 826 P.2d at 613. Mr. Battenfield's reliance on *Presnell v. Georgia,* 439 U.S. 14, 16-17, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978) (an appellate court may not uphold a death sentence upon aggravating factor or circumstance not before the jury), is completely unconvincing. Here, the continuing threat aggravator was contained in the bill of particulars and both the jury and the OCCA were entitled to consider the 1978 conviction in connection with it.

236 F.3d 1215, 2001 CJ C.A.R. 246

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C

United States Court of Appeals,
Tenth Circuit.

Teresa Vilene PAINE, Petitioner-Appellant,
v.
Neville MASSIE, Warden; Attorney General of the State of Oklahoma,
Respondents-Appellees.

GK

No. 01-6437.

Aug. 11, 2003.

Petitioner, convicted in state court of murder, having exhausted state-court appeals, sought federal habeas relief. The United States District Court for the Western District of Oklahoma, Tim Leonard J., denied petition. Petitioner appealed. The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that: (1) counsel's performance in not offering expert testimony on battered woman syndrome (BWS) to support petitioner's claim of self-defense was deficient, and (2) remand was necessary to determine if petitioner could produce expert willing to testify that she suffered from BWS, to establish prejudice resulting from counsel's deficient performance.

Remanded with instructions.

West Headnotes

[1] Habeas Corpus ⇐450.1
197k450.1 Most Cited Cases

State-court decision is "unreasonable application" of federal law, warranting federal habeas relief, if state court identifies correct governing legal rule from Supreme Court's cases but unreasonably applies it to facts of particular state prisoner's case; it is not sufficient if state court applies federal law erroneously or incorrectly, application must be objectively unreasonable. 28 U.S.C.A. § 2254(d)(1)
.

[2] Habeas Corpus ⇐450.1
197k450.1 Most Cited Cases

Petitioner need not show that all reasonable jurists would disagree with state court's decision in order to establish unreasonable application of federal law warranting federal habeas relief. 28 U.S.C.A. § 2254(d)(1).

[3] Habeas Corpus ⇐766
197k766 Most Cited Cases
and

Even if state court resolves claim in summary fashion with little or no reasoning, federal habeas court owes deference to state court's result. 28 U.S.C.A. § 2254(d)(1).

[4] Habeas Corpus ⇐765.1
197k765.1 Most Cited Cases

Unlike full de novo review, federal habeas court's "independent review" of state court's summary decision is deferential, because habeas court cannot grant relief unless state court's result is legally or factually unreasonable. 28 U.S.C.A. § 2254(d)(1).

[5] Homicide ⇐795
203k795 Most Cited Cases

Key to defense of self-defense under Oklahoma law is reasonableness; defendant must show that she had reasonable belief as to imminence of great bodily harm or death and as to force necessary to compel it.

[6] Criminal Law ⇐474.4(3)
110k474.4(3) Most Cited Cases

Under Oklahoma law, expert testimony on battered woman syndrome (BWS) is necessary to assist jury in properly assessing battered woman's self-defense claim.

[7] Criminal Law ⇐474.4(3)
110k474.4(3) Most Cited Cases

[7] Criminal Law ⇐1170(1)
110k1170(1) Most Cited Cases

Under Oklahoma law, trial court's failure to allow expert testimony on battered woman syndrome (BWS) to provide necessary context for battered woman's self- defense claim is reversible error mandating new trial.

[8] Criminal Law ⇐641.13(6)
110k641.13(6) Most Cited Cases

Counsel's performance in not offering expert testimony on battered woman syndrome (BWS) to support petitioner's claim of self-defense at trial for murdering her abusive husband was deficient, as required to support claim for ineffective assistance; evidence admitted, and testimony elicited, by counsel injected BWS theory into case, but counsel failed to equip jury with understanding of BWS necessary for assessing reasonableness of petitioner's fear of bodily harm or death at time of murder. U.S.C.A. Const.Amend. 6.

[9] Habeas Corpus ⇐864(7)
197k864(7) Most Cited Cases

Remand was necessary to determine if petitioner could produce expert willing to testify that petitioner suffered from battered woman syndrome (BWS), to establish prejudice resulting from counsel's deficient performance in failing to present expert testimony on BWS to support petitioner's claim of self- defense at trial for murdering her abusive husband, as required to support claim for ineffective assistance on petition for federal habeas relief. U.S.C.A. Const.Amend. 6.

***1195** Matthew Austin Pring (and Timothy M. Hurley, with him on the briefs), Denver, CO, for Petitioner-Appellant.

David M. Brockman, (W.A. Drew Edmondson, Attorney General of Oklahoma and William R. Holmes, Assistant Attorney General, on the brief), Oklahoma City, OK, for Respondents-Appellees.

Before KELLY, BALDOCK and BRISCOE, Circuit Judges.

***1196** PAUL KELLY, JR., Circuit Judge.

In March 1998, Petitioner-Appellant Teresa Vilene Paine was convicted by a jury in Oklahoma state court for the murder of her husband and was sentenced to life imprisonment. Since her conviction Ms. Paine has consistently maintained that she was denied the effective assistance of counsel at her trial. After the Oklahoma Court of Criminal Appeals ("OCCA") affirmed her conviction on direct appeal and denied rehearing, Ms. Paine filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court on the ineffective assistance claim. The district court denied habeas relief and a certificate of appealability ("COA"). After reviewing her claim we granted a COA and appointed counsel to represent her in this matter.

On appeal, Ms. Paine continues to argue that her trial counsel's performance was unreasonably deficient for failing to present expert testimony on battered woman syndrome ("BWS"). She asserts that counsel's deficient performance prejudiced her and that, as a result, she was denied her Sixth Amendment right to effective assistance of counsel as explained by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). She contends that the OCCA's decision denying her ineffective assistance claim is an objectively unreasonable application of *Strickland* and its progeny. We exercise jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253 and remand with instructions.

Background

On February 11, 1996, at or about 4:00 a.m., Ms. Paine shot her husband three times with a single-shot 12-gauge shotgun at their home, killing him. II Trial Transcript ("TT.") at 104, 106-07; III TT. at 8. At trial, several witnesses testified about the various ways her husband abused her during their 12-year marriage. The testimony described abuse including: (1) various forms of verbal and mental abuse, including calling her "dumb ass," "slut," "bitch," and "whore" in front of their children and others, III TT. at 42-43, 153; IV TT. at 65-66; (2) repeated physical torment, including beatings that left visible bruising, III TT. at 33-35, 40-41, 55, 57-58, 154; IV TT. at 7, 9-10, 15, 83-84, 89; (3) threats to harm and/or kill her, their children and her family, particularly if she left him, and sometimes accompanied with threats to kill himself as well, III TT. at 38-40, 43-44, 48; IV TT. at 7-8, 16, 40, 43, 70-71; (4) forced sex with other people, IV TT. at 42-43, 47, 52, 57; (5) forced sex with a dog, III TT. at 103, 106; IV TT. at 42-43, 45; and (6) threats relating to forced sex with a horse, III TT. at 21, 23.

Several witnesses testified that Ms. Paine attempted to leave her home on numerous occasions to escape the abuse. The absences ranged from several hours to several weeks, but her husband would hunt her down and issue threats against her, her family and

her friends if anyone helped her hide. III TT. at 32, 38- 40, 48, 52; IV TT. at 7-8, 43. Although help was sought from the police on more than one occasion, no action was taken. III TT. at 35-36, 48, 50-51, 54, 56-57. In contrast, more than one witness for the State testified to being unaware of evidence suggesting Ms. Paine's abuse by her husband. *Id.* at 105-06, 108, 119, 122. Other State witnesses also testified to threats made by Ms. Paine relating to her husband. *Id.* at 109-10, 119-21, 130.

On the date of the shooting, testimony adduced at trial indicated that Ms. Paine's husband had watched a pornographic movie, injected methamphetamine, and then directed her to have sex with their dog in a tin outbuilding. II TT. at 131-32, 164-65; III TT. at 15-16, 21; IV TT. at 45. She refused and he became very angry. IV ***1197** TT. at 45. She left the outbuilding and returned to the house, fearing that he would pursue her and kill her. *Id.* When he attempted to enter the house at some point later, she shot him in the chest and he fell down, glaring at her and clenching his fists. II TT. at 151- 52, 176. She then shot him again, hitting him in the side of the face; he continued to clench his fists. *Id.* She then shot him a third and final time in the chest. II TT. at 151-52; III TT. at 8-9.

Ms. Paine wiped the blood from the gun, and after collecting her children and some dice and cards, she drove herself to her mother's house. II TT. at 152, 162. She told her mother that she had shot her husband, and that if he was not dead, then she was. III TT. at 31. She then called the police and reported her actions in a calm manner. II TT. at 97. While in custody, she admitted to using drugs recently and desiring more. III TT. at 21. Police officers reported that she at times acted calm and normal, and at other times acted inappropriately, including laughing and making odd comments, like "I told that son-of-a-bitch not to come in the house." *E.g.,* II TT. at 128-29.

Ms. Paine was charged with first degree murder. At trial, her counsel proceeded on a theory of self-defense and offered an expert psychologist who gave an opinion that Ms. Paine was in genuine fear for her life at the time of the shooting. IV TT. at 45-46. However, her counsel offered no expert testimony regarding the effect of BWS or how such a condition might have affected the objective reasonableness of her subjective fear. Ultimately Ms. Paine was convicted of first degree murder in violation of 21 Okla. Stat. § 701.7 and was sentenced to life imprisonment.

On appeal to the OCCA Ms. Paine argued ineffective assistance for her counsel's failure to offer expert BWS testimony. Over the dissent of Judge Chapel, the OCCA affirmed in an unpublished summary opinion, disposing of her claim in one sentence: "[Ms. Paine] has failed to show that due to counsel's decision not to label her defense as that of 'battered woman' and present expert testimony on [BWS] the trial was rendered unfair or the verdict was rendered suspect or unreliable." R. Doc. 14, Ex. C at 2 (citing *Strickland* and *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)). In subsequently denying rehearing on this claim, the OCCA noted the following:

> [D]efense counsel essentially presented a defense of "battered woman" at trial, presenting evidence of the victim's abusive treatment of [Ms. Paine]. However, this defense was referred to as "post-traumatic stress syndrome" rather than "battered woman syndrome." The record reflects this was a strategic decision by defense counsel. Under the standard set forth in *Strickland* ... counsel's decision did not render the trial unfair or the verdict suspect or unreliable.

R., Order Denying Rehearing filed April 22, 1999, at 2-3.

Ms. Paine then sought habeas relief in federal district court on her ineffective assistance claim. She argued that although the OCCA had correctly identified the applicable standard, i.e., *Strickland,* it had nonetheless unreasonably applied it to her case, especially in light of Oklahoma law relative to BWS as discussed in *Bechtel v. State,* 840 P.2d 1 (Okla.Crim.App.1992). On referral the magistrate judge applied *Strickland* and concluded that even assuming deficient counsel performance, Ms. Paine had not shown prejudice because she failed to show the probability of a different outcome. R. Doc. 19 at 8-9, 10-11. The district court agreed that the OCCA had not unreasonably applied federal law and denied Ms. Paine's habeas petition and her request for a COA. R. Doc. 21 ***1198** at 1-2; R. Doc. 27 at 1-2. We granted a COA and Ms. Paine is now before us to appeal the district court's denial of her habeas petition.

Discussion

I. Standard of Review

Because Ms. Paine filed her habeas petition after April 24, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") govern this appeal. *Battenfield v. Gibson,* 236 F.3d 1215, 1220 (10th Cir.2001). Under AEDPA, habeas relief:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Here, the OCCA identified the correct governing legal rule to apply (i.e., *Strickland*) and adjudicated Ms. Paine's claim on the merits, albeit in a summary opinion. Therefore, it is the "unreasonable application" portion of AEDPA that is at issue in this appeal. Aplt. Br. at 15; *see, e.g., Bell v. Cone,* 535 U.S. 685, 698, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

[1][2] The Supreme Court has held that a state court decision is an "unreasonable application" of federal law if "the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams v. Taylor,* 529 U.S. 362, 407, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). It is not sufficient if the state court decision applied clearly established federal law erroneously or incorrectly; the application must be objectively unreasonable. *Id.* at 409, 120 S.Ct. 1495; *Lockyer v. Andrade,* --- U.S. ----, ----, 123 S.Ct. 1166, 1175, 155 L.Ed.2d 144 (2003) (holding that "objectively unreasonable" is more deferential than review for clear error). However, the petitioner need not show that "all reasonable jurists" would disagree with the state court's decision. *Williams,* 529 U.S. at 409-10, 120 S.Ct. 1495.

[3][4] Even if a state court resolves a claim in a summary fashion with little or no reasoning, we owe deference to the state court's result. "Thus, we must uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us that its result ... unreasonably applies clearly established federal law." *Aycox v. Lytle,* 196 F.3d 1174, 1178 (10th Cir.1999). Unlike full de novo review, this "independent review" is deferential "because we cannot grant relief unless the state court's result is legally or factually unreasonable." *Id.*

II. Applying Strickland to These Facts

To decide if the OCCA's summary decision amounts to an unreasonable application of federal law, we must apply the *Strickland* framework to the facts before us to determine if the OCCA's application was not only wrong, but also objectively unreasonable. Doing so first requires an understanding of Oklahoma law regarding self-defense and BWS. How these concepts interrelate under Oklahoma law is the focus of *Bechtel v. State,* 840 P.2d 1 (Okla.Crim.App.1992).

A. Self-defense & BWS in Oklahoma: Bechtel v. State

[5] In *Bechtel,* the OCCA reviewed a trial court's decision to exclude expert testimony ***1199** on BWS offered to support the defendant's claim of self-defense. The OCCA made it clear that in Oklahoma, the "key to the defense of self-defense is reasonableness. A defendant must show that she had a *reasonable* belief as to the imminence of great bodily harm or death and as to the force necessary to compel it." *Id.* at 10 (emphasis added); *id.* at 6 (A "bare belief that one is about to suffer death or great personal injury will not, in itself, justify [self-defense]. There must exist *reasonable* grounds for such belief at the time of the killing.... Fear alone never justifies one person to take the life of another.") (emphasis in original).

In *Bechtel,* a battered woman case very much like Ms. Paine's, the OCCA stated that the two requirements of self-defense, reasonableness and imminence, "can be understood *only* within the framework of [BWS]." *Id.* at 6 (emphasis added). Finding that BWS is a "substantially scientifically accepted theory," *id.* at 8, the OCCA concluded that expert testimony about it would assist the trier of fact in assessing how the experiences of a battered woman impact her state of mind at the time of the killing and in assessing the reasonableness of her belief that she was in imminent danger. *Id.* at 6-8. The OCCA did not stop there, however.

After examining various psychological impacts of abuse on battered women, the OCCA determined that "[s]everal of the psychological symptoms that develop in one suffering from the syndrome are particularly relevant to the standard of *reasonableness* in self-defense." *Id.* at 10 (emphasis in original). As a result, an expert's testimony about how BWS "affected [a battered woman's] perceptions of danger, its imminence, what actions were necessary to protect herself and the reasonableness of those perceptions are relevant and *necessary* to prove" self-defense. *Id.* at 10 (emphasis added). Because "the issue is not whether the danger was in fact imminent, but whether, *given the circumstances as [the battered woman] perceived them,* [her] belief was reasonable that the danger was imminent," such expert testimony is all the more critical. *Id.* at 12 (emphasis added).

[6][7] For these reasons, the OCCA concluded that a jury could not properly assess a battered woman's self-defense claim in the absence of the context provided by expert BWS testimony: "Misconceptions regarding battered women abound, making it more likely than not that the average juror will draw from his or her own experience or common myths, which may lead to a wholly incorrect conclusion. Thus, we believe that expert testimony on the syndrome is *necessary* to counter these misconceptions." *Id.* at 8 (emphasis added) [FN1]; *accord Dunn v. Roberts,* 963 F.2d 308, 313-14 (10th Cir.1992) (recognizing that an "expert [BWS] opinion is particularly useful and oftentimes necessary to interpret for the jury a situation beyond average experience and common understanding"). Therefore, although the OCCA held that the expert could not specifically testify to the ultimate fact of whether the battered woman's fear was reasonable, it concluded that a trial court's failure to allow expert testimony on BWS in such cases to provide necessary context ***1200** is reversible error mandating a new trial. 840 P.2d at 9-10.

> FN1. Regarding such misconceptions, the OCCA noted the following: "Expert testimony on [BWS] would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at anytime [and] ... would counter any 'common sense' conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage." *Id.* at 8 n. 8.

B. The Strickland Framework

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court articulated two elements a petitioner must show to demonstrate ineffective assistance. First, petitioner must demonstrate that her attorney's "performance was deficient" and "fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. 2052. In applying this test, we review counsel's performance with great deference and "recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S.Ct. 2052. We consider all the circumstances, making every effort to "eliminate the distorting effects of hindsight," and to "evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. Petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotations omitted). But "the mere incantation of 'strategy' does not insulate attorney behavior from review." *Fisher v. Gibson,* 282 F.3d 1283, 1296 (10th Cir.2002). We must consider whether that strategy was objectively reasonable. *Id.* at 1305; *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Second, petitioner must show that the trial counsel's deficient performance prejudiced her and deprived her of a fair trial with a reliable result, which requires a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052; *see also Bullock v. Carver,* 297 F.3d 1036, 1043-54 (10th Cir.2002).

C. Was Counsel's Performance Deficient?

(i) Counsel's Performance

As noted above, counsel for Ms. Paine proceeded on a theory of self-defense. The trial record reflects that counsel offered several witnesses to establish that Ms. Paine was abused and battered by her husband during their 12-year marriage. *E.g.,* IV TT. at 7-9, 15-16, 40-43, 45. In fact, more than one witness for the State lent further support to this conclusion. III TT. at 21, 33, 40, 43. The record also reflects that counsel offered just one expert, Dr. Edith King, to testify on Ms. Paine's behalf. Dr. King was an expert primarily specializing in assessing a defendant's competency to stand trial. IV TT. at 22-23, 53-54. She was not particularly experienced working with battered women. *Id.* at 24. In fact, counsel for Ms. Paine specifically disavowed any effort to qualify Dr. King as an expert either about battered women or about BWS. *Id.* at 32, 33-34.

Understanding how Ms. Paine's counsel sought to use Dr. King's testimony is critical to this case. Interestingly, this topic was the focus of a lengthy discussion between the parties and the court conducted outside the presence of the jury shortly after Dr. King began to testify. The discussion began after the State's attorney objected to "[a]ny questioning regarding [BWS] or battered women in that [Dr. King] is not a qualified expert." *Id.* at 27. Ms. Paine's counsel responded: "[W]e're not going to elicit any opinion regarding whether or not [Ms. Paine] is a person that has BWS or anything of that nature." *Id.* Counsel stated that instead, Dr. King would testify that "she examined [Ms.] Paine ... and essentially made an assessment ***1201** of [her] personality traits ... relevant to such issues as ... why would someone stay in such an atmosphere if the abuse were so bad; why would someone go back to someone who was treating them this way; essentially those things." *Id.* at 30.

When asked by the court if that would not actually be a BWS defense, *id.,* counsel responded:

> If you mean am I going to ask [Dr. King] if [Ms. Paine] suffers from [BWS], no I'm not.... I'm not going to ask [Dr. King] to go into a dissertation about what [BWS] is per se.... All of my questions are tailored to [Ms.] Paine, not to women in general or battered women as a class.

Id. at 31. This made the court question the relevance of Dr. King's testimony, to which counsel responded that "[Dr. King's testimony] goes to show [Ms. Paine's] state of mind at the time of the occurrence ... [and] during her relationship, to show her fear of the deceased, to show what effect that that would have upon [Ms. Paine's] actions." *Id.* at 33-34. Exasperated, the court lamented that it "can't believe we're in the middle of the trial where the defense has been and has always been that [Ms. Paine] was a battered woman and ... no one's ready on this issue." *Id.* at 34. The court then asked both parties to bring their copies of *Bechtel* to a discussion off the record to discuss the use of Dr. King's testimony. *Id.* at 35.

Following the off-the-record discussion, Ms. Paine's counsel proceeded to question Dr. King about her evaluation of Ms. Paine. Regarding Ms. Paine, Dr. King testified that she has "some addictive features, some highly dependent features, ... features of post traumatic stress, ... features of battering, ... features of neglect. It's a mixed picture." *Id.* at 37. After testifying about Ms. Paine recounting the various forms of abuse perpetrated against her by her husband, *id.* at 39-44, Dr. King then focused her testimony on the events leading to the shooting. Specifically, counsel elicited the following testimony from Dr. King regarding her opinion about the genuineness of Ms. Paine's subjective fear on the night in question: "I think [Ms. Paine] was afraid he was going to kill her.... I was absolutely convinced [Ms. Paine] was scared to death and that he was going to come kill her." *Id.* at 45-46.

Although counsel used Dr. King to establish that Ms. Paine had "features of battering," at no point did counsel ask Dr. King whether, in her opinion, Ms. Paine suffered from BWS. *Id.* at 37. Furthermore, counsel at no point asked Dr. King to explain BWS or the effect it might have upon the objective reasonableness of a battered woman's subjective fear. Indeed, given the concession that Dr. King was not an expert on BWS, such testimony would have probably been inadmissible.

(ii) Was Counsel's Performance Objectively Unreasonable?

[8] With the contours of counsel's performance well in hand, we now turn to the question of whether such performance was deficient under *Strickland.* From Ms. Paine's perspective, the highest hurdle to clear on this issue is the presumption that her counsel acted reasonably and perhaps even strategically by not eliciting testimony about BWS from an expert. Such is the essential

had an expert, but not a BWS expert; remanded to investigate. See if a BWS expert would have been helpful

argument of the State on appeal. Aplee. Br. at 11, 14-15. As the following discussion shows, this hurdle is easily cleared.

As an initial matter, we think there can be little doubt from the record that Ms. Paine's counsel put a BWS theory in play. The State recognizes that Ms. Paine's counsel made a "back-door" attempt to use a BWS theory by trying to show that she was not only battered and abused, but was ***1202** also an addicted, neglected and dependent person suffering from post-traumatic stress disorder ("PTSD"). Aplee. Br. at 10-12. By "back-door" the State presumably refers to counsel's efforts to characterize Ms. Paine as suffering from *more* than just BWS. Furthermore, the State admits that the trial court gave the BWS- specific jury instruction on reasonableness. *Id.* at 10, 15. The OCCA requires that this instruction "be given in all [BWS] cases," *Bechtel,* 840 P.2d at 11, so obviously the trial court viewed this case, based on the evidence before it, as a BWS case requiring the special instruction. *See* IV TT. at 140 (neither party objected to trial court's proposed jury instruction 33 which is the BWS-specific self-defense instruction, Okla. UJI-Cr 8-47); *see also* IV TT. at 34 (the trial court characterized the trial as one "where the defense has been and has always been that [Ms. Paine] was a battered woman."). Essentially, the trial court and both parties at trial agreed that Ms. Paine was "battered" and that a BWS theory was put in play by her counsel. *See* Aplt. Br. at 17.

The State acknowledges, however, that Ms. Paine's counsel did not specifically ask her expert if Ms. Paine suffered from BWS, and did not ask the expert to explain BWS or the ramifications of BWS on the reasonableness of Ms. Paine's fear. Aplee. Br. at 10-11. And as we noted above, Ms. Paine's counsel made it very clear that the trial strategy did not include asking the expert to equip the jury with an understanding of BWS. III TT. at 31. The State also acknowledges that Ms. Paine's counsel labored extensively to establish that Ms. Paine's subjective fear was genuine. Aplee. Br. at 10, 12, 14-16, 17. However, the State points to not one instance of counsel attempting to establish the reasonableness of that fear in the context of Ms. Paine's being a BWS sufferer. *E.g.,* Aplt. Br. at 19. In fact, counsel chose an expert that was not even qualified to render BWS testimony. *See* Aplt. Br. at 17; *see also Bechtel,* 840 P.2d at 9 (discussing such a requirement).

Given the OCCA's extensive focus on the "key" reasonableness component of a self-defense claim in a BWS case, *Bechtel,* 840 P.2d at 10-11, counsel's failure to offer expert BWS testimony to provide context for the jury on the reasonableness of Ms. Paine's subjective fear amounts to objectively unreasonable performance. Counsel failed to apply *Bechtel* and failed to recognize its core teaching that expert testimony about how BWS "affected [Ms. Paine's] perceptions of danger, its imminence, what actions were necessary to protect herself and the reasonableness of those perceptions [were] relevant and *necessary* to prove" self-defense. *Id.* at 10 (emphasis added). Without expert testimony about how a BWS sufferer views the world, a complete disconnect existed that prevented the jury from assessing the reasonableness of Ms. Paine's conduct based on the "circumstances and from the viewpoint of the defendant," as Oklahoma law requires. *Id.* at 11 (quoting the specific self- defense jury instruction required for every BWS case).

Simply put, counsel failed to do something that the OCCA said was *necessary* to mount an effective self-defense claim given the jury's likely misconceptions about BWS. In *Bechtel,* the OCCA established the professional standard in Oklahoma for an attorney representing a battered woman claiming self-defense, i.e., the attorney must put on an expert to explain BWS to the jury. Recently, the Supreme Court concluded that an attorney's failure to follow "standard practice" to use state-provided funds for development of a social history report amounted to unreasonably deficient performance. *Wiggins v. Smith,* 539 U.S. ----, ----, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003) (relying solely on the testimony of the attorney to establish ***1203** what constituted "standard practice"). In this case, the professional standard at issue is decidedly more established and clear than that relied on by the Supreme Court in *Wiggins.* Here, the OCCA itself announced the professional standard. For these reasons, we have little trouble concluding that counsel's performance fell short of the professional standard and was objectively unreasonable.

The State attempts to support its argument that counsel's decision was strategic by relying on an erroneous reading of *Bechtel.* It claims that by "providing the subjective fear testimony through a PTSD expert," and therefore failing to put on a BWS expert, counsel strategically "deprived the

State of [ ] potentially damning evidence." Aplee. Br. at 15. The State argues that "were a BWS defense pursued," *Bechtel* would mandate that "the accused would have to submit to an examination by an expert of the State's choosing and that this expert could testify in rebuttal." *Id.* Unfortunately for the State, *Bechtel* does not say that. *Bechtel* does, however, mandate the following in a BWS case:

> The defendant, who has submitted herself to psychological or psychiatric examination and who intends to use or otherwise rely on testimony resulting from said examination, *may be ordered, at the discretion of the trial court,* to submit to an examination by the State's expert witness, *upon application of the State.* The defendant's expert is permitted to be present and observe the examination.... Testimony of the State's witness shall be admitted only in rebuttal on matters covered by the expert for the defense and for the same purposes for which the defense expert's testimony was offered.

840 P.2d at 9 (emphasis added). It is obvious that the accused would not *have* to submit to an examination by a State expert *unless* (1) the State applied for it and (2) the trial court, in its discretion, allowed it. Here a BWS theory was in play and Ms. Paine's counsel did use an expert to examine her and to testify about her having PTSD (which can encompass BWS). Under *Bechtel,* this would entitle the State to apply to have its expert examine Ms. Paine, but it is not known whether the State even tried to do so. However, no faithful reading of *Bechtel* supports the State's argument that Ms. Paine's counsel somehow made a *strategic* decision not to offer expert BWS testimony because of the rights it would give the State. Simply put, the State had those rights any way.

Finally, the State also appears to argue that counsel's failure to offer expert BWS testimony and the failure to establish definitively that Ms. Paine was in fact a BWS sufferer was reasonable because Ms. Paine simply could not qualify as a "battered woman." Aplee. Br. at 10, 15-16. In support of this argument, the State contends that there is no clearly documented pattern of abuse (i.e., medical treatment for abuse, calling the police, telling friends, etc.) and that Ms. Paine demonstrated a lack of fear and even physical aggression toward her husband. *Id.* at 13, 15-16. The State relies on certain witnesses who said they never heard her express fear but did hear her threaten her husband. *Id.* at 13-14.

This argument is specious and misses the point. As noted above, the State admits that the trial court gave the BWS-specific jury instruction on reasonableness as required by *Bechtel* in "all [BWS] cases." *Id.* at 10, 15; *Bechtel,* 840 P.2d at 11. Given the evidence that Ms. Paine was battered, and the fact that the court and both parties at trial saw this as a BWS case, it simply makes no sense for the State to argue now that counsel somehow acted reasonably by failing to offer expert ***1204** BWS testimony because Ms. Paine was not a "battered woman." Having reviewed *Bechtel* and the record in this case, we conclude that counsel's performance was deficient and fell below an objective standard of reasonableness and that the OCCA's reliance on trial strategy to excuse counsel's performance is an unreasonable application of *Strickland.*

D. Was Ms. Paine Prejudiced by Counsel's Deficient Performance?

[9] The magistrate judge and the district court concluded that the OCCA's application of *Strickland* was not unreasonable because of Ms. Paine's inability to show prejudice. Both courts were persuaded because "[a]lthough an expert in [BWS] might have helped Ms. Paine, she has not established a probability of a different outcome with the use of a specialist in the syndrome." R. Doc. 19 at 11; R. Doc. 21 at 1-2. Critical to the magistrate judge's conclusion was the idea that a BWS expert could not render an opinion on the ultimate fact of whether Ms. Paine's fear was actually reasonable. R. Doc. 19 at 11. There is no doubt that is true under *Bechtel.* 840 P.2d at 9. However, that is not the point.

Although the expert could not testify to the ultimate fact, testimony about BWS from an expert was *necessary* (in the words of the OCCA, 840 P.2d at 8) to equip the jury to properly assess the reasonableness of Ms. Paine's fear. The magistrate judge emphasized that Dr. King did testify in support of the notion that Ms. Paine's fear was genuine. R. Doc. 19 at 10. But, without testimony about BWS from an expert, the jury was rendered unable to consider fully the evidence presented and to follow the jury instruction to assess the reasonableness of that fear based on the "circumstances and from the viewpoint of the defendant." *Bechtel,* 840 P.2d at 11 (quoting what is now Okla. UJI- Cr. § 8-47, the revised

self-defense instruction required in all BWS cases). Ms. Paine's self-defense theory, the *only* theory offered, was effectively eviscerated by this failure.

The State's case cited in opposition, *Seymour v. Walker,* 224 F.3d 542, 557 (6th Cir.2000), concluded that a failure to offer expert BWS testimony was not ineffective assistance. Aplt. Br. at 21. However, *Seymour* is inapposite because it is based on Ohio law which has a completely subjective self-defense test. Therefore, the usefulness of expert BWS testimony in Ohio is much different than its usefulness under Oklahoma's self-defense test given its reasonableness requirement.

Although the lesson to be drawn from *Bechtel* is obvious, the record before us is unclear on the last remaining element needed to convince us that Ms. Paine was prejudiced under *Strickland:* a qualified BWS expert willing to testify that Ms. Paine was suffering from BWS at the time of the killing and willing to explain the impact of BWS on her state of mind and, specifically, to opine that Ms. Paine's belief that the use of deadly force was necessary to protect herself from imminent danger of death or great bodily harm could be considered reasonable based on her circumstances and viewed from her perspective. *See Bechtel,* 840 P.2d at 6-8. The magistrate judge recognized that Ms. Paine, who was incarcerated and proceeding pro se at the time, claimed that she had already been evaluated by a BWS expert who could testify favorably on her behalf. R. Doc. 19 at 7. Although it is not clear, apparently Ms. Paine's former habeas counsel [FN2] had the supporting materials in ***1205** her possession. To further complicate matters, the magistrate judge also explained that parts of the state appellate record are missing. R. Doc. 18 at 2. Given the gaps in the record pertaining to this critical piece of missing information, we will remand to the district court to conduct a hearing during which Ms. Paine will be given the opportunity to produce a qualified BWS expert as described above.

> FN2. Ms. Paine was represented by counsel on her first habeas petition. That petition was dismissed without prejudice for being a mixed petition of exhausted and unexhausted claims. *See* R. Doc. 2 Attach. A. Ms. Paine proceeded pro se on her second (and instant) habeas petition until she received a COA and we appointed counsel to represent her.

If Ms. Paine is able to satisfy this showing on remand, the prejudice inquiry will be complete. Given the OCCA's insistence that juries entertain misconceptions about BWS that must be overcome before a proper assessment of reasonableness is possible, there would exist at the very least a " *reasonable* probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052 (emphasis added). [FN3]

> FN3. Other courts agree with the OCCA. A few examples include *Dunn,* 963 F.2d at 313-14 (Tenth Circuit); *Washington v. Janes,* 121 Wash.2d 220, 850 P.2d 495, 502 (1993); *West Virginia v. Riley,* 201 W.Va. 708, 500 S.E.2d 524, 530 n. 6 (1997); and *People v. Christel,* 449 Mich. 578, 537 N.W.2d 194, 196 (1995).

Therefore, if Ms. Paine satisfies the requirement on remand, the district court is instructed to grant a conditional writ of habeas corpus effective only if the State refuses to retry Ms. Paine within a reasonable time. If Ms. Paine does not satisfy the requirement, however, then the district court is instructed to deny the petition for failure to demonstrate prejudice under *Strickland.*

This case is REMANDED with instructions.

339 F.3d 1194

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972 P.2d 1157
1998 OK CR 68
(Cite as: 972 P.2d 1157)

Court of Criminal Appeals of Oklahoma.

James Joseph FITZGERALD, Appellant,
v.
STATE of Oklahoma, Appellee.

No. F-96-1200.

Dec. 10, 1998.

Following jury trial before the District Court, Tulsa County, E.R. Turnbull, J., defendant was convicted of first-degree malice murder, two counts of robbery with firearm, and attempted robbery and sentenced to death on murder conviction. Defendant appealed. The Court of Criminal Appeals, Chapel, P.J., held that: (1) refusal to provide defendant with *Ake* expert assistance was harmless error with respect to guilt phase, but was not harmless in penalty phase because of effect on his ability to rebut aggravators and present mitigating evidence; (2) failure to life-qualify jury was abuse of discretion; (3) failure to conduct *Wallace* hearing on pro se defendant's decision to waive presentation of mitigating evidence was not harmless; (4) denial of opportunity to rebut evidence of aggravating circumstance was not harmless; (5) denial of chance to list circumstance of crime in mitigation was not harmless; and (6) cumulative error, in form of five serious errors, none of which were individually harmless beyond reasonable doubt, denied defendant fair and reliable sentencing proceeding.

Convictions affirmed; sentence affirmed in part, remanded for resentencing.

Lumpkin, J., filed opinion concurring in result.

West Headnotes

[1] Criminal Law ⚿641.4(2)
110k641.4(2) Most Cited Cases

A criminal defendant has the absolute right to counsel, but he may waive that right if he clearly and unequivocally declares his wish to proceed pro se and the trial court determines: (1) the defendant is competent to make that decision and (2) the waiver is voluntary, knowing and intelligent. U.S.C.A. Const.Amend. 6.

[2] Criminal Law ⚿641.6(2)
110k641.6(2) Most Cited Cases

[2] Criminal Law ⚿641.9
110k641.9 Most Cited Cases

Competency standard for the waiver of right to counsel is not higher than that for ability to stand trial, and a trial court need make a separate determination of competency only where the court has reason to doubt a defendant's competence. U.S.C.A. Const.Amend. 6.

[3] Mental Health ⚿432
257Ak432 Most Cited Cases

A defendant is competent if he has the present ability to consult with his attorney and a rational and actual understanding of the proceedings against him.

[4] Criminal Law ⚿641.7(1)
110k641.7(1) Most Cited Cases

The trial court must advise a competent defendant who expresses desire to waive right to counsel of the nature of the charges, the offenses against him, the range of punishment, and the dangers of self-representation. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⚿641.4(2)
110k641.4(2) Most Cited Cases

Valid waiver of right to counsel must be determined from the total circumstances of individual case. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⚿641.9
110k641.9 Most Cited Cases

Trial court did not err in failing to conduct separate competency proceeding when defendant, who had been represented by counsel, moved to proceed pro se in capital murder and robbery prosecution, notwithstanding information that defendant suffered from juvenile-onset diabetes and had previous head injury, where nothing in record raised doubt in defendant's ability to make intelligent and knowing waiver. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⚖641.4(4)
110k641.4(4) Most Cited Cases

[7] Criminal Law ⚖641.7(1)
110k641.7(1) Most Cited Cases

Defendant made knowing, intelligent and voluntary waiver of right to counsel in capital murder and robbery prosecution where he was informed of nature of charges, offenses and range of punishment, repeatedly advised that he was making bad decision, and given several opportunities to reconsider his decision. U.S.C.A. Const.Amend. 6.

[8] Criminal Law ⚖655(1)
110k655(1) Most Cited Cases

To prevail on claim that he was deprived of constitutional right to fair, impartial judge, defendant must show the trial court's prejudice against him materially affected his rights at trial, and the defendant must be prejudiced by the trial court's actions. Const. Art. 2, § 6.

[9] Criminal Law ⚖655(1)
110k655(1) Most Cited Cases

Exchanges between court and trial counsel, in which court disagreed with counsel regarding defendant's burden on *Ake* motion and with defendant's claim that experts were necessary to present defense, did not show actual bias or prejudice against defendant that deprived defendant of fair and reliable trial. Const. Art. 2, § 6.

[10] Judges ⚖49(2)
227k49(2) Most Cited Cases

Trial court's expressed personal opinion, out of jury's hearing, that court believed that jury should have information about prior violent felony because crime was same as some offenses involved in current prosecution, did not reflect bias or prejudice requiring recusal, as comment was not communicated to jury and thus could not have prejudiced defendant. Const. Art. 2, § 6.

[11] Criminal Law ⚖796
110k796 Most Cited Cases

Refusal to instruct in mitigation that defendant was under the influence of alcohol at the time of the crimes, while puzzling in face of evidence that defendant had been drinking, did not support inference that decision was made because of bias against defendant and therefore did not infringe on his right to fair and impartial judge. Const. Art. 2, § 6.

[12] Costs ⚖302.2(2)
102k302.2(2) Most Cited Cases

Ake principles regarding determination of whether state funds should be used to provide indigent defendant with access to psychiatric experts extend to any expert necessary for adequate defense.

[13] Criminal Law ⚖1148
110k1148 Most Cited Cases

Trial court's action in denying *Ake* motion for expert assistance is reviewed for abuse of discretion.

[14] Costs ⚖302.2(2)
102k302.2(2) Most Cited Cases

In applying *Ake* to determine whether indigent defendant is entitled to expert assistance at state expense, court should balance: (1) defendant's private interest in accuracy of the proceedings; (2) State's interest affected by providing the assistance; and (3) probable value of the procedural safeguards sought and the risk of inaccuracy in the procedural safeguards sought and the risk of inaccuracy in the proceedings without the requested assistance.

[15] Costs ⚖302.4
102k302.4 Most Cited Cases

Defendant made threshold showing necessary to qualify for expert assistance under *Ake* principles by presenting evidence regarding his juvenile-onset diabetes, probable brain damage from his head injury, and drinking habits, and claiming that expert assistance was required to determine if combination of these factors affected his mental processes and deprived him of the ability to form the intent to kill.

[16] Costs ⚖302.4
102k302.4 Most Cited Cases

In order to satisfy *Ake* threshold for expert assistance, defendant was not required to show that he actually suffered from claimed conditions and

problems at time of offense.

[17] Homicide ⚿829
203k829 Most Cited Cases
(Formerly 203k28)

Voluntary intoxication is not a complete defense to malice murder but may be considered in determining whether a defendant had the intent to kill during the commission of the crime.

[17] Homicide ⚿829
203k829 Most Cited Cases
(Formerly 203k28)

Voluntary intoxication is not a complete defense to malice murder but may be considered in determining whether a defendant had the intent to kill during the commission of the crime.

[18] Costs ⚿302.4
102k302.4 Most Cited Cases

Refusal to grant defendant's *Ake* request for expert assistance resulted in error in guilt phase of malice murder and robbery prosecution, as it prejudiced defendant's attempt to show that combination of his juvenile-onset diabetes, possible organic brain damage and drinking rendered him incapable of forming the intent necessary for malice murder.

[19] Criminal Law ⚿1162
110k1162 Most Cited Cases

Generally, a right to which a defendant is not entitled absent some threshold showing cannot fairly be defined as basic to the structure of a constitutional trial, for purposes of harmless error analysis.

[20] Criminal Law ⚿1166(1)
110k1166(1) Most Cited Cases

Harmless error analysis ordinary applies to *Ake* error.

[21] Criminal Law ⚿1166(1)
110k1166(1) Most Cited Cases

Error in refusing defendant's *Ake* request for expert assistance was harmless beyond reasonable doubt in guilt phase of malice murder and robbery prosecution, as expert testimony was not necessary in face of overwhelming evidence of intoxication that was sufficient by itself to raise voluntary intoxication defense.

[22] Constitutional Law ⚿248(2)
92k248(2) Most Cited Cases

[22] Costs ⚿302.2(2)
102k302.2(2) Most Cited Cases

Error in refusing defendant's *Ake* request for expert assistance did not violate equal protection in malice murder and robbery prosecution, even though defendant would have been entitled to funding in most other counties from public defender's office without necessity of making motion, absent some indication that defendant was treated differently from other capital defendants who were similarly situated. U.S.C.A. Const.Amend. 14.

[23] Sentencing and Punishment ⚿50
350Hk50 Most Cited Cases
(Formerly 110k986.2(1))

[23] Sentencing and Punishment ⚿92
350Hk92 Most Cited Cases
(Formerly 110k986.2(1))

[23] Sentencing and Punishment ⚿94
350Hk94 Most Cited Cases
(Formerly 110k986.2(1))

Defendant may present in mitigation any aspect of his record or character, and any circumstances of the crime.

[24] Costs ⚿302.4
102k302.4 Most Cited Cases

Error in refusing defendant's *Ake* request for expert assistance prejudiced defendant in punishment phase of malice murder prosecution and resulted in error by limiting defendant's ability to show mitigating effect of his diabetes and possible organic brain damage and to rebut State's charge that defendant was continuing threat.

[25] Costs ⚿302.2(2)
102k302.2(2) Most Cited Cases

Qualified defendant should receive expert

assistance at state expense to rebut any State evidence of continuing threat, in sentencing phase of capital trial.

[26] Criminal Law ⚿1166(1)
110k1166(1) Most Cited Cases

Error occurring in penalty phase of malice murder trial, when denial of *Ake* experts hindered rebuttal of continuing threat aggravator and prevented any effective presentation of mitigating evidence regarding defendant's diabetes and possible brain damage, was not harmless beyond reasonable doubt.

[27] Jury ⚿131(6)
230k131(6) Most Cited Cases

Voir dire is designed to discover actual and implied bias and determine whether jurors' views would substantially impair the performance of juror duties in accordance with the trial court's instructions and the juror oath.

[28] Jury ⚿33(2.15)
230k33(2.15) Most Cited Cases

[28] Jury ⚿131(8)
230k131(8) Most Cited Cases

Upon a defendant's request, a trial court must determine whether each juror can consider the punishments of life and life without parole as well as the death penalty; in other words, "life-qualify" the jury.

[29] Jury ⚿33(2.15)
230k33(2.15) Most Cited Cases

[29] Jury ⚿131(8)
230k131(8) Most Cited Cases

It is not error for a trial court to deny a defendant's request that the court life-qualify the jury where trial counsel has the opportunity to ask those questions, but a defendant, his attorney, or the trial court must be allowed to ask life-qualifying questions after the defendant's request.

[30] Jury ⚿33(2.15)
230k33(2.15) Most Cited Cases

[30] Jury ⚿131(8)
230k131(8) Most Cited Cases

Trial court abused its discretion in failing to life qualify jury in malice murder prosecution after pro se defendant unartfully attempted to ask life-qualifying questions, to which State's objections were sustained.

[31] Sentencing and Punishment ⚿1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)

It was not error to exclude evidence during punishment phase of malice murder prosecution from Department of Corrections official who would have testified about the conditions under which defendant would serve a sentence of life imprisonment without the possibility of parole.

[32] Sentencing and Punishment ⚿1780(2)
350Hk1780(2) Most Cited Cases
(Formerly 203k358(1))

[32] Sentencing and Punishment ⚿1782
350Hk1782 Most Cited Cases
(Formerly 203k358(1))

In capital sentencing stage of malice murder prosecution, evidence of nonviolent nature of defendant's prior conviction for escape should have been admitted for use in closing argument to rebut State's use of conviction to support aggravators, notwithstanding defendant's reliance on noncertified document and his failure to introduce evidence prior to resting, given scope of capital defendant's right to present evidence rebutting aggravating circumstances and misunderstanding which resulted in surprise in State's use of conviction.

[33] Sentencing and Punishment ⚿1789(9)
350Hk1789(9) Most Cited Cases
(Formerly 203k343)

[33] Sentencing and Punishment ⚿1782
350Hk1782 Most Cited Cases
(Formerly 203k358(1))

Trial court's failure to conduct mandatory *Wallace* hearing, on waiver of right to present mitigating evidence in capital murder sentencing proceeding, was error analogous to trial error, rather than being structural in nature, and thus was subject to

harmless error review.

[34] Criminal Law ⚿1177
110k1177 Most Cited Cases

If, from the record, it is apparent a defendant (a) understands the difference between life and death, (b) understands and appreciates the vital importance of mitigating evidence in capital proceedings, and (c) voluntarily and intelligently waives all right to present mitigating evidence, then failure to hold a *Wallace* hearing on waiver may be harmless.

[35] Sentencing and Punishment ⚿1789(9)
350Hk1789(9) Most Cited Cases
(Formerly 203k343)

Failure to conduct *Wallace* hearing based on defendant's intent not to present mitigating evidence in capital punishment proceedings was not harmless where it was not clear from record that defendant understood purpose or importance of mitigating evidence.

[36] Homicide ⚿829
203k829 Most Cited Cases
(Formerly 203k28)

Voluntary intoxication is not a complete defense to malice murder but may be considered in determining whether a defendant had the intent to kill during the commission of the crime.

[37] Criminal Law ⚿774
110k774 Most Cited Cases

Where the trial court finds insufficient evidence has been introduced that defendant was so intoxicated his mental powers were overcome and he was unable to form criminal intent to support a voluntary intoxication defense, it is within the court's discretion to either reject an instruction on voluntary intoxication or instruct the jury that voluntary intoxication is not a defense.

[38] Criminal Law ⚿774
110k774 Most Cited Cases

[38] Homicide ⚿1506
203k1506 Most Cited Cases
(Formerly 203k294.2)

Instructing jury that voluntary intoxication was not defense to crime in malice murder and robbery prosecution was not abuse of discretion, given conflicting evidence regarding defendant's level of intoxication and amount of detail he recalled in each statement to police.

[39] Sentencing and Punishment ⚿1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)

Jury was improperly prevented from considering intoxication in mitigation in punishment phase of malice murder prosecution by trial court's refusal to instruct in mitigation that defendant was under influence of alcohol at time of crimes, despite its finding in capital felony report that defendant was under influence, coupled with its instruction in guilt phase that voluntary intoxication was not defense to malice murder charge, which was incorporated into second stage proceedings.

[40] Criminal Law ⚿1186.1
110k1186.1 Most Cited Cases

Cumulative error, in form of five serious errors, none of which were individually harmless beyond reasonable doubt, denied capital defendant fair and reliable sentencing proceeding so as to require reversal of death sentence and remand for resentencing; errors included failure to life-qualify jurors, denial of experts to assist in presentation of mitigating evidence, failure to conduct *Wallace* hearing on decision to waive presentation of mitigating evidence, denial of opportunity to rebut evidence of aggravating circumstance, and denial of chance to list circumstance of crime in mitigation.
***1160** An Appeal from the District Court of Tulsa County; E.R. Turnbull, District Judge.

James Joseph Fitzgerald was convicted of one count of First Degree Murder, two counts of Robbery with a Firearm, and one count of Attempted Robbery with a Firearm in Case No. CF-94-3451, in the District Court of Tulsa County, sentenced to death and life imprisonment plus a $10,000 fine, and appeals. The Judgment is AFFIRMED. The Sentences on Counts I, II, and IV are ***1161** AFFIRMED. Count III, the death sentence, is REMANDED for resentencing.

Sid Conway, Tulsa, for Defendant at trial.

972 P.2d 1157
1998 OK CR 68
(Cite as: 972 P.2d 1157)

Tim Harris, Mark Collier, Assistant District Attorneys, Tulsa, for the State at trial.

Paula J. Alfred, Assistant Public Defender, Tulsa, for Appellant on appeal.

W.A. Drew Edmondson, Attorney General of Oklahoma, William L. Humes, Assistant Attorney General, for Appellee on appeal.

OPINION

CHAPEL, Presiding Judge:

¶ 1 James Joseph Fitzgerald was tried by jury and convicted of Count I, Robbery with a Firearm in violation of 21 O.S.1991, § 801; Count II, Attempted Robbery with a Firearm in violation of 21 O.S.1991, § 801; Count III, First Degree Murder (Malice Aforethought) in violation of 21 O.S.1991, § 701.7; and Count IV, Robbery with a Firearm in violation of 21 O.S.1991, § 801, in the District Court of Tulsa County, Case No. CF-94-3451. The jury found that Fitzgerald (1) was previously convicted of a felony involving the use or threat of violence; (2) committed the murder in order to avoid or prevent a lawful arrest or prosecution; and (3) probably would commit criminal acts of violence that would constitute a continuing threat to society. In accordance with the jury's recommendation, the Honorable E.R. Turnbull sentenced Fitzgerald to life imprisonment plus a $10,000 fine on Counts I, II, and IV, and death on Count III. Fitzgerald has perfected his appeal of this conviction and raises sixteen propositions of error. After thorough consideration of the record before us, we find pervasive error in the second stage of trial compels us to remand Count III for resentencing.

¶ 2 Fitzgerald spent the evening of July 15, 1994, with Regina Stockfleth and other friends. In the early morning hours of July 16, Fitzgerald, armed with an SKS assault rifle, robbed the Git-N-Go store at 7494 East Admiral Street in Tulsa. After the robbery he returned to Stockfleth's house, wearing a bandanna around his neck and carrying $55 cash in a Git-N-Go bag. He was asked to leave.

¶ 3 Fitzgerald arrived at the Git-N-Go store at 6938 East Pine about 2:45 a.m. The clerk, William Russell, took the SKS rifle away from Fitzgerald. Russell pointed the rifle at Fitzgerald but apparently could not release the safety on the weapon. Fitzgerald came over the counter, and the two scuffled. Russell escorted Fitzgerald (who had the rifle) out of the store and locked the doors. As Russell retreated behind the store counter, Fitzgerald turned and fired, shattering the glass doors. His bandanna mask had fallen, and his face was visible. Fitzgerald pointed the gun in Russell's direction and fired several shots, then ran. Police recovered eight spent casings and six bullets from various locations in the store, and one bullet was found in Russell's body. That bullet had passed through six cigarette packages, two counter partitions, and a roll of calculator tape before entering Russell near his left armpit. The bullet pierced his lung and spine and broke two ribs. Russell had massive internal bleeding and died of a gunshot wound to the chest.

¶ 4 After leaving the Pine Street store, Fitzgerald robbed the Git-N-Go store at 903 North Yale at approximately 3:00 a.m. He wore a bandanna mask and threatened the clerk with the SKS assault rifle. After this robbery Fitzgerald briefly returned to his parents' home, then left the state. In Illinois he traded the SKS rifle for $100 and a .357 magnum handgun. He was arrested in Missouri. Fitzgerald confessed to robbing the two stores and attempting to rob the store on Pine Street, but insisted he did not intend to injure or kill Russell.

¶ 5 Fitzgerald was represented by appointed counsel until a month before trial, when he exercised his right to proceed *pro se*. Trial counsel remained in the courtroom as standby counsel and assisted Fitzgerald in framing objections and making arguments to the court. Fitzgerald presented no evidence in mitigation in the second stage of the proceedings (punishment on the capital charge) or the third stage (punishment on the robbery charges).

***1162 ISSUES RELATING TO GUILT OR INNOCENCE**

[1][2][3][4][5] ¶ 6 In Proposition I Fitzgerald claims the trial court erred by accepting his purported waiver of the constitutional right to counsel where there was no determination of

competency and the purported waiver was not knowingly and intelligently made thus violating constitutional provisions. A criminal defendant has the absolute right to counsel, but he may waive that right if he clearly and unequivocally declares his wish to proceed *pro se* and the trial court determines: (1) the defendant is competent to make that decision and (2) the waiver is voluntary, knowing and intelligent. [FN1] The competency standard for the waiver of right to counsel is not higher than that for ability to stand trial, and a trial court need make a separate determination of competency only where the court has reason to doubt a defendant's competence. [FN2] A defendant is competent if he has the present ability to consult with his attorney and a rational and actual understanding of the proceedings against him. [FN3] The trial court must advise a competent defendant of the nature of the charges, the offenses against him, the range of punishment, and the dangers of self-representation. [FN4] This Court has consistently refused to impose a list of factors on trial courts, holding instead that a valid waiver is determined from the total circumstances of each case. [FN5]

FN1. *Faretta v. California,* 422 U.S. 806, 835-36, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); *Braun v. State,* 1995 OK CR 42, 909 P.2d 783, 787, *cert. denied,* 517 U.S. 1144, 116 S.Ct. 1438, 134 L.Ed.2d 559 (1996).

FN2. *Godinez v. Moran,* 509 U.S. 389, 401 n. 13, 113 S.Ct. 2680, 2688 n. 13, 125 L.Ed.2d 321 (1993).

FN3. *Cargle v. State,* 1995 OK CR 77, 909 P.2d 806, 815, *cert. denied,* 519 U.S. 831, 117 S.Ct. 100, 136 L.Ed.2d 54 (1996).

FN4. *Braun,* 909 P.2d at 787.

FN5. *Id.* at 788; *Edwards v. State,* 1991 OK CR 71, 815 P.2d 670, 673.

[6] ¶ 7 Fitzgerald was represented by appointed counsel throughout the preliminary proceedings. On April 18, 1996, a hearing was held at which Fitzgerald's motion to proceed *pro se* was granted (trial began May 20). The trial court questioned Fitzgerald extensively to determine whether he was dissatisfied with his attorney's representation and whether he understood the consequences of his decision. Fitzgerald said he and his attorney did not agree on his defense but stated he was satisfied with her qualifications and experience. He said self-representation was his right as an American citizen and indicated he preferred to take control of his case since he would have to live with the outcome. The trial court found Fitzgerald was "in control of your faculties, that you understand what's going on, that you understand the conversations, the meaning and the consequences of conversations that we're having." [FN6] The trial court advised Fitzgerald of the nature of the charges, the offenses charged, and the range of punishment possible for each offense. Trial counsel confirmed she had explained Fitzgerald's Sixth Amendment rights. The trial court repeatedly advised Fitzgerald against self- representation, pointing out Fitzgerald did not know what he was doing, that this was a bad decision, and that Fitzgerald could get the death penalty because he decided to go *pro se.* In subsequent motions proceedings the trial court explained court procedures and gave Fitzgerald a comprehensive written outline of the trial structure, which included the court's *voir dire* questions on the death penalty and indicated when Fitzgerald would have the opportunity to argue, present evidence, and make motions to the court. The trial court arranged for Fitzgerald to have reasonable opportunity to move about the courtroom and present documents to the court or witnesses and defined the court's role in the proceedings. Throughout, the trial court stated if Fitzgerald changed his mind standby counsel would be re-appointed to represent him, even if trial had begun, and urged Fitzgerald to reconsider. Fitzgerald insisted he wanted to represent himself.

FN6. April 18, 1996 Motions Hearing Transcript at 10.

***1163** ¶ 8 The trial court determined that Fitzgerald was competent to waive counsel by

finding that Fitzgerald was in control of his faculties and understood the proceedings. Fitzgerald claims the trial court should have conducted a separate hearing to determine competency because he had presented information raising a doubt about his competency to waive counsel. In support of his requests for state-funded expert assistance, Fitzgerald submits: (a) evidence that he suffered from juvenile-onset diabetes; (b) evidence he had received a gunshot wound to the head requiring surgery; (c) medical reports discussing some physical symptoms associated with juvenile-onset diabetes and the effects the disease may have on physical and psychosocial development, as well as evidence describing the effect of alcohol on a person with this disease; (d) assertions that he suffered some of these physical symptoms; and (e) evidence that he had been drinking the night of the murder. This information was not presented to support a suggestion that Fitzgerald was incompetent to stand trial or waive his right to counsel. Fitzgerald's competence was not questioned at any point in the proceedings, and the record does not support an inference that his decision to waive counsel resulted from poor impulse control, an exaggerated emotional reaction, a reaction to alcohol, or any other cognitive defect. Nothing in the record suggests Fitzgerald appeared incompetent or acted in an unusual manner during the hearing on his motion to proceed *pro se*, and no evidence introduced then or at any other proceeding cast doubt on Fitzgerald's ability to make an intelligent and knowing waiver. This Court cannot find that the information about Fitzgerald's diabetes and head injury alone raised a doubt about his competency sufficient to require a separate competency proceeding.

[7] ¶ 9 Fitzgerald also gave a knowing, intelligent, and voluntary waiver. He denied his decision was coerced during the April 18, 1996, hearing and does not suggest coercion on appeal. Fitzgerald had several prior convictions and was familiar with the criminal justice system. He was informed of the nature of the charges, offenses, and range of punishment and repeatedly advised that this was a bad decision. Over the course of several hearings, the trial court explained courtroom procedure and the role of each party, including Fitzgerald and standby counsel. Offered several opportunities to reconsider his decision, Fitzgerald clearly and unequivocally stated his intention to proceed *pro se*. [FN7] The record shows Fitzgerald's waiver of his right to counsel was knowing and voluntary. [FN8] This proposition is denied.

FN7. *Faretta,* 422 U.S. at 836, 95 S.Ct. at 2541.

FN8. *Braun,* 909 P.2d at 787.

[8] ¶ 10 In Proposition III Fitzgerald claims the trial court showed obvious bias in this case depriving him of the right to an impartial judge in violation of constitutional provisions. The Oklahoma Constitution guarantees a defendant a right to a fair, impartial trial not tainted by the personal bias or prejudice of the trial court. [FN9] A defendant must show the trial court's prejudice against him materially affected his rights at trial, and the defendant must be prejudiced by the trial court's actions. [FN10] "The decision to recuse is within the discretion of the trial court, and this Court will disturb that ruling only for an abuse of discretion." [FN11] Abuse of discretion has occurred where trial judges become intertwined in cases due to personal relationships or take actions showing actual prejudice against a defendant. [FN12]

FN9. Okla. Const. art II, § 6; *Bryan v. State,* 1997 OK CR 15, 935 P.2d 338, 354-55, *cert. denied,* 522 U.S. 957, 118 S.Ct. 383, 139 L.Ed.2d 299.

FN10. *Bryan,* 935 P.2d at 354; *Stouffer v. State,* 1987 OK CR 92, 738 P.2d 1349, 1353, *cert. denied,* 484 U.S. 1036, 108 S.Ct 763, 98 L.Ed.2d 779; *Carter v. State,* 1977 OK CR 57, 560 P.2d 994, 996-97.

FN11. *Bryan,* 935 P.2d at 354-55.

FN12. *Wilkett v. State,* 1984 OK CR 16, 674 P.2d 573 (trial court expressed resentment of defendant, accused trial counsel of dishonest, false and dilatory

action, and revealed annoying pre-trial contacts with defendant's family members); *Merritt v. Hunter,* 1978 OK 18, 575 P.2d 623 (trial court traveled without subpoena at own expense to testify against defendant's opponent in pending Kansas case); *Sadberry v. Wilson,* 1968 OK 61, 441 P.2d 381 (trial court must award brother attorney fees); *State ex rel. Larecy v. Sullivan,* 207 Okl. 128, 248 P.2d 239 (1952) (wife's opponent in divorce case worked for trial court political campaigns; opponent attorney was advisor to trial court).

***1164** [9] ¶ 11 Fitzgerald claims the trial court's repeated denial of his *Ake* claims shows actual bias which deprived him of a fair and reliable trial. He cites an exchange during a hearing held August 31, 1995, in which trial counsel asked Judge Turnbull to recuse. Counsel recalled that, at a previous hearing, Judge Turnbull said he did not believe in this sort of defense, [FN13] possibly because he hadn't quite gotten the prosecutor out of himself. Judge Turnbull replied that he thought counsel had misunderstood, that he may have said he was fresh out of the prosecutor's office and for that reason trying to be fair and impartial, and that he believed in every defense the law says is appropriate. The record suggests this exchange was in fact based on a misunderstanding. Nothing in subsequent proceedings indicates Judge Turnbull *did not believe* in Fitzgerald's defense, but he frequently said he *disagreed* with counsel regarding Fitzgerald's burden to make a showing before he was entitled to experts in order to present that defense to the jury; he also disagreed with Fitzgerald's claim that experts were necessary to present this evidence. This exchange simply does not show bias or prejudice against Fitzgerald.

FN13. Judge Turnbull was referring to Fitzgerald's request for experts to explain the effects of juvenile-onset diabetes, alcohol, and possible neurological impairment from the head wound.

[10] ¶ 12 Fitzgerald also complains of a comment Judge Turnbull made, out of the hearing of the jury, during a discussion of evidence to be offered in the second stage of trial. The State had filed notice that it would introduce an Indiana armed robbery conviction to support the aggravating circumstance that Fitzgerald had committed prior violent felonies. When Fitzgerald offered to enter a *Brewer* [FN14] stipulation to this offense, the State objected claiming details of the crime would be admissible to prove continuing threat. Judge Turnbull found in favor of Fitzgerald since the State had not given notice that this prior offense would be used to support the continuing threat aggravating circumstance. During the discussion Judge Turnbull remarked that he believed the jury should have this information since it was the same crime Fitzgerald had committed in this case. This comment does not reflect bias or prejudice requiring recusal. We have never held a trial court must have no personal opinions regarding guilt or innocence, or prejudice against a particular crime. The question is whether the trial court's personal opinion, if any, is communicated to the jury, skewing the fact-finding and deliberation process. [FN15] As this exchange was out of the jury's hearing, any possible negative inference could not have prejudiced Fitzgerald.

FN14. *Brewer v. State,* 1982 OK CR 128, 650 P.2d 54, 63, *cert. denied,* 459 U.S. 1150, 103 S.Ct. 794, 74 L.Ed.2d 999 (1983) (defendant must be allowed to stipulate that prior felony convictions involved the use or threat of violence to the person).

FN15. *Arnold v. State,* 1990 OK CR 78, 803 P.2d 1145, 1148-49; *T.R.M. v. State,* 1979 OK CR 59, 596 P.2d 902, 905.

[11] ¶ 13 Finally, Fitzgerald claims bias in the trial court's refusal to instruct in mitigation that Fitzgerald was under the influence of alcohol at the time of the crimes. Judge Turnbull sustained the State's objection to this instruction without comment but observed in his Capital Felony Report that evidence was presented Fitzgerald was under the influence of alcohol at the time of the crimes. While we find this decision puzzling (see Proposition IX), nothing in the record supports an

inference that the decision was made because of bias against Fitzgerald.

¶ 14 The trial court must perform its duty to see both sides have a fair trial. [FN16] None of the comments discussed above showed bias against Fitzgerald or infringed on his right to a fair trial. This proposition is denied.

FN16. *Bryan,* 935 P.2d at 355.

SECOND STAGE PROPOSITIONS CUMULATIVELY REQUIRING REVERSAL

¶ 15 Fitzgerald claims in Proposition II that the trial court erred by denying Fitzgerald expert funds after a proper *Ake* showing, ***1165** thus depriving him of the right to present a first-stage defense and the right to present a defense to the death penalty by way of mitigation. He claims in two subpropositions that the trial court's denial of funds to hire an expert on juvenile-onset diabetes and a neuropsychiatrist deprived him of the ability to defend against the capital charges. We determine the trial court abused its discretion in denying Fitzgerald funds for experts. While denial of the funds was error in both stages, the first stage error was harmless. The error was not harmless in second stage.

[12][13] ¶ 16 Fitzgerald tirelessly and constantly requested that the State provide funds under *Ake v. Oklahoma* [FN17] for a neuropsychologist and an expert on juvenile-onset diabetes. Fitzgerald had to apply to the trial court because he was defended by the Tulsa County Public Defender's Office rather than the Oklahoma Indigent Defense System, which handles such funding requests internally. [FN18] *Ake* held that when an indigent defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, he is entitled to experts, at the State's expense, who will assist in evaluation, preparation and presentation of the defense. [FN19] This Court has extended the principles of *Ake* to any expert necessary for an adequate defense. [FN20] In doing so, we have emphasized the necessity of providing each defendant with the "basic tools" for his defense. [FN21] This comports with the Legislature's intent that indigent defendants be provided experts, and non-expert assistance, at State expense. In creating the Indigent Defense System, the Legislature has consistently provided that the Executive Director of that System shall approve expert witnesses, and non-expert assistance, when those services are necessary in a particular case. [FN22] The Legislature has also provided that in counties where the population is over 200,000 expert witness compensation for indigent defendants shall be paid by the court fund. [FN23] We are concerned here, not with the technicalities of who pays and what procedures for payment are followed, but with the clear intention that all defendants are entitled to necessary expert assistance when that constitutes a basic defense tool. By extending *Ake,* we have ensured that the Legislature's intent is preserved, and indigent defendants in all counties of Oklahoma have access to the basic tools necessary for an adequate defense.

FN17. 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

FN18. 22 O.S.Supp.1997, § 1355.4(D).

FN19. *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096.

FN20. *Rogers v. State,* 1995 OK CR 8, 890 P.2d 959, 966, *cert. denied,* 516 U.S. 919, 116 S.Ct. 312, 133 L.Ed.2d 215 (and cases cited therein).

FN21. *Washington v. State,* 1990 OK CR 75, 800 P.2d 252, 253; *see also Ake v. State,* 1989 OK CR 30, 778 P.2d 460, 464 n. 1 (this Court follows other states in concluding *Ake* applies to any expert necessary for adequate defense).

FN22. 22 O.S.Supp.1997, § 1355.4(D) (expert witnesses approved from a list of authorized expert contractors; non-experts authorized by the Executive Director upon request and approval). In *Toles v. State,* 1997 OK CR 45, 947 P.2d 180, 187-88,

we held there was no *Ake* violation where the Executive Director failed to approve an attorney's request for a pharmacologist to investigate and develop a voluntary intoxication defense. *Toles* is distinguishable because there, we determined that the Executive Director of OIDS was a member of the defense team, and the decision to deny funding was thus trial strategy. Here, of course, the trial court is not a member of the defense team, and its decision to deny funds cannot be considered a strategic move by the defense. We review the trial court's action for abuse of discretion.

FN23. 19 O.S.Supp.1997, § 138.8. Payment is pursuant to procedures established by the governing board of the court fund.

[14] ¶ 17 Applying the three-part test set forth in *Ake,* we balance: (1) Fitzgerald's private interest in the accuracy of the proceedings; (2) the State's interest affected by providing the assistance; and (3) the probable value of the procedural safeguards sought and the risk of inaccuracy in the proceedings without the requested assistance. [FN24] We conclude that Fitzgerald's interest and the interest of accuracy in the proceedings outweigh the State's interest in not expending funds. The trial court apparently also came to this ***1166** conclusion, as its repeated denials of Fitzgerald's request turn instead on whether Fitzgerald had made the required preliminary showing.

FN24. *Ake,* 470 U.S. at 78-80, 105 S.Ct. at 1093-1094; *Rogers,* 890 P.2d at 966.

¶ 18 Fitzgerald claimed that the combination of his juvenile-onset diabetes, probable brain damage from his head injury, and drinking habits (including drinking before committing the crimes) affected his mental processes and deprived him of the ability to form the intent to kill necessary for malice murder. To qualify for expert assistance, a defendant must make "an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense...." [FN25] We have held the threshold showing is met where a defendant shows need and that he will be prejudiced by the lack of expert assistance. [FN26] Fitzgerald presented evidence to support his claims at four *ex parte* pretrial motions hearings; *ex parte* hearings were also held after the first stage and before second stage instructions were given. Each time, the trial court determined Fitzgerald had failed to make the preliminary showing necessary under *Ake.*

FN25. *Ake,* 470 U.S. at 82, 105 S.Ct. at 1096.

FN26. *Rogers,* 890 P.2d at 967; *Tibbs v. State,* 1991 OK CR 115, 819 P.2d 1372, 1377.

¶ 19 Over the course of these hearings, Fitzgerald presented: (1) evidence admitted in the preliminary hearing that he had been drinking and was under the influence of alcohol at the time of the crime; (2) medical evidence that he suffered from juvenile-onset diabetes and had received a gunshot wound to the head requiring surgery in 1985; (3) medical articles on the physical, psychological, and psychosocial effects of juvenile-onset diabetes; (4) information that the combination of alcohol and juvenile-onset diabetes could result in poor judgment, poor impulse control, and exaggerated emotional responses; (5) an affidavit detailing Fitzgerald's physical and psychological symptoms corresponding with symptoms discussed in the medical literature; (6) an affidavit including a neuropsychologist's general explanation of the symptoms which, occurring after a head wound, may signal brain injury, and a description of the neuropsychological tests necessary to determine the existence and extent of such an injury; (7) an affidavit from the then Deputy Chief of the Capital Trial Division, Oklahoma Indigent Defense System (OIDS), who believed that Fitzgerald would qualify for expert funds were he being defended by OIDS; (8) information about Fitzgerald's childhood and family life resulting from his diabetes; and (9) Dr. Taylor's current psychological evaluation noting Fitzgerald's head injury and diabetes, diagnosing him as depressed, alcoholic, with poorly regulated diabetes and probable neurological impairment, and

strongly recommending neurological testing plus consultation with a juvenile-onset diabetes expert. This is far more than, as the State argues, an "underdeveloped claim"; Dr. Taylor's report, combined with the other evidence, certainly contained enough information to meet the threshold requirement for a preliminary showing. [FN27]

FN27. *Caldwell v. Mississippi,* 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 2637 n. 1, 86 L.Ed.2d 231 (1985).

[15][16] ¶ 20 Fitzgerald argued to the trial court and claims on appeal that this information is sufficient to meet the *Ake* threshold. We agree. In applying for funds to hire experts, Fitzgerald is merely required to show his physical and psychological condition at the time of the crime will be *a significant factor* in his defense. *Ake* stated a defendant has a right to expert assistance "to help determine whether the insanity defense is viable," as well as to conduct an appropriate examination and assist a defendant in evaluating, preparing, and presenting his defense. [FN28] The trial court consistently held that, to make a proper showing, Fitzgerald would have to demonstrate that he actually suffered from these conditions and problems at the time of the offense. To require such specificity in a preliminary showing renders the *Ake* categories of assistance pointless. [FN29] If a defendant ***1167** must be able to show initially that he actually suffered from a condition at the time of the offense, there is no need for expert assistance in determining whether the defense based on that condition is viable, nor will an expert be needed to evaluate the defendant and the defense.

FN28. *Ake,* 470 U.S. at 82-83, 105 S.Ct. at 1096.

FN29. Cf. *Starr v. Lockhart,* 23 F.3d 1280, 1290-91 (8th Cir.), *cert. denied sub nom. Norris v. Starr,* 513 U.S. 995, 115 S.Ct. 499, 130 L.Ed.2d 409 (1994) (ability to subpoena and question State examiners does not fulfill *Ake* requirements regarding assistance, evaluation and presentation).

¶ 21 Fitzgerald made a showing of need when he presented detailed evidence, including a psychologist's report, [FN30] that he (1) suffered from a chronic, long-term physical condition with psychological components that, combined with alcohol, may have affected his judgment and behavior the night of the crimes, and assistance of a juvenile-onset diabetes expert was necessary to confirm and explain that connection and (2) had suffered a wound with probable organic brain damage which could have affected his judgment and behavior the night of the crimes, and which could only be determined through specific neuropsychological testing available in the community. We discuss his showing of prejudice with regard to each stage of the trial below.

FN30. The fact Fitzgerald was examined and diagnosed by Dr. Taylor does not change our decision that he was entitled to his requested experts under *Ake.* Dr. Taylor, a psychologist, diagnosed Fitzgerald as best she could but was not qualified to adequately diagnose or explain Fitzgerald's conditions which went to his ability to form intent. Dr. Taylor explicitly recommended further testing by appropriate experts in those areas. This is not a case where a defendant is provided with an expert but wishes to have access to more or better experts. Rather, Fitzgerald was examined by Dr. Taylor in an effort to show that he needed appropriate expert assistance to prepare his defense--he was, in fact, trying to use an expert to get an expert. *Ake* emphasized that a defendant is entitled to appropriate expert assistance. *Ake,* 470 U.S. at 82-83, 105 S.Ct. at 1096. Dr. Taylor was not the appropriate expert in this case.

[17][18] ¶ 22 We first address Fitzgerald's claim that he was deprived of the right to present a first-stage defense. Since his arrest, Fitzgerald has stated he did not intend to kill Russell. Fitzgerald claimed he needed the experts during the first stage of trial to effectively present his defense that voluntary intoxication, under his special circumstances, rendered him incapable of forming the intent necessary for malice murder. Voluntary

intoxication is not a complete defense to malice murder but may be considered in determining whether a defendant had the intent to kill during the commission of the crime. [FN31] Sufficient evidence must be introduced to show a defendant was so intoxicated his mental powers were overcome and he was unable to form criminal intent. [FN32] Fitzgerald showed he was prejudiced by the trial court's ruling since the experts would have tied the evidence that he was intoxicated at the time of the crimes to evidence that he suffered from diabetes (and, possibly, organic brain damage). The experts would have explained to the jury how the combination of those two factors created a physical/mental condition in which Fitzgerald was unable to form the intent necessary for malice murder. This testimony would have strengthened Fitzgerald's claim that he did not intend to kill Russell and enabled him to rebut the State's very effective argument for malice murder, which was based in large part on the State's version of Fitzgerald's state of mind at the time. Fitzgerald showed both need and prejudice, and the trial court's denial of his request for expert funds was error.

FN31. *Edwards v. State,* 1982 OK CR 204, 655 P.2d 1048, 1051; *Jones v. State,* 1982 OK CR 112, 648 P.2d 1251, 1255, *cert. denied,* 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983).

FN32. *Jackson v. State,* 1998 OK CR 39, 964 P.2d 875, 892.

[19][20] ¶ 23 Having found error in the first stage proceedings, we must determine whether harmless error analysis applies. Fitzgerald relies on *Frederick v. State* [FN33] for his claim that harmless error analysis cannot apply. In *Frederick* the defendant's only defense was insanity; the erroneous denial of an *Ake* expert completely denied him any ability to defend against the charges. This Court determined the error permeated the entire trial, since we could not look at any evidence presented on Frederick's behalf but would be forced to speculate on what it might have been. Under those narrow circumstances, we held the denial of an *Ake* expert was not subject to harmless error analysis. ***1168** However, we agree with the Tenth and Eighth Circuits that, generally, "a right to which a defendant is not entitled absent some threshold showing [cannot] fairly be defined as basic to the structure of a constitutional trial." [FN34] We hold that, absent the narrow circumstances presented by *Frederick,* harmless error analysis applies to *Ake* error.

FN33. 1995 OK CR 44, 902 P.2d 1092.

FN34. *Brewer v. Reynolds,* 51 F.3d 1519, 1529 (10th Cir.1995), *cert. denied,* 516 U.S. 1123, 116 S.Ct. 936, 133 L.Ed.2d 862 (1996), *quoted in Starr,* 23 F.3d at 1291; see also *Castro v. Oklahoma,* 71 F.3d 1502, 1515 (10th Cir.1995) (*Ake* violations subject to harmless error analysis).

[21] ¶ 24 Having concluded harmless error analysis applies, we must determine whether this error is harmless beyond a reasonable doubt. [FN35] Although expert testimony would have helped Fitzgerald explain his state of mind and ability to form intent, it was not necessary to raise the issue of voluntary intoxication. A defendant may claim voluntary intoxication as a defense to malice murder where evidence of overwhelming intoxication is presented. No experts are needed to raise the defense. Although the evidence of intoxication was conflicting, Fitzgerald could have made his voluntary intoxication claim based on that evidence without relying on expert testimony. Thus, Fitzgerald was not denied his ability to defend against the malice murder charge. The trial court's erroneous denial of *Ake* experts in the first stage of trial was harmless beyond a reasonable doubt.

FN35. *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

[22] ¶ 25 Fitzgerald also claims in this section that the trial court's denial of funds under *Ake* resulted in an equal protection violation. He claims that had

crimes been committed in any county except lahoma or Tulsa counties he would have been resented by OIDS and entitled to funding hout asking the trial court. The only support in record for his claim that he would have received ding for experts from OIDS is an affidavit by the n Chief of the OIDS Capital Trial Division, who imed he believed that, in a case with similar ts, OIDS would authorize payment for the uested experts. However, the affiant was not iself in a position to authorize such expenses, his opinion is at best an educated guess. sent some indication that Fitzgerald was in fact ted differently from other capital defendants ilarly situated, we will not reach the merits of claim.

26 We next address Fitzgerald's claim he was rived of the right to present mitigating evidence. gerald argues that, without experts, he was ied the opportunity to present mitigating dence. He argues the mere facts of the gunshot und and his diabetic condition are not icularly mitigating, and he needed experts to sent the effects these conditions had on his sical, mental and social development, as well as effect of his diabetes on his family and dhood. Indeed, the State effectively argued at that neither of these conditions was mitigating suggested the gunshot wound might work in ravation.

[24] ¶ 27 It is settled that a defendant may ent in mitigation any aspect of his record or acter, and any circumstances of the crime. 36] The trial court recognized this when it d the evidence about Fitzgerald's diabetes and n injury would be appropriate in mitigation. vever, since the court erroneously believed gerald had not made an *Ake* showing, it gested, "You can have his relatives, friends or or testify that he had these conditions, or has these conditions." [FN37] We reject the gestion that lay witnesses provide an effective titute for expert testimony in these umstances. [FN38] Fitzgerald's friends and ly could have testified regarding symptoms 9 and behavior they observed, and his atrician and surgeon could have testified rding their diagnoses and treatments. vever, these witnesses could not effectively ain the particular problems and phenomena associated with juvenile-onset diabetes, nor could they describe the physiological and psychological effects resulting when alcohol and diabetes are combined. These witnesses certainly could neither conduct neuropsychological tests nor present the result of those tests to the jury. As other witnesses could not present this mitigating evidence, Fitzgerald has shown he was prejudiced by the trial court's decision.

FN36. *Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S.Ct. 869, 875-77, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978).

FN37. November 2, 1995 Motions Hearing Transcript at 9-10.

FN38. *Ake,* 470 U.S. at 80, 105 S.Ct. at 1095 (lay witnesses can merely describe symptoms they believe relevant to a defendant's mental state, while experts can identify the symptoms of insanity); *Castro,* 71 F.3d at 1514 (defendant entitled to expert although lay witnesses testified).

[25] ¶ 28 Fitzgerald was also entitled to expert assistance to rebut the State's charge that he would be a continuing threat to society. *Ake* held that a capital defendant was entitled to expert assistance where the State presents psychiatric evidence of his future dangerousness. [FN39] The Tenth Circuit has extended this principle, concluding a defendant is entitled to an expert "if the State presents evidence, psychiatric or otherwise, of the defendant's future dangerousness or continuing threat to society during the sentencing phase, and the indigent defendant establishes the likelihood his mental condition is a significant mitigating factor." [FN40] Like the Tenth Circuit, we have rejected a narrow construction of *Ake.* [FN41] *Ake* focused, not on whether the State presented expert evidence, but on "the probable value that the assistance of a psychiatrist will have in this area and the risk attendant on its absence." [FN42] In the absence

of any explicit limitation by the Supreme Court and given our extension of *Ake* to any expert assistance necessary for an adequate defense, logic and fairness dictate that a qualified defendant should receive expert assistance to rebut any State evidence of continuing threat. Principles of comity also support our conclusion that, absent any compelling reason to the contrary, we will follow the Tenth Circuit's persuasive opinions on this federal constitutional issue. [FN43]

FN39. *Ake,* 470 U.S. at 83, 105 S.Ct. at 1096.

FN40. *Castro,* 71 F.3d at 1513; *Brewer,* 51 F.3d at 1529; *Liles v. Saffle,* 945 F.2d 333, 340-41 (10th Cir.1991), *cert. denied,* 502 U.S. 1066, 112 S.Ct. 956, 117 L.Ed.2d 123 (1992).

FN41. *Rogers,* 890 P.2d at 966.

FN42. *Ake,* 470 U.S. at 84, 105 S.Ct. at 1096; *Liles,* 945 F.2d at 341.

FN43. *McLin v. Trimble,* 1990 OK 74, 795 P.2d 1035, 1047 n. 17 (Justice Opala, dissenting); *Dean v. Crisp,* 1975 OK CR 95, 536 P.2d 961, 964, *overruled on other grounds by Edwards v. State,* 1979 OK CR 18, 591 P.2d 313, 316. The State cites these cases for their suggestion that we need not adopt the Tenth Circuit's reasoning. However, the State simply suggests we rely on *Brewer v. State,* 1986 OK CR 55, 718 P.2d 354, which was overturned on this very issue in *Brewer v. Reynolds,* 51 F.3d 1519, 1529 (10th Cir.1995), *cert. denied,* 516 U.S. 1123, 116 S.Ct. 936, 133 L.Ed.2d 862 (1996). *Brewer* was decided immediately after *Ake,*

> when this Court had adopted the narrowest possible construction of that decision. Our *Ake* jurisprudence has significantly changed since then. The State offers no compelling reason to ignore common sense, fairness, or the Tenth Circuit. In fact, the State urged us to adopt the Tenth Circuit's view, *set forth in these same cases,* that an *Ake* violation is subject to harmless error analysis. We decline the State's invitation to adopt only a portion of the Tenth Circuit's reasoning on *Ake* while rejecting other reasoning found within the same cases. The only possible reason to adopt *Brewer* here would be in order to refuse to reach the merits of this issue.

¶ 29 Fitzgerald was prejudiced by his inability to respond to the continuing threat charges with expert testimony. He presented no evidence in mitigation. The jury could only consider the possible mitigating circumstances listed in the instructions, without any indication of why those factors were actually mitigating. The State argued that neither his diabetes nor the 1985 head wound were in any way mitigating and suggested that the fact Fitzgerald engaged in armed robbery after being shot in the head made that factor aggravating, if anything. Only the requested expert testimony could have fully explained the mitigating nature of these conditions. The trial court implicitly recognized this. After both sides had rested in second stage, the judge again denied Fitzgerald's *Ake* motion and remarked:

> I think that Fitzgerald could have introduced any and all mitigating evidence that he wished to, and that *much of the information, if not all* of the information that he wished to inform this jury of would, ***1170** would have been understood by the jury, and they would have found out whether they thought that was appropriate or not. He chose in all instances not to present any mitigating evidence whatsoever. [FN44]

FN44. Trial Transcript at 1154 (emphasis added).

If the jury could have understood *much, if not all,* of Fitzgerald's evidence without experts, then experts were necessary to present *all* the mitigating evidence.

[26] ¶ 30 We must determine whether this error is harmless. Although Fitzgerald should have had experts to rebut the continuing threat charge, this

evidence would have been probative of much more than that aggravating circumstance. Thus, this Court cannot simply invalidate that circumstance and reweigh the remaining evidence. As Fitzgerald presented no evidence at all in mitigation, we cannot speculate about what these experts might have said nor weigh the evidence actually presented against the evidence offered in aggravation. [FN45] Although lay witnesses were available, we have determined that they could not effectively present this mitigating evidence, so Fitzgerald's failure to call them does not lessen the severity of this error. [FN46] As we cannot say this evidence in mitigation would not have swayed at least one juror, we cannot find this error harmless beyond a reasonable doubt. In other contexts, this Court has vigilantly preserved the rights of capital defendants to introduce psychological evidence in mitigation. [FN47] In combination with other errors in the second stage, this error requires reversal and remand for capital sentencing.

FN45. *Frederick v. State,* 1995 OK CR 44, 902 P.2d 1092, 1098.

FN46. *Castro,* 71 F.3d at 1514.

FN47. *Allen v. State,* 1997 OK CR 44, 944 P.2d 934; *Wisdom v. State,* 1996 OK CR 22, 918 P.2d 384.

[27][28][29] ¶ 31 In Proposition IV Fitzgerald argues the trial court erred by death qualifying the jury without fulfilling its legal duty to life qualify the jury, resulting in a guilt/death prone jury in violation of constitutional provisions. Voir dire is designed to discover actual and implied bias and determine whether jurors' views would substantially impair the performance of juror duties in accordance with the trial court's instructions and the juror oath. [FN48] Jurors who would automatically vote either for or against the death penalty will necessarily fail to consider all the evidence presented in aggravation and mitigation and should be removed for cause. [FN49] Upon a defendant's request, a trial court must determine whether each juror can consider the punishments of life and life without parole as well as the death penalty ("life-qualify" the jury). [FN50] It is not error for a trial court to deny a defendant's request that the court life- qualify the jury where trial counsel has the opportunity to ask those questions, [FN51] but a defendant, his attorney, or the trial court must be allowed to ask life-qualifying questions after the defendant's request. [FN52]

FN48. *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Mitchell v. State,* 1994 OK CR 70, 884 P.2d 1186, 1195, *cert. denied,* 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995).

FN49. *Morgan v. Illinois,* 504 U.S. 719, 728-729, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992); *Witherspoon v. Illinois,* 391 U.S. 510, 521-22, 88 S.Ct. 1770, 1776-77, 20 L.Ed.2d 776 (1968).

FN50. *Morgan,* 504 U.S. at 729, 112 S.Ct. at 2229; *Hammon v. State,* 1995 OK CR 33, 898 P.2d 1287, 1300.

FN51. *Cannon v. State,* 1998 OK CR 28, ¶ 7, 961 P.2d 838, 844, 69 OBJ 1804, 1804-05.

FN52. *Hammon,* 898 P.2d at 1300.

[30] ¶ 32 On March 23, 1995, Fitzgerald filed a Motion to Life Qualify Of [sic] the Jury. Fitzgerald requested that, after jurors were death-qualified, the trial court ask seven enumerated questions (or substantially similar questions). [FN53] The trial court denied ***1171** this motion without comment at the April 18, 1995, motions hearing. [FN54] Having refused to life-qualify the jury itself, the trial court was required to allow counsel to do so. Of course, Fitzgerald represented himself at trial. Three times Fitzgerald inartfully attempted to ask life-qualifying questions by asking jurors under what circumstances they would impose a death sentence, and each time the State's objection was sustained. The record is unclear whether these objections were

sustained purely due to the form of the question or due to the life-qualifying substance. The unfortunate result is that, despite Fitzgerald's request, the jury was not life-qualified. Under the circumstances of this case we cannot say this result does not amount to an abuse of discretion.

FN53. Summarized, the questions were: (1) Whether the juror believed the death penalty was ordinarily the only appropriate punishment for first degree murder; (2) If there was any case in which the juror would not favor the death penalty as punishment for premeditated malice murder; (3) Whether the juror could consider a sentence less than death after convicting Fitzgerald of first degree murder; (4) Whether, after convicting Fitzgerald of malice murder, the juror would presume that life or life without parole was proper until that presumption was overcome by proof beyond a reasonable doubt that the death penalty was the only appropriate penalty; (5) After hearing all the evidence and finding Fitzgerald guilty of first degree murder, would the juror have any preconceived notions about penalty; (6) Would the juror consider all three punishments in determining the appropriate punishment; and (7) Does the juror understand he is never required to impose the death penalty, and may always choose to sentence Fitzgerald to life without parole. O.R. at 118--119.

FN54. The State argued the questions were improper because jurors should only be asked whether they could consider the three alternative punishments. This was an inaccurate statement of law. The record does not reflect whether the trial court adopted this reasoning in reaching its decision.

¶ 33 We must determine the proper remedy for this error. In *Hammon* we reversed for resentencing where the trial court refused to allow the defendant to life-qualify the jury. In *Cannon* we held it was not error for the trial court to refuse to ask life-qualifying questions where trial counsel successfully did so. This situation falls between the two. We need not determine whether this error is reversible per se but find it contributes to an accumulation of error which necessitates reversal of the second stage of the proceedings and a remand for resentencing on the capital murder charge.

¶ 34 In Proposition VI Fitzgerald claims the trial court erred by excluding evidence to rebut continuing threat, by failing to protect Fitzgerald's right to reliable sentencing, and by denying requested instructions on the meaning of life without parole. Only the second of these claims has merit.

[31] ¶ 35 Fitzgerald first complains in Subproposition A that the trial court excluded evidence from Mr. Steve Strode, from the Department of Corrections, who would have testified about the conditions under which Fitzgerald would serve a sentence of life imprisonment without the possibility of parole. Fitzgerald claims this information should have been presented to the jury under *Simmons v. South Carolina.* [FN55] This Court has held *Simmons* does not apply to Oklahoma's capital sentencing structure since Oklahoma capital juries are aware that a defendant may be sentenced to life, life without the possibility of parole, or death. [FN56] We have specifically held it was not error to refuse a defendant's request to call Mr. Strode to testify about Department of Corrections policy and practice. [FN57] This subproposition is denied.

FN55. 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (error where a capital jury is not told a defendant is parole ineligible and thus wrongly believes the only sentencing options are life with parole or death).

FN56. *Hain v. State,* 1996 OK CR 26, 919 P.2d 1130, 1145, *cert. denied,* 519 U.S. 1031, 117 S.Ct. 588, 136 L.Ed.2d 517; *Hamilton v. State,* 1997 OK CR 14, 937 P.2d 1001, 1011-12, *cert. denied,* 522 U.S. 1059, 118 S.Ct. 716, 139 L.Ed.2d 657; *Trice v. State,* 1996 OK CR 10, 912 P.2d

349, 351-52.

FN57. *Hamilton,* 937 P.2d at 1011-12.

[32] ¶ 36 Fitzgerald correctly argues in Subproposition B that evidence of the nature of his conviction for escape was admissible to rebut evidence introduced in aggravation. A defendant has a right to a fair opportunity to defend against the State's accusations, and the rules of evidence should not be mechanistically applied to defeat that right in a capital case. [FN58] The State introduced evidence of a 1978 escape conviction in Nebraska to support the continuing threat and prior violent felony aggravating circumstances. Fitzgerald objected because in a pretrial ruling the court had held the escape charge would not be admissible in the capital sentencing stage; ***1172** this ruling was later modified, but the escape charge was not specifically mentioned. Through a misunderstanding the State believed the escape conviction would be admissible, but Fitzgerald's stand-by counsel thought she had told the State the escape was non-violent and believed it would not be admitted. Fitzgerald argued that the conviction could not support the aggravating circumstances because it was non-violent, but he was overruled. Fitzgerald rested without presenting evidence.

FN58. *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973); *Green v. Georgia,* 442 U.S. 95, 97, 99 S.Ct. 2150, 2151-52, 60 L.Ed.2d 738 (1979).

¶ 37 After discussing the proposed instructions, standby counsel presented Defendant's Exhibit 6, a non-certified copy of the Nebraska Information, which showed that the escape conviction was a non-violent walk-away from a work release program. The State did not contest the non-violent nature of the escape. The prosecutor admitted that the Information was the same document attached to the certified copy of the Judgment and Sentence introduced by the State to support the aggravating circumstances but claimed that the State would not be allowed to admit a non-certified document and what was "sauce for the goose was sauce for the gander." This is, of course, an inaccurate perception of the law regarding a capital defendant's right to present evidence rebutting aggravating circumstances. The trial court appeared more concerned that Fitzgerald had not attempted to introduce the Information before he rested. Standby counsel replied that was her mistake, but the trial court noted this matter was not included in the list of things counsel had said they needed to do before bringing the jury back in and ruled the document was untimely and inadmissible.

¶ 38 Although both parties had rested, the jury had not been instructed nor argument heard, and the document could easily have been admitted into evidence for use in argument. The record reflects a genuine misunderstanding which resulted in Fitzgerald's surprise at having to defend against this charge in this stage of the case. To reflexively apply the rules of evidence on document authentication when no party questioned the actual authenticity of the document and to refuse to admit the evidence because it was not introduced a few moments earlier before the jury completely deprived Fitzgerald of the ability to respond to the State's accusations. This is exactly the sort of action the Supreme Court condemns. [FN59] Several other convictions were admitted to support the prior violent felony aggravating circumstance, and this error would not, standing alone, require reversal. However, combined with other error in the second stage, it does necessitate reversal and remand for resentencing on the capital murder charge.

FN59. One can only assume the State recognizes this, as it does not respond to the Supreme Court cases at all and merely cites cases regarding authentication of documents which is not the issue here.

¶ 39 Finally, Fitzgerald argues in Subproposition C that the trial court erred in denying his requested instructions on the meaning of life without parole. Fitzgerald acknowledges we have previously held it is not error to refuse a defendant's request to instruct on life without parole. [FN60] We will not reconsider this decision. This subproposition is denied.

FN60. *Bryan,* 935 P.2d at 364.

[33][34] ¶ 40 In Proposition VII Fitzgerald claims the trial court's failure to conduct a *Wallace* hearing, in light of his failure to introduce any mitigation in the penalty phase of trial, requires a new sentencing hearing. Fitzgerald presented no mitigating evidence. [FN61] This Court held in *Wallace v. State* [FN62] that a defendant may waive his right to present mitigating evidence only after a mandatory hearing by the trial court in which the court (a) finds the defendant has the capacity to understand the choice between ***1173** life and death and to knowingly and intelligently waive his right to present mitigating evidence and (b) questions the defendant on the record about his knowledge and understanding of mitigating evidence and its role in the capital sentencing process. No *Wallace* hearing was held, and the entire trial record does not indicate the trial court ever questioned or advised Fitzgerald regarding his knowledge or understanding of the importance of mitigating evidence (including the hearing in which Fitzgerald waived his right to counsel). *Wallace* did not indicate whether failure to hold this hearing requires automatic reversal. We believe this error is analogous to trial error, rather than being structural in nature, and is thus subject to harmless error review. [FN63] *Wallace* set forth a mandatory procedure to ensure that a defendant understood and intelligently waived this right, but, as with other questions of waiver, our focus is on the nature of the defendant's understanding rather than the form in which it is presented. We reiterate that a *Wallace* hearing is mandatory. However, if, from the record, it is apparent a defendant (a) understands the difference between life and death, (b) understands and appreciates the vital importance of mitigating evidence in capital proceedings, and (c) voluntarily and intelligently waives all right to present mitigating evidence, then failure to hold a *Wallace* hearing may be harmless.

FN61. The State mistakenly argues that Fitzgerald did present mitigating evidence. Three times the trial court noted Fitzgerald chose not to present mitigating evidence. The State's argument is based on Instruction 7, which listed mitigating factors gleaned from evidence presented in the first stage. The existence of an instruction listing mitigating factors is separate from the question of whether Fitzgerald introduced mitigating evidence in the second stage of trial. He did not.

FN62. 1995 OK CR 19, 893 P.2d 504, 508, 512-13, *cert. denied,* 516 U.S. 888, 116 S.Ct. 232, 133 L.Ed.2d 160.

FN63. *Arizona v. Fulminante,* 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

[35] ¶ 41 The record does not support such a conclusion in this case. It is apparent Fitzgerald understood the choice between life and death. However, while the record shows Fitzgerald was aware he could call witnesses in mitigation, it is not clear that Fitzgerald understood the purpose or importance of mitigating evidence. After he rested, standby counsel made a record confirming that Fitzgerald chose not to present mitigating evidence because the trial court denied him funds to retain experts who might have effectively presented evidence of his physical and psychological disabilities to the jury (see Proposition II). Fitzgerald's mother was in the courtroom available to testify as a mitigating witness, and he was aware he could have called her. Fitzgerald said in closing:

> I've had the opportunity more than once to get up on the stand and open up my whole past to you. I don't know why but I didn't do that. I allowed that not to happen. I feel quite strongly that it should come from me, my past should come from me first, before you heard from Mr. Harris. I was advised that that might not be too smart, and unfortunately I listened to that advice, I think that that was wrong of me. I can't change it. [FN64]

FN64. Trial Transcript at 1183.

This admission, plus his failure to call any family member or other person who could speak about him, suggests Fitzgerald did not understand the effect personal information about him could have on the jury's deliberations. As the Supreme Court

has often noted, the Constitution requires individualized sentencing, [FN65] and mitigating evidence is an important factor in ensuring this right. This is why *Wallace* requires such stringent procedures before a defendant may waive his right to present evidence in mitigation. We need not decide whether this murky record would, standing alone, require reversal since in combination with other errors, it necessitates reversal and remand for resentencing on the capital murder charge.

FN65. *See, e.g., Lockett,* 438 U.S. at 605, 98 S.Ct. at 2965.

¶ 42 In Proposition IX Fitzgerald argues the trial court by instruction relieved the State of the burden of proof and precluded consideration of mitigating evidence in violation of constitutional provisions. Fitzgerald complains of two instructions in first and second stage, respectively, concerning whether he was under the influence of alcohol at the time of the crimes. In first stage the trial court instructed that voluntary intoxication did not render a person's actions less criminal. In second stage the trial court refused to instruct in mitigation that Fitzgerald was under the influence of alcohol. At trial, the two surviving robbery victims testified Fitzgerald did not appear to be drunk; one said Fitzgerald might have been intoxicated but appeared to know what he was ***1174** doing. Family and friends with Fitzgerald that night, testifying for the State, variously said he had one beer and was not intoxicated, was slightly drunk, obviously drunk, and pretty drunk. [FN66] In Fitzgerald's statements to police, admitted at trial, he said he had been drinking tequila and beer all night, was very intoxicated, did not remember a lot of details about the crimes, and had not intended to hurt Russell.

FN66. None of these accounts supported Fitzgerald's claim that he went to several bars with a female friend before committing the crimes.

[36][37][38] ¶ 43 Fitzgerald requested an instruction on voluntary intoxication in the first stage but withdrew the request after the trial court denied him funds for experts. [FN67] Voluntary intoxication is not a complete defense to malice murder but may be considered in determining whether a defendant had the intent to kill during the commission of the crime. [FN68] Sufficient evidence must be introduced to show a defendant was so intoxicated his mental powers were overcome and he was unable to form criminal intent. [FN69] Where the trial court finds insufficient evidence has been introduced to support a voluntary intoxication defense, it is within the court's discretion to either reject an instruction on voluntary intoxication or instruct the jury that voluntary intoxication is not a defense. [FN70] Here, Fitzgerald withdrew his request for the voluntary intoxication instruction. The State requested an instruction that intoxication was not a defense to the crime, and the trial court agreed stating it felt this instruction was proper given the evidence of intoxication presented. In light of the conflicting evidence presented regarding Fitzgerald's level of intoxication and the amount of detail he recalled in each statement to police, this decision was not clearly an abuse of discretion.

FN67. Fitzgerald argued tirelessly at trial and on appeal that expert testimony was necessary to explain why his drinking that night, combined with his diabetes and possible residual brain damage from the gunshot wound to his head, would so impair his judgment as to prevent him from forming the intent to kill necessary for malice murder.

FN68. *Edwards,* 655 P.2d at 1051; *Jones,* 648 P.2d at 1255.

FN69. *Jackson,* 964 P.2d at 892.

FN70. *Crawford v. State,* 1992 OK CR 62, 840 P.2d 627, 638.

[39] ¶ 44 In the second stage Fitzgerald requested the jury be instructed in mitigation that he was under the influence of alcohol at the time of the crimes. Although the trial court found in its Capital Felony Report that there was evidence

Fitzgerald was under the influence at the time of the capital offense, it refused to include this as a mitigating circumstance. Fitzgerald claims this omission, coupled with the instruction above (which was incorporated into the second stage proceedings), prevented the jury from considering any evidence of intoxication as mitigating evidence. This argument is persuasive. In *Ledbetter v. State,* [FN71] we were "puzzled" where a trial court listed a similar factor in its capital felony report but refused to include it in the list of mitigating circumstances submitted to the jury. We held that, in combination with other errors, this required reversal. The State does not discuss *Ledbetter* and simply argues that incorporation of the first stage instructions could not have discouraged any juror from considering all relevant mitigating circumstances. The State argues both that evidence of intoxication was irrelevant and that the jury was not precluded from considering it in mitigation. We fail to see the logic in this argument. The issue is whether, under these instructions, the jury could think evidence of intoxication would be mitigating. The prosecutor argued in the first stage, and the jury was instructed, that intoxication was not a defense to the crime. This instruction applied to the second stage, and no instruction suggested intoxication might be used in mitigation. The trial court agreed that evidence of intoxication was presented. There appears to be no reason to deny Fitzgerald's request that it be included in his sparse list of mitigating circumstances. As in *Ledbetter,* we need not decide whether this error alone would require reversal since in combination ***1175** with other errors, it necessitates reversal and remand for resentencing on the capital murder charge.

FN71. 1997 OK CR 5, 933 P.2d 880, 898-99.

[40] ¶ 45 In Proposition XVII Fitzgerald argues the cumulative error in this case was, in and of itself, an arbitrary factor that requires reversal. There are five separate serious errors in the sentencing stage. They include errors in jury selection as well as evidentiary errors and the refusal of a factor in mitigation. Any one of these, standing alone, might not require reversal. We need not decide whether these errors are individually reversible because in combination they denied Fitzgerald a fair and reliable sentencing proceeding. The trial was well conducted, and the prosecutor behaved fairly and with propriety. However, in the second stage a *pro se* defendant was unable to life-qualify his jury, was denied experts to assist in presentation of mitigating evidence, chose not to present such evidence without guidance or inquiry from the trial court, was denied the opportunity to rebut evidence of an aggravating circumstance, and was denied the chance to list a circumstance of the crime in mitigation. We were unable to find any of these errors individually harmless beyond a reasonable doubt. Their combination requires reversal. [FN72] As we must reverse on these issues, we do not address the remaining propositions of error. [FN73]

FN72. The State merely argues in response to this proposition that there can be no cumulative error where no error occurred. This argument ignores the State's own repeated suggestion that error in many of these propositions was harmless.

FN73. Fitzgerald's Application for Evidentiary Hearing And/Or Request to Supplement the Record on Direct Appeal, filed September 29, 1997, is **DENIED**.

STRUBHAR, V.P.J., LANE, J., and JOHNSON, J., Concur.

LUMPKIN, J., Concurs in Results.

LUMPKIN, Judge, concurs in results:

¶ 1 I do not disagree with the result in this opinion which affirms the conviction but remands for resentencing. However, I do disagree with the analysis that is applied regarding the procedure for request of expert witnesses. [FN1] I do not believe the mere noting of the provisions of 19 O.S.Supp.1992, § 138.8, is sufficient to address the problems I see with the analysis.

FN1. I remain committed to the view expressed in *Rogers v. State,* 890 P.2d 959, 979 (Okl.Cr.1995) (Lumpkin, J. Concur in results) and *Hawkins v. State,* 891 P.2d 586, 599-600 (Okl.Cr.1995) (Lumpkin, P.J. specially concurring) regarding the current scope and applicability of *Ake* in Oklahoma criminal procedure.

¶ 2 To appreciate and understand the application of this statutory reference, a review of the history of the statute, together with revisions and ultimate repeal of 22 O.S.Supp.1985, § 464, must be made. From statehood until 1991, Title 22 had contained a Section 464. Up until 1985, that particular section related only to the right to counsel prior to arraignment and provided for compensation of counsel. However, in 1985, Section 464 was amended to address the *Ake* [FN2] problem. In that amendment, the Legislature created a procedure for an individual charged with a crime where the death penalty could be imposed to apply for an expert witness. That amendment required the trial court to rule on the reasonableness of the request by the defendant for expert witnesses and other services. It also provided for the payment of compensation to expert witnesses out of the state judicial fund in a sum not to exceed $750.00 per defendant, with the specific amount to be determined by the trial judge, subject to the approval of the Chief Justice. In addition, the amendment provided that expenses in excess of $750.00 per defendant could be compensated upon application and approval of the Chief Justice, according to rules promulgated by the Supreme Court. Additionally, it stated that no application for compensation of expert witnesses and other services would be heard by the trial court prior to the final trial disposition. This statute was repealed by Laws 1991, c. 238, § 37, eff. July 1, 1991.

FN2. *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

¶ 3 That repealer was at the end of the Indigent Defense Act which created the ***1176** Oklahoma Indigent Defense System. Prior to that time, there had been an Oklahoma Public Defender System which provided only limited services on a statewide basis, and almost all appointments of attorneys for indigent defense at the trial level were made by the District Courts with the attorneys being compensated through the court fund. This Act created a body of new law in formulating the organization of the Oklahoma Indigent Defense System (O.I.D.S.), its Board and Executive Director. A part of that Act provided the Executive Director of O.I.D.S. would determine payment of expert witness services "at a reasonable hourly rate". Exceptions were made for those counties above 200,000 population, according to the federal decennial census of 1960 or any succeeding federal decennial census. The repealer to this Act included Section 464, Title 22. Then in 1992, the Act was amended [FN3] and expanded the duties of the Executive Director and the Indigent Defense Board. This amendment included the requirement for the payment of expert witnesses as authorized by the Executive Director to be subject to the approval of the Board.

FN3. Laws 1992, c. 303, § 5, eff. May 27, 1992.

¶ 4 As the opinion notes in footnote 25, we held in *Toles v. State,* 947 P.2d at 187-88, there was no *Ake* violation where the Executive Director failed to approve an attorney's request for a pharmacologist to investigate and develop a voluntary intoxication defense. That provision was a part of the new law, which was added in the 1991 Act. In the 1992 Act, in Section 21, the Legislature added Section 138.8 of Title 19, which states, "in counties subject to the provisions of Section 138.1 of Title 19 of the Oklahoma Statutes, expert witness compensation for indigent defense shall be paid by the Court fund pursuant to procedures established by the governing board of the Court fund." It would appear, the repealer at the end of the 1991 Act, which repealed Section 464, vacated the only statutory authorization/procedure for the appointment and compensation of expert witnesses. A logical reading of the sequence of events in these Session Laws is that the repealer, which did not provide a vehicle for Oklahoma and Tulsa counties to pay expert witnesses since they were not a part of the Indigent Defense System, was overlooked and subsequently corrected at the first opportunity in the

1992 session.

¶ 5 In the previous provisions of Section 464, the Legislature specifically delegated to the trial court the responsibility to make decisions relating to expert witnesses and their compensation. Likewise, in the 1992 provision, the Legislature specifically said those expert witnesses shall be paid by the Court fund pursuant to procedures established by the governing board of the Court fund. The Legislature did not include the District Court in that process. It seems the logical interpretation, as we look at that 1991-92 session laws revamping the Indigent Defense System, is as we said in *Toles*, the Legislature made a conscious decision that the Indigent Defense System is going to be responsible for its own expenses. 947 P.2d at 187. That applies to Oklahoma and Tulsa counties likewise through the provisions of Section 138.8 of Title 19. [FN4]

> FN4. This interpretation is consistent with the limitations on the expenditure of funds set forth in 20 O.S.Supp.1997, § 1304(B)(19). That section provides in pertinent part: B. The term "expenses" shall include the following and none others:
> ...
> 19. Reasonable compensation for expert, investigative or other services authorized by the court for *indigent defendants not represented by a county indigent defender or the Oklahoma Indigent Defense System,* if requested;
> ... (emphasis added).
> This language means that when the defendant is represented by OIDS or Tulsa or Oklahoma County Public Defender, claims for experts witnesses must go through those entities and are not payable from the court fund...

¶ 6 A reading of these statutory amendments reveals that now the Court fund board sets a budget for the Public Defender in Oklahoma and Tulsa counties. The Chief Public Defender is then responsible for managing that budget and remaining within the budgetary authorizations. The Chief Public Defender in Tulsa and Oklahoma counties acts just as the Executive Director of O.I.D.S. acts. The Chief Public Defender receives requests, makes a determination of ***1177** the appropriateness of experts and either authorizes or denies the request for expert witnesses. If an expert is authorized, the Chief Public Defender then sets an amount which may be expended. It is clear this is the legislative intent which can be gleaned from a review of this history of the evolution of O.I.D.S. and the Public Defender Systems.

¶ 7 In this case, Appellant was initially determined to be indigent and counsel from the Tulsa County Public Defender's Office was appointed to represent him. When the trial court granted Appellant's request to represent himself, the Tulsa County Public Defender's Office was directed to serve as stand-by counsel. Appellant then filed his request for a state funded expert witness with the trial court rather than proceeding under Section 138.8. Under the record in this case, it does not appear the District Court of Tulsa County complied with the provisions of Section 138.8 of Title 19. Under the current statutory framework, a judge is not to be involved in authorizing or compensating expert witnesses within the context of the facts presented in this case. That budget is to be established by the governing board of the Court fund for the Public Defender's office. Granted, that Court fund board would consist of a District Judge, Associate District Judge and District Court Clerk of the County as set out in 20 O.S.1991, § 1302. But by its repeal of Section 464 of Title 22, the Legislature has changed the procedure. Because of this change in procedure established by the Legislature, the analysis set forth in *Fitzgerald,* relating to the trial judge, is no longer applicable within the State of Oklahoma. The only time the District Court should become involved in the issue of funding, as it relates to the Public Defender, is if the Public Defender believes insufficient funds have been provided to fulfill his or her statutory and constitutional role. An action could be filed in the District Court to mandamus the providing of those funds. However, other than the sufficiency of the overall budget, the individual decisions relating to the expenditure of those funds is the same for the Public Defender in Oklahoma and Tulsa counties as it is for the Executive Director of O.I.D.S.

¶ 8 It would be appropriate to remand this case to the District Court of Tulsa County to have an

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Evidentiary Hearing for a record to be made to determine the procedure being utilized in Tulsa County and if Tulsa County has complied with this statutory provision. If Tulsa County has not complied with the statutory provision, then this Court would have an evidentiary base upon which to make findings and enter directives as a part of our remand for resentencing. We should give serious consideration to this issue regarding the application of the specific statutory revisions in this case rather than the general statements of our belief of what should be done under *Ake.* As we set out in *Banks v. State,* 953 P.2d 344, 346-47 (Okl.Cr.1998) , if our decision on an issue is not a violation of the federal Constitution, then regardless of whether it is right, wrong or another Court would have done it different, it should be followed and applied. The same is true as to our role in applying legislative enactments. Regardless of whether we might have done it different, if the Legislature has provided a constitutional vehicle for addressing the issue of authorization and funding for expert witnesses, then we are required to apply that procedure.

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United States Court of Appeals,
Tenth Circuit.

Mark Roy LILES, Petitioner-Appellee,
v.
James L. SAFFLE, Warden, State Penitentiary at McAlester, Respondent-Appellant,
and
Gary Maynard, Director, Oklahoma Department of Corrections; Robert H. Henry, Attorney General of Oklahoma, Respondents.

No. 90-6380.

Sept. 16, 1991.

After defendant's state conviction for first-degree murder was affirmed on appeal, 702 P.2d 1025, he petitioned for writ of habeas corpus. The United States District Court for the Western District of Oklahoma, Lee R. West, J., granted relief, and the state appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) state trial court deprived petitioner of due process by denying his pretrial motion for state funds to employ a psychiatrist in aid of his defense; (2) petitioner was not precluded from asserting due process challenge to denial of his motion seeking court-appointed psychiatrist simply because he did not proceed with an insanity defense; and (3) petitioner was deprived of due process by denying him court-appointed psychiatric assistance at sentencing phase of trial.

Affirmed.

West Headnotes

[1] Costs ⇐302.4
102k302.4 Most Cited Cases

Criminal defendant is entitled to psychiatric assistance at trial when he is able to make an ex parte threshold showing to trial court that his sanity is likely to be a significant factor in his defense.

[2] Costs ⇐302.4
102k302.4 Most Cited Cases

General allegations supporting a request for court appointment of a psychiatric expert, without substantive supporting facts, and undeveloped assertions that psychiatric assistance would be beneficial to defendant will not suffice to require appointment of a psychiatrist to aid in preparation of a criminal defense.

[3] Constitutional Law ⇐268.2(3)
92k268.2(3) Most Cited Cases

[3] Costs ⇐302.4
102k302.4 Most Cited Cases

Trial court deprived defendant of due process by denying his pretrial motion for state funds to employ psychiatrist in aid of his defense, as defendant could have made threshold showing that his sanity at time of offense would be a significant factor at trial, considering his history of mental problems, his treatment with antipsychotic medication, and conflicting diagnoses of his incompetency and his mental condition in general. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law ⇐43(1)
92k43(1) Most Cited Cases

[4] Criminal Law ⇐1044.2(1)
110k1044.2(1) Most Cited Cases

Defendant was not precluded from asserting due process challenge to denial of his motion seeking court-appointed psychiatrist simply because he did not proceed with insanity defense after denial of his motion for court-appointed psychiatric assistance. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law ⇐268.2(3)
92k268.2(3) Most Cited Cases

[5] Costs ⇐302.4
102k302.4 Most Cited Cases

State trial court deprived defendant of due process by denying him court- appointed psychiatric assistance at sentencing phase of trial for first-degree murder, where defendant had established likelihood that his mental condition could have been a significant mitigating factor and the state presented evidence of future dangerousness, notwithstanding that such evidence was not psychiatric in nature. U.S.C.A. Const.Amend. 14.

*334 William J. Mertens of Swidler & Berlin,

Chartered, Washington, D.C., and Patti Palmer, Okl. Appellate Public Defender System, Norman, Okl., for petitioner-appellee.

Robert H. Henry, Atty. Gen. of State of Okl. and A. Diane Hammons, Asst. Atty. Gen., Oklahoma City, Okl., for respondent-appellant.

Before SEYMOUR and EBEL, Circuit Judges, and BABCOCK, [FN*] District Judge.

FN* Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

SEYMOUR, Circuit Judge.

Respondent James L. Saffle appeals from the district court's order granting habeas relief to petitioner Mark Roy Liles, under 28 U.S.C. § 2254, from his conviction for first degree murder and sentence of death. [FN1] In vacating the conviction, the district court determined that, under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the state trial court had *335 deprived petitioner of due process by denying his pretrial motion for state funds to employ a psychiatrist in aid of his defense. We affirm.

FN1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

On August 31, 1982, the State of Oklahoma charged petitioner with murder occurring during the commission of an armed robbery. *See* Okla.Stat.Ann. tit. 21, § 701.7 B. A jury convicted petitioner of first degree murder and sentenced him to death, finding the existence of two aggravating factors: the killing was especially heinous, atrocious, or cruel, and petitioner posed a continuing threat to society. *See* Okla.Stat.Ann. tit. 21, § 701.12.

The Oklahoma Court of Criminal Appeals upheld petitioner's conviction. *Liles v. State,* 702 P.2d 1025 (Okla.Crim.App.1985), *cert. denied,* 476 U.S. 1164, 106 S.Ct. 2291, 90 L.Ed.2d 732 (1986). He subsequently challenged his conviction and sentence through two state post-conviction proceedings, again without avail. *Liles v. State,* No. PC-87-391 (Okla.Crim.App. July 9, 1987), *cert. denied,* 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 266 (1987); *Liles v. State,* No. PC-88-589 (Okla.Crim.App. Apr. 25, 1989), *cert. denied,* 493 U.S. 945, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989).

Petitioner then filed this petition for habeas relief in the United States District Court for the Western District of Oklahoma, asserting thirteen grounds for relief. He moved for summary judgment on the ground that the trial court had deprived him of due process by denying his motion for funds to employ a psychiatric expert. The district court granted petitioner's motion for summary judgment, relying upon *Ake,* 470 U.S. 68, 105 S.Ct. 1087. [FN2]

FN2. Because the United States Supreme Court decided *Ake* while petitioner's direct appeal was pending, this case does not present a retroactivity issue. *See Griffith v. Kentucky,* 479 U.S. 314, 322-23, 107 S.Ct. 708, 712-13, 93 L.Ed.2d 649 (1987). Further, the parties do not dispute that petitioner has exhausted his state court remedies concerning the issue presented by this appeal. *See generally White v. Meachum,* 838 F.2d 1137, 1138 (10th Cir.1988).

On appeal, respondent challenges the district court's determination that the trial court deprived petitioner of due process by denying him psychiatric assistance at both the guilt and the sentencing phases of his trial. This court will review an order granting summary judgment de novo. *Abercrombie v. City of Catoosa,* 896 F.2d 1228, 1230 (10th Cir.1990). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.;* Fed.R.Civ.P. 56(c) (1991).

The Supreme Court premised its decision in *Ake* on the principle that "a criminal trial is fundamentally

unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. at 77, 105 S.Ct. at 1093. Applying that principle to the issue of "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense," *id.*, the Court determined that, although

> [a] defendant's mental condition is not necessarily at issue in every criminal proceeding, ... when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 82-83, 105 S.Ct. at 1095-96. Similarly, under certain circumstances, due process also entitles a criminal defendant to court- appointed psychiatric assistance during the sentencing phase of a capital proceeding. *Id.* at 83-84, 105 S.Ct. at 1096-97.

[1][2] A criminal defendant is entitled to psychiatric assistance at trial when he is able to make "an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." *Id.* at 82-83, 105 S.Ct. at 1095-96. *See United States v. Austin,* 933 F.2d 833, 841 (10th Cir.1991).

> ***336** [I]f "sanity" or "mental capacity" defenses [are] to be defense issues, they must be established by a "clear showing" by the indigent defendant as "genuine," "real" issues in the case. In order for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a "close" question which may well be decided one way or the other. It must be one that is fairly debatable or in doubt.

Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir.1986) (citing *United States v. Sloan,* 776 F.2d 926 (10th Cir.1985)), *rev'd on other grounds,* 822 F.2d 1477, 1478 n. 2 (10th Cir.1987) (en banc), *aff'd,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). General allegations supporting a request for court appointment of a psychiatric expert, without substantive supporting facts, and undeveloped assertions that psychiatric assistance would be beneficial to the defendant will not suffice to require the appointment of a psychiatrist to aid in the preparation of a criminal defense. *Davis v. Maynard,* 869 F.2d 1401, 1407 (10th Cir.1989), *vacated on other grounds,* 494 U.S. 1050, 110 S.Ct. 1516, 108 L.Ed.2d 756 (1990); *Cartwright,* 802 F.2d at 1211.

[3] In cases such as this, in which the trial court denied a criminal defendant court-appointed psychiatric assistance prior to the Supreme Court's determination in *Ake,* but to which *Ake* 's standard applies, the question presented is whether, "upon review of the entire record, [petitioner] *could have* made a threshold showing under *Ake* that 'his sanity at the time of the offense is to be a significant factor at trial....' " *Cartwright,* 802 F.2d at 1212 (emphasis in original). The record before this court supports the district court's determination that petitioner could have made this showing. [FN3]

> FN3. We have supplemented the record on appeal with petitioner's Documentation of *Ake* Claim and his Evidentiary Submission, both filed with the district court. *See* 10th Cir.R. 10.2.4.

The State of Oklahoma charged petitioner with first degree murder on August 31, 1982. He was already in police custody at that time. On February 9, 1983, court-appointed defense counsel applied to the state trial court for a determination of petitioner's competency, asserting that petitioner's "mental state and communications abilities [were] such that they seriously interfere[d] with his understanding of the proceedings against him and with his capability of aiding ... in preparation for trial." State Court Rec., vol. I, at 37. Defense counsel also requested that the trial court waive the notice requirement for the competency hearing, asserting that petitioner "is unable to communicate with his attorney to inform him of any relatives residing within or outside ... Oklahoma." Documentation, *Ake* claim, exh. 2. The trial court consented to waive the notice requirement. *Id.*

The next day, after conducting a hearing on the application for a competency determination, the trial court ordered petitioner committed to the

Oklahoma Department of Mental Health for sixty days for observation and examination, stating "there is a doubt as to the present competency of the said [defendant], by reason of personal observation of the defendant by this Court; and testimony regarding defendant's ability to understand the proceedings against the defendant and the defendant's capability of aiding the attorney in preparation for trial." *Id.,* exh. 1.

A month later, R.D. Garcia, M.D., the chief forensic psychiatrist at Eastern State Hospital where petitioner was confined, reported to the trial court that the hospital staff had determined that petitioner was capable of understanding the proceedings against him and of assisting his attorney with his defense and, that "[s]ince it is the consensus of our staff that [petitioner] is not in need of psychiatric treatment, we would therefore consider him as competent to stand trial at this time." *Id.,* exh. 3 at 1. The report also indicated that petitioner had not displayed any behavior that would indicate that he should be considered dangerous to himself or others, "at least not as a result of any overt psychotic symptoms ***337** elicited during his period of confinement in the hospital." *Id.* at 2.

The report further noted, however, that petitioner was being treated daily with 150 milligrams of Thorazine, a powerful antipsychotic medication, *see* Physician's Desk Reference 2116 (44th ed. 1990), as well as 400 milligrams of Tegretal [Tegretol], an anticonvulsant medication, *see id.* at 988, and four milligrams of Cogentin, a medication used to treat parkinsonism, a common side effect of Thorazine, *see id.* at 1337. Documentation, *Ake* claim, exh. 3 at 2. The report to the court "of course recommend[ed] that this treatment be continued in order for [petitioner] to retain his present degree of stability." *Id.*

Relying upon the hospital's evaluation, the state trial court determined that petitioner was competent to stand trial. Evidentiary submission, exh. 3. Petitioner returned to the Oklahoma County jail, where, according to jail records, he was medicated with Haldol, yet another antipsychotic medication, *see* Physician's Desk Reference at 1282. Documentation, *Ake* claim, exh. 6.

Although Dr. Garcia noted in his report to the court that petitioner was well behaved while confined at the hospital and did not present any management problems, documentation, *Ake* claim, exh. 3 at 2, Dr. Garcia's notes also reflect that petitioner had to be secluded for combative behavior on February 18 and March 3 and 4, 1983. *Id.,* exh. 5 (state hospital records). In addition, on March 3, the staff also noted "definite sociopathic behavior" from petitioner. *Id.*

On February 25, 26, 27, 28, and 29, the staff had to medicate petitioner with 100-milligram doses of Thorazine in order to control his combative or agitated behavior. *Id.* Petitioner's behavior continued to require administration of 400 milligrams of Thorazine daily, from March 1 through March 7, when the dosage was reduced to 150 milligrams a day. [FN4] *Id.* Dr. Garcia recommended this medication continue after petitioner's release from the hospital. *Id.*, exh. 3 at 2. On the day of his release, March 17, petitioner's agitated behavior required two milligrams of Ativan, an anti- anxiety medication, *see* Physician's Desk Reference at 2348. Documentation, *Ake* claim, exh. 5.

> FN4. In his dissent to the affirmance of petitioner's conviction on direct criminal appeal, Judge Parks noted that petitioner's treatment with antipsychotic medication should have indicated to the trial court that there were serious concerns presented regarding petitioner's mental condition.
> [T]he psychiatric report indicated that during the period of the psychiatric examination, the [petitioner] was being maintained on 150 milligrams of Thorazine per day. Thorazine is an extremely powerful psychotropic drug. Its most common use is for the management of manifestations of *psychotic disorders. See Physician's Desk Reference* (39th Ed.Barnhart 1985), at 1977. In a special warning box, the *Physician's Desk Reference* states that Thorazine "is not the first drug to be used in therapy for most patients with non-psychotic anxiety because certain risks associated with its use are not shared by common alternative treatments.... When used in the treatment of non-psychotic anxiety [it] should not be administered in doses of not [sic] more than 100 mg. per day...." *Id.* Therefore, assuming that the State's doctors were

> following standard medical practice, the fact that [petitioner] was being maintained on 150 milligrams of Thorazine per day strongly indicates that the doctors were concerned with "the management of manifestations of psychotic disorders." [Further], the psychiatric report recommended that the [petitioner] continue his Thorazine treatment "in order for him to retain his present degree of stability." The fact that Thorazine therapy was administered during the [petitioner's] psychiatric examination and the recommendation for continuation belie the psychiatric report's assertion that the [petitioner] was "not in need of psychiatric treatment," and indicate that the doctors entertained serious concern about his mental stability.... [T]he doctor's concern about [petitioner's] mental condition was further illustrated by the fact that the psychiatric report suggested that [petitioner] be referred "to a mental health clinic in his locale for follow-up care on an out-patient basis as might be indicated."
> *Liles,* 702 P.2d at 1039.

In addition to this treatment, the hospital staff implemented precautions in caring for petitioner, in light of his depression and threatened suicide. *Id.* Petitioner also received medication for insomnia and headaches throughout his stay at the hospital. *Id.*

Further notations in the hospital records indicate that, on March 1, petitioner experienced "*338 strong inner feelings of wrath and anger" that he believed to be the product of his being possessed by a "violent alter ego" named Rock. *Id.* Several days later, petitioner became very angry, stating that he would "kill someone on the ward before the night [was] over," and claiming that he was no longer himself, but had become Rock and that Rock would take care of things. *Id.* At that time, petitioner claimed Rock had committed the murder. *Id.*

Dr. Garcia noted that petitioner "may be considered potentially dangerous, daring, with temper tantrums and a short fuse, very easily ready to fight, as an aggressive and explosive individual, but not psychotic." *Id.* Dr. Garcia ultimately diagnosed petitioner as having a dysthmic personality disorder and an intermittent explosive disorder, along with a continuous alcohol dependence and episodic mixed substance abuse. *Id.* Notations in the records also indicated petitioner suffered from an "organic personality syndrome (intermittent explosive disorder)" and "mild focal brain damage secondary to cerebral trauma." *Id.*

Lance A. Portnoff, Ph.D., a clinical neuropsychologist and a consultant at Eastern Hospital, reported that, after examining and testing petitioner, his findings

> are suggestive of bilateral tempero-limbic dysfunction secondary to brain trauma and polydrug abuse.... These findings are consistent with the reported episodes of dyscontrol, which can occur with such a locus of damage because of irritation or disinhibition of limbic structures mediating instinctual aggressive drives.... [T]he behavior described by the patient is consistent with an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Such patients have diminished control over aggressive patterns of response, particularly if further disinhibiting influences such as drugs or alcohol are ingested. Because of the close proximity of limbic aggressive and memory structures, often the irritative effect which triggers tendencies for explosiveness also impairs memory encoding for the duration of the irritative ictus.
> ....
> [T]hese test findings are more consistent with a nonpsychotic [rather] than psychotic mental status, characteristic of adjustment disorder of mixed emotional features, organic personality syndrome (intermittent explosive disorder), alcohol abuse, continuous, mixed substance abuse, unspecified, and mild focal brain damage secondary to cerebral trauma.

Id.

In his subsequent affidavit, Dr. Portnoff further explained that

> the results of my evaluation [of petitioner in 1983] were consistent with the presence of an organic impairment, or physical dysfunction to [petitioner's] brain. The results suggested the presence of an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Persons

> experiencing this problem may have a diminished ability to control aggressive impulses, and, as a result of damage to their brains, they may be capable of explosive, violent behavior during ictal, or seizure-like states. They may then have no memory or impaired memory of their violent behavior.

Id., exh. 8 at 1 (Affidavit of Lance A. Portnoff, Ph.D. (March 17, 1990)).

In corroboration of Dr. Portnoff's diagnosis, petitioner offered the affidavit of Russell R. Monroe, M.D., a professor of psychiatry at the University of Maryland School of Medicine. After examining petitioner's hospital records, Dr. Monroe

> concluded that there is a significant possibility that [petitioner] experiences an episodic behavioral disorder associated with a limbic ictus. Such a condition may lead an individual to commit acts of violence over which he lacks control in an ordinary sense, and which are not in an ordinary sense intentional. The possibility of a behavioral disorder associated with a limbic ictus is consistent with the findings in the February 25, 1983 ***339** neuropsychological evaluation conducted by L.A. Portnoff, Ph.D.
> ....
> In my opinion, further evaluation ... is justified by the significant possibility that if [petitioner] indeed killed Mr. Yarbrough, he did so as a result of a brain disorder that produced a seizure-like event.

Id., exh. 9 at 1-2, 3 (Affidavit of Russell R. Monroe, M.D. (October 24, 1988)).

In addition to Dr. Portnoff's findings concerning possible mental conditions affecting petitioner, Dr. Portnoff reported, on February 25, 1983, that although petitioner had a factual and rational understanding of the charges against him, because of his depression, he was at that time incompetent to stand trial. *Id.*, exh. 5. In his affidavit, Dr. Portnoff explained that his competency determination was not included in the hospital's report to the trial court because he "was considered a consultant only, and was not a part of the forensic team assigned to [petitioner] at Eastern State Hospital." *Id.,* exh. 8 at 1. Dr. Portnoff further asserted that

> [a]t that time it was the policy of Eastern State Hospital to report to the trial courts only the opinion on competency of their Chief Forensic Psychiatrist, Dr. R.D. Garcia. Any dissenting views from other staff members were not reported. At that time Dr. Garcia's view of competency to stand trial evaluations would have prevented him from considering either [petitioner's] depression or his apparent brain damage in determining competency. Dr. Garcia was of the belief that only psychotic individuals could be considered incompetent, and any individual who was non-psychotic was therefore competent.
> ....
> In the time I was employed at Eastern State Hospital by far most of the patients I saw there I considered to be competent. In my opinion [petitioner's] depression and incompetency [were] very real, and he was in no way malingering.

Id. at 1-2.

In an effort to suggest possible causes for petitioner's brain injuries, the affidavit of petitioner's mother asserted that he suffered physical and sexual abuse as a child, periods of head banging, head injuries from an automobile accident in which his head went through the windshield, repeated headaches, and episodes of sleepwalking. Evidentiary submission, exh. 29 (Affidavit of LaDonna Meadows (March 21, 1990)). A childhood acquaintance of petitioner also attested to the fact that, when petitioner was fourteen years old, he fell approximately fifteen feet off a cliff, hit his head, and was unconscious for a time. *Id.,* exh. 30 (Affidavit of Chuck Richmond (March 16, 1990)). The hospital records indicate petitioner said that he had suffered repeated minor head trauma from boxing. Documentation, *Ake* claim, exh. 5.

In her affidavits, petitioner's mother also stated that a psychiatrist treated petitioner for a time while he was in elementary school, Affidavit of LaDonna Meadows (June 3, 1987), and that, prior to his joining the Marines at age seventeen, petitioner had serious psychological problems, including exhibiting a split personality, Affidavit of LaDonna Meadows (June 4, 1987). "There were times when [petitioner] would only respond to you if you called him by the name of 'Rock.' There were times that he would disappear into the woods for days, and not remember much about it." Evidentiary submission, exh. 29 at 4. Petitioner's mother further attested that, while petitioner was in the Marines, she

received notice from the Marine Corps that he had received psychiatric treatment. *Id.*

Petitioner's mother chronicled several episodes of explosive violence occurring throughout petitioner's life. He had, at various times, attempted to strike his mother, attempted to cut his brother with a broken bottle, and threatened to shoot his brother. Affidavit of LaDonna Meadows (June 3, 1987). He had also beaten his girlfriend, then disappeared for several days, finally emerging from the woods in a dazed state. *Id.* Petitioner's mother also witnessed occurrences suggesting to her that petitioner had killed his prized pet pit bulls. *Id.* When asked about the pets, ***340** petitioner insisted someone had killed them while he was away from home. *Id.*

Immediately preceding the murder, petitioner's pregnant wife had left him. Affidavit of LaDonna Meadows (June 4, 1987). Petitioner, according to his mother's affidavit, fell into a deep depression and again was found wandering dazed in the woods. *Id.* At the time of the murder, petitioner was in Oklahoma searching for his wife. *Id.*

In light of petitioner's history of mental problems, his treatment with antipsychotic medication, and the conflicting diagnoses of his incompetency and his mental condition in general, this record sufficiently supports the district court's determination that petitioner could have made a sufficient showing, under *Ake,* that his sanity was likely "to be a significant factor at trial." *See Cartwright,* 802 F.2d at 1212.

[4] Respondent contends that petitioner cannot claim the state court's denial of a court-appointed psychiatrist deprived him of due process because he failed to assert an insanity defense at trial, unlike the defendant in *Ake* who presented an insanity defense even though the trial court had denied him psychiatric assistance. *See* 470 U.S. at 72, 105 S.Ct. at 1090. In his motion seeking state funds in order to employ a psychiatrist or psychologist, defense counsel did assert that he had

> reason to believe that [petitioner] suffers from mental disease or defect, that would affect his capacity to appreciate the wrongfulness of his conduct or conform his [conduct to the] requirements [of the] law.
> ....
> The need for a psychologist [or] psychiatrist is clear.... Clearly, there is a need to determine whether [petitioner] had the ability to distinguish right from wrong at the time he allegedly committed these particular acts. A determination of this fact is relevant and material in determining guilt. It is further necessary for determining mitigating circumstances as authorized in 21 O.S.1976 Supp. § 701.10.

Evidentiary submission, exh. 4 at 2.

In *Ake,* the Supreme Court held that, upon the requisite showing, a criminal defendant will be entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in *evaluation,* preparation, and presentation of the defense." 470 U.S. at 83, 105 S.Ct. at 1096 (emphasis added). One of the functions of such a court-appointed psychiatric expert, therefore, is to assist the defense in determining whether an insanity defense is viable or warranted under the circumstances of a particular case. *Id.* at 82, 105 S.Ct. at 1095; *see also Smith v. McCormick,* 914 F.2d 1153, 1157 (9th Cir.1990); *United States v. Fazzini,* 871 F.2d 635, 637 (7th Cir.), *cert. denied,* 493 U.S. 982, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989). "The right to psychiatric assistance ... means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment." *Smith,* 914 F.2d at 1157. Petitioner is therefore not precluded from asserting a due process challenge to the denial of his motion seeking a court-appointed psychiatrist simply because he did not proceed with an insanity defense after the denial of his motion for court-appointed psychiatric assistance. Indeed as the Court recognized in *Ake,* given the complex nature of mental disease, "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' " *Ake,* 470 U.S. at 81, 105 S.Ct. at 1095 (citation omitted).

[5] Respondent next argues that petitioner cannot establish his entitlement to psychiatric assistance at the penalty phase of his trial because the state did not present any *psychiatric evidence* concerning the aggravating factor of petitioner's future dangerousness. In *Ake,* the Supreme Court determined that the state court had deprived the defendant of due process by denying him court-appointed ***341** psychiatric assistance in

"presenting evidence to rebut the State's evidence of his future dangerousness." 470 U.S. at 83, 105 S.Ct. at 1096. The Court held that due process entitles a criminal defendant to psychiatric assistance "when the State presents psychiatric evidence of the defendant's future dangerousness." *Id.* Although the Court discussed the necessity of psychiatric assistance to enable a defendant to respond to and challenge the state's psychiatric evidence concerning defendant's future dangerousness, the Court did not expressly limit a defendant's right of psychiatric assistance to situations where the state first presents psychiatric evidence. *See id.* at 83-84, 105 S.Ct. at 1096-97. Rather, the Court stated that "[t]he variable on which we must focus is ... the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence." *Id.* at 84, 105 S.Ct. at 1096. In this case, because the state presented evidence concerning petitioner's future dangerousness, albeit not psychiatric evidence, and because petitioner established the likelihood that his mental condition could have been a significant mitigating factor, the district court correctly determined that the state trial court deprived petitioner of due process by denying him court-appointed psychiatric assistance at the sentencing phase of his trial.

The judgment of the United States District Court for the Western District of Oklahoma granting petitioner habeas relief is AFFIRMED. The stay of the district court's order is dissolved. Respondents are to release petitioner from custody on the ninety-first day following the date of this opinion unless, within ninety days from the date of this opinion, the State of Oklahoma has elected to retry petitioner.

945 F.2d 333

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173 F.3d 1278
1999 CJ C.A.R. 2303
(Cite as: 173 F.3d 1278)

United States Court of Appeals,
Tenth Circuit.

Kelly Lamont ROGERS, Petitioner-Appellant,
v.
Gary E. GIBSON, Warden; Attorney General of the State of Oklahoma,
Respondents-Appellees.

No. 98-6301.

April 12, 1999.

After his convictions for first-degree murder, robbery, rape, and larceny of motor vehicle and his death sentence were affirmed on direct appeal, 890 P.2d 959, petitioner sought federal habeas corpus relief. The United States District Court for the Western District of Oklahoma denied relief. Petitioner appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) petitioner was not entitled to additional time and funds to hire mental health expert to assist during guilt phase of trial; (2) petitioner failed to make preliminary showing that he was entitled to psychiatric expert's assistance during penalty phase of trial; (3) variance did not prejudice petitioner or subject him to risk of double jeopardy; (4) petitioner's claim that standard of proof employed at his competency hearing violated his due process rights was not procedurally barred; and (5) habeas relief was not warranted as result of trial court's application of clear and convincing evidence standard at petitioner's competency hearing.

Affirmed.

West Headnotes

[1] Habeas Corpus ⚿205
197k205 Most Cited Cases

Provisions of Antiterrorism and Effective Death Penalty Act (AEDPA) applied to habeas petition that was filed almost one year after AEDPA's effective date. 28 U.S.C.A. §§ 2253, 2254.

[2] Habeas Corpus ⚿842
197k842 Most Cited Cases

[2] Habeas Corpus ⚿846
197k846 Most Cited Cases

In reviewing the denial of a habeas corpus petition, Court of Appeals reviews the district court's factual findings under a clearly erroneous standard and its legal conclusions de novo.

[3] Costs ⚿302.4
102k302.4 Most Cited Cases

Indigent capital defendant failed to make threshold showing that his sanity at time of offense would likely be significant factor at trial, as required for defendant to be entitled to additional time and funds to hire mental health expert to assist during guilt phase of trial; defendant's expert report did not address his sanity at time of offense, defendant did not assert that state's expert report called his sanity into doubt, defense counsel repeatedly informed court that defendant did not want to raise insanity defense, and defendant's statements after arrest, indicating that he "blacked out" after offense, were insufficient alone to demonstrate that sanity would be significant factor at trial.

[4] Costs ⚿302
102k302 Most Cited Cases

An indigent defendant must have a fair opportunity to present his defense. U.S.C.A. Const.Amends. 6, 14.

[5] Costs ⚿302.4
102k302.4 Most Cited Cases

State's obligation to provide indigent defendant access to psychiatrist's assistance upon showing that defendant's sanity at time of offense is likely to be significant factor at trial applies to both guilt and penalty phases of capital proceedings.

[6] Courts ⚿100(1)
106k100(1) Most Cited Cases

In cases in which Supreme Court's *Ake* decision, which recognized state's obligation to provide psychiatric assistance to qualified indigent defendants, was decided after trial but while direct appeal was pending, reviewing court determines whether defendant could have made threshold showing under *Ake* in determining whether state

met its obligation, instead of determining whether defendant made requisite showing to trial court.

[7] Costs ⚿302.4
102k302.4 Most Cited Cases

For a defendant to be entitled to a psychiatric expert, he must offer more than undeveloped assertions that the requested assistance would be beneficial.

[8] Costs ⚿302.4
102k302.4 Most Cited Cases

Failure to assert insanity defense does not defeat indigent defendant's claim that he is entitled to state-funded psychiatric expert on grounds that sanity at time of offense will be significant factor at trial.

[9] Costs ⚿302.4
102k302.4 Most Cited Cases

Defendant failed to make preliminary showing that he was entitled to assistance of state-provided psychiatric expert during penalty phase of capital trial; although state relied upon defendant's continuing threat to society as aggravating circumstance, defendant failed to demonstrate to trial court that his mental condition would be significant mitigating factor.

[10] Costs ⚿302.4
102k302.4 Most Cited Cases

If, during penalty phase of capital trial, state uses psychiatric evidence to show that defendant presents continuing threat to society, defendant is automatically entitled to expert psychiatric assistance.

[11] Habeas Corpus ⚿461
197k461 Most Cited Cases

Even if capital defendant was constitutionally entitled to assistance of mental health expert during sentencing phase, lack of such assistance was harmless error that did not warrant federal habeas relief; jury's decision to recommend death penalty was not based solely on defendant's continuing threat to society, as to which mitigating mental health evidence would have gone, but also on two additional aggravating factors, and neither posttrial expert report nor defendant's medical records refuted allegation that defendant was continuing threat to society.

[12] Costs ⚿302.2(2)
102k302.2(2) Most Cited Cases

[12] Costs ⚿302.3
102k302.3 Most Cited Cases

Capital defendant was not constitutionally entitled to appointment of investigator or forensics expert to assist in his defense when defendant offered trial court nothing more than "undeveloped assertions" that requested assistance would have been beneficial.

[13] Costs ⚿302
102k302 Most Cited Cases

Indigent defendants are not entitled to all the assistance that wealthier counterparts might buy; the Federal Constitution requires access to the "basic tools" needed to present an adequate defense.

[14] Costs ⚿302.2(2)
102k302.2(2) Most Cited Cases

[14] Costs ⚿302.3
102k302.3 Most Cited Cases

To determine whether indigent defendant was constitutionally entitled to requested investigatory or expert assistance, Court of Appeals considers three factors: (1) the effect on defendant's private interest in the accuracy of the trial if the requested assistance is not provided, (2) the burden on the state if the assistance is provided, and (3) the probable value of the additional assistance and the risk of error in the proceeding if such assistance is not provided.

[15] Habeas Corpus ⚿474
197k474 Most Cited Cases

Jury was instructed that postmortem sexual assault was insufficient to constitute rape under Oklahoma law, given language in information and instructions indicating that rape conviction required showing that defendant overcame victim's resistance, presupposing that victim was alive at time of sexual

assault, and therefore variance between information charging defendant with only one act of first-degree rape and evidence suggesting two acts of sexual intercourse with victim, with one occurring at or after victim's death, did not prejudice defendant or subject him to risk of double jeopardy, and thus did not warrant federal habeas corpus relief. U.S.C.A. Const.Amends. 5, 6; 21 Okl.St.Ann. § 1114.

[16] Indictment and Information ⚿171
210k171 Most Cited Cases

A "variance" arises when the evidence adduced at trial establishes facts different from those alleged in an information.

[17] Criminal Law ⚿1167(1)
110k1167(1) Most Cited Cases

Variance between facts alleged in information and evidence adduced at trial is not reversible error unless the variance affects the substantial rights of the accused.

[18] Criminal Law ⚿1167(1)
110k1167(1) Most Cited Cases

A variance affects substantial rights if the defendant is prejudiced in his defense because he cannot anticipate from the information what evidence will be presented against him or is exposed to the risk of double jeopardy. U.S.C.A. Const.Amend. 5.

[19] Criminal Law ⚿702.1
110k702.1 Most Cited Cases

[19] Criminal Law ⚿708.1
110k708.1 Most Cited Cases

Arguments of counsel during opening and closing statements are not evidence.

[20] Habeas Corpus ⚿313.1
197k313.1 Most Cited Cases

[20] Habeas Corpus ⚿401
197k401 Most Cited Cases

A mental competency claim raising procedural due process concerns may be procedurally barred, for purposes of habeas review, but a mental competency claim raising substantive due process concerns may not. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254.

[21] Criminal Law ⚿1439
110k1439 Most Cited Cases
(Formerly 110k998(3))

Under Oklahoma law governing postconviction relief, a claim is unavailable on direct appeal, and thus may be asserted for first time on postconviction relief motion, if the legal ground supporting it either was not recognized by the court as precedent at the time of direct appeal or is a new rule of constitutional law which has been given retroactive effect. 22 Okla.St.Ann. § 1089, subd. C, par. 1.

[22] Habeas Corpus ⚿403
197k403 Most Cited Cases

Habeas petitioner's claim that standard of proof employed at his competency hearing violated his due process rights was not procedurally barred on grounds that he failed to raise claim on direct appeal, given that amendments to state postconviction procedures giving rise to purported default had not yet been enacted when petitioner filed direct appeal and thus could not have been firmly established and regularly followed at time of purported default. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254; 22 Okla.St.Ann. § 1089, subd. C, par. 1.

[23] Habeas Corpus ⚿401
197k401 Most Cited Cases

[23] Habeas Corpus ⚿404
197k404 Most Cited Cases

[23] Habeas Corpus ⚿422
197k422 Most Cited Cases

Claims that have been defaulted in state court on an independent and adequate state procedural ground will not be considered on federal habeas review, unless the petitioner can demonstrate cause and prejudice or that failure to consider the claim will result in a fundamental miscarriage of justice.

[24] Habeas Corpus ⚿403
197k403 Most Cited Cases
Inconsistent

An independent state procedural ground is "adequate" to support procedural default of federal habeas claim if it has been strictly or regularly followed and applied evenhandedly to all similar claims.

[25] Habeas Corpus ⚿403
197k403 Most Cited Cases

Court of Appeals determines whether a state procedural rule was firmly established and regularly followed, so as to constitute "adequate" state grounds for procedural default foreclosing review of federal habeas claim, by looking to the time of the asserted procedural default.

[26] Habeas Corpus ⚿477
197k477 Most Cited Cases

Habeas relief was not warranted as result of trial court's application of clear and convincing evidence standard at petitioner's competency hearing, in violation of petitioner's procedural due process rights, given that both state and defense experts concluded that petitioner was competent to stand trial and defense expert also found that petitioner was not mentally ill, and therefore petitioner failed to establish bona fide doubt regarding his competency. U.S.C.A. Const.Amend. 14.

[27] Habeas Corpus ⚿477
197k477 Most Cited Cases

To obtain habeas relief on a claim that burden of proof employed at petitioner's mental competency hearing violated procedural due process, petitioner must show that the trial court ignored facts which raised a bona fide doubt regarding his competency to stand trial; relevant to this inquiry is evidence of petitioner's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial. U.S.C.A. Const.Amend. 14.

[28] Habeas Corpus ⚿718
197k718 Most Cited Cases

To obtain habeas relief on a substantive due process claim that unconstitutional standard of proof was applied at competency hearing, petitioner must demonstrate by clear and convincing evidence a real, substantial and legitimate doubt as to his competence to stand trial. U.S.C.A. Const.Amend. 14.

***1281** Robert Wade Jackson, Jackson & Presson (Steven M. Presson, Jackson & Presson, with him on the brief) Norman, OK for Petitioner-Appellant.

Robert L. Whittaker, Asst. Atty. Gen. (W.A. Drew Edmondson, Atty. Gen. of OK, with him on the brief), Oklahoma City, OK for Respondents-Appellees.

Before PORFILIO, BALDOCK, and BRISCOE, Circuit Judges.

BALDOCK, Circuit Judge.[*]

On December 17, 1991, an Oklahoma jury convicted Petitioner Kelly Lamont Rogers of first degree murder in the death of Karen Marie Lauffenburger, a student at Oklahoma State University. The same jury also convicted Petitioner of two counts of first degree robbery, one count of first degree rape, and one count of larceny of a motor vehicle. In the penalty phase of the trial, the jury recommended the death penalty for Lauffenburger's murder, fifty and seventy-five year terms for the two robbery convictions, one-hundred fifty years for the rape conviction, and fifty years for the larceny conviction.

[1][2] Petitioner appealed the judgment and sentences to the Oklahoma Court of Criminal Appeals. The state appellate court denied Petitioner's appeal on January 24, 1995. *Rogers v. State,* 890 P.2d 959 (Okla.Crim.App.1995). The United States Supreme Court denied Rogers' Petition for Writ of Certiorari on October 10, ***1282** 1995. On September 16, 1996, Petitioner filed an application for post-conviction relief with the Oklahoma Court of Criminal Appeals. The court denied the application on February 25, 1997. *Rogers v. State,* 934 P.2d 1093 (Okla.Crim.App.1997). On February 28, 1997, Petitioner commenced this action in federal district court when he filed an application to proceed in forma pauperis. The district court granted the application and appointed counsel on March 4, 1997. Counsel filed the 28 U.S.C. § 2254 petition for a writ of habeas corpus on April 23, 1997, asserting fifteen grounds for relief. On June 18,

1998, the district court denied the petition and granted a certificate of appealability ("COA") under 28 U.S.C. § 2253, for three of the fifteen claims raised. [FN1] Petitioner timely filed a notice of appeal. In Petitioner's opening brief, he requested that we grant a COA for seven of the twelve issues on which the district court had previously denied a COA. We deny Petitioner's request for a COA for the seven additional issues. Consequently, we address the following three issues on appeal: (1) whether Petitioner was denied access to state-funded investigatory and expert assistance in violation of *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (2) whether variations between the allegations in the information and the proof at trial prejudiced Petitioner and renders his conviction for first degree rape constitutionally deficient; and (3) whether the unconstitutional standard of proof imposed upon Petitioner at his post-examination competency hearing violated his Fourteenth Amendment right to due process and undermined the reliability of the proceedings in violation of the Eighth Amendment. In reviewing the denial of a habeas corpus petition, we review the district court's factual findings under a clearly erroneous standard, and its legal conclusions de novo. *Castro v. State of Oklahoma,* 71 F.3d 1502, 1510 (10th Cir.1995). Under the AEDPA, our review of the state court's proceedings is quite limited, however. We may not grant habeas relief unless the state court's decision was:

> FN1. Petitioner asserts that the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which includes the COA requirement, do not apply to this case. We disagree. Petitioner's § 2254 petition was filed almost a year after the April 24, 1996, effective date of the AEDPA. Therefore, the AEDPA provisions apply to this case. *See Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (AEDPA generally applies only to cases filed after the AEDPA became effective); *see Nguyen v. Reynolds,* 131 F.3d 1340, 1345 (10th Cir.1997).

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

28 U.S.C. § 2254(d)(1), (2). Our jurisdiction arises under 28 U.S.C. §§ 1291and 2253. We affirm.

I. Background

At approximately 10:15 p.m. on December 19, 1990, Lauffenburger's fiance discovered Lauffenburger's nude body in her apartment in Stillwater, Oklahoma. Lauffenburger, a part-time pizza delivery person, had disappeared that evening while delivering pizzas in the Stillwater area. After she failed to return from a delivery, Eric Zanotelli, the manager of the pizza restaurant where she worked, became concerned and attempted to locate her. He retraced her route and drove to the location of her last delivery, an apartment rented to Audra Lynn Todd. Petitioner lived with Todd and is the father of her three children. Todd told Zanotelli that Lauffenberger had delivered the pizza and left. Concerned, Zanotelli called Lauffenburger's fiance who went to Lauffenburger's apartment and discovered the body.

The events leading up to Lauffenburger's murder transpired as follows. After Lauffenburger delivered the pizza to Todd's apartment around 7:00 p.m., Petitioner took a knife from Todd's apartment, ***1283** followed Lauffenburger and robbed her of $40.00. Petitioner and Lauffenburger then drove to her apartment where Petitioner raped her. After the rape, Petitioner drove Lauffenburger to a nearby automated teller machine, where she withdrew $175.00 from her account at 7:52 p.m. Petitioner then returned Lauffenburger to her apartment and murdered her. After the murder, Petitioner drove, in Lauffenburger's car, to the vicinity of Todd's apartment where Lauffenburger's 1984 Toyota Tercel, keys and identification were found at 5:15 a.m. the next morning.

On December 20, 1990, Defendant was charged by Information with first degree murder for Lauffenburger's death. The court declared Petitioner indigent on December 26, 1990, and appointed counsel the same day. On January 29, 1991, Petitioner was charged by Information with

two counts of robbery by force, first degree rape, and larceny of a motor vehicle. Defendant was tried before a jury and convicted on all counts. In the penalty phase, the jury found three aggravating factors: (1) the murder was especially heinous, atrocious, or cruel; (2) Petitioner posed a continuing threat to society; and (3) Petitioner had previously been convicted of a felony involving violence. The jury recommended the death penalty, and the trial court sentenced Petitioner to death for the murder conviction.

II. Analysis

A. Investigatory and Expert Assistance

Petitioner, relying heavily on *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), argues that he was denied access to state-funded investigatory and expert assistance in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Petitioner alleges two specific *Ake* violations: (1) denial of funds for a qualified mental health expert; and (2) denial of funds for an investigator and forensic expert. The facts relevant to these claims are set forth below.

On September 19, 1991, Petitioner's appointed counsel, Jack S. Bowyer, filed a motion with the trial court to retain an expert witness at state expense. The motion did not identify the type of expert or explain how the expert would aid in the defense. However, at a hearing held the same day, Bowyer explained that he needed funds to hire an investigator to gather witness statements and to hire a forensics expert and a medical doctor to test the state's theories of the case. The trial court denied the requests.

At the November 18, 1991, motion hearing, the state requested an examination of Petitioner by a state psychiatrist. Bowyer opposed the motion and requested that, if granted, Petitioner was entitled to state funds to employ his own psychiatrist. On December 2, 1991, the trial judge granted the state's motion and granted Petitioner's request to hire, at public expense, a mental health professional to conduct a competency examination. Dr. Thomas A. Goodman, M.D., a psychiatrist, conducted the state's examination of Petitioner. Dr. Jack P. Schaefer, Ph.D., a clinical psychologist examined Petitioner for the defense. Dr. Schaefer only evaluated Petitioner's competency to stand trial and did not address Petitioner's mental condition at the time of the offense. Dr. Schaefer did not assist Bowyer during the guilt or penalty stages of the trial.

The trial court held a post-examination competency hearing on December 6, 1991, and determined that Petitioner was competent to stand trial. At the hearing, Bowyer argued that he had been unable to employ a mental health expert whose credentials equaled Dr. Goodman's. Bowyer asked for a continuance so he could hire another mental health expert. The trial judge denied the request. After the trial began on December 9, 1991, Bowyer renewed his request for a continuance based in part on his need for additional time to find a mental health expert who could render an opinion regarding Petitioner's mental condition when the crime was committed. The trial judge denied the request, ***1284** noting that Dr. Schaefer had testified as an expert witness on numerous occasions and was "fully qualified as a mental health professional."

1. Psychiatric Expert

[3] Petitioner argues that the trial court erred by refusing to provide his counsel with additional time and funds to hire a mental health expert who could assist with both the guilt and penalty phases of the trial. Petitioner asserts that if his requests were granted, evidence about his neuropsychological development and abilities, as documented by Petitioner's June 15, 1996, examination by Michael M. Gelbort, Ph.D., a licensed psychologist, could have been discovered and presented at trial and that such evidence would have altered the trial's outcome.

[4][5] An indigent defendant must have "a fair opportunity to present his defense." *Ake v. Oklahoma,* 470 U.S. 68, 76, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). This principle is derived in significant part from the Fourteenth Amendment's due process guarantee of fundamental fairness, *id.,* and in part from the Sixth Amendment's guarantee of the "fundamental right to a fair trial." *See Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Ake,* the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this

issue if the defendant cannot otherwise afford one." 470 U.S. at 74, 105 S.Ct. 1087. This requirement applies to both the guilt and penalty phases of capital proceedings. *See id.* at 83, 105 S.Ct. 1087 (obligation to provide psychiatric experts arises "when the State presents psychiatric evidence of the defendant's future dangerousness."); *see also Moore v. Reynolds,* 153 F.3d 1086, 1108 (10th Cir.1998). Relying upon *Ake,* we have held that in the sentencing phase, an expert must be appointed if the State presents evidence, "psychiatric or otherwise, of the defendant's future dangerousness or continuing threat to society" and the defendant "establishes the likelihood his mental condition is a significant mitigating factor." *Castro v. State of Oklahoma,* 71 F.3d 1502, 1513 (10th Cir.1995) (citing *Brewer v. Reynolds,* 51 F.3d 1519, 1529 (1995)).

[6][7] In the present case, the district court concluded that Petitioner did not make the threshold showings with respect to either the guilt or penalty phases of the trial. [FN2] We agree. In order for a defendant to be entitled to a psychiatric expert, he must offer "more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi,* 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). "In order for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a close question which may well be decided one way or the other." *Castro,* 71 F.3d at 1513 (quoting *Liles v. Saffle,* 945 F.2d 333, 336 (10th Cir.1991)). In this case, the trial court had nothing before it that suggested that Petitioner's sanity at the time of the offense would be a significant factor at trial. Dr. Schaefer's report did not address Petitioner's sanity at the time of the offense. Although Dr. Goodman's report is not included in the record, ***1285** Petitioner does not assert that the report called into doubt his sanity at the time of the offense.

> FN2. In making this determination, the district court reviewed the information available to the trial court at the time it denied Petitioner's request for additional time and funds to secure a mental health expert. Petitioner asserts this was error, relying on *Castro v. State of Oklahoma,* 71 F.3d 1502, 1514-15. Petitioner argues that the district court should have considered the material counsel obtained post-conviction in determining whether Petitioner could have made the *Ake* showing. Petitioner fails to recognize, however, that in the portion of the *Castro* opinion that he relies upon, we were applying a different standard, one that *only* applies in cases where *Ake* was decided after the trial but while a direct appeal was still pending. *See Castro,* 71 F.3d at 1513. In such cases, we determine whether the defendant "could have made a threshold showing under *Ake* " instead of whether the defendant actually made such a showing to the trial court. *See id.*

Petitioner points to the statement he made to officers after his arrest, that he "blacked out" after the stabbing, to show that the trial court should have recognized that his sanity was likely to be a significant factor at trial. While Petitioner's statement could suggest an emotional disturbance *after* the crime was committed, without more, it did not "demonstrate to the trial judge that his sanity at the time of the offense [was] to be a significant factor at trial." *Ake,* 470 U.S. at 83, 105 S.Ct. 1087.

[8] In addition, trial counsel repeatedly informed the trial court that Petitioner had instructed him not to raise an insanity defense, and that, as a result, counsel would not raise the defense. Although the failure to assert an insanity defense does not defeat Petitioner's *Ake* claim, *see Liles v. Saffle,* 945 F.2d 333, 340 (10th Cir.1991), it is relevant to the determination of whether the trial court should have recognized that Petitioner's sanity was likely to be a significant factor at trial. Considering all the information before the trial court at the time of the request for a psychiatric expert, we conclude that Petitioner failed to make the requisite showing under *Ake.* [FN3]

> FN3. To salvage his *Ake* claim, Petitioner attempts to raise a Sixth Amendment ineffective assistance of counsel claim. Petitioner argues that his trial counsel was ineffective because even though counsel had Petitioner's medical records, counsel failed to use the records to support the

request for a psychiatric expert. Petitioner further argues that if the medical records had been introduced to the trial court, *Ake* 's threshold showing would have been satisfied. Although we did not grant a certificate of appealability as to any of Petitioner's Sixth Amendment claims, we nonetheless considered the ineffective assistance argument in the limited context of the *Ake* claim and find no substance to it.

)] Finding no error at the guilt phase, we turn e penalty phase of the proceedings. At this as well, Petitioner failed to make the requisite inary showing. Petitioner must establish that ie state presented evidence in the sentencing that Petitioner was a continuing threat to y; and (2) that his mental condition was likely a significant mitigating factor. [FN4] *See o,* 71 F.3d at 1513. Petitioner meets the first of this test, because the state relied upon oner's "continuing threat to society" as one of ggravating circumstances in the case. [FN5] oner did not, ***1286** however, demonstrate to ial court that his mental condition would be a icant mitigating factor. Petitioner points to ig in the record in support of his claim that he ed this threshold showing.

FN4. We recognize that under *Ake,* if the state had used *psychiatric* evidence to show that Petitioner was a continuing threat to society, he would automatically be entitled to expert psychiatric assistance. *See Castro,* 71 F.3d at 1513. Petitioner does not assert, and the record does not show, that the state used psychiatric evidence in the sentencing phase. Therefore, Petitioner must also show that he demonstrated to the trial court that his mental condition was likely to be a significant mitigating factor. *See id.*

FN5. We have rejected a narrow interpretation of *Ake* by holding that the presentation of psychiatric evidence of future dangerousness is *not* necessary to trigger entitlement to a psychiatric expert. *See Castro,* 71 F.3d at 1513 (citing *Brewer v. Reynolds,* 51 F.3d 1519, 1529 (10th Cir.1995)). *Ake* holds that a defendant is entitled to a psychiatric expert if psychiatric evidence is presented. *Ake,* 470 U.S. at 83-84, 105 S.Ct. 1087. The state of Oklahoma argues that our broad interpretation of *Ake* conflicts with Oklahoma's interpretation, which tracks *Ake* and *requires* psychiatric evidence at the sentencing stage in order for a defendant to be entitled to a psychiatric expert. Thus, the state of Oklahoma asserts that in light of § 2254(d)(1) of the AEDPA, we cannot grant habeas relief because Oklahoma's interpretation is not "contrary to" or and "unreasonable application of" *Ake.* 28 U.S.C. § 2254(d)(1) . We recognize that under the standard set forth in § 2254(d)(1) of the AEDPA, we look to federal law "as determined by the Supreme Court of the United States" when reviewing state court decisions. Thus, it is questionable whether our decision in *Castro,* which expands upon *Ake,* is the proper precedent to apply in § 2254 habeas actions. We have yet to decide these issues or interpret the amount of deference owed to state courts under § 2254(d)(1), and decline to do so here, because regardless of whether we apply our broad interpretation of *Ake* or defer to Oklahoma's narrower one, Petitioner's claim fails.

[11] Even assuming that Petitioner was constitutionally entitled to a mental health expert during the sentencing phase, we find the lack of such assistance harmless error. *See Castro,* 71 F.3d at 1515 (applying harmless error analysis to denial of a psychiatric expert in violation of *Ake*). Petitioner has not shown that the error "had substantial and injurious effect or influence." *Castro,* 71 F.3d at 1515-16 (quoting *Brewer,* 51 F.3d at 1529). First, the jury's decision to recommend the death penalty was based on two additional aggravators: (1) the murder was especially heinous, atrocious and cruel; and (2) Petitioner was previously convicted of a violent felony. Because Petitioner's continuing threat to society was not the only aggravator weighed by the jury, the exclusion of the mitigating evidence was

harmless. *See Moore,* 153 F.3d at 1111 (finding harmless error where the defendant should have been allowed to present mitigating evidence regarding his mental condition, but where continuing threat was not the only aggravator). Second, we are not persuaded by Dr. Gelbort's August 28, 1996, affidavit that Petitioner "*would be a recurring threat to the community if released,* [but] he is virtually no threat within the prison setting." (emphasis added). Neither this report nor Petitioner's medical records refute the allegation that Petitioner is a continuing threat to society. Consequently, after reviewing the record in this case, we are not left with "a significant doubt that this evidence would have caused at least one juror to choose life rather than death." *Moore,* 153 F.3d at 1110. Accordingly, the district court did not err in denying relief on this claim.

2. Investigator & Forensic Expert

[12][13][14] Petitioner also argues that the trial court's refusal to appoint an investigator and a forensics expert violated his constitutional rights. Indigent defendants are entitled to a "fair opportunity to present their defense at trial." *United States v. Kennedy,* 64 F.3d 1465, 1473 (10th Cir.1995). Indigent defendants are not, however, entitled to "all the assistance that ... wealthier counterpart[s] might buy." *Id.* The Constitution requires access to the "basic tools" needed to present an adequate defense. *Ake,* 470 U.S. at 77, 105 S.Ct. 1087. To determine whether Petitioner was constitutionally entitled to the requested assistance, we consider three factors: (1) the effect on Petitioner's private interest in the accuracy of the trial if the requested assistance is not provided; (2) the burden on the state if the assistance is provided; and (3) the probable value of the additional assistance and the risk of error in the proceeding if such assistance is not provided. *Kennedy,* 64 F.3d at 1473.

On February 12, 1991, counsel filed a motion seeking the appointment of a private investigator. Counsel renewed the motion on May 17, 1991, stating that a private investigator was necessary "to locate the witnesses and completely explore the parameters of the defense." During a hearing on September 19, 1991, counsel informed the court that he was a solo practitioner and needed an investigator "to aid and assist me in gathering witness' statements and ... exculpatory evidence in favor of" Petitioner. At the time, the prosecution's witness list included more than fifty names. The trial court denied the request.

From the record, it appears that Petitioner's counsel sought a state-appointed investigator because he needed assistance interviewing the large number of witnesses in the case. We have previously rejected a constitutional claim based on the court's refusal to provide a defense investigator, where the trial attorney had asserted that he was "overworked, [and] many witnesses were involved in the case." *Coleman v. Brown,* 802 F.2d 1227, 1237 (10th Cir.1986). Likewise, in *Castro v. Ward,* we rejected the argument that a large number of witnesses necessitated the appointment ***1287** of an investigator. 138 F.3d 810, 826 (10th Cir.1998). Here, Petitioner offered the trial court nothing more than "undeveloped assertions" that the requested assistance would have been beneficial in trial preparation. Without more, we find Petitioner failed to meet his burden of showing that investigative assistance was necessary to an adequate defense. *See Caldwell v. Mississippi,* 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (no due process violation where the petitioner offered "little more than undeveloped assertions that the requested assistance would be beneficial").

On September 19, 1991, Petitioner asked the trial court for a state-appointed forensic expert to counter the state's anticipated evidence regarding hair and fiber samples and the medical examiner's report. Counsel stated that he needed the expert assistance to review the potential evidence, evaluate its weight and discover any exculpatory evidence. The trial court denied the request. We find no constitutional error in the denial. Petitioner merely speculates that the requested assistance would have been beneficial. Therefore, we find that Petitioner has failed to show that the denial of a forensic expert substantially prejudiced his case. *See Moore,* 153 F.3d at 1112. [FN6]

FN6. Petitioner asserts that the alleged *Ake* violations undermined the reliability of his capital sentence. Therefore, Petitioner argues that the imposition of the death penalty in this case violates the Eighth

Amendment requirement of heightened reliability. *See Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Thus, as Petitioner conceded at oral argument, the Eighth Amendment claim is dependent upon the success of his *Ake* claims. Because we find that Petitioner's fundamental right to a fair trial has not been violated under *Ake,* we necessarily conclude that Petitioner's Eighth Amendment claim fails as well.

B. Allegations in Information

[15][16][17][18] As his second ground for relief, Petitioner challenges his conviction for first degree rape. Petitioner argues that the Information charged him with only one act of rape, but the evidence at trial suggested two separate acts of sexual intercourse. Petitioner contends that this variance between the Information and the evidence at trial deprived him of his Sixth Amendment "right to be informed of the nature and cause of the accusations filed against him." [FN7] *Hunter v. State of New Mexico,* 916 F.2d 595, 598 (10th Cir.1990). "A variance arises when the evidence adduced at trial establishes facts different from those alleged in an [information]." *Dunn v. United States,* 442 U.S. 100, 105, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Such a variance is not reversible error, however, unless the variance affects the "substantial rights of the accused." *United States v. Edwards,* 69 F.3d 419, 432 (10th Cir.1995). A variance affects substantial rights if the defendant is "prejudiced in his defense because he cannot anticipate from the [Information] what evidence will be presented against him or is exposed to the risk of double jeopardy." *Hunter,* 916 F.2d at 599.

FN7. The state argues that Petitioner failed to exhaust his state court remedies as to this claim. The district court did not address the exhaustion argument, and we need not here because it is proper to consider an unexhausted claim on the merits for the purpose of denying relief. *See* 28 U.S.C. § 2254(b)(2) ("an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust" state remedies). Furthermore, it appears that Petitioner did in fact raise the variance claim in his direct appeal. *See Rogers v. State,* 890 P.2d 959, 969 (Okla.Crim.1995).

[19] The January 29, 1991, Information charged Petitioner with one count of first degree rape through "the use of force and violence and by means of threats of immediate and great bodily harm...." The evidence before the jury could suggest that two separate acts of sexual assault occurred, one while the victim was still alive and one at or after the time of the victim's death. [FN8] The prosecution argued in closing argument that the:

FN8. Physical evidence found on the victim's jeans and underwear indicate that after sexual intercourse the victim put her clothes back on. The medical examiner's testimony indicated that the vaginal injuries sustained by the victim occurred at or after the time of death. In addition, the victim's body was found unclothed. This evidence suggests that two separate acts of sexual assault occurred. Under the state's theory of the case, after the first rape occurred, the victim dressed and was taken by Petitioner to withdraw money from the automated teller machine, then was returned to her apartment where Petitioner stabbed her and sexually assaulted her corpse.

***1288** "defendant forced her to have sex with him twice, two times.... [W]hen he took her to her apartment, he forced her to have sexual intercourse with him there.... Then he took her back to her apartment, and forced sexual intercourse with her again.... After stabbing her repeatedly ... he accomplished sexual intercourse with her ... after he had killed her." [FN9]

FN9. We note that the arguments of counsel during opening and closing statements are not evidence and that the trial judge so instructed the jury.

First, Petitioner argues that because one of the two alleged acts of sexual intercourse is legally insufficient to constitute the crime of rape, and the jury was given inadequate instructions to distinguish between the two, the conviction must be reversed. *See Yates v. United States,* 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), *overruled on other grounds, Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), (verdict must be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"). Specifically, Petitioner argues that because the jury was not expressly instructed that the crime of rape under Okla. Stat. tit. 21 § 1114 requires sexual intercourse with a living person, [FN10] his conviction may have been based on a legally unsupportable ground, i.e., sexual intercourse with a dead body. We disagree. Although the jury instructions do not expressly inform the jury that the crime of rape can be committed only against a living person, the allegations in the Information and jury instruction No. 42, adequately informed the jury that the victim must have been alive in order for a rape to occur.

> FN10. The state does not challenge Petitioner's contention that sexual intercourse with a dead body does not constitute the crime of first degree rape under Oklahoma law.

The Information, read to the jury prior to the start of the state's case, alleged that Petitioner committed rape in the first degree when he "overc[a]me all resistance on the part of Karen Marie Lauffenberger" through the "use of force and violence and by means of threats of immediate and great bodily harm." In addition, instruction No. 42 informed the jury that rape constitutes sexual intercourse: "accomplished by means of force, violence or threats of force or violence accompanied by apparent power to carry out the threats, which overcomes that person's resistance." The above language presupposes that the victim of the rape must have been alive at the time of the assault because of the statements requiring the perpetrator to overcome the victim's resistance. *See Rogers v. State,* 890 P.2d 959, 969 (Okla.Cr.1995) (holding that the phrase "that person" in the context of the jury instruction presupposes a living human being). This is so because a person's resistance would be irrelevant if the defendant was accused of sexually assaulting a dead body. Thus, the jury was properly instructed that a post-mortem sexual assault was not sufficient to constitute the crime of rape. Therefore, we conclude that any variance between the Information and the evidence presented at trial did not prejudice Petitioner.

Second, Petitioner argues that the variance between the Information and the evidence exposes him to the risk of double jeopardy. Petitioner argues that because the prosecution submitted evidence at trial of two separate acts of sexual intercourse, and the Information did not designate ***1289** which act the charge was based upon, the evidentiary basis the jury relied upon in reaching the guilty verdict is unclear. As a result, Petitioner argues that should the state attempt to charge him again based on events occurring on December 19, 1990, he could be put in jeopardy twice for the same offense, because it is impossible to discern which acts formed the basis of his first degree rape conviction. We disagree. As discussed above, the jury was properly instructed that Lauffenberg must have been alive in order for the jury to find Petitioner guilty of first degree rape. Therefore, Petitioner's conviction for rape was based upon the act of sexual intercourse which occurred while the victim was still alive, not on any sexual act that may have occurred after the victim died. Thus, there is no confusion as to the basis of the verdict and no double jeopardy exposure. Any variance between the Information and the evidence was not fatal in that Petitioner will not be subjected to double jeopardy because of it.

C. Post-examination Competency Hearing

As his final ground for relief, Petitioner asserts that the clear and convincing standard of proof employed at his competency hearing violated his Fourteenth Amendment due process rights and undermined the reliability of the capital proceedings against him in violation of the Eighth Amendment. As a result of the unconstitutional standard of proof, Petitioner sought either a new competency hearing employing a constitutional burden of proof or a new trial. The district court denied the requested relief.

Oklahoma law in effect at the time of Petitioner's competency hearing required criminal defendants to prove their incompetence to stand trial by "clear and convincing evidence." Okla. Stat. tit. 22 § 1175.4(B). In 1996, however, the Supreme Court held that Oklahoma's clear and convincing standard in competency hearings violated the right to due process under the Fourteenth Amendment. *Cooper v. Oklahoma,* 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996). Therefore, the trial court employed an unconstitutional standard when conducting Petitioner's competency hearing. Petitioner did not, however, raise this claim in his direct appeal. As a result, the state argues that the claim is procedurally barred.

[20] Mental competency claims may raise both substantive and procedural due process claims. *See Medina v. Singletary,* 59 F.3d 1095, 1106 (11th Cir.1995) (differentiating between procedural and substantive competency claims). A procedural competency claim may be procedurally barred, but a substantive mental competency claim may not. *See Nguyen v. Reynolds,* 131 F.3d 1340, 1346 (10th Cir.1997). This distinction is not only important for purposes of procedural default but also in determining the standard of review. To the extent that Petitioner argues that his competency hearing inadequately ensured that he was competent to stand trial because of the unconstitutional burden of proof, we will construe the claim as one of procedural due process. *See Walker v. Attorney General for the State of Okla.,* 167 F.3d 1339, 1343-44 (10th Cir.1999).

1. Procedural Default

Petitioner's direct appeal was filed in 1993 and denied in January 1995, prior to the Supreme Court's decision in *Cooper.* Thus, Petitioner first raised his *Cooper* claim in his application for post-conviction relief. The Oklahoma Court of Criminal Appeals, citing *Walker v. State,* 933 P.2d 327, 338-39 (Okla.Crim.App.1997), denied the claim on the ground that the court has "declined to apply *Cooper* on post-conviction review." *Rogers v. State,* 934 P.2d 1093, 1096 (Okla.Crim.App.1997). In *Walker,* the Oklahoma appeals court held that all *Cooper* claims not raised on direct appeal are waived on collateral review even where the direct appeal is pre-*Cooper.* 933 P.2d at 339.

[21] The *Walker* court applied the 1995 amendments to Oklahoma's post- conviction ***1290** procedures, which bar post-conviction relief where the claim was not raised on direct appeal unless the petitioner can show that the issue "could not have been raised in a direct appeal." Okla. Stat. tit. 22 § 1089(C)(1). A claim is unavailable on direct appeal if "the legal ground supporting it either was not recognized by the court as precedent at the time of direct appeal or is a new rule of constitutional law which has been given retroactive effect." *Walker,* 933 P.2d at 339. Applying these new standards, the court concluded that the challenge to the clear and convincing burden of proof could have been raised by Walker in his direct appeal, even though *Cooper* had not yet been decided. *Id.* Importantly, prior to the 1995 amendments, Petitioner would not have been procedurally barred from raising his *Cooper* claim, as an intervening change in the law, for the first time in his application for post-conviction relief. *See Valdez v. State,* 933 P.2d 931, 933 n. 7 (Okla.Crim.App.1997) (noting that 1995 amendments "greatly circumscribed" the court's power to apply intervening changes in the law to post-conviction applicants). With this background in mind, we turn to Petitioner's case.

[22][23][24][25] Claims that have been defaulted in state court on an independent and adequate state procedural ground will not be considered on federal habeas review, unless the petitioner can demonstrate cause and prejudice or that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). An independent state procedural ground is "adequate" if it has been "strictly or regularly followed and applied evenhandedly to all similar claims." *Hickman v. Spears,* 160 F.3d 1269, 1271 (10th Cir.1998) (internal quotations omitted). We determine whether a procedural rule was firmly established and regularly followed by looking to the time of the asserted procedural default. *Walker,* 167 F.3d 1339, 1343-44. [FN11] In the present case, we conclude that Petitioner's *Cooper* claim is not procedurally barred because the 1995 amendments had not yet been enacted in 1993, the time of Petitioner's purported default. [FN12] In *Walker,* we addressed the 1995 amendments in the same context, and concluded that "a defendant cannot be expected to comply with a procedural

rule that does not exist at the time of the purported default." *Id.* We fail to see how a procedural rule can be "firmly established and regularly followed" if it did not exist at the time of the default. Thus, we conclude here, as we did in *Walker,* that Petitioner's failure to challenge the clear and convincing standard on direct appeal does not bar federal habeas review of the claim.

FN11. Although coincidentally the defendants have the same surname, this case is unrelated to *Walker v. State,* 933 P.2d 327.

FN12. Petitioner filed his direct appeal in 1993 and the court of criminal appeals denied it in January 1995. The post-conviction procedures at issue in this case did not become effective until November 1, 1995.

2. Competency Claim

[26][27] In order to obtain habeas relief on a procedural competency claim, Petitioner must show that the trial court ignored facts which raised a "bona fide doubt" regarding Petitioner's competency to stand trial. *Walker,* 167 F.3d 1339, 1344-45; *see also Castro v. Ward,* 138 F.3d 810, 818 (10th Cir.1998). Although this standard is normally applied in cases where the trial court failed to hold a competency hearing, it applies with equal force to a case such as this where an unconstitutional burden of proof was employed at the competency hearing. *See Walker,* 167 F.3d 1339, 1344- 45. Relevant to our inquiry is "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Id.* (quoting *Drope v. Missouri,* 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)).

During the preliminary hearing, Stillwater, Oklahoma police officer Lloyd Romine ***1291** testified that after his arrest, Petitioner made statements to officers that he may have "blacked out" after the stabbing and couldn't remember what he did with the murder weapon or how he got out of the victim's apartment and into her car. As a result of this testimony, the state filed a motion for a mental examination of Petitioner. The trial judge granted the motion and authorized Petitioner to employ his own mental health practitioner to conduct an examination. After the examinations were completed, the trial court held a competency hearing. The trial judge considered the reports of the state's psychiatrist, Dr. Goodman, and the psychologist retained by Petitioner, Dr. Schaeffer. Both reports concluded that Petitioner was competent to stand trial. Dr. Schaeffer concluded that Petitioner was able to appreciate the nature of the charges against him and was able to consult with and rationally assist his lawyer in preparing his defense.

[28] Dr. Schaeffer also found that Petitioner was not mentally ill. Our review of the record simply does not reveal evidence sufficient to raise a bona fide doubt regarding Petitioner's competency at the time of his trial. [FN13] Accordingly, the district court properly denied relief.

FN13. To the extent that Petitioner's claim may be construed as raising a substantive competency claim, we find that Petitioner fails to satisfy the even higher burden applied in such cases. In order to obtain relief on a substantive claim, Petitioner must demonstrate by "clear and convincing evidence" a "real, substantial and legitimate doubt" as to his competence to stand trial. *Walker,* 167 F.3d 1339, 1343 (internal citations omitted). Because we find that Petitioner failed to meet the bona fide doubt standard, likewise, we find that he failed to meet this more stringent standard. We therefore reject any claim by Petitioner that he was tried while incompetent.

III. Conclusion

For the reasons stated above, the judgment of the district court is AFFIRMED.

173 F.3d 1278, 1999 CJ C.A.R. 2303

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