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Criminal Procedure: Finding the Needle—Toward a More Stringent Standard for Effective Assitance of Counsel

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CRIMINAL PROCEDURE: FINDING THE NEEDLE—TOWARD A MORE STRINGENT STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL

Rompilla v. Beard, 125 S. Ct. 2456 (2005)

*Brooke R. Hardy**

Petitioner was convicted by a jury of, among other offenses,[1] brutally murdering a local barkeeper.[2] At the sentencing phase of the bifurcated proceeding, Petitioner's counsel presented the brief testimony of only five mitigation witnesses.[3] Balancing the evidence, the jury found three aggravating factors[4] and two mitigating factors,[5] concluded that the aggravators outweighed the mitigators,[6] and sentenced Petitioner to death.[7] On appeal, the Supreme Court of Pennsylvania affirmed both Petitioner's conviction and his sentence.[8]

With the aid of new counsel, Petitioner filed for post-conviction relief under a Pennsylvania statute,[9] claiming, inter alia, ineffective assistance of trial counsel.[10] The post-conviction court denied relief, finding that the trial counsel's investigation into possible mitigating factors was

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1. In addition to first-degree, capital murder, Petitioner was convicted of "burglary, criminal trespass, robbery, two counts of theft, and two counts of receiving stolen property." Commonwealth v. Rompilla, 653 A.2d 626, 628 (Pa. 1995).

2. Rompilla v. Beard, 125 S. Ct. 2456, 2460 (2005). In his dissent, Justice Kennedy emphasized the brutal nature of the crime, stating that the victim had been found "lying in a pool of blood" with a number of stab wounds around his head and neck. *Id.* at 2471-72 (Kennedy, J., dissenting).

3. *Id.* at 2460-61 (majority opinion).

4. The jury found, specifically, "that the murder was committed in the course of another felony; that the murder was committed by torture; and that [there was] a significant history of felony convictions indicating . . . violence." *Id.* (citing 42 PA. CONS. STAT. § 9711 (d)(6), (8), (9) (2002)).

5. Although trial counsel put on a mitigation case including the testimony of five family members that Petitioner was "innocent and a good man," the jury accepted only two mitigating factors as true: "that [Petitioner]'s son had testified on his behalf and that rehabilitation was possible." *Id.*

6. *Id.* at 2461.

7. *Id.*

8. *Id.*

9. *Id.* (citing Pennsylvania Post-Conviction Relief Act, 42 PA. CONS. STAT. § 9541 (2004)).

10. *Id.* Petitioner based this claim on trial counsel's alleged failure to introduce certain other "significant" mitigating evidence during the sentencing phase, including information about Petitioner's "childhood, mental capacity and health, and alcoholism." *Id.*

adequate.[11] The state supreme court agreed and affirmed the denial of post-conviction relief.[12]

Having exhausted his state remedies, Petitioner applied for a writ of habeas corpus[13] in federal district court, renewing his claim of ineffective assistance of trial counsel.[14] The District Court for the Eastern District of Pennsylvania granted Petitioner's request for relief, holding that the state post-conviction court had "unreasonably applied"[15] the framework that the United States Supreme Court had developed in *Strickland v. Washington*[16] during the penalty portion of Petitioner's criminal trial.[17] On appeal, a split Third Circuit reversed; the majority held that the state post-conviction court's application of the *Strickland* standard was not unreasonable[18] and that Petitioner's case was distinguishable from *Wiggins v. Smith*,[19] the Court's then-most-recent case regarding ineffective assistance of counsel.[20]

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11. *Id.*

12. *Id.*

13. Rompilla's petition for federal habeas relief relied on 28 U.S.C. § 2254 (2000), which states in relevant part:

> 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 . . . [if] he is in custody in violation of the Constitution or laws . . . of the United States . . . .

Because the Sixth Amendment guarantees the right to assistance of counsel, *see infra* note 24 and accompanying text, Rompilla's ineffective assistance claim properly alleged the constitutional violation a habeas petition requires. *See* 28 U.S.C. § 2254(a) (2000).

14. *Rompilla*, 125 S. Ct. at 2461.

15. *Id.*

16. 466 U.S. 668 (1984).

17. *Rompilla*, 125 S. Ct. at 2461. The District Court for the Eastern District of Pennsylvania based its grant of habeas relief on Petitioner's claim of ineffective assistance of counsel, finding specifically that trial counsel "unjustifiably" placed excessive weight on conversations with Petitioner regarding his background, thus failing to properly pursue "pretty obvious" outlying mitigating factors. *Id.* For examples of these mitigators, see *supra* note 10.

18. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 104 (codified at 28 U.S.C. § 2254(d)(1), (2) (2000)), added a new hurdle for defendants to overcome, in addition to the *Strickland* standard, to obtain post-conviction relief. The AEDPA modified the federal habeas corpus statute, 28 U.S.C. § 2254 (2000), such that a defendant had to show, post-AEDPA, that the state court decision "was contrary to, or involved an *unreasonable* application of, clearly established Federal law," or "was based on an *unreasonable* determination of the facts." *See* 28 U.S.C. § 2254(d)(1), (2) (emphasis added).

19. 539 U.S. 510 (2003).

20. *Rompilla*, 125 S. Ct. at 2461. The Third Circuit majority viewed the actions of Petitioner's trial counsel as factually different from Wiggins' trial counsel. *Id.* While Petitioner's counsel was reasonable, considering the amount of investigation already completed, in the belief that further investigation would not be helpful when balanced against minimal available resources, Wiggins' counsel performed only cursory searches, and "ignor[ed] the leads" that resulted. *Id.* This,

The Third Circuit denied Petitioner's request for a rehearing en banc[21] and Petitioner appealed to the Supreme Court. The Court granted certiorari and, reversing the decision of the Third Circuit,[22] HELD, that when the prosecution is likely to utilize specific aggravating evidence during capital sentencing, the Sixth Amendment requires a reasonable attempt by defense counsel to procure and examine that evidence, despite intimations by the defendant that investigation into a mitigation case will be fruitless.[23]

The Sixth Amendment guards the rights of the accused, and it specifically guarantees a criminal defendant the "Assistance of Counsel."[24] Within the body of Sixth Amendment jurisprudence, the Court has continually refined what constitutes assistance[25] in light of its importance

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according to the Third Circuit majority, justified the finding that Wiggins' counsel "failed to investigate adequately." *Id.*

The Third Circuit dissent argued that trial counsel's behavior, including undue reliance on mitigation testimony and failure to obtain certain pertinent records, was unreasonable. *Id.*; *see also* Rompilla v. Horn, 355 F.3d 233, 273 (2004) (Sloviter, J., dissenting) (describing the unobtained evidence as "school, medical, court and prison records").

21. *Rompilla*, 125 S. Ct. at 2461.

22. *Id.*

23. *Id.* at 2460.

24. U.S. CONST. amend. VI. The Sixth Amendment states:

> 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.

Id.

25. Originally, the Court interpreted the language of the Sixth Amendment to mean that a criminal defendant's constitutional right was violated only if there was a complete denial of counsel. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (stating that "any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him"); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (extending the right of appointed counsel to indigent federal defendants); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that the right to counsel in capital cases is a fundamental right, and the denial of that right to state defendants is a "denial of due process within the meaning of the Fourteenth Amendment"). This interpretation has gradually progressed to include not only actual, complete denial of counsel, but also constructive denial of counsel, governmental interference with the independence of counsel, and eventually, ineffective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668, 683 (1984) ("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."); Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."); Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (finding constructive denial of counsel when the attorney repeatedly slept during trial: "Unconscious counsel equates to no counsel at all."). This list of possible Sixth Amendment violations based on the right to counsel is

in "protect[ing] the fundamental right to a fair trial."[26] Indeed, even after interpretation of Sixth Amendment language had broadened to include occasions where counsel was merely ineffective rather than absent,[27] lower courts applied a number of different standards to decide when counsel's performance crossed into constitutional deficiency.[28]

In *Strickland v. Washington*,[29] the Court finally established the proper standard for measuring defense counsel's performance against the requirements of the Sixth Amendment.[30] Articulating a framework within which future ineffective assistance of counsel claims could be analyzed, the Court required a two-part showing.[31] First, a defendant bore the burden of demonstrating that "counsel's performance was deficient."[32] Second, even after establishing counsel's inadequacy, a defendant had to demonstrate that the "deficient performance prejudiced the defense."[33] Without proving both prongs, the Court concluded, a defendant could not complain that "the conviction or death sentence resulted from a breakdown in the adversary process that render[ed] the result unreliable."[34]

Having sketched a sturdy skeleton, the *Strickland* Court clarified its newly adopted framework by establishing standards by which each prong

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neither exhaustive nor inclusive.

26. *Strickland*, 466 U.S. at 684.

27. *See id.* at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)) (explaining "the right to counsel is the right to the effective assistance of counsel").

28. The major disagreement among the lower courts before *Strickland* involved the suitability of establishing rigid guidelines against which to measure counsel's performance when deciding ineffective assistance claims. *See* WAYNE R. LAFAVE, JERALD H. ISRAEL & NANCY J. KING, 3 CRIMINAL PROCEDURE § 11.10(a) (2d ed. 1999). Two major lines of cases emerged—those favoring the categorical approach, in which courts would apply a checklist of minimums that counsel must fulfill to be considered competent, and those favoring the judgmental approach, in which courts would look to the totality of the particular circumstances in evaluating counsel performance. *See* YALE KAMISAR ET AL., ADVANCED CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 157 (11th ed. 2005). For cases that advocated a categorical standard, see United States v. Decoster, 624 F.2d 196, 275 (D.C. Cir. 1976) (Bazelon, J., dissenting), and Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). For cases that supported a judgmental standard, see Baldwin v. Maggio, 704 F.2d 1325, 1329 (5th Cir. 1983); *Decoster*, 624 F.2d at 203 (plurality opinion of Leventhal, J.); and Commonwealth v. Saferian, 315 N.E.2d 878, 883 (Mass. 1974).

29. 466 U.S. 668 (1984).

30. *Id.* at 687.

31. *Id.*

32. *Id.* The Court elaborated on the first prong of the new framework, defining deficiency as "errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment," *id.*, and requiring a showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

33. *Id.* at 687. Again, the Court expanded upon the framework, describing prejudice as serious error that "deprive[d] the defendant of a fair trial, a trial whose result is reliable." *Id.*

34. *Id.*

would be measured.[35] Deficient performance, according to the Court, should be a totality of the circumstances analysis, weighing whether counsel provided "reasonably effective assistance" as judged by "prevailing professional norms."[36] Similarly, prejudice should be measured by the "reasonable probability that, but for counsel's unprofessional errors," the proceeding would have culminated in a different result.[37]

Nearly twenty years later, in *Williams v. Taylor*,[38] the Court applied this framework in conjunction with a recently enacted statutory amendment that modified the amount of deference courts owed to findings of state post-conviction courts during habeas review.[39] In *Williams,* a divided Court clarified for the first time the additional burden that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[40] imposed on a defendant seeking federal post-conviction relief due to ineffective assistance of counsel.[41] Justice O'Connor, writing for the majority regarding AEDPA,[42] held that before attempting to satisfy the *Strickland* test, a defendant had to show either that the state court applied a rule contradictory to established Supreme Court precedent, or that the state court applied the correct rule in an "objectively unreasonable" manner.[43] Justice Stevens,[44] writing for a different majority regarding the

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35. *See id.* at 687-88, 694.

36. *Id.* at 687-88; *see also* LAFAVE, ISRAEL & KING, *supra* note 28, § 11.10(a). Although many lower courts advocated a more categorical approach, extolling the virtues of rigid guidelines and "checklist[s] for judicial evaluation," the Court expressly rejected this standard, stating: "More specific guidelines are not appropriate." *Strickland*, 466 U.S. at 688. Justice Marshall, in his dissent, disagreed with the *Strickland* Court's more judgmental, case-by-case analysis. *See id.* at 706-19 (Marshall, J., dissenting). For a better understanding of the categorical approach, see cases cited *supra* note 28.

37. *Strickland*, 466 U.S. at 694 (majority opinion). Reinforcing one of the principal purposes for the Sixth Amendment right to effective assistance of counsel, the Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.*

38. 529 U.S. 362 (2000).

39. *See id.* at 390. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which modified 28 U.S.C. § 2254 (2000). Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104 (codified at 28 U.S.C. § 2254(d)(1)). Importantly, the AEDPA imposed the requirement that federal courts accept decisions of state post-conviction courts that had been adjudicated on the merits unless those decisions either contradicted existing federal law or involved an "unreasonable application" of that law. 28 U.S.C. § 2254 (d)(1).

40. Pub. L. No 104-132 § 104 (codified at 28 U.S.C.A. § 2254(d)(1)).

41. *Williams*, 529 U.S. at 402-03; *see also* Wayne M. Helge, Note, *Know Your Client: The Mundane Case of* Wiggins v. Smith, 10 ROGER WILLIAMS U. L. REV. 581, 590 (2005).

42. *Williams*, 529 U.S. at 399. Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas joined Justice O'Connor's opinion regarding AEDPA's additional barrier to habeas relief. *Id.* Justice Scalia joined the opinion except as to a footnote analyzing the legislative history of the federal habeas corpus statute. *Id.*

43. *Id.* at 405, 407, 409; *see also* Helge, *supra* note 41, at 590.

44. *Williams*, 529 U.S. at 367. Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer

specific facts of defendant Williams, held that the state supreme court had applied the wrong standard[45] to the ineffective assistance of counsel inquiry, satisfying the newly-imposed AEDPA burden,[46] and further, that both prongs of the *Strickland* test had been met.[47] The Court granted Williams relief despite the new AEDPA barrier,[48] perhaps signifying a movement away from the strong presumption of reasonableness the Court had afforded to counsel's actions since *Strickland*.[49]

In *Wiggins v. Smith*,[50] the Court continued its demanding scrutiny of ineffective assistance of counsel claims, applying the AEDPA-enhanced *Strickland* standard set forth in *Williams*.[51] *Wiggins*, like *Strickland* and *Williams*, concerned an allegation of improper investigation into mitigating evidence.[52] Because the state post-conviction court had utilized the correct legal standard, the Court stated that relief would only be available if the state court's conclusion was "objectively unreasonable."[53] Prior to assessing the reasonableness of the state court's decision, however, the Court focused first on the reasonableness of Wiggins' trial counsel's decision not to offer background information during Wiggins' mitigation case.[54] Given state and professional guidelines, as well as the promising leads uncovered by the cursory mitigation investigation, the Court found that Wiggins' trial counsel had not met the *Strickland* standard for effective performance.[55] Going further, the *Wiggins* Court found both the prejudice prong of the *Strickland* test and the AEDPA burden of objective unreasonableness satisfied, and granted Wiggins'

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joined Justice Stevens' opinion regarding the application of the AEDPA-enhanced *Strickland* standard to *Williams*' specific facts. *Id.*

45. *Id.* at 391. The Virginia Supreme Court misread another United States Supreme Court decision, Lockhart v. Fretwell, 506 U.S. 364 (1993), as "modif[ying] or in some way supplant[ing] the rule set down in *Strickland*." *Williams*, 529 U.S. at 391. The Virginia Supreme Court measured Williams' ineffective assistance of counsel claim not by the *Strickland* standard, but required, in addition, a "separate inquiry into fundamental fairness." *Id.* at 393.

46. *Williams*, 529 U.S. at 399-400.

47. *Id.* at 395-97.

48. *Id.* at 399.

49. *See* Strickland v. Washington, 466 U.S. 668, 690 (1984); Wendy N. Davis, *Inching Away from Death? Ineffective-Assistance Rulings Show High Court Wary of Lawyering in Capital Cases*, A.B.A. J., Sept. 2005, at 14-16. The Court in *Williams* granted relief based upon a claim of ineffective assistance of counsel for the first time since *Strickland* was decided in 1984. *See* Helge, *supra* note 41, at 591.

50. 539 U.S. 510 (2003).

51. *Id.* at 520-22.

52. *Id.* at 521.

53. *See id.* at 521-22 (quoting Williams v. Taylor, 529 U.S. 362, 409 (2000)); Helge, *supra* note 41, at 600.

54. *Wiggins*, 539 U.S. at 523.

55. *Id.* at 523-35.

requested relief.[56]

The instant case solidified the Court's progression away from the "heavy measure of deference [applied] to counsel's judgments"[57] and toward a more stringent evaluation of counsel's performance during capital sentencing.[58] Applying the AEDPA-enhanced *Strickland* standard adopted in *Williams* and reaffirmed in *Wiggins*, the instant Court granted Petitioner's request for post-conviction relief based on trial counsel's inadequate preparation of a mitigation case for Petitioner's penalty phase.[59] Specifically, the Court found that because Petitioner's trial counsel neglected to obtain and examine evidence counsel knew the prosecution would rely upon during its aggravation case,[60] in the process failing to discover powerful mitigation evidence contained in the same case file, counsel's performance fell below the *Strickland* standard.[61] Indeed, the instant Court considered counsel's inadequacy to be so apparent that the state court's conclusion to the contrary was objectively unreasonable.[62]

In a dissenting opinion, Justice Kennedy asserted that it was the majority's distortion of the *Strickland* standard, and not the state post-conviction court's finding, that was unreasonable.[63] Justice Kennedy contended that the instant Court had departed from the *Strickland* Court's purposeful selection of a flexible standard, replacing the well-settled totality of circumstances approach with a "new *per se* rule."[64] Justice O'Connor, concurring with the majority, disagreed and stated that the instant Court had merely applied the "longstanding case-by-case approach"[65] developed in *Strickland* to determine that the performance of Petitioner's counsel "was not 'reasonable considering all the circumstances.'"[66]

The instant Court emphasized that although the analysis into ineffective

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56. *Id.* at 534, 536.

57. *Id.* at 522 (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)).

58. *See, e.g.*, Erwin Chemerinsky, *The End of an Era*, 8 GREEN BAG 2d 345, 347, 348 (2005) (stating that the Court is "concerned about inadequate representation in capital cases"); Jeffrey L. Fisher, *No Clear Ideologies*, NAT'L L.J., Aug. 3, 2005, at 14.

59. Rompilla v. Beard, 125 S. Ct. 2456, 2469 (2005).

60. *Id.* at 2464, 2467. The prosecution put trial counsel on notice long before the penalty phase that it intended to use testimony from Petitioner's previous victim to establish Petitioner's propensity to commit violent felonies. *Id.* at 2464. Specifically, the prosecution planned to, and in fact did, read to the sentencing jury the previous trial testimony of a victim who Petitioner was convicted of brutally raping, rather than simply entering the list of prior convictions into evidence. *Id.*

61. *Id.* at 2467-68.

62. *Id.* at 2467.

63. *Id.* at 2471 (Kennedy, J., dissenting).

64. *Id.*

65. *Id.* at 2469 (O'Connor, J., concurring).

66. *Id.* at 2469-70 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

assistance of counsel claims was still to be conducted on a case-by-case basis and that its decision did not create a "rigid, per se" rule,[67] it continued to look to certain professional standards[68] as "'guides to determining what is reasonable.'"[69] Nevertheless, despite its reference to advisory checklists, the instant Court again declined to establish specific minimum requirements.[70] The instant Court feared that faced with a categorical standard, counsel would be forced to "scour the globe" in search of a mitigation case,[71] or to "look[] for a needle in a haystack, when . . . [counsel] truly has reason to doubt there is any needle there."[72] This, in the opinion of the instant Court, was beyond necessary.[73] Petitioner's case, however, did not fit this description according to the instant Court: Far from forcing counsel to sift through endless documents with little hope of finding useful information, the prosecution had given clear notice of its intent to use a specific, easily accessible file.[74]

Ultimately, by heavily quoting professional ethics manuals, such as the ABA Standards for Criminal Justice, in deciding Petitioner's ineffective assistance of counsel claim,[75] the instant Court appeared to be validating the use of checklists and guidebooks to a greater degree than what a true "case-by-case approach"[76] would allow.[77] While claiming to adhere to the flexible *Strickland* standard, the instant Court created a seemingly unreachable burden for defense counsel.[78] The instant decision implied that counsel retains some discretion to curtail, justifiably, mitigation investigations based on indications that further searching will be fruitless.[79] The instant Court further suggested, however, that failing to consider discoverable prosecution evidence when that evidence is a "sure bet" to include information helpful to rebut an aggravation case—even if the evidence is not necessarily guaranteed to strengthen mitigation—will be deemed constitutionally-deficient performance.[80] In truth, the result of these implications is an opinion that comes extremely close to installing

67. *Id.* at 2467 (majority opinion).
68. *Id.* at 2466 (referring specifically to "ABA Guidelines relating to death penalty defense").
69. *Id.* (quoting Wiggins v. Smith, 539 U.S. 510, 524 (2003)).
70. *See id.*
71. *Id.* at 2463.
72. *Id.* at 2467.
73. *See id.*
74. *Id.* at 2463-64.
75. *Id.* at 2465-66.
76. *Id.* at 2469-70 (O'Connor, J., concurring).
77. *See id.* at 2471 (Kennedy, J., dissenting).
78. *See id.* at 2475.
79. *See id.* at 2463 (majority opinion).
80. *See id.* at 2467.

a bright-line minimum.[81]

This new, more stringent burden portends a particularly harsh future for capital defendants relying on government-appointed counsel already disadvantaged by severely limited financial and investigatory resources.[82] If defense counsel must now obtain and review every document that the prosecution has given notice it will utilize, there is a strong likelihood that more important aspects of advocacy will be shelved.[83] Indeed, appointed counsel, in an effort to avoid a constitutional challenge, may "divert resources from other tasks[,]" thereby "diminish[ing] the quality of representation" provided to indigent capital defendants.[84]

Even if the instant decision expressly adheres to the *Strickland* standard in theory, in practice it will cause confusion as counsel attempts to decipher exactly what is required for adequate performance.[85] Caught between the Court's professed adherence to a totality of circumstances analysis, in which all counsel's actions will be examined, and its constructive adoption of mandatory duties, in which counsel must secure certain prosecution evidence to be constitutionally competent, defense attorneys will be unable to predict what choices will insulate them from ineffective assistance claims.[86] In the end, this uncertainty will result in an increased burden on the judicial system, as capital defendants flood the courts with challenges—hoping that their attorneys have chosen incorrectly.[87]

The instant decision may be alternatively explainable by reference to the Court's recent caution in death penalty matters.[88] Though the instant

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81. *See id.* at 2475-76 (Kennedy, J., dissenting).

82. *See id.* at 2475. This possibility is especially problematic considering that the portion of "state felony cases in which defendants were given appointed counsel" was approximately eighty percent in 1992. *See* KAMISAR ET AL., *supra* note 28, at 79, n.G.

83. *Rompilla*, 125 S. Ct. at 2475 (Kennedy, J., dissenting).

84. *Id.*

85. *See id.*

86. *See id.*

87. *See id.* Defense attorneys exercising their best judgments regarding what steps constitute "effective advocacy" may

> leave[] open the possibility that a defendant will seek to overturn his conviction based on something in a prior conviction case file that went unreviewed. This elevation of needle-in-a-haystack claims to the status of constitutional violations will benefit undeserving defendants and saddle States with the considerable costs of retrial and/or resentencing.

Id.

88. *See, e.g.*, Chemerinsky, *supra* note 58, at 347-48 (stating that the Court is "concerned about inadequate representation in capital cases"); Davis, *supra* note 49, at 14-16 (noting that the

Court frames its conclusion as the result of a normal *Strickland* analysis in which Petitioner's trial counsel simply failed to perform as a reasonable attorney should, the decision might more reasonably "reflect the [C]ourt's growing unease with the day-to-day administration of the death penalty in light of the mounting proof that innocent people sometimes are convicted of extremely serious crimes."[89] Indeed, Petitioner is the third capital defendant in five years to gain post-conviction relief based upon a claim of ineffective assistance of counsel,[90] and in the same term as the instant decision, the Court completely abolished the death penalty for juvenile defendants.[91]

The instant Court, in reaching this decision, distorted *Strickland*, misapplied *Williams*, and disregarded *Wiggins*.[92] Viewed narrowly, the instant case merely extends a line of Supreme Court cases imposing harsher scrutiny of attorney performance in capital cases.[93] Taken more broadly, however, the instant Court may have inadvertently established the exact categorical imperative that it sought to avoid in *Strickland*.[94] If this broader view is correct, the instant Court dangerously approaches interfering with the constitutionally guarded right to autonomous, independent counsel that has been so vigorously defended in prior decisions.[95]

Court may be following a larger cultural trend of backing away from the death penalty); Fisher, *supra* note 58, at 14 (noting that the Court is uneasy with the death penalty due to evidence that some innocent people are found guilty). The Court's caution regarding capital punishment and its trappings is not new. As early as the 1970s, some members of the Court were expressing concern that "'[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.'" Robert F. Schopp, *Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 FLA. L. REV. 475, 521 (2001) (quoting Justice Harlan in McGautha v. California, 402 U.S. 183, 204 (1971)).

89. Fisher, *supra* note 58, at 14. Apparently, the members of the Court are not alone in their apprehension of the death penalty. Recent surveys show that the general public, when asked to choose between the death penalty and a sentence of life in prison without parole, "preferred [the life imprisonment] alternative to capital punishment, often by sizable majorities . . . ." David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 10 (1998).

90. *See* Wiggins v. Smith, 539 U.S. 510, 519 (2003); Williams v. Taylor, 529 U.S. 362, 399 (2000). This statistic is all the more jarring considering that sixteen years passed between the Court's decisions in *Strickland* and *Williams* to reverse the imposition of the death penalty due to ineffective assistance.

91. Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005).

92. *See Rompilla*, 125 S. Ct. at 2475-76 (Kennedy, J., dissenting).

93. *See, e.g.*, Chemerinsky, *supra* note 58, at 347-48 (stating that the Court is "concerned about inadequate representation in capital cases"); Davis, *supra* note 49, at 14-16 (noting that the Court may be following a larger cultural trend of backing away from the death penalty); Fisher, *supra* note 58, at 14 (same).

94. *See Rompilla*, 125 S. Ct. at 2475-76 (Kennedy, J., dissenting).

95. *See id.* at 2478.