

**SUMMARIES OF ALL U.S. SUPREME COURT
INEFFECTIVE ASSISTANCE OF COUNSEL CASES
INCLUDING AND FOLLOWING *WIGGINS V. SMITH***

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UNITED STATES SUPREME COURT CASES

**Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) (sentenced in May 1984). The Court reversed the Ninth Circuit's finding of ineffective assistance of counsel and held that federal habeas review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Prior to sentencing, trial counsel moved to exclude any aggravating evidence due to the state's failure to provide notice of the evidence to be introduced as required by state law. That motion was denied and trial counsel rejected the court's offer of a continuance. In sentencing, trial counsel presented only testimony from the petitioner's mother concerning the petitioner's troubled childhood and adolescent years. In state habeas, counsel asserted ineffectiveness in failing to adequately investigate and in failing to furnish the defense expert with adequate background materials. The petitioner presented evidence from Dr. George Woods that the petitioner suffers from bipolar mood disorder and seizure disorders. The state court summarily rejected the claims on the merits. In federal court, the district court granted an evidentiary hearing and received additional evidence from two new medical experts. The district court and the Ninth Circuit granted habeas relief. The Supreme Court found error in the federal courts considering evidence that was not before the state court when the claim was adjudicated on the merits. The Court also found error in the federal courts' finding of ineffective assistance of counsel. Review of the state court's decision is "doubly deferential." First, there is a "highly deferential" look at counsel's performance. Second, this must be done through the "deferential lens of § 2254(d)." Here, "[t]he state court record supports the idea that [petitioner's] counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on [petitioner's] mother." Counsel interviewed the mother and retained a psychiatrist. Counsel "confronted a challenging penalty phase with an unsympathetic client, which limited their feasible strategies." Specifically, the petitioner bragged in his trial testimony about "his criminal disposition" and "hundreds of robberies." The defense expert, who did not testify, had noted "psychopathic personality traits" and diagnosed antisocial personality disorder. "Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for [petitioner's] mother." "[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's family is a better idea because the defendant himself is simply unsympathetic." In finding that the state court had unreasonably applied *Strickland*, the Ninth Circuit "erred in attributing strict rules to this Court's recent case law" in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). Here, just as the relevant standard in *Wiggins* was the standard of practice for capital cases in Maryland at the time of trial, the relevant standard of professional competence here was the standard "that prevailed in Los Angeles in 1984." Even if trial counsel performed deficiently, there was no showing that the state court unreasonably concluded there was no prejudice in light of the extensive aggravating evidence and the unsympathetic defendant. The "new" evidence presented in state habeas

“largely duplicated the mitigation evidence at trial.” To the extent it did include “new factual allegations or evidence, much of it is of questionable mitigating value.” If trial counsel had presented Dr. Woods’ testimony, it would have opened the door to rebuttal by a state expert. Likewise, the “new evidence” concerning the petitioner’s family - “substance abuse, mental illness, and criminal problems” - “is also by no means clearly mitigating, as the jury might have concluded that [petitioner] was simply beyond rehabilitation.” The Ninth Circuit again erred in relying on *Williams* and *Rompilla* in finding prejudice. “[T]his Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important ‘doubly deferential’ standard of *Strickland* and AEDPA” and “therefore offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking.” Even if the federal court might have reached a different conclusion as an initial matter, the state court did not unreasonably apply Supreme Court precedent in finding no prejudice.

Harrington v. Richter, 131 S. Ct. 770 (2011). The Supreme Court reversed the Ninth Circuit’s finding of ineffective assistance of counsel in murder and attempted murder case for failing to consult with blood evidence experts. The State’s case was built on the testimony of the attempted murder victim and circumstantial evidence. While the state had not planned to present blood pattern evidence, the approach was altered following defense counsel’s opening statement. The State presented expert testimony by both a blood spatter expert and a serologist to contradict the defense theory.

The pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel’s performance fell below *Strickland*’s standard.

Id. at 785. In this case, the state court’s decision was “unaccompanied by any explanation.”

Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Id. at 786. “[E]ven a strong case for relief does not mean the state court(s) conclusion was unreasonable.” *Id.*

As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that

there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 786-87. In assessing the effectiveness of representation, “[t]he question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Id.* at 788. “Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” *Id.* at 789. “Reliance on ‘the harsh light of hindsight’ to cast doubt on a trial that took place now more than 15 years ago is precisely what *Strickland* and AEDPA seek to prevent.” *Id.* at 789. Counsel’s failure to consult a blood expert was not unreasonable. Even if it was apparent that expert testimony would support the defense, competent counsel might elect not to use this evidence. “Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” Here, counsel had reason to question the truth of his client’s account, given his initial denial of involvement and then production of evidence. Thus, concentrating on the blood pool carried its own serious risks, such as exposing the petitioner’s story as “an invention.” “An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense.” “Even apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether [the petitioner] was telling the truth, or transform the case into a battle of the experts.” *Id.* at 790.

To support a defense argument that the prosecution has not proved its case it sometimes is better to try to case pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option.

Id. at 790. Counsel also was not ineffective in failing to anticipate that the state would offer expert testimony. “Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Id.* at 790. Here, the prosecution did not anticipate that it would present expert testimony until the eve of trial. “Even if counsel had anticipated the state would call an expert, *Strickland* does not enact Newton’s third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.” *Id.*

In many instances, cross-examination will be sufficient to expose defects in an expert’s presentation. When defense counsel does not have a solid case, the best strategy can be to say that there

is too much doubt about the State's theory for a jury to convict.

Id. at 791. Prejudice was not established.

Strickland asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

Id. at 792 (citations omitted). "There was ample basis for the California Supreme Court to think any real possibility of [the petitioner's] being acquitted was eclipsed by the remaining evidence pointing to guilt." *Id.*

Premo v. Moore, 131 S. Ct. 733 (2011). The Supreme Court reversed the Ninth Circuit's finding of ineffective assistance of counsel for recommending a plea bargain in felony murder case without first seeking suppression of a confession assumed to have been properly obtained. Counsel asserted he did not move to suppress the confession in light of the petitioner's admissible confessions to two other witnesses. The state court decision was not an unreasonable application of either part of the *Strickland* rule. "With a potential capital charge lurking, [petitioner's] counsel made a reasonable choice to opt for a quick plea bargain." The Ninth Circuit erred in resting its holding on *Arizona v. Fulminante*, 499 U.S. 279 (1991) because *Fulminante* may not be incorporated into the *Strickland* performance inquiry. *Fulminante* involved the admission into evidence of an involuntary confession. It "says nothing about the *Strickland* standard of effectiveness." Thus, "a finding of constitutionally adequate performance under *Strickland* cannot be contrary to *Fulminante*."

There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those, like this one, where a plea was entered even before the prosecution decided upon all the charges...

Hindsight and second guesses are ... inappropriate, and often more so, where a plea has been entered without a full trial or, as in this case, eve before the prosecution decided on the charges. . . . There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in

cases where witnesses and evidence were not presented in the first place.

**Sears v. Upton*, 130 S. Ct. 3259 (2010). The Court held that the state postconviction court failed to apply the proper prejudice inquiry in determining that counsel’s facially inadequate mitigation investigation did not prejudice the petitioner. Because “*some* mitigation evidence” had been presented, “the state court determined it could not speculate as to what the effect of additional evidence would have been.” “[I]t is plain from the face of the state court’s opinion that it failed to apply the correct prejudice inquiry . . . for evaluating [petitioner’s] Sixth Amendment claim.” At trial, “counsel presented evidence describing his childhood as stable, loving, and essentially without incident” in an effort to “portray the adverse impact of [his] execution on his family and loved ones.” This strategy backfired as the prosecutor “used the evidence of [petitioner’s] purportedly stable and advantaged upbringing against him during the State’s closing argument.” Rather than being “privileged in every way,” as the state argued, petitioner’s parents had a physically abusive relationship and divorced when the petitioner was young. He suffered sexual abuse from a male cousin. He was demeaned by his mother referring to him and his brothers as “little mother fuckers.” His father was also “verbally abusive,” even berating him in front of his school principal during a parent-teacher conference. His father disciplined him “with age-inappropriate military-style drills.” He “struggled in school, demonstrating substantial behavior problems from a very young age.” He repeated the second grade and was referred at age nine to a local mental health center for evaluation. By the time he reached high school, he was described as “severely learning disabled” and “severely behaviorally handicapped.” His older brother was “a convicted drug dealer and user, who introduced [petitioner] to a life of crime. “Environmental factors aside, and more significantly,” the postconviction evidence revealed that petitioner “performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning,” likely due to “significant frontal lobe damage [the petitioner] suffered as a child, as well as drug and alcohol abuse in his teens.” He had a “grandiose self-conception” and beliefs of “magical thinking,” due to a “profound personality disorder.” “[T]he fact that some of this evidence may have been ‘hearsay’ does not necessarily undermine its value—or its admissibility—for penalty phase purposes” because:

We have . . . recognized that reliable hearsay evidence that is relevant to a capital defendant’s mitigation defense should not be excluded by rote application of a state hearsay rule. *See Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L.Ed.2d 738 (1979) (*per curiam*) (“Regardless of whether the proffered testimony comes within Georgia’s hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause. . . . The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial); *see also Chambers v.*

Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (“In these circumstances, where constitutional directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice”).

In considering the state court’s prejudice analysis, the Court noted that the state court “appears to have stated the proper prejudice standard,” but then “did not correctly conceptualize how that standard applies to the circumstances of this case.” Because *some* mitigation evidence had been presented, the state court concluded that it could not “be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made.” Likewise, the state court found it “impossible to know what effect [a different mitigation theory] would have had on [the jury].” In short, in the state court’s view, “counsel put forth a reasonable theory with some supporting evidence,” which precluded finding “a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced.” The state court committed two errors in its analysis. First, it “placed undue reliance on the assumed reasonableness of counsel’s mitigation theory,” when the reasonableness of counsel’s theory was, “at the very least, called into question” by the state court’s “determination that counsel had conducted a constitutionally deficient mitigation investigation.”

[T]hat a theory might be reasonable in the abstract, does not obviate the need to analyze whether counsel’s failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [petitioner]. The “reasonableness” of counsel’s theory was, at this stage in the inquiry, beside the point: [petitioner] might be prejudiced by his counsel’s failures, whether his haphazard choice was reasonable or not.

The Court made this “plain” in *Williams v. Taylor*, 529 U.S. 362 (2000), where the Court “rejected any suggestion that a decision to focus on one potentially reasonable trial strategy—in that case, petitioner’s voluntary confession—was ‘justified by a tactical decision’ when ‘counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.’” *Id.* at ___ (quoting, *Williams*, 529 U.S. at 396). “A ‘tactical decision’ is a precursor to concluding that counsel has developed a ‘reasonable’ mitigation theory in a particular case.” Second, “and more fundamentally, the court failed to apply the proper prejudice inquiry.” The Court has “never limited the prejudice inquiry under *Strickland* to cases in which there was only ‘little or no mitigation evidence’ presented.” To the contrary, “the *Strickland* inquiry requires . . . probing and fact-specific analysis,” rather than “the type of truncated prejudice inquiry undertaken by the state court in this case.” A proper prejudice analysis must consider “the newly uncovered evidence” and the mitigation evidence introduced during sentencing.

Berghuis v. Thompkins, 130 S. Ct. 2250 (2010). Under AEDPA, counsel was not ineffective in murder trial for failing to request a limiting instruction, informing the jury that it could consider an accomplice’s acquittal in a prior trial only in assessing the accomplice’s credibility and not as substantive evidence of the defendant’s guilt. Here, without considering whether the state court used an incorrect legal standard or applying “AEDPA’s deferential standard,” prejudice could not be shown in light of significant evidence of guilt independent of the accomplice, including an eyewitness and a surveillance photo of the crime identifying the defendant, as well as, the defendant’s friend’s testimony that the defendant confessed to him.

****Jefferson v. Upton***, 130 S. Ct. 2217 (2010). The state court rejected Jefferson’s claim of “constitutionally inadequate” assistance due to counsel’s failure “to investigate a traumatic head injury that he suffered as a child” because of “a finding that the attorneys were advised by an expert that such investigation was unnecessary.” The Eleventh Circuit erred in presuming this finding was correct, under pre-AEDPA law, without having fully considered the applicable exceptions to a presumption of correctness under 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963). The court considered only whether the finding were “fairly supported by the record,” even though Jefferson had consistently argued that “the state court’s *process* was deficient” because: “those findings were drafted exclusively by the attorneys for the State pursuant to an *ex parte* request from the state-court judge, who made no such request of Jefferson, failed to notify Jefferson of the request made to opposing counsel, and adopted the State’s proposed opinion verbatim even though it recounted evidence from a nonexistent witness.” Remanded for further proceedings.

Padilla v. Kentucky, 130 S. Ct. 4235 (2010). Padilla, a native of Honduras who had lived in the U.S. for 40 years legally and fought for the U.S. in the Vietnam War, pleaded guilty based on counsel’s incorrect advice that deportation was unlikely. Starting with the premise that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel,” the Court found deficient conduct in counsel’s failure to advise Padilla that his conviction for drug distribution made him subject to automatic deportation. The Court declined to consider whether there is some “distinction between direct and collateral consequences” for *Strickland* purposes because of the “unique nature of deportation,” which is “an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” “The first prong [of *Strickland*]—constitutional deficiency—is necessarily linked to the practices and expectations of the legal community,” described in *Strickland* as “prevailing professional norms.” While ABA standards and the like “are ‘only guides,’ and not ‘inexorable commands,’ these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.” Here, the

Court cited the ABA Standards for Criminal Justice, NLADA standards, and others in finding, with some qualification, that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”

When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

In addressing whether there is a distinction between giving bad advice and no advice, the Court found “no relevant difference ‘between an act of commission and an act of omission’ in this context.” Case remanded for a determination of prejudice.

**Wood v. Allen*, 130 S. Ct. 841 (2010) (crimes in 1993 and direct appeal in 1996). Under AEDPA, the Court upheld the Eleventh Circuit’s finding that counsel was not ineffective in failing to pursue and present mitigating evidence of the defendant’s borderline mental retardation as the failure was a strategic decision rather than a negligent omission. The state court’s factual findings in denying relief were reasonable. Counsel were aware of a favorable expert report about low IQ, but that report also contained the expert’s conclusion that the defendant had a high level of adaptive functioning. In addition, the report contained details of the defendant’s 19 prior arrests and his attempt to murder a prior ex-girlfriend when the capital murder involved the killing of an ex-girlfriend. All of the defendant’s counsel read the report. Lead counsel told the counsel handling sentencing that nothing in the report merited further investigation. Sentencing counsel told the judge that counsel did not intend to introduce the expert report before the jury. Thus, the failure to present the report “was not mere oversight or neglect but was instead the result of a deliberate decision to focus on other defenses.” While Wood’s counsel asserted that counsel’s strategic judgment was not reasonable due to the failure to make a reasonable investigation of Wood’s mental deficiencies before deciding not to pursue or present such evidence, the Court declined to reach that question because the argument was not “fairly included” in the questions presented.

Whether the state court reasonably determined that there was a strategic decision under § 2254(d)(2) is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland* or whether the application of *Strickland* was reasonable under § 2254(d)(1).

**Smith v. Spisak*, 130 S. Ct. 676 (2010) (sentenced in 1983). Without deciding whether “deference” to the state court decision was required under AEDPA, the Court reversed the Sixth Circuit’s finding of ineffective assistance due to an inadequate closing argument

in the capital sentencing phase. Counsel described the crimes in detail, acknowledged that the defendant's "admiration for Hitler inspired his crimes," referred to the defendant as "sick," "twisted," and "demented," and said that he would never change. Counsel did argue, however, that the defendant should not be executed due to mental illness (schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking), despite the "substantial" aggravating factors. The Court assumed that counsel's conduct was deficient, but found no prejudice, as the defendant admitted three murders and two other shootings by asserting a not guilty by reason of insanity plea. In addition, the defendant himself gave very damaging testimony admitting his "Aryan" admiration of Hitler and his crimes. He also testified that he would continue to commit similar crimes if he had the chance.

***Porter v. McCollum**, 130 S. Ct. 447 (2009) (Per Curiam) (sentenced in 1988). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The defendant, after proceeding *pro se* with stand-by counsel, plead guilty to shooting his former girlfriend. His stand-by counsel was appointed to represent him in sentencing and presented only his ex-wife's testimony and an excerpt from a deposition. "The sum total of the mitigating evidence was inconsistent testimony about [the defendant's] behavior when intoxicated and testimony that [he] had a good relationship with his son." *Id.* at 449. No mental health evidence was presented and the trial court found no mitigating circumstances. Because the state court did not decide whether counsel's conduct was deficient, the Court reviewed this element of the claim *de novo*. While "counsel had an 'obligation to conduct a thorough investigation of the defendant's background,'" *id.* at 452 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)), counsel "did not satisfy those norms," *id.* at 453. Counsel was appointed a month before sentencing and had only one short meeting with the defendant about the sentencing phase. "He did not obtain any of [the defendant's] school, medical, or military service records or interview any members of [the defendant's] family." Where counsel in *Wiggins* failed to "expand[] their investigation," counsel here "did not even take the first step of interviewing witnesses or requesting records." *Id.* at 453. "[H]e ignored pertinent avenues for investigation of which he should have been aware." *Id.* Even court-ordered competency evaluations revealed his limited education, his military service and combat record, and his father's "over-discipline." While counsel asserted that the defendant was "fatalistic and uncooperative," the defendant had instructed him not to talk to his ex-wife or son, but otherwise "did not give him any other instructions limiting the witnesses he could interview." *Id.* In short, while the defendant "may have been fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation." *Id.* There was also prejudice. In short, the judge and jury at sentencing "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability. They learned about [his] turbulent relationship with [the victim], his crimes, and almost nothing else." *Id.* at 454. Evidence was available that the defendant had routinely witnessed his father beat his mother. He

was also routinely beaten by his father, particularly when he tried to protect his mother. His father even shot at him once. He attended classes for slow learners and left school when he was 12 or 13. He joined the Army at 17 and fought in the Korean War. His company commander testified that he fought in two major battles within a 3 month period and was wounded in both. In one of the battles his unit suffered more than 50% casualties. He was individually decorated for his actions in both battles. When he returned to the U.S., he went AWOL and was sentenced to six months' confinement, but he was honorably discharged. After his discharge, he suffered from posttraumatic stress disorder (PTSD), which the Court noted is "not uncommon among veterans returning from combat," *id.* at 450, as the Secretary of Veteran Affairs testified before Congress in 2009 "that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD" *id.* at 450 n.4. He also developed a serious drinking problem. An expert in neuropsychology also found that he suffered from "brain damage that could manifest in impulsive, violent behavior." *Id.* at 452. The expert testified that two statutory mitigating circumstances were present: substantially impaired ability to conform conduct and extreme mental or emotional disturbance.

Unlike the evidence presented during [the defendant's] penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.

Id. at 449. The aggravation evidence "[o]n the other side of the ledger" was not substantial. *Id.* at 454.

Had the judge and jury been able to place [the defendant's] life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury—and the sentencing judge—"would have struck a different balance," *Wiggins*, 539 U.S. at 537, and it is unreasonable to conclude otherwise.

Porter, 130 S. Ct. at 454. Thus, under AEDPA, the state court's finding of no prejudice was "an unreasonable application of our clearly established law." *Id.* at 455. The state court did not consider the expert testimony for purposes of nonstatutory mitigation and "unreasonably discounted the evidence of [the defendant's] childhood abuse and military service." *Id.* The evidence of childhood abuse "may have particular salience" in a case like this where the defendant killed his former girlfriend. *Id.* The military service was important as "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Id.* The

military service was also relevant mitigation because of “the intense stress and mental and emotional toll that combat took.” *Id.*

**Wong v. Belmontes*, 130 S. Ct. 383 (2009) (Per Curiam) (reversing *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008)) (sentenced in 1982). The Court reversed the Ninth Circuit’s finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court did not resolve whether counsel’s conduct was deficient because it found that prejudice was not established.

That showing requires [the defendant] to establish “a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,” and “that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.”

Id. at 386 (quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003)). The Court accepted the lower court’s conclusion that a reasonably competent lawyer would have introduced more mitigation evidence, but found no likelihood of a different result.

In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [counsel] had pursued the different path—not just the mitigation evidence [counsel] could have presented, but also the . . . [aggravation] evidence that almost certainly would have come in with it.

Id. In this case, counsel had put on nine lay witnesses for testimony spanning two days to testify about the defendant’s terrible childhood, with an alcoholic and abusive father, living in a small house, and not doing well in school. His younger sister died when she was only 10 months old and his grandmother drowned. He had plead guilty to accessory after the fact of murder and had a religious conversion in custody where he adapted well. The evidence counsel did not present was “merely cumulative” or “would have triggered admission” of powerful aggravation evidence in rebuttal. *Id.* at 387. Specifically, there was extensive evidence that the defendant had committed the prior “execution style” murder to which he plead guilty as an accessory. *Id.* at 385. He had boasted to several people and admitted to his counselor while in custody that he had committed the murder. Counsel had structured the mitigation evidence to keep this evidence out. There was no prejudice from not using expert testimony because the mitigating evidence “was neither complex nor technical” and the jury could “use its common sense or own sense of mercy” to “understand the ‘humanizing’ evidence.” *Id.* at 388. Moreover, presenting expert testimony would have opened the door to the evidence of the prior murder, which was the “elephant in the courtroom” kept out only by counsel’s careful presentation of the mitigation. *Id.* at 390.

***Bobby v. Van Hook**, 130 S. Ct. 13 (2009) (Per Curiam) (reversing *Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009)) (sentenced in 1985). In this pre-AEDPA case, the Court reversed the Sixth Circuit’s finding of ineffective assistance of counsel for failing to adequately investigate and present mitigation evidence. The Court reiterated that the *Strickland* “standard is necessarily a general one.” *Id.* at 16.

Restatements of professional standards . . . can be useful as “guides” to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Id. In this case, the Sixth Circuit erred by “relying on ABA guidelines announced 18 years after Van Hook went to trial” in 1985. In short, “[t]he ABA standards in effect in 1985 described defense counsel’s duty to investigate both the merits and mitigating circumstances in general terms,” *id.* at 16-17, rather than the “detailed prescriptions for legal representation of capital defendants” in the 2003 Guidelines, *id.* at 17. It was error to judge counsel’s conduct based on the 2003 Guidelines and to treat the Guidelines “not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel ‘must fully comply.’” *Id.* The Court noted that it was expressing “no views” on how post-2003 representation should be changed, *id.* at 17 n.1, but declared here:

What we have said of state requirements is *a fortiori* true of standards set by private organizations: “While States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

Id. at 17. The Court also held that, applying the appropriate standards, counsel was not ineffective. While the lower court held that counsel “began their mitigation investigation too late,” counsel had three months from the time of indictment to trial and “contacted their lay witnesses early and often,” including talking nine times with the defendant’s mother. *Id.* at 18. They contacted one of their experts a month before trial and met with the other expert a week before the trial court verdict. They attempted to obtain VA medical records seven weeks before trial. They also “looked into enlisting a mitigation specialist when the trial was still five weeks away.” *Id.* The scope of counsel’s investigation was also not unreasonable. Counsel presented evidence that the defendant’s parents were “heavy drinkers” that encouraged his drug and alcohol use as a child and that he continued abusing drugs and alcohol into adulthood. *Id.* He grew up in a “combat zone” with his father holding his mother at gun and knife-point and engaging in “sexual violence.” *Id.* His drug and alcohol abuse resulted in him being forced out of the military. He had attempted suicide five times in the month before the murder. There was

also expert testimony about his diminished capacity at the time of the offenses—a “homosexual panic”—from his borderline personality disorder and drugs and alcohol. *Id.* at 19. While counsel did not interview a stepsister, two uncles, two aunts, and a psychiatrist that had treated the defendant’s mother, this conduct was not deficient.

[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. The ABA Standards prevailing at the time called for . . . counsel to cover several broad categories of mitigating evidence, which they did. And given all the evidence they unearthed from those closest to [the defendant’s] upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents.

Id. at 19 (citations omitted). In short, this was not a case like *Wiggins v. Smith*, 539 U.S. 510 (2003), where counsel “failed to act while potentially powerful mitigating evidence stared them in the face,” or *Rompilla v. Beard*, 545 U.S. 374 (2005), where evidence “would have been apparent from documents any reasonable attorney would have obtained.” *Bobby*, 130 S. Ct. at 19.

It is instead a case, like *Strickland* itself, in which defense counsel’s “decision not to seek more” mitigating evidence from the defendant’s background “than was already in hand” fell “well within the range of professionally reasonable judgments.”

Id. at 19 (quoting *Strickland v. Washington*, 466 U.S. 668, 699 (1984)). Finally, even if counsel’s conduct was deficient, there was no prejudice as only two witnesses “even arguably would have added new, relevant information.” *Id.* In addition, the lower court failed to consider the aggravation evidence “[o]n the other side of the scales,” which included a history of luring homosexual men into secluded settings to rob them many times in the past, as he did in this case that resulted in murder. *Id.* at 20.

Knowles v. Mirzayance, 129 S. Ct. 1411 (2009). Reversing the Ninth Circuit’s and holding, under AEDPA review, that the decision of the California Court of Appeal, that defendant was not deprived of effective assistance of counsel when his attorney recommended withdrawing his insanity defense, was not contrary to or an unreasonable application of clearly established federal law, and defense counsel was not ineffective. Defendant was charged with murder and plead not guilty and not guilty by reason of insanity. Under California law, this required a bifurcated trial, first on guilt or innocence (with the burden of proof on the state) and then on insanity (with the burden of proof on the defendant.) Although the defendant confessed, the defense first sought conviction

only on the lesser included offense of second-degree murder based on the defendant's inability to premeditate or deliberate. Counsel presented medical testimony in the guilt-or-innocence phase, but the jury rejected this evidence and convicted of first-degree murder. Counsel had intended to present the same medical testimony in the insanity phase, along with testimony of the defendant's parents, but the parents refused to testify. On the advice of counsel, who believed it was unlikely the defense would prevail, the defendant withdrew the insanity plea. Following confusion from the Ninth Circuit's remand, the Magistrate Judge and District Court granted relief and the Ninth Circuit affirmed even though it appeared that the District Court had "evaluated counsel's strategy under a 'nothing to lose' standard," meaning counsel had no true tactical reason for withdrawing the plea because there was "nothing to lose" in pursuing insanity. Even following the Supreme Court's remand for consideration in light of *Carey v. Musladin*, 549 U.S. 70 (2006), the Ninth Circuit granted "because defense counsel's failure to pursue the insanity defense constituted deficient performance as it 'secured ... [n]o actual tactical advantage.'" The Supreme Court reversed.

The question "is not whether a federal court believes the state court's determination" under the *Strickland* standard "was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007)]. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. See *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

Id. at 1420.

We conclude that the state court's decision to deny Mirzayance's ineffective-assistance-of-counsel claim did not violate clearly established federal law. The Court of Appeals reached a contrary result based, in large measure, on its application of an improper standard of review—it blamed counsel for abandoning the NGI claim because there was nothing to lose by pursuing it. But this Court has held on numerous occasions that it is not " 'an unreasonable application of clearly established Federal law' " for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. This Court has never established anything akin to the Court of Appeals' "nothing to lose"

standard for evaluating *Strickland* claims.

Id. at 1419 (citations omitted). The Court also rejected the Court’s “nothing to lose” reasoning: “Finding that counsel is deficient by abandoning a defense where there is nothing to gain from that abandonment is equivalent to finding that counsel is deficient by declining to pursue a strategy where there is nothing to lose from pursuit of that strategy.” *Id.* at 1419 n.3.

Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, see *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam), Mirzayance's ineffective-assistance claim fails. It was not unreasonable for the state court to conclude that his defense counsel's performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success.

Id. at 1420. Moreover, “Even if Mirzayance's ineffective-assistance-of-counsel claim were eligible for *de novo* review, it would still fail” under *Strickland*. Counsel’s conduct was not deficient because his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail.” *Id.* Counsel reasoned that “[t]he jury had already rejected medical testimony about Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt” and, thus, the defense could not meet its burden in the insanity phase because “there was almost no chance that the same jury would have reached a different result when considering similar evidence.” *Id.* at 1421. Counsel also believed the experts could be impeached for other reasons.

We are aware of no “prevailing professional norms” that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. And in this case, counsel did not give up “the only defense available.” Counsel put on a defense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase [where he received the lowest possible sentence for his first-degree murder conviction]. The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason above and beyond a reasonable appraisal of a claim's dismal prospects for success-for recommending that a weak claim be dropped altogether.

Id. at 1421-22 (citations omitted). While the Court of Appeals faulted counsel for not

persuading the reluctant parents to testify, the Magistrate Judge and District Court had found more than reluctance. They found refusal.

[C]ourts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous. Fed. Rule Civ. Proc. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior.

Id. at 1421. “Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded.” *Id.* There was also no prejudice. “It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase.”

Wright v. Van Patten, ___ U.S. ___, 128 S. Ct. 743 (2008) (Per Curiam). The Court vacated the Seventh Circuit’s holding that the defendant had been denied the assistance of counsel under *Cronic* during his plea hearing for reckless homicide because his lawyer was not physically present “but was linked to the courtroom by speaker phone.” Because the Court’s precedents have not addressed this question, it could not be said that the state court’s had unreasonably applied clearly established Federal law under AEDPA in applying *Strickland* rather than *Cronic* as the Seventh Circuit did.

****Schriro v. Landrigan***, 127 S. Ct. 1933 (2007). The Court reversed the Ninth Circuit’s grant of an evidentiary hearing on the question of whether counsel was ineffective for failing to adequately investigate and present mitigation despite the defendant’s instruction to counsel not to offer any mitigating evidence. In sentencing, counsel attempted to present the testimony of the defendant’s ex-wife and birth mother, but, at the defendant’s request, both refused to testify. The defendant also informed the court that he did not want to present any mitigating evidence. Counsel proffered that the witnesses would have testified that the defendant’s birth mother used drugs and alcohol (including while she was pregnant with the defendant), that the defendant had abused drugs and alcohol, and that he had been a good father. When counsel tried to proffer additional mitigating evidence, the defendant “would have none of it” and contradicted counsel. The defendant also informed the court that “if you to give me the death penalty, just bring it right on. I’m ready for it.” In reversing the Ninth Circuit, the Court held that, if the defendant “instructed his counsel not to offer any mitigating evidence” then “counsel's failure to investigate further could not have been prejudicial under *Strickland*.” *Id.* at 1941. The Court also rejected the Ninth Circuit’s finding that, “due to counsel's failure to

investigate, [the defendant] could not have known about the mitigating evidence he now wants to explore.” This finding was rejected because the proffered evidence “overlaps” with the evidence relied on in the habeas proceedings and because it was plain from the transcript “that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered.” *Id.*

In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence.

Id. at 1942. The Court also rejected the Ninth Circuit’s finding that the decision not a present mitigation was informed and knowing. “We have never imposed an ‘informed and knowing’ requirement upon a defendant's decision not to introduce evidence. Even assuming, however, that an ‘informed and knowing’ requirement exists in this case, Landrigan cannot benefit from it. . . .” *Id.* (citation omitted). First, this issue was not raised in state court. Second, counsel informed the trial court that he had carefully explained the importance of mitigation to the defendant and it is “doubtful that Landrigan would have sat idly by” if this were not true. Finally, Landrigan’s final statement to the court to “bring it right on” clearly indicates the defendant understood the consequences of not presenting mitigation. Finally, the Court rejected the Ninth Circuit’s finding of a “colorable” showing of prejudice because most of the evidence available could have been presented through the defendant’s birth mother and ex-wife and was proffered to the sentencing court anyway. Thus, “[t]he District Court could reasonably conclude that any additional evidence would have made no difference in the sentencing.” *Id.* at 1943. The “mitigation evidence was weak,” the defendant had an “exceedingly violent past” (“before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man”), the defendant showed no remorse, and the defendant was “belligerent” and “flaunted his menacing behavior.” In sum, “[o]n this record, assuring the court that genetics made him the way he is could not have been very helpful.”

**Rompilla v. Beard*, 545 U.S. 374 (2005). Counsel ineffective in capital sentencing for failing “to make reasonable efforts to obtain and review material that counsel [knew] the prosecution [would] probably rely on as evidence of aggravation at the sentencing phase of the trial,” *id.* at 377, which would have led to significant mitigation. Counsel interviewed the defendant, who provided minimal assistance in mitigation and “was actively obstructive by sending counsel off on false leads,” *id.* at 381, and a few of the defendant’s family members, and reviewed the reports of court-appointed examiners, who assessed only competence and capacity at the time of the offenses. Finding nothing “particularly helpful” in these sources, *id.*, counsel did not conduct additional

investigation for information “that might have cast light on [the defendant’s] mental condition,” *id.* at 382. Counsel also did not obtain the file of a prior conviction for rape and assault, even though counsel knew the state intended to rely on the aggravating circumstance of a significant history of felony convictions indicating the use or threat of violence and knew that the state specifically intended to read the testimony of the prior rape victim into evidence in sentencing. In mitigation, the defense presented brief testimony from the defendant’s family members, who “argued in effect for residual doubt, and beseeched the jury for mercy.” *Id.* at 378. In addressing the ineffective assistance claim, the Court noted that, in a capital sentencing, “defense counsel’s job is to counter the State’s evidence of aggravated culpability with evidence in mitigation.” *Id.* at 380-81. While “reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste,” *id.* at 383, counsel’s conduct in this case was “deficient in failing to examine the court file,” *id.*, on the prior conviction because counsel knew the state intended to rely on it and “the prior conviction file was a public document, readily available for the asking at the very courthouse where [the defendant] was to be tried,” *id.* at 384. While counsel opposed admission of the evidence, this was insufficient because “[c]ounsel’s obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out.” *Id.* at 386 n.5. Here, despite knowing of the state’s intent to rely on the evidence, counsel did not look at any part of the file, until the day before the sentencing phase began and then looked only at the transcript of the victim’s testimony. The obligation to review the remainder of the file

was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and [the defendant’s] sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

Id. at 386. In reaching this conclusion, the Court emphasized “[t]he ease with which counsel could examine the entire file. . . . Suffice it to say that when the State has warehouses of records available in a particular case, review of counsel’s performance will call for greater subtlety.” *Id.* at 386 n.5. The Court also noted that “[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.” *Id.* at 387. It is described “in terms no one could misunderstand” in the ABA Standards for Criminal Justice “in circulation,” *id.*, at the time of trial and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases promulgated in 1989, “shortly after” this trial, and made “even more explicit” in the 2003 revisions. *Id.* at 387 n.7. “[I]n any case, [we] cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.” *Id.* at 387 n.6. The state court’s application of Strickland was objectively unreasonable because

the court reasoned that “defense counsel’s efforts to find mitigating evidence by other means excused them from looking at the prior conviction file.” *Id.* at 388. The Court rejected this reasoning because “[n]o reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim’s testimony.” *Id.* at 389. Counsel is not required to look

for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there. But looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell the defense counsel something about what the prosecution can produce.

Id. The Court cautioned, however, that, although counsel’s conduct was unreasonable in the circumstances of this case, a different result might be obtained in other situations “where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way.” *Id.* at 390. Because the state court never reached question of prejudice, the Court examined this issue “de novo.” *Id.* Prejudice was uncontested by the Commonwealth and the Court found prejudice. If counsel had looked in the file, counsel would have discovered “mitigation leads that no other source had opened up,” *id.*, including information that the defendant grew up in a “slum environment” and had numerous prior incarcerations for offenses “often of assaultive nature and commonly related to over-indulgence in alcoholic beverages,” *id.* at 391. The file also contained information “pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.” *Id.* “The jury never heard even of this and neither did the mental health experts who examined [the defendant] before trial.” *Id.* at 392. If the experts had reviewed these records, they (like “their post-conviction counterparts”) would have “found plenty of ‘red flags’ pointing up to a need to test further.” *Id.* This testing would have established that (1) the defendant “suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions”; (2) the impairments probably resulted from “fetal alcohol syndrome” and, thus, existed since childhood.; and (3) the defendant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offenses. *Id.* “These finds in turn would probably have prompted a look at school and juvenile records, all of them easy to get,” which showed that (1) the defendant’s mother was often missing from the home for a week or more at a time when the defendant was 16; (2) the defendant’s mother was frequently drunk and “the children have always been poorly kept and on the filthy side which was also the condition of the home at all times”); and (3) the defendant’s “IQ was in the mentally retarded range.” *Id.* at 393. “This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury” and “‘might well have influenced the jury’s appraisal’ of . . . culpability.” *Id.* (quoting *Wiggins*

v. Smith, 539 U.S. 510, 538 (2003) and *Williams v. Taylor*, 529 U.S. 362, 398 (2000)).

**Florida v. Nixon*, 543 U.S. 175 (2004). Trial counsel's "failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial" is not automatically deficient performance and must be evaluated under the *Strickland* test rather than under the *Cronic* test. The Court recognized that some decisions concerning "basic trial rights" must be made by the defendant and require that "an attorney must both consult with the defendant and obtain consent to the recommended course of action." These basic trial rights include the determination of "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id.* (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). For other matters, "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy," *id.* (citing *Strickland*, 466 U.S. at 688), but this "obligation . . . does not require counsel to obtain the defendant's consent to 'every tactical decision,'" *id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval)). With respect to capital cases, the court recognized that

the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

Id. In circumstances where guilt is clear, counsel must "strive at the guilt phase to avoid a counterproductive course," *id.*, such as presenting logically inconsistent strategies in the trial and sentencing. *Id.* (citing, *inter alia*, Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L.Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.")). Thus, "[c]ounsel . . . may reasonably decide to focus on the trial's penalty phase," *id.*, and "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'"

To summarize, in a capital case, counsel must consider in

conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Id.

Holland v. Jackson, 542 U.S. 649 (2004). The Sixth Circuit Court of Appeals erred in finding that the state court decision denying relief on the basis of an ineffective assistance of counsel claim was an "unreasonable application" or "contrary to" *Strickland*. The petitioner in a murder case sought state post-conviction relief on the basis of counsel's failure to adequately investigate. The court denied relief. Afterwards, the petitioner filed a motion to reopen on the basis of "newly discovered evidence" and attaching an affidavit that would have contradicted the testimony of the state's primary witness. On appeal, the state court held that the affidavit was not properly before the court. Alternatively, the court stated it would deny relief on the merits. "[W]hether a state court's decision was unreasonable must be assessed in light of the record the court had before it." Here, the District Court and the Court of Appeals made no findings warranting the admission of new evidence buttressing a previously rejected claim. Instead, the Court of Appeals "simply ignored entirely the state court's independent ground for its decision, that [the] statement was not properly before it." Thus, the court erred in finding that the state court's decision was an unreasonable application of *Strickland*. The court also erred in finding that the state court's decision was "contrary to" *Strickland* (in three instances) due to imposition of a different burden of proof on prejudice than "reasonable probability." The important holding here is that "the unadorned word 'probably' is permissible shorthand when the complete *Strickland* standard is elsewhere recited."

Yarborough v. Gentry, 540 U.S. 1 (2003). The Court reversed the Ninth Circuit's grant of relief because the state court determination that counsel was not ineffective was not objectively unreasonable under the AEDPA. The defendant had been convicted of assault with a deadly weapon for stabbing his girlfriend. On appeal, he argued that his trial counsel's closing argument deprived him of his right to effective assistance of counsel. The state court denied relief, as did the federal district court, but the Ninth Circuit reversed. The court held that the right to effective assistance extends to closing arguments. Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that

stage. Closing arguments should “sharpen and clarify the issues for resolution by the trier of fact,” but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing arguments altogether. Judicial review of a defense attorney’s summation is therefore highly deferential – and doubly deferential when it is conducted through the lens of federal habeas. The Court found that the Ninth Circuit erred in finding the state court decision to be objectively unreasonable. While the Ninth Circuit found and relied on the fact that counsel did not highlight a number of potential exculpatory pieces of evidence, the Court found “these other potential arguments do not establish that the state court’s decision was unreasonable.” Relying on a number of law review articles and treatises, the court found that “focusing on a small number of key points may be more persuasive than a shotgun approach.” “In short, judicious selection of arguments for summation is a core exercise of defense counsel’s discretion.” “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.” That presumption has particular force where a petitioner bases his ineffective assistance claim solely on the trial record, creating a situation in which a court “may have no way of knowing whether a seemingly unusual or misguided action had a sound strategic motive.” Here, “counsel plainly put to the jury the centerpiece of his case.” The court also found that counsel’s argument was not deficient in reminding the jury of evidence of the defendant’s bad character but also stating that evidence was legally irrelevant. “This is precisely the sort of calculated risk that lies at the heart of an advocate’s discretion. By candidly acknowledging his client’s shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case.” The Court also found that counsel’s conduct in making only a passive request that the jury reach some verdict was not unreasonable. “Given a patronizing and overconfident summation by a prosecutor, a low-key strategy that stresses the jury’s autonomy is not unreasonable.” The Court also rejected the Ninth Circuit’s finding that counsel was ineffective for failing to argue explicitly that the government had failed to prove its case. The court held “[c]ounsel’s entire presentation, however made just that point.” Finally, the Court rejected the Ninth Circuit’s finding of ineffectiveness because counsel admitted that he did not know the truth which implied that he did not even believe his client’s testimony. The Court held, however, “there is nothing wrong with a rhetorical device that personalizes the doubt anyone but an eyewitness must necessarily have. Winning over an audience by empathy is a technique that dates back to Aristotle.” In sum, the Court found that the Ninth Circuit’s decision “gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials.”

***Wiggins v. Smith**, 539 U.S. 510 (2003). Counsel ineffective in capital habeas case, decided under the AEDPA, for failing to adequately prepare and present mitigation. Counsel relied on arguments that the defendant was not directly responsible for the murder and did not present any social history or other mitigation, despite knowledge of at

least some of the defendant’s background information. The issue before the Court was “whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ background was *itself reasonable*.” *Id.* at 523 (emphasis in original). “In assessing counsel’s investigation, we must conduct an objective review of their performance, measured for ‘reasonableness under prevailing professional norms,’ which includes a context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time.’” *Id.* (quoting *Strickland*, 466 U.S. at 688). In this case, where counsel had only limited records available and did not investigate further, counsel’s conduct “fell short of the professional standards that prevailed in Maryland in 1989,” because no “social history report” was prepared even though counsel had funds available to retain a “forensic social worker.” *Id.* at 524.

Counsel’s conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we have referred as “guides to determining what is reasonable.” *Strickland*, *supra*, at 688; *Williams v. Taylor*, *supra*, at 396. 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.I(C), p. 93 (1989) (emphasis added).

Id. “Despite these well-defined norms, . . . , counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources.” *Id.* (citing the ABA standards again). The Court found that “[t]he scope of their investigation was also unreasonable in light of what counsel actually discovered” in the records available to them, “particularly given the apparent absence of any aggravating factors in petitioner’s background.” *Id.* at 525 (citation omitted).

In assessing the reasonableness of an attorney’s investigation, . . . , 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 [counsel] 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 the strategy.

Id. at 527. In this case, “counsel were not in a position to make a reasonable strategic

choice . . . because the investigation supporting their choice was unreasonable.” *Id.* at _____. “In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigation evidence.” *Id.* at 536. “[W]e evaluate the totality of the evidence – ‘both that adduced at trial, and the evidence adduced in the habeas proceeding[s].’” *Id.* (quoting *Williams v. Taylor*, 529 U.S. at 397-98). Prejudice was found here because counsel did not discover “powerful” evidence of “physical torment, sexual molestation, and repeated rape,” as well as, alcoholic parents, foster homes, homelessness, and “diminished mental capacities.” *Id.* at 535. “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 difference balance.” *Id.* at 537. While *Williams v. Taylor* had not been decided at the time of the state court decision, the Court held that it “made no new law” in *Williams v. Taylor* and had just applied *Strickland* to conclude that “counsel’s failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . , because counsel had not ‘fulfill[ed] their obligation to conduct a thorough investigation of the defendant’s background.’” *Id.* at 522 (quoting *Williams*, 529 U.S. at 396). Like in *Williams*, the state court decision here was “objectively unreasonable,” *id.* at 527, and an unreasonable application of *Strickland* (under the AEDPA standards) because the state court did not

conduct an assessment of whether the decision to cease all investigation . . . actually demonstrated reasonable professional judgment. The state court merely assumed that the investigation was adequate. In light of what the . . . [available] 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.

Id. at 527-28. The state court decision was also an unreasonable application of the facts to the law because the state court erroneously concluded that the [available] . . . records reflected sexual abuse, when the records did not mention it at all, “much less . . . the repeated molestations and rapes of petitioner. . . .” *Id.* at 528. The state court conclusion was proven to be incorrect by clear and convincing evidence as required by 28 U.S.C. 2254(e)(1). The facts are discussed in more detail below in the capital sentencing section.