The T-Rex without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel

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Introduction

In Strickland v. Washington\(^1\) the United States Supreme Court formulated the test for determining whether counsel in a criminal case is ineffective. When the Court decided Strickland\(^2\) it created a doctrine of enormous proportion but with little impact—a legal tyrannosaurus rex without teeth. In the last decade, by using ABA standards to evaluate counsel's performance the Court has given the T-Rex some sizable incisors. The purpose of this article is to:

1. Determine how frequently the United States Supreme Court uses American Bar Association Standards in its decisions and briefly for what purposes;


\(^2\) Id.
2. Describe in some detail the decision of *Strickland v. Washington*\(^3\) and its test for determining whether counsel was ineffective;

3. Trace the effects of the Strickland decision since 1984;

4. Describe the decisions of *Williams v. Taylor*,\(^4\) *Wiggins v. Smith*,\(^5\) and *Rompilla v Beard*\(^6\) and their implications to the test formulated in *Strickland* in as far as the ABA standards relate to defense counsel’s duty to investigate; and

5. Report on the American Bar Associations efforts to discover and describe the causes of ineffective assistance.

6. Suggest changes that tighten the *Strickland* test giving it more traction as a guide for the courts in measuring counsel’s performance—in other words the evolution of *Strickland*.\(^7\)

**American Bar Association Standards and the Supreme Court**

The United States Supreme Court has used ABA standards in a variety of contexts making the Court no stranger to ABA standards. They are used as primary and secondary authority in both majority and dissenting opinions. As early as 1971, the court used the ABA standards in determining whether a defendant’s right to a speedy trial was violated.\(^8\)

\(^3\) *Id.*


\(^6\) 545 U.S. 374 (2005).

\(^7\) 466 U.S. 668 (1984).

\(^8\) United States v. Marion, 404 U.S. 307, 322 (1971) “In its Standards Relating to Speedy Trial, the ABA defined the time at which the beginning of the delay period should be computed as “the date the charge is
In the following years the court has used the standards in addressing a number
issues presented.\(^9\)

filed, except that if the defendant has been continuously held in custody or on bail or recognizance until
that date to answer for the same crime or a crime based on the same conduct or arising from the same
criminal episode, then the time for trial should commence running from the date he was held to answer.”
Rule 2.2(a). Under the ABA Standards, after a defendant is charged, it is contemplated
that his right to a speedy trial would be measured by a statutory time period excluding necessary and other
justifiable delays; there is no necessity to allege or show prejudice to the defense. Id. at Rule 2.1.”
9 Deck v. Missouri, 544 U.S. 622, 629 (2005) (determining whether the restraint of a prison in the presence
of the jury is permissible); Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748, 761 (2005)
determining police liability for a civil action brought pursuant to 1983); I.N.S. v. St. Cyr, 533 U.S.289,
323 (2001) (determining whether an immigration statute could be applied retroactively); Roe v. Flores-
Ortega, 528 U.S. 470, 479 (2000) (determining counsel’s obligation to file a notice of appeal in a criminal
case); City of Chicago v. Morales, 527 U.S. 41, 109 (1999) (Scalia, J. dissenting) (determining the
dissenting) (determining the admissibility of statements during a plea for impeachment purposes); Gentile
for a lawyer’s pretrial press conference is constitutionally permissible); Mu'Min v. Virginia, 500 U.S. 415,
430 (1991) (determining whether a defendant in a criminal case had a fair and impartial jury); Bonin v.
California, 494 U.S. 1039, 1042 (Mem. 1990) (determining whether a conflict of interest results from a
literary agreement between defense counsel and their client); Michigan v. Harvey, 494 U.S. 344, 365 (1990
)(Stevens, J. dissenting) (determining the admissibility of a defendant’s statement offered for
impeachment); Penry v. Lynaugh, 492 U.S. 302,337(1989) (determining whether a jury should consider
mental retardation and abuse during the death penalty phase of a trial); Caplin & Drysdale, Chartered v.
U.S., 491 U.S. 617, 645 (1989) (Blackman, J. dissenting) (determining whether attorney’s fee are exempt
from a federal forfeiture statute); Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 468
(1989) (Marshall, J. dissenting) (determining whether a state corrections department could restrict
dismissal of a federal indictment for a violation a speedy trial rule is appropriate); McCoy v. Court of
Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 436 (1988) (determining whether a state rule requiring
counsel to state why an appeal is frivolous is constitutional); Burger v. Kemp, 483 U.S. 776, 797 (1987)
(Blackmun, J. dissenting) (determining whether a defense counsel had a conflict of interest where their
partner represented a coindictee in a separate prosecution); Buchanan v. Kentucky, 483 U.S. 402, 418
(1987) (determining whether the use of a death qualified jury when the death penalty is sought only against
a codefendant violated the defendants right to a fair and impartial jury); New York v. Burger, 482 U.S. 691,
717 (1987) (determining whether a statute authorized warrantless search of vehicle dismantling
establishment falls within the administrative inspection exception); Turner v. Saferley, 482 U.S. 78, 112
(1987) (Stevens, J. dissenting) (determining the reasonableness of a prison regulation restricting inmate
correspondence with other inmates); McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (determining whether
racial discrepancy in imposition of the death penalty violated constitutional safeguards); Town of Newton
v. Rumery, 480 U.S. 386, 398 (1987) (determining whether an agreement where a defendant in criminal
case forgoes their right to pursue a civil action in exchange for dismissal of the criminal charges is
constitutional); Holbrook v. Flynn, 475 U.S. 560, 571 (1986) (determining whether additional security
placed in the front row of a spectators section deprived the defendant of a fair trial); Nix v. Whiteside, 475
U.S. 157, 170 (1986) (determining whether trial counsel was ineffective for threatening to withdraw as
counsel based inconsistent statements by a defendant); Davis v. Florida, 473 U.S. 913, 914 (1985) (Mem) (determining a petition for cert is denied raising the issue of pretrial publicity); Ponte v. Real, 471 U.S. 491
(1985) (Marshall, J. dissenting) (determining whether the failure to record the reasons for not calling
witnesses at a prison disciplinary hearing violates due process); Black v. Romano, 471 U.S. 606, 613
(1985) (determining whether a sentencing court must take into alternatives to incarceration at a probation
violation hearing ); Smith v. Jago, 470 U.S. 1060, 1061 (Mem) (1985) (White, J. dissenting) (determining
whether a late filing of defense witnesses as grounds to exclude witness testimony violated sixth
amendment right to present witnesses); Ake v. Oklahoma, 470 U.S. 68, 82 (1985) (determining whether an
indigent defendant was entitled to an expert witness at state expense ); Hudson v. Palmer, 468 U.S. 517,
The Strickland Test

In 1984 in *Strickland v. Washington* 10 the Court referred to the ABA standards in formulating the test to determine whether defense counsel is ineffective. The defendant pled guilty to three capital murder charges against trial counsel’s advice.11 The trial court commended the defendant for accepting responsibility but made no promises regarding the sentencing decision.12 Trial counsel did not present any evidence during the subsequent sentencing hearing and instead relied on the plea colloquy with the court.13 The sentencing judge found a litany of aggravating factors and the defendant was sentenced to death.14

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11 *Id.* at 672.
12 *Id.*
13 *Id.* at 673 (Noting that the trial judge told respondent that he had “a great deal of respect for people who are willing to step forward and admit their responsibility” but that he was making no statement at all about his likely sentencing decision.)
14 *Id.* at 674-75. The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, and all involved repeated stabbings. All three murders were committed in the course of at least one other dangerous and
Subsequently, trial counsel’s efforts were claimed to constitute ineffective assistance of counsel. The defendant challenged six aspects of counsel’s performance:

1. Failure to move for continuance to prepare for sentencing;  

2. Failure to request a psychiatric report;  

3. Failure to investigate and present character evidence;  

4. Failure to present meaningful arguments to the sentencing judge;  

violent felony, and since all involved a robbery, the murders were found to be done for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victims sisters-in-law, who sustained severe and ultimately fatal-injuries.)

15 Id. at 676 “First there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty.”

16 Id. at 675-76 “He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence of extreme mental or emotional disturbance, was “chronically frustrated and depressed because of his economic dilemma” at the time of his crimes.”

17 Id. at 675 “In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so.”

18 Id. at 673 “It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own.”

“Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's “rap sheet.” Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and
5. Failure to investigate the medical examiners reports; 19

6. Failure to cross-examine the medical experts called by the state at the sentencing proceeding. 20

The claims were reviewed in both state court 21 and the federal courts. 22 The United States Supreme Court granted certiorari “to consider the standards by which to judge a contention that the constitution requires that a criminal judgment be overturned because of actual ineffective assistance of counsel.” 23

The Court began its analysis by stating that “Sixth Amendment right to counsel exists and is needed, in order to protect the fundamental right to a fair trial.” 24 The Court defined a fair trial as one where “evidence subject to adversarial testing is presented to an impartial tribunal” and the right to counsel plays a “crucial role.” 25 The Court went on to recognize that the “right to counsel is the right to effective assistance of counsel.” 26

thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. Id.

19 Id. at 676.
20 Id. at 676.
21 Id. 675-78.
22 Id. 678-83.
23 Id. at 685.
24 Id. at 684.
25 Id. at 685.
26 Id. at 685-86 “That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether
The Court established the guiding policy in evaluating counsel's performance as, “whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” The decision also established the principle that the penalty phase of a capital case is the equivalent of a trial.

The Court then articulated what has become known as the Strickland test for ineffective assistance of counsel. The test involves a two-step analysis. The first is a determination of whether counsel performance was not “within the range of competence retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that “the right to counsel is the right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970).”

27 Id. at 686.

28 Id. at 686-87 “The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay v. Florida, 463 U.S. 939, 952-954, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial-to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.”

demanded of attorneys in criminal cases.”30 The second is “but for counsel’s unprofessional errors the result of the proceeding would have been different.”31

The court reasoned:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4- 1.1 to 4-8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides.32

In a cautionary tone the Court advises lower courts not to adopt “detailed rules”33 and to give great deference to counsel’s performance.34 The court notes that “detailed

30 Id. at 687 “First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.”

31 Id. at 687 “Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.”

32 Id. at 688.

33 Id. at 688-89 “No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S.App.D.C., at 371, 624 F.2d, at 208.”
guidelines could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.”

In a surprising revelation the Court notes that the Sixth Amendment guarantee of effective assistance is “not to improve the quality of legal representation.” This generates a perception that lawyer performance is static rather than evolving. The “presumption that counsel’s conduct falls within a wide range of reasonable professional assistance” has led to a number of decisions allowing

34 Id. at 688-89. “Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983)”

35 Id. at 689. “Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.”

36 Id. at 689 “Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.”

37 Strickland, 466 U.S. at 689.
questionable attorney behavior to fall within the range of adequate assistance of counsel. With regard to the duty to investigate the Court held, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 38

With regard to the performance of counsel in *Strickland*, the Court found that counsel’s actions were reasonable and any prejudice that accrued was insufficient to set aside the death sentence. 39

In a dissenting opinion, Justice Marshall pointed out the porous nature of the courts performance standard:

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

38 *Id.* at 691.

39 *Id.* at 699.
theirs. The debilitating ambiguity of an “objective standard of reasonableness” in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a “reasonably competent attorney” a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale? (footnote omitted) The majority offers no clues as to the proper responses to these questions.40

*Strickland* was decided on May 14, 1984. On October 29, 1984 Justice Marshall used *Strickland* and the ABA Standards in evaluating a petition for certiorari in *Alvord v. Wainwright*.41 Once again the question of the trial counsel’s competence in investigation of a death penalty case was reviewed.42 Although the court declined to grant certiorari the dissent outlined trial counsel’s lack of investigation.43

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40 *Id.* at 707-08 (Marshall, J. dissenting).


43 *Id.* (Marshall, J. dissenting).
Alvord, the petitioner, was convicted of multiple murders in Florida after escaping from a mental hospital in Michigan.\textsuperscript{44} The petitioner was committed to the mental health facility in Michigan as a result of being found not guilty by reason of insanity for rape and murder.\textsuperscript{45}

A part time public defender was appointed to represent Alvord. He refused to talk with the lawyer.\textsuperscript{46} After learning from the prosecutor that Alvord was previously found not guilty by reason of insanity, counsel moved for a mental examination.\textsuperscript{47} Alvord refused to talk to the psychiatrists without counsel but did speak with a psychiatrist who knew him from Michigan.\textsuperscript{48} The psychiatrist was brought into the case by the State.\textsuperscript{49} The trial court subsequently found Alvord competent to stand trial.\textsuperscript{50} In spite of Alvord’s lengthy mental health history and having been previously found not guilty by reason of insanity, counsel did not conduct “an independent investigation into Alvord’s history of mental illness.”\textsuperscript{51} Other than the contact with the psychiatrist brought into the case by the State, the attorney did not consult with other treating psychiatrist from Michigan and only obtained a small portion of his clients medical records.\textsuperscript{52} He did not obtain an

\textsuperscript{44} Id. at 957.

\textsuperscript{45} Id.

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} Id. Alvord did speak to the two psychiatrists after speaking to the psychiatrist from Michigan. One determined the Alvord was competent to stand trial the other could not draw a conclusion. Id.

\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 957-58.

\textsuperscript{52} Id. at 958.
independent expert to review the portion of the medical records he did obtain. Nor did counsel contact Alford’s lawyer in Michigan to discuss Alvord’s condition or the viability of any defense. This is especially troubling given Florida’s law that creates a presumption of insanity placing the burden of proof on the state to prove Alvord sane beyond a reasonable doubt at trial.

Trial counsel, instead, relied on the defendant’s assertion of a “frivolous alibi defense.” Assuming counsel was reasonable in concluding the investigation in the client’s background would not yield valuable evidence, it is disturbing that counsel only spent fifteen minutes with the client outside of court proceedings to discuss the case.

Marshall’s dissent details counsel’s obligation to inform a client and quotes the ABA standards extensively in one footnote stating:

53 Id.

54 Id. n. 3 “At the federal habeas hearing, one of Alvord’s Michigan psychiatrists testified:

‘Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.” Pet. for Cert. 14 (emphasis added)).”

55 Id.

56 Id. at 959.

57 Id. at 957.
The lower court ruling is therefore premised on a significant misunderstanding of the division of responsibility between counsel and client at trial, and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determining the reasonableness of counsel's assistance. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, are especially relevant. That section provides:

Standard 4-5.1. Advising the defendant

(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

"Standard 4-5.2. Control and direction of the case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

(i) what plea to enter;

(ii) whether to waive jury trial; and

(iii) whether to testify in his or her own behalf.

(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the
lawyer after consultation with the client. ABA Standards for Criminal Justice 4-5.1, 4-5.2 (2d ed. 1980 and Supp.1982).”

Although the court denied the petition in *Alvord* the court would return to the standards as a basis to evaluate defense counsel’s performance in a number of decisions with less than satisfactory reviews.

This highly elastic approach used to address claims of ineffective assistance of counsel has been condemned for allowing substandard performance by defense counsel. Stephen Bright published a law review article ten years after *Strickland* chronicling conduct that had passed as effective assistance in death penalty cases. The first case Bright cites involved counsel who was drunk at trial, did not investigate allegations of abuse by the victim and failed to adequately prepare an expert witness on domestic violence. Bright goes on to cite cases where counsel had not fully investigated client

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58 Id. at 960 n. 4 (Mem) (Marshall, J. dissenting).
61 Bright, supra note 53 at 103 Yale L.J. .
background information relating to mental health issues and therefore did not present the
evidence to the jury.62 Bright notes the causes of the failure to investigate are
inexperience, incompetence, and lack of adequate funding. With regard to “presumption”
of competence of Strickland, Bright’s critique is blunt and unyielding:

There is no basis for the presumption of competence in capital cases where the
accused is represented by counsel who lacks the training, experience, skill,
knowledge, inclination, time, and resources to provide adequate representation in
a capital case. The presumption should be just the opposite—where one or more of
these deficiencies exist, it is reasonable to expect that the lawyer is not capable of
rendering effective representation. Indeed, the presumption of competence was
adopted even though the Chief Justice of the Supreme Court, who joined in the
majority in Strickland, had written and lectured about the lack of competence of
trial attorneys. 63

Later, in 1994, Justice Blackman, in a dissenting opinion to the denial of a writ of
certiorari, voiced criticism of Strickland and cited instances of attorney conduct allowed

62 Id. at 1837 citing Peter Applebome, Two Electric Jolts in Alabama Execution, N.Y. TIMES, July 15,
1989 at A6; Holoway v. State 361 S.E. 2d 794, 796 (Ga. 1987); Smith v Kemp, 664 F. Supp. 500 (M.D.
Ga. 1987) (setting aside death sentence on other grounds), aff’d sub nom. Smith v. Zant, 887 F.2d 1407
(11th Cir. 1989) (en banc); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), cert. denied, 479 U.S.
996 (1986).

63 Id. at 1862 citation omitted.

The consequences of such poor trial representation for the capital defendant, of course, can be lethal. Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived. Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than "a person
who happens to be a lawyer." *Id.*, at 685, 104 S.Ct., at 2063.

The impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective-assistance claims have been denied. John Young, for example, was represented in his capital trial by an attorney who was addicted to drugs and who a few weeks later was incarcerated on federal drug charges. The Court of Appeals for the Eleventh Circuit rejected Young's ineffective-assistance-of-counsel claim on federal habeas, *Young v. Zant*, 727 F.2d 1489 (1984), and this Court denied review, 470 U.S. 1009, 105 S.Ct. 1371, 84 L.Ed.2d 390 (1985). Young was executed in 1985. John Smith and his codefendant Rebecca Machetti were sentenced to death by juries selected under the same Georgia statute. Machetti's attorneys successfully challenged the statute under a recent Supreme Court decision, *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), winning Machetti a new trial and ultimately a life sentence. *Machetti v. Linahan*, 679 F.2d 236 (CA11 1982). Smith's counsel was unaware of the Supreme Court decision, however, and failed similarly to object at trial. *Smith v. Kemp*, 715 F.2d 1459 (CA11 1983). Smith was executed in 1983.

Jesus Romero's attorney failed to present any evidence at the penalty phase and delivered a closing argument totaling 29 words. Although the attorney later was suspended on unrelated grounds, Romero's ineffective-assistance claim was rejected by the Court of Appeals for the Fifth Circuit, *Romero v. Lynaugh*, 884 F.2d 871, 875 (1989), and this Court denied certiorari, 494 U.S. 1012, 110 S.Ct. 1311, 108 L.Ed.2d 487 (1990). Romero was executed in 1992. Larry Heath was represented on direct appeal by counsel who filed a 6-page brief before the Alabama Court of Criminal Appeals. The attorney failed to appear for oral argument before the Alabama Supreme Court and filed a brief in that court containing a 1-page argument and citing a single case. The Eleventh Circuit found no prejudice, *Heath v. Jones*, 941 F.2d 1126, 1131 (CA11 1991), and this Court denied review, 502 U.S. 1077, 112 S.Ct. 981, 117 L.Ed.2d 144 (1992). Heath was executed in Alabama in 1992.

James Messer, a mentally impaired capital defendant, was represented by an attorney who at the trial's guilt phase presented no defense, made no objections, and emphasized the horror of the capital crime in his closing statement. At the penalty phase, the attorney presented no evidence of mental impairment, failed to introduce other substantial mitigating evidence, and again repeatedly suggested in closing that death was the appropriate punishment. The Eleventh Circuit refused to grant relief, *Messer v. Kemp*, 760 F.2d 1080.
Our system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result. When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. And when this Court curtails federal oversight of state-court proceedings, it does so in reliance on the proposition that justice has been done at the trial level. My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the


None of these cases inspires confidence that the adversarial system functioned properly or "that the trial ca[n] be relied on as having produced a just result." *Strickland*, 466 U.S., at 686, 104 S.Ct., at 2064. Yet, in none of these cases was counsel's assistance found to be ineffective. . . ."
failings of our present system of capital representation and the conviction to do what is necessary to improve it.\textsuperscript{65}

The topic of inadequate investigation by defense counsel continued throughout the 1990’s highlighted by raising criticism of counsel’s performance in death penalty cases. The year 2000 represented a watershed year for claims of ineffective assistance of counsel.\textsuperscript{66} The United States Supreme Court in \textit{Williams v. Taylor} found defense counsel ineffective for failure to investigate a client’s background in a death penalty case.\textsuperscript{67} The death of the victim was attributed to alcohol poisoning\textsuperscript{68} until Williams wrote a letter to the police confessing he had killed the victim and stole three dollars from.\textsuperscript{69}

During the penalty phase of the trial the prosecution introduced evidence of prior crimes,\textsuperscript{70} a written confession given by Williams\textsuperscript{71} as well as two separate “violent assaults on elderly victims” committed after the murder for which Williams was on trial.\textsuperscript{72} One confession of an assault on an elderly woman was significantly harmful to Williams because the woman was in a vegetative state and “not expected to recover.”\textsuperscript{73}


\textsuperscript{66} Commission on Capital Punishment, 2002. (hereinafter the Ryan Commission) The governor of the state of Illinois imposed a moratorium on the death penalty ordering the establishment of a commission to investigate the death penalty based on finding thirteen innocent individuals on death row.


\textsuperscript{68} \textit{Id.} at 367.

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.} at 368.

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}
He was also convicted of arson for setting fire to the jail while awaiting trial.\textsuperscript{74} The prosecution also called to experts who testified there “was a ‘high probability’ that Williams would pose a serious continuing threat.”\textsuperscript{75}

Defense counsel countered the prosecution’s case by calling “William’s mother, two neighbors and taped excerpt from a statement by a psychiatrist.”\textsuperscript{76} Their testimony characterized William as a “‘nice boy’ and not a violent person.”\textsuperscript{77} One of witness was noticed during the trial in audience and asked to “testify on the spot.”\textsuperscript{78} Counsel focused on the confession during his cross examination of the states witness, highlighting the fact Williams had implicated himself in the murder and other incidents thus clearing unsolved crimes.\textsuperscript{79} Defense counsel ended the case by arguing to the jury that it would be “very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself.”\textsuperscript{80}

What counsel did not discover and the jury never heard was a recount of “extensive records graphically describing Williams’ nightmarish childhood.”\textsuperscript{81} The Supreme Court agreed with the lower courts’ finding that:

\begin{thebibliography}{9}
\bibitem{74} Id.
\bibitem{75} Id.
\bibitem{76} Id. at 369.
\bibitem{77} Id.
\bibitem{78} Id.
\bibitem{79} Id.
\bibitem{80} Id. at 369 n. 2
\bibitem{81} Id. at 395 (trial counsel incorrectly believed state law prohibited the discloser of juvenile records).
\end{thebibliography}
....[T]he jury would have learned Williams parents had been imprisoned for the criminal neglect of Williams and his siblings, (footnote omitted) that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including on stint in an abuse foster home, and then, after his parents were released from prison, had been returned to his parents’ custody.  

Trial counsel also failed to present to the jury evidence that Williams was “borderline mentally retarded” and had not advanced beyond the sixth grade. Testimony could also have been presented by prison officials that Williams, as an inmate, was “least likely to act in a violent, dangerous or provocative way.” Despite his limited education and ability evidence could have illustrated his educational efforts while incarcerated including testimony that Williams “seemed to thrive in a more regimented and structured environment.” This of course would directly contradict the state’s experts’ conclusion that William posed a “serious continuing threat.” This failings may easily be attributed to the fact counsel did not start preparing for the sentencing phase “until a week before trial.”

The Supreme Court in reversing stated:

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82 Id.
83 Id. at 396.
84 Id.
85 Id. (Williams earned a carpentry degree while incarcerated).
86 Id.
87 Id. at 368.
88 Id. at 395.
But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980).89

Factually, the omissions in Williams v. Taylor90 look strikingly similar to those in Strickland v. Washington.91 Both cases involve failure to investigate to adequately prepare for the sentencing phase of a death penalty case. The question becomes whether or not Williams signals a change in the way the Court is reviewing claims of ineffective assistance of counsel, keeping in mind the Strickland test remained the same. Lower courts were also looking more closely at trial counsels investigation.92 More evidence that the Court was tightening up standards came in 2003.

89 Id.


92 Stevens v. Delaware Correctional Center, 152 F.Supp.2d 561 (U.S.Dist.Ct. Delaware (2001) Stevens was convicted of unlawful sexual intercourse in the first degree and sentenced to life in a Delaware state court proceeding. In reviewing the investigation conducted by trial court the noted: “At the end of the day, Reardon did little more than contact people Stevens and his mother identified. Yet, Reardon knew that he could not rely on Stevens to recount the events of the night in question. An attorney's performance is deficient when he or she fails to conduct any investigation into exculpatory evidence and has not provided any explanation for not doing so. See United States v. Gray, 878 F.2d 702, 711 (3d Cir.1989) (stating
In *Wiggins v. Smith* the Supreme Court found defense counsel ineffective based on the failure to conduct an adequate investigation into their client’s background. Wiggins was indicted for the murder of 77 year old woman who was drowned in her bathtub. After conviction by the trial court Wiggins chose to be sentenced by a jury. During this phase of the proceedings Wiggins attorney did not present any evidence of Wiggins history. According to subsequent testimony offered at a post conviction proceeding:

. . . [P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. (cite omitted) Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex

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‘[i]neffectiveness is generally clear in the context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which a such decision could be made’) (citing cases); *Sullivan v. Fairman*, 819 F.2d 1382, 1389 (7th Cir.1987) (stating that complete failure to investigate potentially corroborating witnesses can hardly be considered tactical decision) (quotations and ellipses omitted); see also ABA Standards for Crim J. 4-4.1 (3d ed.1993) (citing *Strickland*).(Un omitted) Since Stevens was facing a life sentence and consent was, in Reardon's words, “the only defense possible,” the court concludes that Reardon's efforts fell short of minimally acceptable professional standards. For the reasons discussed above, the court finds that the state courts' conclusion to the contrary was unreasonable.” Id. at 576-77.


95 *Id.* at 514.

96 *Id.* at 515.

97 *Id.*
with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. (cite omitted) At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, (cite omitted) and, as petitioner explained to Selvog, the father in his second foster home repeatedly molested and raped him. (cite omitted) At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. (cite omitted) After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor. (cite omitted)98

Reviewing trial counsel's failure to conduct a thorough investigation into Wiggins's history the Court noted:

Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable." Strickland, supra, at 688, 104 S.Ct. 2052; Williams v. Taylor, supra, at 396, 120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined

98 Id. at 516-17.
norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").

Within two years of the Wiggin’s decision the Supreme Court reversed a third death penalty case based on trial counsels inadequate investigation. In *Rompilla v. Beard*, the Court again cited the ABA standard for investigation in criminal cases to reverse a conviction for capital murder. *Rompilla* was charged with the death of an individual who had been “repeatedly stabbed and set on fire.” The prosecution introduced evidence of three aggravating factors:

[T]he murder was committed in the course of another felony; the murder was committed by torture; and that Rompilla has a significant history of felony convictions indicating the use or threat of violence.

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102 *Id.*

103 *Id.*
In post conviction proceedings Rompilla’s new counsel argued trial counsel had failed to perform an adequate investigation into his background. Trial counsel did not investigate Rompilla’s troubled childhood, mental illness and alcoholism relying on Rompilla’s description of an “unexceptional background.” Trial counsel, knowing that the prosecution’s intention to introduce evidence of Rompilla’s prior conviction for rape and assault, did not bother to look at the prosecutor’s file. The court finds:

The 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. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla’s trial describes the obligation in terms no one could misunderstand in circumstances of a case like this one:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's

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104 Id. at 378-79.

105 Id. at 385-86. “Reasonable efforts certainly included obtaining the Commonwealth’s own readily available file on the prior conviction to learn what the Commonwealth know about the crime, to discover any mitigating evidence the Commonwealth would downplay ant to anticipate details of the aggravating evidence the Commonwealth would emphasize.”
admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.106

The court noted the standard had been amended in 1993 but found there was no material difference.107 The court again stated, “[We] long have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’”108 The court also notes with approval the ABA adoption of ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in 1989.109 In a footnote the court gives a history of the guidelines as applied in death penalty cases. The court states:

Later, and current, ABA Guidelines relating to death penalty defense are even more explicit:

"Counsel must ... investigate prior convictions ... that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find

106 Id. at 387 citing 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

107 Id. n. 6 “The new version of the Standards now reads that any "investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities" whereas the version in effect at the time of Rompilla's trial provided that the "investigation" should always include such efforts. ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1, (3d ed.1993). We see no material difference between these two phrasings, and in any case 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.”


109 Id. n. 7.

Our decision in Wiggins made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S., at 524, 123 S.Ct. 2527 ("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' " (quoting 1989 ABA Guideline 11.4.1.C)).

The Court held that trial counsel investigation fell “below the line of reasonable practice.” The Court notes that by looking at the file counsel would have found “a range of mitigation leads that no other source would have opened up.” In summary the Court held the “evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury.”

**Evaluation of Defense Counsel Performance in Criminal Cases**

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110 Id.
111 Id. at 390.
112 Id..
113 Id. at 2469.
The Court’s use of ABA standards\textsuperscript{114} as a means to measure lawyer performance in death penalty cases signifies a change in the practices that may subject attorneys to valid claims of ineffective assistance of counsel. This practice was not envisioned by the drafters of the standards. Both the current prosecution standards and defense standards begin with an admonition by the drafters:

> These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of (prosecutor/defense counsel) to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending on all the circumstances.\textsuperscript{115}

In spite of the cautionary note by the ABA the Court is using the standards in evaluating counsels’ performance. In doing so the Court has given teeth to the test for ineffective assistance articulated in \textit{Strickland}.

**Effect of Williams, Wiggins and Rompilla**

The effect of \textit{Williams, Wiggins and Rompilla} is a detailed analysis of trial counsels preparation and investigation, especially in death penalty cases by both state and federal courts.

\textsuperscript{114} \textit{See ABA Standards for Criminal Justice, Prosecution Function and Defense Function,} Defense Function (3d 1993).

\textsuperscript{115} \textit{See ABA Standards for Criminal Justice, Prosecution Function and Defense Function,} Defense Function stnd. 3-1.1 & 4-1.1 (3d ed. 1993).
In one of the early applications of *Williams v. Taylor* the sixth circuit reversed a capitol murder conviction in *Coleman v. Mitchell*.\(^{116}\) Again, the reversal was based on trial counsel's lack of investigation into mitigating facts that would be relevant to the penalty phase of the trial.\(^{117}\) *Coleman* presented an interesting argument advanced by the government. The petitioner had stated his desire to conduct a mitigation phase proceeding using the petitioner's own unsworn statement.\(^{118}\) The district found that trial counsel had honored the petitioner's request and therefore did not provide substandard representation.\(^{119}\) An analogy was drawn between the limited representation presented in this case with a self representation request.\(^{120}\) The sixth circuit rejected the analogy finding that no colloquy with the defendant advised him of the dangers of his approach to the penalty phase of the case.\(^{121}\) The court further found that the petitioner's request did

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\(^{116}\) *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2000) (Williams v. Taylor was decided on April 18, 2000. Coleman v. Mitchell was decided on October 10, 2000).

\(^{117}\) *Id.* at 445-53.

\(^{118}\) *Id.* at 445.

\(^{119}\) *Id.* at 445.

\(^{120}\) *Id.* at 448-449.

\(^{121}\) *Id.* at 448-49. “The *Faretta* decision included a lengthy colloquy between the judge and the unrepresented defendant, discussing defendant's independent legal research on exceptions to the hearsay rule, the grounds for challenging a juror for cause, and trial procedure generally under the California Codes. *Id.* at 811, 95 S.Ct. 2525. Defendant in *Faretta*, a high-school educated man who had previously represented himself in a criminal prosecution, reasoned that he did not want to be represented by a public defender because that office was overloaded with cases. *Id.* at 807, 95 S.Ct. 2525. Defendant in *Faretta* faced a criminal charge of grand theft.” “Applying *Faretta* to a capital case, involving a defendant with low intelligence, limited education and an
not excuse trial counsel duty to conduct an independent investigation. The court of appeal found:

Further, defendant resistance to disclosure of information does not excuse counsel's duty to independently investigate.\textsuperscript{122}

The courts finding is in harmony with the general duty to investigate as stated in the standards cited by the Supreme Court in \textit{Williams v. Taylor}:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's unsettling past, whose strongest demand for self-representation consisted of "No, I don't" responses when asked if he wanted a pre-sentence investigation and mental evaluation, hollows the Sixth Amendment.

Requiring counsel to independently investigate Petitioner's personal background does not "thrust counsel upon the accused, against his considered wish," \textit{Faretta}, 422 U.S. at 820, 95 S.Ct. 2525, especially where, as in this case, the record fails to indicate both Petitioner's mitigation preferences and the informed consideration supporting such preferences. In \textit{Faretta}, "the record affirmatively show[ed] that [defendant] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." \textit{Faretta}, 422 U.S. at 835, 95 S.Ct. 2525. There is no such record support in this case. Also under \textit{Faretta}, a defendant "must first be 'made aware of the dangers and disadvantages of self-representation.'" \textit{Martinez v. Court of Appeal of Calif.}, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (quoting \textit{Faretta}, 422 U.S. at 835, 95 S.Ct. 2525). Again, the record offers no indication that Petitioner was so made aware in this case."

\textsuperscript{122} \textit{Id.} at 449-50.
admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.\textsuperscript{123}

After \textit{Wiggins} the sixth circuit further articulated a more detailed analysis of defense counsel duty to investigate mitigating circumstances. In \textit{Hamblin v. Mitchell}, the sixth circuit court of appeals granted a writ of habeas corpus based on trial counsel’s failure to investigate into mitigating circumstances in a death penalty case.\textsuperscript{124} The court uses both the 1989 ABA guidelines and the 2003 Guidelines to amplify counsel obligation to conduct an investigation in cases.\textsuperscript{125} Central to the courts finding is the premise that:

\begin{itemize}
  \item \textsuperscript{123} 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.) subsequently cited with approval by the Supreme Court in Rompilla v. Beard, 545 U.S.374, 387 (2005).
  \item \textsuperscript{124} Hamblin v. Mitchell, 354 F.3d 482 (2003).
  \item \textsuperscript{125} \textit{Id.} at 487. “The ABA standards are not aspirational in the sense that they represent norms newly discovered after \textit{Strickland}. They are the same type of longstanding norms referred to in \textit{Strickland} in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in \textit{Wiggins} and consistently followed by our court in the past. The Court in \textit{Wiggins clearly holds at 539 U.S. at ----, 123 S.Ct. at 2535}, that it is not making "new law" on the ineffective assistance of counsel either in \textit{Wiggins} or in the earlier case on which it relied for its standards, \textit{Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)}. . . .
  New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from \textit{Strickland, Wiggins} or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances.” The Sixth Circuit cites the ABA Guidelines in a footnote:
"The 2003 ABA Guidelines at section 10.7 contain ten pages of discussion about counsel's "obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The description of counsel's obligation to investigate mitigating evidence for the sentencing phase of the case is as follows (omitting quotation marks and the lengthy footnotes attached to the test):

Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case. Because the sentences in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. In the case of the client, this begins with the moment of conception \[i.e., \text{undertaking representation of the capital defendant}\]. Counsel needs to explore:

(1) Medical history, (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage).

(2) Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or
provide necessary services, placement in poor quality foster care or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defense (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluation (including competency, mental retardation, or insanity), motion practice, and plea negotiations. ....

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. Records--from courts, government agencies, the military, employers, etc.--can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources--a time-consuming task--is important wherever possible to ensure the
Thus, the *Wiggins* case now stands for the proposition that the ABA standards for
counsel in death penalty cases provide the guiding rules and standards to be used
in defining the "prevailing professional norms" in ineffective assistance cases.
This principle adds clarity, detail and content to the more generalized and
indefinite 20-year-old language of *Strickland*. . . .\textsuperscript{126}

The court was not troubled by the fact that the petitioners trial occurred prior to
the adoption of the 1989 standards.\textsuperscript{127}

Needless to say state courts seized on the *Taylor* and *Wiggins* application of ABA
standards and detailed factual inquiry into counsel’s performance.

An example of this detailed analysis is found in *In re Lucas*.\textsuperscript{128} The California
Supreme Court reversed a capitol murder convicted after appointing a special master to
conduct an investigation into trial counsels failure to adequately investigate.\textsuperscript{129} Although
trial counsel did interview the petitioner’s wife, mother and sister counsel did not explore
the petitioner’s history surrounding his childhood.\textsuperscript{130} The California court specifically
found:

\textsuperscript{126}Hamblin, at 486.

\textsuperscript{127}Id. at 488.

\textsuperscript{128}*In re Lucas*, 33 Cal.4th 682, 16 Cal.Rptr.3d 331(Cal. 2004).

\textsuperscript{129}*In re Lucas*, 33 Cal.4th 682, 16 Cal.Rptr.3d 331(Cal. 2004).

\textsuperscript{130}Id. at 699.
In summary, readily discoverable evidence presented at the reference hearing established that petitioner was born in Ohio in 1949, and his mother Margaret, an unwed teenager, gave him up for adoption at birth. He was placed in foster care, but his mother had second thoughts. When he was approximately one and a half years of age, she requested his return to her care but failed to appear to reclaim him. Ultimately, when he was two and a half to three years of age, after he had been in five foster homes, she did reclaim him and brought him to live with her and her new husband, Edward Lucas, in Montgomery County, Ohio. School records indicate that petitioner appeared for school in the first grade, beaten black and blue. When he was seven years of age, petitioner was placed in the care of a facility for abused and neglected children located in Montgomery County, Ohio. Records dating from that time indicate staff doctors who were employed by the county juvenile facilities and treated petitioner believed that he had been subjected to extreme abuse and that he was psychologically very damaged. Petitioner's care and treatment in public facilities for abused and neglected children appeared in public records that were still available at the time of trial. Several doctors and other persons who had treated petitioner as a child also were still available and provided deposition testimony concerning the abuse he had received at the hands of his family as a young child and the resulting damage to his character and personality. Petitioner's sister, other relatives, and other persons who easily could be traced and had contact with petitioner's family while petitioner was a child testified at the evidentiary hearing and also stated in depositions and declarations that, as a
young child, petitioner had been singled out for physical and emotional abuse, both by his parents and by his stepfather's mother, with whom he frequently resided. Between the ages of three and seven years, he was beaten regularly, given inadequate food, dressed in rags during Ohio winters, forced to sleep under the bed, disciplined by being burned with a cigarette and by the administration of chili peppers to his genitals, and excoriated because of the circumstances of his birth. His sister was not subject to abuse; petitioner often was fed solely on her leftovers.

Petitioner's trial counsel did not discover this evidence. ¹³¹

This detailed finding by the court highlights the fact analysis done by the United States Supreme Court in Wiggins. ¹³² In quoting Wiggins the court notes:

With respect to the question of what constitutes an "objective standard of reasonableness" for attorney performance, the United States Supreme Court recently explained: "We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " (Wiggins, supra, 539 U.S. at p. 521, 123 S.Ct. at p. 2535, italics added.) But "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (In re Marquez (1992) 1 Cal.4th 584, 602, 3 Cal.Rptr.2d 727, 822 P.2d 435.)

¹³¹ Id. at 698.

Although "a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance" (Bell v. Cone (2002) 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914), nonetheless, counsel's alleged tactical decisions must be subjected to "meaningful scrutiny." (In re Avena (1996) 12 Cal.4th 694, 722, 49 Cal.Rptr.2d 413, 909 P.2d 1017.) Tactical decisions must be informed, so that before counsel acts, he or she "will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (Ibid.; see also In re Jones (1996) 13 Cal.4th 552, 564-565, 54 Cal.Rptr.2d 52, 917 P.2d 1175.)

As the United States Supreme Court has instructed: "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (Strickland, supra, 466 U.S. at pp. 690-691, 104 S.Ct. 2052.)

In determining whether counsel's performance in petitioner's case was constitutionally deficient, we are guided principally by the high court's opinion in Wiggins, supra, 539 U.S. 510, 123 S.Ct. 2527.133

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133 In re Lucas, 33 Cal.4th 682, 721-22, 16 Cal.Rptr.3d 331, 361(Cal. 2004).
The invocation of the ABA standards do not automatically mean a reversal of a conviction based on a claim of ineffective assistance of counsel. Courts throughout the country routinely reject claims of ineffective assistance.\(^{134}\)

However the evolving use of the ABA standards have heightened the scrutiny courts use in evaluating counsel’s performance over the years but the *Strickland* test is still criticized for setting the “constitutional and ethical safeguards too low.”\(^{135}\) Eliminating the Strickland requirement that a “court must indulge a strong presumption that counsel’s conduct falls with the wide range of reasonable professional assistance”\(^{136}\) is one step the court may wish to take in order to focus more closely on counsel’s performance. Looking at the language of *Williams*\(^{137}\), *Wiggins*\(^{138}\) and *Rompilla*\(^{139}\) the

\(^{134}\) Vinson v. True, 436 F.3d.412, 419 (4th Cir. 2005). “The record also reveals that, “although requested to supply” mitigation information, Vinson and his family failed to do so, but that nevertheless defense counsel independently discovered mitigation evidence. At sentencing, Vinson's counsel presented a mitigation case that included Vinson's school records and favorable testimony from Vinson's mother, his step-father, two court-appointed expert witnesses, a previous employer, Vinson's high school band leader, a parole officer, and a church leader. The case at hand thus stands in stark contrast to *Wiggins*, on which Vinson heavily relies. There, the Court found constitutionally ineffective counsel who relied *solely* on three documents and failed to investigate further or present any mitigation evidence on the defendant's background despite information in these documents that could have been used to uncover helpful mitigation information. *Wiggins*, 539 U.S. at 523-26, id."


\(^{136}\) *Strickland*, 466 U.S. at 689.


\(^{139}\) Rompilla, 545 U.S. 374 (2005).
Court may have in fact abandoned the presumption in favor of a detailed factual analysis of the alleged breach of duty. If that is the case the abandonment of the presumption is well justified and long overdue.

**The Evolving ABA Defense Standards**

In 2004 the American Bar Association Standing Committee on Legal Aid and Indigent defense outlined the minimum steps defense counsel should take to adequately represent clients charged with a crime. The Committee found that defense counsel should:

1. Keep abreast of substantive and procedural criminal law in the jurisdiction.
2. Avoid unnecessary delays and control workload to permit the rendering of quality representation.
3. Attempt to secure pretrial release under condition most favorable to the client.
4. Prepare for a pretrial interview with the client.

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140 GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE, A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS (December 2004).


142 Id. (citing ABA, Defense Function, note 130 Standard 4-1.3).

143 Id. (citing NLADA, Performance Guidelines, note 131 Guideline 2.1).

144 Id. (citing NLADA, Performance Guidelines, note 131 Guideline 2.2).
5. Seek to establish a relationship of confidence and trust form the client and adhere to ethical confidentiality rules.\textsuperscript{145}

6. Secure relevant facts and background from the client as soon as possible.\textsuperscript{146}

7. Conduct a prompt and thorough investigation of the circumstance of the case and all potentially available legal claims.\textsuperscript{147}

8. Avoid conflicts of interest.\textsuperscript{148}

9. Undertake prompt action to protect the rights of the accused at all stages of the case.\textsuperscript{149}

10. Keep clients informed of developments and progress in the case.\textsuperscript{150}

11. Advise the client on all aspects of the case.\textsuperscript{151}

\textsuperscript{145} Id. (citing ABA, Ten Principles, note 42 Principle 4; ABA Defense Function, note 130 Standard 4-3.1; Nat’l Study Comm’n. note 42, Guideline 5.10).

\textsuperscript{146} Id (citing ABA Defense Function, supra note 130, Standard 4-3.2; NLADA, Performance Guidelines, supra note 131 Guideline 2.2; ABA Death Penalty, supra note 41 Guideline 10.5).

\textsuperscript{147} Id. (citing ABA Defense Function, supra note 130, Standard 4-4.1; ABA Death Penalty, supra note 41 Guideline 10.7, 10-8; NLADA, Performance Guidelines, supra note 131 Guideline 4.1); see also Wiggins v. Smith, 539 U.S. 510 (2003).

\textsuperscript{148} \textbf{GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE, A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS} (December 2004). (citing ABA Defense Function, supra note 130, Standard 4-3.5; NLADA, Performance Guidelines, supra note 131 Guideline 4-1.3).

\textsuperscript{149} Id. (citing ABA Defense Function, supra note 130, Standard 4-3.6; NLADA, Performance Guidelines, supra note 131 Guideline 5.1, 5.2, 5.3).

\textsuperscript{150} Id. (citing ABA Defense Function, supra note 130, Standard 4-3.8, 4-6.2; NLADA, Performance Guidelines, supra note 131 Guideline 6.3).
12. Consult with the client on decisions relating to control and direction of the case.\textsuperscript{152}

13. Adequately prepare for trial and develop and continually reassess a theory of the case.\textsuperscript{153}

14. Explore disposition without trial.\textsuperscript{154}

15. Explore sentencing alternatives.\textsuperscript{155}

16. Advise the client about the right to appeal.\textsuperscript{156}

Most of committee recommendations follow a common sense approach to criminal defense practice. Should it be assumed by the judiciary that most lawyers conform their practice habits to these recommendations? Unfortunately the committee made findings that indicate there are system wide failures throughout the United States.

\textsuperscript{151} Id. (citing ABA Defense Function, supra note 130, Standard 4-5.1; NLADA, Performance Guidelines, supra note 131 Guideline 6.4).

\textsuperscript{152} Id. (citing ABA Defense Function, supra note 130, Standard 4-5.2; NLADA, Performance Guidelines, supra note 131 Guideline 6.1, 6.3).

\textsuperscript{153} Id. (citing NLADA, Performance Guidelines, supra note 131 Guideline 4.3, 7.1; ABA Death Penalty, supra note 41 Guideline 10.10.1).

\textsuperscript{154} Id. (citing ABA Defense Function, supra note 130, Standard 4-6.1; NLADA, Performance Guidelines, supra note 131 Guideline 6.1, 6.2.)

\textsuperscript{155} Id. (citing ABA Defense Function, supra note 130, Standard 4-8.1; NLADA, Performance Guidelines, supra note 131 Guideline 8.1-8.7; ABA Death Penalty, supra note 41 Guideline 10.11-10.12.)

\textsuperscript{156} Id (citing ABA Defense Function, supra note 130, Standard 4-8.2; NLADA, Performance Guidelines, supra note 131 Guideline 9.2; ABA Death Penalty, supra note 41 Guideline 10.14.)
The committee through various witnesses and documentary evidence found that the practice of providing defense counsel fell short in several aspects. The report issued by the committee cited “Meet ‘em and Plead ‘em” Lawyers;\textsuperscript{157} Incompetent and Inexperienced Lawyers;\textsuperscript{158} Excessive Caseloads;\textsuperscript{159} Lack of Contact with Clients and Continuity in Representation;\textsuperscript{160} Lack of Investigation, Research, and Zealous Advocacy;\textsuperscript{161} Lack of Conflict-Free Representation;\textsuperscript{162} and Ethical Violations of Defense Lawyers.\textsuperscript{163}

After these findings the questions become after these findings why do these problems exist and what can be done? As previously stated the courts are starting to use ABA standards to evaluate defense counsels performance. The problem isn’t the lack of standards, it is the bench and the bars lack of enforcement of standards. Again the case is made for the abandonment of the presumption of counsels effectiveness directed in \textit{Stickland}.

\textbf{Repeated Violations of Strickland/ABA and Ethics Enforcement}

The test for ineffective assistance of counsel provides a specific remedy for the defendant in a criminal case-reversal of the conviction. In a larger sense ineffective

\textsuperscript{157} Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice, A Report on the American Bar Association’s Hearings on the Right to Counsel in Criminal Proceedings. 16 (December 2004).

\textsuperscript{158} \textit{Id.} at 16-17.

\textsuperscript{159} \textit{Id.} at 17.

\textsuperscript{160} \textit{Id.} at 18.

\textsuperscript{161} \textit{Id.} at 19.

\textsuperscript{162} \textit{Id.} at 19.

\textsuperscript{163} \textit{Id.} at 20.
assistance jeopardizes the profession and public by allowing attorneys who are not competent to continue practice in a field where life and liberty are at stake.

The ABA standards are corollaries to the ABA Model Code of Professional Responsibility. The standards reference the Model Code as a related standard.\textsuperscript{164} An example is the Duty to Investigate referred to in the above section \textsuperscript{165} that cites the Model Code. Ethical Considerations of the ABA Model Code provides that “a lawyer should act with competence and proper care in representing clients.”\textsuperscript{166} In addition to the Model Code the Model Disciplinary Rules provide that:

A lawyer shall not:

…..

(2) Handle a legal matter without preparation adequate in the circumstances

(3) Neglect a matter entrusted to him.\textsuperscript{167}

Several jurisdictions have suspended attorneys for neglecting client’s criminal cases.

In the case of \textit{In Re Miller} the Indiana Supreme Court suspended an attorney’s license for 60 days.\textsuperscript{168} The suspension was based on a violation of three findings of

\begin{itemize}
  \item\textsuperscript{164} E.G. \textit{See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Defense Function (3d 1993). Standard 4-4.1 references related standards: ABA Model Code or Professional Responsibility, D 5-101(B); DR 5-102: DR 7-102(A)(1); DR 7-108(D), (E); DR 7-109(C)(1969); ABA Models of Professional Conduct 1.2: 3.4(b), (f); 3.7; 4.3; 4.4 (1983).}
  \item\textsuperscript{165} ABA Defense Function, Standard 4-4.1.
  \item\textsuperscript{166} ABA Compendium of Professional Responsibility Rules and Standards, Cannon 6, EC 6-1 p.239 (2004).
  \item\textsuperscript{167} ABA Compendium of Professional Responsibility Rules and Standards, Disciplinary Rules, DR 6-101 p.240 (2004).
\end{itemize}
misconduct. The first was for neglecting a defendant’s case who was charged with armed robbery.\textsuperscript{169} On April 6, 1999 the attorney entered an appearance.\textsuperscript{170} The defendant was incarcerated but the attorney did not meet with the client until February of 2000 at the client’s second court appearance.\textsuperscript{171} At the time the attorney promised to meet with the client within two weeks. The visit did not occur.\textsuperscript{172} The defendant pled guilty to burglary and robbery and received a nine year sentence, four of which were suspended.\textsuperscript{173}

The second incident involved a client who was charged with residential entry.\textsuperscript{174} The attorney entered an appearance on October 29, 2000.\textsuperscript{175} The client was unable to contact the attorney and the attorney failed to appear at a pretrial conference.\textsuperscript{176} At another hearing on June 6, [2001]\textsuperscript{177} the client plead guilty to a charge and received credit for time served.\textsuperscript{178}

\textsuperscript{168} In re Miller, 759 N.E. 2d 209, 212 (Ind. 2001).

\textsuperscript{169} Id. at 211.

\textsuperscript{170} Id.

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Id. The court attributes the June 6 hearing to the year 2000. This of course would be impossible giving the attorney’s appearance in October of 2000. The author assumes the court meant June 6, 2001.

\textsuperscript{178} Id.
The third violation was that the attorneys never responded to the disciplinary commission.179

The Supreme Court of Tennessee upheld the suspension of attorney’s license for two years.180 The court found the attorney, who had never represented anyone who was charged with a felony, accepted a client charge with first degree murder.181 The court found the attorney did not talk to witnesses, including potential alibi witnesses, and did not attempt to discover the case the state was going to present.182 The court also concluded the attorney did not understand the rules of criminal procedure.183 Astonishingly the attorney filed an answer and amended answer to the murder indictment.184 In the amended answer the attorney detailed the clients version of the offense without determining whether the client had made a previous statement to the police.185 The court notes that without the statement in the amended answer the state “would have difficulty getting by the ‘directed verdict’ stage in any trial on the indictment.”186 The court went on describing two other civil cases mishandled by the attorney.187

179 Id. at 210.
181 Id. 62-63.
182 Id. at 63.
183 Id. The attorney filed motions based on statutes that were superseded by the Rules of Criminal Procedure.
184 Id.
185 Id.
186 Id.
187 Id. at 63-64.
In a variant of the “meet ‘em and plead ‘em” theme a Wisconsin attorney was retained to represent a client who had been convicted and sentenced on a sexual assault case where the state was seeking to commit the client as sexually violent person. The attorney never had represented clients subject to commitment under the sexually violent person provision of the Wisconsin statutes. The attorney did not explore the factors used by the state to determine who would qualify for commitment pursuant to the statute. Also the attorney did not seek experts who could evaluate the client even thought the statute provided for court appointed experts and the client’s mother had offered to pay to retain an expert. What the attorney did do was to appear on the trial date, waived his right to trial and admitted the allegations by the state. Subsequently the attorney stipulated to being confined to a mental health facility. The Wisconsin Supreme Court suspended the lawyer’s license for two years.

The Court of Appeals in Maryland suspended an attorney’s license for three years based on various forms of neglect in four cases. In the first case the lawyer represented

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188 Office of Lawyer Regulation v. Dumke, 635 N.W.2d 594, 595-96 (Wisconsin 2001).
189 Id. at 596-97.
190 Id.
191 Id. The explanation tendered by the attorney was that he did not want to retain an expert because he might bolster the state’s case. This was rejected by the court since the expert would not have disclose unfavorable results unless the expert testified. Id. at 597.
192 Id. at 596.
193 Id.
194 Id. at 598.
a client charged with criminal assault and use of handgun. The client was convicted at trial and sentenced to a five year term of incarceration. The conviction was ultimately set aside in Post Conviction Relief hearing where the state conceded the attorney had provided ineffective assistance. The court found trial counsel had failed to:

“a. Meet with and go over possible defense strategies with his client;
“b. Pursue a motion to suppress evidence that may have been illegally obtained;
“c. Present evidence in support of an intoxication defense that may have been available to his client;
“d. Prepare adequately to cross-examine the State's witnesses;
“e. Prepare and submit voir dire;
“f. Prepare and request specific jury instructions applicable to the charges in the case; and
“g. Object to possibly improper jury instructions prejudicial to his client.”

In the subsequent disciplinary proceedings the court found the attorney had violated Maryland’s Disciplinary Code by failed to provide competent representation and had “engage[d] in conduct that is prejudicial to the administration of justice.”

\[196 Id. at 568.\]
\[197 Id.\]
\[198 Id.\]
\[199 Id. These findings were made by a Judge in a Bar Proceeding and subsequently adopted by the Maryland Court of Appeals.\]
\[200 Id. n. 1Rule 1.1 “Competence,” provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”\]
In the second case cited by the Maryland Court of Appeals the attorney undertook representation of a client charged with first degree rape in October of 1997. In April of 1998 on the day of trial counsel had not filed any discovery requests or pretrial motions and moved for a continuance complaining of a physical ailment. The court continued the case but removed the attorney from the case. In the disciplinary proceeding the court found the lawyer failed to act with diligence.

The third case involved a misrepresentation to a judge regarding an appearance in other court in order to obtain a continuance. Upon checking the judge determined the representation was false. This precipitated a Criminal Contempt action being filed that resulted in an 18 month suspended sentence with a number of conditions of probation being imposed including the surrender of the attorney’s law license for one year. In the disciplinary case the court concluded the lawyer engaged in misconduct by knowingly making a false statement to the court.

201 Id. n. 2. Section (d) of Rule 8.4, “Misconduct,” provides: “It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice[.]” Id.
202 Id. at 569.
203 Id.
204 Id.
205 Id. n. 3 Rule 1.3, “Diligence,” provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.”
206 Id. at 569-70.
207 Id. at 570.
208 Id. 570.
209 Id. n. 5 Section (a)(1) of Rule 3.3, “Candor toward the tribunal,” provides: “A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal[.]”
In the fourth case involving a client charged with possession and intent to distribute cocaine the attorney failed to appear for a scheduled trial.\textsuperscript{210} Finally the attorney failed to respond to the bar complaints.\textsuperscript{211}

By enforcing ethical rules through attorney disciplinary proceedings would send a powerful message to lawyers.

**Conclusion**

It is clear that the United States Supreme Court has tightened counsel’s duty to investigate not by changing the test formulated in *Strickland*, but by using the ABA standards as an evaluative tool rather than mere “guidelines.” This evolution was caused by the court having to adapt to changing circumstances. This change was evidenced by counsels inadequate performance documented over the years since *Strickland*.\textsuperscript{212} This evolution should continue with the American Bar Association honing its standards to fit heightened expectations of counsel’s performance\textsuperscript{213} and counsel’s performance being evaluated by the court and when necessary the appropriate disciplinary proceeding. Criminal defense lawyers who practice without consulting the ABA standards do so at their professional peril. Now, the tyrannosaur has teeth.

\textsuperscript{210} *Id.* at 571.

\textsuperscript{211} *Id.* at 571.
