

**SUMMARIES OF SUCCESSFUL  
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS  
POST-*WIGGINS V. SMITH* INVOLVING  
CAPITAL SENTENCING PHASE ERRORS**

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## A. NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION<sup>1</sup>

### 1. U.S. Supreme Court Cases

**2005:** *Rompilla v. Beard*, 545 U.S. 374 (2005) (sentenced in November 1988). 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,” which would have led to significant mitigation. [For additional details, see the summary in the section on U.S. Supreme Court cases.]

**2003:** *Wiggins v. Smith*, 539 U.S. 510 (2003) (sentenced in October 1989). Counsel ineffective in capital habeas case, decided under the AEDPA, for failing to adequately prepare and present mitigation. Prior to trial, counsel had arranged for a psychologist to test Wiggins and had obtained a presentencing report and his social services records. Prior to sentencing, counsel filed a motion to bifurcate sentencing so they could present evidence in the first phase that Wiggins was not directly responsible for the murder (a finding required by state law for death eligibility) and in the second phase could present mitigation. The court denied the motion. In opening statements, counsel argued both issues and said that Wiggins had a difficult life and no prior convictions. Counsel did not present any life history evidence during mitigation though. Before closing arguments, counsel preserved the bifurcation issue and argued that, if bifurcation had been granted, counsel would have presented psychological reports and expert testimony demonstrating Wiggins’ limited intellectual capacity, the absence of aggressive behavior, and his desire to function in the world. In post-conviction testimony, counsel claimed to have investigated “extensively,” but counsel in making their proffer did not even mention sexual abuse. This failure is “explicable only if we assume that counsel had no knowledge of the abuse.” *Id.* at 533. The Court found that this “may simply reflect a mistaken memory shaped by the passage of time. After all, the state post-conviction proceedings took place over four years after Wiggins’ sentencing.” *Id.* The Court described the issue in this case as “not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ background *was itself reasonable.*” *Id.* at 523 (emphasis in original). In this case, the Court held that “[c]ounsel’s decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989,” 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.’” *Id.* (quoting *Strickland, supra*, at

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<sup>1</sup>Also look in the document covering numerous deficiencies in trial phase because some cases found IAC in both.

688; *Williams v. Taylor, supra*, at 396). Applying these standards, the Court found that, “[d]espite 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. *Id.* at 525.

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 536. Counsel’s conduct was deficient because the trial record revealed that the “failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.” *Id.* at 526. The trial record reflected that “[f]ar from focusing exclusively on petitioner’s direct responsibility, . . . , counsel put on a halfhearted mitigation case. . . .” *Id.* The “strategic decision” the court’s had found to be reasonable was rejected because it “resembles more a post-hoc rationalization of counsel’s conduct than an accurate description of their deliberations prior to sentencing.” *Id.* at 527-28. Prejudice was found because counsel did not discover “powerful” evidence of severe abuse from “alcoholic, absentee” parents. He also suffered “physical torment, sexual molestation, and repeated rape” in foster homes. He also spent time homeless and had “diminished mental capacities.” *Id.* at 534-35. The Court found:

Wiggins’ sentencing jury heard only one significant mitigating factor – that Wiggins had no prior convictions. Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a difference balance.

*Id.* at 537. In the final analysis, the Court held:

Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form. While it may well have been

strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive. Moreover, given the strength of the available evidence, a reasonable attorney may well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases.

*Id.* at 535.

## 2. U.S. Court of Appeals Cases

**2009:** \**Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009) (direct appeal in 1987). Under AEDPA, counsel ineffective in failing to adequately investigate and present mitigation evidence. The court cited the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in finding a "requirement for counsel to perform thorough, not last-minute, investigations before a mitigation hearing."

The ABA Guidelines also explain that preparing for the mitigation phase of trial "requires extensive and generally unparalleled investigation into personal and family history," as well as school, medical and psychological records.

*Id.* (quoting Guidelines). Counsel's conduct was deficient in conducting only a "last-minute investigation" following conviction. Counsel failed to discover evidence that the defendant was physically abused by his parents, witnessed his father attempting to kill his mother several times, or that his mother had been committed to a psychiatric hospital when the defendant was four and five years old. "This omitted evidence goes far beyond the brief details of his parents' alcohol abuse and dysfunctional relationship that were presented at mitigation." Counsel's conduct was not explained by strategy because, "[c]onsidering the information that they had already learned about [the] abusive family background, counsel certainly had reason to suspect that much worse details existed." Nevertheless, counsel did not interview the defendant's step-sister, his uncles, or the psychiatrist who treated his mother when she was committed. "All of these individuals could have helped his counsel narrate the true story of [the defendant's] childhood experiences in mitigation" and all were willing to testify. "Failing to complete a mitigation investigation when additional family witnesses are available is not sound trial strategy; neither is waiting until four days before the mitigation hearing to begin the investigation." *Id.* at 529. Prejudice established because the three-judge panel did not learn "fully about the two statutory mitigating factors that were the strongest in his case—his traumatic family background and his mental illness." The panel also did not hear "first-hand accounts from those who knew [the defendant] best." *Id.* at 529 (quoting

*Powell v. Collins*, 332 F.3d 376, 400 (6th Cir.2003)). Because Ohio is a “weighing” state and there was only one statutory aggravating circumstance (robbery), “the introduction of more available mitigating evidence could certainly have tipped the scales in favor of his life.” *Id.* at 530.

**2008:** *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008) (sentenced in Sep. 1983). In pre-AEDPA case, counsel was ineffective in sentencing for three reasons. First, counsel permitted the prosecution to review and introduce into evidence the confidential report of a defense-retained expert counsel decided not to present as a witness. The report contained information about the defendant’s “criminal history and his upbringing” revealed only to this doctor, who diagnosed a “polymorphous perversion.” Counsel’s conduct was deficient because the state would not have had access to this information otherwise and “defense counsel had absolutely no obligation to disclose [the] confidential report to the prosecution.” Second, counsel erred in allowing the prosecution to call the defense expert as a witness.

[C]ounsel should not have stipulated to the prosecutor calling [the same defense-retained expert] *as a witness for the prosecution*. Counsel's decision to so stipulate is indefensible. This decision put counsel in the difficult position of having to cross-examine the only mental health expert to testify during the penalty phase of . . . trial, even though counsel himself had chosen [the expert] and supplied him with information about [the defendant]. Furthermore, the jury was told that [the expert] was hired by the *defense* to examine [the defendant] and report on his mental health. Given that the defense's expert not only had nothing favorable to say about [the defendant], but thought that he was beyond all hope of rehabilitation, the jurors had even less incentive to impose a sentence that they were told [improperly] by the prosecutor and the court might lead to [the defendant's] eventual release.

*Id.* at \_\_\_\_ . Counsel’s alleged strategy for not objecting was the belief that the witness would provide helpful information on the defendant’s troubled background, but this was not “a sound strategic decision” because [i]f counsel truly believed that [the] testimony would be helpful, the appropriate ‘strategic decision’ would have been to call [the expert] to testify on behalf of the defense.” In addition, counsel did not pursue or argue any mitigating factors related to troubled background. “Given these considerations, counsel cannot hide behind a later, implausible assertion that his decision was ‘tactical’ given that his actions show that he had no intention of presenting any mitigating evidence based on . . . mental health.” Finally, counsel inadequately prepared for the expert testimony. “Once counsel decided to allow the prosecution to call [the defense expert] as a witness, counsel had a duty to prepare for [the] testimony.” Counsel did not speak to the expert after agreeing to let him testify for the state, which was evident in “counsel's lackluster

performance at trial” eliciting on cross that the defendant could not be cured or treated. “In sum, some of the most damaging testimony presented during the penalty phase of trial was elicited by [the defendant’s] own counsel, from a witness [defense] counsel had originally selected and could have prevented from testifying.” Prejudice found because the expert’s testimony “likely played an important role in the jury’s verdict imposing the death penalty.” Reversal was also required due to a due process violation in the prosecutor repeatedly making false, inflammatory statements indicating that the state board of pardon commissioners could release petitioner if the jury did not return a verdict imposing the death penalty.

***Johnson v. Bagley***, 544 F.3d 592 (6th Cir. 2008) (tried and sentenced in May 1998). Under AEDPA, counsel “committed legal malpractice—or, what is worse, legal representation that amounts to constitutionally ineffective assistance—” in failing to adequately investigate and present mitigation evidence. Citing the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, the court observed that counsel had complied on a “surface level” in making the petitioner’s grandmother as a positive caretaker the central theme of their sentencing strategy. In the abstract, this might well have been a legitimate strategic decision, one about which the Constitution would have nothing to say. But in [petitioner’s] case, his counsel pursued this strategy after what can only be described as an anemic and leaderless investigation that suffered from at least three conspicuous flaws.

First, counsel never interviewed the petitioner’s mother, even though counsel knew of her whereabouts. Counsel “chose” not to interview her because she had a bad background as a prostitute and drug addict and would make a bad witness.

But [the mother’s] “bad background” is precisely what should have prompted the defense team to interview her—both to see what that background entailed and to learn more fully how her prostitution and drug addiction affected [the petitioner’s] childhood. That someone may make a bad witness is no explanation for not interviewing her first. And, that is particularly true with respect to this witness, who was [the petitioner’s] *mother*, not a distant aunt or neighbor.

Second, counsel obtained a 12 inch thick stack of Department of Human Services (DHS) records shortly before sentencing and, without reading them, submitted them to the jury. Many of these pages were not relevant to the petitioner. Some of the records indicated concerns about the grandmother’s abusive history and placing the petitioner in her care.

A review of the records, in short, not only would have tipped them off to a different mitigation strategy but also would have avoided

the pitfall of submitting records to the jury, that directly contradicted their theory that [the grandmother] was a positive force for change in his life.

Third, “these investigative blunders occurred because no one who participated in [the] penalty-phase defense made *any* deliberate decisions about the scope of the investigation, let alone the ‘reasonable’ ones *Strickland* requires.” Counsel gave the two “alleged mitigation specialists” an initial set of names for interviews but were otherwise “not involved in the investigation” and only began thinking about “a mitigation strategy” after the petitioner was convicted. The “lead” mitigation specialist was “in the midst of a debilitating bout of depression” that ultimately resulted in suspension from the practice of law. He, “it seems clear, was almost certainly not making any significant decisions, reasonable or otherwise, regarding the scope of . . . investigation.” The other “alleged mitigation specialist,” a graduate student with limited experience and working part-time interviewed only the witnesses on the list counsel initially gave him and gave only his notes to the defense expert. The state court’s finding that counsel’s conduct was not deficient was an unreasonable application of *Strickland* in finding that counsel had discovered the relevant evidence as shown by the sentencing evidence. “[T]he testimony only scratched the surface of [petitioner’s] horrific childhood.” While some information may have been included in the records submitted, “that does not mean defense counsel performed a reasonable investigation or for that matter reasonably used the evidence.”

[D]efense counsel was not familiar with the records; some of the records contradicted their mitigation strategy . . . ; and it hardly constitutes a reasonable investigation and mitigation strategy simply to obtain . . . records from the State, then dump the whole file in front of the jury without organizing the files, reading them, eliminating irrelevant files or explaining to the jury how or why they are relevant.

The state court also unreasonably concluded that counsel performed adequately “without looking to the reasonableness of the investigation’s scope.” While counsel had presented testimony of five people about the petitioner’s “troubled past” and presented an expert witness, “an unreasonably truncated mitigation investigation is not cured simply because some steps were taken prior to the penalty-phase hearing and because some evidence was placed before the jury.”

Buttressed by a reasonably adequate investigation, the defense team’s ultimate presentation to the jury might have been justified as the product of strategic choice. But, that is not what happened. [Petitioner’s] attorneys “were not in a position to make . . . reasonable strategic choice[s] . . . because the investigation supporting their choice[s] was unreasonable.” *Wiggins*, 539 U.S.

at 536; *Strickland*, 466 U.S. at 690-91.

Counsel's conduct was also not excused because their interviews did not yield information about the grandmother's abusive history or negative influence on the petitioner. "Uncooperative defendants and family members . . . do not shield a mitigation investigation (even under AEDPA's deferential standards) if the attorneys unreasonably failed to utilize other available sources that would have undermined or contradicted information received." Because the state court did not address prejudice, the court reviewed this issue *de novo*. Counsel's errors, "particularly their lack of investigation, had a serious impact on the mitigation theory presented to the jury." First, there was "a goldmine of mitigating evidence showing that [the grandmother] was anything but a saint." She had schizoid personality disorder, had no maternal instincts, was abusive to her daughter, and allowed her daughter to be raped by a friend. While petitioner "was an indirect victim" of the neglect and abuse of his mother, "he was a direct victim as well." The grandmother was emotionally and physically abusive to him. Thus, the jury was misled to believe that she was a positive influence. Second, counsel "could have presented a detailed and horrific picture" of petitioner's mother's role in his life. She was portrayed in sentencing as "a mostly absent mother, when the truth is that her early abuse and on-again-off-again presence in his life had an irreparable and devastating impact on [him]. The evidence would have shown: (1) she was a prostitute who sold herself to buy drugs; (2) she often fed him only sugar water; (3) when he cried, she would put him in a closet and give him beer and pain killers to make him stop crying; (4) she was physically abusive, even putting a cigarette out on his eye, and threatened to kill him; (5) she was involved in many abusive relationships and tried to set fire to petitioner's father at one time; (6) she taught petitioner to cut cocaine, cook it into crack and sell it; and (7) she killed one of her abusive boyfriends and bragged to petitioner about it.

Yet, due to counsel's bungling or sheer laziness, the jury heard none of this. "I and the public know [w]hat all schoolchildren learn," it has been said, "[t]hose to whom evil is done [d]o evil in return." W.H. Auden, "September 1, 1939." While these words may not capture a satisfactory theory of morality, they assuredly suggest a plausible theory for sparing a life at a mitigation hearing, *see* ABA Guideline 10.11(F)(1)-(2), one that on this remarkable record could well have affected a juror's vote in the case.

Third, counsel's failure to investigate led to damaging testimony from the defense expert, who diagnosed antisocial personality disorder and testified that the petitioner was not remorseful. "This unhelpful testimony could have been prevented" with a complete background picture. The defense expert "then might have been able to say, as [the PCR expert] did . . . , that [petitioner's] 'chaotic, abusive, neglectful' family 'play[ed] a significant role in the development of [his] personality and his addiction to alcohol and drugs and later mental illness,'" such that his "psychological profile is 'almost identical' to

that of his mother.”

Defense attorneys, we recognize, are not obligated to shop for “the ‘best’ experts” who will testify in the most advantageous way possible. But it is unreasonable, after an incomplete investigation, to put an expert on the stand who will “directly contradict[] the sole defense theory” and “render worthless” other helpful testimony.”

*Id.* (citations omitted). This is especially so when the prosecution even points out in closing that the expert testimony is harmful to the defense. In sum, “this post-conviction evidence differs from that heard by the jury not only in degree but also in kind, and forms a mitigation story that ‘bears no relation’ to the story the jury heard.” Even though some of this information was in the documents submitted to the jury, “this jury was given no basis for construing and digesting this information” because no mitigation witness ever referred to the 12-inch thick records and counsel simply told the jury to “leaf through” them, which “likely would have discouraged the jury from reading more closely” and the references to the grandmother’s “deficiencies were few.”

***Mason v. Mitchell***, 543 F.3d 766 (6th Cir. 2008) (sentenced in June 1994). Under AEDPA (and citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)), counsel was ineffective in failing to adequately investigate and present mitigation evidence. Counsel presented only brief testimony of adaptability to confinement, family member requests for mercy, and the defendant’s unsworn denial of guilt. Counsel’s decision to limit the defense presentation “to appeals for mercy and claims of residual doubt” was made after the conviction during a phone call with members of the Ohio Public Defender Office. “Therefore, the evaluation of [counsel’s] performance must focus on what knowledge [counsel] then possessed regarding [the petitioner’s] childhood and background and what investigation and interviews, if any, that [counsel] had performed prior to making that decision.” Counsel met with the petitioner and his wife several times but did not really discuss mitigation. Counsel had been denied a mitigation investigator from the Public Defender Office and denied funding from the court. He was provided only with a brief psychiatric examination limited to “potential for rehabilitation and the likelihood of future dangerousness.” He was provided voluminous records by the state concerning criminal history, involvement by Children’s Services, drug treatment programs, and some educational records. From this, counsel was aware that: (1) petitioner was born into a drug-dependent family; (2) the family was involved in drug trafficking; (3) both parents had been incarcerated on trafficking charges; (4) petitioner had been exposed to a lot of violence; and (5) petitioner had prior injuries and scars he told police were due to beatings from his father. Counsel had only brief phone calls with a person at Children’s Services and the petitioner’s probation officer. Counsel’s time records reflected only “very brief” contacts with some family members *after* that phone call. He *never*

contacted some of petitioner's siblings. And, at most may have talked briefly with the petitioner's father and a brother, whose "statements appear to contradict the ample documentary evidence" already provided by the state in discovery. The failure to investigate further "is inexcusable given this apparent contrast between the facts contained in the documentary evidence and what he apparently learned" from the petitioner's father and brother.

[Counsel's] efforts consisted of no more than reviewing documents provided by the state, arranging for a psychiatric evaluation limited to predicting [petitioner's] future dangerousness, talking to Mason himself, and very briefly talking to a small subset of [petitioner's] family members. Under the Supreme Court's governing case law regarding counsel's obligation to undertake a reasonable investigation to support strategic decisions about the presentation of mitigation evidence, we have no doubt that the performance of [petitioner's] counsel was deficient.

Prejudice established.

[Petitioner] need only have persuaded one juror not to impose the death penalty, and [petitioner's] jury initially reported a deadlock regarding his sentence. Even a slightly more compelling case for mitigation thus might have altered the outcome of the sentencing phase of [the petitioner's] trial.

If counsel had performed adequately, the evidence would have established: (1) petitioner's father ran a prostitution ring and a home-based drug business with 10 employees; (2) both of petitioner's parents were drug users and traffickers; (3) petitioner's mother shot his father; (4) petitioner's parents abused him and isolated him from anyone not associated with their drug dealing activities; (5) petitioner began using drugs at eight years old; (6) petitioner's father included him on drug trafficking trips when he was in junior high; and (7) petitioner has "a borderline personality disorder largely as a result of his dysfunctional home environment." This evidence would not necessarily have opened the door to damaging prosecution rebuttal evidence, which is permitted under state law only to rebut good character or rehabilitation potential evidence. The state court "unreasonably applied the *Strickland* standard" because the state court ignored the *Strickland* principle that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* (quoting *Strickland*, 466 U.S. at 690-91). Here, the state court "simply asserted that . . . counsel had made a strategic decision regarding mitigation strategy, but that court failed to assess whether a thorough and reasonable investigation supported counsel's strategic decision." The state court's prejudice analysis was also "flawed and objectively unreasonable" because the court

relied on the possibility of the state presenting rebuttal evidence to good character or rehabilitative potential evidence, which was “a mitigation strategy that [petitioner] was not advocating.”

*Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), *petition for writ of certiorari filed Feb. 11, 2009* (sentenced in April 1990). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel’s conduct was deficient because counsel was aware of: (1) a report by a defense psychologist, who examined only competence and mental state at the time of the offenses, that the defendant had an IQ of 83 and exhibited signs of personality disorder and depression; (2) a presentencing report describing the petitioner’s father as an abusive alcoholic and referring to previous psychological evaluations of the petitioner; and (3) petitioner’s mother’s statements. Counsel’s “failure to broaden the scope of their investigation beyond these sources was unreasonable under prevailing professional noAppointment and Performance of Counsel in Death Penalty Cases (1989)). “A reasonable investigation into the leads in this case should have included, at a minimum, interviewing other family who could corroborate the evidence of abuse and speak to the resulting impact on [the petitioner]. Counsel, however, failed to contact such witnesses.”

Counsel uncovered nothing in their limited inquiry . . . to suggest that “further investigation would have been fruitless.” *Wiggins*, 539 U.S. at 525, 123 S. Ct. At 2537. To the contrary, the many red flags . . . would have prompted a reasonable attorney to conduct additional investigation. Moreover, acquiring additional mitigating evidence would have been consistent with the penalty phase strategy that counsel ultimately adopted. Given that counsel’s sentencing case focused on establishing . . . a troubled background, they had every incentive to develop the strongest mitigation case possible. *Cf. id.* at 526, 123 S. Ct. 2538. It is thus apparent that counsel’s failure to expand their investigation “resulted from inattention, not reasoned strategic judgment.” *Id.* at 526, 123 S. Ct. 2537.

The state court decision was unreasonably applied *Strickland* by focusing “entirely on counsel’s decision not to present additional mitigating evidence” without addressing “whether counsel’s *investigation* into such evidence was adequate under prevailing professional norms.” While other family members were available for interview, counsel relied only on the petitioner’s mother, who was the sole mitigation witness, to provide “brief testimony” about the petitioner’s childhood. “By choosing to rely entirely on her account, trial counsel obtained an incomplete and misleading understanding of [the petitioner’s] life history.” Prejudice established.

The mitigation evidence that . . . trial counsel failed to discover

paints a vastly different picture of [the petitioner's] background than that created by [his mother's] abbreviated testimony. . . . [T]he violence experienced by [the petitioner] as a child far exceeded—in both frequency and severity—the punishments described at sentencing. . . . Moreover, contrary to the impression created by [the petitioner's mother], this violence was not of a type remotely associated with ordinary parental discipline. . . . This evidence surely would have been relevant to an assessment of [the petitioner's] culpability, particularly in light of his age [nineteen] and lack of prior criminal history.

In addition, the trial court, in overriding the jury's nine to three recommendation for life, "expressly relied" upon the mother's testimony in "discounting the significance of the abuse described at sentencing." The available but unrepresented mitigation evidence contradicted this finding. Prejudice was also clear because "this case is not highly aggravated." The state court's finding of no prejudice was an unreasonable application of *Strickland*" because of the "court's emphasis on the absence of a 'causal relationship' between [the] mitigating evidence and the statutory aggravator." The state court also "rested its prejudice determination on the fact that . . . mitigating evidence did not undermine or rebut the evidence supporting the aggravating circumstances" without considering the "possibility that the mitigating evidence, taken as a whole, might have altered the trial judge's appraisal of . . . moral culpability, notwithstanding that the evidence did not relate to his eligibility for the death penalty." The court rejected the trial court's "post-hoc statements" that additional evidence would not have impacted his decision because "the assessment should be based on an objective standard that presumes a reasonable decisionmaker."

***Kindler v. Horn***, 542 F.3d 70 (3rd Cir. 2008), *petition for writ of certiorari filed Feb. 2, 2009* (sentencing in Sep. 1984). Counsel ineffective in failing to investigate and present mitigation evidence. Counsel's conduct was deficient because counsel did not conduct any family or background interviews and did not gather any background records even though counsel knew the defendant would likely be convicted. There was no strategy because counsel testified that "it never occurred to him to investigate [the defendant's] history." Prejudice established because the evidence would have established violent fighting between the defendant's parents in front of him; defendant's mother suffered from depression and was often intoxicated; physical abuse of the defendant from both parents; and after the parents separated, the defendant's father threatened to kill the defendant's mother and the children. Expert testimony also would have established that the defendant suffered from frontal lobe impairment (consistent with a history of head injuries and abuse) that can affect judgment, and the ability to control impulsive behavior. He also suffered from a general mood disorder due to a general medical condition and narcissistic personality disorder. The court rejected the state's argument that counsel's conduct was sufficient because counsel presented five witnesses and made an

“impassioned final argument asking the jury to spare [the defendant’s] life.”

This misses the point. We do not suggest that [counsel’s] performance was deficient because he inadequately presented the limited information that he had. Rather, [his] performance was deficient because his failure to adequately investigate mitigation evidence of mitigation [sic] materially limited what evidence he could present to the jury. Indeed, the skillful manner in which [counsel] presented the limited evidence that he did have illustrates the potential force of the mitigation evidence that he did not have because he so limited the scope of his mitigation investigation.

*Id.* at 86. The mitigation presented “pales in comparison to the mitigating circumstances that a proper investigation of [the defendant’s] background would have developed.” The expert testimony “in conjunction with proposed testimony regarding [the defendant’s] chaotic and violent childhood with ‘two crazy people’ for parents who constantly abused him (and each other in his presence), is sufficient” to establish prejudice. “The evidence might well have been accepted as explaining (though certainly not excusing) [the defendant’s] impulsive actions including why he was so willing to kill and brutalize [the victim].” Reversal was also required in this case due to error under *Mills v. Maryland* because the jury instructions and verdict slip created a reasonable likelihood that the jury believed it could only consider mitigating circumstances that jurors unanimously agreed upon.

***Correll v. Ryan***, 539 F.3d 938 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 903 (2009) (tried in 1984). Under pre-AEDPA law, counsel ineffective in capital sentencing for failing to adequately investigate and present evidence of the petitioner’s mental health and failing to present mitigation evidence. Counsel’s conduct was deficient in numerous respects. Counsel knew the petitioner “came from a dysfunctional family, sustained a serious head injury, was committed to various psychiatric facilities, and that he was addicted to drugs; yet defense counsel did not obtain the records nor did he interview witnesses concerning these matters.” Counsel only met with the petitioner possibly once and with the petitioner’s father, sister, and brother once and at the same time. He did not obtain school records, police reports on prior convictions, records from the California Youth Authority, medical records, or psychiatric records. “As anemic as the defense counsel’s investigation was, his presentation of mitigating evidence at the penalty phase was worse.” Counsel presented no evidence, which mandated the death penalty under Arizona law because the defendant had a qualifying prior conviction and no mitigation. Defense counsel’s mitigation argument did not even attempt to rebut three of the five aggravating factors urged by the State. “The entirety of his oral argument at the penalty phase consists of approximately 7 pages of transcript.” “Given his virtual concession of most of the aggravating factors argued by the State, and waiver of the presentation of mitigation evidence, the outcome was obvious: imposition of the death penalty.” Prejudice found

because, if counsel had adequately investigated, the evidence would have established the petitioner endured an abusive childhood in which he was neglected by his mother, who spent most of her time at church. The children were physically punished if they did not understand religious doctrine. There was incest in the family. A brick wall collapsed on the petitioner's head when he was seven causing unconsciousness for some time, but no medical treatment was sought for several days. The petitioner began "self-medication" by experimenting with alcohol and drugs around age ten and was using marijuana, LSD, and amphetamines regularly by age twelve. The petitioner's parents responded by beating him and threatening to kick him out. After the petitioner was shot at age 14, his parents asked the state to terminate their parental rights and cut off all communication with him. He became a ward of the state and spent his teenage years "in various state institutions described as 'gladiator schools,' which were characterized as cruel and inhumane, even by those who worked there." Within months, he became addicted to heroin. He was committed to psychiatric institutions at least twice during his teen years and was described at age 16 as "severely psychologically impaired." He was treated with a tranquilizer/anti-psychotic drug while institutionalized, and attempted suicide on two occasions. By the time of the crimes, he was injecting a quarter gram to a gram of methamphetamine in one shot, and injecting three to four shots a day. He would go seven to ten days without sleep, followed by one to two days of continuous sleep. Expert testimony indicated that he was likely having impulse control problems and judgment impairment at the time of the crime, and may have been experiencing drug-induced paranoia. Counsel did not pursue "the classic mitigation evidence," because "he didn't think of the evidence as favorable evidence. However, it is precisely this type of evidence that the Supreme Court has termed as 'powerful.'" *Id.* (quoting *Wiggins*). While counsel also appeared to be afraid of the particular judge's reaction to the evidence, "this presumes that the judge would not follow the law—speculation that is never appropriate and that is not supported by the record here" and also ignores the fact that, under state law, the Arizona Supreme Court independently reviews the aggravating and mitigating factors and re-weighs them and conducts a proportionately review.

***Bond v. Beard***, 539 F.3d 256 (3rd Cir. 2008) (sentenced in Feb. 1993). Under AEDPA, counsel ineffective in failing to adequately investigate and present mitigation. Counsel presented "seven family members and friends at the penalty phase hearing" to testify generally about "good character and willingness to help others." The post-conviction testimony "painted a very different picture than that presented at the penalty hearing." In short, the defendant "endured an extremely troubled and deprived childhood." His mother drank, gambled extensively, and physically abused the defendant. The family lived in "poverty, disrupted by periods in which the family lacked food, utilities, or adequate clothing." The defendant "ate lead paint chips at certain points in his youth." There was "pervasive drug use in the home and . . . heavy gang presence in their neighborhood." School records reflected substantial absences from school, which his mother testified were "caused by his unstable family circumstances." Counsel did not discover this information because "counsel did not inquire into [the defendant's]

background in any meaningful fashion.” Counsel did not obtain school and hospital records and had only “brief and perfunctory discussions” with the family “between the guilt and penalty phases” of trial and “did not inquire into family dynamics or background.” Counsel retained a mental health expert to evaluate capacity to understand *Miranda* warnings, but did not talk to the expert after receiving his report or inquire about the tests administered or anything the expert learned about the defendant’s background. Counsel’s conduct was deficient.

We do not doubt that the prospect of representing a defendant at a capital penalty phase hearing can overwhelm even experienced lawyers. Nor does it surprise us that a first-degree murder verdict would disappoint defense attorneys who have worked hard during a trial. But that does not excuse trial counsel's failure to prepare for the penalty phase prior to the handing down of the conviction. These attorneys, particularly in the face of a record so full of testimony calling for a first-degree murder verdict, should not have waited until the eve of the penalty phase to begin their preparations.

*Id.* at \_\_\_\_ . Because counsel did not obtain “readily available” school and medical records and did not “conduct a meaningful inquiry into [the defendant’s] family life,” they “failed to give their consulting expert sufficient information to evaluate [the defendant] accurately.”

Trial counsel did not investigate possible mitigating circumstances or ask experts to do so. Instead, counsel conducted an *ad hoc* and perfunctory preparation for the penalty phase *the night before it began*. Their “strategy” relied on an uninformed guess as to the best available way to present [the defendant] to the jury. We will not excuse this conduct on the ground that [the defendant] and his family members did not tell counsel that his background provided fertile territory for mitigation arguments. Neither [the defendant] nor his family had a duty to instruct counsel how to perform such a basic element of competent representation as the inquiry into a defendant's background. They did not, as the Commonwealth suggests, have to volunteer “red flags” about [the defendant’s] mental health when trial counsel should have discovered that information through a basic inquiry into his background.

*Id.* at \_\_\_\_ (citing and quoting the American Bar Association's Guideline for Appointment and Performance of Counsel in Death Penalty Cases). Counsel, here, “neither began their investigation at an appropriate time nor attempted to discover reasonably available mitigation evidence. They thus failed to meet prevailing standards of timeliness and

quality.” Counsel compounded this error by deciding at the eleventh hour for co-counsel with no capital experience to take full responsibility for sentencing. “[N]o amount of good intentions makes up for his lack of experience and preparation.” The state court “applied *Strickland* in an objectively unreasonable fashion in concluding that counsel performed adequately.” The state court holding also rested “in part on the unreasonable factual determination that trial counsel began meaningful preparations for the penalty phase at a point prior to the eve of the penalty phase. The record includes no evidence to that end.” The state court also “incorrectly” relied on strategy.

It is difficult to call . . . counsel's decisions “strategic” when they failed to seek rudimentary background information about [the defendant]. Strategy is the result of planning informed by investigation, not guesswork.

*Id.* at \_\_\_\_\_. If counsel had performed adequately, the evidence would have established: (1) neglect, along with physical and psychological abuse, as a child; (2) severe cognitive impairments, likely from birth; (3) ingestion of lead paint chips, as well as fetal alcoholism, are consistent with a finding of organic mental deficit; and (4) Post Traumatic Stress Disorder (“PTSD”), caused by the abuse he suffered as a child, being attacked by gang members, and/or the stillborn birth of one of his children. If counsel had performed adequately, the evidence would have supported two statutory mitigating circumstances (“under the influence of extreme mental or emotional disturbance” and substantially impaired capacity “to appreciate the criminality of his conduct or to conform his conduct to the requirements of law”) and the catch-all mitigating circumstance. The state court's conclusion that the state's expert had thoroughly refuted the defense experts in post-conviction, “rendering any claim based on their testimony ‘meritless,’ . . . rests on an unreasonable factual determination.” “[C]ounsel could have obtained testimony from family members that would have given the jury a very different impression than that left by the other penalty phase testimony. This testimony would not contradict earlier testimony, but rather provide details not uncovered by trial counsel at the penalty phase hearing.” The state court found no prejudice.

That court apparently equated the paltry testimony at the penalty phase hearing with the vastly expanded testimony provided by friends and family members at the PCRA hearing. The two sets of testimony brook no comparison. The first left the impression that [the defendant] came from a supportive (if poor) family but went on a crime spree after the type of disappointments many people face in life. The second showed that he had grown up in an extraordinarily dysfunctional environment rife with abuse and neglect. The penalty phase testimony may have suggested some difficulties during [his] youth, but this does not prevent relief. *Strickland* permits relief where, as here, trial counsel presented

some mitigation evidence but could have introduced evidence that was upgraded dramatically in quality and quantity. The PCRA court's conclusion that [the defendant] had failed to show prejudice, however construed, either reflects an unreasonable determination of fact (in the comparison of the two sets of testimony) or an objectively unreasonable application of controlling law (in denying relief on the basis that [the defendant] already had presented some mitigating evidence).

*Id.* at \_\_\_\_.

A reasonable lawyer who understood [the defendant's] life history would not have proceeded on the theory that he had led a productive life before going on a crime spree as a result of a series of disappointments. Such an attorney instead would have presented evidence to the jury of [the defendant's] abusive and neglectful family life, his low intelligence, and his psychiatric and psychological problems. There is a reasonable probability that this different course, even in the face of competing expert testimony introduced by the Commonwealth, would have resulted in the imposition of a life sentence.

*Id.* at \_\_\_\_.

***Jells v. Mitchell***, 538 F.3d 478 (6th Cir. 2008) (sentenced in October 1987). Under AEDPA, counsel ineffective in failing to adequately investigate and present mitigation evidence. In so holding, the court observed: “the deference owed to counsel’s strategic judgments about mitigation is directly proportional to the adequacy of the investigations supporting such judgments.” Counsel’s conduct was deficient in failing to timely prepare for sentencing and in failing to utilize a mitigation specialist to gather information about the defendant’s background, including his educational, medical, psychological, and social history. Counsel did not contact a mental health expert until two days after conviction and 16 days prior to the mitigation hearing. Counsel did not provide the expert with “personal history records—records that would have been collected had they uses a mitigation specialist—that were necessary for the evaluation.” In addition, counsel interviewed only three family members, “neglecting to speak with many other family member who had lived with [the petitioner] and were available. When speaking with the family members they did contact, their inquiry was brief and they failed to ask sufficiently probing questions; as a result they failed to discover the abuse that [the petitioner] received from his mother’s live-in boyfriend and his stepfather.” Counsel also failed to obtain a prior psychological report and accessible school records that revealed mental impairments. Counsel’s conduct was also deficient “[i]n the context of [the petitioner’s] case” in “failing to use a mitigation specialist.” “While [petitioner’s] counsel did not

have a specific obligation to employ a mitigation specialist, they did have an obligation to fully investigate the possible mitigation evidence available.” Under state law, “the range of potential mitigation evidence is quite broad.” Thus, “defense counsel must conduct a reasonably thorough investigation into all possible mitigation evidence that would present a sympathetic picture of the defendant’s family, social, and psychological background.” Counsel conducted some investigation and made a “limited presentation of [petitioner’s] unstable childhood and academic difficulties.” Counsel’s awareness of this limited information “should have alerted them that further investigation by a mitigation specialist might [have] proved fruitful.” Counsel’s failure to investigate prior to the conviction was objectively unreasonable under *Strickland* and the state court’s finding to the contrary was an unreasonable application of *Strickland*. Prejudice established because “there is a reasonable probability that at least one of the [three state sentencing panel] judges may have reached a different conclusion regarding the imposition of the death penalty.” Available but unrepresented evidence “paints a significantly more detailed picture of [the petitioner’s] troubled background.” While trial counsel presented evidence of essentially a normal childhood, an IQ of 77, and no antisocial personality disorder or mental illness, petitioner had “a history of serious cognitive learning and socialization impairment” that amounted essentially to academic problems that resulted in behavioral problems with “several missed opportunities” to resolve the problems “through special education and remedial classes.” These educational problems were compounded by his home. The defendant was one of seven children and his mother constantly moved in and out of relationships with abusive men making the petitioner “a witness to . . . violence and cruelty” inflicted on his mother. “In short, rather than being cumulative, this evidence provides a more nuanced understanding of [petitioner’s] psychological background and presents a more sympathetic picture of [him].” The state court’s finding of no prejudice was unreasonable.

***Belmontes v. Ayers***, 529 F.3d 834 (9th Cir. 2008) (sentenced in 1982). Under pre-AEDPA standards, counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel’s conduct was deficient in that counsel interviewed only a few of the defendant’s family and friends and a few staff members at the California Youth Authority that knew the defendant. The only records collected were from the CYA. Even this limited information put counsel on notice that the defendant had suffered rheumatic fever and had been repeatedly hospitalized as a child, had a history of drug abuse, had difficulty in school prior to dropping out, and possibly suffered from depression. In addition, although counsel obtained a mental health expert, he asked that expert only to examine capacity at the time of the offenses. Counsel also failed to adequately prepare the witnesses in sentencing.

[H]e had a duty to discuss with them the purpose of their testimony, reveal the type of questions he planned to ask them on the stand, and instruct them as to what kind of information the jury would find helpful and what kind of testimony would not be

relevant. It is evident from the testimony given at the penalty phase that [counsel] did not do this. Several of the witnesses who knew [the defendant] best [including his mother] and clearly could have provided compelling mitigating evidence did not testify to a single positive quality he possessed. Instead, witness after witness told the same jury that had just found [the defendant] guilty of first degree murder beyond a reasonable doubt, that [the defendant] should not receive the death penalty because he was innocent.

This was followed by the defendant's testimony that "second-guessed the jury's verdict," "showed little remorse," and did not provide any mitigation. Thus, the mitigation presented was "a cursory presentation of some . . . family history," testimony about the defendant's religious conversion in CYA, and his behavior in CYA.. "[C]onspicuously missing from the penalty phase . . . was the testimony of an expert who could make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to . . . involvement in criminal activity."

Obtaining competency evaluations from mental health experts for guilt phase purposes does not discharge counsel's duty to consult such experts for the penalty phase because the considerations involved are very different in the two phases. This failure to consult a psychologist or psychiatrist about the significance of the mitigating evidence would have been unreasonable in any capital case, but was particularly unreasonable here, given the information [counsel] had at the time he made this decision.

Prejudice found because there was substantial mitigation not presented. The defendant grew up in a poverty-stricken family with an alcoholic, abuse father, who severely and regularly beat the defendant's mother. His maternal grandmother was also an alcoholic and drug addict and she and her husband did not approve of the defendant because of his mixed race (mother white and father Mexican). When the defendant was only five, his 10-month-old sister died of a brain tumor and he began exhibiting symptoms of depression. The defendant did well in school, sports, etc., until he contracted rheumatic fever at age 14. He was repeatedly hospitalized, had to stay out of school, sports, and social activities, and was told he would likely die before age 21. He became depressed, withdrawn, and lost some of the positive personality traits that seemed to be developing during his early years. Around the same time, the family had to move into a cheap motel and his mother engaged in casual sexual relations with a number of men and frequently brought the men back to the motel room in which the family lived. The defendant starting abusing drugs on a regular basis and continued up to this murder. While he was in CYA, he had very positive behavior, which also was only cursorily investigated and offered in sentencing. "[T]he fact that a capital jury was presented with a cursory or incomplete presentation of the mitigating circumstances that should have been more

thoroughly and fully presented does not obviate a finding of prejudice.” Prejudice was also clear because despite “an incomplete, inadequate, and unconvincing presentation of the potential mitigating evidence, at least some members of the jury, perhaps a majority, had serious doubts during the deliberations as to the correct result,” as evidenced by long deliberations and questions “that suggested that some jurors [perhaps a majority] were leaning toward a verdict of life without the possibility of parole.” The court also held that prejudice would have been found even if the state had been permitted to offer rebuttal evidence that the defendant had previously killed another man, which the trial court prohibited because he had entered a no contest plea only to accessory after the fact for that offense.

**Gray v. Branker**, 529 F.3d 220 (4th Cir. 2008), *cert. denied*, \_\_\_ S.Ct. \_\_\_, 2009 WL 578892 (March 9, 2009) (sentenced in December 1993). Under AEDPA, counsel was ineffective in capital sentencing for failing to adequately prepare and present mental health evidence. The defendant, who was a dentist or “prosperous professional” (as noted by the dissenting judge) represented by retained counsel, was charged with killing his wife during ongoing, bitter divorce proceedings. Counsel’s conduct was deficient because counsel was aware from the divorce proceedings, from the defendant’s behavior in pretrial confinement, and from a five-week court-appointed evaluation of mental health issues, but only talked to the defendant once, pre-indictment and prior to the state’s notice of intent to seek death, about the need to retain an independent mental health expert.

Defense counsel should not have dispensed with a mental health investigation just because Gray did not want to hire an independent psychiatrist at the pre-indictment stage, well before the state announced its intention to seek the death penalty. *See* ABA Guideline 11.4.1.C (“The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.”).

Here, the court-appointed examiner had offered additional assistance at no charge. Additionally, counsel did not “seek court approval to hire an independent psychiatrist at state expense when [the defendant] became indigent shortly after his indictment” or even after the jury returned a guilty verdict and the defendant faced the certainty of a capital sentencing proceeding. Counsel’s conduct was not excused by strategy. “There was simply no consideration of whether a defense based on psychiatric evidence might be a strategy worth exploring,” before pursuing “a questionable alibi theory until days before trial” and then pursuing an accident theory. Counsel “simply missed or ignored—and failed to act on—the many signs that [the defendant] was mentally and emotionally unstable.” The state court finding to the contrary was an unreasonable application of *Strickland* because the state court “failed to consider the reasonableness of counsel’s actual performance under prevailing professional norms, which include the duty to make considered decisions about areas of potential investigation. The state court also

erroneously found that the accident defense and the diminished mental responsibility defense were inconsistent, when “common sense dictates” to the contrary in this case. The state court also “overlooked” the mental health testimony that would have been available and unreasonably “relied heavily on [the defendant’s] one-time refusal to hire an independent psychiatrist.” “[A] reasonable lawyer would not rely on his client’s self-assessment of his mental health, especially in a capital case. There was an independent duty to investigate.” The state court held that the defendant was not indigent, but this finding was rebutted by clear and convincing evidence that he was in fact indigent at the time of trial, having placed all of his assets in an irrevocable trust for his children six months earlier.” Finally, regardless of financial status, the court-appointed examiner had offered additional assistance without charge. *Schriro v. Landrigan* does not require a contrary conclusion, because “[n]othing in *Schriro* permits [the defendant’s] statement to be used to relieve his counsel of their duty to investigate for mitigating mental health evidence.” With respect to prejudice, the state court “required *certainty* that the jury would have reached a different result at sentencing,” which is contrary to *Strickland*’s “reasonable probability” standard. The state court decision was also an unreasonable application of *Strickland* because the state court relied on determinations that the court had instructed the jury on mental health mitigating evidence and the state had presented contrary lay evidence. The state court did so without mention, as *Williams* requires, of the mitigation evidence presented at trial and by improperly discounting the evidence that could have been presented in mitigation. Independent review established prejudice. The defendant had already presented mitigation evidence establishing the defendant was a loving and dedicated father and son, who contributed to the community as a Little League baseball coach. He had no prior offenses, cooperated with law enforcement, and behaved well in confinement. The defense presented no mental health evidence, even though “[e]vidence of mental disturbance . . . can be persuasive mitigating evidence for jurors considering the death penalty, and this evidence can determine the outcome.” *Id.* at \_\_\_ (citing 2003 ABA Guidelines and capital jury study article). Here, “the two mental health mitigating factors—largely ignored by defense counsel—were [the defendant’s] best hope of convincing the jury that he did not deserve the death penalty.” If counsel had adequately investigated, the evidence would have revealed a diagnosis of paranoid personality disorder and adjustment disorder, with the possibility of “psychotic episodes” under severe stressors, such as faced by the defendant at the time of the offense. “The jury would have known that he suffered from a severe mental illness” when he killed his wife.

**2007:** *Morales v. Mitchell*, 507 F.3d 916 (6th Cir. 2007) (tried in December 1985). Under AEDPA, counsel was ineffective in failing to adequately investigate and present mitigation. Counsel’s conduct was deficient because counsel failed to interview the petitioner’s family, friends, and others who knew him; failed to obtain any background records; failed to retain a mitigation expert; and failed to adequately prepare the petitioner for his unsworn statement in sentencing. The state court’s finding that counsel’s conduct was not deficient was an unreasonable application of clearly established constitutional

law. Because the state court did not address the issue of prejudice, the federal court's review of prejudice was de novo. Prejudice established because counsel presented no sworn testimony or evidence, made no opening statement, and made a closing statement that was a mere three pages long during the penalty phase. The jury was provided only with an unprepared unsworn statement by the petitioner. If counsel had adequately investigated, a number of family members and a former principal at the petitioner's school would have testified and documentary evidence was available to corroborate information about the alcohol abuse of the Petitioner's parents, his abuse by an older mentally retarded brother, his mentally disturbed sister's suicide when he was only nine, his mother's emotional problems, and the effect and role of alcohol, drugs, and Native American culture on him.

*Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007) (tried in September 1987). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented three witnesses in sentencing along with an unsworn statement from the defendant. A former employer testified that the defendant was a good employee. A psychiatrist, who spent only one and a half hours with the defendant and relied on pretrial court-appointed competence and sanity reports, testified that the defendant was diagnosed with an "adjustment disorder with depressed moods" and "malingered," but that the defendant does not have a mental disease or defect. Finally, the defendant's grandmother testified that the defendant lost both his parents and a brother over a two-month period. His father died of a heroin overdose and his brother was shot. Counsel's conduct was deficient in failing to conduct "even the most basic interviews" with the defendant's family members concerning the family background, even though counsel knew the defendant's father died of a heroin overdose. "It is not the usual case where a parent copes with an addiction as serious and controlling as a heroin addiction without repercussions, often serious repercussions, being felt by the remaining family members." Even basic interviews would have revealed a family history filled with the father's physical abuse, which is "an important mitigation factor." Counsel instead presented inconsistent evidence in the defendant's statement that his parents were wonderful and in a doctor's report that the defendant denied any physical abuse. Counsel also was aware that the defendant had attempted suicide by shooting himself in the left temple, "which should have strongly suggested the need to investigate whether Petitioner had a mental defect." Instead, counsel presented evidence that the defendant had no mental disease or defect when "the limited time that [the doctor] spent with Petitioner—a mere hour and a half—sharply hindered his ability to make any independent analysis of Petitioner's mental health." The court also noted that counsel's performance fell short of the 2003 ABA Guidelines. Counsel's failure to investigate "was unlikely the result of a strategic choice. Despite the availability of funding to procure experts chosen by Petitioner at the mitigation phase, . . . Petitioner's attorneys nevertheless relied upon the presentence report" of a court-appointed expert and the inadequate testimony of the expert witness presented.

Had Petitioner's counsel taken an active role in procuring an expert to investigate Petitioner and author a report for mitigation, evidence of Petitioner's social history and brain injury would likely have come before the trial court. We can fathom no strategic reason for Petitioner's counsel's failure in this regard.

Prejudice found because adequate investigation would have revealed significant mitigation, including the defendant's father's violence against the defendant and his family, the loss of both parents and a brother when the defendant was only a teenager, which affected the defendant profoundly. Shortly afterwards, he started using heroin, leading to a drug addiction. He also became severely depressed and shot himself causing a serious brain injury and functional brain impairment, which causes problems with impulsivity, judgment, and problem solving. There is a reasonable probability that this evidence would have led to a different result before the three-judge sentencing panel, which would likely have reached a different result with evidence of a mental disease or defect.

*Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 882 (2008) (tried in 1982). Under pre-AEDPA law, counsel ineffective in failing to adequately prepare and present mitigation. Counsel's conduct was deficient because counsel "failed to do even a minimal investigation of 'classic mitigation evidence,' notwithstanding the fact that he knew such evidence potentially existed." He spent less than five hours preparing for sentencing even though counsel was aware from the pre-sentence investigation report and the court-appointed examiner's report of the defendant's long history of mental health problems, his two prior suicide attempts, his prior hospitalization in a psychiatric facility, his traumatic combat experiences in Vietnam, his serious drug problems, and his diagnosis by a court-appointed examiner of antisocial personality disorder. It was not sufficient that counsel prepared a short memorandum for the sentencing court because counsel's duty "is not discharged merely by conducting a limited investigation of these issues or by providing the sentencing court with a cursory or 'abbreviated' presentation of potentially mitigating factors." Prejudice found because counsel presented a single witness to testify about adaptability to confinement and this evidence covered less than three pages of the transcript. The court rejected the "nexus requirement" applied by the District Court.

If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant. This is simply

unacceptable in any capital sentencing proceeding, given that "treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," and determining whether or not he is deserving of execution only after taking his unique life circumstances, disabilities, and traits into account, is constitutionally required. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Prejudice established because counsel failed to even develop or argue the limited and unsubstantiated mitigating evidence that was before the court in the pre-sentence report and the state's expert report. These documents included information that the defendant's mother was "very strict" and hypochondriacal. In truth, she physically abused the defendant frequently and stayed in bed much of the time claiming to suffer from illnesses and was profoundly addicted to prescription drugs. She would even force the defendant to take Valium and sleeping pills when he acted up or had too much energy. The information before the court indicated that the defendant's family moved frequently but did not "convey" the impact on the defendant in terms of his ability to form relationships or that he never attended any school for more than a year. The information before the court indicated that the defendant was raised in a lower-middle class family, when he grew up in extreme poverty. The family moved frequently because of his father's struggle to maintain employment. The family often lived in homes with no running water or indoor plumbing and once had to live in a rat-infested house in which the walls and ceilings were lined with cardboard to block holes. The court had information about drug use but was not aware that drug and alcohol abuse were rampant in the defendant's family or that it was his mother who first exposed him to drug abuse by forcing him to take sedatives when he was a child or that he used large quantities of drugs throughout his life and would stay awake for weeks at a time on methamphetamine. The defendant also likely suffered from post-traumatic stress disorder from his combat experience and abusive background, but even the state's expert in post-conviction agreed that the defendant had a depressive disorder, which resulted in two suicide attempts, and had to be hospitalized at least once due to hallucinations. The state expert also agreed that the defendant has a personality disorder not otherwise specified with antisocial, borderline, and inadequate features, which "if properly developed and explained to the sentencer, would have had a mitigating effect under Arizona law." Even the diagnosis of antisocial personality disorder given by the court-appointed examiner at trial, "is a mitigating factor under Arizona law." Even though some mitigating evidence was before the court, prejudice was still clear.

We do not underestimate the importance of the role of counsel in the adversarial process. The sentencing judge cannot be expected to comb the record looking for mitigating factors, particularly where the minimal evidence that exists is buried in reports that are on the whole strongly unfavorable to the defendant.

Prejudice was especially clear since there was only one aggravating factor and Arizona law at the time of sentencing “mandated the death penalty” when one aggravating factor was present and no mitigation evidence was presented.

*Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2429 (2008) (crimes in July 1993 and affirmed on appeal in 1997). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately prepare and present mental health expert and presenting the testimony of an “expert” counsel believed to be a “quack,” which was very prejudicial. The defendant, described in the first sentence of the opinion as “an emotionally disturbed young man who had been abused and raped as a child,” was sentenced to death for “the molestation and brutal murder” of a 10-year-old boy. He also had a prior molestation conviction for which he was on parole at the time. Prior to trial counsel retained “a defense mitigation specialist” and were aware of obvious mental health issues due to the defendant’s physical, mental, and emotional abuse and his rape as a child. Medical records reflected that he had been held in a psychiatric facility following an attempted suicide and that he had been diagnosed with major depression and possible schizophrenia. The defendant also disclosed to the mitigation specialist that, at the time of the murder, he put himself in the victim’s place because he had wished that the man who raped him had also killed him. Based on the mitigation specialist’s recommendation, counsel retained a psychologist, who at the time was director of a child and adolescent psychiatric center. Counsel met with the doctor and asked him to evaluate the defendant but not to prepare a report. The doctor wrote a report anyway which included very prejudicial information such as no mental illness, molestation of 25-30 children, a prior murder (later recanted), lack of acceptance of responsibility, committing this murder for the purpose of avoiding a return to prison, a diagnosis of pedophilia, and future dangerousness. Counsel contacted the doctor, who said basically that he would make a good witness for them despite his report. Counsel also learned that the doctor believed that “mental illness” is a “myth” and used a “therapeutic technique described as “putting 18-year-olds on his lap and sticking a bottle in their mouth.” Counsel then had “well founded doubts” about the doctor’s “fitness as a defense expert” and believed he was a “quack.” Counsel’s conduct was deficient though because counsel did not seek a different mental health expert and provided the state with this doctor’s report prior to trial (when counsel was only required to disclose reports from expert witnesses who would be called to testify). During trial, rather than pursuing a mental illness defense, counsel argued a voluntary manslaughter theory, but the court refused to even charge on manslaughter. In the penalty phase before the jury, counsel presented testimony from the defendant and some family members and then called the “quack” to testify. His testimony extensively covered the doctor’s beliefs and theories and some testimony about the defendant’s “terrible childhood” and abuse. His testimony did not, however, provide any evaluation of the defendant’s mental health at the time of the offenses. On cross, the state questioned the doctor extensively on his report, which he confirmed. The quack volunteered that the defendant had “antisocial qualities and sociopathic traits.” In response to questions from the state, the doctor also confirmed that the defendant had admitted to him that he was

sexually aroused by killing the child and had masturbated on the child's body. The doctor had not even disclosed this last information to defense counsel. After the jury recommended death, counsel called the doctor to testify yet again in sentencing before the judge. This time he added that the defendant posed "a great risk to society." The defendant challenged counsel's ineffectiveness for failing to present a mental health defense during trial and in mitigation. The state argued essentially that counsel was entitled to rely on their "expert" without seeking an additional expert because he was a qualified doctor. The court rejected this because "the general qualifications of an expert witness do not guarantee that the witness will provide proficient assistance in any given instance." The problem in this case arose due to the "methods" the doctor used, "his idiosyncratic view of mental disorders," and "the fact that [his] views favored the prosecution." Thus, "it would not have been reasonable for defense counsel to rely on" this doctor "based only on his credentials." While the court was "inclined to believe that their performance was ineffective" during the trial and that prejudice was established, the court, constrained by AEDPA review, did not find that the state court's contrary conclusion was an unreasonable application of *Strickland*. With respect to sentencing, however, counsel's conduct was both deficient and prejudicial because counsel presented lay testimony as essentially non-statutory mitigation, but did not present evidence of the statutory mitigating circumstances of extreme emotional disturbance and impaired capacity to appreciate the wrongfulness of his conduct at the time of the murder, which were supported by two competent experts in post-conviction. These experts diagnosed a severe dissociative disorder and found that the defendant was dissociating during the murder and killing the child because he himself wanted to be killed by the man that had raped him as a child.

The strategic reasons that might, at a stretch, have justified this decision [not to present a mental health defense] at the guilt phase, fall apart when we consider that at the sentencing phase [the defendant] had nothing left to lose. The lawyers' decision to forego presenting this kind of mitigation evidence was made without the kind of investigation into [his] mental health that *Strickland* calls for, after [his] lawyers had concluded that [the doctor] was a "quack." Indeed, it is uncontested that [his] lawyers knew nothing about the content of [the doctor's] planned testimony. The lawyers confessed at the post-conviction hearing that they were utterly in the dark about what [he] would say when he took the stand. . . . This is a complete failure of the duty to investigate with no professional justification. Where an expert witness's opinion is "crucial to the defense theory[,] defense counsel's failure to have questioned [the expert] ... prior to trial is inexcusable."

*Id.* (quoting *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir.2000)). The court also noted that counsel had the doctor's report and "we cannot imagine what they hoped to gain" by

calling him to testify. In addition, if he had not been called as a witness, counsel was under no obligation to disclose his report to the prosecution. Even though counsel may not have been ineffective for not presenting mental health testimony during the trial, they were during sentencing.

[T]here is an important difference between the statutory mitigating factors . . . for capital sentencing purposes and the requirements for proving an insanity defense at the guilt phase. Furthermore, the burden on the defendant is not as heavy at sentencing as during the guilt phase. . . . As a legal matter, a mental illness mitigation defense to the imposition of a death sentence may be available even if an insanity defense to the murder charge is not.

If counsel had presented “mainstream expert psychological testimony” such as that presented in post-conviction, there is a reasonable probability of a different outcome. “Competent evidence” of “mental illness would have strengthened the general mitigation evidence presented by defense counsel . . . by focusing the jury on the concrete results of years of abuse on [the defendant’s] psyche.” There was also “little downside” in further evidence of the defendant’s “predatory peophilia” being presented when “evidence of the most damning sort was already before the jury.” Prejudice was especially clear in calling the “quack” to testify and then to do it a second time because he not only provided the only evidence of “necrophilia after the murder, he also gave the prosecution a gift by expressing his belief in . . . future dangerousness—a subject that the prosecution itself is not permitted to argue as an aggravating circumstance under Indiana law.” The trial court’s sentencing order also was “a close reflection of [the doctor’s] written report and testimony.

*Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007) (crimes in September 1996 and affirmed on appeal in 1999). Under AEDPA analysis, trial counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. Although the issue was first raised in federal habeas, the court found, under unique facts not relevant here, that exhaustion was excused and the issue was not procedurally barred because the state had not established regular and consistent application of a procedural bar. Because of these rulings and the state court’s failure to address the merits, the court applied de novo review and cited repeatedly to the 1989 and 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Counsel’s conduct was deficient because counsel focused “almost exclusively on the guilt phase of his trial.” *Id.* at 1143. While counsel had a mitigation investigator that investigator spent only 23 hours on the case, all of which was in the month prior to trial, did not interview the petitioner and “did not have access to life-history information, school records, or medical records.” Counsel also did not have the petitioner evaluated by any mental health expert or other expert qualified to ascertain whether the petitioner “suffered from neurological or other deficits that would mitigate his moral culpability.” *Id.* Although trial counsel did

not provide an affidavit, the mitigation investigator's affidavit along with evidence that trial counsel's file contained no background records was sufficient to establish that the investigation of mitigation evidence was unreasonable. Prejudice established despite three "callous and brutal" murders, no residual doubt of guilt, three aggravating circumstances, and evidence the petitioner obtained drugs and a weapon and corresponded with his wife about "taking care" of witnesses while in pretrial confinement. Trial counsel had presented evidence only of petitioner's support of his family, that his mother was a "good woman," who loved him, and his daughter loved him and he could help her from prison. "Thus, rather than offering the jury a potential explanation for [the petitioner's] actions relating to the murders he participated in, trial counsel's case in mitigation was limited to a simple plea for mercy." *Id.* at 1144. This evidence "played into the prosecution's theory that the only explanation for the murders was that [the petitioner] was simply an 'evil' man." *Id.* at 1147. If counsel had adequately investigated the evidence would have established that the petitioner was raised in an environment of neglect and abuse; his mother and step-father were violent alcoholics, who battled before the children; his mother physically abused the children with anything at hand; his mother had numerous illicit affairs in the home that were known to the children; he suffered from brain damage and an IQ in the 70's, likely as a result of extensive drug and alcohol abuse begun as a child and numerous head injuries. "[T]his is just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of a trial." *Id.* at 1144.

**2006:** *Outten v. Kearney*, 464 F.3d 401 (3rd Cir. 2006) (sentenced in March 1993). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. The state presented evidence of the defendant's post criminal history, which was all non-violent offenses. The defense presented six people (four family members, a friend, and an ex-girlfriend, who was the mother of the defendant's children) to testify about general background and good guy evidence in mitigation. Counsel's conduct was deficient because the "investigation was cursory" in that counsel only sent the defendant a letter asking for the names of "potential penalty phase witnesses" and had only limited discussions with the defendant and his mother. Counsel's conduct was not excused by strategy to focus on the defendant being a loving, generous, and non-violent person, who did not commit the crime, and to avoid negative information.

Simply stated, defense counsel's penalty-phase strategy was to argue to the jury—which had convicted Outten of murder unanimously and beyond a reasonable doubt—that he was a good guy and that his life should be spared because he was actually innocent.

The court found, however, that trial counsel did not "carry through this tack" because the trial court prohibited counsel from arguing actual innocence in sentencing. Trial counsel then changed tactics and stated explicitly that the defendant was guilty and had a

“horrendous record.” Counsel never mentioned the defendant’s positive character traits. While counsel did mention the non-violent nature of the defendant’s prior convictions, this was undermined by the state’s cross of the mitigation witnesses about his assaults on various family members and his ex-girlfriend. Counsel’s “effort fell well short of the national prevailing professional standards articulated by the American Bar Association” in the 1989 ABA Guidelines. Counsel’s conduct was also unreasonable in light of “what they presumably discovered from the conversations” counsel had with the defendant and his mother. Prejudice found because, if counsel had adequately investigated, the evidence would have established that the defendant’s alcoholic father was extremely physically and emotional abusive to his children all of whom ultimately suffered from alcoholism and/or drug addiction. The defendant’s mother drank regularly while she was pregnant with him and was beaten by her husband. The defendant also had two serious head injuries that caused loss of consciousness as a child. He was placed in classes for the learning disabled at school. After the defendant ran away from home as a teenager to avoid his father’s abuse, he was placed in foster care where he was sexually abused by his foster mother. He was ultimately placed in a facility for troubled children where counselors noted that he was depressed and hopeless. As an adult, the defendant suffered two major losses due to the death of his father from cancer (and the defendant cared for him the last 6 months of his life despite the history of abuse) and the death of his child who lived only 14 days because of the mother’s drug use during pregnancy. The defendant also had a substantial history of alcohol and substance abuse beginning at age 10. Although counsel did present “some mitigating evidence” to the jury, “it does not follow that the jury was provided a comprehensive understanding” of the mitigation. “For example, while Outten’s mother portrayed her husband as a ‘very, very strict parent,’ she did not relate to the jury the disturbing abuse. . . .” The jury also heard nothing of the sexual abuse, possible neurological damage, learning disabilities, or low IQ. Prejudice was also clear due to the jury’s close vote in favor of death (7 to 5). Under AEDPA, the state court’s holding was an unreasonable application of *Strickland* on both prongs. With respect to sentencing it was unreasonable, in part, because the court found no prejudice because the background information also “contained some harmful information.”

***Frierson v. Woodford***, 463 F.3d 982 (9th Cir. 2006) (crimes in 1978 and third trial in 1986). Under pre-AEDPA law, counsel ineffective in third capital sentencing for failing to adequately prepare and present mitigation and for failing to challenge a significant mitigation witness’ invocation of his Fifth Amendment right against self-incrimination. Counsel’s conduct was deficient because counsel failed to adequately investigate, even though “[t]he imperative to cast a wide net for all relevant mitigating evidence is heightened at a capital sentencing hearing.” *Id.* at 989. “[T]he reasonableness of counsel’s investigatory and preparatory work at the penalty phase should be examined in a different, more exacting, manner than other parts of the trial.” *Id.* at 993. Here, counsel did not review the prior sentencing transcripts, which would have revealed a thorough drug history by an expert, along with a series of psychiatric evaluations while the defendant was in the custody of the California Youth Authority (CYA). These records revealed

symptoms of organic brain dysfunction. Counsel also did not obtain readily available school, hospital, prison, and juvenile records. These records revealed significant head injuries as a child that required hospitalization, an IQ score of 71, and a documented learning disability. Although counsel knew of the head injuries, he “ignored the red flag of possible brain damage caused by multiple childhood head injuries by failing to consult a neurologist, and instead relied on the lay opinion of [the defendant’s] parents” who saw no change in behavior following the injuries. *Id.* at 991. Counsel also claimed to have relied on the prior testimony of a forensic psychiatrist that there was no evidence of brain damage, but the “failure to consult with a neurologist—the only expert qualified to evaluate organic brain dysfunction caused by multiple childhood head trauma—[was] not ameliorated” on this basis, in part, because it was clear that counsel had not been aware of the prior testimony. Counsel’s conduct was not excused by “strategy” because “strategy presupposes investigation.” *Id.* at 992. Prejudice found because the omitted evidence, taken as a whole, might well have influenced the jury’s appraisal of the defendant’s moral culpability. Counsel’s conduct was also deficient in adequately preparing and responding to the state’s evidence that the defendant had a juvenile adjudication for murder for which he was committed to CYA. Counsel presented several witnesses who testified that the defendant was not the shooter, but these witnesses lacked much credibility. Counsel then sought to present the testimony of the juvenile co-defendant that counsel believed to be the shooter but basically encouraged this witness to invoke his Fifth Amendment rights even though this witness had confessed to counsel and his investigator that he was, in fact, the shooter. Counsel’s conduct was deficient because, much like counsel in *Rompilla*, counsel failed to review the prior juvenile records, which would have disclosed that this witness had been tried and acquitted on this charge and thus could not assert the Fifth Amendment privilege because double jeopardy barred trying him again for this murder. Prejudice was also established for this error because this prior homicide was “the central focus of the penalty hearing” and the prosecution’s closing argument. Had the jury heard testimony that the co-defendant confessed to the murder rather than a simple invocation of his Fifth Amendment rights there is a reasonable probability that at least one juror would have struck a different balance in the outcome.

***Williams v. Anderson***, 460 F.3d 789 (6th Cir. 2006) (tried in July 1984). Under AEDPA, counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. Following the defendant’s conviction of hiring a person to commit the murder, counsel waived opening statement in sentencing and presented no evidence. The defendant made a brief statement and then counsel gave “a long, rambling closing, in which he arguably presented a case for residual doubt.” *Id.* at 794. The remainder of the closing argument included prejudicial statements by counsel. Appellate counsel asserted counsel’s ineffectiveness on direct appeal, which was denied due to the lack of any evidence outside the trial record. Post-conviction counsel asserted the issue with supporting evidence, but the post-conviction court was prohibited from granting relief under state law because the issue had been addressed on the merits during the direct appeal. The federal court determined that its review should be based on the direct appeal

opinion. While the court would normally be prohibited from considering evidence not before the court at that time, the court found cause and prejudice for the default because appellate counsel was ineffective. Counsel's conduct was deficient because "[i]t is well-established in Ohio law that where an ineffective assistance of counsel claim cannot be supported solely on the trial court record, it should not be brought on direct appeal." *Id.* at 800. Moreover, "[i]neffective assistance of counsel claims based on trial counsel's failure to investigate and present mitigation evidence can never be proven based solely on evidence in the record because the record necessarily does not contain evidence of prejudice." *Id.* Prejudice was established because the underlying claim of ineffective assistance of trial counsel had merit when supported with evidence. Trial counsel's conduct was deficient in completely failing to investigate mitigation evidence. Counsel never even discussed the possibility of a court-ordered psychiatric evaluation and pre-sentence report with the defendant until two days prior to sentencing. He did not even discuss the issue with the defendant or with his family or friend. Counsel's conduct was not excused by strategy to focus only on residual doubt "because defense counsel never conducted an investigation into mitigation before deciding to pursue residual doubt." *Id.* at 804. The state court's determination that counsel's conduct was reasonable was "contrary to federal law as articulated in *Strickland*." *Id.* at 802. The state court did not address the question of prejudice so the federal court's review of this issue was de novo. Prejudice found because the available but unrepresented evidence included evidence of an alcoholic, abusive mother; abandonment by his father at a young age; an uncle, who was his primary male role model, that was a career criminal; cocaine dependence and cocaine induced paranoid fears at the time of the murder; a diagnosis of Dyssocial Reaction, Mixed Personality Disorder with Anti-social and Narcissistic Features; and that the defendant had treated his wife's autistic son like his own. "In addition to presenting the jury with mitigating evidence, the testimony of Petitioner's family and friends would have humanized Petitioner." *Id.* at 805.

*Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006) (tried in 1982). Under pre-AEDPA law, counsel ineffective in capital sentencing for failing to adequately prepare and present mental health evidence during the trial, where a finding of premeditation was required before the petitioner was eligible for the death penalty, and sentencing. In exchange for the exclusion of other unrelated charges, the petitioner stipulated his guilt with the exception of the intent element. Early in the trial, the court convened a two-day hearing because of the court's concerns about primary counsel's competence. The court found him competent, but no one even informed the petitioner about this hearing. Following his conviction with a finding of premeditation, the defense presented eighteen witnesses, including twelve friends and three family members, who described him as a well-meaning and introspective young man from an unexceptional middle-class family. He attended college and had been living at home and working sporadically at the time of the murder. Witnesses described his behavior in the months leading up to his crimes as increasingly eccentric. The primary defense witness, a psychiatrist, testified (primarily just on his interviews with the petitioner) that the petitioner suffers from schizophrenia, which

caused him to lose control and kill the victim. Counsel's conduct was deficient.

A defense attorney in the sentencing phase of a capital trial has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client[ ] facts that the experts do not request." Regardless of whether a defense expert requests specific information relevant to a defendant's background, it is defense counsel's "duty to seek out such evidence and bring it to the attention of the experts."

*Id.* at \_\_\_\_\_. While the petitioner's mental health was the "heart" of the mitigation case, this evidence came almost exclusively through the testimony of the psychiatrist. Counsel had not provided the psychiatrist with relevant background information, including records from the petitioner's hospitalization a year before these crimes due to what doctors initially believed was an acute "catatonic" schizophrenic episode. These records "would have strengthened" and "confirmed" the psychiatrist's diagnosis and "corroborated [his] testimony and bolstered the credibility of his response to the prosecution, whose primary strategy in attacking [the psychiatrist] was to suggest that [the petitioner] had never suffered from mental illness." *Id.* at \_\_\_\_\_. Without these records, the psychiatrist testified in cross-examination that he was not aware of the petitioner receiving any treatment or diagnosis prior to his arrest. The prosecution focused on the lack of support for the doctor's testimony in closing arguments in sentencing. "The prosecutor's closing argument, in combination with [the psychiatrist's] ignorance of [petitioner's] experience [in his prior hospitalization], strongly suggested that the defense had concocted the mitigating mental illness evidence." *Id.* at \_\_\_\_\_. Prejudice found because "[t]his evidence, coming as it did from doctors who had no connection to the defense or incentive to invent a diagnosis and thus who were invulnerable to charges of fabrication, could very well have made the difference in a life as opposed to death verdict." *Id.* at \_\_\_\_\_. Moreover, even though the prior doctors ultimately concluded that the petitioner suffered from "drug-induced psychosis," this was based on his own statements that were not confirmed by blood tests. Regardless of the diagnosis, he "displayed symptoms consistent with" the defense expert's diagnosis and the initial diagnosis of the prior doctors of an "acute schizophrenic episode." "[A]ll potentially mitigating evidence is relevant at the sentencing phase of a death case, so ... mental problems may help even if they don't rise to a specific, technically-defined level." *Id.* at \_\_\_\_\_. Finally, during deliberations, the jury specifically asked that the defense expert's "testimony be re-read, suggesting that the jury placed importance on it." *Id.* at \_\_\_\_\_. Counsel also failed to provide the psychiatrist "with important information about the circumstances surrounding" a kidnaping that occurred after these crimes.

This information would have prevented the prosecutor from portraying [the psychiatrist] as ill-prepared and foolish and thereby impugning his medical conclusions. Because [the psychiatrist] was

not adequately prepared, the prosecution was able to demonstrate that [he] was completely ignorant of several important facts, including that [the petitioner] was regularly and successfully attending a training school at the time of [this] murder, that [the petitioner] altered his appearance after [this] murder and before the [separate] kidnapping, and that [the petitioner] released [the kidnapping victim] only after being discovered and pursued by two witnesses to his crime.

*Id.* at \_\_\_\_\_. The prosecution also focused on the doctor's ignorance of these facts in closing arguments. Prejudice found because "there is a reasonable probability that [the psychiatrist's] ignorance of basic background facts related to the [separate] kidnapping affected the jury's sentencing decision."

The clear implication of the prosecution's argument was that [the psychiatrist] was uninformed about the subject of his diagnosis and that his conclusions stemmed from a general misunderstanding of the facts. Even if the background information did not change [his] diagnosis, he at least would have been able to testify more knowledgeably about the case and better weather the prosecution's attempts to discredit him. He would have been able to anticipate the prosecution's questions during cross-examination and explain how [the petitioner's] activities around the time of the offense could be consistent with a diagnosis of schizophrenia. Instead, [the psychiatrist] was caught by surprise, in an embarrassed and vulnerable situation. He was entirely discredited by his lack of critical information, information that lay in the hands of [petitioner's] counsel.

*Id.* at \_\_\_\_\_. In a footnote, the court addressed additional prejudice due to counsel's failure to provide the psychiatrist with a probation report after he plead guilty to the separate kidnapping and with hospital records from post-arrest hospitalizations. While these documents reflected diagnoses of schizoid personality rather than schizophrenia, they also contained observations by medical professions, "including descriptions of his delusions and grandiose ideas, that are consistent with [the psychiatrist's] observations and diagnosis." In short, whatever the precise diagnosis, medical professionals repeatedly had concluded that [the petitioner] was seriously mentally disturbed."

***Poindexter v. Mitchell***, 454 F.3d 564 (6th Cir. 2006) (sentenced in June 1985). Under pre-AEDPA law, counsel ineffective in failing to adequately prepare and present mitigation. In sentencing, counsel presented the testimony of three family members and a friend. This testimony included the following information: (1) the petitioner was a good student, who was involved in gymnastics in school; (2) the petitioner was peaceful and

quiet and kept to himself; and (3) the petitioner read the Bible a lot, worked, and got along with everyone. The petitioner also made an unsworn statement that began with describing his relationship with his former girlfriend, whose new boyfriend was the murder victim in this case and she had also been assaulted. He described an incident when he had slapped her for wearing an “obscene” miniskirt and said her mother had instigated everything because “she disliked dreadlocks.” After that point, the petitioner refused to continue reading the prepared statement and a recess was taken. Counsel convinced him to continue reading “his” statement. He read the rest, which basically said he was a good guy and believed in God. At the end, “he yelled, ‘And the main thing, I didn’t kill that man,’ and slammed the microphone down.” Counsel’s conduct was deficient.

[C]ounsel failed to conduct virtually any investigation, let alone sufficient investigation to make any strategic choices possible. They did not request medical, educational, or governmental records that would have given insight into [the petitioner’s] background. They did not request funds to enlist a psychological or psychiatric expert to evaluate [the petitioner], despite the fact that he exhibited odd behavior. They did not consult with an investigator or mitigation specialist, who could have assisted in reconstructing [the petitioner’s] social history. They failed to interview key family members and friends who could have described his upbringing. And they did not even begin to prepare for mitigation until [the petitioner] was convicted, which was only five days before the sentencing phase began. This was despite the fact that prevailing norms at the time of trial required counsel in a death penalty case to seek records, interview family members and friends, and obtain appropriate mental evaluations well in advance of trial.

*Id.* at \_\_\_\_\_. Counsel expressed no strategic reason. Prejudice found because, if counsel had adequately investigated, the evidence would have established the following: (1) the petitioner’s father beat him, his mother, and his sister; (2) the petitioner’s mother was a heavy drinker, who used marijuana almost daily; and (e) the petitioner’s mother neglected her children, beat them, and once tried to kill the whole family by shutting them in the house and turning on a gas stove. An expert in forensic psychology described the family as “very dysfunctional” with “four generations of alcoholism and physical abuse and emotional abuse.” In addition to his mother’s problems, the petitioner was exposed to the alcohol abuse and domestic violence she endured in two of her three significant relationships. She was ultimately hospitalized and her children placed in foster homes. The petitioner functioned in the borderline range of intelligence and suffers from a paranoid personality disorder. These crimes were caused by “his paranoid personality disorder” and “a pathological jealous reaction accompanied by rage.” Because of this evidence “any mitigation strategy to portray [the petitioner] as a peaceful person was

unreasonable since that strategy was the product of an incomplete investigation.” *Id.* at —.

***Dickerson v. Bagley***, 453 F.3d 690 (6th Cir. 2006) (tried in November 1985). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigation. The court quoted extensively from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in describing counsel’s duties. Here, counsel failed to discover significant mitigation that included that the petitioner’s biological father denied that petitioner was his son; his mother referred to him as “the moron”; he was raised in an atmosphere of pimps, prostitutes, and drug dealers; several homosexual advances were made upon him; he had a full-scale I.Q. of 77, placing him in the lower seven percent of cognitive ability; and he had a borderline personality disorder. The state court held that counsel had a strategic reason for the failure to investigate, because one of the three-judge panel had suggested to him waiver of the jury, which counsel took to mean that the judges would not impose death. This finding was an unreasonable application of Supreme Court case law because “[i]t is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover.”

Had the investigation been conducted, reasonable lawyers surely *would not have limited* the mitigation proof in this case to simply an effort to show only that [the petitioner] was “provoked” by jealousy [in killing his former girl-friend’s new lover] and could not control his impulses, and therefore suffered from “diminished capacity” at the time of the crime.

“Accordingly, the state court unreasonably applied clearly established Supreme Court precedent when it simply assumed that counsel’s oversights were motivated by strategy, instead of requiring a complete and thorough mitigation investigation as mandated by *Strickland* and its progeny.” Prejudice found because “[a]n argument based on reduced culpability similar to that given by the Supreme Court in *Atkins* might well have been persuasive in [this] case too.”

**2005:** ***Marshall v. Cathel***, 428 F.3d 452 (3rd Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006) (*affirming* 313 F. Supp. 2d 423 (D.N.J. 2004)) (tried in March 1986). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence, failing to seek a continuance to do so, failing to adequately consult with the defendant concerning his options and the procedure in the sentencing proceeding, and did not even make a plea for his client’s life. Following conviction for hiring someone to murder his wife, the defendant proceeded immediately to sentencing after being checked at the hospital after fainting following his conviction. Counsel had not prepared at all for the penalty phase and had not investigated at all on this front or retained any experts. Nonetheless, counsel did not request a continuance to prepare. Instead, counsel “agreed”

with the prosecutor that both sides would waive opening and would not present evidence in sentencing and would only do a short closing argument. The state also dismissed two of the three aggravating factors charged and stipulated a single mitigating factor—that the defendant did not have a prior criminal record. Analyzing the case under AEDPA, the court found that counsel’s conduct was deficient because “the lack of preparation is striking and inexplicable,” *id.* at 466, “in light of his knowledge from the inception that the case would be a capital one and that his client faced powerful State’s evidence,” *id.* at 472. While the defendant was a “difficult client to control” and the community, and perhaps his family, had turned against him, “neither circumstance excuses counsel’s failure to conduct any investigation into possibly mitigating factors or prepare a case for life.” *Id.* at 467. Counsel also failed to adequately consult with the defendant and did not even explain to him that he “had the right to allocute at the penalty phase.” The defendant’s failure to cooperate with the preparation of mitigation does nothing to relieve counsel “of his constitutional duty as an attorney.”<sup>2</sup> “Widely accepted national guidelines, state specific standards, and [counsel’s] own testimony regarding his previous capital experience—all of which aid in our evaluation of the reasonableness of [counsel’s] preparation—make clear that [counsel] understood but abdicated his responsibility as counsel to a client facing a possible death sentence.” *Id.* at 467 (citing the ABA Standards for Criminal Justice).

Regardless of counsel’s trial strategy of denying guilt, “[w]ith the outright rejection of [the] defense, which is the only way the guilty verdict can be interpreted, [counsel] knew that the jury also had rejected the character evidence submitted in support of that defense. Indeed, it would only be fair to assume that they had found [the defendant] to be a liar and a despicable person for paying someone to have his wife killed. [Counsel’s] clear duty at that point was to shift his focus away from absolving [the defendant] of involvement in his wife’s murder—certainly, the evidence for the guilt phase had not worked for that purpose—to saving his life.

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<sup>2</sup>As the District Court put it:

Even when clients strongly assert their innocence and refuse to discuss the possibility of being found guilty, an attorney must find a way to prepare for and investigate a mitigation case. . . . No matter how difficult, [counsel] had an obligation either to convince [the defendant] to cooperate with him in preparing a case for life, or to find a way to conduct an investigation without [the defendant’s] assistance.

*Marshall v. Hendricks*, 313 F. Supp. 2d 423, 451 (D.N.J. 2004).

*Id.* at 469. Counsel’s most glaring omission was failing to interview the defendant’s sons even though he believed they would be hostile to the defendant. “[C]ounsel’s ‘beliefs’ are not a substitute for informed strategy.” *Id.* at 471. The court also viewed counsel’s “agreement” with the state as an “abdication of his role.” *Id.* at 472. Counsel “was not merely agreeing to hold back on the production of evidence—he had no evidence to introduce. . . . Far from a strategic, bargained-for exchange, the agreement appears to have been the only option.” *Id.* While counsel argued that the defendant was a law abiding citizen with no significant history of prior criminal activity, these are “relatively insignificant aspects—essentially applicable to any and every first time offender of a brutal crime—that are anything but ‘humanizing.’” *Id.* at 473. Counsel’s presentation was only a “bland emotionless argument.” Prejudice was found because the general character testimony presented during the trial was only general, “cursory” information. Counsel’s conduct was not excused by strategy. “Rather, it is a situation where [counsel] inadequately prepared for the penalty phase and put in no mitigating evidence because he had none to present.” Likewise, counsel only gave a “verbal shrug of the shoulders” in arguments and did not even make a plea for mercy. Prejudice was found because an adequate investigation would have revealed numerous family members and friends willing to ask for mercy and to testify about the harmful impact of execution on the defendant’s family, particularly his son. The state court’s finding of no prejudice was an unreasonable application of *Strickland*.

***Summerlin v. Schriro***, 427 F.3d 623 (9th Cir. 2005), *cert. denied*, 547 U.S. 1097 (2006) (sentencing in July 1982). Counsel ineffective in capital case for failing to prepare and present mitigation evidence. Analyzing the case under pre-AEDPA law, the court held that counsel “utterly failed” to investigate the defendant’s family and social history or to develop a mental health defense. Counsel instead relied “on the limited information developed in [the defendant’s] pre-trial competency examination, which was prepared for an entirely different purpose” than mitigation. *Id.* at 631. Counsel did so even though he was aware of the “preliminary mental health information” from the defendant’s prior counsel. He even failed to interview the state’s experts even though counsel knew the state intended to call these experts in sentencing. During the month between the trial and sentencing hearing, counsel did not meet with his client. In sentencing, counsel sought only to present testimony of consulting psychiatrist retained by the defendant’s prior counsel. Before this witness was sworn, the defendant interrupted and apparently requested that the witness not be called so the defense presented no testimony.

Even if [the defendant] had instructed counsel not to present a mitigation defense, that fact would have no effect on the deficient conduct prong of *Strickland* because counsel had already demonstrated ineffectiveness by failing to thoroughly investigate the existence of mitigating factors. Although the allocation of control between attorney and client typically dictate that ‘the client decides the ‘ends’ of the lawsuit while the attorney controls the

‘means,’” it does not relieve an attorney of the duty to investigate potential defenses, consult with the client, and provide advice as to the risks and potential consequences of any fundamental trial decision within the client’s control.

*Id.* at 638 (citation omitted). The court stated that “[t]his is especially true in capital cases.” *Id.* (citing the ABA Standards for Criminal Justice and ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases). Prejudice found even in the “context of judge-sentencing.” If counsel had adequately investigated, the evidence would have shown a “tortured family history” in which the defendant’s father deserted him and was later killed in a police shootout and the defendant’s alcoholic mother beat him frequently and punished him by locking him in a room with ammonia fumes. He had electric shock treatments, at his mother’s behest, to control his temper. He had a learning disability that left “him functionally mentally retarded.” He had also been diagnosed as a paranoid schizophrenic and had been treated with anti-psychotic medications. He also had a temporal lobe seizure disorder and there were indications of organic brain syndrome and impaired impulse control. Instead of developing and presenting this evidence, counsel presented no evidence in sentencing and only asked the court to consider a report attached to the presentencing report. Counsel’s argument covered only three pages of transcript. In addition to failing to present mitigation evidence, counsel also failed to present evidence mitigating one of the statutory aggravating circumstances (a prior violent felony conviction). The defendant’s prior aggravated assault conviction was a result of the defendant showing a pocket knife to the driver of a car that veered off the road, jumped the curb, and struck the defendant’s wife causing serious injuries that required hospitalization. The knife was pulled at the scene, but the driver was not physically injured. Counsel knew of this information because he had represented the defendant on this prior assault but still did not present this information. Finally, counsel also failed to object to the presentence report prepared by a probation officer that contained numerous sentencing recommendations from the probation officer, the victim’s family and friends, police officers, and others. All of this material was hearsay and inadmissible and almost all was damaging to the defendant. Instead of objecting, counsel made it worse by requesting that the court review a report attached to it. Counsel’s failure to present mitigation “all but assured the imposition of a death sentence” under state law that mandated death if there was a qualifying prior conviction and no mitigation. The court also found that this “was not by any means a clear-cut death penalty case” because the initial very experienced prosecutor did not believe he could get a death sentence and offered to allow the defendant to plead to second-degree murder for a 21 year sentence that would have allowed the defendant’s release in 14 years. (This offer was withdrawn when the initial prosecutor and defense counsel were replaced.)

***Harries v. Bell***, 417 F.3d 631 (6th Cir. 2005) (tried in 1981). Counsel was ineffective in capital sentencing for failing to prepare and present evidence in mitigation in case analyzed under pre-AEDPA standards. Despite the requirements of the ABA Guidelines

to investigate “to discover all reasonably available mitigating evidence,” *id.* 638 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.4.1(C), p. 93 (1989), counsel limited their investigation to a few phone calls with family members, sending requests for information to some of the institutions in which the petitioner had been confined, and interviewing the defendant, his codefendant, and two state witnesses. While the petitioner had requested that counsel not pursue mental illness as a defense and counsel believed that background evidence “would not persuade the jury,” counsel’s conduct was unreasonable because “defendant resistance to disclosure of information does not excuse counsel’s duty to independently investigate.” *Id.* at 639 (quoting *Coleman v. Mitchell*, 268 F.3d 417, 449-50 (6th Cir. 2001)). Counsel’s conduct was also deficient because counsel was aware of the defendant’s poor mental health and troubled family background, which left “no ‘room for debate’ that their truncated investigation was deficient. *Id.* at 639 (quoting *Rompilla v. Beard*, 125 S. Ct. 2456, \_\_\_ (2005)). Prejudice was found because adequate investigation would have revealed a traumatic childhood, involving physical abuse by petitioner’s mother, stepfather, and grandmother. He had been hit on the head with a frying pan and choked so severely, at age 11, that his eyes hemorrhaged. A year later, staff at a detention home noted multiple traumatic scars on his head. He was also exposed to his father and stepfather beating his mother and both his father and stepfather had ultimately been murdered themselves. Since age 11, he spent all of his life, except a combined total of 36 months, combined in institutions, many of which were violent or unsanitary. He had also had numerous head injuries and had attempted suicide and suffered carbon monoxide poisoning at age 20. He had frontal lobe damage, even according to the state’s experts, which “can result from head injuries and can interfere with a person’s judgment and decrease a person’s ability to control impulses.” *Id.* at 640. He also suffered from a mental disorder although the exact diagnoses ranged from bipolar mood disorder, trauma-induced anxiety, anxiety disorder, post-traumatic stress disorder, and antisocial personality disorder. “This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury.” *Id.* (quoting *Rompilla*, 125 S. Ct. at 2469). While the State argued that admission of this evidence would have opened the door to evidence of numerous prior criminal acts, Tennessee law prohibited this evidence. Even if it was admissible, however, prejudice was still found because the petitioner in *Williams v. Taylor*, 529 U.S. 362, 396 (2000), “had a criminal history . . . at least as serious” as the petitioner’s and the Court still found prejudice. *Id.* at 641. Tennessee law also supported a finding of prejudice because counsel’s failure to present mitigation evidence left the jury with no choice but to impose the death penalty.

- 2004** *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004) (trial in October 1994). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel’s conduct during the trial was “troubling” but the court found no prejudice in light of the overwhelming evidence of guilt and disposed of these claims on that basis. In addressing the right to effective assistance in sentencing—“the most critical phase of a death penalty case,” *id.* at \_\_\_—the court declared:

[W]e are particularly vigilant in guarding this right when the defendant faces a sentence of death. Our heightened attention parallels the heightened demands on counsel in a capital case. *See* ABA Standards for Criminal Justice 4-1.2(c) (3d ed. 1993) (“Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.”).

*Id.* at \_\_\_ (other internal citations omitted). Here, counsel had no experience or training in capital cases and inadequate funding from the defendant’s family. In addition, while counsel presented some mental health evidence during the trial, it was done in an “incoherent and haphazard” way. *Id.* at \_\_\_. Counsel did not present any additional mental health evidence during sentencing because counsel was unaware that he could do so. Counsel presented only on a few witnesses to testify that the defendant was kind and considerate but “made no attempt to explain how this kind and considerate person could commit such a horrendous crime, although mental health evidence providing such an explanation was at his fingertips.” *Id.* at \_\_\_. The evidence in mitigation was “pitifully incomplete, and in some respects, bordered on the absurd.” *Id.* at \_\_\_. Counsel’s arguments concerning the trial mental health evidence in sentencing also “were at best belittling of the evidence and at worst damning” of the defendant. If counsel had performed adequately, the evidence would have established that the defendant was completely illiterate, mentally retarded or borderline mentally retarded, and had significant brain damage due to a near drowning and lack of oxygen to the brain when the defendant was quite young. The defendant had been taunted, tormented, and then beaten in school to the extent that the defendant’s mother kept him home for an entire year. He also had an unstable home and had been abused by an aunt charged with his care.

The Supreme Court has, time and again, cited “the standards for capital defense work articulated by the American Bar Association (ABA) . . . as ‘guides to determining what is reasonable’” performance. Those standards repeatedly reference mental health evidence, describing it as “of vital importance to the jury’s decision at the punishment phase.” *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for [counsel] to omit this evidence from his case for mitigation.”

*Id.* at \_\_\_ (other internal citations omitted). Prejudice found because the mitigating evidence omitted in this case “is exactly the sort of evidence that garners the most sympathy from jurors,” according to “available empirical evidence as to juror attitudes.” *Id.* at \_\_\_. This evidence could have provided the “explanation” of how a “kind-hearted

person” could commit these crimes because the “organic brain damage caused these outbursts of violence.” *Id.* at \_\_\_\_.

**2003:** *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003) (sentencing in May 1987). Counsel was ineffective in capital sentencing for failing to adequately investigate and present evidence of the petitioner’s abusive childhood. Applying pre-AEDPA law, the court gave no deference to the state court’s resolution of the claims because the state court did not make any factual findings. Under *Wiggins*, “[a] limited investigation into mitigating evidence may be reasonable only if counsel has a basis for believing that further investigation would be counterproductive or fruitless.” *Id.* at 367. Here, counsel’s performance was deficient. While the record was limited by counsel’s hazy memories and the fact that neither counsel had their file from the trial conducted 14 years before, the petitioner’s sisters testified credibly that counsel had never interviewed any of them. Nothing in counsel’s testimony indicated a tactical decision for failure to do so. Although the district court found the sisters’ testimony was not credible, the Fifth Circuit rejected this finding because the testimony of the sisters was remarkably consistent in that each testified that their father beat them all with extension cords, switches, sticks, or anything else within his reach and that he regularly made them undress and whipped them in their genital areas. The court also found that there was corroborating evidence in the records, which revealed that the defendant’s father was a violent drug abuser who shot the defendant’s mother, almost killing her; and that he beat the defendant’s mother on numerous occasions in front of the children. Medical records also establish that the children made numerous trips to the hospital emergency room for treatment of injuries consistent with the described beatings. The defendant had been hospitalized for cuts on his penis and his sister had been hospitalized for severe burns on her back. The defendant’s mother had been hospitalized for a gunshot wound. There was also evidence of numerous domestic disturbance calls to the home. Prejudice was found even though the defendant’s grandmother testified that the defendant had been abused. “[H]er conclusional testimony contained none of the details provided by Lewis’ siblings at the habeas hearing, which could have been truly beneficial. [Her] skeletal testimony concerning the abuse of her grandson was wholly inadequate to present to the jury a true picture of the tortured childhood experienced by Lewis.” *Id.* at 368. “[H]ad this evidence [of Petitioner’s abuse] been presented, it is quite likely that it would have affected the sentencing decision of at least one juror.” *Id.* at 369. The district court found that the testimony would have been inadmissible or given little weight due to the elapsed time between the child abuse and the crimes and the fact that the defendant had intervening criminal convictions, but this finding was erroneous. Mitigating evidence was considered in both *Williams v. Taylor* and *Wiggins* despite the elapsed time in both cases and the defendant in *Williams* had many intervening criminal convictions. “The district court’s conclusion regarding the temporal nexus requirement was therefore erroneous.” *Id.*

*Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (sentenced in April 1983). Counsel was ineffective in capital sentencing for failing to adequately prepare and present

mitigation. Counsel did not attempt to obtain any family history or any facts concerning the defendant's psychological background and mental illness and counsel did not seek any advice or expert consultation. Despite a large body of mitigating evidence, counsel did nothing to discover what was available or introduce it in evidence. Analyzing the case under pre-AEDPA standards, the court held:

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*.

*Id.* at 486. Even though Hamblin was tried before the 1989 ABA standards were published, the Court held:

The standards merely represent the codification of long-standing, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland*. They are the same type of longstanding norms referred to in *Strickland* in 1984 as “prevailing professional norms” as “guided” by “American Bar Association standards and the like.”

*Id.* at 487. The court also held:

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 *Strickland*, *Wiggins*, or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances.

*Id.* While the court recognized that it was required to measure counsel's performance against the prevailing standards at the time of trial,

We cite the 1989 and 2003 ABA guidelines simply because they are the clearest exposition of counsel's duties at the penalty phase of a capital case, duties that were recognized by this court as applicable to the 1982 trial of the defendant in *Glenn v. Tate*. . . .

*Id.* at 488. The district court held that counsel had a strategic reason for the failure to

investigate and to rely instead on a residual doubt theory in sentencing (which has since been rejected by the Ohio Supreme Court as an improper mitigating factor). Counsel's conduct was deficient because counsel did not prepare in any way until after the guilty verdict. Counsel only interviewed the mother of Hamblin's daughter. Counsel did not gather any medical information, including psychological information, in part, because counsel believed that the only mental condition relevant was the defendant's competence to stand trial. In sentencing, the mother of the defendant's daughter testified only that the defendant had a good relationship with his child. She had nothing else positive to say and did not want to testify. The only other mitigation was a relatively short rambling, almost incoherent, unsworn statement by the defendant explaining his background. Counsel did nothing to prepare the defendant in giving this statement. The only explanation for the failure to prepare was that counsel believed the case would plead out and not go to trial. While the district court found a strategy because counsel would have uncovered harmful evidence and because the defendant expressed that he did not want to present evidence in mitigation; the Sixth Circuit rejected these findings

because counsel does not know what an investigation will reveal is no reason not to conduct the investigation. Counsel was obligated to find out the facts not to guess or assume or suppose some facts may be adverse.

*Id.* at 492. Likewise, the court observed that

ABA and judicial standards do not permit the court to excuse counsel's failure to investigate or prepare because the defendant so requested. . . . The Guidelines state that "the investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented," because [c]ounsel 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 clients competency to make such decisions, unless counsel has first conducted a thorough investigation. . . .

*Id.* (citing the 2003 ABA guidelines). Prejudice found because, if counsel had adequately investigated and presented mitigation, the evidence would have shown Hamblin's unstable and deprived childhood in which he grew up in extreme poverty and neglect surrounded by family violence and instability. He had a poor education and likely suffered from a mental disability or disorder. Hamblin's father was violent and beat his wife regularly. He ran a still and was arrested for public intoxication, manufacture of moonshine, and child neglect. Hamblin's mother often abandoned her children, leaving them to fend for themselves, and she at times resorted to prostitution. Hamblin tried to provide for himself and his younger sister by stealing food as a very young child. He

started getting in trouble with the law as a teenager and left home at 13 the first time and left permanently at 16. He started showing signs of mental disorder when he was a teenager, probably resulting from his poor family situation and possibly from a severe blow to the head at age 8 inflicted by his father with a dog chain. His mother also had a severe infection while pregnant with him as a result of being stabbed by the defendant's father. In light of the "substantial evidence of a childhood in which abuse, neglect, violence and hunger were common," *id.* at 493, the court was convinced that had the available evidence been presented "at least one juror would have voted against the death penalty," *id.*

***Frazier v. Huffman***, 343 F.3d 780, supplemented on denial of rehearing, 348 F.3d 174 (6th Cir. 2003), *cert. denied*, 541 U.S. 1095 (2004) (tried in August 1991). Counsel was ineffective in capital sentencing for failing to prepare and present mitigation evidence concerning a brain injury and a lack of impulse control that reasonably was a result of that injury. The defendant had been charged with killing his stepdaughter after she filed sexual assault charges against him in state court. During trial, the defense theory was one of innocence and the defense presented no evidence. In sentencing, the state had already proven the aggravating circumstances and state law required the jury to weigh aggravating and mitigating circumstances, but the defense presented no evidence, relying instead only on the defendant's brief statement to the jury in which he denied guilt, but asked for mercy. The court found that defense counsel was aware from a review of records about the brain injury and that there could be no reasonable trial strategy that would justify failing to investigate and present evidence of the brain impairment and instead rely exclusively on the hope that the jury would spare the defendant's life due to doubt about guilt. The court also noted that residual doubt is not a mitigating factor under Ohio law. The defendant "had everything to gain and nothing to lose by introducing evidence of his brain injury in the penalty phase of the case. Yet they sat on their hands." In analyzing the case under the AEDPA, the court found that the state court's determination that counsel had performed in a competent manner was not simply erroneous but unreasonable. The court also found prejudice because evidence of the brain injury could easily have been used by counsel to argue a scenario where the defendant did not intend to kill the victim and did so only due to the impulsively and stress. The state court's conclusion that counsel was effective was found to be an unreasonable application of clearly established Supreme Court precedent.

### 3. U.S. District Court Cases

**2009:** \****McNeill v. Branker***, 601 F. Supp. 2d 694 (E.D.N.C. 2009) (tried in April 1996). Under AEDPA, counsel ineffective in failing to adequately investigate and present mitigation evidence. During sentencing, the defense presented family members to testify about the defendant's positive traits and deeds, lack of criminal history, honorable military service, and how he was easily influenced by his brother, who was also a co-defendant. Although counsel had retained a mental health expert to examine the defendant, counsel did not

present any evidence of the defendant's depression, troubled family background, or suicide attempt. Relying on the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, the court found deficient conduct in the investigation because "counsel focused their attention on the guilt phase of trial and made only minimal effort to investigate potential mitigating evidence," which consisted only of asking the defendant and his parents "their impression on the subject." Counsel did not request funding for a "mitigation expert," even though "funds for mitigation experts were granted in capital cases during that time period." In addition, the defense psychiatric expert was given very little background information and was asked only to focus on the defendant's competence and criminal responsibility rather than sentencing issues. Counsel never contacted the defendant's sister, family members, former girlfriend, friends, and neighbors. The state court unreasonably "placed the responsibility on [the defendant] and his family for failing to inform counsel of petitioner's suicide attempt, depression, alcohol abuse, and troubled background."

Rather than investigating the accuracy of the impression they received from [the defendant] and his parents in discussion or seeking other potential mitigating evidence, counsel did little more than work to confirm the opinion that petitioner had a good or "normal" childhood.

"The few people whom counsel did call at sentencing were not interviewed by counsel or the defense investigator to learn what type of evidence or information they could provide." Counsel also "failed to inform themselves of and develop information in their possession," including failure to review the defendant's "diary or autobiography, 84 pages long, with information about his life and upbringing," which was prepared at counsel's request. "It included references to . . . depression, regular abuse of alcohol, dysfunction in family relationships, and his suicide attempt." If counsel had adequately investigated the evidence would have established that: numerous family members suffered from depression and/or mental illness; the defendant's father sexually abused one of the defendant's sisters and, physically abuse, and ruled by threatening severe beatings; the defendant "exhibited symptoms of mental health problems as young as seven years-old when he began self-mutilating himself by pulling out all of his eyelashes and developed a nervous habit of clearing his throat"; and as a teenager he experienced serious depression, struggled with substance abuse, and eventually attempted suicide. Counsel's conduct was not excused by strategy, due to the failure to investigate. In addition, the available but unrepresented evidence would not have conflicted with the evidence counsel presented in sentencing because the defendant's "helpful and reliable nature, military service, and positive character traits would have been more admirable in light of his personal struggle with mental health issues and substance abuse." Prejudice established because "[t]here is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Id.* at \_\_\_ (quoting *Boyde v.*

*California*, 494 U.S. 370, 382 (1990)).

There is a substantial difference between considering punishment for crimes perpetrated by a person raised in a supportive and nurturing family environment with no history of mental health issues versus considering punishment for a person who has struggled with serious mental health issues and substance abuse, raised in a dysfunctional family environment which denied him the opportunity to receive treatment or even acknowledge his problems.

Prejudice was also clear because “when such evidence was presented at [the co-defendant brother’s] trial, even with his serious criminal history, [he] received a life sentence.”

**2008:** *Ben-Sholom v. Ayers*, 566 F. Supp. 2d 1053 (E.D. Cal. 2008) (sentenced in Feb. 1986). Under pre-AEDPA law, counsel ineffective in failing to adequately investigate and present mitigation. The 18-year-old defendant’s confessions suggested that he wanted to be a “mercenary,” planned to “fight communists in Burma,” and the crimes were a “mission.” Although counsel “consulted with five mental health experts during trial preparation [concerning a possible diminished capacity defense], he presented no expert testimony at penalty proceedings” and did not provide his mental health experts with records or social history information. He presented only a few family members, associates, and the defendant to testify. Counsel’s conduct was deficient.

It is manifest that to counter the effect of the aggravating circumstances of the crime [counsel] was obligated to show something mitigating about [the defendant’s] mental state during his homicidal actions. . . . What was missing was evidence explaining why [he] committed this awful crime and an effort on [counsel’s] part to develop that evidence.

*Id.* at \_\_\_\_.

In this case, however, it was not the quantity of sources consulted but the quality of the investigation and the assimilation of that information into a coherent mitigation case. Because [counsel] hung onto a “strategy” of not providing experts with pertinent background information and the belief that a clinical interview was unnecessary for psychological testing, the expert consultations he arranged were worse than worthless because not only were they based on insufficient information, but on fabricated information [the defendant] supplied. Digging deeper in this case meant that [counsel] needed to ascertain the true facts about [the defendant].

*Id.* at \_\_\_\_ . Counsel’s “opinion about mental defenses being a ‘hard sell’ and that the jury would have been disgusted” with such evidence was not borne out by other attorney testimony in the case, including a “*Strickland* expert.” [The court also considered CLE publications prior to trial in determining the applicable standards.] Counsel’s “conscious decision to provide no documents to most of his experts and only a few document[s] to” one was also unreasonable. The “idea that any psychologist could offer evidence of empirical test results without a clinical interview was totally wrong.” “[N]ot giving his experts all relevant information, good and bad, totally defeated the purpose of a mental health examination.” “Because [counsel] failed to verify [the defendant’s] background information, he did not (and could not) provide what he didn’t know to his experts.” Counsel’s actions (in not providing sufficient information to the one mental health expert he wanted to testify) were not justified by concerns that the four bad reports he had already received would be disclosed. Rather than providing these negative reports, counsel could have supplied the expert with the “*actual* background” information through witness interviews.

The problem with [counsel’s] approach was that since he provided his experts with no substantiated background information, they could not be sure how much of what [the defendant] told them during clinical interviews was embellished, exaggerated, or true. The resulting opinions were uninformed, incomplete, and unfounded. . . . The lack of verifiable, true information about [the actual] background disabled the experts from giving the assistance for which they had been retained.

*Id.* Counsel’s failure to present mental health evidence in sentencing was not justified by “clearly anti-social behavior in [the defendant’s] past,” which could be presented in rebuttal by the state’s expert.

[T]he cause for that behavior, including the merciless abuse inflicted by his father, the sense of abandonment by his mother, the depression over losing his life-long dream of being in the Army, and his lack of identity, were mitigating and could have been developed to explain why and how [the defendant] became involved in the unrealistic, military mission that tragically ended [the victim’s] life. [Counsel’s] failure to expose the [false] foundation for [the state expert’s] potential testimony was constitutionally ineffective.

*Id.* at \_\_\_\_ . The court “accept[ed]” the opinion of the “*Strickland* expert, knowledgeable about the standard of professional performance at the time” that “the entire trial presentation was confused and at cross purposes.” Since counsel “viewed a penalty phase a certainty, the guilt phase opening statement should have raised penalty phase mitigation

concepts.”

While [counsel] did explain the idea that [the defendant] and his companions perceived the entire crime as a military mission with the ultimate purpose of going to Burma, he didn't argue that the mission was fantasy, but instead told the jurors they would have to determine for themselves whether the military purpose of the crime was reality or fantasy.

Counsel then “negated” the military mission notion in trial closing. Counsel referenced some potential mitigation in the sentencing opening, “but failed to explain how those facts were mitigating and failed to mention these subjects again on summation.” Counsel also failed to mention other significant aspects of mitigation, including the defendant’s testimony “of his remorse and substantial domination (following the order to kill [the victim] ‘explicitly’),” in closing. Prejudice was established because the evidence would have shown: (1) abuse as a toddler “during the critically important time of toilet training”; (2) his father’s “sadistic abuse” from the time he was seven years old; (3) 13 different schools; (4) a history of nightmares, depression, and preoccupation with suicide; (5) “extreme emotional and mental disturbances at the time of the crime, including PTSD, borderline personality disorder, identity fragmentation, and major depression; (5) hypertension for which he received a prescription of “Inderal, which can exacerbate depression”; and (6) humiliation and demeaning “by his anti-Semitic father because he was Jewish.” Yet, the defendant sought and “responded well to therapy, revealing his hurt and consistent efforts to escape an untenable home life (by running away) and seeking help from therapists.” While counsel presented some of the background facts through lay witnesses in sentencing, “the depth and breadth of the evidence paled in comparison with the understanding the mental health experts added.”

[A]t least one member of . . . [the] penalty phase jury would have voted for life without the possibility of parole had [counsel] presented mental state evidence through the testimony of mental health experts. This conclusion is strengthened by the fact that the penalty verdict following the paltry mitigation evidence presented was not an instant victory for the prosecution. The deliberations began with a vote favoring life by eight to four and deliberations were protracted, lasting nearly 17 hours in contrast to the two and one half hours from beginning to end of the actual penalty phase case. The state of these deliberations suggest a close case.

*Id.* at \_\_\_\_ (citations omitted).

[The defendant] was sentenced to death by a jury that had no understanding of the “indisputably sadistic treatment” inflicted

upon him as a child. Nor was the jury aware of well-established psychological criteria for [his] mental state at the time of the crime.

*Id.* at \_\_\_ (citation omitted).

***Richie v. Sirmons***, 563 F. Supp. 2d 1250 (N.D. Okla. 2008) (sentenced in October 1993). Under AEDPA, counsel ineffective in capital sentencing for failing to develop and present neuropsychological evidence. Counsel presented family member testimony of alcoholism in the family, verbal and physical abuse of petitioner, petitioner's prior hospitalization for stab wounds, and petitioner's drug problems and prior problems with the law.

Consisting solely of testimony from family members, the thrust of Petitioner's mitigation defense focused on Petitioner's family history. Some of the family members touched briefly upon Petitioner's social and educational background. However, other than the mention of one hospitalization, there was no testimony regarding Petitioner's medical history, religious and cultural influences, or employment history. Notably, there was no testimony from a medical expert concerning Petitioner's mental state and mental abilities. . . . Omission of mental health evidence from Petitioner's case for mitigation was unreasonable, and resulted in prejudice to Petitioner.

Petitioner had a series of head injuries as a teenager and a long history of severe headaches.

Nothing in the record indicates that trial counsel's failure to investigate and obtain a neurological expert was a strategic decision. Counsel simply did not take any action to determine whether such evidence was available.

While counsel did retain a psychologist prior to trial, his "evaluation was based on personality tests, rather than neuropsychological tests which are designed to detect brain damage." If counsel had performed adequately, the evidence would have included evidence of brain dysfunction, a history of significant alcohol and marijuana dependency, and limited intellectual capacity. Reversal was also required because petitioner was denied an instruction on second degree depraved mind murder, which was supported by the record.

***Sowell v. Collins***, 557 F. Supp. 2d 843 (S.D. Ohio 2008) (sentenced in November 1983). Counsel, in pre-AEDPA case, ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Counsel's mitigation strategy was to

emphasize petitioner’s good deeds during his adult life. Counsel presented lay witnesses (probation officers and acquaintances) on this, an unsworn statement by the petitioner, mental health reports of court-appointed examinations requested by counsel, and a presentencing (PSI) report. Citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), the court found deficient conduct.

[P]etitioner's case closely resembles that of *Wiggins*. [Petitioner’s] trial counsel did not request or obtain a mitigation specialist or investigator, and instead relied on the investigations of others who were not trained to conduct the type of investigation required in a capital case. Counsel failed to investigate highly relevant mitigating evidence of petitioner's family background. Counsel relied on the information contained in the PSI and the brief mitigation reports prepared by [court-appointed examiners], and did not “dig deeper” and investigate several leads contained in those reports. Counsel did not call one family member to testify, and there is no evidence that counsel conducted even the most basic interviews with petitioner's siblings and other family members for the purpose of investigating petitioner's background. Like *Wiggins*, counsel abandoned their duty to investigate after “having acquired only rudimentary knowledge of his history from a narrow set of sources.” 539 U.S. at 524, 123 S. Ct. 2527.

The court-appointed examiner reports “contained hints of petitioner's violent and deprived background,” and “morsels of evidence,” but “counsel did not investigate further.”

[C]ounsel's investigation into petitioner's background did not reflect reasonable professional judgment. Counsel's failure to interview members of petitioner's family was neither consistent with the professional standards that prevailed in 1983, nor reasonable in light of the evidence contained in the PSI and the psychological reports that would have led a reasonable attorney to investigate further. . . .

This is not a case where counsel presented absolutely no evidence in mitigation. Counsel did present a case emphasizing the good in petitioner. The Court cannot conclude, however, that counsel's decision to emphasize the good rather than the bad was reasonable trial strategy, not because there was insufficient evidence to support that theory, but because there simply is no evidence that counsel were even aware of petitioner's troubled past

because they did not sufficiently investigate petitioner's background. . . . In this case, counsel were not in a position to elect to pursue one strategy over another because they had not reasonably investigated petitioner's background. Pursuing the leads regarding petitioner's background was necessary to making an informed choice regarding available mitigation strategies. Furthermore, . . . a reasonable investigation would have revealed that the information concerning petitioner's background was not inconsistent with, and might actually have bolstered, counsel's mitigation theory.

Prejudice established because the available evidence “paint[s] a more complete picture of petitioner” and “is qualitatively different than the information that was presented during the mitigation hearing.” The evidence was “powerful” and established: (1) severe deprivation, neglect, and physical and emotional abuse as a child; (2) extreme poverty, including malnourishment, a younger brother dying of starvation, inadequate clothing, and being bitten by rats; (3) beatings and head injuries as a child; and (4) living in a tent in a junkyard at age 14 to escape his father’s home. This evidence “was significant, and qualitatively different” and “would have painted an entirely different portrait of petitioner.” This evidence also “would have bolstered their mitigation case by demonstrating that petitioner was capable of generosity and good acts in spite of the upbringing that he endured.”

The testimony regarding his childhood could not have possibly made petitioner appear more culpable. Rather, the evidence, if discovered and presented, is of the type that might well have affected the [three-judge] panel's appraisal of his moral culpability. . . . The evidence would have helped illustrate the manner in which [petitioner’s] violent background contributed to his conduct and violent reaction to the theft that he perceived.

This is also not a case where counsel could have reasonably feared opening the door to negative information that the panel would not have otherwise learned about petitioner. The door was already opened by the information [presented in sentencing] . . . . Yet, the panel did not hear any evidence of how violence was so very prevalent during the formative years of petitioner's life-evidence which may have explained why petitioner grew into the kind of adult who found himself frequently reacting in a violent manner. Evidence of petitioner's background would have helped explain petitioner's significant repressed rage, and had the panel 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

member of the panel “would have struck a different balance.”  
*Wiggins*, 539 U.S. at 537, 123 S. Ct. 2527.

***Moore v. Mitchell***, 531 F. Supp. 2d 845 (S.D. Ohio 2008) (sentencing in November 1994). Under AEDPA, trial counsel was ineffective in capital sentencing for failing to adequately interview the retained defense expert prior to presenting his testimony, which undercut the mitigation argument and established that the defendant intentionally killed the victim.

**2007:** ***Jefferson v. Terry***, 490 F. Supp. 2d 1261 (N.D. Ga. 2007) (sentenced in March 1986). Counsel ineffective in capital sentencing for failing to adequately investigate and present evidence of brain damage. Counsel obtained the assistance of a psychologist to determine competence and capacity at the time of the offenses. This expert found the defendant competent and sane with a “midrange level of intelligence,” but, in his written report, recommended neuropsychological testing “to rule out an organic etiology. Counsel did not, however, seek additional testing because the doctor allegedly made a written statement to counsel that the defendant was “just a criminal” and that further testing would be a waste of time. Counsel also believed that mental health evidence would contradict the defendant’s assertion that he did not commit the crimes. A week prior to trial counsel interviewed a number of the defendant’s family members in Kentucky. In sentencing, counsel presented lay testimony that the defendant had adapted to pretrial confinement, he had a difficult childhood growing up without a father, he had a serious head injury at age two “when a car ran over the top of his head,” and he was a good person and good father loved by his family.

In examining this claim, the issue before the Court is not whether counsel should have presented additional mitigating evidence during the penalty phase. Rather, the question is whether the investigation supporting counsel's decision not to investigate further for mitigating evidence was reasonable.

Counsel’s conduct was deficient in failing to contact the defendant’s family members and friends “earlier in the case” and failing to pay “attention to obvious information concerning . . . childhood injury.” Even the pretrial confinement records noted “frequent headaches as a result of the head injury,” but counsel “apparently failed to pay attention” to this information. Police records also noted that the defendant had been hit by an automobile when he was a child, but this information was not followed up on. “Petitioner also had a visible scar on his forehead. This also was ignored.” If counsel had followed up with the family, counsel would have learned that the defendant stayed in the hospital for a long time and had heavy fevers the whole time. He was slower than other children and had problems with attention and concentration. He had frequent headaches and would get dizzy. He would even faint at times, which required hospitalization on one occasion. There was also a history of mental illness in the family. If counsel had pursued the

neuropsychological testing and neurological examination, counsel also would have learned that the defendant suffers from permanent brain damage, which is most pronounced in the right hemisphere of the brain, including the frontal lobe. This is also likely the cause of the attention deficit disorder and learning disability suffered by the defendant. Counsel's decision not to investigate further was "unreasonable" because counsel relied on their expert's oral statements, which contradicted his recommendation in his written report, "without adequate explanation for the contradiction." Counsel also failed to inquire "about and appreciate the potential value of evidence of brain damage as a mitigating circumstance." Instead, counsel limited their mental health inquiry into competence, capacity, and intelligence and the doctor's conclusions in this regard, . . . , do not speak to the existence or nonexistence of mitigating mental health evidence pertinent to the penalty phase of trial." Counsel was even confused and equated "explosive personality disorder with neuropsychological testing."

Simply put, trial counsel in this case had no idea of, and did nothing to learn, the significance of developing mental-health testimony and evidence for the penalty phase of a capital trial, even if such testimony and evidence would not have assisted mental-health based claims at the guilt-innocence phase of the trial.

Finally, "the decision not to present mental health evidence can hardly be described as strategic, since trial counsel was not aware of the mental health evidence that might have been available." Even though the mental health evidence would had "the risk that such evidence would imply Petitioner's guilt and weigh against trial counsel's credibility," counsel chose not to argue residual doubt and to plead for mercy "without reasonably investigating the alternative. Therefore, "even if trial counsel's decision was 'strategic,' the decision was not an informed decision and therefore was unreasonable." "Trial counsel's strategic decision and investigation also were not reasonable in light of the guidelines set forth by the American Bar Association" in 1989. Prejudice found because the evidence of neurological damage would have:

(1) explained how an otherwise largely inexplicable crime could have occurred because of circumstances beyond Petitioner's control; and (2) substantially impacted any "mercy-based" juror decision-making on sentencing, since it figures directly into the state of the murderer's mind.

Even assuming that counsel chose not to contradict their theory of innocence, the state presented evidence of past behavior and crimes in aggravation and the mental health evidence "would have provided the jury an explanation" for the past behavior.

**2005:** *King v. Bell*, 392 F. Supp. 2d 964 (M.D. Tenn. 2005) (trial in November 1982). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation

and failing to object to the prosecutor's argument expressing his personal opinion. Counsel's conduct was deficient under *Strickland* and the ABA Standards for Criminal Justice. Counsel "focused their limited sentencing efforts on researching the statutory aggravating and mitigating factors and consulting with each other about the content of closing argument" after the guilty verdict. *Id.* at 975. Counsel did not interview family members or otherwise investigate. Counsel also failed to even discuss sentencing with the defendant or prepare him for his testimony. Even if counsel were not aware of any of the defendant's history before, counsel knew the basics about the defendant's background from his testimony during the trial. Nonetheless, counsel did not seek to delay sentencing to allow more time for investigation and preparation for sentencing. In short, "it appears trial counsel failed to conduct any investigation whatsoever." *Id.* at 986. Prejudice found based on the failure to present mitigation and the failure to object to the prosecutor's improper arguments expressing his personal opinion that the defendant deserved the death penalty without objection. If counsel had adequately investigated the evidence would have established that the defendant's biological parents separated when he was nine months old. His father moved to New York. His alcoholic mother gave him over to his aunt and uncle to raise. She died when he was 14 for cirrhosis of the liver. The defendant was raised in a good loving home with discipline even though they lived in "the projects." As a teenager, the defendant started getting into trouble running around with a biological brother raised in a different home nearby. After he was disciplined, he asked to move to New York with his father, which was allowed. His father did not maintain discipline and the defendant started skipping school and getting into trouble. Thus, the defendant "spent his formative years in New York with little supervision." *Id.* at 979. He became addicted to heroin before returning to Tennessee as a young adult. The turning point in his life though came when his aunt and uncle were murdered in 1975 by Black Moslems in retaliation for a mentally retarded, schizophrenic shooting one of their own. They were abducted and their bodies were later found shot in a burned out vehicle. Four other homes, including those of the defendant's brother and cousin who were raised in the same home with him, were firebombed. The murders "overwhelmed" him and he began seeing and hearing his "Mama" (the aunt) and using drugs to "an even greater extent than before." *Id.* at 980. He would often call out to her in his sleep and wake up sweating with nightmares. He had "anxiety attacks" and passed out a few times at work. He was also hospitalized for three gunshot wounds and a heroin overdose. His records showed "episodes of depression, heavy alcohol abuse, and IV drug abuse" and a referral for psychiatric treatment. Mental health experts could have testified that the defendant had Post Traumatic Stress Disorder and an organic brain syndrome, along with panic attacks associated with an anxiety disorder. The state court decision was an objectively unreasonable application of *Strickland*. The court withheld a final ruling, however, in order to conduct an evidentiary hearing to obtain counsel's testimony and "to resolve any factual disputes that may remain."

*Thomas v. Beard*, 388 F. Supp. 2d 489 (E.D. Pa. 2005) (tried in February 1986). Counsel ineffective for failing to adequately prepare and present mitigation and even declining the

state's offer to stipulate to the defendant's age and that he had a high school diploma because the defendant did not want to present mitigation. Counsel was aware that the defendant's "actions indicating questionable mental health," including his post-arrest suicide attempt and statements that he wanted to die. Counsel also knew that the prosecution intended to rely on several aggravating circumstances "and thus of the need to respond in order for there to be any hope of avoiding a death sentence." Despite this knowledge, counsel did not obtain mental health records pertaining to the defendant's past offenses and treatment, did not interview anyone concerning the defendant's background, and did not obtain the services of a mental health expert. Prejudice was found because, if counsel had adequately investigated, the evidence would have revealed—"both documentary and testimonial—of a long history of mental illness, including repeated diagnoses of paranoid schizophrenia and an inability to control aggressive impulses." "[I]t is reasonably probable that, for a single juror, such evidence could have been powerful enough to affect his or her sentencing decision."

Because counsel failed to present any evidence in mitigation, [the defendant's] chance to escape the death penalty became especially contingent upon counsel's penalty phase closing argument. Sadly, that performance was grossly deficient: counsel's closing argument was largely incoherent, and portions of it that could be said to have a semblance of coherence served only to underscore the tragic fact of [the victim's] death . . .

In sum, counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment. Counsel wholly failed in his duty to present a closing argument helpful to [the defendant]. Instead, counsel's closing, whose importance was heightened in the absence of any mitigating evidence, gravely prejudiced his client."

Although the defendant said he did not want to present mitigation, "[a] defendant's desire to not present mitigating evidence . . . cannot by itself terminate counsel's duty to investigate." Here, the defendant's decision "was not an informed one." Counsel did not adequately explain the nature of the sentencing proceeding so the defendant

could not possibly have had full knowledge of what he was waiving when he instructed counsel that he did not wish to present mitigating evidence. As such, his waiver was not made knowingly, voluntarily, and intelligently, and therefore must be considered invalid. Counsel had a duty to investigate that was independent of any expressed reluctance of [the defendant]. Only after such an investigation would counsel have been in a position to advise [the defendant] of all avenues available to him, explain to him the

nature of the proceeding, and then be guided by his client's informed decision. The duty to investigate is well established, and it cannot be overcome by the misguided instruction of an uninformed client.

*Id.*

#### 4. Military Cases

**2004:** *United States v. Kreutzer*, 59 M.J. 773 (Army Crim. App. 2004), *aff'd on other grounds*, 61 M.J. 293 (2005) (sentenced in 1996). Counsel ineffective in capital sentencing for failure to adequately investigate and present mitigation. The appellant was charged with 18 specifications of attempted premeditated murder and one premeditated murder arising from Appellant opening fire on his unit formation at Fort Bragg, North Carolina. After his apprehension, he asked to speak with a social worker that he identified as "his psychiatrist." The social worker was not available, but a substitute psychiatrist was brought in. Appellant was given three military defense counsel, none with capital experience, beyond a two day training seminar. Prior to trial, Appellant privately paid for an evaluation by a civilian forensic psychiatrist, who advised defense counsel that an insanity defense was not viable and that their efforts should focus on mitigation. This doctor's services were not continued because Appellant could not afford to continue to pay for his services. A sanity board (similar to court-appointed examiners) evaluated Appellant and concluded that he was not suffering from any severe mental disease or defect at the time of the offenses. Counsel then requested funding for a mitigation specialist and for counsel to travel to investigate the case. Although funding for travel was authorized, counsel did very little travel for investigation. The mitigation investigator was denied. Instead, a team of psychiatrists at the Walter Reed Army Medical Center was assigned to evaluate Appellant as defense experts. Counsel interviewed two members of the Walter Reed team, who did not reduce their findings to writing. Their reports were made orally to defense counsel and "were not all favorable" to Appellant. Appellant entered pleas of guilty to the lesser included offenses of aggravated assault with a loaded firearm and murder by an inherently dangerous act, which left the government to prove only specific intent and premeditation. In the defense opening statement, counsel asserted that Appellant's state of mind at the time of the offenses was the focus of the defense case. During the defense case-in-chief, counsel presented lay testimony about the Appellant's breakdown in the Sinai two years before that required counseling. Counsel also presented testimony from the President of the Sanity Board, who testified that Appellant had embellished his statements to examiners but had been diagnosed with an adjustment disorder with mixed anxiety and depressed mood, dysthymia (a "lowgrade depression"), and a personality disorder not otherwise specified with a mixture of paranoid and narcissistic traits. This expert also testified that Appellant's actions were "a coolly calculated plan of revenge upon his unit," which supported the panel's findings of premeditation. In sentencing, the defense presented evidence that Appellant came from a

normal family upbringing and had been an above average student in high school. Counsel also presented a “good soldier” packet of awards, certificates, transcripts, and counseling statements about Appellant. On appeal, the Army Court granted the request for a mitigation expert. A two-judge majority of the court found that the trial court erred in denying the defense request for a mitigation specialist and that the trial court’s error required that the contested findings and sentence be reversed. [This was the issue addressed in a wonderful fashion by the United States Court of Appeals for the Armed Forces in *United States v. Kreutzer*, 61 M.J. 293 (2005).] The unanimous court agreed that counsel was ineffective in sentencing. Counsel’s conduct was deficient because counsel failed to adequately investigate and present mitigation. Counsel did not discover and present evidence of Appellant’s history that included a family history of alcoholism and depression and Appellant’s depression since age 12 and multiple suicide attempts, since age 16. Counsel also did not discover and present the testimony of a social worker, who saw Appellant twice when Appellant broke down in the Sinai. He concluded that Appellant had problems with anger and interpersonal relationships, poor coping skills, and low self-esteem. Counsel also did not listen to the audiotapes of the interview or interview the psychiatrist that examined Appellant shortly after his arrest. The psychiatrist opined that she had never seen anyone in such psychic distress and that Appellant’s mood was severely distraught and that he was irrational and possibly delusional because of his beliefs that “God wanted him to commit murder and that he was doing [the] soldiers a favor by killing them.” Counsel failed to interview the expert witnesses not due to a conscious, tactical decision, but due to incompetence because each counsel thought the other was responsible for interviewing the witnesses. Counsel also never interviewed the psychologist that examined Appellant for suicide risk in pre-trial confinement, even though this expert faxed his report to counsel. This expert found that Appellant was “profoundly depressed” and that “there were definite mental health issues in the case.” Counsel also failed to request that their own examiners at Walter Reed consider mitigation and then failed to adequately interview their own investigation team at Walter Reed. If counsel had adequately investigated, they would have discovered that a third member of the Walter Reed team, a reserve officer, who was also a practicing civilian psychiatrist, signed a written report stating his opinion that Appellant was “chronically and seriously mentally ill,” that “[t]he crimes which he committed are causally related to his mental illness,” and “[t]he impulse to commit these crimes could not have been resisted by” Appellant. As a result of counsels’ failure to adequately investigate and discover all this evidence, counsel presented the harmful testimony of the President of the Sanity Board. Prejudice was found because, “[a]s horrific as Appellant’s crimes were, there was but a single death, and a substantial body of information to suggest Appellant’s disordered mental status may have affected his volitional acts.” One judge also found that counsel was ineffective in failing to interview or cross-examine the wife of the deceased, who provided victim impact testimony. Had she been interviewed and cross-examined, the panel would have learned that she was a religious woman, who had forgiven Appellant for killing her husband.

## 5. State Cases

**2009:** *Parker v. State*, 3 So. 3d 974 (Fla. 2009) (trial in 1990). Counsel ineffective for failing to fully investigate and present mitigating evidence regarding defendant's chaotic and dysfunctional childhood and mental health. If counsel had adequately investigated, the evidence would have shown: (1) defendant was abandoned by father as baby; (2) defendant's mother was frequently hospitalized with mental health issues; (3) defendant spent his childhood in a series of foster homes and attended 17 different schools; (4) defendant was physically and sexually abused; and (5) defendant had a long history of alcohol abuse and violent and "crazy" behavior. Counsel did not request any records and did not interview anyone other than the defendant, his mother, and his ex-wife. "The only investigator employed . . . was asked to investigate the victim's background and guilt phase issues."

While trial counsel presented a 'bare bones' rendition of some of . . . [the defendant's background], it was not enough to establish mitigation even though there was a wealth of witnesses who were never interviewed and documents that were never sought that could have fleshed out and established the mitigating circumstances. . . . In addition to this failure to conduct an adequate investigation, . . . counsel presented the information about his childhood and background through the hearsay testimony of the public defender investigators and not from first-hand sources.

Counsel also gave the defense mental health expert, "quite sparse materials" and "no background records," such that the expert had to rely only on the defendant's self-report and a brief phone call with his mother. Counsel erroneously believed "it was the doctor's responsibility to seek out this information." If the expert had seen the records and been given background information, including the mother's mental health history and school records indicating significant behavioral and intellectual functioning problems, he would have supported additional nonstatutory mitigating factors and recommended additional evaluation and further testing that would have revealed "some type of neuropsychological impairment that affects his executive brain functions."

**2008:** *State v. Pearce*, 994 So. 2d 1094 (Fla. 2008) (arrest in 1999, direct appeal in 2004). Counsel ineffective for failing to adequately investigate mitigation in order to advise client prior to his waiver of presentation of mitigation and argument in sentencing. Counsel "did not conduct any preparation for the penalty phase of the trial." Counsel did not obtain any background records, never contacted any of defendant's family members, and never investigated mental health issues. If counsel had investigated, the following information would have been able: (1) defendant received "whoopings" with a belt or switch as a child; (2) he had "temper tantrums and mood swings" as a child; (3) there was a family history of bipolar disorder; (4) defendant fell down stairs as a baby and fell out

of a truck, resulting in head injuries; (5) he was a drug user; (6) his ex-wife physically abused him; (7) he suffers from brain damage and (8) has bipolar disorder and “is predominantly manic and goes for long periods of time in manic states.” Although the defendant “did not want any form of mitigation presented during the penalty phase. . . ., an attorney’s obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case.”

Although a defendant may waive mitigation, he should not do so blindly. Counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived and reasonably understands the ramifications of a waiver. The defendant must be able to make an informed, intelligent decision.

*Id.* at 1102. The “waiver of the presentation of mitigating evidence was not knowingly, voluntarily, and intelligently made.” Prejudice established “because there was substantial mitigating evidence which was available but undiscovered.”

***Lowe v. State***, 2 So. 3d 21 (Fla. 2008). Counsel ineffective in sentencing for failing to investigate and present two witnesses, who would have testified that a state witness, who denied involvement at trial, had previously admitted participation in the robbery and to killing the victim. Counsel’s conduct was deficient. The state’s theory was that the defendant acted alone and specifically excluding the state witness. Defense counsel believed the state witness was involved. Counsel’s conduct was deficient because he failed to investigate even though one of the potential witnesses was mentioned in a police report and an officer’s deposition as having information about the crime. This witness was aware of the other witness and could have provided that information. No prejudice during trial because his statements did not exclude the defendant and there was substantial evidence of the defendant’s involvement in the crimes. Prejudice was found in sentencing even though there were “some inconsistencies . . . as to the specific details.” In addition, these witnesses supported two mitigating factors raised by the defense but rejected by the trial judge: the disproportionate punishment mitigator and the relatively minor participation mitigator. Finally, while the evidence at trial proved the defendant was involved, including his confession also implicating the state witness, there was no evidence presented that conclusively showed that he was the actual killer.

***Taylor v. State***, 262 S.W.3d 231 (Mo. 2008) (tried in January 2003). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation evidence. The case involved a killing in prison. The defense presented substantial expert testimony concerning mental health history and issues in the trial in pursuing a not guilty by reason of mental disease or defect verdict, but otherwise presented only videotaped deposition testimony from the superintendent of the correctional facility, who testified that the defendant would present minimal risk to correctional officers and other inmates under his conditions of confinement. “Because of the unique nature of capital sentencing—both the

stakes and the character of the evidence to be presented—capital defense counsel have a heightened duty to present mitigation evidence to the jury.” Counsel’s conduct was deficient. Where there is strong mitigation evidence available, “and the jury has recently convicted a defendant of first-degree murder while in a maximum security prison, it is not reasonable for defense counsel to only present mitigation evidence that the defendant is unlikely to commit crimes in prison.” Here, four of five experts that testified in the trial were limited and the fifth focused on the affirmative defense. These experts could have been recalled in sentencing “for their own merit, as evidence of . . . [the] history of mental illness” without limitations “at a time when their instructions would have permitted them to give mitigating effect to their conclusions about . . . [the] history of mental illness—testimony that in itself provided no defense in the guilt phase.” Likewise, while one of the experts testified about the defendant’s “abusive upbringing and other difficulties in childhood,” this testimony was “provided primarily to support his conclusion at the guilt phase” on the affirmative defense. “Reasonable trial counsel would have recognized the need to put on additional mitigation evidence regarding the defendant’s character and background at the penalty phase, particularly after the jury had rejected the expert’s ultimate conclusion.” Counsel also failed to introduce any of the records supporting the conclusions regarding the “abusive background, history of mental illness, and eventual diagnosis,” which the jury asked for during the trial.

Despite the jury’s specific desire to see these available records, which were replete with statements showing [the defendant] had suffered from mental illness since long before the murder, counsel made no attempt to fill this evidentiary void by introducing them in the penalty phase.

Counsel did not present the records because of potentially harmful information.

While not all of the evidence in the records was favorable . . . , such records seldom are. Where the only basis of defense is that one’s client has long had a mental illness that reduces his responsibility, the failure to introduce records that present not only support for his history of mental health evaluations and treatment beginning at the extremely young age of 7, but also a treasure trove of mitigation regarding [his] abusive childhood, simply is not a reasonable trial strategy.

Counsel could also have presented record and family member testimony of the defendant’s father’s abuse of him and his mother, living in an abuse shelter, struggling in school, the early onset of mental illness hearing voices at 11 or 12, belief in “demons” so badly that “they attempted a church exorcism when he was in early adolescence,” running away from home, command hallucinations, and suicide threats and behavior. Prejudice found. “A vivid description of [the defendant’s] poverty-stricken childhood, particularly

the physical abuse, and the assault . . . , may have influenced the jury's assessment of his moral culpability.” *Id.* at 253 (quoting *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir.2002)). In addition the “contemporaneous records documenting . . . mental health problems, more than any testimony the defense offered at the guilt phase, could have persuaded the jury that the mental health evidence had value as mitigation of punishment, and that, perhaps, [the defendant]deserved a punishment other than death for his crime.” “If competent counsel had presented and explained the significance of all the available mitigation evidence, there is a ‘reasonable probability that the result of the sentencing proceeding would have been different.’” Reversal was also required due to *Brady* error because the state failed to disclose impeachment evidence related to jailhouse snitch, which was material in sentencing.

***Commonwealth v. Sattazahn***, 952 A.2d 640 (Pa. 2008), *petition for writ of certiorari filed Feb. 17, 2009* (retrial in 1999). Counsel ineffective in retrial for failing to adequately investigate and present mitigation evidence. Counsel obtained school and prison records and spoke to the defendant’ mother, a prison employee, and perhaps a school teacher and then offered “brief testimony” only from the defendant’s mother and a former employer. Counsel’s conduct was deficient because counsel failed to review the file of defendant’s prior murder conviction, including the prison records, which “contained red flags concerning potential mental-health and/or cognitive impairment.” Counsel also failed to investigate potential mental, cognitive, emotional and/or social difficulties despite awareness the defendant had failed several grades and was placed in special classes during early childhood development. Counsel’s conduct was not justified by strategy. Prejudice found because “[t]he difference in the very nature and quality of the evidence adduced at trial versus that put forward at the post-conviction stage after a fuller investigation is substantial” and the additional evidence would have supported several statutory mitigating factors that “bore upon the degree of [the defendant’s] culpability in terms of selecting between capital punishment and a life sentence.” In addition to the actual evidence of difficulties in school, the available evidence included mental health experts to testify about the defendant’s long history of learning disabilities, attention deficit hyperactivity disorder, chronic brain dysfunction, Aspergers syndrome, and pervasive developmental and schizotypal personality disorders.

***Council v. State***, 670 S.E.2d 356 (S.C. 2008) (sentenced in October 1996). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Defense counsel asserted during trial and sentencing that the defendant was “merely present at the time” of the crimes, which were committed by another man. The only mitigation evidence presented was “extremely limited testimony” of the defendant’s mother. Counsel’s conduct was deficient, as follows:

Initially, trial counsel was deficient in not beginning his investigation into [the defendant’s] background once the State served its notice of intent to seek the death penalty, counsel

discovered that [the defendant's] DNA was found at the scene of the crime, and counsel learned of Respondent's inculpatory statements to police indicating that he sexually assaulted the victim. Clearly counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence.

Nonetheless, counsel sought only limited records prior to trial, did not request other records until the day jury selection began, did not have the defendant examined by a defense psychiatrist "until one month before trial," and provided the defense psychiatrist "with only limited records." "As in *Wiggins*, counsel's conduct fell below the standards set by the ABA." *Id.* at \_\_\_ (citing 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases). "Even the limited information obtained should have put counsel on notice that [the defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence. "[N]ot only did counsel delay in investigating [the defendant's] background, he failed to conduct an adequate investigation." "Significantly," counsel "failed to provide his only expert witness . . . with sufficient records and only directed him to evaluate . . . competency to stand trial and criminal responsibility." The expert, "at the direction of counsel" also "only met with [the defendant] "on two occasions, the first being shortly before trial."

Furthermore, even though the funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified in terms of social work experience, to evaluate the information to assess [the defendant's] background.

Finally, we believe it was unreasonable for trial counsel not to obtain . . . family records. First it is inexplicable that trial counsel deemed these records unimportant because they did not directly involve [the defendant].

*Id.* at \_\_\_ (citing 1989 Guidelines). Second, counsel's "brief interviews" with family and DJJ records "should have alerted him to the fact that the family was dysfunctional, [the defendant] had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation." "Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence." Counsel's conduct was not excused by strategy because:

[S]trategic choices made by counsel after an incomplete

investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation. Secondly, counsel was already aware the jury had rejected the defense theory that [the defendant] was not the actual perpetrator but was merely present. Thirdly, it would not have been inconsistent for trial counsel to present the accomplice theory during the guilt phase but mitigation evidence in the penalty phase. Finally, given the State had already presented damaging character evidence, we do not believe [the defendant's] character could have been damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

*Id.* at \_\_\_ (citations omitted). Prejudice found despite "overwhelming" evidence of guilt and the jury's finding of six aggravating factors because the jury did not hear "very strong mitigating evidence," including: (1) "medical evidence or other testimony describing mental health issues or that several of his immediate family members suffered from mental illness," such as "schizophrenia, bipolar disorder, depression, and borderline personality disorder"; (2) alcoholic father and parents' divorce on the basis of physical cruelty; (3) "bad neighborhoods" and extreme poverty; (4) a significant drop in I.Q. between the ages of seven and ten "which may have been the result of a head injury or the onset of mental illness; (5) "began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings"; (6) alcohol and drug use beginning at age sixteen; (7) attempted suicide in his twenties; (8) "a borderline I.Q. and frontal lobe brain dysfunction"; and (9) "the onset of . . . schizophrenia [which is undisputed now and has rendered the defendant incompetent since at least 2001] may have begun in early adolescence or childhood." The court concluded: "We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence."

***Williams v. State***, 987 So. 2d 1 (Fla. 2008) (crimes in 1988 and direct appeal in 1993). Counsel ineffective in capital sentencing for failing to present a detailed report from a mental health expert in the override hearing before the trial court. The defendant was convicted of ordering the murders of three people and other charges stemming from the victims' alleged theft of drugs and money from the defendant in a drug trafficking ring. Counsel was aware that three co-defendants had already proceeded separately to trial. Each received a life verdict from the jury, but the same judge as defendant had overrode the verdict and imposed death. Counsel possessed an expert report that revealed that the defendant had: 1) an IQ of 75 and functioned mentally at the age level of a thirteen or fourteen-year-old; 2) abusive, alcoholic parents and an impoverished childhood; and 3) a lengthy drug abuse history. Counsel did not present this evidence before the jury or the

trial court and instead presented only brief evidence that the defendant was a loving son and father. The jury recommended life by a vote of eleven to one, but the trial court overrode the verdict and imposed death. Counsel's conduct was deficient, especially since counsel was aware of the overrides for the co-defendants. Counsel's conduct was not based on strategy.

It appears counsel's decision to withhold [the mental health expert's] evidence was based upon counsel's overconfidence that a life sentence would be imposed and his erroneous belief that it was not necessary since his research seemed to show that this Court generally did not approve of overrides. However, counsel clearly missed the mark in overlooking our extensive case law that consistently requires some reasonable evidentiary basis for a life sentence in order to bar an override. Under Florida law, a trial judge is prohibited from rejecting a jury's recommendation of life imprisonment if there is competent evidence of mitigation supporting a life recommendation at the time of sentencing.

The court also noted that counsel had "nothing to lose in presenting this evidence" to the court. Prejudice was clear even though the trial court held that it would have made no difference to his override ruling. The evidence would have "provided an objective and reasonable basis for the jury's recommendation and a sentence of life" and, thus, would "preclude a trial judge's override of the jury's decision."

*State v. Larzelere*, 979 So. 2d 195 (Fla. 2008) (convicted in February 1992). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Even though the defendant waived presentation of mitigation evidence, the jury recommended death only by a vote of seven to five. The defendant was convicted of planning and directly the murder of her husband for assets and insurance money. Counsel did not conduct any investigation concerning the defendant's background or interview her family members about mitigation. They even discounted reports from a prior investigator of her father's alcoholism, possible child abuse, and possible spousal abuse. They did not hire a mental health expert until after the jury's recommendation and then did not provide him with the investigator's report or other relevant information and did not even attend the state's deposition of the defense expert. Counsel even told the expert that "no family members were available to assist in his evaluation." The defendant's waiver was "not made knowingly and intelligently" because counsel "did not investigate possible mitigation sufficiently before [she] waived her right to present penalty-phase evidence." Counsel's conduct was deficient in failing to investigate, despite the investigative report, and in failing to obtain "an informed mental health evaluation . . . in advance of the penalty phase." Prejudice was established because the evidence would have revealed that the defendant was: 1) sexually abused as a child by her father and uncle; 2) physically abused as an adult; and 3) suffered from narcissistic

and histrionic personality disorders. She also may have suffered from post-traumatic stress disorder and obsessive compulsive disorder. Although the state could have presented rebuttal evidence in sentencing, the prejudice was still clear, especially in light of the bare majority of jurors voting for death even in the absence of any mitigation evidence.

***Hall v. McPherson***, 663 S.E.2d 659 (Ga. 2008) (sentenced in September 2000). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence and rebuttal to aggravation evidence. Initially, the court rejected the state's argument that the "habeas court erred as a matter of law by relying upon the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and the Southern Center for Human Rights Defense Manual in evaluating counsel's performance." Counsel's conduct was deficient. Counsel did not hire a mitigation investigator and instead arranged with the defendant's mother to bring anyone "she wished to bring with her" to his office during one evening a week. Counsel did so despite having a court-appointed examiner's report that reflected that the mother was alcoholic and had physically and verbally abused the defendant and his brother and neglected them during their childhood. Counsel also did not interview the defendant's brother or a foster mother and did not obtain records from youth detention centers, group homes, or foster homes that the defendant informed him about. Counsel also did not adequately investigate and present evidence of the defendant's drug history and the "psychiatric mitigating evidence" related to that, despite the "thrust" of state's case at both phases being the defendant's drug addiction and intoxication when he left detoxification treatment against medical advice and killed his live-in girlfriend shortly afterwards. Trial counsel were on notice of this and had been provided with some records of prior detox treatments reflecting discharge prior to completion. Counsel failed, however, to obtain the complete records or to interview prior doctors, although eliciting testimony about these treatments from the defendant's mother and sister. While counsel proceeded on a theory of "residual doubt," counsel also "propounded a broad mitigation theory" that encompassed "lack of parental supervision, his early introduction to drugs and alcohol, and the absence of a positive male role model in his life." "Trial counsel's [investigation and] presentation was not strategic, as the testimony presented in the habeas evidentiary hearing would have supported counsel's arguments at the sentencing phase of trial." Counsel argued about the defendant's rough life and use of drugs at an early age, but did not present any evidence of juvenile drug use. He also presented evidence of abandonment by the defendant's father but "the witnesses only hinted at the extent and scope of the neglect that [the defendant] suffered from his mother, and there was no testimony regarding his childhood history of abuse or his placement in foster homes and group homes as a youth." Prejudice found based primarily on the testimony of the defendant's foster mother and brother concerning the mother's extreme physical and verbal abuse and neglect, such that the defendant would sleep in abandoned cars and get food from dumpsters when she chased him from the home and he was on his own for days at a time. The older brother also testified that he introduced the defendant to

marijuana, LSD, and other drugs when the defendant was 12. The jury did not hear this evidence and, in fact, heard evidence portraying the mother as a child simply unsupervised because his mother was working two jobs, but doing “everything she possibly could to help her son, including trying to keep him away from drugs.” The jury also did not hear testimony from a prior doctor that diagnosed a major depressive disorder and drug dependence following a suicide attempt. This doctor would have also testified about the defendant’s genetic predisposition to substance dependence, such that he “never had a choice in the matter of whether to develop drug and alcohol addiction problems in his life.” He also would have testified that the defendant did not complete detox on that occasion because his insurance would not cover it and no other funds were available. This doctor “would have willingly testified at . . . trial without charging a fee for his time.” Information in the records also rebutted the state’s claim that the defendant “chose his life of addiction” by establishing the defendant’s struggles and intense desire for help.

***Littlejohn v. State***, 181 P.3d 736 (Okla. Crim. App. 2008) (crimes in 2002). Counsel found ineffective, as conceded by the state, in capital sentencing for failing to adequately investigate and present mitigation. The defendant was charged with three co-defendants for felony murder arising from a car-jacking. Throughout the trial and sentencing, the defendant admitted participation but denied only that he was the triggerman. Counsel did not conduct any investigation and presented only the unprepared testimony of the defendant and his mother to testify in sentencing. Prejudice found because there was available evidence the defendant had: (1) a low IQ and attended special education classes; (2) suffered domestic abuse from his mother and step-father, who were drug dealers and users; (3) the defendant did not learn his step-father was not his father until he was a teenager; and (4) expressed remorse and suicidal ideation shortly after the crimes.

**\**Commonwealth v. Williams***, 950 A.2d 294 (Pa. 2008) (sentenced in June 1990). Counsel was ineffective in capital sentencing for failing to adequately investigate and present mental health mitigation evidence. Previous counsel had filed a notice of intent to assert an insanity defense, which referenced two prior psychiatric hospitalizations (one involuntary) in the seven months prior to these offenses. The defendant, who was a Vietnam veteran, had been diagnosed with adjustment disorder, depression and dysthmic disorder. Counsel’s conduct was deficient in failing to obtain these records or a mental health evaluation and failure to investigate information about the defendant’s bizarre behaviors, etc. Prejudice found because the jury heard only good character evidence in mitigation rather than evidence that the defendant’s mental-health condition impacted on his conduct in a way that was relevant to the assessment of the degree of his moral culpability.

**2007: *In re Hardy***, 163 P.3d 853 (Cal. 2007) (trial in 1983). Counsel was ineffective in capital sentencing for failing to adequately investigate and present evidence of a third party’s culpability that would have undermined the state’s theory that the defendant was the actual killer. The case involved a conspiracy headed by a man who sought to kill his wife

and son for life insurance money and solicited the defendant and several others to assist him. Counsel's conduct was deficient and not explained by strategy because counsel sought to convince the jury that Calvin Boyd was involved rather than the defendant. This was counsel's primary strategy that he pursued in cross-examining the state's and codefendants' witnesses. Counsel's conduct was deficient because adequate investigation would have revealed that Boyd made incriminating statements to a number of people, strongly suggesting he had participated in the murders. He habitually carried a knife similar to the murder weapon and did around the time of the crimes. He had previously committed several assaults and threatened people with a knife. He had cuts on his hands after the murders and made up a false story to explain them. He made up a false alibi and pressured his wife and others to support that alibi. He had a motive to commit the murder because he was a habitual drug and alcohol user, who was unemployed at the time of the murders. He testified falsely during petitioner's preliminary hearing and trial. There was no prejudice during trial because the state argued primarily that the defendant was the actual killer but also argued conspiracy and aiding and abetting, which also allowed for the murder conviction. Prejudice established in sentencing though because, in addition, to the evidence of Boyd's guilt, this evidence would have undermined his credibility in testifying that the husband admitted to him that the defendant was one of the conspirators and that he saw the husband and the defendant together shortly before the crimes. Without this testimony, the evidence that the defendant was the actual killer was "weak and circumstantial." He was young and had only a minor criminal record. He had descended into despair and drug abuse following his brother's suicide. Given these circumstances it would have made a difference if the jury heard substantial evidence that he "was likely not the actual killer, but merely participated in the conspiracy to kill for insurance proceeds." While the state argued that he personally stabbed the victims in a "brutal and horrific manner" solely for money, this evidence would have made a difference.

[I]f he did not kill anyone, if he merely conspired . . . , if he did not show up at the appointed hour, if he was lying passed out from drink and drugs that fateful night instead of stabbing a defenseless woman and child in the dark of night, the nature of his moral culpability is quite different. More to the point, the jury's weighing of the relevant aggravating and mitigating factors would have been entirely different.

*Id.* at 895.

**Ross v. State**, 954 So. 2d 968 (Miss. 2007) (sentencing in October 1987). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. "[C]ounsel may be deemed ineffective for relying almost exclusively on material furnished by the State during discovery and conducting no independent investigation." *Id.* at 1005. Likewise, "[i]t is not reasonable to refuse to investigate when

the investigator does not know the relevant facts the investigation will uncover.” *Id.* at 1006 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 696097 (6th Cir. 2006)). Counsel’s conduct was deficient in failing to investigate even though a court-appointed evaluation disclosed a “a number of potential mitigating factors, including accounts of physical and sexual abuse, possible alcoholism, accounts of visual and auditory hallucinations, and the deaths of his ex-wife and four young children in a car accident in 1985 and the brutal murder of his sister in 1982.” He was also taking anti-psychotic and anti-depressant medications at the time of the evaluation. Although counsel was aware of this information, they did not pursue mental health issues simply because the defendant informed counsel that “he wasn’t ‘crazy.’” *Id.* at 1006. The failure to investigate was unreasonable “given the serious mitigating issues evident.” *Id.* Likewise, while lay witnesses, including the defendant, testified about some of this background information “defense counsel provided no expert evidence about how these events had affected [the defendant] psychologically.” *Id.* Even more problematic, however, was counsel’s failure to properly investigate the defendant’s record as an inmate prior to making his adaptability to confinement a central argument in sentencing, which opened the door to rebuttal evidence that the defendant had been moved from the local jail to a more secure facility prior to trial because he possessed a hacksaw blade and planned an escape and that he had been disciplined for making alcoholic beverages during a prior confinement. “This failure falls below an objective standard of reasonableness and was undoubtedly highly prejudicial, as it tended to cast Ross as unrepentant, a habitual criminal, and a danger to society.” *Id.* The court also found that the defendant was entitled to a new trial due to “cumulative error,” which included counsel’s failure to object to a tainted venire panel after a venireperson stated that she had testified against the defendant in federal court that she had been the victim of a crime when counsel was aware that she was the victim in the defendant’s prior armed bank robbery. Counsel did not object to her statements, move to remove her after her initial statements, request a curative instruction, or query the remaining venire members about the possible prejudice from her statements.

***Glass v. State***, 227 S.W.3d 463 (Mo. 2007) (crimes in July 2001 and affirmed on appeal in 2004). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented the testimony of family members, friends, and former employers in sentencing, but did not investigate and present evidence from “school officials and prior professionals” who were “more ‘disinterested’ witnesses.” Prejudice found because available witnesses included a doctor that admitted the defendant to the hospital for bacterial meningitis when the defendant was less than two years old. While an aunt testified about the meningitis, she could not explain “the long-term effects of meningitis” and the impact on the defendant’s “impaired mental functioning.” Former teachers were also available to testify concerning the defendant’s impaired intellectual functioning. Former probation officers were available to testify that for about 18 months prior to the offenses the defendant had no probation violations and was cooperative. Counsel argued in closing that the crimes were “out of character” for the defendant and this testimony would have supported that argument. Counsel also failed to

present the testimony of a neuropsychologist concerning the defendant's deficits even though "neuropsychological deficits have 'powerful, inherent mitigating value,'" especially in a case like this where the "jury heard from no experts." Counsel also failed to present the testimony of "a speech and language pathologist" concerning the defendant's impaired intellectual functioning, which is "valid mitigating evidence in the penalty phase of capital case, regardless of whether defendant has established a nexus between his mental capacity and crime." Finally, counsel failed to present the testimony of "a toxicologist and pharmacologist" concerning the influence of alcohol at the time of the offenses, which would have supported two statutory mitigating circumstances (substantially impaired capacity to appreciate the criminality of his conduct and conform to the requirements of law and extreme mental and emotional disturbance).

*Marquez-Burrola v. State*, 157 P.3d 749 (Okla. Crim. App. 2007) (tried in February 2003). Counsel ineffective in capital sentencing for failing to conduct a meaningful mitigation investigation. The defendant, a Mexican foreign national, was convicted of killing his wife of 17 years. Retained counsel had participated in one capital case, but hired an associate counsel with no capital experience to prepare for sentencing. The first associate left one month before trial and a second associate who had only been an intern on one capital case was hired to prepare for sentencing. Well before trial counsel had been provided with sample funding motions for experts and other services to prepare mitigation by the Mexican Legal Assistance Program (MCLAP), counsel for Mexico. Counsel did obtain funding for a psychiatrist and an investigator but these people focused only on a "heat of passion" defense for the guilt-or-innocence stage of trial. Just days before trial, counsel for Mexico expressed concern to the trial court about the lack of preparation for sentencing because no investigation had been conducted other than speaking to a few family members one week prior to trial about testifying. The trial court told defense counsel it would be accommodating to additional request for funding but none was made. Counsel, who spoke no Spanish, also did not obtain the services of an interpreter to communicate with the defendant, who spoke very little English when an interpreter had to be used even during his interrogation. Counsel used the brother of the victim and the defendant's 12-year-old nephew to interpret even during matters of legal significance. Counsel also did not attempt to overcome the "logistical challenges" involved because almost everyone who could offer insight into the defendant's past and his school, medical, and other records were in Mexico. Counsel's conduct was deficient because "[d]efense counsel has a duty to take all necessary steps to ensure that available mitigating evidence is presented, *id.* at 765, including "seeking funds from the court and specifying why they were necessary." Counsel's conduct was also not explained by strategy because, even with testimony from all three defense counsel, "the actual strategy with regard to mitigation remains elusive." *Id.* The defendant was prejudiced because "mitigation evidence can, quite literally, make the difference between life and death in a capital case." *Id.* at 764. "One important purpose of mitigation evidence is to humanize the defendant in the eyes of the jury and, if possible, to explain what might have driven him to commit the crime." *Id.* at 766. Here, the mitigation consisted of less than fifteen

pages of testimony from the defendant's father, mother, and sister that the defendant had been a good man and asking the jury to spare his life. If counsel had adequately investigated, a number of witnesses, some of whom made "substantial sacrifices" to come from Mexico to testify, would have "offered unique and moving vignettes about [the defendant's] good character." This evidence could have made the difference because there is a

*qualitative* difference between having a family member generally ask the jury to spare the life of the defendant, and having third parties offer the jury *more objective and specific* examples of *why* the defendant's life should be spared. . . . Jurors may well understand that a defendant's mother will almost always extol the virtues of her son; but they may give different treatment, and perhaps greater weight, to the testimony of less biased witnesses which illuminates the man whose life is in their hands. . . . [T]he stories of Appellant growing up and doing good things in his rural Mexican community might well have resonated with citizens of a rural Oklahoma county.

*Id.* at 766-67 (emphasis in original). Preparation for sentencing was especially important because "[t]his case may fairly be called a 'second stage' case," where "[t]he only real question appeared to be what punishment was appropriate." *Id.* at 767. With adequate investigation, the defense could also have countered the state's argument that the defendant was "an abusive monster who was unreasonably jealous and controlling over his wife." *Id.* The evidence would have established that his "jealousy in the months leading up to the homicide might not have been unfounded, and that [his] marital problems may have had a marked effect on his mental health." *Id.* Prejudice was also established because the jury, at some point during deliberations, which evenly split on whether life or death should be imposed. This "strongly suggest[s] how outcome-determinative a real mitigation investigation might have been." *Id.* Finally, while there was argument in the case about whether a "mitigation specialist" is necessary in a capital case, the court held that "the real issue is whether defense counsel understands what kind of mitigation evidence can make a difference, what kind of mitigation evidence is available, and whether counsel makes reasonable efforts to obtain it." *Id.* at 768. The court also rejected the "suggestion that it was the responsibility of [the defendant] and his family to understand the nature of mitigation on their own, and to bring relevant evidence to defense counsel's doorstep." *Id.* Although the usual remedy would be to grant a new sentencing trial, the court modified the defendant's death sentence to life without parole because "[a]ll of the mitigating evidence, viewed together, clearly outweighed the evidence supporting the aggravating circumstances." *Id.*

**2006:** *Blackwood v. State*, 946 So. 2d 960 (Fla. 2006) (sentencing in early 1993). Counsel ineffective in capital sentencing for murder of former girlfriend for failing to adequately

prepare and present mitigation. During sentencing before the jury, counsel presented eleven witnesses consisting of friends and family, as well as a detention officer who testified that the defendant demonstrated good behavior while incarcerated and had become an inmate trustee. Counsel's conduct was deficient because counsel never even met with the retained defense expert, who had previously found the defendant incompetent, or even attempted to schedule an evaluation of the defendant for sentencing purposes until two weeks prior to sentencing. That expert notified counsel that he could not testify concerning statutory mitigating circumstances, but counsel never asked about non-statutory mitigation. Rather than ask for a continuance or contact the court-appointed doctors, who had also examined competence, counsel did nothing and presented no mental health evidence. Prejudice found because even one of the court-appointed examiners would have testified that the defendant was depressed and emotionally disturbed at the time of the offense. She would also have testified that his verbal IQ was 70, placing him in the borderline mentally retarded range of intelligence. Her testing also indicated some neurological impairment and she would have recommended a neurological evaluation had counsel asked. She also would have testified that the defendant had no prior criminal history and was a good candidate for rehabilitation. Additional available testimony, if counsel had adequately prepared and presented the evidence reflected that the defendant suffered from major depression and avoidant personality traits with masochistic features and was experiencing extreme emotional disturbance at the time of the crime. While the court-appointed examiner testified before the trial court, the court was required to give great weight to the jury recommendation, which was 9 to 3 in favor of death.

***Commonwealth v. Gorby***, 909 A.2d 775 (Pa. 2006) (crimes in December 1985 and affirmed on appeal in 1991). Trial counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation evidence. Trial counsel's conduct was deficient because counsel knew the defendant behaved irrationally around the time of the offenses, had a history of drug abuse and a "rough childhood," and had been hospitalized previously for head injuries. Nonetheless, counsel did not investigate further than discussions with his client, his mother, and his step-father because he did not believe that any of this was potentially mitigating. In sentencing, counsel called only the step-father to testify that the defendant sometimes assisted him in work around the home. Prejudice found because if counsel had adequately investigated and presented the evidence the jury would have been aware that the defendant was raised in an impoverished, dysfunctional household. He endured substantial verbal and physical abuse and sexual molestation. He witnessed violent and life-threatening altercations between his mother and several husbands, in which he attempted to defend her. He would rock back and forth and bang his head against walls at times. He was also homeless during a substantial portion of his teenage years after his step-father kicked him out of the home. Mental health experts would have testified that the defendant suffered from "cognitive disorder (brain injury affecting thought process), major depression, post-traumatic stress syndrome, borderline personality disorder, and poly-substance abuse." Prejudice found.

***Commonwealth v. Sneed***, 899 A.2d 1067 (Pa. 2006) (sentencing in March 1985). Counsel ineffective in failing to adequately prepare and present mitigation evidence. Counsel failed to conduct any investigation or to even interview family members, with the sole exception being one of the defendant's sisters, even though the defendant informed counsel that he had a "hard childhood," had abused drugs and alcohol, and had previously been incarcerated. Counsel presented no mitigation in sentencing. Counsel's conduct was deficient.

"The onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client." Therefore, although it is true that appellee never volunteered to counsel all of the alarming details of his childhood, it was not necessarily his responsibility to do so. Counsel is charged with the duty of asking probing questions of his client, and with the duty of discovering and developing mitigation evidence . . . .

*Id.* at \_\_\_ (quoting *Commonwealth v. Malloy*, 856 A.2d 767 (Pa. 2004)). Prejudice found because an adequate investigation would have revealed that the defendant grew up in extreme poverty with an alcoholic mother, who drank during pregnancy and while breast-feeding the defendant. He was often abandoned as a child while his mother was on drinking binges. He was exposed to his mother's prostitution and his alcoholic grandmother's making and selling of illegal liquor. He was physically abused by his mother and grandparents and malnourished such that he was often forced to steal in order to have any food.

***Ex parte Gonzales***, 204 S.W.3d 391 (Tex. Crim. App. 2006) (sentencing in February 1997). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. Specifically, counsel failed to ask the defendant, his mother, or his sister whether the defendant had been abused as a child. Counsel's conduct was deficient because he spoke to the mother only once before trial and the sister once during the trial but did not ask about the issue of abuse. "[A]n objective standard of reasonable performance for defense counsel in a capital case would have required counsel to inquire whether the defendant had been abused as a child." *Id.* at 397. The only evidence counsel presented was general background testimony from the defendant's sister. Prejudice found because, if counsel had performed adequately, the evidence would have established the defendant's childhood abuse by his father, which included forced oral and anal sex. He was physically abusive if the defendant resisted and would threaten to kill him and his mother if he told anyone about the abuse. A psychiatrist could also have testified that the defendant suffers from Post-Traumatic Stress Disorder due to the repeated physical and sexual abuse he suffered. This expert would also have testified that, if treated, the defendant could perhaps become a productive, law abiding member of society.

**2005:** *Commonwealth v. Collins*, 888 A.2d 564 (Pa. 2005) (sentencing in October 1991). Counsel ineffective in failing to adequately investigate and presentation mitigation evidence. Counsel presented evidence of the defendant’s “good character” and also presented expert testimony demonstrating that the defendant had low intelligence, a history of drug and alcohol abuse, a lack of self esteem, and that he lacked a male role model in his life because his father left the family when the defendant was young. Counsel’s conduct was deficient though because counsel did not obtain a “social history” and met only briefly with the defendant’s family just prior to sentencing and told them to say “good things” about the defendant. Counsel failed to secure relevant school and mental health records, which would have demonstrated that the defendant was diagnosed with serious emotional problems from an early age and that such problems were compounded by a head injury he sustained in 1990. While the defendant had denied any head injuries, counsel had not asked anyone other than the defendant and could easily have obtained this information from family members. Prejudice found because if counsel had obtained these records and provided them to the defense psychologist at trial, he would have recommended neurological and neuropsychological testing. The evidence would have established that the defendant was abused by his father and other men as a child. He had cognitive defects and emotional problems, which supported two statutory mitigating circumstances: (1) the defendant was under the influence of extreme mental or emotional disturbance; and (2) the defendant’s capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.

*Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005) (trial in January 1990). Counsel ineffective in capital resentencing trial for failing to adequately prepare and present mitigation evidence. Counsel believed that they had no significant evidence in mitigation even though counsel were aware that the defendant had suffered a head injury prior to the murders. Counsel also were provided with the defendant’s prison records, which revealed the opinion of a consulting psychiatrist that the defendant had a change in behavior consistent with post-concussion syndrome and recommending a neuropsychiatric evaluation. Counsel failed to provide these records to their experts. One of these experts was aware of the head injury from hospital records and testified that it was his general practice to recommend additional evaluation by a neurologist. If counsel had adequately investigated, the evidence would have established that the defendant has organic brain damage, which would have exacerbated his underlying antisocial personality disorder. The defendant was unconscious for 45 minutes due to the head injury and developed seizures and posttraumatic amnesia as a result. In addition, the defendant had a “dramatic behavior change” with respect to violent tendencies which “was well-documented” in the prison records. This evidence would have supported two statutory mitigating circumstances: (1) extreme mental and emotional disturbance; and (2) substantially impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. “Had the jury heard this relevant evidence, there is a reasonable probability that at least one juror would have found an additional mitigating circumstance and struck a different balance in weighing the aggravating and mitigating

circumstances.”

**2004:** *In re Lucas*, 94 P.3d 477 (Cal. 2004) (crimes in October 1986 and affirmed on appeal in 1995). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigation. Counsel’s conduct was deficient under the “norms prevailing in California” and the ABA standards because counsel waited until just before sentencing and then conducted only a few brief interviews of family members and did not follow up on the information they provided to conduct additional investigation and gather records. Counsel’s stated reason for failing to follow up on the information concerning the defendant’s childhood abuse and confinement and other information was that the information was too remote and trivial and would make the defendant look like a career criminal. Counsel “did not regard evidence of child abuse or alcoholism in the family as particularly mitigating—an apparently idiosyncratic view not commonly shared by contemporary capital defense attorneys.” Counsel intended only to present testimony from the defendant and his wife, but the wife refused to testify and then the defendant also refused. Thus, no mitigation evidence was presented. Counsel’s conduct was not excused by the defendant’s refusal to testify or alleged failure to provide information about his background because “the accused would not necessarily understand the significance of the information that would be uncovered by such an investigation.” There was also no evidence that counsel actually pressed the defendant for the information. Prejudice established because adequate investigation would have revealed severe emotional and physical abuse as a young child, institutionalization from age seven in a home staffed by abusive, violent adults, and then juvenile confinement in facilities known for crowding, neglect, and abuse. This evidence would have provided some “explanation for petitioner’s criminal propensities and some basis for the exercise of mercy.”

*Hutchison v. State*, 150 S.W.3d 292 (Mo. 2004) (crimes in late 1995 and affirmed on appeal in 1997). Counsel ineffective for failing to adequately prepare and present mitigation evidence. Counsel’s conduct was deficient because “[t]hey spent nearly the entire time before trial preparing for the guilt phase and virtually no time preparing for the penalty phase.” *Id.* at 297. They hired only one expert because the family lacked additional money and did not investigate the defendant’s “life history or obtain any records documenting his troubled background and his mental and emotional deficits.” In short, they “were overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase. . . . Counsel knew that they needed to prepare for the penalty phase, but they left no time to prepare adequately and to present such evidence” after they were denied a continuance which left them with only eight months to prepare for trial. *Id.* at 302. Counsel argued that the defendant was a “follower” influenced by his co-defendants but “failed to investigate and present testimony in support of this theory.” *Id.* at 303.

Readily available records that trial counsel admitted they did not attempt to obtain would have documented [the defendant’s]

troubled childhood, mental health problems, drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems.

*Id.* at 304. The one expert counsel retained provided information about the defendant's "severe psychiatric problems," that he had been hospitalized, that he had an IQ of 76 and trouble in school, and that the defendant had suffered emotional and sexual abuse. Prejudice found because counsel presented only brief testimony from the defendant's parents about his learning disability and placement in special education classes. The court rejected any requirement of "a nexus between his mental capacity and the crime to admit such mitigating evidence." *Id.* at 305. The court also rejected piecemeal consideration of prejudice from "each family member's testimony," because "[t]he question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Id.* at 306. The testimony of the defense expert was not sufficient because of his "reliance solely on the background information" provided by the defendant, which left him "open to impeachment at trial." He also spent less than three hours with the defendant and "his report was very short" and "did not address the effect" the defendant's deficits had on him at the time of the crimes. *Id.* This was caused, in part, because trial counsel had instructed him to consider only where the defendant "was competent and whether he suffered from a mental disease or defect." *Id.* This expert did not address any statutory mitigating factors and "gave no interpretations and provided no testimony to assist the jurors in making an educated determination about [the defendant's] mental condition and whether it mitigated the offense." *Id.* at 306-07. The court noted that there was no allegation that counsel should have "shop[ped] for a more favorable expert," but alleged "only that the expert they hired should have conducted a more thorough investigation and evaluation." *Id.* at 307.

Although [the defendant's] family could not afford these experts, failure to do any follow-up cannot, under these circumstances, satisfy *Wiggins'* mandate to discover all "reasonably available mitigating evidence." The evidence, readily obtained and presented by postconviction counsel established that with adequate mental health evaluations, the jury would have heard significant evidence for mitigation.

*Id.*

***State v. Chew***, 844 A.2d 487 (N.J. 2004) (trial in June 1995). Counsel ineffective in capital sentencing for failing to adequately prepare and present mitigation. In preparation for sentencing, counsel retained a psychologist to assess any mitigating factors. The psychologist diagnosed: (1) personality disorder (NOS), mixed with dependent, histrionic, and antisocial features; (2) drug dependency; (3) depressive disorder; and (4)

developmental reading disability. He believed there was support for the statutory mitigating factor that the “defendant was under the influence of extreme mental or emotional disturbance.” After counsel learned that the defendant had an incestuous relationship with his sister though, counsel never discussed this information with the defense expert and did not present the expert testimony because she feared that this information had been disclosed to a state examiner, who had examined the defendant’s sister, and that this harmful information would be revealed to the jury. In sentencing, counsel presented only the testimony of a social worker who described the defendant’s family background of chaos, violence, sexual abuse, sexual promiscuity, beatings, excessive drinking, and lack of love and support. Counsel’s conduct was deficient because the decision not to call the expert was not based on an adequate investigation because counsel failed to investigate to determine whether the court-appointed examiner was aware of the defendant’s incestuous relationship with his sister. They never obtained his report or interviewed him. Counsel also failed to discuss this information with the defense expert, whose opinion would have been strengthened by the incestuous relationship because it demonstrated even greater problems than he had previously realized. Prejudice was found because presentation of the expert testimony in support of the extreme mental or emotional disturbance mitigating factor would have substantially affected the jury’s deliberations at the penalty phase. While the additional mitigating evidence had a potential downside, the defense expert’s opinion would have been supported by the additional evidence of incest, along with undisclosed evidence of the defendant’s abuse of animals and sexual abuse of a child.

***Commonwealth v. Moore***, 860 A.2d 88 (Pa. 2004) (trial in 1983). Appellate counsel was ineffective in failing to assert trial counsel’s ineffectiveness for failure to prepare and present mitigation evidence. Counsel presented no mitigation evidence. He asserted that the defendant declined to testify and he had no other mitigating evidence. Thus, counsel presented no opening and no evidence and only referred generically to possible mitigating circumstances in closing. The jury found two aggravating circumstances and no mitigating circumstances. On appeal, counsel alleged trial counsel’s ineffectiveness but failed to specify what mitigating evidence had been available. Thus, the issue of trial counsel’s ineffectiveness was denied on appeal. Appellate counsel was ineffective for failing to adequately present the available mitigating evidence, which included testimony from the defendant’s mother, sister, and wife of the defendant’s traumatic and abusive childhood, including witnessing his father slash his mother’s throat. The mother and sister had not been subpoenaed and had not been advised of the need for their testimony in sentencing. Although the ex-wife did appear under subpoena to testify at trial concerning an alibi, she would have testified in sentencing if counsel had explained the nature of the proceeding to her. While these witnesses were “obviously more cooperative in 2000 than in 1983,” *id.* at 99, and the defendant was an “uncooperative client,” *id.* at 100, counsel’s conduct was deficient because counsel was not “relieved of the duty to investigate potential mitigating evidence, particularly where counsel had no other penalty phase strategy,” *id.* at 100. Counsel’s conduct was not excused by any strategic reason.

Prejudice was found because without any mitigating evidence, the defendant's only chance for a life sentence would have been if the jury did not find either of the aggravating circumstances, which was unlikely based on the evidence presented by the state. New sentencing granted.

***Commonwealth v. Malloy***, 856 A.2d 767 (Pa. 2004) (sentencing in March 2000). Counsel was ineffective for failing to adequately prepare and present mitigation. Counsel's conduct was deficient because counsel met with the defendant only twice, did not apply for co-counsel or an investigator, and conducted no investigation. No evidence was presented in mitigation. Counsel's conduct was not excused by the defendant's failure to inform counsel of possible mitigation evidence and witnesses.

The onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client.

Counsel's conduct was also not excused by the defendant's statement in sentencing that he was satisfied with counsel.

The fact that appellant was satisfied with counsel at the sentencing hearing colloquy in no way proves that trial counsel's investigation and performance satisfied Sixth Amendment standards. Appellant is not a lawyer, nor was he in a position to know whether his counsel had performed competently. The measure of effectiveness is not whether one's client appeared satisfied at the time. A client is entitled to trust in the fact that his attorney will know what investigation to undertake, what leads to pursue, and what evidence to look for.

Prejudice found because, if counsel had adequately performed, the evidence would have shown that the defendant was physically abused as a child, he lived with his grandmother after his drug-addicted mother abandoned him, and he was institutionalized by age 12 because his grandmother could not control him. Although this evidence is not overwhelming, it was a "close case" and the state presented only one aggravating circumstance. On the other hand, counsel completely failed to "personalize appellant for the jury."

***Von Dohlen v. State***, 602 S.E.2d 738 (S.C. 2004) (trial in May 1991). Counsel was ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented evidence that the petitioner was a good husband, a good father, and a dependable employee. He grew up in a poor family and had suffered physical and emotional abuse as a child. He had no prior criminal record. His brother was murdered

just two weeks before the crimes and petitioner became withdrawn and depressed and began abusing alcohol and Valium. The “violent murder was completely unexpected and out of character for a man who had never displayed violent tendencies.” During sentencing, counsel presented testimony from a defense psychiatrist that petitioner suffered an “adjustment reaction with mixed features of emotions and conduct,” and pathological intoxication of alcohol and Valium abuse. The psychiatrist testified, however, that petitioner “did not have a chronic mental illness” and the prosecutor capitalized on this in closing arguments. Counsel’s conduct was deficient in failing to provide the defense expert with available medical records and testing relating both to the petitioner, as well as his father and brother. Prejudice found because, with the available records, the defense expert would have testified that the petitioner “suffered from severe, chronic depression, a major mental illness,” *Id.* at 742, with “psychotic and suicidal tendencies.” Counsel’s conduct was also deficient in failing to object to the prosecutor’s closing argument in sentencing inviting the jurors to put themselves in the “victim’s shoes,” which was improper under state law and impermissible under *Payne v. Tennessee*, 501 U.S. 808 (1991). Prejudice was not, however, established on this issue.

**2003:** *State v. Williams*, 794 N.E.2d 27 (Ohio 2003), *modified on reconsideration*, 814 N.E.2d 818 (Ohio 2004) (trial in March 1999). Counsel was ineffective in capital sentencing case for failing to object to improper prosecutorial argument and an improper instruction on mitigation. The court found that the trial court erred in denying counsel’s motion to withdraw from representation after the defendant assaulted one of his attorneys in front of the jury following his conviction. After the assault, counsel had very little communication with the defendant because they were frightened of him and they were worried that their fear would be revealed to the jury.

This is particularly damaging to a defendant during the penalty phase of a capital case when counsel must humanize the defendant for the jury, show his character in the best light available, and bring his good qualities to the fore.

*Id.* at 50. In closing arguments in sentencing the prosecutor argued that the jury should weigh nonstatutory aggravating circumstances that included the final thoughts of the murder victim, the suffering of the victim’s mother, and the death of the victim’s unborn child. All of these arguments were improper under state law. At the conclusion of sentencing the trial court instructed the jury that mitigating factors are those that are “extenuating or reducing the degree of the defendant’s blame or punishment.” This instruction was improper because mitigation is not about blame or culpability, but rather about punishment. Despite the prosecutor’s improper arguments and the improper instruction, counsel failed to object. The court found that there was no possibility, particularly in light of the prior physical assault of one counsel and the misgivings of both counsel about their ability to continue the representation of the defendant, that the failure to object was a conscious tactical decision. Prejudice was found because there was

substantial mitigation in the case and the crime appeared to be a crime of passion. The defendant's family testified that he had a strong close knit family that loved him and was willing to stand beside him. Prejudice was also found because the jury deliberated for six and a half hours before announcing a deadlock and when they were required to continue deliberations they deliberated for an additional eight and half hours before reaching a unanimous decision for death.

## **B. ONE DEFICIENCY**

### **1. STATE AGGRAVATION EVIDENCE OR ARGUMENT (STATE CASES ONLY)**

**2007:** *Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007). Counsel was ineffective in failing to object to improper victim impact testimony. Specifically, counsel failed to object when the state trooper victim's widow read from a prepared statement saying that her husband had been shown no mercy when he begged for his life and the defendant should be shown no mercy. She also cited the Bible as giving citizens duties and obligations to enforce the law. She also "beseech[ed]" and "beg[ged]" the jury to impose death. Counsel's conduct was deficient (and the trial court committed plain error) because "[t]his invocation of religious belief and obligation in the context of a capital sentencing recommendation is totally inappropriate." *Id.* at 210. Counsel also failed to object to the improper reading of cards the victim sent to other family members. Counsel's conduct was deficient (and the trial court committed plain error) in failing to object that the victim impact testimony was too long and overly emotional. The testimony covered 36 transcript pages, 28 of which was uninterrupted narrative.

While this Court declines to adopt specific rules governing the length of such testimony, we note that we have previously held that such statements should not be "lengthy" and that they should contain only a "quick glimpse" of the life that has been extinguished. Victim impact statements were never intended to be—and should not be allowed to become—eulogies, which summarize the life history of the victim and describe all of his or her best qualities.

*Id.* at 210. Here the victim impact evidence was "'too much'—both too long and too emotional." The court also failed to give an instruction on how the jury was to evaluate and consider the victim impact evidence, within the context of its overall sentencing decision even though a uniform instruction is generally given. Prejudice established even though the defense conceded the three aggravating factors as part of a reasonable strategy. The court emphasized, however, "that although a defendant's crime may make him eligible to receive the death penalty, a jury is never obligated to sentence a defendant to death, and that a single juror has the power to prevent a death sentence in a given case."

*Id.* at 214-15. Here, the prejudice was enhanced by the prosecution's reliance on the improper victim impact testimony in the closing argument that asserted a sentence other than death would be "a travesty." *Id.* at 215. The court's "confidence in the jury's sentencing verdict" was also undermined by counsel's failure to prepare and present mitigation evidence from former co-workers, who could provide "powerful, varied, unbiased, and potentially result-altering mitigating evidence." The evidence would have established the defendant had been a good and caring person as a fireman and EMT, had saved a number of lives, and was a good father prior to his descent into drugs culminating in this methamphetamine-related murder. His descent was fueled, in part, by his ex-wife's very public affair with his supervisor in the fire department and then his mother's death. The court did not reverse on this basis, however. It noted that the defendant would be entitled to an evidentiary hearing on this claim, but the issue was mooted because of the victim impact ruling.

- 2005:** *State v. Fudge*, 206 S.W.3d 850 (Ark. 2005). In split decisions for varying reasons, the court affirmed the trial court's ruling finding counsel to be ineffective in capital sentencing for failing to object to evidence of a prior conviction the defendant did not have that was used to support an aggravating circumstance. The aggravating circumstance was that the defendant had been convicted of prior felonies "an element of which was the use of threat or violence to another person or the creation of a substantial risk of death or serious physical injury to another person." The state submitted three exhibits in support of this factor, which were read but not given to the jury. The exhibits included prior convictions of: (1) battery in the first degree; (2) two counts of terroristic threatening; and (3) an additional two counts of terroristic threatening. The issue involved only the battery in the first degree because the lower court found that the defendant had actually only been convicted of "robbery, a less violent offense." Three judges found no deficient conduct (based on the defendant's statements to counsel) and no prejudice (due to the other evidence supporting the aggravating circumstance). Two judges declined to review the issue of deficient conduct because the State had not raised the issue on appeal and affirmed on the prejudice prong on the basis that the lower court's ruling was not clearly erroneous. A third judge voted to affirm without a separate opinion stating the reason. Yet another judge voted to remand for additional fact-finding because the actual exhibit showed a conviction for battery in the first degree, but the state conceded in briefing that it was only a robbery conviction.
- 2004:** *Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004). Counsel was ineffective in capital sentencing for failing to object to the prosecutor's closing argument that asked the jury to compare the defendant's worth and the victims' worth in an emotionally inflammatory fashion unrelated to the circumstances of the crime and traditional victim impact evidence.

## 2. INSTRUCTIONS

### a. U.S. Court of Appeals Cases

**2006:** *Lankford v. Arave*, 468 F.3d 578 (9th Cir. 2006), *cert. denied*, 128 S.Ct. 206 (2007). Under pre-AEDPA law, counsel ineffective in capital trial for requesting a jury instruction that eliminated Idaho's requirement that an accomplice's testimony must be corroborated by other evidence in order to convict a defendant. Petitioner and his brother were arrested based on fingerprints in the victim's van and other evidence. The petitioner's brother testified against him in exchange for a life sentence and the state's theory that petitioner was the actual killer depended heavily on his uncorroborated eyewitness testimony about the events. Counsel's conduct was deficient. He had conducted research at a law school library and took the instruction from a collection of federal instructions because there were no model instructions for Idaho at the time. While the instruction was correct under federal law, it was clearly incorrect under Idaho law, which expressly forbids "conviction on the basis of uncorroborated accomplice testimony. "It was a young lawyer's mistake, akin to failing to check the pocket part, but it was a mistake, plainly enough," *id.* at 585, based on "a misunderstanding of the law," *id.* at 584 (quoting *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir.1996)).

### b. State Cases

**2004:** *Thomas v. State*, 83 P.3d 818 (Nev. 2004). Counsel ineffective in capital sentencing for failing to object to the trial court's erroneous instruction that informed the jury that the Board of Pardons could, under certain circumstances, modify a life without parole sentence. While the Nevada Supreme Court had approved this instruction in 1985, the state statute was amended in 1995. The amendments provide that the Pardons Board cannot commute a prison term of life without possibility of parole to a sentence allowing parole. Because the Defendant's crimes were committed in 1996, there was no circumstance or condition under which the Pardons Board could modify a life without parole sentence. Counsel's conduct was deficient in failing to object to the erroneous instruction to the jury. Prejudice found because the jury could have reasonably believed that a death sentence was necessary to prevent the possibility that the defendant could eventually receive parole if they returned a sentence of life without possibility of parole. Prejudice was exacerbated by the prosecutor's future dangerousness arguments. Trial and appellate counsel's conduct was also deficient in failing to object to the prosecutor's improper arguments in the closing argument of the penalty phase. First, the prosecutor asserted, "This is not a rehabilitation hearing. There is no program that we know of that rehabilitates killers." This argument was based on facts and inferences not supported by the record. Second, the prosecutor argued: "The defendant is deserving of the same sympathy and compassion and mercy that he extended" to the victims. This argument was improper because it "implored [the] jury to make a death penalty determination in the cruel and malevolent manner shown" by the defendant and was calculated to incite

passion rather than a reasoned moral response to the evidence. While this argument has been approved by the Nevada Supreme Court when the argument is made in response to defense counsel raising the issue of mercy, defense counsel in this case did not invoke “mercy” or “sympathy” or “compassion” in closing argument. While trial and appellate counsel’s conduct was deficient in failing to object to these arguments, the court declined to address prejudice since a new penalty hearing was already required.

### 3. MISCELLANEOUS

#### a. U.S. Court of Appeals Cases

**2008:** *Lawhorn v. Allen*, 519 F.3d 1272 (11th Cir. 2008) (trial in April 1989). Counsel was ineffective in capital sentencing under AEDPA for waiving his closing argument in sentencing. Counsel’s conduct was deficient and was not based on a reasonable strategy because counsel’s decision was based on “a gross misunderstanding” of state law. While counsel believed that by waiving his closing, the state would be prohibited from making a closing, this was incorrect under state law and counsel had failed to adequately research the issue in preparation for trial. “Such preparation includes an understanding of the legal procedures and the legal significance of tactical decisions within these proceedings.” The court reviewed *Bell v. Cone* but found this case factually distinguishable. The state court’s decision was unreasonable because the court found that counsel had researched the issue and found a state case in support of his “strategy,” which was not supported by the evidence. Prejudice was also found because counsel forfeited the opportunity to remind the jury of important mitigation evidence presented during the trial that indicated substantial domination of the defendant by his aunt, who requested that he kill the victim because she was afraid of him. Here, the jury recommended death by a vote of 11-1. Under state law, at least a 10-2 vote was required for a verdict of death, so the defendant needed only to convince two more jurors.

*Spisak v. Mitchell*, 512 F.3d 852 (6th Cir. 2008) (reinstating 465 F.3d 684 (6th Cir. 2006), *vacated and remanded*, 128 S. Ct. 373 (2007)), *cert. granted*, \_\_\_ S.Ct. \_\_\_, 2009 WL 425079 (Feb. 23, 2009) (sentencing in August 1983). Under AEDPA review, counsel ineffective in capital sentencing for repeatedly stressing the brutality of the crimes and demeaning the defendant during closing arguments. Despite counsel's claim that he was attempting to portray the defendant as sick and twisted to mitigate, counsel provided an extremely graphic and overly descriptive recounting of the defendant's crimes, described the defendant as a “sick twisted mind” associated with the Third Reich and Nazis, told the jury that the defendant was undeserving of mitigation, and suggested that either outcome, death or life, would be a valid conclusion.

[T]rial counsel abandoned the duty of loyalty owed to Defendant. . . . [T]rial counsel's hostility toward Defendant aligned counsel with the prosecution against his own client. Much of Defendant's

counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim.

*Id.* at 706. Prejudice found.

**2005:** *Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005). Counsel was ineffective in sentencing for failing to advise the defendant of his right to testify. The court was not constrained in this case by the AEDPA standards because the state courts failed to address this issue even though it was “squarely presented” in state court. Thus, the issue was not “adjudicated on the merits” for purposes of 28 U.S.C. § 2254(d), just as the Supreme Court’s review was “not circumscribed by a state court conclusion with respect to prejudice [in *Wiggins*], as neither of the state courts below reached this prong of the *Strickland* analysis.” (quoting *Wiggins v. Smith*, 123 S. Ct. 2527, 2537 (2003)). The court noted, however, that the result would be the same under the AEDPA. The court declined deference to the state court finding that counsel advised the defendant of his right to testify in sentencing because this finding was “flatly contradicted” by counsel’s testimony. In determining whether counsel’s conduct was deficient, the court “look[ed] first to the ABA Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” The court noted that the 2003 ABA Guidelines for death penalty cases provide that “[c]ounsel should consider, and discuss with the client, the possible consequences of having the client testify . . . .” In failing to advise the defendant of his right to testify, “counsel also defaulted on their ‘duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Although counsel’s advice “might go either way, . . . [t]he point here is that the final choice must be the client’s. . . .” The defendant was prejudiced because no mitigating evidence was presented. State law requires that the jury weigh aggravating and mitigating circumstances. “With nothing to put on the mitigating side of the scale, the jury was almost certain to choose a death sentence.” If counsel had performed adequately, the defendant’s testimony would have revealed “a deeply troubled history” of the kind found to be relevant in *Wiggins*. *Id.* at 386. He suffered physical and emotional abuse and struggled with drugs and alcohol.

#### **b. State Cases**

**2008:** *Green v. State*, 975 So. 2d 1090 (Fla. 2008) (crimes in 1989 and direct appeal in 1994). Counsel ineffective in capital sentencing for failing to investigate a prior New York robbery case used by the state in support of a prior violent felony conviction aggravating factor. Counsel challenged admissibility unsuccessfully on the basis of remoteness and the failure to offer a certified copy of the judgment. Counsel’s conduct was deficient because counsel failed to obtain the file from New York even though it was readily available. Counsel’s conduct was not excused even though the defendant admitted to the

robbery. Prejudice established because the file revealed that the defendant had pled guilty to a simple robbery when he was 18 rather than an “armed robbery” as the state’s witnesses testified. The New York court then vacated the robbery conviction and entered a youthful offender finding and sentence. In short, under New York law, a youthful offender adjudication is not a “conviction” and, therefore, does not satisfy the prior violent felony conviction aggravator under Florida’s death penalty statute. In addition to the prejudice of this aggravating factor, the defendant was prejudiced by the characterization of the prior as an “armed robbery” rather than a simple robbery because the capital murder was committed during the course of an armed robbery.

***Williams v. State***, 254 S.W.3d 70 (Mo. App. 2008). Counsel ineffective in murder case for failing to adequately establish the defendant’s indigence in support of a motion for a psychiatric expert to evaluate the defendant’s capacity at the time of the offense and to assist counsel. The defendant was indigent, but counsel was retained for him by his father. Counsel requested funds for a defense expert and presented evidence that the defendant had twice been involuntarily committed and diagnosed with a schizophreniform type psychosis within several years of the crime. Counsel also presented testimony from the defendant to establish indigence that was inadequate under the state statute requiring an affidavit of indigence and specific information. Counsel’s conduct was deficient for failing to present adequate testimony of evidence, which would have entitled the defendant to appointment of an independent expert. Prejudice was found because the court-appointed competence evaluation was insufficient. In addition, prejudice was found despite the defendant’s failure to establish the expected testimony of an independent expert. “It would be useless to require such a movant, now proven to have been indigent, to produce at a post-conviction hearing the same expert testimony he could not afford at trial.”

**2006:** ***Commonwealth v. May***, 898 A.2d 559 (Pa. 2006). Trial counsel ineffective in failing to assert as error the trial court’s ruling in capital sentencing that the defendant’s proffered mitigation evidence was irrelevant and inadmissible. Specifically, the defendant sought to present evidence, under the “catchall” mitigator, that his father physically and sexually abused him and forced him to watch the physical and sexual abuse of his sisters and mother. Prejudice was clear because, with an aggravating circumstance established and no mitigating circumstances, state law required the jury to impose a sentence of death.

**2005:** ***Salazar v. State***, 126 P.3d 625 (Okla. Crim. App. 2005). Counsel ineffective in jury trial determination of whether the defendant was mentally retarded due to counsel’s failure to investigate with respect to the testing conducted by the state’s expert. Although the defendant’s IQ score fell in the mentally retarded range on his testing, the state’s expert testified that, based on two tests, the defendant was malingering.

[The state’s expert] effectively discredited Petitioner’s experts by claiming they used improper testing procedures, by using tests not

“normed” for a person like Petitioner, and by not properly reporting the results. Had [he] not done the exact same things, there would be no problem.

Counsel did not cross-examine him, however, with respect to the malingering tests he conducted or other investigate to determine the nature of that testing. “One test counsel recognized as the TOMM test and the other he did not recognize but it did not occur to him to inquire into the origins of that test.” Counsel did not cross-examine the state’s expert concerning the malingering tests for strategy reasons but “it was a strategy based upon counsel’s admitted failure to recognize the significance of and determine the origins of [the expert’s] testing and raw data.”

We cannot fathom, in a case which boiled down to a battle of experts, why Petitioner’s counsel failed to research the tests [the state’s expert] performed on Petitioner to confirm the origins of and the scientific validity of those tests before Petitioner’s mental retardation hearing. The raw data was provided to counsel prior to the mental retardation jury trial. The evidence was discoverable with due diligence—that is clear from another attorney’s discovery of the information in a separate and unrelated proceeding.

If counsel had adequately investigated, he would have discovered that one of the malingering tests given by the state’s expert was a non-standardized test the expert “made up and . . . it was not administered pursuant to accepted scientific norms.” “No reasonable trial strategy would have supported a decision not to utilize this important impeachment evidence.” Prejudice found because counsel could have discredited the state’s expert in the exact same way that he had discredited Petitioner’s experts. Prejudice was also clear because “three juror surveys” revealed that the state’s expert testimony was the most credible to the jury. Because the court was “bothered that this State’s witness seemingly, intentionally, misled the trial court and the parties about the reliability of his own tests to strengthen the State of Oklahoma’s case,” the court modified the sentence to life without parole rather than remanding for a new hearing.

**2004:** *In re Davis*, 101 P.3d 1 (Wash. 2004). Counsel was ineffective in sentencing for failing to object to the shackling of the defendant. Counsel objected to the shackling on the first day of jury selection but was overruled. A mistrial was subsequently granted due to the trial court’s poor health and an order was entered that continued all prior rulings unless modified by the new judge. Counsel did not object to the shackling during the second trial, which resulted in the defendant’s conviction and death sentence. “Assuming that the failure to object was deficient performance,” *id.* at 30, there was prejudice during the trial even though one juror saw the leg restraints on two occasions because there was overwhelming evidence of guilt. Prejudice was found during sentencing, however,

because “placing the [D]efendant in restraints indicates to the jury that the Defendant is viewed as a ‘dangerous’ and ‘unmanageable’ person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security.” *Id.* at 32. Thus, even though no juror saw the shackles in sentencing, the court could not “be assured that any negative inference as to Petitioner’s character was cured” from the juror’s viewing of the shackles during trial. *Id.* In so finding, the court declined to consider juror testimony of no impact because of “the remoteness in time of the reference hearing from the actual verdict.” *Id.* at 24.