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Federal Habeas Review of Death Sentences, Where are We Now: A review of Wiggins v. Smith and Miller-el v. Cockrell

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FEDERAL HABEAS REVIEW OF DEATH SENTENCES, WHERE ARE WE NOW?: A REVIEW OF *WIGGINS V. SMITH* AND *MILLER-EL V. COCKRELL*

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National commentators have proclaimed the United States Supreme Court's 2002-2003 Term as one where civil liberties triumphed.[1] Among the heralded victories for civil liberties are two decisions in which death row inmates seeking federal habeas corpus relief prevailed. The Court, which in the past has restricted and even precluded the ability of federal courts to grant relief to death row inmates, found that Kevin Wiggins was denied effective assistance of counsel during capital sentencing proceedings entitling him to habeas relief as to his death sentence;[2] and found that Thomas Joe Miller-El was entitled to a certificate of appealability,[3] commonly referred to as a COA, ensuring that a federal appellate court will review his state murder conviction and death sentence for racial bias in the jury selection process.[4] As a result of these decisions, Mr. Wiggins will be

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1. *See* Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, 152 N.Y. Times A1, A18 (July 1, 2003); Charles Lane, *Civil Liberties Were Term's Big Winner*, Wash. Post A1 (June 29, 2003).

2. *Wiggins v. Smith*, 123 S. Ct. 2527, 2544 (2003).

3. Under federal habeas corpus statutes, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), before a habeas petitioner can obtain appellate review of the district court's denial of the petition he must first obtain a certificate of appealability from a federal court finding that he "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000).

4. *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1045 (2003). In addition to these two cases, the Court also considered the scope and availability of federal habeas corpus relief to state and federal prisoners in other cases this past Term. *See e.g. Price v. Vincent*, 123 S. Ct. 1848, 1854-55 (2003) (reversing circuit court grant of habeas relief in first-degree murder case because state court's double jeopardy determination was not an objectively unreasonable application of law); *Demore v. Kim*, 123 S. Ct. 1708, 1713-14 (2003) (finding Immigration and Nationality Act did not deprive Supreme Court of the ability to grant habeas relief to immigrant challenging his detention); *Massaro v. U.S.*, 123 S. Ct. 1690, 1696 (2003) (finding federal prisoner not procedurally barred from raising ineffective assistance of counsel claim in collateral proceeding when he did not raise it on direct appeal); *Woodford v. Garceau*, 123 S. Ct. 1398, 1403 (2003) (finding AEDPA applicable to petitioner's habeas petition); *Lockyear v. Andrade*, 123 S. Ct. 1166, 1175-76 (2003) (finding habeas petitioner not entitled to federal habeas relief because California's three strike law was not contrary to or an unreasonable application of Supreme Court law on cruel and unusual punishments); *Clay v. U.S.*, 123 S. Ct. 1072, 1079 (2003) (finding federal prisoner's motion for post-conviction relief timely under applicable statute of limitations); *Woodford v. Visciotti*, 537 U.S. 19, 26-27 (2002) (per curiam) (reversing grant of habeas on grounds that state court's

afforded a new sentencing proceeding and another chance to ask a jury to spare his life; Mr. Miller-El will have another opportunity to ask a federal court to grant him relief from his murder conviction and death sentence.

The Court's decisions to grant these men further proceedings in their death penalty cases pose interesting questions about the Justices' evolving views on the death penalty and federal habeas corpus review. For example, with respect to *Wiggins*, Charles Lane of the *Washington Post* observed that the decision "adds new specificity to the court's standards for attorney performance, signaling lower courts and state governments that the Justices intend to keep a closer watch on the right to counsel."[5] Mr. Lane further noted that "[t]he result in Wiggins' case is all the more striking because the court and Congress have set high legal hurdles for challenges of state criminal judgments in federal courts, through the legal device know as habeas corpus."[6] Linda Greenhouse of the *New York Times* stated that both *Wiggins* and *Miller-El* reflect a concern by a majority of Justices that "the lower federal courts were not monitoring with sufficient vigilance the quality of justice being meted out by state courts."[7]

This article examines the applicable federal statutes governing federal habeas corpus relief and the manner in which federal courts have applied those statutes in reviewing state court decisions. The article then explores the Court's decisions in *Wiggins* and *Miller-El* in an effort to understand the concerns and issues that compelled a majority of the Court to find in favor of these two death row inmates under the current restrictive habeas corpus statutes. The article also considers the impact of *Wiggins* and *Miller-El* on the Court's death penalty and habeas jurisprudence and the extent to which these decisions change or provide greater habeas protection for other death row inmates.

I. INTRODUCTION TO FEDERAL HABEAS CORPUS AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

Article I, section 9, of the United States Constitution provides, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[8] The writ of habeas corpus traces its roots at least as far back as fourteenth century English law and has been championed as the "Great Writ of Liberty."[9] The writ at its most

finding that petitioner had not shown prejudice with respect to his ineffective assistance of counsel claim was not contrary to or an unreasonable application of federal law); *Early v. Packer*, 537 U.S. 3, 11 (2002) (reversing a grant of the writ because state court's denial of relief was not contrary to or an unreasonable application of federal law).

5. Charles Lane, *Death Penalty of Md. Man Is Overturned*, Wash. Post A1, A14 (June 27, 2003).
6. *Id.*
7. Greenhouse, *supra* n. 1, at A18.
8. U.S. Const. art. I, § 9(2).
9. Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 1 (N.Y.U. Press 2001).

exalted enforces the rule of law, protects individual liberty, and curtails governmental oppression.[10]

Since the beginning of this country's history, Congress has provided federal courts with the express authority to issue writs of habeas corpus to federal prisoners being held in custody in violation of the Constitution, and later to state prisoners being held in custody in violation of the federal Constitution, federal laws, or federal treaties.[11] Under modern federal habeas law, a federal court may issue a writ of habeas corpus ordering the release of a state or federal prisoner from custody unless a new trial or other appropriate proceeding is held within a certain specified period of time.[12] Theoretically, a federal court's power to issue the writ ensures that no one is held in custody in either state or federal prison whose conviction or sentence was obtained or otherwise imposed in violation of the federal Constitution or federal law.

However, by issuing a writ of habeas corpus and ordering the release or retrial of a state prisoner, a federal district court essentially is "reversing" a decision by the highest court of the state in which the prisoner was convicted and sentenced.[13] Accordingly, a number of people have criticized the modern habeas corpus system as allowing a federal court to usurp the authority of a competent

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10. *See id.* at 12; Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 Wash. & Lee L. Rev. 1 (1997).

11. For a general discussion of the history of the writ of habeas corpus in the United States, see Erwin Chemerinsky, *Federal Jurisdiction* §§ 15.2-15.3, 868-80 (4th ed., Aspen 2003); Randall Coyne & Lyn Entzeroth, *Capital Punishment and the Judicial Process* 661-69 (2d ed., Carolina Academic Press 2001); William F. Duker, *A Constitutional History of Habeas Corpus* (Greenwood Press 1980). Professor Eric Freedman provides a provocative look at the history of the writ of habeas corpus in *Habeas Corpus: Rethinking the Great Writ of Liberty*. Professor Freedman argues that the Suspension Clause of the Constitution was intended to provide the writ of federal habeas corpus to both state and federal prisoners and that the First Congress granted federal courts the power to issue the writ to both state and federal prisoners in the Judiciary Act of 1789. Freedman, *supra* n. 9, at 2-3. Other scholars argue that the Judiciary Act of 1789 did not confer on federal courts the power to issue the writ to state prisoners and that the extension of the writ to state prisoners did not occur until the post-Civil War period. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* vol. 1, § 2.4d, 42, 47 (4th ed., LexisNexis 2001).

12. For example, the United States District Court for the District of Maryland granted a writ of habeas corpus to Mr. Wiggins ordering that he "shall be released within thirty (30) days unless within that time respondents advise this court that they intend to appeal this decision, in which event counsel shall contact the court to discuss the issue of the appropriate forum to consider the question of petitioner's release pending appeal." *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 577 (D. Md. 2001) (emphasis omitted). Respondents appealed, and the Fourth Circuit reversed. *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002). As discussed *infra*, on June 26, 2003, the Supreme Court reversed the Fourth Circuit. *Wiggins*, 123 S. Ct. 2527.

13. Although the process may vary somewhat among the states, there are in general three stages in a criminal case as follows:

> **Primary System:** 1. Trial in state court resulting in conviction and sentence → 2. Direct appeal to highest state court → 3. Certiorari petition to U.S. Supreme Court;
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> **State Post-Conviction:** 4. Post-conviction application typically filed in trial court → 5. Post-conviction appeal to highest state court → 6. Certiorari petition to U.S. Supreme Court;
>
> **Federal Post-Conviction:** 7. Petition for writ of habeas corpus filed in federal district court → 8. Appeal to United States Circuit Court of Appeals → 9. Certiorari petition to U.S. Supreme Court.

See Coyne & Entzeroth, *supra* n. 11, at 637 (reformatted).

state court and as permitting a convicted criminal—indeed, a convicted killer—to engage in endless appeals and delays in an effort to overturn his conviction and sentence, even after a full hearing of his constitutional claims in state court.[14] Needless to say, the power conferred on federal courts to grant such relief implicates some of the most basic ideas concerning the relationship between federal and state courts and touches on a number of the more emotionally and politically charged aspects of federalism.[15]

The United States Supreme Court has reflected these conflicting and divisive views of the writ. For example, commentators generally describe the Warren Court as exalting the writ and expanding the ability of state and federal prisoners to obtain federal habeas review, thus expanding the rights of criminal defendants in general.[16] In contrast, the Burger Court and the current Rehnquist Court have contracted, and in some cases precluded, the ability of prisoners to have their constitutional claims heard by a federal court in federal habeas review; and in so doing, the Court has limited or curtailed the avenues for relief that a prisoner on death row can pursue in challenging his death sentence.[17]

In April 1996, Congress substantially amended the federal habeas corpus statutes,[18] ushering in a new regime of procedural rules governing habeas corpus review of federal and state prisoners' constitutional claims under the aegis of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[19] The AEDPA was in part a response to the domestic terrorist attack in Oklahoma City on April 19, 1995, and also a response to long-simmering dissatisfaction with habeas review.[20] Nonetheless, the amendments to federal habeas law were not without controversy or opposition, including serious concerns that the amendments might so limit habeas review as to amount to a suspension of the writ in violation of Article I, § 9 of the Constitution.[21] While strongly supporting the AEDPA, President Clinton appeared mindful of, although unpersuaded by, these concerns. In signing the AEDPA into law, the President stated:

> I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served. Some have expressed the concern that two provisions of this important bill could be interpreted in a manner that would undercut meaningful Federal habeas corpus review. I have signed this bill because I

14. Chemerinsky, *supra* n. 11, at § 15.1, 863-66.

15. *See id.* at § 15.1, 861-67.

16. *See id.* at § 15.2, 871-72.

17. *See id.* at § 15.2, 870-73; Coyne & Entzeroth, *supra* n. 11, at 664-69.

18. *See* 28 U.S.C. §§ 2241-56.

19. The AEDPA has been described by one scholar as the most significant change in habeas corpus law since 1867. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 Conn. L. Rev. 919, 923 (2001).

20. *See e.g.* Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 Minn. L. Rev. 1015 (1993). For a critique of the political forces giving rise to the AEDPA, see James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brook. L. Rev. 411, 411-16 (2001); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 706-31 (2002).

21. Liebman, *supra* n. 20, 411-16; Stevenson, *supra* n. 20, at 706-31.

> am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.[22]

Notwithstanding these assurances, the AEDPA has had a tremendous impact on the ability of federal district and circuit courts to exercise "meaningful" review of constitutional claims raised by prisoners.

At the same time that Congress was curtailing the ability of federal courts to review a state prisoner's conviction and sentence, a number of organizations—such as the American Bar Association[23]—and governmental leaders—including former governors of Illinois and Maryland[24]—were raising significant concerns about the process by which states impose the death penalty. Among the concerns is the disquieting evidence that there are the number of innocent people who until recently were awaiting execution on death row in a number of different states;[25] the likelihood that there remain innocent people on death row;[26] chilling accounts of incompetent, drunk, or sleeping counsel "representing" individuals charged with capital murder;[27] and mounting evidence regarding the racial disparity involved in the way the death penalty is administered.[28]

The Court, in granting certiorari and reviewing habeas cases, appears to be grappling with these concerns and the limitations that the AEDPA imposes on federal courts. Among the significant changes affecting habeas review that are considered in this article are: (1) the statutory provisions setting out the standard of review a federal court must apply when reviewing a state court's decision and findings of fact and law, and (2) the statutory provisions setting out the process by which a habeas petitioner may attain appellate review of a federal district court's denial of his habeas petition.[29]

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22. William J. Clinton, Statement, *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996* (White House, Apr. 24, 1996), in Pub. Papers of the Pres. of the U.S.: William J. Clinton, bk. 1, 631 (U.S. Gov. Printing Off. 1997).

23. *See* Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 Geo. J. on Fighting Pov. 3 (1996).

24. *See* Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. Colo. L. Rev. 42, 43-48 (2002); Carlos Sadovi, *Governor Vows He Won't Be Intimidated*, Chi. Sun-Times 28 (Oct. 30, 2002); CBS News, *Maryland Death Penalty Moratorium* <http://www.cbsnews.com/stories/2002/05/09/politics/printable508491.shtml> (May 9, 2002).

25. *See* Coyne & Entzeroth, *supra* n. 11, at 32-37; James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839 (2000).

26. Bright, *supra* n. 10, at 23-24; Adam Liptak, *U.S. Judge Sees Growing Signs that Innocent Are Executed*, 152 N.Y. Times A10 (Aug. 12, 2003).

27. Bright, *supra* n. 10, at 17-23; Coyne & Entzeroth, *supra* n. 23, at 3; Liebman, *supra* n. 25, at 1850; James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2102-06 (2000).

28. *Cf.* Coyne & Entzeroth, *supra* n. 11, at 32-37; Liebman, *supra* n. 25, at 1844.

29. These two changes are not the only changes that the AEDPA brought to habeas review. Other dramatic changes include: (1) a one-year statute of limitations for filing habeas petitions, Hertz & Liebman, *supra* n. 11, at vol. 1, § 5.2, 230; (2) access to and compensation for counsel in habeas, *id.* at vol. 1, § 12.3b, 612-22; and (3) limitations on successive habeas petitions. *Id.* at vol. 2, § 28.1, 1263.

II. *WIGGINS V. SMITH:* STRUGGLING WITH THE MEANING OF THE STANDARD OF REVIEW UNDER PRE-AEDPA LAW AND § 2254(d)(1)

To understand the issues before the Supreme Court in *Wiggins v. Smith* and the current struggle over the standard of review federal courts should apply in habeas petitions requires one to examine the standard of review prior to 1996 and the AEDPA amendments. The change in the standard of review has had a significant impact on a federal court's power to grant relief and a state prisoner's ability to obtain relief from a conviction or sentence that a federal court may believe violates the federal Constitution.

For many years prior to the AEDPA, federal courts engaged in de novo review of any legal claim or mixed question of law or fact that a prisoner raised in his habeas petition.[30] Thus, prior to 1996, a federal court "would consider both types of questions [purely legal questions and mixed questions of law and fact] *de novo* - meaning, from scratch, or without regard to the state court's prior decision of the same question in the same case."[31] In conducting this review, the pre-AEDPA court could rely on Supreme Court precedents as well as the precedents of the applicable circuit court, subject to nonretroactivity principles.[32] If the federal court in its independent de novo review concluded that a prisoner's constitutional rights had been violated, the court could grant habeas relief.

In enacting the AEDPA, Congress dramatically changed this standard of review by adding § 2254(d), which provides:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[33]

The "contrary to" and "unreasonable application of" language of § 2254(d)(1) did not exist in the pre-AEDPA habeas statutes.[34] Moreover, § 2254(d)(1) indicates

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30. *Id.* at vol. 1, § 2.4b, 25. For an interesting discussion of the history of the de novo standard of review, see Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate after* Williams v. Taylor, 2001 Wis. L. Rev. 1493. For further discussion on the history of habeas review, see Freedman, *supra* n. 9, at 3.

31. Hertz & Liebman, *supra* n. 11, at vol. 1, § 2.4b, 25.

32. *Id.* at vol. 1, § 2.4b, 26.

33. 28 U.S.C. § 2254(d).

34. Indeed, as discussed *infra*, the Supreme Court has held that a state court decision should be upheld by a federal court on habeas review even if the federal court finds that the state court's application of the Constitution is wrong, provided that the state court's wrong application of the law is not "unreasonable." *Williams v. Taylor*, 529 U.S. 362, 365 (2000). For further discussion of the changes that the AEDPA has brought to federal review of state court's conclusions of law and mixed questions of law and fact, see Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 Ohio St. L.J. 731, 740-54 (2002); Steinman, *supra* n. 30, at

only Supreme Court precedent may be applied in federal habeas and not the law of the circuit, which is a significant change from pre-AEDPA standards for reviewing state court decisions.[35] On its face, § 2254 dramatically curtails the power of federal courts over state court decisions.

Further, the AEDPA amendments provide tremendous deference to state court factual determinations. In addition to the language in § 2254(d)(2), 28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.[36]

Surmounting the hurdles of § 2254(e)(1) can be monumental.

A. Williams v. Taylor: *The Supreme Court's Initial Attempt to Interpret § 2254(d)(1)*

After the enactment of the AEDPA amendments, federal courts were left to struggle with the meaning of § 2254(d)(1)'s requirement that a court was authorized to grant habeas relief only where the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[37] As noted above, prior to the AEDPA amendments, the federal courts applied a de novo standard of review when reviewing a state prisoner's petition for habeas relief. Interpretation of the new language in § 2254(d)(1) was critical to habeas petitioners. Some courts, particularly the Fourth and Fifth Circuits, initially applied such a deferential standard for reviewing state court decisions as to make those state

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1507; Claudia Wilner, *"We Would Not Defer to That Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. Rev. 1442 (2002).

35. Hertz & Liebman, *supra* n. 11, at vol. 1, § 2.4b, 26.

36. 28 U.S.C. § 2254(e)(1).

37. *Id.* § 2254(d)(1).

decisions almost, if not absolutely, impenetrable to habeas corpus relief.[38] Other circuits applied somewhat differing standards of review.[39]

The circuit courts' differing applications of § 2254(d)(1) came to a head in *Williams v. Taylor*, a case in which the Fourth Circuit denied habeas relief to Terry Williams, a death row inmate who claimed that his trial counsel rendered ineffective assistance of counsel during the sentencing phase of his Virginia capital murder trial.[40] Because *Williams* is critical to the Court's decision this Term in *Wiggins*, a brief discussion of the case is warranted.

In 1986, a Virginia jury convicted Mr. Williams of the capital murder of Harris Stone, a crime to which Mr. Williams had confessed several times. During the capital sentencing phase of the trial,[41] the prosecution introduced evidence of Mr. Williams' criminal history, which included two previous violent attacks on elderly victims.[42] The State also called two expert witnesses who testified that Mr. Williams posed "a serious continuing threat to society."[43] Mr. Williams' defense to the State's call for the death penalty was limited: (1) defense counsel pointed out on cross-examination of the State's witnesses that Mr. Williams confessed to Mr. Stone's murder; (2) three defense witnesses—one of whom defense counsel only discovered in the audience during trial and whom counsel never interviewed—testified that Mr. Williams was "a nice boy"; and (3) a tape recorded excerpt from a psychiatrist, who simply reiterated Mr. Williams' interview statement that in a prior robbery Mr. Williams "removed the bullets from the gun so as not to hurt anyone."[44] After hearing this evidence, the jury sentenced Mr. Williams to death; the trial judge agreed that the punishment was just.[45]

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38. *See e.g. Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998) ("In other words, *habeas* relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)) (internal quotations omitted)), *rev'd*, 529 U.S. 362; *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000) ("An application of law to facts will not be deemed unreasonable, unless reasonable jurists 'would be of one view that the state court ruling was incorrect.'" (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996))).

39. *See e.g. Hill v. Brigano*, 199 F.3d 833, 839 (6th Cir. 1999); *Barnes v. Scott*, 201 F.3d 1292 (10th Cir. 2000). The Sixth Circuit stated:

> This standard requires this court to uphold a state court's determination unless the "unreasonableness of a state court's application of clearly established Supreme Court precedent will not be 'debatable among reasonable jurists,' *Drinkard [v. Johnson]*, 97 F.3d at 769, if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.'" *Nevers*, 169 F.3d at 362.

Hill, 199 F.3d at 839.

40. *See* 529 U.S. at 362.

41. Generally, capital cases are tried in two phases. During the first part of the trial, the jury determines whether the defendant is guilty. If the jury finds the defendant guilty, the case proceeds to the sentencing phase of trial during which the jury determines whether the defendant should be sentenced to death or sentenced to a term of imprisonment, such as life imprisonment or life imprisonment without the possibility of parole.

42. *Williams*, 529 U.S. 368.

43. *Id.* at 368-69.

44. *Id.* at 369.

45. *Id.* at 370.

On direct appeal, the Virginia Supreme Court affirmed Mr. Williams' conviction and death sentence, and Mr. Williams sought state collateral relief.[46] The same trial judge who presided over Mr. Williams' capital trial and sentencing presided over the state collateral hearing at which Mr. Williams set forth extensive evidence showing that defense counsel failed to discover significant mitigating evidence and failed to render effective assistance of counsel during sentencing.

For Mr. Williams to prevail on his claim of ineffective assistance of counsel, he would have to show that (1) counsel's performance "fell below an objective standard of reasonableness,"[47] and (2) there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[48] The trial court affirmed Mr. Williams' murder conviction; however, in reviewing counsel's performance during sentencing—including counsel's lack of investigation and preparation for the capital sentencing proceedings—the trial court found that, in light of *Strickland v. Washington*, counsel's second stage investigation and performance was constitutionally deficient.[49] Accordingly, the trial court recommended a rehearing on sentencing.

The Virginia Supreme Court reversed, rejecting the trial court's finding that counsel had been ineffective during sentencing.[50] In its review of Mr. Williams' case, the court found that *Lockhart v. Fretwell*[51] had modified *Strickland*. Applying this modified standard of effective assistance of counsel, the Virginia Supreme Court found counsel's performance was constitutionally acceptable.

Having exhausted his state remedies,[52] Mr. Williams then sought federal habeas relief. He filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, raising once again his claim that trial counsel had been ineffective during the sentencing phase of trial. The federal district court granted the writ, finding that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of"[53] the applicable United States Supreme Court law. The State appealed to the Fourth Circuit.[54] The Fourth Circuit stated that on habeas review, a federal court could grant habeas relief only if the state court "decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable."[55] Needless to say, under this extraordinarily deferential

46. *Id.*

47. *Strickland v. Wash.*, 466 U.S. 668, 687-88 (1984).

48. *Id.* at 694.

49. *Williams*, 529 U.S. at 370-71.

50. *Id.* at 371-72.

51. 506 U.S. 364 (1993).

52. One of the requirements that a habeas petitioner must satisfy before seeking federal habeas relief is exhaustion of all available state remedies. 28 U.S.C. § 2254(b)(1), (c).

53. *Williams*, 529 U.S. at 373-74 (quoting 28 U.S.C. § 2254(d)(1)) (internal quotations omitted).

54. *Williams*, 163 F.3d 860. Although a habeas petitioner who is denied relief in district court must obtain a certificate of appealability before a circuit court will hear an appeal, the State may appeal automatically from a district court's order granting relief. 28 U.S.C. § 2253.

55. *Williams*, 163 F.3d at 865 (quoting *Green*, 143 F.3d at 870) (internal quotations omitted).

standard of review, the Fourth Circuit reversed the district court and denied the writ.

The Supreme Court granted certiorari, and a divided Court reversed, rejecting the Fourth Circuit's interpretation of § 2254(d) and the circuit's analysis of Mr. Williams' ineffective assistance of counsel claim. Justice O'Connor, writing for the Court as to the standard of review to be applied in federal habeas stated:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.[56]

Although the Supreme Court's interpretation of § 2254(d) was not as limited as the Fourth Circuit's standard, the standard of review adopted by the *Williams* Court remains quite restricted. Independent de novo review of habeas claims no longer exists. Rather, according to the *Williams* majority, issuance of the writ is allowed only in certain limited circumstances.[57] First, a writ may issue if it is contrary to established Supreme Court precedent, which can occur only if (1) a state court decision contradicts Supreme Court precedent (that is, if the state court applies the wrong law), or (2) a state court decision reaches a different result from the Supreme Court on materially indistinguishable facts.[58] Second, a writ may issue if the state court applied the correct Supreme Court precedent in an objectively unreasonable manner.[59] However, "[u]nder § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[60]

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56. *Williams*, 529 U.S. at 412-13 (quoting 28 U.S.C. § 2254(d)(1)).

57. For an in-depth discussion of the *Williams* standard of review and the meaning and limitations of the standard see Pettys, *supra* n. 34, at 740-54.

58. *See* Chemerinsky, *supra* n. 11, at § 15.5, 930; Pettys, *supra* n. 34, at 749.

59. *See* Chemerinsky, *supra* n. 11, at § 15.5, 930; Pettys, *supra* n. 34, at 749-50.

60. *Williams*, 529 U.S. at 411.

Four Justices found Justice O'Connor's interpretation of § 2254(d)(1) too constricted. Justice Stevens stated:

> [T]he statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.[61]

Despite the reservations and concerns of the minority, Justice O'Connor's articulation of the standard of review now applies in federal habeas.

The second issue in *Williams*, of course, was not simply the standard of review to be applied, but also the application of that standard to the question of ineffective assistance of counsel. Remarkably, for the first time since its 1984 decision in *Strickland*, the Supreme Court found that under the limited standard of review of § 2254(d)(1), counsel had rendered constitutionally deficient performance and the writ should issue.

In reversing the Fourth Circuit, the United States Supreme Court found that the Virginia Supreme Court erred in two ways. First, the Virginia court applied the wrong law. The governing standard for ineffective assistance of counsel claims is found in *Strickland*, and the Court made clear that *Lockhart* had not modified the standard as the Virginia court asserted.[62] Thus, a writ could issue under the "contrary to" prong of § 2254(d)(1) in Mr. Williams' case. In addition, the Court found the Virginia Supreme Court's holding—that counsel was not ineffective—was "unreasonable" under the correct law and applicable facts of Mr. Williams' case.[63] In reaching this conclusion, the Court carefully culled through the evidence supporting Mr. Williams' ineffective assistance claim and found that: (1) counsel failed to adequately investigate or prepare for the sentencing phase of Mr. Williams' trial; (2) this lack of investigation was not due to any trial strategy; (3) had the investigation been conducted, significant mitigating evidence would have been uncovered; and (4) had the jury heard this evidence, there was a reasonable probability that the sentence imposed on Mr. Williams would have been different. Under the applicable *Strickland* standard, the Court found such performance was constitutionally deficient. Moreover, the Virginia Supreme Court's finding to the

61. *Id.* at 389-90 (Stevens, Souter, Ginsburg & Breyer, JJ.) (footnote omitted). Parts I, III, and IV of Justice Stevens' opinion constitute the Opinion of the Court, while Part II of Justice O'Connor's opinion also garnered the support of a majority of Justices. *See id.* at 365-66.

62. *Id.* at 391, 397.

63. *Id.* at 397-98.

contrary was objectively unreasonable. Accordingly, Mr. Williams was entitled to issuance of the writ.

The initial impact of *Williams* was to send a signal to state and federal courts that the AEDPA did not strip federal courts of all power to grant relief to state prisoners convicted and sentenced in violation of the Constitution. However, equally clear is the Court's view that not every error by a state court will warrant habeas relief. Indeed, according to the *Williams* Court, an erroneous decision by a state court should not be disturbed unless that erroneous decision is also objectively unreasonable. Unfortunately, the Court in *Williams*, while granting relief to Mr. Williams, did not shed much light on when a decision is erroneous and objectively unreasonable as opposed to erroneous and not objectively unreasonable.

B. Wiggins v. Smith*: A More Searching Review of Death Cases?*

On a Monday morning in late March 2003, against this backdrop of habeas law and the constitutional standards for attorney performance in capital cases, counsel for Kevin Wiggins rose to argue for his client's life before the United States Supreme Court.[64] The question before the Supreme Court was whether a writ of habeas corpus should issue allowing Mr. Wiggins a new capital sentencing proceeding.

In the summer of 1989, a judge, after a four-day trial, convicted Mr. Wiggins of first-degree murder, robbery, and two counts of theft.[65] The evidence presented to the state trial judge showed that Florence Lacs, a seventy-seven-year-old woman, was found dead in her bathtub on the afternoon of September 17, 1988, the victim of an apparent homicide by drowning.[66] The State's theory of the homicide was that between 5:00 and 5:30 p.m. on September 15, Mr. Wiggins broke into Mrs. Lacs' apartment, stole her credit cards and a ring, and murdered her.[67] The credible evidence indicating that Mr. Wiggins committed the murder was wholly circumstantial.[68] The most damaging evidence was the testimony of Mr. Wiggins' girlfriend. She testified that at approximately 7:45 on the evening of September 15, Mr. Wiggins picked her up in Mrs. Lacs' car, that the two of them made a number of purchases using Mrs. Lacs' credit cards, and that on Saturday, September 17, Mr. Wiggins pawned Mrs. Lacs' ring.[69] Another witness testified that she saw Mr. Wiggins on the afternoon of September 15 and overheard him speaking with Mrs. Lacs between 5:00 and 5:50 p.m.; however, the witness did not

64. *See* Donald B. Verrilli, Jr., Gary E. Bair & Dan Himmelfarb, Oral argument, *Wiggins v. Smith* (S. Ct., Mar. 24, 2003) (available in 2003 WL 1699820).

65. *Wiggins*, 123 S. Ct. at 2532.

66. *Wiggins v. State*, 724 A.2d 1, 4 (Md. App. 1999); *Wiggins v. State*, 597 A.2d 1359, 1361 (Md. App. 1991).

67. *Wiggins*, 724 A.2d at 5.

68. *Id.* The State offered the testimony of two jailhouse informants, one of whom had a history of mental illness, who testified that Mr. Wiggins confessed to the murder. The trial court found neither witness credible and did not consider their testimony in his determination. *Wiggins*, 597 A.2d at 1364-65.

69. *Wiggins*, 724 A.2d at 4; *Wiggins*, 597 A.2d at 1363.

see Mr. Wiggins enter Mrs. Lacs' apartment.[70] Although the evidence showed that Mrs. Lacs was intentionally drowned, none of the various medical examiners could pinpoint the time of death or definitively determine that Mrs. Lacs was dead before Mr. Wiggins appeared at his girlfriend's house in Mrs. Lacs' car on September 15.[71] In addition, although the police found seven fingerprints from Mrs. Lacs' partially ransacked apartment, none of the fingerprints matched Mr. Wiggins.[72] Based on this evidence, the trial court found Mr. Wiggins guilty, and the case proceeded to capital sentencing.

Mr. Wiggins elected to have a jury decide whether he should be sentenced to death for the murder of Mrs. Lacs.[73] A capital sentencing trial, however, is not a simple proceeding. The Supreme Court, in resurrecting the death penalty in 1976, stated:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[74]

To effect this goal of reliability and fairness in capital sentencing, a large body of law has developed since 1976. Ideally, under the modern death penalty system in the United States, the capital sentencing proceeding rationally narrows the field of persons subject to the death penalty while allowing the jury the ability to individualize sentencing and to grant mercy based on the defendant's individual characteristics and circumstances.[75] One result of this jurisprudence is that the capital sentencing proceeding can be as long and as complicated as the guilt and innocence phase of a capital trial.

In Mr. Wiggins' case, the prosecution had to convince the jury that under the applicable Maryland law, Mr. Wiggins deserved to die for Mrs. Lacs' murder. Not all murder defendants are eligible for the death penalty. Only those defendants who meet certain statutory criteria—such as a defendant who commits murder in an especially heinous manner or a defendant who poses a continuing threat to society—are subject to the death penalty. In order for the State of Maryland to inflict the death penalty on Mr. Wiggins, the State had to prove that: (1) Mr. Wiggins was a principal in Mrs. Lacs' murder, that is, that he actually killed her; and (2) Mr. Wiggins met one of the statutory aggravating factors, which in Mr. Wiggins' case was that the murder occurred during the course of a robbery.[76]

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70. *Wiggins*, 724 A.2d at 4; *Wiggins*, 597 A.2d at 1363.

71. *Wiggins*, 724 A.2d at 5-14; *Wiggins*, 597 A.2d at 1363.

72. *Wiggins*, 597 A.2d at 1362.

73. *Wiggins*, 123 S. Ct. at 2532.

74. *Woodson v. N.C.*, 428 U.S. 280, 305 (1976). For a discussion on the death penalty evolution in the twentieth century, see Coyne & Entzeroth, *supra* n. 11, at 3-6; Lyn Entzeroth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 Tulsa L. Rev. 299, 300-07 (2002).

75. *See e.g. Gregg v. Ga.*, 428 U.S. 153 (1976).

76. Md. Crim. L. Code Ann. §§ 2-202(a)(2), 2-303(g) (2002).

The defense goal in capital sentencing is to counterbalance the State's evidence by presenting other evidence, including mitigating evidence, to show that the defendant should be spared from the death penalty. Mitigating evidence typically includes evidence from a defendant's life: his background; his family; his friends; his relationships; and his cognitive, emotional, or intellectual abilities. Defense counsel's plan in Mr. Wiggins' case was to bifurcate the sentencing proceeding. Counsel intended to show, during the first stage of the sentencing proceeding, that Mr. Wiggins did not actually kill Mrs. Lacs and that he therefore could not be subject to the death penalty under Maryland law. If unsuccessful in avoiding the death penalty on this basis, counsel intended to proceed to the second stage of sentencing and to present mitigating evidence that would convince the jury nonetheless to spare Mr. Wiggins' life.[77] The trial court denied the motion to bifurcate sentencing and proceeded with a single sentencing proceeding.[78]

It appears from the record that counsel's reaction to the court's ruling was to continue with the plan to present evidence that Mr. Wiggins did not actually kill Mrs. Lacs.[79] However, counsel curiously failed to present any mitigating evidence, such as evidence of Mr. Wiggins' life history, his childhood, his school experience, or his intellectual abilities, to the jury.[80] Jurists and lawyers familiar with capital litigation consider such mitigating evidence critical in capital sentencing proceedings.[81]

Moreover, the failure to present mitigating evidence contradicted counsel's opening statements in which one of Mr. Wiggins' lawyers advised the jury that she would present evidence of Mr. Wiggins' "difficult life."[82] Instead of presenting such mitigating evidence to the jury, defense counsel made a proffer to the court that had the sentencing proceeding been bifurcated, they would have presented psychological reports and expert testimony demonstrating that Mr. Wiggins had limited mental abilities, did not have a history of aggressive behavior, and wanted to function in the world.[83] The only mitigating evidence presented to the jury was a stipulation that Mr. Wiggins had no prior convictions.[84] After hearing the evidence that counsel did present, the jury found that Mr. Wiggins committed the murder, that the State proved the existence of one aggravating circumstance, and that the aggravating evidence outweighed the mitigating evidence. The jury sentenced Mr. Wiggins to death.

A divided court of appeals affirmed Mr. Wiggins' murder conviction and death sentence.[85] Two judges dissented, finding the evidence insufficient to

77. *Wiggins*, 123 S. Ct. at 2532.
78. *Id.*
79. *Wiggins*, 724 A.2d at 15; *Wiggins*, 597 A.2d at 1365-66.
80. *Wiggins*, 724 A.2d at 15-16.
81. *See generally e.g.* Coyne & Entzeroth, *supra* n. 23; Liebman, *supra* n. 20; Stevenson, *supra* n. 20.
82. *Wiggins*, 123 S. Ct. at 2532.
83. *Id.*
84. *Id.* at 2533.
85. *See Wiggins*, 597 A.2d 1359.

support the jury determination that Mr. Wiggins actually killed Mrs. Lacs.[86] Mr. Wiggins did not raise a claim of ineffective assistance of counsel on direct appeal.

Mr. Wiggins then sought state post-conviction relief. With new counsel representing him, Mr. Wiggins argued that trial counsel had been ineffective during the sentencing phase of his capital trial.[87] At a post-conviction hearing, new counsel presented the testimony of Hans Selvog, a social worker who had prepared a social history chronicling Mr. Wiggins' childhood. Mr. Selvog documented that Mr. Wiggins grew up under nightmarish conditions, which included severe physical abuse by his alcoholic mother, repeated physical and sexual abuse by other care providers, severe neglect, abusive foster homes, and life on the street.[88]

Mr. Wiggins' trial counsel testified at the post-conviction hearing about his investigation and strategy for the capital sentencing phase of the trial. Trial counsel admitted that he did not have a forensic social worker prepare a social history of Mr. Wiggins, even though such social histories were routinely prepared in death penalty cases in Maryland and he had the funds to conduct such an investigation.[89] Reacting to this omission, the state court judge hearing the post-conviction evidence stated that he believed it "absolute error" not to compile a social history.[90] Ultimately, however, the judge concluded that "when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel."[91] The state court accordingly denied post-conviction relief.

A divided Maryland Court of Appeals affirmed the denial of post-conviction relief, finding that counsel made a tactical decision to focus on convincing the jury that Mr. Wiggins was not directly responsible for the murder rather than focusing on his difficult childhood.[92] According to the court of appeals, the attorneys' tactical decision not to present mitigating evidence did not constitute constitutionally deficient representation.[93] The court of appeals also found that even though defense counsel did not retain an expert to prepare a social history, counsel did have copies of the presentence investigation report (PSI report) and social service records, which put counsel on notice as to the defendant's physical abuse, sexual abuse, alcoholic mother, placements in foster care, and borderline mental retardation.[94] Additionally, the state court found that the jury heard some mitigating evidence, although this evidence consisted solely of a stipulation by the parties that Mr. Wiggins had no prior violent convictions.[95] According to the

86. *Id.* at 1374-77 (Eldridge & Cole, JJ., dissenting).

87. Although different counsel represented Mr. Wiggins on direct appeal than at trial, a third lawyer took over Mr. Wiggins' post-conviction case. This lawyer continued to represent Mr. Wiggins in federal habeas. *See Wiggins*, 123 S. Ct. at 2532-33.

88. *Id.*

89. *Id.* at 2533.

90. *Id.*

91. *Id.* (quoting App. to Pet. for Cert. 155a-156a) (internal quotations omitted).

92. *Wiggins*, 123 S. Ct. at 2533; *Wiggins*, 724 A.2d at 15.

93. *See Wiggins*, 724 A.2d at 15-18.

94. *Wiggins*, 123 S. Ct. at 2533; *Wiggins*, 724 A.2d at 15.

95. *Wiggins*, 123 S. Ct. at 2533; *Wiggins*, 724 A.2d at 17.

Maryland Court of Appeals, the investigation and trial presentation were sufficient under the Constitution.[96]

Mr. Wiggins, having exhausted his state court remedies and having failed to obtain relief in state court, filed a habeas corpus petition in federal district court asserting that the writ should issue because, *inter alia*, he had been denied his constitutional right to effective assistance of counsel during sentencing.[97] The United States District Court for the District of Maryland granted the writ. The district court concluded, in part, that the Maryland Court of Appeals' finding that Mr. Wiggins' counsel adequately investigated relevant mitigating evidence and rendered effective assistance of counsel during sentencing was unreasonable under established federal law and "almost directly contrary to the Supreme Court's . . . decision in *Williams v. Taylor*."[98] In particular, the district court found that trial counsel failed to adequately investigate Mr. Wiggins' background and, therefore, could not make an informed, reasonable assessment as to how to proceed in sentencing with respect to mitigation.[99]

The Fourth Circuit reversed and agreed with the state court that counsel's performance met the constitutional standards set out in *Strickland*.[100] While the Fourth Circuit followed the applicable standard of review for habeas claims set out in *Williams*, the circuit court stated:

> However, a writ of habeas corpus may not issue if the federal court, in its own judgment, decides that the state court decision applied clearly established federal law merely "erroneously or incorrectly." *Vick v. Williams*, 233 F.3d 213, 216 (4th Cir.2000) (citation omitted). Instead, we must decide if the state court's application of federal law was objectively unreasonable. 233 F.3d at 216. We have said that the criterion of reasonableness for purposes of § 2254(d)(1) is "whether the [state court's] determination is at least minimally consistent with the facts and circumstances of the case." *Bell v. Jarvis*, 236 F.3d at 159 (quoting *Wright v. Angelone*, 151 F.3d 151, 157 (4th Cir.1998) (citation omitted)).[101]

Thus, although the Fourth Circuit no longer applied its "no reasonable jurist" standard of deference, it nonetheless continued to defer greatly to the Maryland

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96. *See Wiggins*, 724 A.2d at 17-18.

97. *Wiggins*, 164 F. Supp. 2d at 563.

98. *Id.* at 557. The district court also found that the evidence was insufficient to support Mr. Wiggins' murder conviction and thus reversed his murder conviction as well as his death sentence. In finding the evidence insufficient to support Mr. Wiggins' murder conviction, the district court stated:

> On its face [the] evidence [against Mr. Wiggins] appears compelling, and, particularly given the high degree of deference that must be given in federal habeas proceedings to the findings and rulings made by state courts, *see* 28 U.S.C. § 2254(d), it may seem surprising that I should find, as a matter of constitutional due process, that the evidence is not sufficient to sustain Wiggins's murder conviction. The governing standard of review aside, I have great respect for my state court colleagues and do not pretend to have greater acumen than they. Nevertheless, I am convinced that, when the record is carefully analyzed, no rational finder of fact could have found Wiggins guilty of murder beyond a reasonable doubt, and that to do so involved an unreasonable application of clearly established federal law.

Id. at 554 (footnote omitted).

99. *Id.* at 557-60.

100. *Wiggins*, 288 F.3d at 643.

101. *Id.* at 636.

Court of Appeals' findings and conclusions. Mr. Wiggins then took his fight to the Supreme Court.

The Supreme Court, by a vote of seven-to-two, reversed the Fourth Circuit. Applying *Strickland* and *Williams,* the Court, in an opinion authored by Justice O'Connor, found not only that the Maryland Court of Appeals erred in finding that trial counsel was not ineffective, but also that such error was objectively unreasonable. Interestingly, here, unlike *Williams*, the state court applied the correct Supreme Court precedent, *Strickland.* Thus, the focus of the Court's decision in *Wiggins* was on whether the state court's erroneous application of that law was objectively unreasonable.

This question would appear to require the Court to delineate when an error is reasonable or unreasonable. Prior to *Wiggins*, the Court had provided limited guidance. Although the Court advised that an unreasonable error had to be objectively unreasonable as opposed to subjectively unreasonable, this standard is not easy to discern. Earlier this Term, in rejecting a California death row inmate's claim that trial counsel was ineffective, the Court reiterated:

> Under §2254(d)'s "unreasonable application" clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. Rather, it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. An "*unreasonable* application of federal law is different from an *incorrect* application of federal law."[102]

In another habeas case before the Court this past Term, the Court stated that an objectively unreasonable error was something more than "clear error" because clear error fails to give proper deference required under the AEDPA.[103] While the Court did not provide any greater clarification in *Wiggins*, the Court did not endorse the lax approach that the Fourth Circuit applied, which was that any state court decision is reasonable provided there is some minimal support in the record for the decision. Rather, the Supreme Court engaged in a more exacting, independent review of the record and the quality of legal services rendered.

In considering Mr. Wiggins' case, the first issue the Court considered was whether counsel's performance fell below an objective level of reasonableness. Once again, like in *Williams*, the Court had to (1) evaluate counsel's investigation into the relevant and available mitigating evidence, (2) determine whether the investigation satisfied the Constitution, and (3) decide whether subsequent trial decisions based on that investigation could be sustained. In reviewing counsel's investigation in *Wiggins*, the Court appeared influenced by several factors: (1) the American Bar Association's recommendation and standards for attorney investigation in capital cases, which provide that counsel should seek to discover all reasonably available mitigating evidence; (2) the availability of the information, which appeared to be attainable and for which the Maryland public defender's

102. *Woodford*, 537 U.S. at 24-25 (per curiam) (quoting *Williams*, 529 U.S. at 410).
103. *Lockyer*, 123 S. Ct. at 1174-75.

office had available funds; (3) the information that counsel did review, specifically the PSI report and the social service records, which should have alerted counsel that further investigation was warranted; and (4) the prevailing practice for mitigation investigation in death penalty cases in Maryland.[104] Based at least in part on these factors, the Court found that counsel's mitigation investigation fell below an objective standard of reasonableness.

In considering the state court's assessment of this same investigation, the Supreme Court found that the state court based its legal decision on a clear factual error. According to a majority of the Court, the Maryland court believed that the social service records, which trial counsel did review, included references to the sexual abuse Mr. Wiggins suffered as a child. Without a doubt, the records do not contain such references.[105] As noted earlier, the AEDPA imposes enormous deference to a state court's findings of fact and such state court findings may not be disturbed unless the petitioner can overcome the presumption of correctness by clear and convincing evidence. In most cases, it will be very difficult to overcome this presumption. Here, however, it is undisputed that the Maryland court misstated what was contained in the social service records. The Court found that the state court's reliance on this factual error "highlights the unreasonableness of the state court's decision."[106] Moreover, due to this error, the Court could consider de novo whether counsel actually knew of Mr. Wiggins' childhood abuse and in fact engaged in a more thorough mitigation investigation.[107] In this de novo review, the Court concluded that counsel's investigation consisted only of a review of the PSI reports and social service records.

Based on the state court's findings as to the scope of counsel's investigation and its own de novo review of the record, the Court concluded that Mr. Wiggins' counsel did not conduct a sufficient mitigation investigation beyond the social service and PSI reports. Pretrial investigation is critical. If a mitigation investigation is deficient, then counsel lacks sufficient information upon which to base reasonable trial decisions, particularly decisions concerning the presentation of mitigating evidence at sentencing.[108] Here, Mr. Wiggins' counsel did not sufficiently engage in a mitigation investigation; therefore, counsel's subsequent trial decisions based on this inadequate investigation could not be considered reasonable trial strategy. Accordingly, the Court found counsel's performance deficient.[109]

Having found counsel's performance inadequate, the Court turned to the prejudice prong of the *Strickland* analysis. The Court concluded that the

104. *Wiggins*, 123 S. Ct. at 2535-39. One aspect of the investigation not mentioned by the Supreme Court, but apparently important to the district, court was that the two lawyers representing Mr. Wiggins both thought that the other lawyer was conducting a mitigation investigation. *Wiggins*, 164 F. Supp. 2d at 558. In reality, neither lawyer investigated Mr. Wiggins' life history.

105. *Wiggins*, 123 S. Ct. at 2539.

106. *Id.*

107. *Id.* at 2540.

108. *Id.* at 2538-39.

109. *Id.* at 2541-42.

mitigating evidence that counsel failed to discover and present to the jury was "powerful."[110] The Court then found that there was a reasonable probability that: (1) a competent attorney who knew of this evidence would have presented it to a jury, and (2) there was a reasonable probability that had a jury heard this evidence, it would have returned a sentence other than death. Accordingly, under both the competence and prejudice prongs of *Strickland*, trial counsel's performance was constitutionally deficient.

Of course, under the AEDPA, not only must the state court err, but that error must be objectively unreasonable. In *Wiggins*, the Court found the error objectively unreasonable. The dissent criticized the decision as essentially setting aside the standard of review requirements of deference set out in the AEDPA and instead replacing the state's judgment with the Supreme Court's independent judgment.[111] As discussed earlier, in *Williams*, five Justices of the Supreme Court refused to allow the type of independent de novo review that federal courts engaged in prior to the AEDPA. The Court has continued to adhere to this position, even refusing this Term to grant relief in other habeas cases, including a case raising an ineffective assistance of counsel claim in capital sentencing, precisely because of this standard of review.[112] To support his argument that the Court abandoned this standard in *Wiggins*, Justice Scalia, in dissent, points to evidence in the record that tends to support the state court's conclusion that trial counsel conducted a sufficient mitigation investigation and evidence that the additional mitigating evidence uncovered during post-conviction proceedings was spurious and possibly inadmissible.[113] According to Justice Scalia, this record is sufficient to insulate the state court's decision from habeas relief.

Seven Justices, however, were persuaded that the state court decision was not only wrong, but also objectively unreasonable. One key reason that the Court found the state court decision unreasonable was that the Maryland court committed a "clear factual error" by finding that the social service records contained evidence of sexual abuse, when, as all parties concede, the records did not. This factual error was evidence of unreasonableness. Moreover, because the key issue was the scope of the investigation, the Maryland court's inaccurate assessment of that scope undermined the reasonableness of the state court decision and allowed the Court to conduct a de novo review of the scope of the investigation.

The impact of *Wiggins* is two-fold. First, the Supreme Court is making clear its belief that federal habeas corpus is not merely a vehicle whereby federal courts simply rubber-stamp death sentences imposed by state courts. Rather, according to the Court, habeas corpus remains a viable, independent, and exacting method by which federal courts are to closely review and examine state court convictions and sentences. Second, the Court has signaled that attorney competence in death

110. *Wiggins*, 123 S. Ct. at 2542.
111. *Id.* at 2544, 2550 (Scalia & Thomas, JJ., dissenting).
112. *See e.g. Woodford*, 537 U.S. at 24-25 (per curiam).
113. *Wiggins*, 123 S. Ct. at 2544-45, 2552-53 (Scalia & Thomas, JJ., dissenting).

penalty cases, particularly in the investigation of mitigation evidence, is an important issue that a court must closely scrutinize, even under the deferential standards of the AEDPA.

III. *MILLER-EL V. COCKRELL*: ACCESS TO APPELLATE REVIEW

A second issue in habeas review is whether a circuit court can hear a petitioner's appeal of a district court's denial of relief. Unlike most civil cases, a habeas petitioner does not have an automatic right to appeal a decision by a district court denying the petition for habeas relief.[114] Prior to the AEDPA, a petitioner wishing to appeal the denial of habeas relief had to apply to a district judge, circuit judge, or Supreme Court Justice for a certificate of probable cause.[115] The Supreme Court construed the certificate of probable cause as requiring the "petitioner to make a 'substantial showing of the denial of [a] federal right'"[116] before he could have a hearing before an appellate court. The petitioner was not required to demonstrate that he would prevail on the merits, but he nonetheless was required to demonstrate that the constitutional issues raised in his petition were debatable among jurists of reason.[117] The AEDPA codified this judicial interpretation, although using the term certificate of appealability rather than certificate of probable cause. Specifically, 28 U.S.C. § 2253(c)(2) provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."[118] If a petitioner does not obtain a certificate of appealability, the circuit court lacks jurisdiction to hear the appeal.[119]

Critical to a petitioner who wishes to appeal a denial of a writ is how much he has to show to obtain a COA. Since a COA is a threshold standard that a prisoner must meet simply to get an appellate court to hear his case, it is important to know how much he must present to establish a "substantial showing" that he has been denied a federal right. It was precisely this wall that Mr. Miller-El ran into when he tried to appeal a district court's denial of the writ based on his contention that Dallas County prosecutors engaged in racially discriminatory jury selection practices at his trial.

Mr. Miller-El was convicted in 1986 of the murder of two employees of a Holiday Inn that Mr. Miller-El, his wife, and a companion robbed.[120] The State of Texas tried and convicted Mr. Miller-El of capital murder and sentenced him to

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114. Hertz & Liebman, *supra* n. 11, at vol. 2, § 35.4, 1567. However, Rule 22(b) of the Federal Rules of Appellate Procedure provides that only the petitioner is required to obtain a certificate of appealability in order to appeal a district court decision. If the state loses at the district court level, that is, if the district court issues a writ of habeas corpus, the state may appeal without first obtaining a certificate of appealability. Fed. R. App. P. 22(b) (2003).

115. 28 U.S.C. § 2253 (superseded 1996); Hertz & Liebman, *supra* n. 11, at vol. 2, § 35.4, 1567-68.

116. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (quoting *Stewart v. Beto*, 454 F.2d 268, 270 n. 2 (5th Cir. 1971)).

117. *Id.* at 893 n. 4.

118. 28 U.S.C. § 2253(c)(2).

119. Hertz & Liebman, *supra* n. 11, at vol. 2, § 35.4, 1568.

120. *Miller-El*, 123 S. Ct. at 1034-35.

death.[121] During trial, Mr. Miller-El challenged the jury selection process, arguing that it violated *Swain v. Alabama*,[122] which at the time set out the applicable standards for determining whether jury selection violated the Constitution.[123] The trial court denied the challenge to the jury selection process. On direct appeal to the Texas Court of Criminal Appeals, Mr. Miller-El again raised the issue of the discriminatory jury selection process. While his direct appeal was pending in state court, the Supreme Court decided *Batson v. Kentucky*,[124] which changed the applicable standards for reviewing claims of discriminatory jury selection.[125] The Texas Court of Criminal Appeals remanded Mr. Miller-El's case to the trial court to determine whether, in light of *Batson*, the prosecutor had engaged in purposeful discrimination.

The trial court concluded that Mr. Miller-El failed to show that the prosecution engaged in purposeful discrimination under the *Batson* standard. The Texas Court of Criminal Appeals affirmed. Petitioner then sought state post-conviction relief, but again the Texas courts denied relief. Mr. Miller-El next filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Texas. He again raised the claim that the prosecutor violated his constitutional rights by engaging in discriminatory jury selection practices. Deferring to the state court findings, the district court denied the writ. However, the magistrate judge who issued a Report and Recommendation as to Mr. Miller-El's constitutional claims was troubled by the evidence of discrimination in the jury selection process.[126]

Mr. Miller-El then sought a COA asking that the Fifth Circuit hear his claim of racial discrimination in the jury selection process. Noting that a COA can only issue where the petitioner has made a substantial showing of the denial of a constitutional right, the Fifth Circuit stated that in making this determination the court would consider whether Mr. Miller-El "demonstrate[d] that his petition involve[d] issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further."[127] However, the Fifth Circuit did not stop there. It also drew on the standard of review requirements of § 2254(d)(2) and concluded that in making the COA determination, it had to presume the state findings were correct unless: (1) the findings resulted in an unreasonable decision

121. *Id.* at 1035.

122. 380 U.S. 202 (1965).

123. *Miller-El*, 123 S. Ct. at 1035.

124. 476 U.S 79 (1986).

125. *See id.* at 96-98. To show a constitutional violation under *Batson*, a defendant must first make a prima facie showing that a prosecutor used a peremptory challenge to strike a juror based on the race of the juror. If a prima facie showing is made, the prosecution may offer a race-neutral reason for striking the juror. In light of the parties' submissions, the state court must then determine whether the defendant has shown that the prosecutor engaged in purposeful discrimination in the jury selection process. *Miller-El*, 123 S. Ct. at 1040-45.

126. *Miller-El*, 123 S. Ct. at 1036.

127. *Miller-El v. Johnson*, 261 F.3d 445, 449 (5th Cir. 2001), *rev'd, sub nom. Miller-El v. Cockrell*, 123 S. Ct. 1029.

in light of all the evidence, and (2) the petitioner shows the unreasonableness of the state's finding by clear and convincing evidence. Needless to say, the Fifth Circuit denied the COA. The Supreme Court granted certiorari to consider this threshold requirement.

Writing for the Court, Justice Kennedy found that the Fifth Circuit set too high a threshold for a habeas petitioner to mount in order to have an appellate court consider an appeal. Specifically, Justice Kennedy found that a determination as to whether a COA should issue required an "overview" and "general assessment" of the petitioner's constitutional claim;[128] the circuit court was not to undertake an in-depth or full determination of the constitutional claims at this stage of the appeals process.[129] In fact, the AEDPA deprives a federal court of jurisdiction even to engage in a full, in-depth review of a petitioner's claims at the COA stage.[130] In determining whether a COA should issue, that is, in determining whether the federal appellate courthouse door can even be opened to a federal habeas petitioner, the court only has to make a general determination as to whether the constitutional claim is debatable among reasonable jurists. A COA does not require a petitioner to prove his case or to show that the state court ruling was unreasonable and that he is entitled to relief. Indeed, Justice Kennedy stated, "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'"[131]

In this case, the Supreme Court found it had "no difficulty" determining that Mr. Miller-El's *Batson* claim was debatable among jurists of reason and that a COA should issue.[132] In reaching this conclusion, the Court did not decide whether Mr. Miller-El should prevail on his *Batson* claim. As the Court made clear, such a determination would be inappropriate at this stage of the habeas process. Rather, at the COA stage of Mr. Miller-El's federal habeas review, the issue was whether Mr. Miller-El's *Batson* claim was debatable among reasonable jurists. In finding that Mr. Miller-El's claim met this standard, the Court pointed to the following evidence of racial discrimination in the selection of Mr. Miller-El's jury: (1) the prosecutors used their peremptory challenges to strike ninety-one percent of the eligible African-Americans from the jury; (2) prosecutors used ten of their fourteen peremptory challenges to strike African-Americans from the jury; (3) the prosecutors' purported race-neutral reasons for striking African-Americans were highly suspect, at least in part because similarly situated white jurors were not struck from the panel; (4) potential jurors who were African-American were questioned differently from potential jurors who were white, particularly on issues related to capital punishment; (5) the prosecutor engaged in a practice called "juror shuffle," which had the effect of reducing the number of

128. *Miller-El*, 123 S. Ct. at 1039.
129. *Id.*
130. *Id.*
131. *Id.* (quoting *Barefoot*, 463 U.S. at 893 n. 4).
132. *Id.* at 1042.

potential African-American jurors; and (6) the District Attorney's office had a well-documented history and policy of using peremptory challenges to exclude African-Americans from jury service.[133] This evidence, as noted by Justice Kennedy, suggests that race played some role in the jury selection process. Based on this evidence, which was presented to the district court, reasonable jurists could debate whether Mr. Miller-El presented a constitutional claim entitling him to habeas relief. Accordingly, under this standard, which the Court believes is required by § 2253, the Supreme Court found that Mr. Miller-El was entitled to a COA. The case has been remanded to the Fifth Circuit, which has issued a COA and set a briefing schedule for the parties to brief Mr. Miller-El's *Batson* claim.[134]

The Court consistently reiterated throughout its decision that it was making a threshold COA determination and that such a determination is not a decision on the merits. This view is well supported by the language of the statute and the Court's case law. Moreover, the Court is again making clear that habeas review remains a viable mechanism for reviewing constitutional errors.

IV. IS HABEAS REVIEW EXPANDING?

The initial reactions in the *Washington Post* and the *New York Times* suggest that *Wiggins* and *Miller-El* are opening up habeas corpus review and that greater protection will be extended to capital defendants who are saddled with incompetent lawyers or who are subject to racial discrimination during their capital proceedings.[135] This assessment of the Court's position is debatable. At the very least, it would be incautious to predict that the Rehnquist Court is swinging open the federal court doors to convicted state criminals.

At the outset, *Wiggins* is quite remarkable. For only the second time, the Supreme Court granted relief to a death row inmate who claimed his lawyer was constitutionally deficient. Prior to the *Williams* decision in 2000, the Supreme Court routinely rejected claims of ineffective assistance of counsel. Indeed, prior to 2000, the Court never found counsel ineffective despite some egregious examples of attorney performance. However, the Court in *Wiggins* stressed the limits of its ineffective assistance of counsel analysis:

> In finding that Schlaich and Nethercott's investigation did not meet *Strickland's* performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support

133. *Miller-El*, 123 S. Ct. at 1042-45.
134. *Miller-El v. Johnson*, 330 F.3d 690, 690-91 (5th Cir. 2003).
135. *See supra* n. 1.

> the limitations on investigation." A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."[136]

Nevertheless, *Wiggins*, like *Williams*, suggests that the Supreme Court is more willing to grant relief where attorneys fail to conduct adequate mitigation investigations in capital cases. One practical effect of this decision may be to focus increased attention and resources on the investigative phase of capital litigation. The decision further may force federal and state courts to scrutinize attorney performance more closely, particularly with respect to the investigation and trial presentation of mitigating evidence.

Moreover, the Court appears willing to grant habeas relief in ineffective assistance of counsel cases even under the deferential and limited standards of the AEDPA. Again, while this development is noteworthy, it would be imprudent to overstate the power that the AEDPA bestows on federal courts under the Supreme Court's construction of the statute. Only last year, the Supreme Court indicated that the lower federal courts should not read *Williams* too expansively and found that the Sixth Circuit incorrectly applied the erroneous and unreasonable standard of review in a different death penalty case.[137] Specifically, in *Bell v. Cone*, the Court again faced the issue of a lawyer presenting little or no evidence during the sentencing phase of a capital murder trial.[138] In a decision written by Chief Justice Rehnquist, the Court found that the state court had not been objectively unreasonable in its finding that counsel provided constitutionally sufficient legal representation during the capital sentencing phase of trial. Accordingly, Chief Justice Rehnquist concluded that the Sixth Circuit erred in issuing a writ of habeas corpus for a new sentencing proceeding. In reaching this conclusion, the Court reiterated that "an unreasonable application [of the law] is different from an incorrect one."[139] Likewise this Term, in *Woodford v. Visciotti*, the Court refused to grant relief to a death row inmate raising the claim of ineffective assistance of counsel because the petitioner failed to show that the state court's decision was not only wrong but also unreasonable.[140]

The Court in *Wiggins*—while engaging in an arguably more independent, rigorous review of the ineffective assistance of counsel claim—did not retreat from its erroneous and unreasonable standard for habeas relief. In trying to discern what distinguishes the state court decisions in *Williams* and *Wiggins* as not only wrong but also unreasonable, it is helpful to consider a couple of points. In *Williams*, the Court found that the state court applied the wrong Supreme Court law, which allowed the Court to engage in a more independent, probing examination of Mr. Williams' claim. In *Wiggins*, the Court found that the state

136. *Wiggins*, 123 S. Ct. at 2541 (quoting *Strickland*, 466 U.S. at 689, 690-91).

137. The Supreme Court also concluded that the Sixth Circuit misapplied the "contrary to" prong of § 2254(d)(1) by finding that *U.S. v. Cronic*, 466 U.S. 648 (1984), was applicable to counsel's second stage performance and that therefore prejudice could be presumed. *Bell v. Cone*, 535 U.S. 685, 693-98 (2002).

138. 535 U.S. 685.

139. *Id.* at 694.

140. 537 U.S. at 25, 27.

court made a clear factual error regarding the scope of counsel's mitigation investigation, which again allowed for a more independent review. As a practical matter, a state court error in law or fact appears to be an important factor in compelling the Court to find an unreasonably erroneous decision.

With respect to appellate review, *Miller-El* reflects the Court's view that the standard for issuing a COA remains a substantial showing of the denial of a constitutional right. This standard requires a showing that the constitutional issue is debatable among reasonable jurists, and this showing is not insignificant. However, the Court refuses to erect additional hoops for habeas petitioners to jump through in order to obtain review in circuit court. Had the Fifth Circuit's view prevailed, it is hard to imagine many circumstances in which a habeas petitioner, having been denied relief in district court, could obtain appellate review of that denial of relief.

In both *Wiggins* and *Miller-El*, the Court appears to be expressing the view that while obtaining habeas relief may be difficult, it is not illusory. To the extent that the Fourth and Fifth Circuits erected procedural barriers making habeas review and relief nearly impossible to obtain, the Supreme Court is rejecting such approaches. According to the Supreme Court, the AEDPA, while limiting habeas review, has not resulted in a suspension of the writ. Federal courts still maintain the power to hear habeas claims and grant habeas relief. Again, however, one should not over-read *Wiggins* and *Miller-El*; and, for many state petitioners, including death row inmates, habeas relief is probably not much more than illusory. An inmate who is convicted and sentenced to death in an unconstitutional fashion still cannot obtain habeas relief unless that inmate convinces the federal court that a state court's erroneous application of the law is objectively unreasonable. This task remains formidable. Further, while the Court has also signaled a more exacting look at attorney investigation of mitigation evidence, the Court has not employed that exacting review to attorney decisions, even ill-considered or disastrous attorney decisions, based on a reasonable investigation.

The Supreme Court refuses to allow the AEDPA to shut down federal habeas review completely, or simply make it a perfunctory, meaningless step on the road to execution. However, even in light of *Wiggins* and *Miller-El*, federal courts do not provide a safety net under the AEDPA protecting the innocent, the wrongfully convicted, or the wrongfully sentenced. While the Supreme Court is signaling the importance of federal review of death sentences and raising concerns about the reliability and appropriateness of the death penalty as currently imposed, the Court has not assured that our federal habeas system will protect those who are wrongfully sentenced to death or those who are actually innocent.