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## Tactical Ineffective Assistance in Capital Trials

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# Tactical Ineffective Assistance in Capital Trials

## **Abstract**

Are defense attorneys sandbagging in their death-penalty cases? In *Poindexter v. Mitchell*, a habeas corpus case decided in 2006, Chief Judge Danny Boggs of the United States Court of Appeals for the Sixth Circuit wrote that by conducting a deliberately defective investigation into mitigation evidence that might otherwise have been presented at the penalty phase of a capital trial, a defense attorney can virtually guarantee that any death sentence the jury returns will be vacated in later proceedings. The likelihood of such an outcome, Boggs wrote, will more than make up for the somewhat greater chance that a jury that does not hear the missing mitigation evidence will return a death sentence in the first place. Boggs and his concurring colleague, Judge Richard Suhrheinrich, challenged conventional wisdom holding that sandbagging - the intentional withholding of (or failure to develop) meritorious arguments or useful evidence at trial by criminal defense attorneys, for the purpose of undermining a conviction or sentence in later proceedings - does not work. But these critiques of sandbagging have focused upon a different type of intentional error, the failure to raise timely objections at trial. *Tactical Ineffective Assistance in Capital Trials* focuses on whether defense attorneys in death-penalty cases have an incentive, in the form of better results for their clients, to ignore or bury mitigation evidence. This Comment concludes that the Boggs hypothesis suffers from several flaws, and that this particular form of sandbagging typically (though not necessarily always) represents bad strategy. Not only will a defense attorney contemplating this type of ineffective assistance rarely possess the knowledge and perspective that will allow him or her to foresee the utility of sandbagging in a given case, but deliberate ineffective assistance through a failure to investigate or present mitigation evidence may backfire for a number of reasons.

## **Keywords**

Criminal Law, Criminal Procedure

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# TACTICAL INEFFECTIVE ASSISTANCE IN CAPITAL TRIALS

KYLE GRAHAM\*

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## INTRODUCTION

Are defense attorneys deliberately providing ineffective representation at the penalty phase of capital trials? Two judges on the United States Court of Appeals for the Sixth Circuit recently suggested that they should—if they want to keep their clients off death row. In a concurring opinion in *Poindexter v. Mitchell*,<sup>1</sup> a habeas corpus appeal decided in 2006, Sixth Circuit Chief Judge Danny Boggs identified a scenario in which intentional errors by counsel may benefit death-eligible defendants.<sup>2</sup> Boggs opined that a defense attorney trying a capital case is likely to secure the reversal of any death sentence that the jury might return if he or she deliberately conducts an inadequate investigation into his or her client's troubled childhood, psychological problems, or other mitigating evidence that might otherwise have been presented at sentencing.<sup>3</sup> The probability of eventual reversal on ineffective assistance grounds, Boggs wrote, will more than make up for any greater chance that a jury that does not hear the missing material will arrive at a death sentence in the first place.<sup>4</sup> While Judge Boggs stopped short of accusing defense attorneys of employing these tactics, his colleague Judge Richard Suhrheinrich was not so restrained.<sup>5</sup> In his own concurring opinion in *Poindexter*, Suhrheinrich intimated that defense attorneys in capital cases actually were sowing ineffective assistance claims of the sort described by his colleague.<sup>6</sup>

*Poindexter* sparked renewed debate over “sandbagging” by criminal defense attorneys.<sup>7</sup> Depending upon whom one asks, sandbagging—

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1. 454 F.3d 564 (6th Cir. 2006).

2. *Id.* at 587–89 (Boggs, C.J., concurring).

3. *Id.* at 588.

4. *Id.* at 589.

5. *Compare id.* at 587–89 (identifying the potential of defense attorney sandbagging during the penalty phase of a capital trial), *with id.* at 589 (Suhrheinrich, J., concurring) (referring to his prior encounter with questionable defense attorney conduct as described in his opinion concurring in part and dissenting in part in *Thompson v. Bell*, 373 F.3d 688, 692 (6th Cir. 2004), *rev'd*, 545 U.S. 794 (2005)).

6. 454 F.3d at 589.

7. *E.g.*, Posting of Jonathan Adler to The Volokh Conspiracy, <http://volokh.com/posts/1153939690.shtml> (July 26, 2006, 14:48 EST) (discussing the *Poindexter* decision); Posting of Russ Bensing to The Briefcase, <http://briefcase8.com/2006/07/> (July 26, 2006, 07:47 EST) (observing that “Judge Boggs’ comment about the irony of the situation . . . is unquestionably accurate”); Posting of S. Cotus to Appellate Law & Practice, [http://appellate.typepad.com/appellate/2006/10/judge\\_daughtrey.html](http://appellate.typepad.com/appellate/2006/10/judge_daughtrey.html) (Oct. 19, 2006, 16:58 EST) (asserting that Chief Judge Boggs is “clueless about capital defense”); Posting of Carolyn Elefant to Legal Blog Watch, [http://legalblogwatch.typepad.com/legal\\_blog\\_watch/2006/07/would\\_you\\_rende.html](http://legalblogwatch.typepad.com/legal_blog_watch/2006/07/would_you_rende.html) (July 25, 2006, 14:27 EST) (describing the Boggs concurrence as “insulting” but not expressing an opinion as to its accuracy).

the intentional withholding of, or failure to develop, meritorious arguments or useful evidence at trial by criminal defense attorneys for the purpose of attacking a conviction or sentence in later proceedings<sup>8</sup>—is either a pervasive threat or an urban legend. While several courts have voiced concerns about this sort of gamesmanship,<sup>9</sup> a majority of commentators have downplayed the threat posed by these tactics. These skeptics have concluded that the risks associated with sandbagging are too high, and the benefits too speculative and remote, for this sort of intentional error to gain much currency as a defense strategy.<sup>10</sup> The Boggs and Suhrheinrich concurrences

8. Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 333 (1988) (defining sandbagging as “deliberately not raising a point in a timely fashion in order to have a fresh chance, if things go badly, of attacking a conviction later”).

9. *E.g.*, *Walls v. Bowersox*, 151 F.3d 827, 836 & n.5 (8th Cir. 1998) (viewing with “extreme skepticism” counsel’s admission of his own ineffectiveness, particularly given the attorney’s prior statement that “trial strategy was driven, in part, with an eye to providing [the petitioner with] a colorable claim of ineffective assistance of counsel on habeas review,” and noting in a footnote that “any type of ‘sandbagging’ is ‘not only unethical, but usually bad strategy as well’”) (quoting *United States v. Day*, 969 F.2d 39, 49 n.9 (3d Cir. 1992)); *United States v. Sisto*, 534 F.2d 616, 624 n.9 (5th Cir. 1976) (“If the record indicates that counsel for the complaining party deliberately avoided making the proper objection or request, plain error will almost never be found. This court will not tolerate ‘sandbagging’—defense counsel lying in wait to spring post-trial error.”); *Andrews v. Barnes*, No. 89-C-0649 S, 1989 U.S. Dist. LEXIS 17246, at \*95 n.68 (D. Utah Aug. 17, 1989) (“Those who suggest sandbagging and new issue generation claims are not significant . . . simply ignore reality. Certainly every death case seems to involve such considerations.”); *Martin v. Blackburn*, 521 F. Supp. 685, 706 (E.D. La. 1981) (discussing the possibility of defense sandbagging in capital cases: “A defendant could withhold cumulative evidence as his ace-in-the-hole should the jury or judge return a capital sentence, and should the jury fail to return a death sentence, the defendant would have lost nothing.”); *cf.* *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) (observing, in another context, that “capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death”).

A generation ago, the majority and dissenting opinions in *Wainwright v. Sykes*, 433 U.S. 72 (1977), voiced different opinions concerning the threat posed by sandbagging. Writing for the majority, Justice Rehnquist explained that a failure to strictly enforce contemporaneous-objection rules “may encourage ‘sandbagging’ on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.” *Id.* at 89. These comments prompted Justice Brennan, in his dissenting opinion, to respond that “no rational lawyer would risk the ‘sandbagging’ feared by the Court.” *Id.* at 103 (Brennan, J., dissenting).

10. *E.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 382 n.7 (1986) (“No reasonable lawyer would forego competent litigation of meritorious, possibly decisive claims on the remote chance that his deliberate dereliction might ultimately result in federal habeas review.”); John H. Blume & Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases*, 50 S.C. L. REV. 1, 17–18 (1998) (asserting that defense counsel typically lack the sophistication necessary to engage in successful sandbagging); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 694 (1990) (opining that “almost any lawyer is going to try to prevail in the forum where the case is tried, not ‘save’ an issue for an uncertain later day in a court whose composition and receptiveness to the issue

suggested that this conventional wisdom may not apply to deliberate failures to investigate and present mitigation evidence in death-penalty cases.<sup>11</sup> If the two judges are correct—if this type of sandbagging happens, and works—they raise a host of important and worrisome questions concerning the motives and performance of capital defense attorneys, and the adequacy of existing deterrents to this sort of behavior.

If they are correct, that is. Judge Martha Daughtrey, the third member of the *Poindexter* panel, saw her colleagues as overstating the likelihood of intentional ineffective assistance. Daughtrey described the Boggs concurrence as “an affront to the dedication of the women and men who struggle tirelessly to uphold their ethical duty to investigate fully and present professionally all viable defenses available to their clients.”<sup>12</sup> Though strongly worded, this response falls short of a persuasive rebuttal. Ethical standards, consequences to reputation, and the threat of discipline have proven incapable of preventing merely incompetent representation that contributes to the execution of defendants.<sup>13</sup> How can it be assumed that these

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cannot possibly be calculated at the time of trial”); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 791 (1987) (observing that “it is difficult to see what an attorney may gain by sandbagging”); Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 158 (1970) (positing that only in rare circumstances would a lawyer refrain from raising a legitimate claim to preserve a potential future habeas claim and adding that proving that an attorney employed such a strategy would be challenging); Hughes, *supra* note 8, at 336–37 (“So few cases are won on appeal (and even fewer at some later postconviction stage) that such a strategy would rarely be prudent.”); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 695 n.56 (1990) (doubting that sandbagging occurs frequently); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1196–99 (1986) (reasoning that the likelihood of successful sandbagging is low, for various reasons); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 893–94 (1984) (explaining why “[t]he sandbag argument . . . is unpersuasive for several reasons”); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 118 (1990) (“It is our studied conclusion, based on the extensive testimony on this question and our own experience, that capital trial and appellate lawyers rarely engage in the practice of sandbagging.”); Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 43–46 (1978) (discounting the threat of sandbagging).

11. See *Poindexter v. Mitchell*, 454 F.3d 564, 587–89 (6th Cir. 2006) (Boggs, C.J., concurring) (discussing the logic behind intentionally ineffective investigations); *id.* at 589 (Suhreheinrich, J., concurring) (agreeing with Boggs).

12. *Id.* at 590 (Daughtrey, J., concurring).

13. See WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH* 3–9 (2006) (discussing “shockingly inadequate” performances by capital defense attorneys); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1838–39 (1994) (describing capital defense counsel as being hamstrung by a lack of experience, funding and, in some cases, competence).

same deterrents preclude intentionally defective assistance that may save or prolong a client's life?

A more compelling response to the Boggs and Suhrheinrich concurrences would scrutinize the assumptions of law and practice that lie behind these opinions, to determine whether tactical failures to investigate or present mitigating evidence actually benefit capital defendants. If this study establishes that deliberate ineffective assistance at the penalty phase does not work, then it becomes less necessary to worry about the debatable efficacy of other deterrents, because the counterproductive nature of this strategy will itself have a deterrent effect. That is the purpose of this Article—to map against the law and the realities of death-penalty trials and post-conviction proceedings the hypothesis that defense attorneys in capital cases have an incentive, in the form of better results for their clients, to overlook, ignore, or bury potential mitigating evidence.

This review suggests that the Boggs hypothesis suffers from several flaws. True, an inexplicable failure by counsel to locate or present certain types of mitigating evidence may bring about the reversal of a death sentence, and reversals on this ground are more common than they were just a few years ago.<sup>14</sup> A defense attorney contemplating ineffective assistance at trial, however, is infrequently blessed with the knowledge and perspective that will allow him or her to foresee the utility of sandbagging in a given case.<sup>15</sup> One reason being, counsel must decide whether to embrace intentional error uncomfortably early in the investigatory process.<sup>16</sup> Courts are sometimes willing to reverse death sentences on the ground that counsel failed to *uncover* mitigating material.<sup>17</sup> These same tribunals tend to defer to informed decisions by attorneys not to *present* mitigating evidence of which they were aware.<sup>18</sup> As a result, attorneys contemplating intentionally inadequate investigations face a dilemma. If defense counsel terminates an investigation into mitigating material before it yields fruit, he or she typically will not know for sure whether additional probing at some later date will yield enough evidence to satisfy the

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14. See discussion *infra* Part I.C (documenting the modest upward trend of successful ineffective counsel claims by comparing cases decided in 1987 and in 2007).

15. See discussion *infra* Part III (discussing the difficulty with which the efficacy of deliberate ineffective assistance can be predicted).

16. See *id.*

17. See discussion *infra* Part I.D (discussing the willingness of modern courts to vacate death sentences issued after an unreasonably limited investigation into mitigation material by trial counsel).

18. See discussion *infra* Part I.D (addressing the different treatment of “failure to investigate” and “failure to present” ineffective assistance claims).

prejudice prong of an ineffective assistance claim. If, on the other hand, counsel presses further and obtains this evidence, but declines to present it at trial, reversal will follow only if no legitimate strategic rationale exists for the decision not to place this material before the penalty-phase jury. The law thus ensures that this brand of intentional ineffective assistance works best when counsel doesn't know if it will work at all—hardly a recipe for sure-fire reversal.

This uncertainty is not the sole infirmity of penalty-phase sandbagging. A consciously ineffective investigation or presentation of mitigation evidence can backfire, increasing the odds that a defendant will be executed. A reviewing court entertaining an ineffective assistance claim may conclude that a reasonable inquiry at the time of trial would not have uncovered the material in question, that the evidence would not have meaningfully altered the balance of aggravating and mitigating facts presented at trial, or that the claim of error is factually lacking, procedurally barred, or otherwise improperly presented for review. Mitigation evidence also may disappear or become more difficult to locate during the interval between trial and post-trial investigation. In these situations, intentionally defective work will not undermine a death sentence rendered by a jury that reached its decision without the benefit of mitigating evidence that a more thorough effort might have yielded. The likelihood of these counterproductive outcomes compels the conclusion that, more often than not, it is bad strategy to deliberately fail to investigate or present mitigating evidence at the penalty phase of a capital trial for the sole purpose of generating an ineffective assistance claim.

This Article proceeds as follows. Part I reviews the mechanics of capital trials and describes the law applicable to failures by counsel to investigate or present mitigation material. Part II considers *Poindexter* and its provocative concurring opinions. Part III discusses prevailing views regarding defense sandbagging in general, and then examines whether Boggs and Suhrheinrich were right in departing from this received wisdom—in other words, whether deliberate failures to investigate and produce mitigation evidence actually improve the prospects of capital defendants. Finally, the Conclusion to this piece addresses the handful of situations in which the Boggs hypothesis may have some merit, and suggests how courts might deal with the threat of intentional error in these circumstances.



## I. INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE

A. *The Mechanics of Capital Trials*

The *Poindexter* debate over attorney sandbagging assumes a basic knowledge of the mechanics of capital trials. Death penalty trials are divided into two stages: a guilt phase, and an ensuing penalty phase.<sup>19</sup> At the guilt phase, the trier of fact decides whether the defendant has committed an offense for which the death penalty may be applied.<sup>20</sup> If the defendant is convicted of a death-eligible offense, the trial proceeds to the penalty phase.<sup>21</sup> During this second phase, the parties present what are generally known as “aggravating” and “mitigating” facts.<sup>22</sup> As these names imply, aggravating facts are those that tend to argue in favor of a harsher penalty, while mitigating facts militate in favor of a lesser sentence.<sup>23</sup> The sentencing authority considers these facts together in arriving at a sentence.<sup>24</sup>

The defense may present a wide variety of mitigation material at the penalty phase.<sup>25</sup> Assuming that this evidence otherwise satisfies

19. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983).

20. The trier of fact for both the guilt and penalty phases must be a jury, unless waived by the parties (if and as permitted). *Ring v. Arizona*, 536 U.S. 584, 609 (2002); see Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1521–22 (2001) (discussing the rule applicable in several states, prohibiting a waiver of a jury trial in capital cases).

21. Whitney Cawley, Note, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139, 1155 n.119 (2007).

22. *Id.*

23. By way of example, jury instructions promulgated by the Judicial Council of California define an “aggravating circumstance or factor” as “any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant’s conduct, the enormity of the offense, or the harmful impact of the crime.” JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS § 763 (Matthew Bender 2008). A mitigating circumstance or factor is “any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant’s blameworthiness or otherwise supports a less severe punishment.” *Id.*

24. Helen Gredd, Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1547–48 (1983). For a discussion of the various frameworks that states have created to guide the sentencing authority’s consideration of these facts, see Darian B. Taylor, *Capital Sentencing in Arizona*, 42 ARIZ. ATT’Y 20, 21 (July / Aug. 2006), available at [http://www.myazbar.org/AZAttorney/PDF\\_Articles/0706Capital.pdf](http://www.myazbar.org/AZAttorney/PDF_Articles/0706Capital.pdf).

25. At the penalty phase of a capital trial, “the sentencer [may] . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). However, the state may “set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted” at capital sentencing. *Oregon v. Guzek*, 546 U.S. 517, 526 (2006) (upholding the exclusion at

generic admissibility standards<sup>26</sup> (and sometimes, even if it doesn't),<sup>27</sup> at the penalty phase a defendant can proffer testimony or other evidence concerning his or her character, family and social relationships, remorse, drug and alcohol problems, employment and educational history, lack of intelligence, physical and psychological issues, severe emotional disturbance at the time of the offense, and amenability to rehabilitation, as well as evidence concerning other potentially mitigating topics.<sup>28</sup> Empirical studies suggest that the presentation of mitigating facts can make a difference in a capital trial, drawing jurors away from the death penalty and toward a life sentence.<sup>29</sup> These studies assign special mitigating weight to evidence that a defendant suffers from a significant mental illness or defect, or that he or she weathered extreme childhood abuse.<sup>30</sup> Most judges agree that mitigating facts can affect capital sentencing decisions. As one court has said, "[m]itigation evidence affords an opportunity to humanize and explain."<sup>31</sup> And as will be detailed below, on

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capital sentencing of alibi evidence that was not presented at the guilt phase of the defendant's trial).

26. See, e.g., *People v. Stanley*, 897 P.2d 481, 527–29 (Cal. 1995) (noting that, in general, evidence that does not satisfy traditional standards of reliability may be excluded from consideration at the penalty phase).

27. See *Green v. Georgia*, 442 U.S. 95, 97–99 (1979) (determining that relevant hearsay evidence proffered by the defense that exhibits substantial indicia of reliability must be admitted at the penalty phase of a capital trial).

28. See Louis B. Billionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 302–05 (1991) (discussing types of mitigating evidence).

29. See, e.g., Michelle E. Barnett, Stanley L. Brodsky & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 762–66 (2004) (observing that jurors are more likely to sentence a defendant to death in a case without mitigating evidence than in a case with mitigating evidence); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539, 1559 (1998) (noting that jurors respond well to evidence reducing the defendant's individual responsibility for the crime). But cf. Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1041 (2001) (reporting that interviews with jurors who returned death sentences "reflect a pattern in which mitigating factors play a disturbingly minor role in jurors' deliberations about whether a defendant should be sentenced to death"). See generally William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1987–1988) (surveying ten death penalty cases and the reasons why jurors voted one way or another in the penalty phases of these cases).

30. E.g., Garvey, *supra* note 29, at 1539, 1559.

31. *Mayes v. Gibson*, 210 F.3d 1284, 1288 (10th Cir. 2000); see *Boyde v. California*, 494 U.S. 370, 382 (1990) (remarking upon a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional or mental problems, may be less culpable than defendants who have no such excuse") (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2002) ("Defense counsel's use of mitigation evidence to complete, deepen, or

numerous occasions courts have reversed death sentences issued after an unreasonable failure by defense counsel to discover or present significant mitigation material prevented the sentencing authority from incorporating these facts into the life-or-death calculus.<sup>32</sup>

B. *Strickland v. Washington: The Deferential Baseline for Review of Ineffective Assistance Claims*

Claims alleging ineffective assistance of counsel represent the preferred conduit through which a defendant may attack a failure by counsel to adequately investigate or competently present mitigation evidence at trial. Ineffective assistance claims derive from the Sixth Amendment, which confers upon criminal defendants a right to counsel.<sup>33</sup> This guarantee has been equated with a right to the *effective* assistance of counsel.<sup>34</sup> Typically alleged on direct appeal or in a post-conviction habeas corpus petition,<sup>35</sup> a successful ineffective assistance claim will secure the inadequately represented defendant another opportunity to present his or her case before the trier of fact.

To prevail on an ineffective assistance claim, a defendant must establish both deficient performance by counsel and resulting prejudice. The United States Supreme Court identified these as the essential elements of an ineffective assistance of counsel claim in *Strickland v. Washington*,<sup>36</sup> decided in 1984. The *Strickland* Court determined that a defendant or habeas corpus petitioner raising an ineffective assistance challenge to a conviction or sentence bears the burden of demonstrating, first, that counsel's performance "fell below an objective standard of reasonableness" under the circumstances.<sup>37</sup> The defendant or petitioner must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>38</sup> Second, the defendant

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contextualize the picture of the defendant presented by the prosecution can be crucial to persuading jurors that the life of a capital defendant is worth saving.").

32. See *infra* note 59 (listing recent decisions in which the federal courts of appeals have vacated death sentences due to a failure by defense counsel to investigate or present mitigation evidence).

33. U.S. CONST. amend. VI.

34. See Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 462 (1987) (discussing the origins of this right).

35. See NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 28 (2007), available at <http://www.nicic.org/Library/022519> (discussing the frequent invocation of ineffective assistance of counsel claims in capital habeas petitions).

36. 466 U.S. 668 (1984).

37. *Id.* at 688.

38. *Id.* at 689.

or habeas corpus petitioner must show that this deficient performance denied him or her of a fair trial.<sup>39</sup> This prejudice standard is satisfied when a court detects a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>40</sup> This “reasonable probability” threshold amounts to “a probability sufficient to undermine confidence in the outcome” of the proceeding at issue.<sup>41</sup>

*Strickland* was itself a capital case in which the petitioner asserted that his attorney had not presented enough mitigating evidence at the penalty phase of trial. The *Strickland* Court therefore specifically addressed how courts should evaluate claims that counsel conducted an inadequate penalty-phase investigation, or made poor decisions with the information obtained through these efforts.<sup>42</sup> On these points, the Court announced a framework for judicial review that focuses upon the thoroughness of counsel’s investigation. Per *Strickland*:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.<sup>43</sup>

The *Strickland* Court ultimately determined that the petitioner had not established ineffective assistance.<sup>44</sup> His attorney had failed to present at sentencing mitigating evidence above and beyond his client’s lack of a serious criminal record, the petitioner’s remorse and acceptance of responsibility, and the emotional and mental disturbance the petitioner was experiencing at the time of the crimes.<sup>45</sup> Nevertheless, the Court concluded that counsel did not act unreasonably by failing to put on additional evidence.<sup>46</sup> The material

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39. *Id.* at 687.

40. *Id.* at 694.

41. *Id.*

42. *Id.* at 690–91.

43. *Id.*

44. *Id.* at 673–74.

45. *Id.*

46. *Id.* at 675–76. This additional mitigating evidence was relatively weak, consisting of statements by friends, neighbors and relatives that they would have

the attorney supposedly should have presented, the Court determined, might have opened the door to damaging rebuttal evidence by the prosecution.<sup>47</sup> Moreover, the additional evidence would have contradicted the arguments that the defense raised at sentencing.<sup>48</sup> The Court also concluded that the incremental mitigation material paled in light of the “overwhelming” aggravating factors arrayed against the petitioner, meaning that the petitioner suffered no prejudice from any omission.<sup>49</sup>

*Strickland* announced a lenient standard for reviewing the performance of counsel.<sup>50</sup> The High Court maintained this forgiving approach in the years that followed.<sup>51</sup> For example, in *Burger v. Kemp*,<sup>52</sup> decided in 1987, a narrow majority of the Court held that an attorney was not ineffective for failing to present any mitigating evidence on behalf of a death-eligible client who was seventeen years old at the time of the crime.<sup>53</sup> When he committed the crime, the petitioner had an IQ of eighty-two, functioned at the level of a twelve-year-old, and possibly had suffered brain damage as a result of childhood beatings.<sup>54</sup> A five-Justice majority found that it was reasonable for the petitioner’s trial counsel to decide not to introduce this and other mitigating evidence.<sup>55</sup> As it had in *Strickland*, the Court concluded that this evidence could have opened the door to other damaging material, while compromising the defense strategy used at trial.<sup>56</sup> Lower courts absolved equally questionable performances in the decade following *Strickland*,<sup>57</sup> leading to the observation in one 1995 decision that “the cases in which habeas petitioners can properly prevail” with claims alleging that counsel

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testified if asked; a psychiatric report; and a psychological report that related that the petitioner was “chronically frustrated and depressed because of his economic dilemma” when he committed the crimes. *Id.*

47. *Id.* at 699–700.

48. *Id.*

49. *Id.* at 700.

50. John H. Blume & Stacey E. Neumann, “It’s Like Déjà Vu All Over Again:” *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. (forthcoming) (describing the *Strickland* standard as “virtually impossible for defendants to meet”).

51. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 187 (1986) (rejecting an ineffective assistance claim alleging a failure to present mitigation material at capital sentencing).

52. 483 U.S. 776 (1987).

53. *Id.* at 795–96.

54. *Id.* at 818 (Powell, J., dissenting).

55. *Id.* at 795–96 (majority opinion).

56. *Id.* at 792.

57. See, e.g., *infra* text accompanying note 64 (surveying federal appellate decisions issued in 1987 that rejected ineffective assistance of counsel claims involving a failure to investigate or present mitigation evidence).

ineffectively investigated or presented mitigation evidence were “few and far between.”<sup>58</sup>

C. Williams, Wiggins, and Rompilla: *The Modern Trend Toward Heightened Scrutiny of Mitigation Investigations*

In recent years, courts have become slightly more receptive to claims alleging the ineffective investigation or presentation of mitigation evidence—but only slightly.<sup>59</sup> In 1987, twenty-eight decisions produced by the federal circuit courts addressed ineffective assistance claims brought by death-row habeas corpus petitioners who alleged that their attorneys had failed to adequately investigate or present mitigating evidence at their trials.<sup>60</sup> In only two of these matters did the courts order new penalty trials.<sup>61</sup> In two other cases, the courts ordered evidentiary hearings on the petitioners’ claims;<sup>62</sup> and in one other, the court espied a premature dismissal and remanded for further proceedings.<sup>63</sup> In the remaining twenty-three

58. *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc) (quoting *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)).

59. Compare *Gredd*, *supra* note 24, at 1551 (observing that “reversal of a conviction or sentence on grounds of ineffective assistance of counsel remains uncommon”), with Amy R. Murphy, *The Constitutional Failure of the Strickland Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179, 199 (2000) (“Many of the cases that have passed the *Strickland* test involve counsel’s failure to investigate and present mitigation evidence at the sentencing phase.”). Examples of recent federal circuit court decisions overturning death sentences due to ineffective investigations or presentations of mitigating evidence include: *Gray v. Branker*, 2008 U.S. App. LEXIS 13317 (4th Cir. June 24, 2008); *Belmontes v. Ayers*, 2008 U.S. App. LEXIS 12630 (9th Cir. June 13, 2008); *Morales v. Mitchell*, 507 F.3d 916 (6th Cir. 2007); *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007); *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007); *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007); *Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006); *Correll v. Ryan*, 465 F.3d 1006 (9th Cir. 2006); *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006); *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006); *Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006); *Poindexter v. Mitchell*, 454 F.3d 564 (6th Cir. 2006); *Dickerson v. Bagley*, 453 F.3d 690 (6th Cir. 2006); *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005); *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005); *Summerlin v. Schiriro*, 427 F.3d 623 (9th Cir. 2005); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005); *Boyde v. Brown*, 404 F.3d 1159 (9th Cir. 2005). State courts also have been active on this front. See, e.g., *In re Lucas*, 94 P.3d 477 (Cal. 2004) (ordering a new penalty trial due to trial counsel’s failure to investigate mitigating evidence); *Blackwood v. State*, 946 So.2d 960 (Fla. 2006) (same); *Glass v. State*, 227 S.W.3d 463 (Mo. 2007) (same); *Commonwealth v. Gorby*, 900 A.2d 346 (Pa. 2006) (same); *Ex Parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006) (same).

60. See *infra* notes 61–64 (listing all twenty-eight cases).

61. *Armstrong v. Dugger*, 833 F.3d 1430 (11th Cir. 1987); *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987).

62. *Agan v. Dugger*, 835 F.2d 1337 (11th Cir. 1987); *Wilson v. Butler*, 813 F.2d 664 (5th Cir. 1987).

63. *Bundy v. Wainright*, 808 F.2d 1410 (11th Cir. 1987).

cases, the courts rejected the petitioners' ineffective assistance arguments as procedurally barred or lacking in substance.<sup>64</sup>

In 2007, by comparison, the federal courts of appeals produced forty-two habeas decisions addressing this same subject.<sup>65</sup> The petitioners' ineffective assistance arguments were accepted in five cases.<sup>66</sup> In thirty-five other decisions, the petitioners' claims were rejected on the merits, or found to be procedurally barred.<sup>67</sup> In two

64. Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987); Laws v. Armontrout, 834 F.2d 1401 (8th Cir. 1987); Campbell v. Kicheloe, 829 F.2d 1453 (9th Cir. 1987); Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987); Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987), *overruled on other grounds by* Romano v. Gibson, 239 F.3d 1156, 1169 (10th Cir. 2001); Bell v. Lynaugh, 828 F.2d 1085 (5th Cir. 1987); Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987); James v. Butler, 827 F.2d 1006 (5th Cir. 1987); Mitchell v. Kemp, 827 F.2d 1433 (11th Cir. 1987); Clanton v. Bair, 826 F.2d 1354 (4th Cir. 1987); Booker v. Dugger, 825 F.2d 281 (11th Cir. 1987); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987); Parks v. Brown, 840 F.2d 1496 (10th Cir. 1987), *reh'g granted*, 860 F.2d 1545 (10th Cir. 1988), *rev'd sub nom.* Saffle v. Parks, 494 U.S. 484 (1990); Evans v. Cabana, 821 F.2d 1065 (5th Cir. 1987); Woratzeck v. Ricketts, 820 F.2d 1450 (9th Cir. 1987), *vacated and remanded*, 486 U.S. 1051 (1988); Glass v. Butler, 820 F.2d 112 (5th Cir. 1987); High v. Kemp, 819 F.2d 988 (11th Cir. 1987); Johnson v. Cabana, 818 F.2d 333 (5th Cir. 1987); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987); Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), *vacated*, 828 F.2d 1497; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987); Williams v. Lynaugh, 809 F.2d 1063 (5th Cir. 1987).

65. See *infra* notes 66–68 (listing all forty-two cases).

66. Morales v. Mitchell, 507 F.3d 916 (6th Cir. 2007); Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007); Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007); Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007); Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007).

67. Gardner v. Ozmint, 511 F.3d 420 (5th Cir. 2007); Perkins v. Quarterman, 2007 U.S. App. LEXIS 26523 (5th Cir. 2007); Meyer v. Branker, 506 F.3d 358 (4th Cir. 2007); Moses v. Branker, 2007 U.S. App. LEXIS 24750 (4th Cir. Oct. 23, 2007); Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007); Brown v. Ornoski, 503 F.3d 1006 (9th Cir. 2007); Bower v. Quarterman, 497 F.3d 459 (5th Cir. 2007); Reynolds v. Bagley, 498 F.3d 549 (6th Cir. 2007); Coble v. Quarterman, 496 F.3d 430 (5th Cir. 2007); Getsy v. Mitchell, 495 F.3d 295 (6th Cir. 2007) (en banc); Hartman v. Bagley, 492 F.3d 347 (6th Cir. 2007); Diaz v. Quarterman, 239 F. App'x 886 (5th Cir. 2007); Jennings v. McDonough, 490 F.3d 1230 (11th Cir. 2007); Simpson v. Norris, 490 F.3d 1029 (8th Cir. 2007); Henry v. Sec'y of Dep't of Corr., 490 F.3d 835 (11th Cir. 2007); Wood v. Quarterman, 491 F.3d 196 (5th Cir. 2007); Gaskin v. Sec'y of Dep't of Corr., 494 F.3d 997 (11th Cir. 2007); Cone v. Bell, 492 F.3d 743 (6th Cir. 2007); Dill v. Allen, 488 F.3d 1344 (11th Cir. 2007); Durr v. Mitchell, 487 F.3d 423 (6th Cir. 2007); Foley v. Parker, 488 F.3d 377 (6th Cir. 2007); Henley v. Bell, 487 F.3d 379 (6th Cir. 2007); Young v. Sirmons, 486 F.3d 655 (10th Cir. 2007); Hill v. Polk, 230 F. App'x 285 (4th Cir. 2007); Johnson v. Quarterman, 483 F.3d 278 (5th Cir. 2007); Nields v. Bradshaw, 482 F.3d 442 (6th Cir. 2007); Wilkinson v. Polk, No. 06-3, 2007 WL 1051436, at \*1 (4th Cir. Apr. 5, 2007); Martinez v. Quarterman, 481 F.3d 249 (5th Cir. 2007); Gilliam v. Sec'y of Dep't of Corr., 480 F.3d 1027 (11th Cir. 2007); Skillicorn v. Luebbbers, 475 F.3d 965 (8th Cir. 2007); McNeill v. Polk, 476 F.3d 206 (4th Cir. 2007); Stewart v. Sec'y of Dep't of Corr., 476 F.3d 1193 (11th Cir. 2007); Emmett v. Kelly, 474 F.3d 154 (4th Cir. 2007); Sonnier v. Quarterman, 476 F.3d 349 (5th Cir. 2007); Ringo v. Roper, 472 F.3d 1001 (8th Cir. 2007). Omitted from this list are decisions rejecting failure-to-investigate arguments aimed principally at performance at the guilt phase of trial. *E.g.*, Cummings v. Sirmons, 506 F.3d 1211 (10th Cir. 2007); Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007).

cases, the ineffective assistance issue was remanded to the district court for further proceedings.<sup>68</sup> And so, in 1987 petitioners went 2-23-3 in the federal courts of appeals with their claims alleging an ineffective investigation or presentation of mitigation evidence. In 2007, the scorecard read 5-35-2—an improvement, but hardly a marked one.

The marginally greater success rate for these claims owes, in part, to three recent Supreme Court decisions.<sup>69</sup> Each of these decisions overturned death sentences issued after deficient mitigation investigations by counsel. These decisions all applied the *Strickland* framework for ascertaining deficient performance and resulting prejudice, but manifested a more receptive attitude toward ineffective investigation claims than earlier caselaw had evinced.

In the first of these decisions, *Williams v. Taylor*,<sup>70</sup> the Court found a habeas petitioner's trial counsel prejudicially ineffective because the attorney had committed a series of errors: he had failed to uncover records that "graphically describ[ed] [the petitioner's] nightmarish childhood" and detailed the good deeds the petitioner had performed while in prison, he had not introduced available evidence

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68. *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007); *Lopez v. Schriro*, 491 F.3d 1029 (9th Cir. 2007).

69. See Cawley, *supra* note 21, at 1185 ("In recent decisions regarding capital defendants' claims of ineffective assistance of counsel, the Court has shown a tendency toward modifying *Strickland* and imposing stricter standards on capital defense lawyers. . ."). The enhanced scrutiny of mitigation investigations also owes in part to the acceptance of ABA guidelines for the performance of capital attorneys as an aid in determining what amounts to reasonable performance. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 76, 76 (rev. ed. 2003) [hereinafter REVISED ABA GUIDELINES]. The revised guidelines, issued in 2003, spell out the investigatory obligations of capital counsel in some detail. *Id.* Revised Guideline 10.7 specifies that defense attorneys must "conduct thorough and independent investigations relating to the issues of both guilt and penalty." *Id.* The commentary to this guideline states that counsel should investigate topics including, but not limited to, the defendant's medical history, family and social history, educational history, military service, employment and training history, and prior adult and juvenile correctional experience. *Id.* at 81-82. In conducting this investigation, "[i]t is necessary to locate and interview the client's family members . . . and virtually everyone else who knew the client and his family," and to obtain, to the extent they exist and are available, various documents that might support mitigation arguments or provide additional leads. *Id.* at 83. These documents include the defendant's school records, social service and welfare records, juvenile dependency or family court records, medical records, military records, employment records, criminal and correctional records, family birth, marriage, and death records, alcohol and drug abuse assessment or treatment records, and INS records. *Id.* Several courts have relied upon these guidelines in making findings of ineffectiveness. See, e.g., *Dickerson v. Bagley*, 453 F.3d 690, 693 (6th Cir. 2006) ("[C]ounsel for defendants in capital cases must fully comply with these professional norms."). See generally Blume & Neumann, *supra* note 50 (discussing the adoption of the ABA guidelines as a tool for assessing whether counsel rendered effective assistance).

70. 529 U.S. 362 (2000).



that the petitioner was borderline mentally retarded, and he had not followed up on other leads that might have yielded additional mitigating material.<sup>71</sup> Unlike *Strickland*, the *Williams* Court did not attempt to justify counsel's performance on the ground that an alternative mitigation argument (focusing upon the petitioner's confession, apparent remorse, and cooperation with law enforcement) had been presented at trial.<sup>72</sup> Instead, the Court determined that the failure to develop and present the missing mitigation evidence "was not justified by a tactical decision" to focus upon different issues at sentencing.<sup>73</sup> And because the additional material "might well have influenced the jury's appraisal of [the] petitioner's moral culpability," a finding of prejudice followed.<sup>74</sup>

*Wiggins v. Smith*,<sup>75</sup> the second decision in the failure-to-investigate trilogy, was issued in 2003. The defense attorneys in *Wiggins* had, at the time of trial, access to a report that cursorily mentioned their client's "misery as a youth," much of which was spent in the foster care system.<sup>76</sup> Notwithstanding this lead, counsel did not press their investigation into the petitioner's life history beyond recovering records discussing his foster-care placements, which revealed only that his mother was a chronic alcoholic who had abandoned the family at least once; that the petitioner had frequent, lengthy absences from school; and that the petitioner was "shuttled from foster home to foster home," displaying "some emotional difficulties" in the process.<sup>77</sup> The defense presentation at sentencing was accordingly modest, offering only what the Court later described as a "halfhearted mitigation case" that resulted in a death sentence.<sup>78</sup>

Much more useful evidence was available, if only the defense attorneys had pushed their investigation further. A social history report prepared in connection with post-conviction proceedings detailed extensive physical and sexual abuse that the petitioner had suffered as a child.<sup>79</sup> The *Wiggins* Court concluded that counsel was ineffective for failing to uncover this information.<sup>80</sup> "In assessing the reasonableness of an attorney's investigation," the Court observed en route to reaching this conclusion, "a court must consider not only the

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71. *Id.* at 395–96.

72. *Id.* at 396.

73. *Id.*

74. *Id.*

75. 539 U.S. 510 (2003).

76. *Id.* at 523.

77. *Id.* at 525.

78. *Id.* at 526.

79. *Id.* at 516–17.

80. *Id.* at 525–26.

quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.”<sup>81</sup> Finding that the records already obtained by the petitioner’s trial attorneys bespoke a need for further investigation, the Court said that by failing to undertake this additional effort, “counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.”<sup>82</sup> As for prejudice, the Court stressed that the undeveloped mitigating evidence was not “mutually exclusive” with the sentencing strategy that had been embraced by defense counsel—arguing that the petitioner had no prior record and was not directly responsible for the murder at issue—and determined that had the petitioner’s jury heard this “powerful” mitigating evidence, a reasonable probability existed that it would not have returned a death sentence.<sup>83</sup>

The final chapter in the trilogy, *Rompilla v. Beard*,<sup>84</sup> was written in 2005. In *Rompilla*, counsel failed to conduct a timely review of court records concerning the petitioner’s prior convictions for rape, burglary, and theft, even though these offenses were part of the prosecution’s case in aggravation.<sup>85</sup> These records indicated that the petitioner had experienced an economically deprived childhood in which, among other hardships, he had been beaten by his father and locked in an excrement-filled dog pen with his brother.<sup>86</sup> If these and other records had been placed the hands of experts, they could have supported mitigation arguments that the petitioner suffered from fetal alcohol syndrome and schizophrenia.<sup>87</sup> The information contained in the court records also could have led counsel to other sources of mitigation material, such as school records indicating that the petitioner’s IQ was within the mentally retarded range.<sup>88</sup> Consistent with *Williams* and *Wiggins*, the *Rompilla* court concluded that counsel’s failure to obtain these records amounted to prejudicial error.<sup>89</sup> Quoting *Strickland*, the Court held that the absence of this mitigation evidence at the petitioner’s trial was “sufficient to

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81. *Id.* at 527.

82. *Id.* at 527–28.

83. *Id.* at 536.

84. 545 U.S. 374 (2005).

85. *Id.* at 384–85.

86. *Id.* at 390–92.

87. *Id.* at 391–92.

88. *Id.* at 393.

89. *Id.* at 389–90.

undermine confidence in the outcome' actually reached at sentencing."<sup>90</sup>

*D. The Present State of Ineffective Assistance Law as It Relates to Failures to Investigate and Present Mitigation Evidence*

*Strickland*, *Williams*, *Wiggins*, and *Rompilla* all endorse and implement a "case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient."<sup>91</sup> Inevitably, however, some generic principles have emerged from the burgeoning caselaw addressing claims alleging a failure to investigate or present mitigation evidence.

Several of these guidelines relate to the duty to investigate. In preparing for the penalty phase, counsel must undertake a "reasonable" investigation into mitigation material.<sup>92</sup> A "reasonable" investigation is "thorough and complete,"<sup>93</sup> encompassing efforts to locate all "reasonably available mitigating evidence,"<sup>94</sup> but at the same time, counsel need not "pursue every path until it bears fruit or until all hope withers."<sup>95</sup> This means that counsel (or their agents) need not interview every conceivable witness,<sup>96</sup> particularly those who can be located only with grave difficulty.<sup>97</sup> To safeguard against a

90. *Id.* at 393 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

91. *Id.* at 394 (O'Connor, J., concurring).

92. *Strickland*, 466 U.S. at 691; see *Stewart v. Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) ("In considering claims that counsel was ineffective at the penalty phase of trial, we determine 'whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court.'") (quoting *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006)); *Lambrix v. Singletary*, 72 F.3d 1500, 1506 (11th Cir. 1996) ("Counsel cannot be held responsible for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence.").

93. *Dickerson v. Bagley*, 453 F.3d 690, 693 (6th Cir. 2006). A recurring issue on this front concerns whether counsel has an affirmative duty to ask a defendant whether he or she had been abused as a child. Compare *Simon v. State*, 857 So. 2d 668, 685 (Miss. 2003) (finding that counsel was not ineffective for failing to ask his client whether he had been abused as a child), with *Ex parte Gonzales*, 204 S.W.3d 391, 397 (Tex. Crim. App. 2006) (finding counsel ineffective for failing to ask his client whether he had been abused as a child).

94. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 93 (1989)).

95. *Williams v. Head*, 185 F.3d 1223, 1236–37 (11th Cir. 1999) (quoting *Foster v. Dugger*, 823 F.2d 402, 405 (11th Cir. 1987)).

96. *Young v. Sirmons*, 486 F.3d 655, 680 (10th Cir. 2007); *Gilbert v. Moore*, 134 F.3d 642, 655 (4th Cir. 1998); see *Wiggins*, 539 U.S. at 533 (noting that counsel need not "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing").

97. See *In re Thomas*, 129 P.3d 49, 61 (Cal. 2006) (declining to find counsel ineffective for failing to locate certain witnesses whose identities could only be

subsequent finding of ineffectiveness, however, counsel should undertake

inquiries into social background and evidence of family abuse, potential mental impairment, physical health history, [any] history of drug and alcohol abuse, . . . [an] examination of mental and physical health records, school records, and criminal records . . . [and a] review [of] all evidence that the prosecution plans to introduce in the penalty phase proceedings, including the records pertaining to criminal history and prior convictions.<sup>98</sup>

Because of the substantial mitigating weight accorded to evidence of severe psychological problems, mental defects, and childhood abuse, the modern caselaw exhibits especially little patience for attorneys who fail to conduct at least a basic inquiry into these topics.<sup>99</sup>

This initial investigation will produce some evident leads and some dead ends. It is expected that counsel will dedicate their limited time and resources to the more promising veins of mitigation material. A failure to push auspicious leads will be condemned,<sup>100</sup> but an attorney normally will not be faulted for diverting time and attention away from what reasonably seem to be unfruitful avenues of inquiry.<sup>101</sup> The

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gleaned through painstaking investigation, though counsel was found ineffective for failing to locate other, more easily found individuals).

98. *Correll v. Ryan*, 465 F.3d 1006, 1011 (9th Cir. 2006) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (en banc)). *But cf.* *Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000) (en banc) (maintaining that “no absolute duty exists to investigate particular facts or a certain line of defense”); *Clanton v. Bair*, 826 F.2d 1354, 1358 (4th Cir. 1987) (“There is no constitutional basis for a rule that would require a psychiatric evaluation in every capital case.”).

99. *See, e.g., Haliym v. Mitchell*, 492 F.3d 680, 716–19 (6th Cir. 2007) (finding counsel prejudicially ineffective for failing to uncover evidence of the petitioner’s troubled childhood and brain impairment); *Lambright v. Schriro*, 490 F.3d 1103, 1127–28 (9th Cir. 2007) (finding prejudicially deficient a penalty-phase investigation that overlooked the petitioner’s mental health problems, drug dependency, and childhood abuse); *Anderson v. Sirmons*, 476 F.3d 1131, 1143–45 (10th Cir. 2007) (assigning prejudicial error to a failure by counsel to locate evidence that the petitioner was physically abused as child, had brain damage and a low IQ, and abused drugs and alcohol).

100. *See, e.g., Wiggins*, 539 U.S. at 527–28 (criticizing the decision of counsel not to expand their investigation of petitioner’s life history beyond a review of social services records); *Daniels v. Woodford*, 428 F.3d 1181, 1203–04 (9th Cir. 2005) (faulting trial counsel for failing to follow up on leads suggesting that the petitioner suffered from mental illness).

101. *See McWee v. Weldon*, 283 F.3d 179, 188 (4th Cir. 2002) (“[T]he reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel’s time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation.”). In prioritizing their work, attorneys are entitled to rely on uncontroverted information provided by their clients. “[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also Emmett v. Kelly*, 474 F.3d

latter rule holds true even if subsequent investigation yields mitigating evidence on points that had been abandoned by trial counsel.<sup>102</sup> And so, if a mental health expert or experts consulted in the course of the mitigation investigation return unambiguously unhelpful opinions with no useful leads, counsel has no obligation to continue to consult additional experts on the same issue, in the hope that one will adopt a contrary view.<sup>103</sup> Likewise, counsel can decline to pursue leads further upon reasonably becoming convinced that the mitigation evidence in question has a “double edge” to it, meaning an inherent capacity for aggravation as well as mitigation.<sup>104</sup>

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154, 168 (4th Cir. 2007) (finding that counsel could rely on the client’s denials of abuse); *Moody v. Polk*, 408 F.3d 141, 148–50 (4th Cir. 2005) (finding counsel’s decision not to hold further meetings with the client reasonable because the client had lied and refused to give any productive leads).

102. This rule follows from the principle that with an ineffective assistance claim, the focus lies on what would have been found and produced with a reasonable effort, not on what may have been found and produced through an exemplary effort. This principle informed the following discussion of the limits of the ineffective assistance inquiry:

It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or . . . had they been asked the right questions. . . . But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance. . . . That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.

*Grossman v. McDonough*, 466 F.3d 1325, 1347 (11th Cir. 2006) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1513–14 (11th Cir. 1995)).

103. See *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (“A failure to ‘shop around’ for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance.”) (quoting *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992)); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998) (finding that it was reasonable for counsel to rely on the conclusions of two trained psychiatrists that no additional testing of the petitioner was warranted); *Haight v. Commonwealth*, 41 S.W.3d 436, 447 (Ky. 2001) (concluding that counsel was not ineffective for relying on an expert opinion that the defendant had no significant neurological deficit); *Ringo v. State*, 120 S.W.3d 743, 749 (Mo. 2003) (observing that “where trial counsel has . . . made reasonable efforts to investigate the mental status of defendant and has concluded that there is no basis in pursuing a particular line of defense, counsel should not be held ineffective for not shopping for another expert to testify in a particular way”); *State v. Frogge*, 607 S.E.2d 627, 636 (N.C. 2005) (stating that counsel was not required to second-guess a mental health report).

104. See *Martinez v. Quarterman*, 481 F.3d 249, 255 (5th Cir. 2007) (finding reasonable counsel’s decision not to further pursue evidence in mitigation, on the ground that known facts suggested this evidence would be a double-edged sword); *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) (“[A] tactical decision not to pursue and present potentially mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance.”).

Once counsel becomes aware of the available mitigation evidence, substantial deference will adhere to his or her decisions regarding the presentation of this material at trial.<sup>105</sup> There is no absolute requirement that a defense attorney actually introduce *any* mitigation evidence at the penalty phase.<sup>106</sup> *A fortiori*, attorneys are not required to present all mitigation evidence of which they are aware.<sup>107</sup> Counsel can decline to present even powerful mitigation evidence if a valid strategic reason supports this decision. These reasons include an awareness that the evidence would compromise, contradict, or dilute another reasonable mitigation strategy;<sup>108</sup> well-grounded concerns that the evidence could be construed as aggravating as well as mitigating;<sup>109</sup> or a reasonable sense that the evidence would open the door to powerful rebuttal material from the prosecution.<sup>110</sup> Finally, it almost goes without saying that counsel need not call witnesses whose testimony would be cumulative of other evidence placed before the

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105. See *Strickland*, 466 U.S. at 690 (1984) (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”).

106. *Wiggins v. Smith*, 539 U.S. 510, 533 (2003); see *Commonwealth v. Moore*, 860 A.2d 88, 98 (Pa. 2004) (“It is well settled that failure to present mitigation evidence, without more, is not ineffective assistance *per se*.”).

107. *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000).

108. See, e.g., *Young v. Simons*, 486 F.3d 655, 682 (10th Cir. 2007) (finding it reasonable for the petitioner’s trial counsel to frame his penalty-phase presentation around the theory that the petitioner was not a bad person, as opposed someone who may be violent but has reduced culpability due to his background and circumstances); *Stewart v. Dep’t of Corr.*, 476 F.3d 1193, 1218 (11th Cir. 2007) (finding defense counsel’s decision not to present evidence of the petitioner’s substance abuse reasonable because, *inter alia*, the evidence would have undermined the defense strategy of portraying childhood abuse as a “trigger point to violence”); *Ringo v. Roper*, 472 F.3d 1001, 1006–07 (8th Cir. 2007) (noting that counsel reasonably decided not to call a childhood development specialist to speak to the violence and neglect petitioner suffered during his childhood, as this would have conflicted with the coherent mitigation theme advanced by the petitioner’s mother’s testimony at the penalty phase); *Haliburton v. Sec’y of Dep’t of Corr.*, 342 F.3d 1233, 1243–44 (11th Cir. 2003) (“Counsel is not ‘required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel’s strategy.’ Counsel must be permitted to weed out some arguments to stress others and advocate effectively.” (quoting *Chandler*, 218 F.3d at 1319)).

109. E.g., *Hartman v. Bagley*, 492 F.3d 347, 360–61 (6th Cir. 2007) (finding counsel’s decision not to present a psychologist’s report to be reasonable because the report contained damaging facts and counsel placed useful facts into the record through other witnesses).

110. E.g., *Lovitt v. True*, 403 F.3d 171, 180 (4th Cir. 2005); *Carter v. Mitchell*, 443 F.3d 517, 531–32 (6th Cir. 2001); *Gaskin v. State*, 822 So. 2d 1243, 1248 (Fla. 2002) (“Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.”); *Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997).

trier of fact.<sup>111</sup> In short, courts rarely second-guess informed decisions by counsel regarding what facts, within the universe of available evidence, should be presented at the penalty phase of a capital trial.<sup>112</sup>

Turning to the law surrounding *Strickland's* prejudice prong, to assess the harm done by an unreasonable failure to investigate or present mitigating evidence, courts reweigh the evidence in aggravation against the totality of available mitigating evidence.<sup>113</sup> The presence or absence of overwhelming aggravating evidence is an important part of this analysis,<sup>114</sup> but whether prejudice will be found typically depends more on the quality of the mitigating evidence that counsel inexplicably failed to discover or present.<sup>115</sup> Here, the burden lies on the defendant or petitioner to show what a reasonable investigation would have yielded.<sup>116</sup> If it can be shown that counsel

111. *E.g.*, *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006) (noting that it is not constitutionally necessary to present additional mitigating evidence that is merely cumulative of that already presented); *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324 n.7 (11th Cir. 2002) (noting that "a petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative"); *Fugate v. Head*, 261 F.3d 1206, 1239–40 (11th Cir. 2001) (observing that it is not unreasonable for counsel not to call additional witnesses whose testimony would be virtually the same as that of witnesses who had already testified).

112. Courts sometimes supply their own strategic rationales for such decisions in situations where the attorney offers none. *See Gilliam v. Sec'y of Dep't of Corr.*, 480 F.3d 1027, 1034 (11th Cir. 2007) ("That defense counsel has refused to characterize the decision as strategic is not dispositive" of the ineffective assistance inquiry); *Alderman v. Terry*, 468 F.3d 775, 795 (11th Cir. 2006) (supplying a strategic rationale for an attorney who candidly admitted he could not recall one); *Harich v. Dugger*, 844 F.2d 1464, 1470 (11th Cir. 1988) (assuming that the petitioner's attorneys were not fully aware of the scope of permissible mitigating evidence, petitioner would need to show that the approach they ultimately took "would not have been used by professionally competent counsel").

113. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

114. *See Knight v. Quarterman*, No. 04-70042, 2006 WL 1793586, at \*16 (5th Cir. June 30, 2006) (finding no prejudice even if ineffective assistance was assumed; the crimes were "so horrible and cruel that it is extremely unlikely that a reasonable juror would have been willing to spare [the petitioner's] life, even if presented with [additional mitigating] evidence"); *Grayson v. Thompson*, 257 F.3d 1194, 1228–29 (11th Cir. 2001) (discussing how the aggravating circumstances of some murders will render harmless a failure to investigate or present mitigation evidence); *Simon v. State*, 857 So. 2d 668, 685 (Miss. 2003) (concluding that the heinous nature of the capital crimes at issue ruled out any prejudice to the petitioner, even if ineffective assistance had been shown); *Taylor v. State*, 156 P.3d 739, 755–56 (Utah 2007) (determining that even if evidence of the petitioner's "moderate" brain damage been identified and placed before the jury, it would not have affected the verdict because of the "horrendous circumstances" of the crime).

115. *See Lambright v. Schriro*, 490 F.3d 1103, 1127 (9th Cir. 2007) (discussing previous cases in which the United States Court of Appeals for the Ninth Circuit found prejudice for failing to investigate or present mitigation evidence notwithstanding "horrible" or "horrific" crimes).

116. *See Carter v. Mitchell*, 443 F.3d 517, 529 (6th Cir. 2006) (discussing how ineffective assistance claims have been rejected in cases where the petitioner failed to show what would have been found through a reasonable investigation).

inexcusably overlooked or failed to develop evidence that the defendant experienced severe childhood deprivation or abuse<sup>117</sup> or suffered from significant mental disease or defects,<sup>118</sup> modern courts often follow *Williams*, *Wiggins*, and *Rompilla* and hold that the omission justifies retrial of the penalty phase.<sup>119</sup> An unreasonable failure to locate or present other types of mitigating material also may undermine a death sentence, but far less frequently. Examples of this less potent, but still significant, evidence include indicia of the defendant or petitioner's drug or alcohol problems;<sup>120</sup> childhood hardship not involving physical or sexual abuse;<sup>121</sup> and character evidence from friends, acquaintances, or family members.<sup>122</sup> Of course, a given case often involves multiple types of missing mitigation evidence,<sup>123</sup> and a failure to locate or put on more than

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117. *E.g.*, *Boyd v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005) (finding counsel ineffective for failing to investigate adequately or introduce evidence of childhood physical and sexual abuse); *Lewis v. Dretke*, 355 F.3d 364, 367–69 (5th Cir. 2003) (per curiam) (finding counsel deficient for failing to investigate the petitioner's childhood abuse); *Hamblin v. Mitchell*, 354 F.3d 482, 490–91 (6th Cir. 2003) (finding counsel ineffective for failing to investigate evidence of abuse); *Coleman v. Mitchell*, 268 F.3d 417, 452 (6th Cir. 2001) (finding counsel ineffective for failing to investigate abuse in preparation for the penalty phase of trial).

118. *E.g.*, *Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir. 2005) (finding counsel ineffective for failing to pursue evidence that the petitioner suffered from a mental disorder); *Brownlee v. Haley*, 306 F.3d 1043, 1067 (11th Cir. 2002) (condemning a failure to investigate and present any mitigating evidence at the sentencing stage, including evidence of severe psychiatric illnesses). Of course, some mental illnesses or impairments will be accorded little to no mitigating weight. For instance, while some courts regard a diagnosis of antisocial personality disorder as potentially mitigating, *e.g.*, *Lambright*, 490 F.3d at 1122 (noting that the Arizona Supreme Court has held that an antisocial personality disorder is a mitigating factor), others do not, *e.g.*, *Willacy v. State*, 967 So. 2d 131, 144 (Fla. 2007) (determining that counsel was not ineffective for failing to introduce evidence of defendant's antisocial personality disorder).

119. *E.g.*, *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003) (reversing the petitioner's death sentence because counsel failed to investigate and introduce evidence of the petitioner's social background and mental health); *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002) (reversing the petitioner's death sentence because counsel failed to investigate the petitioner's past for any mental defenses related to psychiatric disorders or substance abuse); *Coleman*, 268 F.3d at 449–53 (reversing the petitioner's death sentence because counsel failed to investigate adequately the petitioner's personal history).

120. *E.g.*, *Correll v. Ryan*, 465 F.3d 1006, 1014–15 (9th Cir. 2006) (according mitigating weight to the petitioner's long history of drug use).

121. *E.g.*, *Morales v. Mitchell*, 507 F.3d 916, 931–34 (6th Cir. 2007) (according significant mitigating weight to the petitioner's difficult childhood, including familial alcoholism).

122. *E.g.*, *Mayfield v. Woodford*, 270 F.3d 915, 928–32 (9th Cir. 2001) (assigning prejudice to ineffective assistance that included a failure to locate witnesses who could have testified to the petitioner's positive traits); *In re Marques*, 822 P.2d 435, 450 (Cal. 1992) (same).

123. *E.g.*, *Outen v. Kearney*, 464 F.3d 401, 419–20 (3d Cir. 2006) (finding prejudicial a failure to locate evidence that the petitioner suffered from physical



one category of mitigation material may be more prejudicial than a lapse involving only one subject. The weighing process used to ascertain prejudice also addresses whether the beneficial effects of the bypassed mitigation material would have been offset or minimized by other evidence. Here, courts consider several of the same factors that bear upon the reasonableness of a decision to truncate an ongoing investigation, or not to present mitigation evidence that counsel has discovered. These considerations include whether the evidence carries a “double edge,” whether it would incite damaging rebuttal from the prosecution, and whether it overlaps with other mitigation evidence that was put before the sentencer.<sup>124</sup>

As the text above suggests, an important difference exists between ineffective assistance claims alleging a failure to *investigate* mitigation evidence and claims alleging a failure to *present* this evidence at trial. With regard to the first type of claim, the caselaw has more precisely specified what sorts of missteps constitute ineffective performance, incapable of strategic justification. Also, with a “failure to investigate” claim, the conventional analysis downplays the coherence of the mitigation arguments that were actually made at trial.<sup>125</sup> These arguments will be treated as the fundamentally compromised products of an inadequate investigation.<sup>126</sup> At least where there are no palpable tensions between the new mitigation evidence and that which was presented at trial, the prejudice inquiry will simply weigh the totality of mitigating facts against the sum of aggravating facts, with little attention being paid to whether counsel might have decided to jettison some of the newfound mitigation material in favor

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abuse, sexual abuse, neurological damage, a low IQ, learning disabilities, placement in foster homes, and substance abuse).

124. *Strickland v. Washington*, 466 U.S. 668, 699-700 (1984) (observing that the mitigation evidence cited by the petitioner would have opened the door to damaging rebuttal material had it been presented at sentencing); *Brooks v. Bagley*, 513 F.3d 618, 629 (6th Cir. 2008) (noting that the strategy the petitioner claimed should have been pursued carried a “double edge” that weakened its potential for mitigation); *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006) (reciting that a failure to introduce mitigating evidence that is merely cumulative of other material that was put on at trial does not amount to a violation of a constitutional right).

125. *See, e.g., Poindexter v. Mitchell*, 454 F.3d 564, 581 (6th Cir. 2006) (discounting the mitigation strategy actually used at trial because “any mitigation strategy to portray [the petitioner] as a peaceful person was unreasonable since that strategy was the product of an incomplete investigation”).

126. *See Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (disputing the dissent’s argument that the defense would have employed the same strategy even had it known of the undiscovered mitigation material, on the ground that “counsel were not in a position to make a reasonable strategic choice as to whether to focus on [the petitioner’s] direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable”).

of a more streamlined presentation.<sup>127</sup> Furthermore, while the *prejudice* determination in a “failure to investigate” case will consider whether the overlooked mitigation evidence could have hurt as well as helped the defense,<sup>128</sup> if the defendant or petitioner establishes that trial counsel stopped his or her investigation before becoming sufficiently aware of both the good and the bad aspects of this evidence, the damaging components of the undiscovered material normally will not influence the threshold inquiry into the *reasonableness* of counsel’s conduct.<sup>129</sup>

By contrast, with a claim alleging that counsel failed to *present* mitigation evidence of which he or she was aware, considerations such as the dual aggravating and mitigating nature of the evidence in question, the chance that it would have opened the door to devastating rebuttal, and the consistency of this information with the strategy adopted by the defense at trial all bear upon both the prejudice inquiry *and* the issue of whether counsel acted reasonably.<sup>130</sup> Moreover, with a “failure to present” challenge, the question is not whether the downside of the mitigation evidence *in fact* outweighs its useful attributes, but whether a reasonable attorney *could have* concluded that the evidence was more trouble than it was

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127. See, e.g., *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003) (engaging in a simple reweighing process of the aggravating and mitigating facts to ascertain prejudice); *Karis v. Calderon*, 283 F.3d 1117, 1140 (9th Cir. 2002) (suggesting it would have been possible to combine the defense strategy employed at the penalty phase with additional mitigation material that counsel failed to discover).

128. See *Strickland*, 466 U.S. at 700 (concluding that the evidence that the respondent said his counsel should have offered would have opened the door to additional aggravating facts); *Emmett v. Kelly*, 474 F.3d 154, 170–71 (4th Cir. 2007) (rejecting the petitioner’s ineffective assistance claim because, *inter alia*, his mitigation evidence would have been offset by related aggravating facts).

129. In other words, counsel cannot merely speculate that a potential line of mitigation will have a double edge, or otherwise not help the defense, and decline to conduct any investigation at all on that basis. See, e.g., *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (finding a defense attorney ineffective for failing to investigate mitigation evidence “because he did not think that it would do any good”). That said, as discussed earlier, counsel may decide to halt an ongoing investigation upon reasonably becoming convinced that the evidence in question has a double edge, or would open the door to damning aggravating facts. See, e.g., *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101–02 (5th Cir. 2006) (regarding as reasonable trial counsel’s decision to stop pursuing psychological evidence after the review already undertaken suggested that this evidence had an aggravating tone to it).

130. See, e.g., *Winfield v. Roper*, 460 F.3d 1026, 1033 (8th Cir. 2006) (regarding counsel’s decision not to call certain mitigation witnesses as reasonable because their testimony would have been cumulative to similar evidence that already had been presented); *Moore v. Parker*, 425 F.3d 250, 254 (6th Cir. 2005) (observing that due to the mixed nature of the testimony that counsel did not proffer at the penalty phase, the failure to introduce this material “was not even deficient performance, let alone prejudicial”).

worth.<sup>131</sup> In other words, if the defendant or petitioner alleges a total or near-total *failure to investigate* mitigation evidence, the potential drawbacks of the undiscovered evidence are minimized<sup>132</sup> and only bear upon the question of prejudice;<sup>133</sup> if the defendant or petitioner alleges a *failure to present* mitigation material, the downside of this evidence is magnified and made central to both the threshold question of whether counsel was ineffective *and* any prejudice inquiry. This difference helps explain why it is more difficult for a defendant or petitioner to succeed with a “failure to present” argument than with a “failure to investigate” challenge.

Two other noteworthy patterns appear within the caselaw. First, relatively few ineffective assistance claims involve a total failure to conduct a mitigation investigation. Far more often, defendants and petitioners argue that their trial attorneys should have conducted a more thorough investigation than they did, or that counsel should have made different decisions about what evidence to present at the penalty phase. The paucity of cases involving no investigation at all suggests that few of the defense attorneys who tried the cases now under post-conviction review appreciated an overall strategic gain from complete default at the penalty phase. Second, the likelihood that a death sentence will be reversed due to a failure to investigate or present mitigation evidence varies from court to court. Some federal circuits, in particular, are far more hospitable to these claims than are other circuits. Among the federal circuit courts entertaining the lion’s share of these ineffective assistance claims (namely, the United States Courts of Appeals for the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits), the Ninth Circuit has been the most welcoming to these arguments.<sup>134</sup> The Sixth Circuit also has vacated

131. See *Crawford v. Head*, 311 F.3d 1288, 1314 (11th Cir. 2002) (commenting on this attribute of ineffective assistance law, and noting that a reviewing court “must simply determine whether the course actually taken by counsel might have been reasonable”); *Grayson v. Thompson*, 257 F.3d 1194, 1225 (11th Cir. 2001) (“[E]ven when trial counsel’s investigation and presentation is less complete than collateral counsel’s, trial counsel has not performed deficiently when a reasonable lawyer could have decided, under the circumstances, not to investigate or present particular evidence.”).

132. See, e.g., *Correll v. Ryan*, 2008 U.S. App. LEXIS 10431, at \*44 (9th Cir. May 14, 2008) (surmising that “all of the so-called ‘damaging rebuttal evidence’” that might have been introduced had counsel investigated and proffered certain mitigation evidence “could, in the hands of a competent attorney, have been used to support” mitigation arguments instead).

133. E.g., *Whitmore v. Lockhart*, 8 F.3d 614, 623-24 (8th Cir. 1993) (finding a failure to investigate a viable mitigating circumstance harmless because the available evidence also might have negatively impacted the defense case).

134. In this decade alone, the Ninth Circuit has overturned death sentences due to a failure to investigate or present mitigation evidence numerous times. *Gray v. Branker*, 2008 U.S. App. LEXIS 13317 (9th Cir. June 24, 2008); *Belmontes v. Ayers*,

numerous death sentences due to failures to investigate or present mitigation material.<sup>135</sup> The Fourth, Fifth, and Eleventh Circuits are all substantially less receptive to these claims.<sup>136</sup> In these courts, only the most egregious missteps by counsel have subverted a death sentence.<sup>137</sup>

## II. *POINDEXTER* V. *MITCHELL*: DEBATING INTENTIONAL INEFFECTIVE ASSISTANCE

The discussion now turns to the *Poindexter* decision and its concurring opinions. The pertinent facts in *Poindexter* were depressingly familiar. Dewaine Poindexter killed a man he thought was his ex-girlfriend's new boyfriend.<sup>138</sup> Poindexter's trial produced a death sentence, which was affirmed on direct appeal.<sup>139</sup> The condemned man then sought habeas relief.<sup>140</sup> Among his claims, Poindexter alleged that he had received ineffective assistance of counsel because his attorney had failed to investigate and present certain mitigating evidence at the penalty phase of trial.<sup>141</sup> This evidence included indicia of a troubled childhood (such as the fact that defendant had been beaten by his mother, who had tried to kill

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2008 U.S. App. LEXIS 12630 (9th Cir. June 13, 2008); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007); *Correll v. Ryan*, 465 F.3d 1006 (9th Cir. 2006); *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006); *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005); *Summerlin v. Schiriro*, 427 F.3d 623 (9th Cir. 2005); *Boyde v. Brown*, 404 F.3d 1159 (9th Cir. 2005); *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001); *Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir. 2001); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000).

135. The Sixth Circuit has overturned death sentences due to a failure to investigate or present mitigation evidence on several occasions over the past few years. *Morales v. Mitchell*, 507 F.3d 916 (6th Cir. 2007); *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007); *Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006); *Poindexter v. Mitchell*, 454 F.3d 564 (6th Cir. 2006); *Dickerson v. Bagley*, 453 F.3d 690 (6th Cir. 2006); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003); *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000).

136. See Blume & Neumann, *supra* note 50 (discussing the reception afforded to ineffective assistance claims in the United States Courts of Appeals for the Fourth and Fifth Circuits).

137. *E.g.*, *Brownlee v. Haley*, 306 F.3d 1043, 1067–68 (11th Cir. 2002) (finding ineffective assistance of counsel for a failure to investigate or present any mitigating evidence, despite the lengthy and significant record of mitigating circumstances); *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding counsel ineffective for failing to pursue basic leads before him that put him on notice that the petitioner may have had mental and psychological disabilities, including “repeated head injuries, black-outs, delusional stories, references to self as another name, family troubles, drug and/or alcohol addiction”).

138. *Poindexter*, 454 F.3d at 568.

139. *Id.* at 569.

140. *Id.*

141. *Id.*

herself and her children) and a diagnosis of paranoid personality disorder.<sup>142</sup>

The district court determined, and the Sixth Circuit agreed, that trial counsel's failure to discover and present this evidence constituted ineffective assistance that prejudiced Poindexter at the penalty phase.<sup>143</sup> At that stage of the proceedings, Poindexter's trial attorney had tried to portray his client as deserving of mercy because he was essentially a quiet and gentle individual.<sup>144</sup> The *Poindexter* panel concluded that it could not treat this presentation as an informed strategic choice because counsel had inadequately investigated the other possible arguments he could have made on Poindexter's behalf.<sup>145</sup> As for prejudice, the court of appeals determined that "had counsel investigated and presented a fuller and more accurate description of [petitioner's] troubled childhood, and paranoid personality disorder, there is a reasonable probability that the jury would not have recommended the death sentence."<sup>146</sup> The court of appeals returned the case to the district court, with instructions to remand the matter to the state courts for further sentencing proceedings.<sup>147</sup>

Nothing about the panel opinion in *Poindexter* is particularly exceptional. The same cannot be said about the concurring opinions that were issued by all three judges who heard the case. In the first of these opinions, Chief Judge Danny Boggs wrote separately to "note the continuing oddity of the circumstances in cases such as this."<sup>148</sup> Judge Boggs elaborated:

To put it bluntly, it might well appear to a disinterested observer that the most incompetent and ineffective counsel that can be provided to a convicted and death-eligible defendant is a fully-investigated and competent penalty-phase defense. . . . [I]f counsel provides fully-effective assistance, and the jury simply does not buy the defense, then the defendant is likely to be executed. However, if counsel provides ineffective assistance, then the prisoner is likely to be spared, certainly for many years, and frequently forever.<sup>149</sup>

After suggesting that some of the undiscovered mitigating evidence in *Poindexter* might not have aided the petitioner had it been

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142. *Id.* at 577.

143. *Id.* at 569–70, 581.

144. *Id.* at 576.

145. *Id.* at 581.

146. *Id.* at 580.

147. *Id.* at 581.

148. *Id.* at 587 (Boggs, C.J., concurring).

149. *Id.* at 587–88.

presented at trial,<sup>150</sup> Boggs returned to what he identified as the “moral hazard” raised by the present state of ineffective assistance law generally, and reversals for failing to locate and present mitigation evidence specifically.<sup>151</sup> He opined:

A somewhat prescient attorney, years ago, in the cases we are now seeing, might implicitly have reasoned (and any sensible attorney today, reading our cases, would have to be blind not to reason) as follows:

If I make an all-out investigation, and analyze and present to the jury every possible mitigating circumstance, especially of the “troubled childhood” variety, it is my professional judgment that I may thereby increase the probability of this extremely repellant client escaping the death penalty from 10% to 12%. On the other hand, if I present reasonably available evidence that I think has as good a chance as any other in securing the slim chance of mercy from the jury, I will have a 50-99% chance of overturning the extremely likely death penalty judgment 10-15 years down the road. I will thus have secured many additional years of life for the client, and he may very likely avoid capital punishment altogether.<sup>152</sup>

Judge Boggs quickly clarified that he was speaking in the abstract, and not accusing defense attorneys of questionable tactics. He wrote, “[w]hile I do not assert that the counsel in this or any other case made such a judgment, either consciously or unconsciously, I do note that our jurisprudence has made such a line of reasoning virtually inevitable for any defense attorney.”<sup>153</sup>

The other two members of the *Poindexter* panel reacted quite differently to the provocative thesis offered by their Chief Judge. In her own concurring opinion, Judge Martha Daughtrey condemned what she described as an “unjustified” and “truly disturbing” assault on the criminal defense bar.<sup>154</sup> While Daughtrey did not assail the logic behind the Boggs concurrence, she described his opinion as “an affront to the dedication of the women and men who struggle tirelessly to uphold their ethical duty to investigate fully and present professionally all viable defenses to their clients.”<sup>155</sup> Judge Daughtrey added that, to the extent that Boggs alleged that defense attorneys were successfully gaming the system, he “also silently accuses the

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150. *Id.* at 588–89.

151. *Id.* at 589.

152. *Id.*

153. *Id.*

154. *Id.* at 589 (Daughtrey, J., concurring).

155. *Id.* at 590.

judges on this court of complicity in the alleged fraud by countenancing the tactics outlined.”<sup>156</sup>

Judge Richard Suhrheinrich wrote the panel opinion in *Poindexter*, but he too was moved to write separately. Suhrheinrich agreed with Boggs, opining that the Chief Judge had “accurately point[ed] out the difficulties with the current legal doctrine concerning ineffective assistance of counsel in death penalty cases at the penalty phase.”<sup>157</sup> Suhrheinrich pointedly disagreed with Judge Daughtrey’s comments. He wrote that his experiences with counsel in death penalty cases “have been different” than hers, following this cryptic comment with a citation to his concurring opinion in *Thompson v. Bell*.<sup>158</sup> In *Thompson*, another capital habeas case decided two years earlier, the petitioner’s habeas attorneys failed to draw the court of appeals’ notice to a deposition transcript containing key mitigating evidence until after the court had issued its opinion denying relief.<sup>159</sup> The transcript eventually came to the court’s attention.<sup>160</sup> After considering the information contained therein, the panel amended its earlier opinion and remanded the matter to the trial court for an evidentiary hearing on the claim of ineffective assistance (a decision ultimately reversed by the United States Supreme Court on procedural grounds).<sup>161</sup> Though the two other members of the *Thompson* panel were inclined to treat counsel’s failure to timely utilize the transcript as an innocent oversight,<sup>162</sup> Suhrheinrich voiced his suspicion that habeas counsel planned to unveil the transcript on the eve of the petitioner’s execution, in order to obtain a last-second stay.<sup>163</sup> “[T]here may be a rational, strategic, calculated reason for habeas counsel’s purported negligence,”<sup>164</sup> Suhrheinrich wrote at that time, calling for an evidentiary hearing to determine if counsel had committed fraud on the court.<sup>165</sup> By citing to *Thompson*, the Suhrheinrich concurrence in *Poindexter* subtly reiterated its author’s

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156. *Id.*

157. *Id.* at 589 (Suhrheinrich, J., concurring).

158. *Id.* (citing *Bell v. Thompson*, 373 F.3d 688 (6th Cir. 2004) (Suhrheinrich, J., concurring), *rev’d*, 545 U.S. 794 (2005)).

159. 373 F.3d 688, 742 (6th Cir. 2004), *rev’d*, 545 U.S. 794 (2005).

160. *Id.* at 689–90 (majority opinion).

161. *Id.* at 691–92; *see Bell v. Thompson*, 545 U.S. 794, 799–801 (2005) (discussing the procedural history of the case).

162. *Thompson*, 373 F.3d at 689–90.

163. *Id.* at 738 n.21 (Suhrheinrich, J., concurring).

164. *Id.*

165. *Id.* at 742.

opinion that defense attorneys may in fact “sandbag” in their capital cases.<sup>166</sup>

The concurring opinions in *Poindexter* thus offered very different views regarding sandbagging by defense attorneys. Before evaluating the flaws and merits of the Boggs and Suhrheinrich concurrences, it is important to understand precisely what Judge Boggs wrote, and to evaluate Judge Daughtrey’s response. Judge Boggs suggested that defendants might benefit if their attorneys failed to conduct “an all-out investigation, and analyze and present to the jury every possible mitigating circumstance,” and instead limited their mitigation presentations to “reasonably available evidence” that “has as good a chance as any other in securing the slim chance of mercy from the jury.”<sup>167</sup> Notwithstanding his reference to “reasonably available evidence,” Judge Boggs evidently envisioned efforts falling short of the “reasonable investigation” standard announced by *Strickland* and advanced in *Williams*, *Wiggins*, and *Rompilla*. Otherwise, there would be no likelihood of reversal due to ineffective assistance, and the sandbagging strategy that Boggs described would collapse. At the same time, with its reference to the presentation of “reasonably available evidence,” the Boggs concurrence evidently did not contemplate the *total* absence of a mitigation case.

Judge Daughtrey’s rebuttal, meanwhile, implied that sandbagging is rare, not because it doesn’t work, but because it violates an attorney’s duty of competence and thereby exposes counsel to criticism, loss of business, and even suspension or disbarment.<sup>168</sup> The problem with this argument, and thus with the Daughtrey concurrence, is that these deterrents are of debatable efficacy. In fact, even egregiously inadequate representation seldom results in serious professional consequences.<sup>169</sup> While failures to investigate or present mitigating evidence may violate the duty of competent representation,<sup>170</sup> the likelihood of lasting professional discipline for

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166. *Poindexter v. Mitchell*, 454 F.3d 564, 589 (6th Cir. 2006) (Suhrheinrich, J., concurring).

167. *Id.* at 589 (Boggs, C.J., concurring).

168. *See id.* at 590 (Daughtrey, J., concurring) (emphasizing the “ethical duty” of capital defense counsel to “investigate fully and present professionally all viable defenses available to their clients”).

169. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 700 (2007) (explaining why disciplinary proceedings are not an effective method of addressing poor performance by counsel).

170. *See* CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT R. 1.1 (6th ed. 2007) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).



these lapses is remote.<sup>171</sup> Furthermore, whether an ethical proscription against incompetent representation will deter the ineffective investigation and presentation of mitigating evidence may depend on whether sandbagging tends to benefit the client. If these tactics work, a zealous defense attorney could rationalize inadequate effort as *effective* assistance, and thus not at all improper; or, at worst, as a personal ethical sacrifice made for the good of the client.<sup>172</sup> A defense investigator recently convicted of forging documents used in a death-penalty habeas corpus petition believed what she did was justified.<sup>173</sup> Does taking an oath to the bar necessarily render all defense attorneys immune to similar reasoning?<sup>174</sup> Indeed, a recurring critique of capital trials concerns defense attorneys who are so indifferent, incompetent, or overtaxed that they seemingly *must* know that they are providing inadequate assistance, or are at least willfully blind to that fact.<sup>175</sup> If this sort of deficient practice is expected, why isn't intentional ineffective assistance that might save, rather than end, a client's life similarly within the realm of possibility?

### III. EVALUATING THE EFFICACY OF INTENTIONAL INEFFECTIVE ASSISTANCE

The real question, then, is whether a deliberate failure to investigate or present mitigation evidence works as a defense strategy. If it does, it may be necessary to formulate new deterrents to this sort of representation. If it does not, then it is unlikely that this conduct

171. Even as attorneys often candidly admit that they rendered ineffective assistance in capital cases, see, e.g., *Walls v. Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998) (remarking upon counsel's admission of ineffective assistance); *Commonwealth v. Carson*, 913 A.2d 220, 265 (Pa. 2006), *cert. denied*, 128 S. Ct. 384 (2007) (describing an affidavit by counsel admitting ineffective assistance), very few courts refer poor-performing attorneys to the appropriate disciplinary authority. See Mike Zapler, *State Bar Ignores Errant Lawyers*, SAN JOSE MERCURY NEWS, Feb. 12, 2006, at A1 (discussing the paucity of disciplinary actions against criminal defense attorneys in California), available at [http://www.mercurynews.com/ci\\_5136869?IADID=Search](http://www.mercurynews.com/ci_5136869?IADID=Search). But see *Garrison v. State*, 103 P.3d 590, 619 n.56 (Okla. 2004) (referring to the Oklahoma Bar Association an attorney who failed to adequately present a failure-to-investigate claim at a post-trial evidentiary hearing).

172. For similar reasons, while the egos and optimism of some defense attorneys may stand in the way of a strategy premised on intentional failure, these same attorneys arguably could endorse conscious errors if they knew that in losing a battle, they would assuredly win the war.

173. Louis Sahagun, *Death Penalty Foe Gets Five Years*, L.A. TIMES, Aug. 17, 2007, at B1.

174. Published decisions document at least a few efforts by counsel to inject error into death penalty proceedings. In *Harding v. Lewis*, 834 F.2d 853, 855 (9th Cir. 1987), for example, counsel advised defendant to represent himself, in the hope that this would give rise to reversible error.

175. See WHITE, *supra* note 13, at 3–9 (2006) (criticizing the performance of certain capital defense attorneys); Bright, *supra* note 13, at 1838–39 (same).

poses a substantial threat to the integrity and reliability of the judicial process. A decision to sandbag bespeaks, if nothing else, a certain cynical shrewdness on the part of the complicit counsel. It stands to reason, then, that the attorneys who might be tempted to sandbag are savvy enough to reject this strategy if it does not work. So again, the question is, does it?

In assessing the pros and cons of intentionally ineffective mitigation efforts by counsel, one must acknowledge at the outset that *if* this strategy will reliably secure the reversal of a death sentence, it offers several benefits to the defense. Most obviously, a defendant whose death sentence is vacated will not be executed unless and until another penalty jury issues another death verdict. This may not happen: The prosecution may decide not to seek the death penalty a second time, the second jury may be more sympathetic to the defendant than was the first, the defense may put on a better penalty-phase presentation at retrial, or the prosecution may put on a worse case, whether because of lost evidence or otherwise.<sup>176</sup> And even if these proceedings result in yet another death sentence, the defense still will have bought more time and another round of appeals.

Arrayed against these apparent advantages are a number of potential drawbacks. Conventional wisdom regarding sandbagging can be summarized as follows: It doesn't work, so don't try it.<sup>177</sup> The orthodox view long has held that the risks of sandbagging outweigh the benefits because, among other reasons, (1) the client may be incapable of presenting the withheld claim in later proceedings, especially if he or she has no right to counsel in those proceedings; (2) there is always a risk that post-conviction counsel may overlook a meritorious claim; (3) the defendant typically will remain

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176. See David McCord, *Switching Juries in Midstream: The Perplexities of Penalty-Phase-Only Retrials*, 2 OHIO ST. J. CRIM. L. 215, 221, 243–44 (2004–2005) (discussing the defendant's possible advantages at retrial of the penalty phase). A chart in the technical appendix to the report of Former Governor Ryan's *Commission on Capital Punishment* that details the status of all death-penalty cases decided in Illinois state courts between 1977 and 2001 reveals that in a substantial number of cases where a death sentence was overturned, the defendant was not re-sentenced to death. COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT tbl. 13 (2002), [http://www.idoc.state.il.us/ccp/ccp/reports/technical\\_appendix/section\\_2/table\\_13.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/technical_appendix/section_2/table_13.pdf).

177. See *Kimmelman v. Morrison*, 477 U.S. 365, 382 n.7 (1986) (describing the drawbacks of sandbagging); *United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992) (observing that sandbagging is "not only unethical, but usually bad strategy as well"); see also *supra* note 10 and accompanying text (listing a number of sources making the point that lawyers would rarely give up a meritorious claim on the off chance they could gain a future habeas claim). But see Hughes, *supra* note 8, at 337 ("It must be conceded, however, that sandbagging cannot be entirely ruled out.").

incarcerated until the withheld claim is presented to, and ruled upon by, the courts; (4) “any strategy of withholding would fail if detected”; and, perhaps most important, (5) reviewing courts may reject claims that would have prevailed if presented to the trial court.<sup>178</sup>

These critiques have been directed principally at a particular type of sandbagging, namely, deliberate failures by defense attorneys to raise timely objections at trial. Some of these arguments lose their force when applied to the conscious failure to investigate or present mitigating evidence. Individuals sentenced to death typically receive appointed counsel to assist with direct appeals and at least one habeas corpus petition.<sup>179</sup> The fact that the defendant will remain incarcerated while post-trial proceedings are pending is not necessarily a bad thing if the alternative is execution, rather than freedom. As for the assertion that “any strategy of withholding would fail if detected,” outright admissions of deliberate error are hard to come by, and it is highly questionable that ineffective investigation will fail as a defense strategy solely because a court vaguely suspects subterfuge. On the contrary, as the (short-lived) result in *Thompson v. Bell* implies, courts have proven themselves willing to permit challenges to death sentences even amid strong suggestions of impropriety by defense counsel.<sup>180</sup>

Most important, if the failure to reliably secure reversal represents the Achilles heel of intentional error generally, perhaps the inadequate investigation or presentation of mitigating evidence will subvert a death sentence often enough to constitute smart strategy. Overall, claims alleging the ineffective investigation or presentation of mitigation evidence fail far more often than they succeed.<sup>181</sup> Certain scenarios may exist, however, in which the likely benefits of an ineffectual investigation or presentation will outweigh the potential drawbacks. For example, what if counsel suspects that

178. Meltzer, *supra* note 10, at 1197–99.

179. Although there is no constitutional right to post-conviction counsel, even in death-penalty cases, *Murray v. Giaratano*, 492 U.S. 1, 8–10 (1989), states routinely make attorneys available to condemned inmates, *id.* at 14–15 (Kennedy, J., concurring) (noting that “no prisoner on death row in Virginia,” the state at issue in the *Murray* case, “has been unable to obtain counsel to represent him in postconviction proceedings”). See 18 U.S.C. § 3599(a)(2) (2000) (conferring upon individuals sentenced to death a right to appointed counsel in federal habeas proceedings); DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA’S DEATH ROW 62 (2005) (discussing the provision of counsel to habeas petitioners in capital cases); Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1155–58 (2005) (outlining the different approaches embraced by the states with regard to providing counsel in habeas cases).

180. 373 F.3d 688, 690 (6th Cir. 2004), *rev’d*, 545 U.S. 794 (2005).

181. See *supra* text accompanying notes 60–67.

further investigation would yield evidence that the defendant has a severe mental health issue, or experienced a childhood replete with suffering? Might a failure to take the extra effort needed to confirm and flesh out this information make sense, given that courts seem inclined to reverse death sentences issued by juries that were denied an opportunity to hear this evidence? After all, if Judge Boggs is correct, a failure to pursue this evidence may only modestly increase the defendant's chances of receiving the death penalty, but it will all but ensure that any death sentence will be overturned.<sup>182</sup> Or what if counsel fully investigates powerful mitigating material and appreciates its significance: does it make more sense to present this evidence at trial, or to file it away, in the hope that a reviewing court will assign prejudicial error to the decision not to proffer the evidence and send the matter back for resentencing?

The answer to these questions begins with the footwear of a defense attorney who is contemplating deliberate ineffective assistance at the time of trial. If one stands in these shoes, instead of those of a commentator having the benefit of hindsight, a basic problem with sandbagging through a failure to investigate or present mitigation evidence becomes obvious: trial counsel generally will not know with any certainty what further investigation will yield, without knowing *so much* that their decisions will be addressed under the deferential "failure to present" rubric instead of the more stringent "failure to investigate" standard. Attorneys who have conducted little or no penalty-phase investigation may not appreciate what evidence a reasonable effort will deliver, leaving them in the dark as to whether a sandbagging strategy will work. This uncertainty may lead to additional investigation, designed to pin down what mitigation evidence exists. But once an attorney comes into possession of the facts discovered through this investigation, the standard of review shifts; his or her decisions about whether to *present* this evidence will be reviewed more deferentially than a decision not to *investigate* would have been.<sup>183</sup>

Assume, for example, that conversations between an attorney and his or her client yield suggestions of childhood abuse, or a mental defect or illness. If counsel proceeds no further, he or she likely will not know for certain what the abuse entailed, who else could

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182. *Poindexter v. Mitchell*, 454 F.3d 564, 589 (6th Cir. 2006) (Boggs, C.J., concurring).

183. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (providing that the degree of judicial deference to counsel's decisions will depend in large measure upon the thoroughness of his or her underlying investigation).

corroborate it, or whether the mental defect or illness was of a sort likely to elicit sympathy in subsequent habeas proceedings. In this case, while a finding of ineffective assistance for a failure to investigate may be guaranteed, a finding of prejudice is anything but assured. If, on the other hand, counsel pursues these leads and discovers that the client was abused, or suffers from a significant mental illness or defect, then a reviewing court likely will examine his or her subsequent decisions about what to do with this evidence under a “failure to present” standard. Under this more forgiving approach, courts will supply a strategic rationale for a decision not to present the evidence—if one exists. This holds true even if the trial attorney describes his or her work as ineffective, or as lacking any strategic purpose.<sup>184</sup> The test for ineffective assistance is an objective one, so that if *any* reasonable attorney would not have presented the evidence in question, an ineffective assistance claim will founder.<sup>185</sup>

Defense attorneys contemplating intentional ineffective assistance thus find themselves on the horns of a dilemma. If they conduct no investigation at all, they rarely will know whether a sandbagging strategy will work. But the more investigation they undertake, and the more mitigation material they uncover, the more difficult it will become to convince a reviewing court that no strategic rationale supported a decision not to present this evidence at trial. Greater certainty about what mitigation evidence exists thus comes at the cost of a diminishing likelihood of subverting a death sentence by failing to use this evidence. This problem is exacerbated by the fact that evidence of abuse, and especially mental illness, rarely has an entirely mitigating effect. More often, this material either contains a “double edge” or will open the door to additional aggravating facts supplied by the prosecution.<sup>186</sup> As more investigation is undertaken, more of these aggravating facts will come to the forefront. These facts will provide reviewing courts with additional reasons why a reasonable

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184. See *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992) (observing that affidavits by attorneys declaring their own ineffectiveness are accorded “no substantial weight”); *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989) (“[B]ecause ineffectiveness is a question which we must decide, admissions of deficient performance by attorneys are not decisive.”); *United States v. Cano*, 494 F. Supp. 2d 243, 251 (S.D.N.Y. 2007) (“An attorney’s statements regarding her own ineffectiveness are not, by themselves, proof of unreasonable representation.”).

185. See *Williams v. Head*, 185 F.3d 1223, 1244 (11th Cir. 1999) (rejecting an ineffective assistance claim because, in the final analysis, the court found that it “cannot say that no reasonable attorney would have done as [petitioner’s trial counsel] did”).

186. *E.g.*, *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) (noting the objective reasonableness of counsel’s decision not to present potentially mitigating evidence that also had negative connotations).

attorney might have decided not to present the mitigation evidence uncovered by counsel's investigation.

Even if defense attorneys have a sixth sense concerning what further research will yield, deliberate failures to investigate or present mitigation evidence still may not make sense. For one thing, a decision to sandbag may necessitate some awkward conversations with the client. Counsel contemplating penalty-phase sandbagging could inform the defendant of their plan, lie about their intentions, or try to avoid the topic. If an attorney takes the first path, he or she must hope that the defendant will not bring the conversation to the attention of the court. If the discussion is disclosed by the defendant, the odds of professional discipline will soar upward and the sandbagging strategy will fall apart. If defense counsel takes the second or third routes, then he or she may have to explain to the defendant why leads are being ignored, which may not be the best way to ensure a positive attorney-client working relationship.

Yet this uncertainty and awkwardness may be the *least* of the problems associated with tactical failures to investigate or present mitigation evidence. After all, uncertainty about whether a strategy will work does not necessarily mean that the approach is counterproductive or otherwise unsound. If intentional ineffective assistance *might* work, and has no downside, then it may represent sound strategy even if counsel cannot anticipate the precise likelihood that it will succeed. As discussed below, however, there exist at least five reasons why these machinations may backfire on the defense.

#### A. The "Reasonable Investigation" Standard

First, a court reviewing an ineffective assistance claim might conclude that a "reasonable investigation" at the time of trial would not have turned up the mitigation material acquired through post-conviction investigation. As previously discussed, the law requires only that counsel conduct a *reasonable* investigation.<sup>187</sup> Counsel can press further than that, but they will not be found ineffective if they fail to do so. And so, when a defendant or petitioner alleges ineffective assistance by trial counsel, the condemned claimant must establish that the helpful evidence he or she presents in post-conviction proceedings could have been located through a

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187. *Strickland*, 466 U.S. at 690–91.

reasonable investigation at the time of trial.<sup>188</sup> If this evidence would not have been found through the exercise of reasonable diligence, trial counsel will not be considered ineffective for failing to find it.<sup>189</sup>

Expert witness testimony poses a particular problem on this front, since it may be difficult to establish that competent efforts at the time of trial would have located an expert who would have testified in substantially the same way as an expert adduced during post-trial proceedings.<sup>190</sup> This attribute of ineffective assistance review can mean that if evidence will only be found through superlative effort, this material must be found by trial counsel for it ever to be usable in mitigation. A trial attorney who conducts an inadequate investigation thus may ensure that a client will never be allowed to present certain mitigating facts in the fight for life.

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188. *Elledge v. Dugger*, 823 F.2d 1439, 1447 n.17 (11th Cir. 1987), *withdrawn in part*, 833 F.2d 250 (11th Cir. 1987) (detailing the showing that a habeas petitioner must make when premising an ineffective assistance claim on a failure to adduce expert testimony at trial); *State v. Davis*, 814 S.W.2d 593, 603–04 (Mo. 1991) (en banc) (“When a movant claims ineffective assistance of counsel for failure to locate and present expert witnesses, he must show that such experts existed at the time of trial, that they could have been located through reasonable investigation, and that the testimony of these witnesses would have benefited movant’s defense.”).

189. See, e.g., *In re Thomas*, 129 P.3d 49, 61 (Cal. 2006) (agreeing with a referee’s conclusion that certain witnesses located by the defense through post-conviction investigation would not have been located through reasonable efforts at the time of trial). The *Thomas* court observed that “it is one thing to conduct such [a thorough] investigation, turning over every conceivable stone, in the context of a habeas corpus proceeding. It is another to argue that counsel, provided with a lengthy ‘cold call’-type list and a few months to prepare, would be constitutionally deficient for failing to have an investigator run through every name on that list, sifting through dross in the hopes of finding a few nuggets of gold.” *Id.*

190. See *Ringo v. Roper*, 472 F.3d 1001, 1006 (8th Cir. 2007) (observing that the petitioner, alleging ineffective assistance due to a failure to adequately investigate his post traumatic stress disorder (PTSD), had to show that “it was reasonably probable that if counsel had retained a clinical psychologist, the psychologist would have diagnosed him with PTSD”); *Elledge*, 823 F.2d at 1447 n.17 (explaining how a petitioner might satisfy his or her burden on this issue).

In *Elledge*, the court suggested that

[t]o prove it is reasonably probable that such an expert could have been found by a competent lawyer exercising a reasonable amount of diligence, a petitioner could present testimony from (a) members of the bar relating to the amount of investigation that is reasonable in such a situation and the ease or difficulty in finding such experts at that time, (b) psychiatrists, or other experts in the field, relating to how widely the proposed theory was accepted at the time the investigation occurred and the ease an attorney would have had in getting such experts, and (c) any other relevant testimony that would tend to demonstrate it was reasonably probable that reasonable diligence would uncover an expert similar to the ones eventually located.

823 F.2d at 1447 n.17.

*B. Absence of Prejudice*

Second, reviewing courts may conclude that the missing mitigation evidence, if located and presented at trial, would not have affected the sentence.<sup>191</sup> This result will follow if the evidence is regarded as cumulative of material that had been presented at trial, because “[c]ounsel does not render ineffective assistance by failing to present cumulative evidence.”<sup>192</sup> To establish prejudice due to a failure to investigate or present mitigation evidence, a defendant or habeas petitioner must establish that the missing material differed in a “substantial way—in strength and subject matter—from the evidence actually presented at sentencing.”<sup>193</sup> Evidence that merely “elaborate[s] on” what was presented at sentencing will not suffice to show prejudice.<sup>194</sup> This new material also must differ from the evidence that was presented at the guilt phase, for a court may conclude that guilt-phase evidence was still fresh in jurors’ minds when they considered which sentence to issue.<sup>195</sup> The incorporation of guilt-phase evidence into the prejudice calculus means that counsel contemplating sandbagging at the penalty phase may have to weaken their guilt-phase presentation, too, if the plan is to succeed.

Nor will a failure to investigate or present *non*-cumulative mitigation evidence necessarily undermine a death sentence. On its own, additional mitigation evidence describing a defendant’s substance abuse, a difficult but not abusive childhood, or the defendant’s positive traits will only occasionally subvert a death sentence, because courts commonly regard this evidence as having only a modest mitigating effect.<sup>196</sup> As previously discussed, evidence

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191. *E.g.*, *Dill v. Allen*, 488 F.3d 1344, 1362 (11th Cir. 2007) (finding no prejudice to the petitioner, even if the court were to presume that his trial counsel rendered ineffective assistance by failing to seek out and present mitigation evidence, because whatever additional evidence might have been uncovered and presented would not have significantly altered the petitioner’s sentencing profile).

192. *Jones v. State*, 928 So. 2d 1178, 1187 (Fla. 2006); *see Van Poyck v. Fla. Dep’t of Corr.*, 290 F.3d 1318, 1324 n.7 (11th Cir. 2002) (“A petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative.”); *Schofield v. Holsey*, 642 S.E.2d 56, 61 (Ga. 2007) (finding a lack of prejudice, due to the cumulative nature of the new mitigation material presented by the habeas petitioner).

193. *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005).

194. *Williams v. Allen*, 458 F.3d 1233, 1245 (11th Cir. 2006).

195. *See Bell v. Cone*, 535 U.S. 685, 699 (2002) (finding reasonable a failure to recall at sentencing witnesses who testified the guilt phase, as their testimony was “still fresh to the jury”); *Ponticelli v. State*, 941 So. 2d 1073, 1097 (Fla. 2006) (finding a lack of prejudice where mitigating testimony not presented in the sentencing phase would have been cumulative of the evidence presented at the guilt phase).

196. *E.g.*, *Stewart v. Dep’t of Corr.*, 476 F.3d 1193, 1217 (11th Cir. 2007) (“We have repeatedly recognized that evidence of a defendant’s alcohol or drug abuse holds little mitigating value.”); *Allen v. Woodford*, 395 F.3d 979, 1002–04 (9th Cir.



regarding a defendant's mental disease or defects, or physical and sexual abuse, tends to carry more weight.<sup>197</sup> Even so, the potency accorded to evidence of childhood trauma varies from court to court,<sup>198</sup> and many judges will scrutinize allegations of "brain damage" and other mental impairments for any suggestion of hyperbole.<sup>199</sup> Most courts also require that mental ailments or impairments satisfy a certain severity threshold before they will be accorded significant mitigating weight.<sup>200</sup> In its recent decision in *Ponticelli v. State*,<sup>201</sup> for example, the Florida Supreme Court concluded that the mental health testimony proffered by the petitioner in post-conviction proceedings would not have affected his sentence, since this evidence did not indicate that he suffered from a "major mental illness" or was "mentally retarded."<sup>202</sup>

Also, in situations where the missing mitigation evidence has undeniable potency, a court evaluating an ineffective assistance claim may conclude that the evidence entails an inextricable aggravating component that offsets its mitigating effect, or that it would have inevitably opened the door to devastating rebuttal evidence had it been presented at trial. In either event, a failure to locate or present the mitigation evidence may be regarded as harmless.<sup>203</sup> Finally, a handful of capital crimes are so heinous, and the aggravating factors so pronounced, that some reviewing courts will not assign prejudice to a failure to find or produce mitigation evidence.<sup>204</sup> In all of these

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2002) (finding nonprejudicial a failure by counsel to locate and adduce certain character evidence); *Housel v. Head*, 238 F.3d 1289, 1296 (11th Cir. 2001) (describing this mitigation evidence as a "two-edged sword").

197. See *supra* text accompanying note 99.

198. See *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324–25 (11th Cir. 2002) (concluding that not all reasonable attorneys would present evidence of childhood abuse); *Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999) (questioning the mitigating value of evidence of childhood abuse when the defendant is no longer young at the time of the crime).

199. See, e.g., *Smith v. Mitchell*, 348 F.3d 177, 201–02 (6th Cir. 2003) (concluding that a diagnosis of a "mild diffuse cerebral dysfunction" did not alter the balance of aggravating and mitigating factors).

200. E.g., *Henley v. Bell*, 487 F.3d 379, 387–88 (6th Cir. 2007) (finding no prejudice in the omission of psychiatric expert testimony that defendant had learning disabilities and was depressed at time of crime).

201. 941 So. 2d 1073 (Fla. 2006).

202. *Id.* at 1098.

203. See, e.g., *Emmett v. Kelly*, 474 F.3d 154, 170–71 (4th Cir. 2007) (rejecting the petitioner's ineffective assistance claim because, *inter alia*, his mitigation evidence would have been offset by related aggravating facts).

204. See *Knight v. Quarterman*, No. 04-70042, 2006 WL 1793586, at \*16 (5th Cir. June 30, 2006) (finding no prejudice even if ineffective assistance was assumed). In *Knight*, the crimes were "so horrible and cruel that it is extremely unlikely that a reasonable juror would have been willing to spare [the petitioner's] life, even if presented with the evidence that he now says trial counsel should have presented." *Id.*; see also *Grayson v. Thompson*, 257 F.3d 1194, 1228–29 (11th Cir. 2001)

situations, a sandbagging strategy will founder on the shoals of *Strickland*'s prejudice prong.

*C. Incompetence of Post-Conviction Counsel*

Third, a strategy that relies entirely on habeas counsel to vindicate a defendant's rights discounts the fact that these lawyers can make mistakes, too.<sup>205</sup> One recurring problem in this vein involves a failure by habeas counsel to adequately develop the record. The burden lies on the habeas petitioner to show both ineffective assistance and prejudice.<sup>206</sup> Habeas attorneys sometimes fail to gather the affidavits or elicit the testimony necessary to support one or both of these elements. Courts have rejected claims alleging a failure to investigate or present mitigation evidence because the record did not establish what the uncalled mitigation witnesses would have testified to, had they been called at trial, or that they would have been available and willing to testify at all.<sup>207</sup> Another recurring problem concerns a failure by habeas counsel to obtain an affidavit from the petitioner's trial attorney that describes the investigatory steps that were taken at trial. Without this evidence, courts have presumed that trial counsel performed reasonably, seriously weakening the ineffective assistance claim.<sup>208</sup>

The likelihood of other sorts of post-trial errors by counsel also casts a shadow over sandbagging strategies. Procedural bars that can

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(discussing how the aggravated nature of some murders will render harmless a failure to investigate or present mitigation evidence).

205. See Robbins, *supra* note 10, at 64 (discussing some of the ways in which post-conviction counsel can be ineffective).

206. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

207. In *Hubbard v. Haley*, for example, the petitioner asserted that trial counsel "could have produced family, friends, and witnesses who could have testified concerning [the petitioner's] alcoholism, mental retardation, and his previous successful adjustments to prison." 317 F.3d 1245, 1260 (11th Cir. 2003). The court rejected this argument, however, because the petitioner offered no proof that such witnesses existed or were available to testify at the time of his trial. *Id.*

208. See *Link v. Luebbbers*, 469 F.3d 1197, 1203 (8th Cir. 2006) ("We have no testimony from [defense counsel] regarding her reasons for declining to pursue further psychological testing. In the absence of such testimony, we have no reason to believe [her] performance was anything other than 'reasonable professional assistance.'"); *Reyes v. Quarterman*, No. 05-70024, 2006 WL 2474268, at \*9 n.4 (5th Cir. Aug. 28, 2006) (remarking on the lack of an affidavit from trial counsel, and noting that the record would have been "far better developed for review" had such an affidavit been provided); *Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005) (observing that the petitioner's habeas counsel had failed to supply affidavits relating what mitigation witnesses would have testified to, if called); *Carter v. Mitchell*, 443 F.3d 517, 532 (6th Cir. 2001) (concluding that without an affidavit from the petitioner's trial attorney, "we must assume that counsel did investigate but ultimately decided that the best strategy at sentencing was not to present the testimony of [the petitioner's] family members").

trip up post-conviction counsel and preclude consideration of an ineffective assistance claim on the merits are seemingly omnipresent.<sup>209</sup> Federal habeas procedures, in particular, contain many traps for the unwary or unprepared.<sup>210</sup> Most notably, as a general matter federal habeas courts will not grant habeas relief upon a claim raised by a state prisoner unless that claim has been properly exhausted in state court.<sup>211</sup> The exhaustion rule has led to the rejection of several habeas claims alleging a failure to investigate or present mitigating evidence.<sup>212</sup> Among them, the fate of Johnny Joe Martinez serves as a cautionary tale to attorneys and defendants tempted to concoct an ineffective assistance claim for presentation in later proceedings. In *Martinez v. Johnson*,<sup>213</sup> the United States Court of Appeals for the Fifth Circuit concluded that Martinez's failure to investigate claim was procedurally barred due to a failure to

209. Furthermore, procedural missteps in state court may preclude federal habeas review, for a federal habeas court cannot "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

210. See *Moses v. Branker*, No. 06-8, 2007 WL 3083548, at \*2-3 (4th Cir. Oct. 23, 2007) (finding a habeas corpus claim to be procedurally barred because it expanded upon the failure-to-investigate claim that had been presented to the state court); *Diaz v. Quarterman*, No. 05-70057, 2007 WL 1969649, at \*4 (5th Cir. July 3, 2007) (refusing to consider affidavits presented by the petitioner because they were discoverable "new evidence" not properly presented to the state court, per 28 U.S.C. § 2254(e)(2) (2000)). One such pitfall is the standard one-year statute of limitations for filing a federal habeas petition, with the limitations period starting to run when the conviction becomes final on direct review, and tolled while an application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. § 2244(d) (2000). According to one commentator, this statute of limitations "has deprived thousands of potential habeas petitioners of any federal review of their convictions, and in some cases, their death sentences." John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 289 (2006). But cf. KING ET AL., *supra* note 35, at 46 (observing that the statute of limitations defense has been used infrequently in capital habeas cases).

211. 28 U.S.C. § 2254(b)(1)(A) (2000).

212. Decisions that have rejected, due to a failure to exhaust, ineffective assistance claims brought by habeas petitioners include: *Davis v. Woodford*, 384 F.3d 628, 650 (9th Cir. 2004) (rejecting an ineffective assistance claim on the ground, among others, that the petitioner had failed to present it to the state courts first); and *Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003) (affirming the dismissal of the petitioner's ineffective assistance claim on failure-to-exhaust grounds). A failure to exhaust prior to seeking federal habeas relief can be utterly fatal to an ineffective assistance claim if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1. A limited exception to standard procedural default rules applies where a "prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750. See KING ET AL., *supra* note 35, at 47-48 (discussing the dismissal of habeas claims brought by condemned petitioners due to a failure to exhaust, or upon a procedural default).

213. 255 F.3d 229 (5th Cir. 2001).

exhaust.<sup>214</sup> Martinez's habeas attorney had not presented this claim to the state courts, despite repeated pleas by his client.<sup>215</sup> The court determined that no exception to the exhaustion rule applied, reasoning that because Martinez had no constitutional right to habeas counsel, he could not complain about errors committed by his attorney in collateral proceedings.<sup>216</sup> Martinez was executed on May 22, 2002.<sup>217</sup>

*D. Adverse Findings of Fact and Rulings of Law*

Fourth, even meritorious claims alleging a failure to investigate or present mitigating evidence typically must run the gauntlet of an evidentiary hearing or similar procedures at which the defendant or petitioner's allegations will be tested.<sup>218</sup> At these proceedings, the defendant or petitioner bears the burden of adducing facts that support his or her ineffective assistance claim. The judge who oversees these sessions may not credit the defendant or petitioner's assertions or evidence. For example, a judge may conclude that a witness or document would not have been located in the exercise of

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214. *Id.* at 239.

215. See generally DOW, *supra* note 179, at 62–79 (discussing the *Martinez* case).

216. *Martinez*, 255 F.3d at 241; see *Hill v. Jones*, 81 F.3d 1015, 1025 (11th Cir. 1996) (observing that default by collateral counsel cannot serve as “cause” that excuses a procedural default); *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992).

217. Texas Department of Criminal Justice, Executed Offenders, <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited June 1, 2008).

218. For example, to flesh out a habeas petition alleging a failure to investigate in a capital case, the California Supreme Court appointed a judge to conduct a reference hearing at which evidence would be heard and findings made relating to the following questions:

1. What mitigating character and background evidence could have been, but was not, presented by petitioner's trial attorneys at his penalty trial?
2. What investigative steps by trial counsel, if any, would have led to each such item of information?
3. What investigative steps, if any, did trial counsel take in an effort to gather mitigating evidence to be presented at the penalty phase?
4. What tactical or financial constraints, if any, weighed against the investigation or presentation of mitigating character and background evidence at the penalty phase?
5. What evidence, damaging to petitioner, but not presented by the prosecution at the guilt or penalty trial, would likely have been presented in rebuttal, if petitioner had introduced any such mitigating character and background evidence?
6. Did petitioner himself request that either the investigation or the presentation of mitigating evidence at the penalty phase be curtailed in any manner? If so, what specifically did petitioner request?

*In re Andrews*, 52 P.3d 656, 659 (Cal. 2002). In federal courts, “[o]n application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.” 28 U.S.C. § 2246 (2000).

reasonable diligence,<sup>219</sup> or that the testimony of a witness or witnesses testifying on behalf of the defendant or petitioner is not credible,<sup>220</sup> or that the testimony concerning mitigating facts is too vague to carry much weight. The (remote) possibility also exists that the judge will detect sandbagging,<sup>221</sup> which may prove lethal to the ineffective assistance claim. A defendant or petitioner will find it difficult to counter these adverse findings in subsequent proceedings.<sup>222</sup> In important respects, then, a sandbagging strategy exchanges the goal of persuading just one out of twelve laymen that a defense witness is credible for an all-or-nothing credibility determination by a single judge.

The Antiterrorism and Effective Death Penalty Act<sup>223</sup> (“AEDPA”) further complicates matters for condemned defendants who raise ineffective assistance claims in federal habeas petitions. This law fastens to these proceedings a healthy deference to state court determinations of fact and law. Pursuant to AEDPA,

an 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

219. *E.g.*, *In re Thomas*, 129 P.3d 49, 59 (Cal. 2006) (relating a magistrate’s finding that some claimed witnesses would not have been located at the time of the petitioner’s trial through reasonable efforts by the defense).

220. *E.g.*, *Perkins v. Quarterman*, No. 07-70010, 2007 WL 3390953, at \*6 (5th Cir. Nov. 15, 2007); *see* *Buckner v. Polk*, 453 F.3d 195, 203–04 (4th Cir. 2006) (deferring to a determination by a state judge who found affidavits supplied by the petitioner were not credible, since the experts who supplied the affidavits based the conclusions therein on witnesses who were “motivated to take a different tact [sic] by an imposed sentence of death”); *Parker v. Sec’y of the Dep’t of Corr.*, 331 F.3d 764, 788 (11th Cir. 2003) (deferring to a finding by the state courts that the testimony of a potential mitigation witness was not at all persuasive); *Ponticelli v. State*, 941 So. 2d 1073, 1098 (Fla. 2006) (deferring to the trial court’s finding that testimony presented by the petitioner relating to his brain damage was less credible than other, conflicting, testimony).

221. *See* *United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992) (“[T]o the extent that petitioners and their trial counsel may jointly fabricate . . . claims later on, the district courts will have ample opportunity to judge credibility at evidentiary hearings.”).

222. In a habeas corpus proceeding initiated by a prisoner who is in custody pursuant to a judgment of a state court, “a determination of a factual issue made by a [s]tate court shall be presumed to be correct.” 28 U.S.C. § 2254(e)(1) (2000). The petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” *Id.* Fact-finding by the federal district courts is reviewed under the “clearly erroneous” standard, a “significantly deferential” brand of review, whereby the reviewing court “must accept the district court’s factual findings absent a ‘definite and firm conviction that a mistake has been committed.’” *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (quoting *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000)). *But cf.* *Correll v. Ryan*, 465 F.3d 1006, 1024 (9th Cir. 2006) (O’Scannlain, J., dissenting) (accusing the majority opinion in a failure-to-investigate case of disregarding the fact-finding of the district court).

223. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18, 21, 28 U.S.C.).

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 that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.<sup>224</sup>

AEDPA thus circumscribes habeas review by federal courts of claims previously adjudicated by state courts. Under AEDPA, “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.”<sup>225</sup> It is unclear whether these provisions of AEDPA have substantially dampened the prospects of federal habeas petitioners.<sup>226</sup> At a minimum, however, some federal courts have implied that they might have decided an ineffective assistance habeas corpus claim in a petitioner’s favor, but for AEDPA’s strictures.<sup>227</sup>

#### *E. Disappearing Evidence*

Fifth, defense evidence may degrade or vanish during the interval between trial and post-trial proceedings. Witnesses who might have attested to mitigating facts at the time of trial may disappear, forget, die, or simply want to move on with their lives. Likewise, as time passes it may become increasingly difficult for an expert witness to discern whether the defendant or petitioner suffered from a recently diagnosed mental-health problem at the time of the crime. This uncertainty will lessen the mitigating effect of the expert’s

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224. 28 U.S.C. § 2254(d) (2000). A decision is “contrary to” clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). A decision “involve[s] an unreasonable application of[] clearly established [f]ederal law” when “the state court identifies the correct legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413.

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

226. See generally Blume, *supra* note 10 (advancing the thesis that Antiterrorism and Effective Death Penalty Act has not substantially affected federal review of habeas claims, at least in cases where the federal court has reached the merits of the claim).

227. E.g., *Ringo v. Roper*, 472 F.3d 1001, 1006 (8th Cir. 2007) (“Regardless of how we might decide the [petitioner’s] ineffective assistance claim in the first instance, our actions are tightly circumscribed by AEDPA.”).

diagnosis.<sup>228</sup> The passage of time also may undermine the credibility of other witnesses adduced by the defense. These witnesses may be accused of inventing mitigating facts after individuals who might have challenged their accounts died or disappeared, or simply of remembering things that did not happen.<sup>229</sup>

It is true that time can make aggravating evidence vanish as well. But there is a catch: if a prosecution witness testified in the first trial, transcripts of the testimony may be admissible at retrial under an exception to the hearsay rule.<sup>230</sup> Dry transcripts lack the punch of live testimony, but something is better than nothing, and nothing may be what the defense has after a significant delay. For example, if the defendant's trial counsel dies during the interval between trial and post-trial proceedings, it may be impossible to know what documents he or she reviewed, whom he or she interviewed, and what the attorney's thought process was at the time of trial. In these circumstances, courts "presume the attorney 'did what he should have done, and that he exercised reasonable professional judgment,'"<sup>231</sup> and the defendant or petitioner bears the burden of rebutting this presumption.<sup>232</sup>

These various considerations bearing upon the viability of a sandbagging strategy mean that, to be more complete and accurate, the Boggs calculus should be rewritten to provide as follows:

If I make an all-out investigation, and analyze and present to the jury every possible mitigating circumstance, especially of the 'troubled childhood' variety, it is my professional judgment that I may thereby increase the probability of this extremely repellant client escaping the death penalty from 10% to 12%. On the other hand, if I present reasonably available evidence that I think has as good a chance as any other in securing the slim chance of mercy from the jury, I will have a [*chance—the precise odds of which cannot be known, absent further investigation that will only weaken my sandbagging strategy*—]of overturning the extremely likely death penalty judgment 10–15 years down the road [*assuming that (1) the mitigation evidence I fail to discover is sufficiently potent to undermine the*

228. See *Carter v. Mitchell*, 443 F.3d 517, 529 (6th Cir. 2006) (noting that an expert adduced by the petitioner in post-conviction proceedings "did not address what impact events in the intervening five years could have had on his diagnosis").

229. Cf. *Buckner v. Polk*, 453 F.3d 195, 203–04 (4th Cir. 2006) (describing findings made by the judge who took evidence on the petitioner's habeas corpus claim and found the petitioner's witnesses not credible).

230. See, e.g., FED. R. EVID. 804(b)(1) (identifying prior testimony by an unavailable declarant as an exception to the hearsay rule).

231. *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005) (quoting *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999)).

232. *Id.*

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*death sentence and not offset by related aggravating facts; (2) this evidence would have been located through a reasonable investigation; (3) habeas counsel is more effective than I am in representing my client; (4) the evidentiary hearing on the claim alleging that I was ineffective is heard before a judge who finds the mitigating witnesses credible; and (5) the witnesses and other evidence that I could have located and produced now with sufficient effort do not vanish during the interval between today and whenever the habeas investigation occurs. If all these factors align,] I will thus have secured many additional years of life for the client, and he may very likely avoid capital punishment altogether.<sup>233</sup>*

This amended calculus is less than compelling from the defense perspective. The difficulty with which the efficacy of a sandbagging strategy can be evaluated in advance, and the existence of so many variables that may defeat these stratagems, means that the prevailing critique of deliberate error in general also applies to the specific tactic of sandbagging through a failure to investigate or produce mitigation evidence: rarely will these methods produce a better outcome for the client.

#### CONCLUSION

The foregoing discussion establishes that sandbagging at the penalty phase is usually bad strategy. There remains a possibility, however, that in rare instances intentional error will make sense. Pinning down these instances requires a differentiation between the *reliability* of information and the *specificity* of this information. As discussed, the more investigation an attorney conducts, and the more information is gleaned from this work, the more deferentially courts will review counsel's decisions regarding what to do with the acquired material. Normally, this additional effort will be necessary to determine whether a mitigating fact or facts exist. But occasionally counsel will receive reliable, if vague, information concerning a potent mitigating factor without having conducted a thorough investigation. This information is reliable, but it is not necessarily specific. The shift from a "failure to investigate" inquiry to a "failure to produce" review is tied to the amount of information obtained by counsel, and the specificity of that information. If an attorney obtains reliable but incomplete information concerning an important mitigating fact, and decides not to pursue this lead, most

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233. *Poindexter v. Mitchell*, 454 F.3d 564, 589 (6th Cir. 2006) (Boggs, C.J., concurring).



courts will review the attorney's decisions under more stringent standards.<sup>234</sup>

With this knowledge, counsel may decide that sandbagging is the only hope for a client if the odds of avoiding the death penalty at the first trial look sufficiently bleak (for whatever reason). To combat these tactics, courts that encounter inexplicable failures by counsel to conduct further investigations into promising mitigation leads should strongly consider referring the culpable attorney to the appropriate disciplinary authorities, or referring the matter to a referee for an evidentiary hearing on the issue of deliberate ineffectiveness. The greatest drawback of such a strategy, however, remains its likely failure, even under optimal conditions. An attorney who sandbags in a capital case is betting the client's life, and the deck is stacked in favor of death.

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234. In this circumstance a contemporary court tasked with reviewing counsel's conduct likely will follow *Wiggins* and find that "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Wiggins v. Smith*, 539 U.S. 510, 527–28 (2003).