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Are Law Students Capable of Delivering a Reasonable Investigation as Required by the U.S. Supreme Court in Capital Cases

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ARE LAW STUDENTS CAPABLE OF DELIVERING A "REASONABLE INVESTIGATION" AS REQUIRED BY THE U.S. SUPREME COURT IN CAPITAL CASES?

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THE U.S. Supreme Court recently in *Wiggins v. Smith* reaffirmed and reinforced the constitutional requirement that capital defendants receive the effective assistance of counsel in both the guilt and penalty phases of capital trials. While the Supreme Court thus set a higher constitutional standard for effective capital representation, the practical reality is that many, if not most, capital defendants are indigents, and the increased burdens of providing effective representation will be borne by defender systems, which are already overburdened. Many indigent capital defendants have extended contacts over their lives with social services or other state resource agencies, and this often creates a special need for investigative thoroughness. Cases can be won, and death averted, based upon this investigative grist.

Some law schools, including Southern Methodist University (SMU) Dedman School of Law, have independently created capital clinical programs in which law students provide investigative and other resources for capital defense counsel under faculty supervision and for academic credit. With the newly enhanced constitutional standards for capital representation, however, the question has arisen whether these capital clinical programs can provide valuable additional resources for capital counsel while still satisfying constitutional standards for effective assistance.

This article will address the potential and propriety of capital clinical programs in providing constitutionally acceptable assistance for capital counsel. Based in part upon practical experience gleaned from SMU Law School's operation of a capital clinical program since 2001, this article

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contends that properly supervised capital clinical programs can serve both as a valuable resource and as a component of effective capital representation.

I. THE EVOLUTION OF STANDARDS FOR EFFECTIVE CAPITAL REPRESENTATION

In the recent case of *Wiggins v. Smith*,[1] the Supreme Court ostensibly continued to follow *Strickland v. Washington* standards,[2] which required a reasonable investigation to refute ineffective assistance of counsel claims. According to the *Wiggins* opinion, the Supreme Court has "long referred to" the American Bar Association (ABA) standards as "'guides to determining what is reasonable.'"[3] In some respects, however, the ABA standards require a more rigorous factual investigation than what is described in *Strickland*, and they provide both a need and an opportunity for law students to help capital defense teams provide high-quality legal services to indigents.[4]

A. *POWELL V. ALABAMA* (1932); *STRICKLAND V. WASHINGTON* (1984)

The new standard of care has created a greater need for investigative support for the criminal defense lawyer. This need is being filled by professional investigators and mitigation experts. Relatively new participants in this arena are students attending law schools offering death penalty clinics and death penalty projects.

In the 1932 Supreme Court case of *Powell v. Alabama*, the Court, for the first time, required the states to appoint counsel for indigent defendants in capital punishment cases.[5] Powell's right to counsel was based on the Fourteenth Amendment's right to a fair trial as provided by the Due Process Clause.[6] The Court found the appointment of the entire local bar association on the morning of a death penalty trial to be "a clear denial of due process,"[7] and that "[the defendant] requires the guiding hand of counsel at every step in the proceedings against him."[8] Six years after *Powell*, the Supreme Court required federal courts to provide indigent defendants with appointed defense counsel in all federal felony cases.[9] In 1963, the Court decided *Gideon v. Wainwright*, which stood for the proposition that the Fourteenth Amendment Due Process Clause incorpo-

1. Wiggins v. Smith, 539 U.S. 510 (2003).
2. Strickland v. Washington, 466 U.S. 668 (1984).
3. *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688); Williams v. Taylor, 529 U.S. 362, 396 (2000)).
4. *American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1015 (2003) (hereinafter *ABA Guidelines*).
5. Powell v. Alabama, 287 U.S. 45, 73 (1932).
6. *Id.* at 71.
7. *Id.*
8. *Id.* at 69.
9. Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938).

rated the Sixth Amendment right to counsel.[10]

B. *WIGGINS v. SMITH* (2003)

The Supreme Court has spoken on the issue of requiring a reasonable investigation, and it is clear that no less than a thorough investigation will satisfy constitutional standards for the effective assistance of counsel claims.[11] The *Wiggins v. Smith* case is an important decision that changes the weight of the evidence required to measure the effective assistance of counsel in capital cases.[12] The decision in *Wiggins* has breathed new life into ineffective assistance of counsel claims.

Kevin Wiggins successfully urged the Supreme Court to hold that his attorney's failure to investigate his background or present mitigating evidence of his miserable life history at his capital sentencing trial violated his right to effective assistance of counsel under the Sixth Amendment.[13] Trial counsel told the jury that it would hear that Kevin Wiggins had a difficult life, but during the punishment phase of the hearing they introduced no evidence of Wiggins' troubled life history.[14] Wiggins sought post-conviction relief with new counsel.[15] He charged that his lawyer rendered constitutionally defective assistance by failing to investigate and present the mitigating evidence of his dysfunctional childhood.[16]

In a post-conviction proceeding, a licensed social worker was certified as an expert by the court and detailed the severe physical and sexual abuse Wiggins suffered at the hands of his mother.[17] He also described Wiggins' experience living in several foster homes.[18] The two trial counsels testified that they decided not to introduce Wiggins' social history, and instead attempted to retry the factual guilt and innocence part of the trial, counting on lingering reasonable doubt to persuade the jury to vote for life imprisonment rather than death.[19]

In *Wiggins*, the Supreme Court cited *Strickland v. Washington* as the controlling law in measuring ineffective assistance of counsel.[20] In *Strickland*, the Supreme Court held that a claim by the defendant of ineffective assistance of counsel required the defendant to establish two components:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious

10. Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment right to counsel is obligatory upon the states through the Due Process Clause of the Fourteenth Amendment).
11. *Wiggins*, 539 U.S. at 510.
12. *Id.*
13. *Id.* at 538.
14. *Id.* at 515.
15. *Id.* at 516.
16. *Id.*
17. *Id.*
18. *Id.* at 517.
19. *Id.*
20. *Id.* at 520.

> that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[21]

Wiggins claimed that his lawyers' decision to limit the scope of their investigation to potential mitigating evidence constituted deficient performance.[22] The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.[23] The Supreme Court focused on whether the investigation supporting defense counsels' decision not to introduce mitigating evidence of Wiggins' background was itself reasonable.[24]

To show prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different.[25] A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the trial.[26]

Wiggins' counsels' investigation drew from three sources: 1) a psychologist, who tested Wiggins and found that he had an I.Q. of seventy-nine, but reported nothing of his dysfunctional childhood; 2) a pre-sentencing (PSI) report with an account of Wiggins' personal history, and 3) the City of Baltimore Department of Social Services (DSS) documentation of the defendant's varied placements in the state's foster care system.[27] The Court held, "[c]ounsels' decision not to expand their investigation beyond the PSI and DSS records fell short of the professional standards that prevailed in Maryland in 1989."[28]

II. THE CAPITAL CLINIC PARADIGM

A. THE *WIGGINS* GOAL

Wiggins v. Smith points out the need for increased efforts in investigating death penalty cases.[29] *Wiggins* also creates opportunities for law student participation in capital case preparation and investigation. There are several ways that student work can be utilized.

One use is cooperation between the defendant's lawyer and the students in a law school course co-supervised by the defense lawyer and at least one law school faculty member. This is not always easy to achieve, as trial lawyers are usually busy and do not have total control over their

21. *Strickland*, 466 U.S. at 687.
22. *Wiggins*, 539 U.S. at 515.
23. *Strickland*, 466 U.S. at 686-87.
24. *Wiggins*, 539 U.S. at 515.
25. *Id.*
26. *Id.*
27. *Id.* at 523.
28. *Id.* at 524.
29. *Wiggins*, 539 U.S. at 534.

time due to unexpected court appearances. Nonetheless, especially with today's communications technologies, it is possible for the defense lawyer, the lawyers on the law team, and the law students to remain informed about each other's activities and whereabouts. This is also true of the other members of the defense team, the mitigation expert, and the investigator.

The busy schedule of all parties involved means communication takes on critical importance. It is necessary to get a time commitment from all the parties at the outset. Even if it is not met, a written commitment can help maintain the parties' close cooperation and coordination.

For the past five years, SMU law students have been contributing to the defense of capital defendants in Dallas and Collin counties, in North Central Texas. Together, the two counties try about ten capital murder cases a year.

Since 2001, six out of sixty-three capital defendants in the above counties received investigative help from the Death Penalty Project at SMU Dedman School of Law. The defense work performed by students in capital murder cases is mainly legal research and witness interviews to gather exculpatory and mitigating facts. There is an almost unending amount of information to be gathered in a typical murder case.

B. WHAT MAKES AN INVESTIGATION REASONABLE?

What makes an investigation reasonable is not a settled issue. "Reasonable" is defined as "being in accordance with reason;" "moderate, fair;" "not extreme or excessive;" "having the faculty of reason;" "possessing sound judgment."[30]

The reasonableness of a situation is measured by how amenable the circumstances are to a logical analysis by the use of reason. To be reasonable, an investigation must comply with certain expectations that follow logic and reason. By complying with reason, the factual pattern is susceptible to logical analysis, and it can be said to "make sense". Circumstances that are not reasonable do not reach the level of logic necessary to satisfy a logical analysis.

Factual patterns are held together by the adhesive effect of a reasonable analysis. The analysis reveals supporting facts and factors that make the theory of the case tenable. The theory of the case is that logical analysis of the facts which best explains the operation of people and events that interact to define the limits of the event which occurred. For an investigation to be reasonable, it must reflect an appreciation of the salient facts which can be used to explain under analysis what happened and who is responsible for the various actions.

The reasonableness of a capital murder investigation is on a different level than any other type of legal case because the defendant's entire life

30. MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 974 (10th ed. 1999).

is at risk.[31] In mitigating the sentence, substantial hours of work are required by investigators and the mitigation experts to do an adequate job of gathering the materials to support the defendant's mitigation claims. The sheer breadth of a reasonable capital investigation is reflected in the *ABA Guidelines* which explain:

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel "sit idly by, thinking that investigation would be futile." Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case.
>
> Because the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant," "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." In the case of the client, this begins with the moment of conception [i.e., undertaking representation of the capital defendant]. Counsel needs to explore:
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> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
>
> (2) Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
>
> (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
>
> (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
>
> (5) Employment and training history (including skills and performance, and barriers to employability);
>
> (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).

31. *Strickland*, 466 U.S. at 704.

> The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.
>
> It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources—a time-consuming task—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.[32]

In sum, it is recognized that counsel's performance in this case must be measured against the prevailing standards at the time of the trial at issue.[33] The 1989 and 2003 *ABA Guidelines* are cited simply because they are the clearest exposition of counsel's duties at the penalty phase of a capital case, duties that were recognized by the court as applicable to the 1982 trial of the defendant in *Glenn v. Tate*.[34] Since *Glenn* took place even before *Wiggins*, the same standards regarding counsel's duty to investigate mitigating evidence, as articulated in the *ABA Guidelines*, are relevant here.

In determining what a reasonable investigation is in *Strickland v. Washington*, the Court made the following statement: 'To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness.'"[35] The Court clarified this position in *Wiggins* by stating: 'We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'"[36]

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32. AM. BAR ASS'N (ABA) STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS & ABA SPECIAL COMM. ON DEATH PENALTY REPRESENTATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.7, 80-83, 84 (Revised ed. 2003) (citations omitted) (hereinafter ABA GUIDELINES).
33. Ohio v. Hamblin, 524 N.E.2d 476, 479-482 (Ohio 1988).
34. Glenn v. Tate, 71 F.3d 1204, 1206-08 (6th Cir. 1995).
35. *Wiggins*, 539 U.S. at 521.
36. *Id.* (citation omitted).

In seeking to explain the counsel's duty in detail, the Court articulated some sources of direction by referencing "[p]revailing norms of practice as reflected in American Bar Association Standards and the like . . . are guides to determining what is reasonable."[37]

The Court also listed several areas that the trial attorney needs to investigate: medical history; educational history; employment and training history; family and social history; prior adult and juvenile corrections experience; and religious and cultural influences.[38] The Supreme Court obviously intended to leave the development of what constitutes a reasonable investigation to the lower courts.

Standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report.[39] Even though the Public Defender's Office made funds available for the retention of a forensic social worker, counsel chose not to secure such expert assistance.[40] The Court also found that counsel's conduct fell short of *ABA Standards*,[41] which the Court referred to as "guides to determining what is reasonable."[42] The *ABA Guidelines* provide that investigation into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut aggravating evidence that may be introduced by the prosecutor."[43]

The scope of defense counsels' investigation was also found unreasonable in light of what the counsel actually discovered in the DSS records.[44] The records revealed that Wiggins' mother was a chronic alcoholic.[45] Wiggins went from foster home to foster home and showed emotional problems while there.[46] He was absent from school on numerous occasions, and his mother left him, his brother, and his sister alone without food for days.[47] *Wiggins* is distinguishable from *Strickland*, where the Supreme Court found limited investigation into mitigating evidence to be a reasonable tactical decision.[48] *Strickland* was the result of years of dormant case law which had established a very lax standard for the mitigation investigation required of defense attorneys.[49] Had Wiggins' counsel investigated further, they would have discovered the sexual abuse that

37. *Strickland*, 466 U.S. at 688.
38. *Cf.* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1 (3d ed. 1993) [hereinafter ABA STANDARDS].
39. *Wiggins*, 539 U.S. at 524.
40. *Id.* at 524.
41. ABA STANDARDS, *supra* note 38, Standards 4-1.1–4-8.6.
42. *Strickland*, 466 U.S. at 688.
43. *Wiggins*, 539 U.S. at 524 (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 11.4.1(C), at 93 (1989)) (emphasis in original).
44. *Wiggins*, 539 U.S. at 525.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Strickland*, 466 U.S. at 699.
49. *Id.*

was only uncovered later, during state post-conviction proceedings.[50]

"In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."[51] The Court quoted *Strickland* with approval: "As we established in *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[52] The Court stated in *Strickland* that strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable.[53] This leaves the lawyer with the clear duty to follow up on all reasonable leads that help to establish the defendant's defense and/or mitigate his sentence. Due to the extraordinary and irrevocable nature of the death penalty, at every stage of the proceedings counsel must make "'extraordinary efforts on behalf of the accused.'"[54]

III. THE CONSTITUTIONAL RIGHT OF EFFECTIVE CAPITAL REPRESENTATION

The need for the guiding hand of counsel was first articulated in *Powell v. Alabama*.[55] Alabama did not provide the Scottsboro boys with counsel, as counsel was not appointed until hours before the start of the trial, in which the defendants were found guilty and sentenced to death.[56] The trial took place just eleven days after the alleged rape occurred.[57] The Supreme Court found that the appointment of the entire bar association only hours before trial was, in effect, denial of the defendants' Sixth Amendment right to the effective assistance of counsel.[58]

The *Wiggins* decision elevates the longstanding guidelines of the ABA that counsel thoroughly explore the defendant's social background to the stature of a constitutional mandate.[59] The Court ruled the investigation by Wiggins' counsel was infirm, insomuch as it failed to uncover vital details of the defendant's social history.[60]

Wiggins was an improvement over the 1984 *Strickland* decision.[61] There, the Court found that,

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50. *Wiggins*, 539 U.S. at 525.
51. *Id.* at 527 (quoting *Strickland*, 466 U.S. at 690-91).
52. *Id.* at 528.
53. *Strickland*, 466 U.S. at 681.
54. *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 923 (2003) (citation omitted). *See also* ABA STANDARDS, *supra* note 38, Standard 4-1.2(c).
55. *Powell*, 287 U.S. at 49.
56. *Id.* at 56.
57. *Id.* at 58.
58. *Id.*
59. *Wiggins*, 539 U.S. at 535.
60. *Id.* at 525.
61. *See Strickland*, 466 U.S. at 668.

> In preparing for the sentencing hearing, counsel spoke with [defendant] about his background. He also spoke on the telephone with [defendant's] wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for [defendant]. . . . Nor did he request a psychiatric examination, since his conversations with his client gave no indication that [defendant] had psychological problems. . . . Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. . . . [This decision] reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress.[62]

The Court also found in *Strickland* "[c]ounsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable."[63] The Court reversed the court of appeals decision and affirmed the district courts' denial of the writ of *habeas corpus*, thus finding counsel's assistance at sentencing in *Strickland* to have been effective.[64] The Court stated that a lawyer representing a criminal defendant has certain basic duties.[65] "[The lawyer's] function is to assist the defendant, and hence [the lawyer] owes the client a duty of loyalty, a duty to avoid conflicts of interest."[66] These basic guidelines are guides to determine "[p]revailing norms of practice as reflected in the American Bar Association standards . . . but they are only guides."[67] "To tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney,' is to tell them almost nothing."[68]

Justice Marshall further wrote in his dissent:

> If counsel had investigated the availability of mitigating evidence, he might well have decided to present same such material at the hearing. If he had done so, there is a significant chance the respondent would have been given a life sentence . . . those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment.[69]

In the nineteen years that passed between *Strickland* and *Wiggins*, there has been an increasing number of cases appealed on grounds of ineffective assistance of counsel.[70] The cases reaching the Supreme Court

62. *Id.* at 672-73.
63. *Id.* at 699.
64. *Id.* at 701.
65. *Id.* at 688.
66. *Id.*
67. *Id.* at 688.
68. *Id.* at 707-08 (Marshall, J., dissenting).
69. *Id.* at 719.
70. *Williams*, 529 U.S. at 362 (holding that petitioner was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during sentencing phase of

during that nineteen-year period, however, have not had much success in distinguishing ineffective assistance cases from cases that merely cast a negative light on the trial practices of the criminal defense bar.[71]

In *Wiggins*, the Court did not purport to be announcing a new standard for measuring counsel's actions. Rather, it cited the *ABA Standards for Criminal Defense* as the same standard used in *Strickland* to measure attorney behavior amounting to ineffective assistance of counsel. In finding counsel's conduct to be ineffective in *Wiggins*, however, the Court subtly but surely raised the bar higher than the *Strickland* level.

In *Wiggins*, the two public defenders had psychological testing reports, a pre-sentence investigation report, and obtained records from the Baltimore City Department of Social Services regarding the defendant's placements in the foster care system.[72] The Court found that this information should have led to further investigation, cited the following language from the *ABA Standards for Criminal Defense* with approval, and indicated it should have been followed:

> With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime, and all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel.[73]

The Supreme Court observed that they did not use an investigator to pursue mitigating evidence even though they had government money available to carry out the investigation.[74] The Supreme Court cited with approval the *ABA Standards of Criminal Defense* as the standard to be followed in evaluating the lawyers' investigatory performance.[75] They found the local standard in Baltimore, Maryland, had not been met by the lawyers, and ordered a new trial for the defendant.[76]

Wiggins is the most recent Supreme Court case seeking to provide defendants with lawyers, who could effect a reasonable investigation and defense for the accused, thus providing the guiding hand of counsel required in every capital case.[77] The appointment of the effective assis-

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capital murder trial); Bell v. Cone, 535 U.S. 685, 702 (2002) (denying post-conviction relief to a defendant whose counsel elected not to make a final plea for the defendant's life before the jury entered into deliberations); United States v. Kaufman, 109 F.3d 186, 191 (3d Cir. 1997) (holding counsel's performance to be unreasonable when counsel had a letter from a psychiatrist diagnosing the defendant as "psychotic" and still recommended that the defendant plead guilty without investigating a possible insanity defense).

71. *Bell*, 535 U.S. at 685; Burger v. Kemp, 483 U.S. 776, 788 (1987) (finding counsel offered no mitigating evidence in two separate sentencing trials).
72. *Wiggins*, 539 U.S. at 524.
73. *Id.* at 522 (applying the same "clearly established" precedent of *Strickland*); ABA GUIDELINES, *supra* note 33, at 6.
74. *Wiggins*, 539 U.S. at 524.
75. *Id.*
76. *Id.* at 528.
77. *See also Williams*, 529 U.S. at 397.

tance of counsel, based on the Sixth Amendment right to counsel, also means that, if the defendant is indigent and cannot afford to hire his or her own lawyer, the tools necessary for counsel to be an effective representative of the defendant must be provided by the courts.[78]

A. THE CAPITAL DEFENSE TEAM

The defendant's capital defense team is headed up by the lead defense lawyer.[79] He or she is responsible for leading the team in defending the guilt/innocence stage of the team's efforts.[80] The lead defense lawyer will usually have the most trial experience, as well as the most experience representing defendants on guilt/innocence issues.[81] He or she will be in charge of the other team members' tasks, and will assign other team members jobs.[82] Additionally, he or she will also assign available resources for their most effective use.[83] It is helpful if this leader has the ability to collaborate with other team members, and that he or she is able to capitalize on the work of law students in critical positions.

Students do impressive work for the mitigation team. Any reluctance to employ law students will quickly evaporate when the defense team is confronted with the sheer volume of work that needs to be accomplished. Once the students show that they can care about the defendant's well-being and begin producing competent work, they prove their value, and demonstrate the importance of having skilled workers take up tasks that are left over from the team members' available time. The team members soon learn to utilize the law students who produce solid, reliable work.

The second team member is either a lawyer with less experience in capital cases, or a mitigation specialist; he or she will usually be responsible for managing the penalty stage of the trial.[84] This person is in charge of investigating the mitigation evidence,[85] which makes a sentence of life imprisonment a reasonable possibility.

Mitigation Specialist is a fairly new job title for this role which underscores a long-standing need.[86] It is generally recognized that, in the complex litigation that today marks capital trials, a mitigation specialist must be included in the capital defense team.[87]

The mitigation specialist is a testifying expert who can tell the defendant's story to the jury if the defense team is to do the necessary investi-

78. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).
79. Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1123 (2003).
80. *Id.* at 1124.
81. *Id.*
82. *Id.*
83. *Id.* at 1125.
84. *Id.* at 1126.
85. *Id.*
86. Pamela B. Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 903, 1143 (2003).
87. *Id.* at 1144.

gation, putting together the facts and testimony required to convince jurors that the mitigating evidence in the case is powerful enough to call for life in prison, rather than a sentence to death. The mitigation specialist must gather all this evidence and present it to the lawyer managing the penalty phase of the case.

> As guilt or innocence is often not a serious issue in these cases, I think that it is a mistake to (a) divide the duties between lawyers and (b) assign the punishment phase to the least experienced lawyer. This is the most important part of the case and one who is responsible for this must be experienced in developing mental health evidence, have an understanding as to what the mitigation specialist is doing and be able to put the evidence on and do so persuasively. Also, by dividing the task, the younger lawyer does not benefit from the more experienced, but more seriously, often the theories between the guilt/innocence and the punishment phase are not consistent. The result is often, phase one: I didn't do it; or phase two: okay, I did it but this is why I did it, you should believe me now and give me life.[88]

The fourth member of the capital defense team is the investigator, who is distinguishable from the other defending team members.[89] Here, the use of students in gathering mitigating evidence is crucial due to the vast amount of documentary material generated during the lifetime of the defendant. Students have shown they are reliable, and they get the job done when time is important. The students fill a crucial need in interviewing the defendant's family, friends, and acquaintances. Together, team members consistently show they can work well together and share the tasks to be accomplished.

The law students team up in pairs to do reports on their research. The combined student effort produces work that is more diligently researched and written than work done individually. Teamwork makes students more confident entering jails and police stations than they would be by themselves. Law students show great patience while interviewing various people who have important information in the case. They stay in close contact with the mitigation specialist on the team, and report back to the entire class weekly on what they have discovered.

The Supreme Court in *Wiggins* also made it clear that an effective defense in a capital case justifies a mitigation specialist.[90] The *Wiggins* opinion suggests making a mitigation expert a part of the constitutional requirement of the Sixth Amendment right to counsel.[91] The opinion states that it is the responsibility of the trial court to provide the resources necessary to make the Sixth Amendment and Due Process guarantees of

88. Telephone Interview with John Niland, Director, Texas Defender Service Organization, and Director of the Capital Trial Project, in Austin, Tx. (Apr. 13, 2007).
89. Miller, *supra* note 79, at 1126.
90. *Wiggins*, 539 U.S. at 533-34.
91. *Id.*

the Fourteenth Amendment a reality.[92] Both the mitigation specialist and the investigator are separate and independent in their workloads. This does not interfere with the team members' work, however, as the team members remain focused on their primary concern: the investigation required by the Constitution must be a reasonable investigation performed in a professionally competent manner.[93] The defendant's life history is the area of maximum interest.

Allowing law students to participate in the pre-trial preparation of the defense of defendants charged with capital murder is a challenging proposition. But it can be done, as death penalty projects at several law schools demonstrate. Beginning in Fall 2001, twelve SMU law students each semester have taken on the task of assisting in the defense of a capital murder case. They meet for two hours per week in a seminar at the law school. A lawyer, or in some cases the mitigation specialist investigating the life of the defendant in a capital case, attends the class to explain the status of the case and outline the work that the students need to do. The students participate by way of investigation, research, organization of information that has been gathered, and generally helping in any way the lead attorneys need assistance. Since the seminar's inception, students at SMU Dedman School of Law have participated in eleven capital murder cases. These students, welcomed by the defense team, found the work to be challenging. The defense teams have consistently expressed their gratitude for the work the students did in competently performing time-consuming research and investigation.

There is a critical need to closely supervise the law students in their work. Students need to be granted some responsibility to make the learning experience real, but not an overwhelming amount. The supervision of law students requires patience and a willingness to discuss the steps needed to make the investigation worthwhile in light of the facts of the case.

Law students participate in the pre-trial preparation of the case by completing the tasks assigned to them by their law school professor and the lawyer directing the preparation of the case for trial. They interview witnesses in the presence of the defense team members and gather needed information. The key to effective support from law students is close contact between them, the participating law school faculty and the defense team.

The defense team is usually very busy, which requires the law school faculty to take an assertive role in keeping information flowing between the law students and the defense team. If communication fails at any time, the law school faculty should take responsibility for the breakdown, and take immediate steps to fix the problem. A telephone call to the lawyer will often repair the lines of communication, and sometimes a visit

92. *Id.* at 524.
93. *Id.* at 528.

to the lawyer's office will get the parties' attention and re-open the necessary communication.

The volume of work in a capital case requires significant resources to investigate the various aspects of the case. This is a rich environment for law students to enhance their interviewing, researching, and investigation skills and put them to good use.

The law students also develop an appreciation for privilege and work product doctrine and their practical importance. They need to be informed of their obligation to protect their clients through application of the lawyer-client privilege: "*General Rule of Privilege*: A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[94]

The work product doctrine shelters at its core the mental processes of the attorney, providing a principal area within which an attorney can analyze and prepare his client's case. An expert appointed pursuant to *Ake v. Oklahoma* is an agent of the defense counsel for purposes of the lawyer-client privilege and the work product doctrine. Although the *Ake* decision is based on a narrow set of facts, the courts have regularly extended its coverage when asked to by defense lawyers.[95] In *Little v. Armontrout*, the court held that the trial court should have allowed the defendant the services of a court-appointed expert in hypnosis, where the victim had been hypnotized by the prosecution to enhance her memory.[96]

Law students enthusiastically embrace the work to be done in death penalty cases because someone's life is affected. It is important to keep the students engaged in the casework, but care must be taken to see that they do not get overwhelmed. This requires close attention to their workload. A professor cannot simply give them their assignment and forget about them. The weekly classes provide a good forum to discuss the case that has been taken for the semester. SMU Dedman School of Law takes one case each semester, and the whole class works on different aspects of this case. This requires cooperation and provides an incentive to find out what the other teams of students have each discovered in their investigations. The table of contents for the semester changes with each case to reflect the needs of that case. A typical assignment list would look like this:

SIX 2-STUDENT TEAMS

Team 1	Interview the Defendant
Team 2	Interview the Defendant's Family
Team 3	Investigate the Defendant's School Records
Team 4	Investigate the Defendant's Military Service

94. TEX. R. EVID. 503(b)(1).
95. Husske v. Virginia, 476 S.E.2d 920, 925 (Va. 1996); Miller v. Dretke, 420 F.3d 356 (5th Cir. 2005).
96. Little v. Armontrout, 835 F.2d 1240, 1245 (8th Cir. 1987).

Team 5	Investigate the Defendant's Stay in the State Mental Hospital
Team 6	Investigate the Forensic Records Concerning the Murder in the Pending Case

A responsible person is necessary to do the administrative work of the project, including setting up logs for loaning out various documents as supplied by the defense team and secured from institutional sources by use of a waiver. The waivers are procured from the defendant or the jail staff to see and copy any records created by the defendant while institutionalized. It is important to request possession of the defendant's belongings before the prosecutor monopolizes the information to your client's detriment.

By increasing the level of thoroughness required to meet the death penalty standards for a reasonable investigation, the Supreme Court has made the utilization of law students a reasonable resource to meet the fact-gathering needs at the trial level of litigation.[97] The *Wiggins* opinion highlighted the need for increased efforts in investigating death penalty cases and provided incentives for law student participation.[98]

Finding another investigation inadequate to meet constitutional standards, the Court wrote in *Penry v. Lynaugh*, "'Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.'"[99] Thus, the Court found that the mitigating evidence in *Wiggins*, when taken as a whole, was stronger than the state's evidence in support of the death penalty, and concluded that the mitigation evidence "might well have influenced the jury's appraisal."[100]

The movement in the Supreme Court's position from *Strickland* to *Wiggins* is quite significant. Lawyers can no longer nonchalantly rely on the strategic choice defense to fend off charges of ineffective assistance of counsel, when the real reason for the charges in many cases is a failure to investigate as thoroughly required by the Supreme Court in *Wiggins*. *Wiggins* now makes the danger of being held responsible for providing ineffective assistance of counsel much more threatening. This puts the criminal defense team on alert that to do a less-than-reasonable job investigating a case will lead to ineffective assistance of counsel charges against them.

In *Doherty v. State*, the Houston Court of Appeals reversed a murder conviction on grounds of ineffective assistance of counsel because defense counsel neither interviewed previous counsel, state witnesses, nor

97. *Wiggins*, 539 U.S. at 510.
98. *Id.*
99. Penry v. Lynaugh, 492 U.S. 302, 319 (1989)(quoting from California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).
100. *Wiggins*, 539 U.S. at 538 (citation omitted).

investigated a potential alibi, other defense witnesses, or another possible suspect of whom he was aware.[101] Harm was shown when the defendant gave proof that he would have benefited from his own testimony and that of his father.[102]

Other Texas cases provide examples of the type of unreasonable investigative efforts that can be avoided through use of monitored law student work product.

In *Ex parte Ybarra*, a murder case in which the trial counsel made no investigation because he received the case only twelve hours before the trial, the defendant was entitled to *habeas corpus* relief.[103] In *Ex parte Jordan*, the Court found that the defendant was denied effective assistance of counsel when the trial lawyer failed to investigate the validity of the defendant's prior convictions, and where the trial court discovered he was not represented by counsel during a 1959 Louisiana conviction.[104] In *Jackson v. State*, the defendant received ineffective assistance of counsel when the attorney failed to investigate why the defendant received disability payments or other defenses and mitigation evidence.[105] In *De Freece v. State*, the indigent defendant was denied effective assistance of counsel when the trial court refused to appoint a psychiatrist to assist counsel in preparing the insanity defense.[106] The law is clear that a reasonable investigation is required to render effective assistance of counsel.[107] The scope and depth of that investigation depends on the reasonableness of what the lawyer knows, and what is reasonable to expect him to pursue.[108] Thus, if a lawyer knows nothing, it is reasonable to expect that he will investigate to the limits of the witnesses available in the case, to make sure no defenses are overlooked or neglected. If the lawyer finds indication of an insanity defense, he or she must pursue that lead until he reasonably believes he has exhausted the possibility of an insanity defense or he has gotten all the evidence that is available. He or she also has the responsibility of petitioning the trial court to appoint a psychiatrist to help the lawyer present the insanity defense.[109] This responsibility is not limited to capital cases.[110]

B. Law Students Can Help Satisfy the New Higher Standards for A Reasonable Investigation

Wiggins establishes a stronger factual basis for providing effective assistance of counsel.[111] Even though the Court uses the same two-prong test

101. Doherty v. State, 781 S.W.2d 439, 440 (Tex. App.—Houston [1st Dist.] 1989).
102. *Id.* at 442.
103. *Ex parte* Ybarra, 629 S.W.2d 943, 948 (Tex. Crim. App. 1982).
104. *Ex parte* Jordan, 879 S.W.2d 61 (Tex. Crim. App. 1994).
105. Jackson v. State, 857 S.W.2d 678 (Tex. App.—Houston [14th Dist.] 1993).
106. De Freece v. State, 848 S.W.2d 150 (Tex. Crim. App. 1993).
107. *Strickland*, 466 U.S. at 691.
108. *Id.*
109. *Ake*, 470 U.S. at 74.
110. *See Ex parte* Gabriel Gonzales, 204 S.W.3d 391 (Tex. Crim. App. 2006).
111. *Wiggins*, 539 U.S. at 534.

first established in *Strickland*, the Court is much more demanding of the factual rigor required to constitute a reasonable investigation.[112] The defendant's attorney is on notice that a superficial review of the available facts simply will not satisfy the constitutional demands for the effective assistance of counsel.

The two public defenders in *Wiggins* would have been better off with the objective reasonable standard under *Strickland*. The standard practice under *Strickland* was to look at the options available to the defendant's counsel; invariably, the decision to fail to investigate thoroughly was attributed to a strategic decision on the part of the lawyer.[113] Under *Wiggins*, that proposition did not work, as counsel made an investigation deep enough to satisfy *Strickland's* standards, but not enough to satisfy *Wiggins'* more stringent factual demands.[114] There can be little doubt in the minds of the practicing bar that the standards in *Strickland* were inadequate to meet a level of effective representation.

This is not the case under *Wiggins*. The requirements, based on reasonable response to factual leads present in the facts of the case, provide an incentive to pursue the trail of facts until the incentive runs out or the issue is established, and requires the state at trial to prove beyond a reasonable doubt that a defense does not exist.[115] The burden of proving some evidence of a defense is only by a preponderance of the evidence, and once established by the defendant, the burden shifts to the State to prove beyond a reasonable doubt that the defense does not exist.[116] Defendant's counsel has a duty to investigate the case to a point where all defenses are eliminated or some evidence of a defense has been raised.[117]

The facts in *Wiggins* sound a warning to the criminal defense bar. The two appointed public defenders read the reports furnished by the child welfare official and the Baltimore SSD.[118] They chose not to present those reports on the grounds that the defense counsel focused on the guilt/innocence aspect of the trial.[119] They did a superficial job of gathering reports from the official agencies of the State of Maryland. Their efforts most certainly would have satisfied the requirements of *Strickland*.[120] The reports presented at trial were thorough enough to give a reviewing court a basis to approve the trial counsel's proffer that it was a tactical decision to refuse to pursue the leads further, and no ineffective assistance of counsel would have been established under *Strickland*.

Wiggins, however, requires a more diligent pursuit of the possibilities presented in the facts of the case.[121] No longer will the defendant's attor-

112. *Id.* at 521.
113. *Strickland*, 466 U.S. at 680.
114. *Wiggins*, 539 U.S. at 533.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 523.
119. *Id.* at 526.
120. *Id.* at 521.
121. *Id.* at 525.

ney be able to claim a strategic decision was made to avoid getting stuck in a quagmire of incriminating facts and circumstances, without showing that the leads were followed to a reasonable degree so that an informed decision could be made on whether to cease the investigation or pursue it further. The decision must be based on a reasonable investigation commensurate with the risk that the defendant is not getting a fair trial, and to satisfy the requirement of the effective assistance of counsel.[122]

The lead attorney needs to make all the facts known to members of the defense team, available to all the other members, as well a keep them informed of the working theory of the case as it develops. The constantly changing working theory of the case needs to be communicated to the whole team on a regular basis, as the developing theory alters what is important and what facts take priority in the case.

The ABA standards make a clear statement of the value of the defense attorney to the defendant in the capital case.[123] The primary role of counsel is to "act as champion for his client. In this capacity he is the equalizer, the one who places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried."[124]

The *ABA Guidelines* leave no question about the effort required of defense counsel in a death penalty case:

> (c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the objective ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.[125]

In stating the language in *Wiggins*, the Supreme Court has established a new factual basis for a reasonable investigation in criminal cases. That basis requires an effort to investigate the facts of the case, which is reasonable in light of the stakes in a capital case, and what is reasonable to expect the investigation will uncover. It is advisable to hire an experienced investigator to perform an investigation requiring extraordinary effort, and which must be reasonable in light of the risk that the defendant will most likely be sentenced to death.

The American Bar Association sets out the requirements for the defense function:

> Defense Counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and penalty in the event of conviction.

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122. *Id.* at 534.
123. ABA Comm. on Criminal Justice, Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 145 (10th Draft 1970).
124. *Id.* (cited with approval in *Wiggins*, 539 U.S. at 522.)
125. ABA STANDARDS, *supra* note 38, Standard 4-1.2.

> The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.[126]

The record established by the use of law students for investigative purposes at the SMU Law School's operation of a capital clinical program since 2001 indicates that law students can assist in the provision of constitutionally-required reasonable investigative support for capital defendants.

III. CONCLUSION

Law students who work on establishing exculpatory and mitigating facts in capital cases are not carrying the main burden of the defense. They are experienced and reliable enough to work under the supervision of an experienced attorney and investigator who are responsible for the primary investigation. There is a place for the participating law students to make a valuable contribution.

The work appropriate for law students is best limited to tasks that can be specified, detailed, and those tasks which have already been looked into by the defendant's lawyer or investigator. Law students can do follow-up and confirming interviews that can be checked against the initial interview by fully qualified professionals.

A certain amount of responsibility is necessary to make the student's effort a realistic experience, but the main burden must remain in the hands of the attorney appointed by the court. Law students must remain in an assisting relationship with the lead attorney. As long as there is a close, well-coordinated relationship, the students will be able to make a solid contribution to the defense team's efforts. The work done for the capital defendant by the participating law students is mutually beneficial. Their effort is substantial, and the benefits for the defense team and defendant are useful and significant. Given the great need for such services for the indigent, the development of similar programs at other law schools may answer a pressing constitutional need identified by the Supreme Court in *Wiggins*.

126. ABA STANDARDS, *supra* note 38, Standard 4-4.1.

Comment and Casenotes