How *Wiggins v. Smith* Raised the Bar

By Greg Westfall (TLC 2002)

> *"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."*
>
> *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

> *"Because the sentencer in a capital case must consider in mitigation anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. At least in the case of the client, this begins with the moment of conception."*
>
> *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003), *reprinted in*, 31 HOFSTRA LAW REVIEW 913, 1022 (commentary).

Even in the quickly changing legal landscape of death penalty litigation, *Wiggins v. Smith*, 539 U.S. 510 (2003) stands out for its reverberating effects. These effects are still being felt as the true import of the case continues to sink in. *Wiggins* is mandatory reading for anyone involved in any way with capital litigation. While there have been important cases in the last decade dealing with the death penalty (*Atkins v. Virginia*, 536 U.S. 304 (2002)(can't execute the mentally retarded); *Ring v. Arizona*, 536 U.S. 584 (2002)(only a jury can hand down a death sentence); *Roper v. Simmons*, 543 U.S. 551 (2005)(can't execute those who were 17 at the time of their crimes), each of these decisions has only affected its own very narrow set of cases. *Wiggins* effects them all. And unlike those other decisions, *Wiggins* directly affects us as lawyers.

As you know or have probably guessed by now, *Wiggins* is an ineffective assistance of counsel case dealing with an inadequate investigation. And from just a bare, legal standpoint, *Wiggins* really didn't change the law. Wiggins was facing the death penalty in Maryland and was represented by the Baltimore County public defender's office. *See id.* 539 U.S. at 514. The guilt or innocence stage was tried to the court, which found Wiggins guilty of first degree murder. *See id*. at 515. The trial on punishment would be in front of a jury. Prior to the punishment hearing, defense counsel moved to bifurcate the proceeding, so they could argue in the first phase that Wiggins was not directly responsible for the murder, as required by Maryland law for the death penalty. *See id*. The proposed second phase would be the mitigation phase. *See id*. The judge, however, denied the motion to bifurcate. Counsel thereafter tried the first issue - lack of direct responsibility - and essentially made a bill with the mitigation evidence. *See id.*

There were some problems with the implementation of this strategy. For one thing, the defense counsel who made the opening statement promised the jury they would hear mitigation evidence and then failed to produce it. Also, the defense kind of did produce mitigating evidence to the extent they showed Wiggins had no priors. But by and large, they didn't put on any mitigating evidence to speak of. Wiggins got a death sentence.

I have always adhered to the belief that residual doubt will save a person's life faster than the best mitigating evidence you can find. I sense that a lot of people out there see mitigating evidence as an excuse. "Abuse excuse" is a phrase I have heard many times. Frankly, if I am going to be honest, I have to admit that at some level I probably feel this way too. I have represented people for capital murders who had it no rougher than to be raised in relative poverty in a single-parent home. But Wiggins was not one of those.

Wiggins' mother was a chronic alcoholic who frequently left Wiggins and his brothers and sisters alone in the house for days. They either had to eat garbage or go out and beg for food. They ate paint chips. When his mother was home, she beat the children for breaking into the kitchen to get food. She had sex with men with the children in the same bed. She once punished Wiggins by laying his hand on a hot stove. At six, Wiggins went into foster care, where he was raped several times over the years by various male caretakers and their male children. Wiggins continued to receive physical abuse. Finally, he ran away and lived in the street. *See id*. at 516-17.

None of this was presented to the jury. Perhaps Wiggins' counsel believed they had such a strong case on the direct responsibility issue that they didn't want to take a chance that they would alienate the jury with all this "excuse" evidence. The problem is, they didn't know about the evidence outlined above when they made their decision. So that really makes it easy, doesn't it? Just reverse under *Strickland v. Washington*, 466 U.S. 668 (1984) and be done with it. After all, *Strickland* was itself an inadequate investigation case. *See id.*, 466 U.S. at 690-91. But the court could not just find that counsel was ineffective under *Strickland*, but had to find further pursuant to 28 U.S.C. § 2254(d)(1)(the AEDPA) that the court of appeals unreasonably applied *Strickland* in saying otherwise. *See id*., 539 U.S. at 519-20. Simply put, *Strickland* held that counsel must conduct a reasonable investigation. *See id*., 466 U.S. at 690-91. In *Wiggins,* the Court held that in the context of a death penalty case, a reasonable investigation is one conducted in accordance with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Make no mistake about it - this raised the bar. Just read the ABA Guidelines and I think you will agree.[1]

So what about counsel's freedom to make a strategic decision to not put on a mitigation case at all? *Wiggins* restates *Strickland's* willingness to defer to such a decision. *See Strickland*,

---

[1] The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) can be found at http://new.abanet.org/DeathPenalty/RepresentationProject/Pages/Resources.aspx.

466 U.S. at 690-91; *Wiggins*, 539 U.S. at 522-23. However, if the decision is based on an incomplete investigation, you will be rendering constitutionally deficient performance. And with *Wiggins*, a "complete investigation" is going to be one based on the ABA Guidelines, which are about as specific and comprehensive as you can get.

The good news is that if you do an investigation as contemplated by the ABA Guidelines, chances are you'll come up with a mitigation case that goes far beyond the "abuse excuse."