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CHANDLER V. UNITED STATES: DOES THE DEFENSE ATTORNEY HAVE A LEGAL OBLIGATION TO PRESENT MITIGATION EVIDENCE IN ELEVENTH CIRCUIT DEATH PENALTY CASES?

INTRODUCTION

In 1991, a jury in the Northern District of Alabama convicted Ronnie Chandler of running a large marijuana operation and procuring the murder of a police informant. Subsequently, the same jury sentenced Chandler to death. The jury heard the details of Chandler’s crimes at the guilt phase of his trial. However, at the penalty phase of the trial, because Chandler’s lawyer did not seek out or produce witnesses who would have testified, the jury never heard

3. Id. Charles Jarrell, Sr., who actually killed the victim, Marlin Shuler, has since recanted his trial testimony implicating Chandler. See Death Row Inmate, First to Be Sentenced Under 1988 Drug Kingpin Law, Seeks New Trial (NPR: Morning Edition radio broadcast, Aug. 9, 2000), available at 2000 WL 21481185. Jarrell’s testimony was the only evidence linking Chandler to the murder. See id. The NPR report also excerpted a 1996 Sixty Minutes report on the case, which featured an interview with Jarrell saying that “[i]f the government kills Ronnie Chandler, they kill an innocent man.” Id. Jarrell’s new story is that he “made it all up in order to save his son and his own life.” Id. But Joe Hubbard, an Assistant United States District Attorney who helped prosecute Chandler, said that “[i]f . . . we were to allow someone to have a new trial simply because someone changed their [sic] story after the individual had been convicted, then probably we’d be retrying most cases.” Id. The prosecutors worry that Jarrell, now serving a prison sentence of twenty-five years to life, has no incentive to stand by his earlier testimony, even if it was true. Id. But Jarrell does have substantial incentive to lie to save Chandler’s life, given that the two were old friends. Id. Chandler’s family, on the other hand, points out that Chandler was the first person tried for murder under the 1988 Drug Kingpin Act, and asserts that the federal prosecutors’ eagerness for a conviction clouded their judgment in pursuing the case. See id. On balance, however, it seems arguable that Chandler’s guilt has not been proven beyond a reasonable doubt, and that he may well be innocent of the crime for which he was sentenced to die.
4. See Chandler v. United States, 218 F.3d 1305, 1344 (Barkett, J., dissenting). Ronnie Chandler’s wife, Deborah, and his mother were the only two witnesses who testified for the defense at the penalty phase of the trial. Id. Defense attorney Drew Redden’s questioning of Chandler’s wife and mother was “so deficient” “as to have been detrimental.” Id. at 1348 n.11, 1354 & n.20 (citing to Chandler v. United States, 193 F.3d 1297, 1301-02 nn.6-7 (11th Cir. 1999)). In fact, the prosecutor used the sparsity of the testimony Redden elicited from Chandler’s wife and mother to buttress his closing argument for a death penalty. See Chandler, 218 F.3d at 1354 & n.20 (Barkett, J., dissenting) (“The
that Chandler, without accepting repayment or recompense, had bought shoes for barefoot children; built a wheelchair-accessible porch for an elderly man; helped friends and family members to build houses; paid the funeral expenses for a neighbor’s child because he knew the family had no money; given food and money to needy neighbors; provided jobs in his construction firm to unemployed people who wanted to work; helped a widow, and later a woman fleeing her abusive husband, by taking them into his home, and supporting each, until they could get on their feet; contributed generously to his church; and faithfully supported a long-time alcoholic friend in quitting drinking. Five years after the trial, at an evidentiary hearing on Chandler’s claim of ineffective assistance of counsel, forty of Ronnie Chandler’s friends and neighbors drove two hours from Piedmont, Alabama to the United States Court for the Northern District of Alabama, in Birmingham. There, they testified that Ronnie Chandler’s trial lawyer never contacted any of them to testify at the penalty phase of Chandler’s trial, when their stories of his generosity and compassion might have saved Chandler from receiving a death sentence.

The United States Court of Appeals for the Eleventh Circuit, in affirming the district court’s denial of relief in Chandler v. United States, has arguably so narrowed the analysis of ineffective assistance of counsel claims arising from the penalty phase of capital trials as to make that claim virtually nonexistent. The decision, announced on July 21, 2000, seemingly eviscerates ineffective assistance of counsel analysis under the standard previously

kinds of questions Redden asked and the brevity of his examination left the jury with the impression that the two women who theoretically knew Chandler best had little or nothing to say about him other than the fact that he liked to participate in building houses.

5. Chandler, 218 F.3d at 1354-58 (Barkett, J., dissenting).

6. See id. at 1360 (Barkett, J., dissenting) (“Given the quality and quantity of the evidence that was available at the time of trial . . . there is a reasonable probability that, but for Redden’s failure to present any of the available mitigating evidence, Chandler would not have been sentenced to death.”); Interview with John R. Martin, federal habeas corpus counsel to David Ronald Chandler, in Atlanta, Georgia (July 23, 2001) (audiotape on file with author) [hereinafter Martin Interview].

7. Id. at 1309, aff’g en banc 957 F. Supp. 1505 (N.D. Ala. 1996), vacating & rev’g 193 F.3d 1297 (11th Cir. 1999), cert. denied 121 S. Ct. 1217 (2001).

8. See Chandler, 218 F.3d at 1361 (Wilson, J., dissenting).
announced in *Strickland v. Washington.* The new standard widens the definition of acceptable defense lawyering in capital cases so far that, according to one of the dissenting judges, it "virtually forecloses any future *Strickland* claim of ineffective assistance during the penalty phase of a capital proceeding." Such a development bodes ill not just for the poor, the retarded, the mentally ill, and members of racial minority groups—the classes of people that have historically received the death penalty—but for any death penalty defendant whose counsel provided inadequate representation.

9. 466 U.S. 668, 687 (1984). See *Chandler,* 218 F.3d at 1361 (Wilson, J., dissenting); see also 218 F.3d at 1328-43 (Tjoflat, J., concurring in part and dissenting in part) (holding that the *Strickland* performance prong analysis should be remanded to the district court, as the petitioner had raised a legitimate question of fact regarding his counsel’s conduct under the performance prong of *Strickland*); *id.* at 1344-61 (Barkett, J., dissenting) (holding that the petitioner had satisfied both the performance and the prejudice prongs of the *Strickland* test). But cf. William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel,* 4 WM. & MARY BILL RTS. J. 91, 94 (1995) ("*Strickland* has been roundly and properly criticized for fostering tolerance of abysmal lawyering."). Professor Geimer argues persuasively that the decision in *Strickland* was both poorly reasoned and drastically reduced the probability that a capital defendant might win federal habeas corpus relief on an ineffective assistance of counsel claim. See, e.g., *id.* at 92-95; cf. Anne M. Voigts, *Note, Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel,* 99 COLUM. L. REV. 1103, 1123 (1999) ("Before . . . [Strickland], lower courts struggled to define just what effective assistance of counsel really meant. They settled, for the most part, on a ‘mockery of justice’ test, which warranted relief only when counsel’s performance shocked the conscience of the court."). Voigts asserts that the *Strickland* test is "not . . . markedly more demanding of counsel [than what went before]." *Id.* But cf. Geimer, *supra,* at 93 (arguing metaphorically that *Strickland* overturned Gideon v. Wainwright, 372 U.S. 335 (1963)) ("*Strickland v. Washington* effectively discarded Gideon’s noble trumpet call to justice in favor of a weak tin horn . . . [T]he United States Supreme Court has undermined, if not virtually destroyed, the right of indigent accused to have counsel do the kind of things . . . an attorney should reasonably be expected to do."). Thus, far from eviscerating the *Strickland* standard, one might argue that *Chandler* falls within the mainstream of *Strickland* jurisprudence, if one accepts the premise that *Strickland* sharply limits a criminally convicted defendant’s ability to attack the validity of her conviction on an ineffective assistance of counsel claim and enables the state to execute capital defendants more frequently. Geimer, *supra,* at 95-97.

10. *Chandler,* 218 F.3d at 1361 (Wilson, J., dissenting).

11. See generally, *e.g.,* McCleskey v. Kemp, 481 U.S. 279 (1987) (discussing racial disparity in death penalty sentencing under the post-*Furman* Georgia scheme); 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 (1994) (documenting the lack of effective representation for indigent defendants in capital cases, especially those suffering from intellectual impairment or mental illness) [hereinafter *Counsel for the Poor*].

12. Martin *Interview,* *supra* note 6. It is worth noting that Ronnie Chandler is not poor, retarded, mentally ill, or a member of a minority racial group. *Id.* He is a white man, married and by all accounts a loving father. *Id.* At one time he was a prosperous marijuana grower and salesman, controlling an
Quite often, even in an age of guided discretion and bifurcated trials, appellate courts find counsel in capital cases ineffective in terms of the Sixth Amendment. Cases have shown that lawyers defending “death-eligible” clients are often inexperienced, underpaid, incompetent, drunk, asleep, or some combination thereof. At the same time, representing a client in a capital trial may demand more strategic and tactical skill from an attorney than any other criminal defense undertaking. Effective counsel will organize a death penalty trial around a “theme for life” that is conceived during the pretrial investigation and presented from voir dire through the closing argument of the penalty phase.

Ronnie Chandler asserted a claim of ineffective assistance of counsel in the federal habeas corpus petition that gave rise to the appeal heard by the Eleventh Circuit in Chandler v. United States. This Comment discusses the disposition of that appeal, which almost resulted in Chandler’s becoming the first federal prisoner executed in

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extensive distribution network. See Chandler, 218 F.3d at 1310. Further, Chandler was not represented by indigent counsel; he retained Drew Redden, a prominent Alabama criminal defense attorney. See id.

13. See 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2e at 476-85 (3d ed. 1998) (noting that in a summary of successful federal habeas corpus petitions, nearly one-third were based directly on ineffective assistance of counsel claims); see also Geimer, supra note 9, at 96 (“Particularly in capital cases, competent defense is the exception, not the rule.”). Of course, the right to counsel is enshrined in the American criminal justice system. See U.S. CONST. amend. VI (guaranteeing criminal defendants the right to be assisted by counsel).

14. See Counsel for the Poor, supra note 11, at 1835, 1842-47; Geimer, supra note 9, at 93 (arguing that the Supreme Court’s right to counsel jurisprudence “guarantees little more than the presence of a person with a law license alongside the accused during trial.”).

15. See Gary Goodpaster, The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. REV. 299, 317-39 (1983) (creating a blueprint for representation of a client in a capital case). Goodpaster argues that the capital defender must start thinking about and planning for the penalty phase the moment he accepts a capital case. See id. at 320; see also Bruce A. Green, Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment, 78 IOWA L. REV. 433, 459, 497 nn.253-55 (1993). Green nods to Goodpaster’s seminal work from a decade earlier, and argues that the capital defender’s work for the penalty phase of a capital trial starts with pre-trial investigation of the client’s life in order to uncover information that may be presented in mitigation of sentence. See id. at 497.

16. Stephen B. Bright, Presenting the Theme for Life Throughout a Capital Case I (July 17, 2001) (unpublished manuscript, on file with the Southern Center for Human Rights, Atlanta, Georgia) [hereinafter Theme for Life]; see also Goodpaster, supra note 15, at 317-39. In addition, defendants seeking relief under color of habeas corpus petitions, based on mistakes at the sentencing phase of capital trials, are not seeking freedom, but merely a conversion of a death sentence into a sentence of life in prison, almost universally without any possibility of parole. See Theme for Life, supra; see also, e.g., 21 U.S.C. § 848(e) (2000); O.C.G.A. § 17-10-30 (2000).

17. See Chandler v. United States, 218 F.3d 1305, 1306 (11th Cir. 2000).
over thirty years. Part I of this Comment briefly reviews and discusses the history of ineffective assistance of counsel in capital cases, as well as the modern history of capital punishment in the United States, with special reference to Georgia and the Eleventh Circuit. Part II examines the Supreme Court’s recent treatment of an ineffective assistance of counsel claim arising from the penalty phase of a capital trial in Williams v. Taylor, where the Court overturned the Fourth Circuit’s denial of relief to Terry Wayne Williams after his attorney failed to discover and present crucial mitigating evidence in the penalty phase of Williams’ trial. Part III discusses the facts of the case in Chandler v. United States and analyzes Judge Edmondson’s majority opinion. Part IV analyzes Judges Tjoflat and Barkett’s dissenting opinions and discusses the apparent conflict between the Supreme Court’s decision in Williams v. Taylor and the Eleventh Circuit’s decision in Chandler v. United States. Part V examines the early jurisprudence in the wake of Chandler. Finally, this Comment concludes with a prediction as to the implications of Chandler for death penalty and ineffective assistance of counsel jurisprudence in the Eleventh Circuit.


19. 120 S. Ct. 1495 (2000).

20. Id. at 1499. On remand, where habeas counsel presented evidence, Terry Williams received a sentence of life in prison without parole. See Frank Green, Death Row Veteran’s Life Spared, RICH. TIMES-DISPATCH, Nov. 15, 2000, at A1 [hereinafter Death Row]. Williams had previously been sentenced to die in Virginia’s electric chair and twice came within hours of execution. Id.
Georgia State University Law Review, Vol. 18, Iss. 2 [2002], Art. 2

I, A SHORT HISTORY OF THE RIGHT TO COUNSEL AND MODERN CAPITAL PUNISHMENT JURISPRUDENCE IN THE UNITED STATES

A. Incorporation of the Sixth Amendment Right to Counsel

The Sixth Amendment to the United States Constitution provides, inter alia, that a criminal defendant has the right to assistance of an attorney at trial. Early in American history, the Supreme Court held that the right to counsel, as well as the Bill of Rights in general, applied only in the context of federal law, not to the states or under state law. In 1932, in Powell v. Alabama, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires the Sixth Amendment right to counsel be applied to indigent defendants in state law capital cases. In Johnson v. Zerbst, the Court subsequently held that the Sixth Amendment extends the right to counsel to all federal criminal defendants. Nonetheless, ten years after Powell, in Betts v. Brady, the Court refused to recognize any Due Process requirement extending the right to counsel to all state law criminal defendants. It was not until 1963, in Gideon v. Wainwright, that the Court fully extended the right to counsel to all state law criminal defendants, including indigents represented by appointed counsel.

More recent Court decisions have arguably blunted the holdings of Powell and Gideon. For example, in Pennsylvania v. Finley, the Court held that the Constitution does not guarantee the right to

21. U.S. CONST. amend. VI.
23. 287 U.S. 45 (1932).
25. 304 U.S. 458 (1938).
26. See WHITEBREAD & SLOBOGIN, supra note 24, § 31.02(a).
27. 316 U.S. 455 (1942).
28. See WHITEBREAD & SLOBOGIN, supra note 24, § 31.02(a).
30. See WHITEBREAD & SLOBOGIN, supra note 24, § 31.02(b).
counsel in post-conviction proceedings.\footnote{See \textit{Whitebread \& Slobogin}, supra note 24, § 31.03(c)(4).} In \textit{Murray v. Giarratano},\footnote{492 U.S. 1 (1989).} the Court held that the right to counsel does not attach even to post-conviction proceedings in capital cases, where it is arguably most needed.\footnote{See \textit{Whitebread \& Slobogin}, supra note 24, § 31.03(c)(4).} Because criminal defense lawyers trying death penalty cases are often woefully under compensated, they are often inexperienced or incompetent, a fact that helps perpetuate the steady supply of ineffective assistance of counsel claims in capital cases.\footnote{See \textit{Counsel for the Poor}, supra note 11, at 1835-36; see also \textit{Liebman \& Hertz}, supra note 13, at 476-85 (summarizing ineffective assistance of counsel claims that have succeeded in federal habeas corpus petitions); \textit{Wasserman}, supra note 34, at 614-15 & n.70 (citing a Columbia University study of national constitutional error rates in capital cases and implying that high habeas corpus reversal rates in Georgia and other states might be explained in part by a low rate of error detection and reversal on direct appeal).}

\section*{B. Modern Death Penalty Jurisprudence}

The modern history of the death penalty in the United States is inextricably tied to the modern history of the death penalty in Georgia.\footnote{See, e.g., \textit{McCleskey v. Kemp}, 481 U.S. 279 (1987); \textit{Gregg v. Georgia}, 428 U.S. 153 (1976); \textit{Furman v. Georgia}, 408 U.S. 238 (1972).} In 1972 the Supreme Court held, in \textit{Furman v. Georgia},\footnote{408 U.S. 238, 239-40 (1972) (per curiam).} that the death penalty sentences in that case "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."\footnote{Id. at 238. All nine Justices filed separate opinions. \textit{Id.} at 240. Five Justices held that the death penalty was unconstitutional. \textit{Id.} The four dissenters held that the legitimacy of the death penalty was implicit in the text of the Constitution and therefore proper. \textit{See id.} at 375-405 (Burger, C.J.,} The Court did not say that the death penalty was
cruel and unusual per se, only that “the imposition and carrying out of the death penalty in *these cases* constitute cruel and unusual punishment.”

The reaction to *Furman* was both immediate and sweeping. Between 1972 and 1976, slightly more than two-thirds of state legislatures revised their death penalty statutes to comport with the *Furman* decision. The Supreme Court approved the revised Georgia, Florida, and Texas death penalty laws through separate dissenting. Although the dissenters opposed the death penalty on moral grounds, they maintained that the issue was only constitutionally amenable through legislative or executive action. See *id.; see also id.* at 405-14 (Blackmun, J., dissenting), 414-465 (Powell, J., dissenting), 465-70 (Rehnquist, J., dissenting). Of the five concurring Justices, only Justices Brennan and Marshall held that capital punishment violated the Constitution. See *id.* at 305-06 (Brennan, J., concurring), 314-74 (Marshall, J., concurring). Justice Douglas stated that the death penalty statutes “are unconstitutional in their operation,” but that there might be some constitutionally valid capital punishment scheme. *Id.* at 256-57; *see id.* at 240-57 (Douglas, J., concurring), 306-10 (Stewart, J., concurring), 310-14 (White, J., concurring). Justices Douglas, Stewart, and White’s opinions each spelled out that the primary problem with the death penalty as practiced was that it was too infrequently applied to serve as an effective deterrent, thus implying that the way to remedy the situation was to impose the death penalty more frequently. *See id.* But cf. *Lockett* v. Ohio, 438 U.S. 586, 599 (1978). Chief Justice Burger's majority opinion characterized the opinions of Justices Douglas, Stewart, and White somewhat differently:

Three Justices were unwilling to hold the death penalty per se unconstitutional under the Eighth and Fourteenth Amendments, but voted to reverse the judgments on other grounds. In separate opinions, the three concluded that discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment because it was “pregnant with discrimination,” . . . (Douglas, J., concurring), because it permitted the death penalty to be “wantonly” and “freakishly” imposed, . . . (Stewart, J., concurring), and because it imposed the death penalty with “great infrequency” and afforded “no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not,” . . . (White, J., concurring).

*Id.* (citations omitted) (alterations in original). Justice Douglas, in fact, implied that a system that punished specified crimes by a mandatory death penalty might well be constitutional. *See Furman*, 408 U.S. at 257 ("Any law which is nondiscriminatory on its face may be applied in such a way as to violate the [Constitution]. . . . Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.").


40. *See*, e.g., *Gregg* v. Georgia, 428 U.S. 153 (1976); *Proffitt* v. Florida, 428 U.S. 242 (1976); *Jurek* v. Texas, 428 U.S. 262 (1976). These three cases tested the revised Georgia, Florida, and Texas death penalty statutes, respectively. *See cases cited supra.* In fact, in the four years between the *Furman* and *Gregg* decisions, thirty-five states and Congress drafted new capital punishment statutes designed to satisfy the *Furman* objections to the death penalty. *See Gregg*, 428 U.S. at 179-81 & nn.23-24. *But see* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 349 n.5, 379 n.178 (1999). Little asserts that although the Department of Justice viewed as unconstitutional federal death penalty statutes passed both before and after *Furman* and *Gregg*, these statutes were never tested in the courts prior to 1986. *See id.*
decisions handed down on the same day in 1976.\textsuperscript{41} In \textit{Gregg v. Georgia},\textsuperscript{42} the Court held that the new death penalty statutes, made rationally sound by guided discretion, would eradicate the “capricious or arbitrary” decisions that had characterized pre-\textit{Furman} jurisprudence.\textsuperscript{43} The Court’s decision in \textit{McCleskey v. Kemp},\textsuperscript{44} a 1987 case that arose in Georgia, further disheartened death penalty critics challenging the punishment as racist and classist. \textit{McCleskey} held that while sociological studies are generally valuable academic tools which support the theoretical conclusion that the death penalty might be applied disproportionally based on race, a defendant must point to a specific racist application in his individual trial before the Court could grant relief.\textsuperscript{45} Despite the methodological soundness of the study McCleskey proffered and the validity of its conclusion that the application of the Georgia death penalty statute was itself

\begin{footnotesize}
\begin{enumerate}
\item 428 U.S. 153.
\item \textit{Gregg}, 428 U.S. at 191-95. The Court actually announced five capital punishment decisions on July 2, 1976. \textit{See id.} at 153; \textit{Proffitt}, 428 U.S. at 242; \textit{Jurek}, 428 U.S. at 262; Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). The Court overruled the North Carolina and Louisiana mandatory sentencing schemes because they applied the death penalty to all defendants convicted of any of the crimes on the states’ lists of death-mandatory offenses. \textit{See Woodson}, 428 U.S. at 302; \textit{Roberts}, 428 U.S. at 355-56. The fact that in North Carolina the enumerated crimes mandated the death penalty troubled the Court, however, because the statute there excluded from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treated all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
\item \textit{Woodson}, 428 U.S. at 304. The Court would have preferred a scheme like Georgia’s, which bifurcated capital trials into separate guilt and penalty phases where “the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.” \textit{Gregg}, 428 U.S. at 192, 195. To safeguard against arbitrariness, “juries [would] be carefully and adequately guided in their deliberations [under the approved capital punishment statutes].” \textit{Id.} at 193.
\item 481 U.S. 279 (1987).
\item \textit{See id.} In \textit{McCleskey}, the petitioner (an African-American man who was convicted of killing a Caucasian man) submitted a rigorous statistical study by sociologist David Baldus demonstrating, inter alia, \textit{ceteris paribus}, that a defendant convicted of killing a Caucasian victim under Georgia law was 4.3 times more likely to be sentenced to death than a defendant convicted of killing an African-American victim. \textit{See id.} at 287. The Court, however, held that “to prevail under the Equal Protection Clause, McCleskey [would have had to] prove that the decisionmakers in \textit{his} case acted with discriminatory purpose. He offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.” \textit{Id.} at 292-93.
\end{enumerate}
\end{footnotesize}
“pregnant with racism,” the Court affirmed McCleskey’s death sentence.\textsuperscript{46}

\textit{C. Ineffectiveness of Counsel Litigation After Gregg v. Georgia}

The \textit{Gregg} decision has significantly impacted ineffective assistance of counsel claims in capital cases primarily because of the Court’s ratification of bifurcated capital trials, where a guilty verdict triggers what is essentially a second sentencing trial.\textsuperscript{47} The Georgia statute that the Supreme Court approved in \textit{Gregg} provided a blueprint for many of the forty states with death penalty statutes.\textsuperscript{48} Under the bifurcated system, the defense attorney’s primary duty at the sentencing trial is to present mitigating evidence sufficient to persuade the sentencer that the convicted defendant’s life should be spared.\textsuperscript{49} Both the Georgia and the federal statutes are silent as to what constitutes sufficient mitigating evidence.\textsuperscript{50} In 1978 the Supreme Court in \textit{Lockett v. Ohio}\textsuperscript{51} held that trial courts in capital cases must generally consider “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.”\textsuperscript{52}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Gregg}, 428 U.S. at 190-91 (endorsing bifurcated trials and citing the Model Penal Code’s endorsement of such a system); see also, e.g., Phyllis L. Crocker, \textit{Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases}, 66 \textit{Fordham L. Rev.} 21, 23 & n.5 (1997); Goodpaster, \textit{supra} note 15, at 317-39; Green, \textit{supra} note 15, at 459, 497 & nn.253-55; Theme for Life, \textit{supra} note 16.
\item See, e.g., Crocker, \textit{supra} note 47, at 23 & n.5.
\item See, e.g., Goodpaster, \textit{supra} note 15, at 317-39; Green, \textit{supra} note 15, at 460 & nn.53-55; Theme for Life, \textit{supra} note 16.
\item 438 U.S. 586 (1978).
\item Id. at 604.
\end{enumerate}
\end{footnotesize}
I. Strickland v. Washington

In 1984, in Strickland v. Washington, the Supreme Court announced the current standard for effective assistance of counsel. In that seminal case, David Leroy Washington committed three brutal murders during a ten-day crime spree in September 1976. When Washington learned that his accomplices in the third murder had been arrested, he turned himself in and confessed to the crime. Once the police took Washington’s confession, the state appointed William Tunkey, a leading criminal defense attorney in Dade County, to represent him. Acting against Tunkey’s advice, Washington confessed to the other two murders, waived his right to a jury trial, pled guilty to all charges, and waived his right to a sentencing jury.

During the plea hearing, Washington stated that he accepted full responsibility for the crimes and Judge Fuller complimented him on that admission. Encouraged by Judge Fuller’s apparent respect for Washington, Tunkey adopted Washington’s testimony from the plea hearing and argued at the sentencing hearing that “Washington’s

55. Washington v. Strickland, 693 F.2d 1243, 1246-47 (5th Cir. Unit B 1982) (en banc). On September 20, 1976, Washington, along with an accomplice, stabbed a minister to death. Id. at 1247. On September 23, Washington alone broke into a house where he shot and stabbed four elderly women. Id. One of those women died immediately, while another languished in a coma for more than a year before succumbing to her injuries. Id. Finally, on September 29, Washington and two accomplices kidnapped a twenty-year-old college student and held him for ransom. Id. After failing to extort money from the boy’s relatives, Washington stabbed him to death. Id.
56. Id.
57. Id. at 1247 n.2.
58. See id. at 1247.
59. Id.
evident remorse and his willingness to face the consequences of his actions should persuade the court to impose life imprisonment rather than death.”

Unmoved, Judge Fuller sentenced Washington to death on each of the three counts of first degree murder, finding that “the aggravating circumstances of the case would still ‘clearly far outweigh’ the factors in mitigation.”

Four years later, the Fifth Circuit Court of Appeals heard the appeal regarding the denial of Washington’s petition for habeas corpus relief. By that time, Washington’s new counsel had attached fourteen affidavits from friends and relatives who would have offered mitigating testimony at the sentencing hearing, had they been called. Habeas counsel also attached affidavits from two psychiatrists who attested to Washington’s chronic depression and frustration due to “his economic dilemma wherein he was unable to find employment and provide for his wife and children.” The petition attacked Tunkey for his failure to investigate or develop mitigating character evidence at the sentencing hearing.

In the initial hearing on the habeas corpus petition, Tunkey testified before the federal district court for the Southern District of Florida, that he had “experienced a feeling of ‘hopelessness’ regarding the case [after Washington confessed to the other two murders], and that he believed there was little chance of Washington avoiding the death penalty.”

Tunkey’s strategy was to persuade Judge Fuller to spare Washington’s life based on “Washington’s sincerity and frankness in pleading guilty.” Apparently, Tunkey was gambling on the fact that in previous cases Judge Fuller had “acknowledged his respect for people who unqualifiedly admitted their responsibility.” However, Tunkey made little effort to develop evidence of Washington’s

60. Id.
61. Id. (citation omitted).
62. Id. at 1250.
63. Id. at 1248.
64. Id.
65. Id. at 1247. This argument actually originated in Washington’s state court appeal. Id.
66. Id. at 1249.
67. Id. at 1249 & n.8 (citing the district court opinion).
68. Id. at 1249.
emotional distress and did not follow up on initial attempts to obtain mitigating character evidence after Washington's wife and mother failed to show up for a related appointment he had made with them. 69 Unmoved, the district court held that the Sixth Amendment does not require "errorless counsel," and that Tunkey's errors of omission were harmless. 70 A Fifth Circuit panel held that the district court failed to conduct the proper analysis of ineffectiveness of counsel. 71 Upon rehearing en banc, the full circuit held that if a habeas petitioner could show that "his counsel's ineffectiveness caused 'actual and substantial disadvantage' to the conduct of his defense," the court would grant relief. 72 Washington's case was remanded for a new sentencing hearing. 73

The state of Florida appealed, and on May 14, 1984, the Supreme Court overturned the Fifth Circuit's decision. 74 In so doing, the Court enunciated a two-pronged test for ineffective assistance of counsel, requiring the habeas corpus petitioner to "show that counsel's performance was deficient," 75 and that "the deficient performance prejudiced the defense." 76 Furthermore, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 77 Therefore, after Strickland the availability of a new trial or sentencing hearing turns on the petitioner's ability to demonstrate both deficient performance and actual prejudice. 78

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69. Id.
70. Id. The district court had allowed the trial judge to testify, over objection, at the hearing on the habeas corpus petition, and "held that Judge Fuller's testimony demonstrated that there was no likelihood that counsel's inaction affected the outcome of the sentence." Id. (citing United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc)).
71. See id.
72. Id. at 1250 (citation omitted).
73. Id.
75. Id. at 687.
76. Id.
77. Id. at 690.
78. Id. at 687.
overcome the "strong presumption" that counsel's performance was constitutionally adequate.  

2. Darden v. Wainwright and Burger v. Kemp

In two cases in the late 1980s, Darden v. Wainwright and Burger v. Kemp, the Supreme Court again entertained ineffective assistance of counsel claims based on a failure to present mitigating evidence in the penalty phase of a capital trial.

In 1973 Willie Jasper Darden was convicted and sentenced to death for killing a furniture storeowner during the course of a robbery. Among other issues in his federal habeas corpus petition, Darden claimed inadequate assistance of counsel during the sentencing phase of his trial. In support of that claim, Darden contended that his attorney spent only thirty minutes, the time between the guilty verdict and the start of the penalty phase, preparing for the last phase of his fight for Darden's life. While the majority dismissed Darden's

79. Id. at 690; see also Liebman & Hertz, supra note 13, § 11.2b, at 437 n.16. David Leroy Washington was not so lucky; he was electrocuted by the state of Florida on July 13, 1984. See Death Penalty Information Center, Executions in the U.S. 1976-1986, at http://www.deathpenaltyinfo.org/dpexec76-86.html (last visited Oct. 15, 2000).
82. See Darden, 477 U.S. at 184-85; Burger, 483 U.S. at 788.
83. Darden, 477 U.S. at 171-72. Armed with a gun, Darden entered the store and demanded money from the proprietor. See id. Darden shot and killed the proprietor's husband when he arrived on the scene and then proceeded to order the proprietor to "perform oral sex on him." Id. A neighbor's sixteen-year-old son, Phillip Arnolds, saw a body lying in the entrance to the store and approached the store to offer assistance. See id. Darden shot the boy and continued shooting at him as he ran away from the store. See id. at 173. Darden then fled the store and was apprehended the following day. See id. at 174.
84. See id. at 184.
85. See id.; see also Goodpaster, supra note 15, at 302 (suggesting that the result in the sentencing phase of a capital trial "may be attributed to the presence or absence of a meaningful penalty trial"); Green, supra note 15, at 496-97 & nn.253-55. Green maintains that a capital defender has three key opportunities to save a client's life. First, a capital defender must begin searching for mitigating evidence during the pretrial investigation if it is to be sufficient in the sentencing phase. See id. Second, voir dire allows the capital defender to seek out and select jurors less likely to impose a death sentence. See id. at 497. Third, during the guilt phase of the trial the defender should present evidence with an eye toward its potential impact on the jury's sentencing decision. See id. An attorney's failure to meet this threefold performance standard implies unconstitutionally ineffective assistance of counsel. See Goodpaster, supra note 15, at 321.
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claim as meritless, there is no evidence in the opinion that Darden’s attorney adequately prepared for the penalty phase of Darden’s trial.\(^{86}\)

Darden also claimed that his trial counsel made a mistake of law in concluding that Florida’s statutory mitigating factors were an exclusive list, when in fact the statute allowed a defendant to introduce any relevant mitigating evidence.\(^{87}\) The Darden majority found that claim to be unpersuasive as well, given that the trial judge had “specifically informed . . . counsel just prior to the sentencing phase”\(^{88}\) and “that [he] could ‘go into any other factors that might really be pertinent to full consideration of [the petitioner’s] case and the analysis of [his] family situation, your causes, or anything else that might be pertinent.”\(^{89}\) Thus, since counsel had notice, his failure to respond to that notice was not incompetence.\(^{90}\) The Court affirmed Darden’s death sentence.\(^{91}\)

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86. See Darden, 477 U.S. at 184-85. Justice Powell authored the majority (5-4) opinion. See id. at 169.
87. See id. at 185.
88. Id. But see Green, supra note 15, at 497 n.253 (“[M]any of these attorneys do not even begin to prepare for the penalty trial until after their client has been adjudicated guilty . . . and “[b]y then it’s too late.”’) (quoting Walsh S. White, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 54 (1987) and citing Blanco v. Singleterry, 943 F.2d 1477, 1501-02 (11th Cir. 1991) (“To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury’s verdict in the guilt phase almost assures that witnesses will not be available.”)).
89. Darden, 477 U.S. at 185. The Court in Darden gave little weight to the issue of research into mitigating evidence in particular, or effectiveness of counsel in general. See id. at 188-206. Justice Blackmun’s dissent mentions neither issue. See id. Blackmun only commented on judicial misconduct at voir dire and on prosecutorial misconduct at sentencing. See id. For a radically different opinion of the difference mitigating character evidence can make at sentencing, see Goodpaster, supra note 15, at 301-03. Goodpaster compared two capital cases, each involving multiple homicides. See id. In a more heinous triple homicide, based on factors beyond the number of people killed, counsel’s portrayal of the defendant Sierra as a human being, through the use of mitigating character witnesses at the penalty phase, resulted in the jury’s sparing Sierra’s life. See id. In a less heinous double homicide, a death sentence was handed down on the heels of counsel’s failure to use mitigating character witnesses and his description of defendant Jackson as a “monster.” See id.
90. See Darden, 477 U.S. at 185-87. Justice Powell proposed several types of mitigating evidence that the defense might have raised and then deduced rational reasons why the trial attorney might have declined to present them. See id. Here, one might see the genesis of Judge Edmondson’s “hypothetical attorney.” See discussion infra Part III.
A similar question arose the following year in *Burger v. Kemp*, where the defendant, Chris Burger, a soldier stationed at Fort Stewart, Georgia, committed murder with an accomplice, his friend and fellow soldier, Thomas Stevens.92 In that case, the majority noted its concern about trial counsel’s “fail[ure] to develop and present mitigating evidence at either of the two sentencing hearings.”93 For example, Chris Burger’s trial counsel, Alvin Leaphart, did not present Burger’s mother’s testimony regarding her son’s “exceptionally unhappy and unstable childhood.”94 Her compelling testimony would have revealed that Burger was born when his mother was fourteen and his father sixteen; that his parents were divorced when Burger was nine; that his mother remarried twice; and that neither stepfather wanted Burger in the home.95 Leaphart also met and interviewed a lawyer from Indiana, who had been a “big brother” to Burger, and also a psychologist hired to examine Burger in preparation for trial.96 The

92. *Burger*, 483 U.S. at 778. One issue disputed at the trial was apportionment of responsibility between Burger and Stevens. *Id.* at 779. Burger, with an IQ of eighty-two, was seventeen at the time of the crime, and Stevens was only twenty. *Id.* (the fact that Chris Burger was a minor at the time he committed the crime is beyond the scope of this Comment). Burger and Stevens hijacked a cab to the Savannah airport to pick up another friend and fellow soldier, James Botsford. *Id.* at 778. Burger and Stevens had been drinking all night and were armed with a knife and sharpening tool. *Id.* While Burger drove, Stevens raped and sodomized the cab driver. *Id.* The two men later locked the driver in the trunk and rolled the car into a pond, drowning their victim. *Id.* at 778-79. Burger’s defense, which the Court held was consistent with the evidence presented at trial, was that Stevens spearheaded the murderous plan. *Id.* at 779. Nonetheless, Burger and Stevens were both sentenced to death. *Id.* at 780; see also *MICHAEL MEARS, THE DEATH PENALTY IN GEORGIA: A MODERN HISTORY: 1970-2000*, at 159 (1999). The State of Georgia executed Thomas Stevens on June 29, 1993. *See Mears, supra; Death Penalty Information Center, Executions in the U.S. 1999*, at http://www.deathpenaltyinfo.org/dpicexec99.html (last visited Oct. 20, 2000).


94. *Id.* at 788-89.

95. *See id.* at 789-90. The first stepfather regularly beat Burger’s mother in his presence, beginning when Burger was eleven years old. *Id.* His second stepfather not only smoked marijuana in Burger’s presence, but taught him to smoke it as well. *See id.* at 790. When Burger’s mother moved from Indiana to Florida and his father kicked him out, he ran away to Florida, selling his shoes to buy food during the trip. *Id.* After an automobile accident, Burger’s mother returned him to Indiana, and placed him in a juvenile detention facility until his father took custody of him. *See id.*; see also *id.* at 814 (Blackmun, J., dissenting).

96. *See id.* at 790-92. The opinion does not disclose what testimony the Indiana attorney would have given, but does discuss the impressions of the psychologist, who described Chris Burger as displaying a “psychopathological behavior” and told Leaphart that if the defendant testified he would probably brag about his crime. *Id.* at 791-92. “Quite obviously . . . an experienced trial lawyer could properly have decided not to put either petitioner or the psychologist [on the stand to] be subjected to a cross-
Court, applying the *Strickland* test, found that Leaphart's investigation, while not painstaking or exhaustive, was sufficient to meet the minimum standard required under the Sixth Amendment.\(^97\) Leaphart's decision to neither investigate further nor use the unearthed information was strategically adequate, especially given the *Strickland* presumption of competence.\(^98\) Once again, the Court held that the trial attorney performed competently, notwithstanding evidence presented at the petitioner's habeas corpus hearing that the attorney had not even used the tools provided by Supreme Court precedent to argue for his client's life.\(^99\)

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examination that might be literally fatal." *Id.* at 792. Of course, some might argue that Leaphart was incompetent for not using a psychologist who was able to describe Burger's psychopathology in a way more helpful to his client. *See generally* Goodpaster, *supra* note 15, at 317-39 (affirming defense counsel's "advocacy obligation"); Green, *supra* note 15, at 497, nn.253-55 and accompanying text; *Theme for Life, supra* note 16. The majority admitted that the mother's testimony about Burger's childhood would have been mitigating, but asserted that her cross-examination would also have revealed Burger's juvenile criminal record. *See Burger, 483 U.S.* at 789-90 n.7. However, Burger's juvenile record was arguably minor. *Id.* at 790. It is somewhat counterintuitive to assume that a jury, having found a defendant guilty of murder, would later be turned against him simply by learning that he hadshoplifted as a child. *See infra* Part III.B. (discussing the *Chandler* majority's similar assessment of the value of mitigation evidence never presented by Ronnie Chandler's trial attorney); *cf.* Martin Interview, *supra* note 6 (making a similar point about the majority's reasoning in *Chandler v. United States*). *See generally* John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel,* 58 Mo. L. Rev. 1480, 1504-09 (1999) (criticizing current "mitigating evidence" framework). Further, the *Burger* majority cited the Court's own holding in *Eddings v. Oklahoma,* 455 U.S. 104, 114-16 (1982), where the court overturned the death sentence of another juvenile because the trial judge had refused to consider evidence of Eddings' troubled childhood presented during the sentencing phase. *See Burger, 483 U.S.* at 789 n.7. The Court distinguished Burger's facts by saying that Leaphart "acted reasonably in deciding not to introduce the [same kind of] evidence out of apprehension that it would contribute little." *Id.* at 789 n.7. The *Burger* Court seemingly held that it was reasonable not to present the same kind of evidence that the *Eddings* court held the sentencer must consider. *See id.* at 816-17 (Blackmun, J., dissenting), 821 (Powell, J., dissenting).

\(^97\) *Burger,* 483 U.S. at 794-95.

\(^98\) *See id.* at 794-95. The Court stated that "[w]e have decided that 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Id.* at 794 (quoting *Strickland,* 466 U.S. at 690-91). Further, the Court said that, under *Strickland,* "[p]etitioner has not established that 'in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.'" *Burger,* 483 U.S. at 795 (quoting *Strickland,* 466 U.S. at 690). Further, "when 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." *Id.* (quoting *Strickland,* 466 U.S. at 691).

II. WILLIAMS V. TAYLOR—DID THE SUPREME COURT RAISE THE FLOOR FOR EFFECTIVE ASSISTANCE OF COUNSEL IN THE SENTENCING PHASE OF A CAPITAL TRIAL?

A. The Facts of the Case and the History Below

In April 1986 Terry Wayne Williams sat in the Danville, Virginia, city jail awaiting trial on an unspecified charge. Williams sent an anonymous note to the chief of police stating that he had killed “that man Who [sic] Die [sic] on Henry St.” The police traced the note to Williams, who, on April 25, 1986, confessed to killing Harris Stones, a fifty-year-old Danville resident found dead at home in bed on November 3, 1985. The police initially believed Stones died of “heart trouble” but later changed the cause of death to self-induced alcohol intoxication, as a post-mortem examination revealed Stones had a blood alcohol content of 0.41 percent when he died.

Williams told the police, in one of several statements he made April 25, 1986, that he went to the Stones residence seeking money. Williams lived nearby and knew both Stones and his daughter Dee Dee, with whom Stones lived. In fact, Williams “had been a frequent fishing and drinking buddy of Stones.” Stones was home alone, lying on his bed drinking, when Williams arrived, and offered Williams something to drink. Williams declined the offer,

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101. Williams Granted, supra note 100, at B1; see also Death Row, supra note 20, at A1.
102. Williams, 529 U.S. at 367; see also Death Row, supra note 20, at A1; Frank Green, Va. Slaying Case Focuses on Scope of Federal Power, RICH. TIMES-DISPATCH, Oct. 5, 1999, at A1 [hereinafter Va. Slaying]; Frank Green, Victim’s Kin Oppose Execution Slain Man’s Daughters Prefer Life in Prison, RICH. TIMES-DISPATCH, Apr. 4, 1999, at C1 [hereinafter Victim’s Kin]; Williams Granted, supra note 100, at B1. Court documents, including the Supreme Court decision in Williams, refer to Stones as “Stone,” but his two daughters confirm that the family name is “Stones.” See id.
103. See Death Row, supra note 20, at A1; Va. Slaying, supra note 102, at A1; Victim’s Kin, supra note 102, at C1; Williams Granted, supra note 100, at B1; see also Williams, 529 U.S. at 367.
104. Williams, 529 U.S. at 367, 368 n.1.
105. See Williams, 529 U.S. at 368, n.1; see also Victim’s Kin, supra note 102, at C1.
107. Williams, 529 U.S. at 368 n.1.
and asked to borrow money instead; after Stones refused Williams grew angry and argued with him.\textsuperscript{108} Williams searched the house for a weapon, found a mattock, went back to Stones’ bedroom, and struck him in the chest and back.\textsuperscript{109} Williams returned the mattock to the bathroom, walked back to the bedroom, where he said Stones was “still grasping [sic] for breath”; he then took three dollars from Stones’ wallet and left.\textsuperscript{110}

Subsequent to Williams’ confession, on July 1, 1986, the State of Virginia exhumed Stones’ body, and further post-mortem examination revealed wounds corresponding to those Williams had described delivering.\textsuperscript{111} “[A] recent law school graduate [who was] appointed to the case a month before the trial” represented Williams on charges of robbery and capital murder.\textsuperscript{112} Williams was convicted in September 1986 and, at his sentencing trial, the state proved prior convictions for robbery, burglary, and grand larceny, going back ten years, as well as for two recent auto thefts.\textsuperscript{113}

However, far more damaging in the sentencing phase were the two violent assaults on elderly victims that Williams had allegedly perpetrated after the Stones murder.\textsuperscript{114} Williams was accused of attacking and robbing an elderly man in 1985.\textsuperscript{115} Then, on March 5, 1986, Williams allegedly “brutally assaulted an elderly woman,” a fact he mentioned in the letter to the police in which he had confessed to the Stones murder.\textsuperscript{116} In the latter assault, the victim sustained a severe brain injury, lingered in a “vegetative state’ and [was] not

\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{See Death Row, supra note 20, at A1; Victim’s Kin, supra note 102, at C1; Williams Granted, supra note 100, at B1; see also Va. Slaying, supra note 102, at A1.}
\textsuperscript{112} \textit{See Va. Slaying, supra note 102, at A1.}
\textsuperscript{113} \textit{Williams, 529 U.S. at 368.}
\textsuperscript{114} \textit{See id.; see also Va. Slaying, supra note 102, at A1; Williams Granted, supra note 100, at B1.}
\textsuperscript{115} \textit{Williams, 529 U.S. at 368; see Va. Slaying, supra note 102, at A1; Williams Granted, supra note 100, at B1.}
\textsuperscript{116} \textit{Williams, 529 U.S. at 368; see Va. Slaying, supra note 102, at A1; Williams Granted, supra note 100, at B1.}
expected to recover.”¹¹⁷ Further, Williams had been convicted of arson for setting fire to the jail while he awaited trial for the assaults.¹¹⁸ Finally, two expert witnesses called by the State of Virginia testified that “there was a ‘high probability’ that Williams would pose a serious continuing threat to society.”¹¹⁹

As evidence for Williams, his attorney entered “the testimony of [his] mother, two neighbors, and a taped excerpt from a statement by a psychiatrist.”¹²⁰ The defense lawyer called the second neighbor on the spur of the moment after seeing her in the gallery.¹²¹ The three lay witnesses all testified that Williams was “a nice boy’ and not a violent person.”¹²² The psychiatrist’s testimony “did little more than relate Williams’ statement . . . that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.”¹²³

When cross-examining the state’s witnesses, the defense lawyer sought to emphasize that Williams had turned himself in and that had he not done so, the crimes likely would have gone unsolved.¹²⁴ However, the closing argument undermined any positive impact of the cross-examination of the state’s witnesses.¹²⁵ In closing, the defense attorney called Williams’ confessions “dumb” and seemingly abandoned his client.¹²⁶

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¹¹⁷ Williams, 529 U.S. at 368; see also Va. Slaying, supra note 102, at A1; Williams Granted, supra note 100, at B1.
¹¹⁸ Williams, 529 U.S. at 368.
¹¹⁹ Id. at 368-69.
¹²⁰ Id. at 369.
¹²¹ See id.
¹²² Id.
¹²³ Id.
¹²⁴ See id.
¹²⁵ See id.
¹²⁶ See id. Williams’ lawyer said in closing that I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself: I doubt very seriously that he thought much about mercy when he was in Mr. Stone’s [sic] bedroom . . . I doubt very seriously that he had mercy very highly on his mind [when he attacked that elderly woman] . . . [However, I would] ask that you give this man mercy . . .

Id. at 369 n.2.
The jury found that Terry Williams posed a great threat of future dangerousness and should be sentenced to death.\textsuperscript{127} Trial Judge Ingram agreed that the sentence was both "proper" and "just" and imposed the death penalty.\textsuperscript{128} The Virginia Supreme Court affirmed the sentence.\textsuperscript{129}

Years later in a state habeas corpus hearing before the Danville Circuit Court, the same Judge Ingram who had imposed the death sentence found that Williams' attorney had provided ineffective assistance of counsel by failing to present four different pieces of evidence at the sentencing trial.\textsuperscript{130} The judge did a straightforward Strickland analysis and found that trial counsel's mistakes and unprofessional conduct met both the performance and prejudice prongs of the test.\textsuperscript{131} Judge Ingram remanded the case for resentencing.\textsuperscript{132} However, the Virginia Supreme Court overturned Judge Ingram's order for remand, rejecting Ingram's findings on the prejudice prong of the Strickland test.\textsuperscript{133} The court assumed, without deciding, that Williams' defense lawyers were ineffective, but then held that Ingram misapplied Strickland in the prejudice analysis.\textsuperscript{134} The court compared the "future dangerousness' aggravating circumstance" to the excluded mitigating evidence and concluded

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{127} \textit{Id.} at 370.
\item \textsuperscript{128} See \textit{id.; see also Death Row, supra note 20, at A1; Williams Granted, supra note 100, at B1.}
\item \textsuperscript{129} \textit{Williams}, 529 U.S. at 370.
\item \textsuperscript{130} See \textit{id.} First, Williams suffered severe abuse, neglect, and mistreatment in early childhood, and as a result, at the age of eleven, became a ward of the state. \textit{Id.} Second, Williams was "borderline mentally retarded." \textit{Id.} Third, Williams had suffered repeated head injuries, and might have also had organic mental impairments. \textit{Id.} Fourth, the same experts who testified for the state at trial stated that Williams, in a closely structured environment, probably posed no threat of danger to society. \textit{Id.; see also Va. Slaying, supra note 102, at A1 (noting Judge Ingram's finding that much of the omitted evidence was easily obtainable at trial); Williams Granted, supra note 100, at B1.}
\item \textsuperscript{131} See \textit{Williams}, 529 U.S. at 371.
\item \textsuperscript{132} See \textit{id.; see also Death Row, supra note 20, at A1; Va. Slaying, supra note 102, at A1; Williams Granted, supra note 100, at B1 (reporting Judge Ingram's resentencing recommendation and his finding that the omitted evidence had a reasonable probability of altering the sentence if it had been presented).
\item \textsuperscript{133} See \textit{Williams}, 529 U.S. at 371-72; \textit{Williams Granted, supra note 100, at B1; see also Death Row, supra note 20, at A1 (noting that the Virginia Supreme Court overruled Judge Ingram); Va. Slaying, supra note 102, at A1 (noting that the Virginia Supreme Court overruled Judge Ingram).}
\item \textsuperscript{134} \textit{Williams}, 529 U.S. at 371-72.
\end{enumerate}
\end{footnotesize}
“that there was no reasonable possibility that the omitted evidence would have affected the jury’s sentencing recommendation.”

After exhausting his state remedies, Williams sought federal habeas corpus relief under 28 U.S.C. § 2254. The federal district court arrived at the same conclusions as the trial judge, utilizing the Strickland performance analysis that the Virginia Supreme Court failed to employ. The judge identified five categories of mitigating evidence that Williams’ counsel had failed to discover and present. Williams’ trial counsel testified at the federal district court hearing that he did not seek Williams’ juvenile and social services records because he mistakenly thought state law prevented him from their discovery. In addition, the attorney admitted that “information about Williams’ childhood would have been important in mitigation,” and that his failure to follow up with a “potentially persuasive character witness” was poor judgment, not a “conscious strategic choice, but simply a failure to return that witness’ phone call.”

Lastly, the judge held that counsel’s failure to conduct an investigation into Williams’ background indicated unreasonable performance, even if it was part of a tactical decision. The judge concluded squarely under the Strickland prejudice prong, “that there was ‘a reasonable probability that, but for counsel’s unprofessional

135. Id.; Williams Granted, supra note 100, at B1.
137. See Williams, 529 U.S. at 372; see also Va. Slaying, supra note 102, at A1; Williams Granted, supra note 100, at B1 (noting that the federal district judge was James C. Cacheris of Alexandria).
138. Williams, 529 U.S. at 372-73 n.4 (citing (1) evidence of Williams’ background; (2) evidence that he was abused by his father; (3) available testimony from correctional officers indicating that Williams did not pose a threat while incarcerated, and that he received prison commendations for helping to crack a prison drug ring and for returning a guard’s missing wallet; (4) several character witnesses who had not been called to testify, including an accountant in the community; and (5) evidence that Williams was “borderline mentally retarded”); see also Williams Granted, supra note 100, at B1 (referring directly to Federal District Judge James C. Cacheris and presenting the same list in less detail).
139. See Williams, 529 U.S. at 373; see also Va. Slaying, supra note 102, at A1 (noting that evidence of Williams’ “deprived and abusive childhood, his low IQ [and] that he may suffer from fetal alcohol syndrome [were] readily available to his trial counsel”).
140. Williams, 529 U.S. at 373.
141. See id.
errors, the result of the proceeding would have been different."

The United States Court of Appeals for the Fourth Circuit subsequently reversed, taking the Virginia Supreme Court's position in assuming arguendo that trial counsel's performance was ineffective; however, the panel found that Williams had failed to satisfy the prejudice prong of the Strickland test. An application for certiorari to the United States Supreme Court followed.

B. The Holding of the Court

Justice Stevens, writing for the majority, addressed the issues of ineffective assistance of counsel. The opinion cites a number of

142. Id. (quoting Strickland, 466 U.S. at 694).
143. See Williams, 529 U.S. at 374 n.6.
144. See Williams, 529 U.S. at 367 (noting that Justice Stevens delivered the opinion of the Court only with respect to Parts I, III, and IV, and that Justice O'Connor delivered the opinion of the Court with respect to Part II and Part V). Part I recited the facts and prior history of the case. See id. at 367-74. Part III recited the Strickland test and held that the Virginia Supreme Court, in denying relief to Williams' state habeas corpus petition, sought "to apply a rule of law that was clearly established at the time his state-court conviction became final" and that "the merits of [Williams'] claim are squarely governed by our holding in Strickland v. Washington." Id. at 390. The point was significant because 28 U.S.C. § 2254, codifying the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, limits the exercise of the writ of habeas corpus in capital cases; a capital defendant seeking reversal of her death sentence must show that the state-court decision was either "contrary to" or an "unreasonable application of clearly [ ] established Federal law." Id. at 374; see also 28 U.S.C. § 2254 (Supp. III 1994) and advisory notes. Part IV held that in Lockhart v. Fretwell, 506 U.S. 364 (1993), the Court did not intend to narrow Strickland when it stated that "it was wrong . . . to rely 'on mere outcome determination' when assessing prejudice." Williams, 529 U.S. at 371 (quoting Lockhart, 506 U.S. at 359) (citation omitted). Justice Stevens opined that the Virginia Supreme Court erred in holding that Lockhart modified the Strickland analysis of ineffective assistance of counsel by adding a "fundamental fairness" analysis. Williams, 529 U.S. at 391-95. Part IV further limited Lockhart to its own peculiar facts. See id. (noting that the petitioner's ineffectiveness of counsel claim in Lockhart was based on the trial attorney's failure to object to a statutory aggravator that had previously been overturned in Lowenfield v. Phelps, 484 U.S. 231 (1988)). See Williams, 529 U.S. at 391-92 & n.16. Justice Stevens distinguished Lockhart by noting that overturning the death sentence in that case would have been a windfall, given that the trial attorney's incompetence comprised his failure to utilize a precedent that was itself invalid. Id. at 392. Williams' claim, on the other hand, concerned his attorney's failure to take actions that effectively deprived Williams "of a substantive or procedural right to which the law entitle[d] him." Id. Further, Stevens held that "it is undisputed that Williams had a . . . constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Id. at 393. Finally, Part IV of the opinion applied the full Strickland analysis and found that Williams had satisfied both the performance and prejudice prongs of that test. Id. at 391-98. The majority did not join Part II of Justice Stevens' opinion. Id. Justice Stevens would have widened the category of cases that could qualify for federal habeas corpus review under the statute. See id. at 399-400, 402-11. (O'Connor, J., writing for the Court). The Court agreed with the Fourth Circuit's interpretation of section 2254(d)(1) as prohibiting the use of the federal writ to obtain relief for a
unprofessional actions and omissions.\footnote{145} First, Williams’ counsel did not begin preparing for the sentencing trial until a week before it started.\footnote{146} Second, trial counsel did not conduct an investigation that “would have uncovered extensive records graphically describing Williams’ nightmarish childhood.”\footnote{147} Third, the failure resulted from counsel’s mistaken impression that the records were not legally discoverable.\footnote{148} Fourth, if the investigation had been done,

the jury would have learned that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody.\footnote{149}

Additionally, trial counsel failed to introduce evidence that Williams was mentally retarded and had not been educated beyond the sixth grade, as well as the fact that he had been a model inmate

defendant convicted under state law “unless the state court ‘decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.’”\footnote{145} Williams, 529 U.S. at 374 (quoting Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)). O’Connor’s argument seems to be that a state court could interpret controlling Supreme Court precedent incorrectly, yet not unreasonably or contrarily, while Justice Stevens seems to suggest that an incorrect interpretation must logically be both unreasonable and contrary. Compare \textit{id.} at 383-88 (Stevens, J., writing for himself and Justices Souter, Ginsburg, and Breyer in Part II), with \textit{id.} at 402-11 (O’Connor, J., writing for the Court in Part II). Part V, which was not part of the opinion of the Court, merely summarized Justice Stevens’ findings. See \textit{id.} at 398-99 (Stevens, J., writing for himself and Justices Souter, Ginsburg, and Breyer). Because \textit{Chandler v. United States} was a federal case to which section 2254 did not apply, and because the \textit{Chandler} court did not argue the relevance of \textit{Lockhart}, those issues are tangential to the central issues of ineffective assistance of counsel and are thus beyond the scope of this Comment.

\footnote{145} \textit{id.} at 369.
\footnote{146} \textit{See id.} at 395.
\footnote{147} \textit{id.}
\footnote{148} \textit{id.}
\footnote{149} \textit{id.}; see also \textit{id.} at 395 n.19 (describing a social services report of a visit to the family home that revealed feces and urine on the floors, trash all over the house, the children in unwashed clothes, and four of the children “definitely under the influence of whiskey”).
While incarcerated. Finally, trial counsel did not pursue proffered testimony from a CPA who met Williams as part of a prison ministry program and felt that Williams "seemed to thrive" in the regimented prison environment and "was proud" of his earned degree in carpentry.

However, the Fourth Circuit argued that not all of the omitted evidence would have been favorable to Williams. Williams had a substantial juvenile criminal record, including a conviction for accomplice liability to larceny at the age of eleven, pulling a fire alarm at the age of twelve, and breaking and entering at the age of fifteen.

Stevens held, however, that the federal district court's *Strickland* performance prong analysis was correct, because

the failure to introduce the comparatively voluminous amount of evidence . . . in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.

Regarding the prejudice prong analysis, Stevens noted first that, after hearing the additional evidence introduced at the habeas hearing, "the very judge who presided at Williams' trial, and who once determined that the death penalty was 'just' and 'appropriate,' concluded that . . . 'the result of the sentencing phase would have

150. *Id.* at 396.
151. *Id.* (citing the habeas hearing transcript).
152. *See id.* at 396. This rationale, similar to the majority's reasoning in *Chandler*, is based on the "double-edged sword" doctrine. *See* Blume & Johnson, *supra* note 96, at 1481-85. Developed in the Fourth Circuit, the doctrine routinely justifies the exclusion of mitigating character evidence, usually of a psychological nature. *See id.* The doctrine justifiably excludes evidence capable of two different interpretations, one of which is inimical to the habeas corpus petitioner's interests, because such evidence would "never" satisfy the prejudice prong of the *Strickland* test. *Id.*
154. *Id.* at 396.
been different’ if the jury had heard the evidence.”155 Stevens outlined that Williams had satisfied the prejudice prong of the Strickland test when considering the totality of the circumstances, even taking into account the arguably aggravating nature of some of the mitigation.156 The result would have been different but for trial counsel’s ineffective assistance.157 The Court remanded the case for a new sentencing hearing.158

III. CHANDLER v. UNITED STATES-THE FACTS OF THE CASE AND THE MAJORITY OPINION

A. The Facts of the Case

David Ronald Chandler, a marijuana rancher and salesman from northern Alabama, was convicted of murder in 1991.159 The jury found Chandler had offered $500 to Charles Ray Jarrell, Sr., “one of [his] marijuana couriers,” in January 1990, to induce Jarrell to kill Marlin Shuler.160 Jarrell initially thought Chandler’s overtures were simply a joke.161 Approximately four months later, on May 8, 1990, Chandler reminded Jarrell, “I still got that $500,” and that “Shuler was going to cause them trouble.”162 On the day of the murder, Jarrell and Shuler spent most of the day together, drinking beer and taking target practice with automatic pistols.163 Jarrell shot Shuler twice, killing him.164 Jarrell called Chandler, who helped dispose of Shuler’s body.165 When the police discovered the crime, the police

155. Id. at 396-97.
156. See id. at 398-99.
157. See id.; see also Death Row, supra note 20, at A1.
158. See Williams, 529 U.S. at 399. On remand, Williams’ habeas counsel negotiated an agreement whereby Williams was sentenced to life imprisonment without the possibility of parole. See Death Row, supra note 20, at A1.
159. Chandler v. United States, 218 F.3d 1305, 1311 (11th Cir. 2000).
160. Id. at 1310.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
charged Jarrell with murder.\textsuperscript{166} Jarrell subsequently agreed to testify against Chandler in return for immunity from the murder charge.\textsuperscript{167} The police charged Chandler with Shuler's murder under the federal continuing criminal enterprise law, the so-called Drug Kingpin Act.\textsuperscript{168} Chandler contended that Jarrell acted independently and presented evidence that Jarrell had personal motives for killing Shuler,\textsuperscript{169} and had twice previously attempted to kill him.\textsuperscript{170} Chandler also put on evidence that Jarrell consumed twenty-three beers on the day of the murder.\textsuperscript{171} Nonetheless, a jury convicted Chandler of murder and sentenced him to death.\textsuperscript{172}

Chandler's attorney, Drew Redden, an experienced Birmingham criminal trial lawyer, performed adequately during the guilt phase of the trial, drawing attention both to Jarrell's independent motives to murder Shuler and to his voluntary intoxication at the time of the murder.\textsuperscript{173} However, Redden's performance arguably collapsed during the penalty phase of the trial: he failed to conduct any penalty phase investigation prior to the announcement of the jury's verdict in the guilt phase.\textsuperscript{174} The jury read its verdict at approximately 2:30 P.M. on April 19, 1991 and, after a conference with Judge Hancock, the penalty phase was scheduled for 9:00 A.M. the following

\textsuperscript{166} Id.
\textsuperscript{167} See id. at 1310-11.
\textsuperscript{169} Chandler, 218 F.3d at 1310. Shuler had once been married to Jarrell's sister; Shuler was physically abusive to her and to Jarrell's mother. See id.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 1310, 1312. Jarrell's voluntary intoxication on the day of the killing raises its own analytical issues. See infra Part III.B.2.a & n.227.
\textsuperscript{172} Chandler, 218 F.3d at 1311; see also 21 U.S.C. § 848(e)(1)(a) (2000) (providing that the punishment for the crime of murder for hire in pursuance of a continuing criminal enterprise may be anywhere from a minimum of twenty years to a maximum penalty of death).
\textsuperscript{173} See Chandler, 218 F.3d at 1310-12. Jarrell actually told four different versions of his involvement in Shuler's killing, stating at various times that (1) he did not kill Shuler; (2) he killed Shuler alone and intentionally; (3) he killed Shuler but it was an accident; (4) he killed Shuler at Chandler's behest. See id.
\textsuperscript{174} See Martin Interview, supra note 6; see also Chandler, 218 F.3d at 1344-45 & n.4 (Barkett, J., dissenting). After hearing the verdict, Redden turned to Chandler's wife and said that she needed "to 'find' some character witnesses to 'stand up for Ronnie' the next morning." Id. at 1345.
morning. Redden presented only two witnesses at the penalty phase—Chandler’s wife and mother. The only other evidence Redden presented consisted of two stipulations: that Chandler had no prior criminal record and that Jarrell would not face prosecution for Shuler’s murder, even though no one contested that Jarrell shot and killed the victim.

Redden testified in the federal district court hearing on Chandler’s habeas corpus petition that he had not called more witnesses or made a greater effort in the penalty phase of the trial because he figured that “‘there was a fair chance’ [he’d] be found not guilty and it was even ‘less likely’ that he would get the death penalty.” In contrast to Redden, Atlanta lawyer John R. Martin, Chandler’s habeas counsel before the Northern District of Alabama, brought forty witnesses to testify to Chandler’s good character and community activism. However, Judge Hancock only heard from twenty-seven of the mitigating character witnesses Martin produced at the evidentiary hearing.

Indeed, Judge Hancock’s decision assumed, without deciding, that Redden’s conduct during the penalty phase failed to satisfy the performance prong of the Strickland test. But Judge Hancock then

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175. Chandler, 218 F.3d at 1344-45 & n.4.
176. Id. at 1311.
177. See id.
178. Id. at 1311 n.5 (“[T]rial counsel testified . . . that, based on his ‘reasonable professional judgment,’ he had not believed that a reasonable jury would impose the death penalty given the weak case against his client.”); see also Martin Interview, supra note 6 (stating that Drew Redden told Martin he “just didn’t get around to [seeking out mitigation evidence]”)
179. See Martin Interview, supra note 6 (identifying spontaneous outpouring of support for Chandler in local community).
180. See Chandler v. United States, 950 F. Supp. 1545, 1570 (N.D. Ala. 1996); see also Martin Interview, supra note 6. John Martin said that Judge Hancock had heard enough after hearing the cumulative testimony from twenty-seven witnesses. See id. “I thought we’d won,” Martin added, recounting how the judge passed by the witnesses, all of whom had driven two hours from Piedmont to Birmingham, standing in line at the cashier’s office to collect the witness fee and reimbursement for travel expenses. See id. Judge Hancock mused to his cashier that the prospective witnesses would have come to court without any reimbursement. Id. Martin said he thought the judge meant “that these witnesses were good people who were good citizens.” Id. John Martin was not even dismayed that Hancock did not hear from all forty witnesses because Judge Hancock had already prepared him for that eventuality. Id.
held that Redden’s failure to seek out and put on mitigating character evidence at the sentencing phase of Chandler’s trial could not meet the prejudice prong of Strickland.\textsuperscript{182} Despite Redden’s mistakes, the case would have come out the same.\textsuperscript{183} Judge Hancock affirmed Chandler’s death sentence.\textsuperscript{184} Martin appealed to the Eleventh Circuit where a three-judge panel reversed the sentence and remanded the

\textsuperscript{182} See id. at 1570-71; see also Martin Interview, supra note 6 (stating that these cases are often decided under Strickland’s prejudice prong). Judge Hancock listed three factors that undercut the mitigation value of the testimony, rendering it non-prejudicial under Strickland. See id. at 1570-71. First, Judge Hancock questioned how well the witnesses knew Ronnie Chandler, given that about half of the witnesses knew Chandler from church, but also testified that he had not attended church regularly “in the several years prior to 1990.” Id. at 1570 & n.22. Additionally, many witnesses testified that they grew up with Chandler, but had not been in close contact with him in recent years. Id. at 1570. Second, Judge Hancock questioned how much many of the witnesses really knew about Chandler’s character, given that many of them claimed ignorance as to Chandler’s involvement in the cultivation and distribution of marijuana. See id. Third, almost all of the witnesses testified that they would not think less of Chandler if they had known of his involvement in the marijuana business, thus demonstrating extreme bias and further reducing their reliability as character witnesses. See id. at 1571. One might argue that Judge Hancock’s analysis of the character evidence misconstrues the Supreme Court’s intended purpose in allowing such evidence in the sentencing trial of a capital case, which is for the sentencer to consider “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Mitigating character evidence of specific good acts in the sentencing trial allows a defendant to show that regardless of the vile behavior for which she has been convicted, her life has touched others in humanizing ways and that she has performed acts in the past that make her less deserving of a death sentence in the present. See Chandler v. United States, 218 F.3d 1305, 1353 (11th Cir. 2000) (Burkett, J., dissenting). Further, the Continuing Criminal Enterprise statute under which Chandler was convicted outlines that “information may be presented as to [mitigating factors listed in the statute, as well as to] any other mitigating factor.” 21 U.S.C. § 848(j) (2000). Judge Hancock himself told Redden in camera after the delivery of the guilty verdict that, regarding mitigating evidence “the ‘world is open’ to the defendant; he [had] the right to introduce any evidence that might mitigate the sentence.” Chandler, 218 F.3d at 1334 (Tjoflat, J., concurring in part and dissenting in part). After all, Ronnie Chandler was only trying to win a new sentencing hearing in order to convert his death sentence to a sentence of life in prison without the possibility of parole. See Martin Interview, supra note 6. If the mitigating character evidence might have made a difference to a jury’s sentencing decision, the habeas counsel had produced the very evidence of prejudicial effect contemplated under the performance prong of Strickland. See infra Part III.B.2.

\textsuperscript{183} See Chandler, 950 F. Supp. at 1571.

\textsuperscript{184} Id. at 1582 (denying Chandler habeas corpus relief).
case for a new sentencing phase on a two-to-one vote.\textsuperscript{185} Ultimately, the full circuit heard the case en banc.\textsuperscript{186}

The circuit judges were writing their opinions when the Supreme Court handed down its opinion in \textit{Williams v. Taylor}.\textsuperscript{187} Even though the Court, on a claim similar to Chandler's, remanded \textit{Williams} for a new sentencing phase, the Eleventh Circuit denied Chandler resentencing, and in fact committed itself to a holding that seemingly contradicts the \textit{Williams} decision.\textsuperscript{188}

\textbf{B. The Majority Opinion}

\textit{1. Some Principles Governing Performance}

The opinion begins with a prefatory note that “the cases in which habeas petitioners can properly prevail . . . are few and far between.”\textsuperscript{189} Judge Edmondson next laid out twelve “principles and presumptions” that he found necessary in evaluating ineffective assistance of counsel claims.\textsuperscript{190} Many of those twelve principles and presumptions\textsuperscript{191} derive from earlier decisions, including \textit{Strickland, Darden,} and \textit{Burger}.\textsuperscript{192} However, the majority also heavily relied on its own circuit jurisprudence involving \textit{Strickland} claims.\textsuperscript{193}

\textsuperscript{185} Chandler v. United States, 193 F.3d 1297, 1310 (11th Cir. 2000) (Birch, J., writing for the panel). Judge Birch’s fact-relevant but dispassionate panel opinion found Redden’s failure to prepare for the penalty phase of Chandler’s trial was not a strategic choice and was prejudicial to Chandler’s case. \textit{See id.} at 1307-10. Birch’s far shorter dissenting opinion, after the en banc hearing, nonetheless thunders moral indignation. \textit{See Chandler,} 218 F.3d at 1343 (“Before we, as a civilized society, condemn a man to death, we should expect and require more of an advocate.”).

\textsuperscript{186} \textit{Chandler,} 218 F.3d at 1309 (Edmondson, J., writing for the majority).

\textsuperscript{187} 529 U.S. 362 (2000). The \textit{Williams} decision was announced on April 18, 2000, and the \textit{Chandler} decision was announced on July 21. \textit{Id.} at 362; \textit{Chandler,} 218 F.3d at 1305.

\textsuperscript{188} \textit{Compare Chandler,} 218 F.3d at 1309 (holding that failure to seek out and present mitigating evidence at the sentencing phase of a capital trial \textit{is} ineffective assistance of counsel), with \textit{Williams,} 529 U.S. at 307 (holding that failure to seek out and present mitigating evidence at the sentencing phase of a capital trial \textit{is not} ineffective assistance of counsel).

\textsuperscript{189} \textit{Chandler,} 218 F.3d at 1313 (quoting Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc)).

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.} at 1313-19.

\textsuperscript{192} \textit{Id.} at 1313 n.10.

\textsuperscript{193} \textit{Id.} at 1314-19.
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The first considered principle in a Strickland claim is that the performance prong relies on "reasonableness under prevailing professional norms." Judge Edmondson added that "[w]e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately." The second principle is that the petitioner bears the burden of persuasion to show by a preponderance of the evidence that the attorney's performance was "unreasonable." Third, the petitioner must accept that the courts will evaluate counsel's performance with extreme deference. Fourth, "[c]ourts must 'indulge [the] strong presumption' that counsel's performance was reasonable and that counsel 'made all significant decisions in the exercise of reasonable professional judgment." In fact, counsel cannot be found incompetent for any given performance if it "might be considered sound trial strategy." Fifth, the reasonableness of counsel's performance must meet an objective standard. The standard that the petitioner must meet requires a showing that "no competent counsel would have taken the action that his counsel did take."

Further, relying on Strickland, Judge Edmondson held that

"[t]here are countless ways to provide effective assistance in any given case." No lawyer can be expected to have considered all of the ways. If a defense lawyer pursued course A, it is immaterial that some other reasonable courses of defense (that the lawyer

194. Id. at 1313 (quoting Strickland, 466 U.S. 688; accord Williams, 529 U.S. at 120).
195. Id. (quoting White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992)).
196. Id. (citing Strickland, 466 U.S. at 688).
197. See id. at 1314. "Judicial scrutiny of counsel's performance must be highly deferential." Id. (quoting Strickland, 466 U.S. at 689).
198. Id. (citing Strickland, 466 U.S. at 688); accord Williams v. Head, 185 F.3d 1223, 1227-28 (11th Cir. 1999).
199. Chandler, 218 F.3d at 1314 (quoting Darden v. Wainwright, 477 U.S. 168 (1986)).
200. See id. at 1315 (citing Darden, 477 U.S. at 168).
201. Id. at 1315-16 (citing Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) ("The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.")).
did not think of at all) existed and that the lawyer's pursuit of course A was not a deliberate choice between course A, course B, and so on. The lawyer's strategy was course A. And, our inquiry is limited to whether this strategy, that is, course A, might have been a reasonable one.202

In fact, Judge Edmondson asserted that even on remand for a new trial based on counsel's failure to use a particular defense or to call a particular witness, it is quite possible that, at a new trial, new and presumably competent counsel would elect not to raise the same defense or call the same witness.203 For Judge Edmondson the idea was paradoxical: "If two trials are identical, one should not be constitutionally inadequate and the other constitutionally adequate."204

Sixth, with experienced trial counsel, the court must indulge an even stronger presumption of competence.205 Seventh, the appellate court must avoid using "the distorting effects of hindsight" and evaluate trial counsel's performance based only on her perspective at the time of the trial.206 Eighth, there are "[n]o absolute rules" for what constitutes reasonable conduct by trial counsel.207 Ninth, because of the lack of absolute rules, no "absolute duty" attaches to make any

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202. Id. at 1315 n.16 (referencing Harich v. Dugger, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (en banc) (holding without an evidentiary hearing that, even if trial counsel's strategy arose from his ignorance of law, counsel's performance was competent because some "hypothetical competent counsel" reasonably could have taken the same action as that taken by actual trial counsel)). Arguably, Williams v. Taylor overturned that holding, as Williams turned in part on trial counsel's ignorance of the law in failing to discover the defendant's juvenile records. See supra Part II.B. Indeed, the Fourth Circuit had held that under the double-edged sword doctrine, a competent attorney could have strategically decided not to use the juvenile records of Williams' misfortune because those records could support an argument that Williams should be put to death given his "future dangerousness." Supra Part II.A.

203. See Chandler, 218 F.3d at 1315-16 n.17.

204. Id. For a different view, see infra Part IV.A.4 for Judge Tjoflat's analysis of the same point.


206. Chandler, 218 F.3d at 1316 (quoting Strickland, 466 U.S. at 689).

207. Id. at 1317 (citing Strickland, 466 U.S. at 688 ("Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.").
particular investigation of facts or to assert any particular defense. In addition, trial counsel has no obligation to investigate at all before determining whether to investigate further. Tenth, how the petitioner behaved and what she said to trial counsel is critical in determining the reasonableness of deciding whether to investigate any particular line of defense. Eleventh, the trial attorney has no obligation even to put on every "nonfrivolous defense," or all mitigation evidence, even if the omitted evidence would have helped the defense. Twelfth, "[n]o absolute duty" obligates counsel to present any mitigating or character evidence.

2. Performance in This Case

Because Drew Redden, in the penalty phase, "called [Chandler's] wife and mother to testify, advanced two statutory mitigating factors, and stressed lingering doubt about [his] true guilt," Judge Edmondson found that the "court's proper inquiry is limited to whether this course of action might have been a reasonable one." Edmondson concluded in the next sentence that "[beginning] with the strong presumption that [Redden's performance] was [reasonable]—given the record in this case and taking in the principles for ineffective assistance claims—[Chandler] has failed, as a matter of law, to overcome the presumption."

208. Id. ("We do not read Williams to declare a per se rule of law that a defense lawyer must present character witnesses at the sentencing phase or that a defense lawyer . . . must in every case investigate purely to see if character witnesses might exist . . . ").
209. See id. at 1318 (citing Strickland, 466 U.S. at 688).
210. See id. at 1318-19 (citing Strickland, 466 U.S. at 688 ("[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.")) (alteration in original).
211. Id. at 1319 (citing Waters, 46 F.3d at 1511 (en banc)).
212. Id. Arguably then, the Strickland test requires "little more than the presence of a person with a law license alongside the accused during trial" for counsel's performance to comport with the requirements of the Sixth Amendment. Geimer, supra note 9, at 93.
213. Chandler, 218 F.3d at 1319.
214. Id. at 1319-20.
Judge Edmondson credited Redden with using a "lingering doubt" defense but conceded that Redden never used that phrase in the sentencing trial and that indeed it was the prosecution who first argued that Redden’s mitigation strategy was based on "lingering doubt."\textsuperscript{215} The argument on lingering doubt draws extensively upon the Eleventh Circuit’s opinion in \textit{Tarver v. Hopper}.\textsuperscript{216} Tarver was one of two men convicted of a murder-robbery.\textsuperscript{217} A question of fact existed as to who killed the victim, Hugh Kite, and during the sentencing trial, Tarver’s lawyer called a polygraph examiner as an expert witness to testify that Tarver spoke truthfully when he denied killing Kite.\textsuperscript{218} \textit{Tarver} differs from \textit{Chandler} in that Tarver’s attorney planned the lingering doubt defense during the guilt trial and arranged to have a relevant witness appear at the sentencing trial.\textsuperscript{219} While it is not clear whether Drew Redden planned to assert a lingering doubt defense, the record reflects that he neither called witnesses nor presented any other evidence to assert that defense.\textsuperscript{220} Judge Edmondson did not comment on that difference.\textsuperscript{221} Further, Judge Edmondson cited material from Redden’s “sentencing argument”

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{215} Id. at 1320 & nn.26-28. \textit{But cf.} Martin Interview, supra note 6 (asserting that the government never made a lingering doubt argument until after Judge Edmondson “came up with [it] out of his imagination” in his dissenting panel opinion). After the prosecution encountered that argument in Edmondson’s dissent, they “seized upon it and used it in the en banc.” Id.
\item \textsuperscript{216} 169 F.3d 710 (11th Cir. 1999).
\item \textsuperscript{217} Id. at 716.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id. at 715.
\item \textsuperscript{220} Compare Tarver, 169 F.3d at 715-16, with Chandler, 218 F.3d at 1320 & nn.26-28.
\item \textsuperscript{221} \textit{Chandler}, 218 F.3d at 1322-24. Tarver complained that his lawyer only spent approximately four hours in preparing for the sentencing trial. \textit{See Tarver}, 169 F.3d at 715. In response, the court held that the time Tarver’s lawyer spent interviewing witnesses during the guilt phase of the trial “continues to count at the sentencing phase.” \textit{Id.} Judge Edmondson noted that Drew Redden had interviewed sixty-seven witnesses for the guilt phase; however, Redden never contacted any of the witnesses who testified at the habeas corpus evidentiary hearing. \textit{See Chandler}, 218 F.3d at 1310; Martin Interview, supra note 6. Further, the court held that creating residual or lingering doubt of a defendant’s guilt is an “effective strategy for avoiding the death penalty.” \textit{Tarver}, 169 F.3d at 715-16 (referencing an empirical study on capital jurors’ reaction to mitigation evidence in Stephen P. Garvey, \textit{Aggravation and Mitigation in Capital Cases: What Do Jurors Think?}, 98 COLUM. L. REV. 1538, 1563 (1998) (“[T]he best thing a capital defendant can do to improve his chances of receiving a life sentence...is to raise doubt about his guilt.”)); \textit{see also} Chandler, 218 F.3d at 1320 n.28 (making the same point and also citing \textit{Tarver}).
\end{enumerate}
\end{footnotesize}
such as the fact that, on the day of the murder, Jarrell had killed Shuler "after [consuming] twenty-three beers." Judge Edmondson concluded that "[i]n the context of the trial and sentencing proceeding, defense counsel’s argument, stressing the lack of strong evidence of guilt, cannot be said to be unconnected to ‘lingering doubt.’ We recognize the argument as a lingering-doubt argument and would not approve a district court’s finding otherwise."  

b. Drew Redden’s Strategic Decision Not to Look for Mitigating Character Evidence

Judge Edmondson found that Drew Redden’s failure to investigate and obtain mitigating character witnesses was defensible as a strategic decision based on two distinct grounds: the judge’s belief that character evidence of Chandler’s specific good acts in the community would not be “compelling,” and Drew Redden’s reasonable fears regarding the cross-examination of proffered character witnesses and the prosecution’s introduction of rebuttal witnesses. Judge Edmondson reasoned that evidence of Chandler’s specific good acts would not have weighed heavily in the jury’s decision, considering that “the Government was not arguing that [Chandler] was in all ways a bad man, but arguing that he had committed specific criminal acts, including offering to pay for a murder.”

In determining how much weight to assign Redden’s fears of cross-examination and rebuttal witnesses, Judge Edmondson distinguished Williams v. Taylor. According to Judge Edmondson, the Williams court rightfully found the defense lawyer incompetent because he did not unearth “voluminous mitigation evidence,” even if it brought to

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Chandler, 218 F.3d at 1320 n.26.
Id.
See Chandler, 218 F.3d at 1321-24 & nn.31-36.
Id. at 1322.
See id. at 1323-24 n.36.
light some unfavorable evidence, because the only other mitigation evidence presented was woefully inadequate.  

Judge Edmondson also held that it would be important to know, as a matter of fact, what transpired between Chandler and Redden at trial.  

He based his decision on dicta from *Strickland* indicating that the communications between attorney and client can be an important factor in dissuading the attorney from following any particular line of investigation.  

However, Ronnie Chandler never testified at the habeas corpus hearing.  

Drew Redden invoked the attorney-client privilege when asked about his communications with Chandler, and John Martin entered objections, sustained by Judge Hancock, when the Government asked Redden about the substance of communications between the parties.  

Therefore, given the absence of evidence in the record, we must assume counsel carried out his professional responsibility and discussed mitigation with his client.  

Judge Edmondson concluded that Drew Redden, “based on his professional judgment . . . determined (or some reasonable lawyer could have) that his client had a fair chance for acquittal, saw (or some reasonable lawyer could have) . . . the potential dangers associated with [character witnesses], and allocated (or some reasonable lawyer could have) his time and resources accordingly.”  

Finally, in light of the holding that Redden’s performance was

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227. Id. Arguably, a similar characterization could apply to Ronnie Chandler’s trial. See *infra* Part IV.A-B.  
228. Id. at 1324.  
229. See id.; see also supra Part III.B.1 (citing this proposition as the tenth of Judge Edmondson’s “twelve principles”).  
231. Id.  
232. Id.; see also id. at 1346-47 & n.9 (Barkett, J., dissenting) (pointing out that, at the habeas corpus hearing, Judge Hancock instructed Redden to answer whether he had discussed the existence or presentation of mitigating evidence with Chandler, albeit without revealing what was said; that the government had asked Redden if there were any such discussions that were not covered by Martin on direct examination; and that Redden had answered in the negative). But cf. id. at 1332 & n.7 (Tjoflat, J., concurring in part and dissenting in part) (arguing that the evidence and inferences drawn from it should be considered in the light most favorable to Chandler under *Fed. R. Civ. Pro.* 52(a)).  
233. *Chandler*, 218 F.3d at 1325. Judge Edmondson added that “[t]rials are full of imponderables.”  
Id.
constitutorially reasonable, there was no need to address the question of prejudice.\footnote{See id. at 1327 n.44 (pointing out that “several judges would be inclined to affirm on account of no prejudice, even if trial counsel’s performance was deficient”). In fact, Judge Cox’s concurrence argued to affirm on both reasonable performance and lack of prejudice grounds, essentially adopting Judge Hancock’s reasoning from the district court opinion. See id. at 1327-28 (Cox, J., specially concurring); see also supra Part III.A.}

IV. THE DISSenting Opinions of Judges TjoFLAT and Barkett and the Problem of How to ReConCile ChANDLER with WILLIAMS

A. Judge TjoFLAT’s Opinion (Concurring in Part and Dissenting in Part)

1. Why Appellate Courts Should Not Decide Matters of Fact Left Undecided by District Courts

Judge TjoFLAT began his analysis by asserting that Judge Hancock had not undertaken a performance prong analysis because, in his view, Chandler could not show prejudice.\footnote{See Chandler, 218 F.3d at 1329-30 (TjoFLAT, J., concurring in part and dissenting in part).} That, TjoFLAT argued, precluded effective review.\footnote{Id.} Nonetheless, the majority had plunged ahead.\footnote{Id.} Arguably, the case should have been remanded to Judge Hancock to make the relevant findings of fact with regard to the performance prong of the \textit{Strickland} test.\footnote{Id. at 1330.} The judge remarked that

\[\text{[o]n a cold record from which various inferences of fact can reasonably be drawn—some in favor of [Chandler], some in favor of the Government—the court has judged the demeanor of the witnesses, determined their credibility, found and weighed the facts, and then . . . has concluded that Redden discharged his Sixth Amendment duty to [Chandler].} \footnote{Id.}

TjoFLAT acknowledged that Judge Edmondson cited authority to support the proposition that engaging in a fact-finding process was a
proper appellate court function. In a case-by-case analysis, he argued persuasively that none of the precedents cited supported that proposition, except in cases "where the material facts are so clear and settled that a remand for fact-finding is unnecessary." Likewise, only two of the seven cases reviewed by Judge Tjoflat, including Darden, were Supreme Court decisions, and were therefore binding authority on the Eleventh Circuit. Thus, out of the seven cases cited in the majority opinion, only Darden was both binding authority and a capital case. In Darden, the Supreme Court noted that the district court made findings of fact, with which the circuit agreed, and that it agreed with both lower courts. In contrast, the Chandler majority made findings of fact even in the absence of a similar district court finding.

2. What Does a Presumption of Effectiveness Mean?

Judge Tjoflat next tackled the questions emanating from the Strickland presumption that counsel’s performance was effective. Although there may be a presumption that a lawyer makes competent “strategic choice[s],” at a habeas hearing on an ineffective assistance of counsel claim, the “presumption” has no practical meaning.

The Government does not need the “benefit of the ‘strategic choice’ presumption” because the burden of proof is on Chandler to prove trial counsel’s incompetence. Thus, the presumption that Redden’s “strategic choice[s]” were competent implies that Chandler

240. Id. at 1330 n.5.
241. Id. Of the seven cases in the majority opinion whose relevancy Tjoflat questioned, five were not murder cases, and only one, Darden v. Wainwright, was a capital case. However, Judge Edmondson’s argument about the propriety of appellate courts making findings of fact where the district court has not, retained only four of the seven cases to which Judge Tjoflat responded. See id. at 1327 n.42. A reasonable conjecture might be that Edmondson pulled three of the cases after reading Tjoflat’s response to an earlier draft. See Chandler, 218 F.3d at 1326 n.42.
242. See id.
243. Id.
244. See id. at 1331-32 n.5.
245. See id.
246. See Chandler, 218 F.3d at 1332 (Tjoflat, J., concurring in part and dissenting in part).
247. Id.
248. Id.
must come forward with proof to the contrary. 249 Once Chandler presented evidence on that point, either the evidence proved Redden’s incompetence or it did not; regardless, the presumption was no longer at issue. 250

3. The Time Frame of Drew Redden’s Trial Preparation

Judge Tjoflat laid out the relevant time frame to evaluate “what the evidence . . . tells us about Redden’s investigation of mitigating evidence and his decision to limit” the whole case at the sentencing trial to “two undisputed statutory mitigating circumstances” and the testimony of Chandler’s wife and mother. 251 Drew Redden had at most forty days, including weekends, from the time he accepted employment until the start of the guilt phase of the trial. 252 Judge Tjoflat found that to be a “relatively short” period of time in which to prepare. 253 The guilt phase of the trial took fourteen days from opening arguments to the reading of the guilty verdict (March 19 to April 2, 1991). 254 After the guilty verdict announcement in open court, Redden attended a meeting in camera from 2:30 P.M. to approximately 3:00 P.M. on April 2, 1991. 255 The penalty phase of the trial began at 9:00 A.M. the next day. 256

4. Redden’s Testimony and the Majority’s Rationalization: A Lack of Credibility Necessitates the Invention of a Hypothetical Attorney

Tjoflat found four sources for the evidence presented at the hearing before Judge Hancock: (1) the direct testimony of both Redden and Deborah Chandler, (2) the testimony of the twenty-seven character witnesses Judge Hancock heard, (3) the timetable governing

249. See id.
250. See id. at 1333-34 & nn.9-10.
251. See id. at 1335 (Tjoflat, J., concurring in part and dissenting in part).
252. Id. at 1334.
253. Id. at 1333.
254. Id. at 1334-35.
255. See id. at 1335.
256. Id.
Redden’s handling of the case, and (4) Drew Redden’s opening and closing statements from the penalty phase of the trial.\textsuperscript{257}

Judge Tjoflat concluded that “a reasonable fact finder would be justified in giving little, if any, credence to what Redden had to say, with the exception of the statements that support [Chandler’s] claim.”\textsuperscript{258} The reason for that reading is simple: “Redden’s testimony . . . is riddled with ‘I don’t know,’ or ‘I don’t recall,’ or ‘I don’t have any recollection,’ or ‘I have forgotten.’”\textsuperscript{259} As one may glean from the generous excerpts Judge Tjoflat provided in a footnote, Redden repeatedly denied knowledge of the most intimate and important details of the sentencing trial and the way he conducted it.\textsuperscript{260}

Judge Tjoflat observed that the majority, confronting Redden’s apparent untruthfulness in testifying, responded “that it is not ‘accepting that [Redden’s] words represent his heartfelt views, that [it] is not crediting his testimony as absolutely true’ or reviewing ‘the quality of the specific lawyer’s judgment process,’” but rather “‘illustrating the kinds of thoughts some lawyer in the circumstances could . . . reasonably have had.’”\textsuperscript{261} Apparently, according to Judge Tjoflat, the majority trivialized the veracity of Redden’s testimony on the stand, as long as any lawyer could have said something similar:

It seems to me that in determining whether a defense attorney provided ineffective assistance of counsel, what the attorney did, and why he did it, is important. The majority seems to be disregarding what Redden did, and why he did it; instead, imagining what a hypothetical lawyer would have done under the circumstances. I am unfamiliar with such an approach . . . to the resolution of ineffective assistance claims.\textsuperscript{262}

\textsuperscript{257} See \textit{id.} at 1335, 1340-43.
\textsuperscript{258} Id. at 1335.
\textsuperscript{259} Id. at 1335-36 \& n.12. See also Martin Interview, \textit{supra} note 6 (noting that Redden was not just falling on his sword by testifying at the habeas proceeding).
\textsuperscript{260} See Chandler, 218 F.3d at 1336 n.12.
\textsuperscript{261} Id. at 1336 n.13 (quoting the majority opinion at 1320 n.27, 1325 n.41) (alterations in original).
\textsuperscript{262} Id.
5. Redden’s Actions: Justifications or Lack Thereof

Disregarding the bulk of Redden’s testimony and drawing reasonable inferences from the rest of the evidence, Judge Tjoflat concluded that it was possible for a “reasonable fact finder” to find the following characterization of Redden’s actions to be accurate.\textsuperscript{263} First, Redden never searched “for mitigating [character] evidence or even [gave] the matter serious thought until after the jury returned its verdict” of guilty.\textsuperscript{264}

Second, Judge Tjoflat inferred that “Redden determined as a matter of sound trial strategy that mitigating evidence would be necessary.”\textsuperscript{265} Redden’s opening statement at the sentencing trial implied that he comprehended a wide conception of what mitigating evidence might entail.\textsuperscript{266} Redden’s closing statement suggested he hoped to get maximum benefit out of the limited mitigating character evidence he had offered.\textsuperscript{267} The problem was not that Redden had considered mitigating character evidence in his “strategic decision” to exclude it, but rather that, since Redden had not investigated Chandler’s life and background, “he had no idea of the sort of mitigating evidence that might be available.”\textsuperscript{268}

Immediately after the guilty verdict, and prior to the meeting in camera with Judge Hancock, Redden delegated to Deborah Chandler the duty of locating mitigating character witnesses, “without asking

\begin{flushright}
\textsuperscript{263} Id. at 1336.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
\textsuperscript{266} See Chandler, 218 F.3d at 1337 n.15 (“Mitigating circumstances may include . . . those . . . identified by statute and . . . also anything else, any other circumstance that any juror wants to consider in mitigation . . . [including anything] tending to indicate to you that you should not recommend a death penalty.”).
\textsuperscript{267} See id. For example, Redden explained that
[T]he testimony of his mother and of his wife . . . was here to show that there was a life here . . . a stability to it, that has had some quality to it . . . here is a family that had tremendous stability . . . He’s got three children, they are all by his wife . . . Here is a man who apparently has some skill . . . who has worked in building his house and his parents’ house, his brother’s houses . . . . They built a sawmill, they cut trees, they made lumber, they collected rocks, they built . . . lives demonstrating lives with some purpose as opposed to life worthless.

\textsuperscript{Id.}
\textsuperscript{268} Id. at 1337.
\end{flushright}
her who might be available to testify or explaining the kinds of persons she should contact,” although “Redden knew that she was visibly shaken and distraught over the jury’s verdict and in no condition to carry out the task he had assigned her.” Nevertheless, Redden did not explain this predicament to Judge Hancock or request a continuance. Further, Judge Tjoflat pointed out, aside from his obligations to his client, Redden should have known that if he did not obtain mitigating character witnesses and Chandler ultimately received a death sentence, Chandler could then claim ineffective assistance of counsel. Thus, “Redden would be back in court before the same district judge and interrogated under oath as to why he did not . . . prepare the sort of mitigation evidence petitioner’s habeas counsel was able to uncover in the span of a few days.” That alone should have motivated Redden to ask for a continuance.

Tjoflat made two points about Redden’s “fear” of cross-examination and rebuttal witnesses. First, because Redden had not performed any investigation, he had no idea who would testify, what they might say, or “what a particular witness might say on cross-examination.” Second, other than Redden’s belief that local law enforcement officers did not like Chandler and that some people in town thought Chandler was a drug dealer, “Redden had nothing to say” regarding what the prosecutor might have developed on cross-examination. Presumably, given that the jury had just convicted Chandler of dealing marijuana and procuring murder, additional evidence of police and citizenry animus would not be shocking.

269. Id.
270. See id. at 1338 & n.17 (“Redden . . . should have . . . informed the court that he had done nothing to prepare for the penalty phase of the case. First, and foremost, his client’s life was at stake.”). Even though requests for a continuance between the guilt trial and the sentencing trial in capital cases are routinely made and rejected, a “reasonable” attorney must still make one, especially where, as here, the attorney has not prepared for the sentencing trial. See Martin Interview, supra note 6.
271. See Chandler, 218 F.3d at 1338 n.17.
272. Id.
273. Id.
274. See id. at 1338-39.
275. Id. at 1339.
276. Id. at 1339 & nn.18-19.
277. See id.; see also Martin Interview, supra note 6.
6. Lingering Doubt

Finally, Judge Tjoflat disagreed with the majority opinion regarding “lingering doubt.” Tjoflat’s point was twofold. First, Redden never advanced the lingering doubt theory in his own testimony at the habeas hearing. Second, Redden’s closing argument conceded to the jury that “[y]ou’ve made a finding of guilt. I can’t argue against that because it’s already made.” Thus, there seems to be no question that Redden failed to employ a lingering doubt strategy.

Judge Tjoflat also voiced his concern that the majority had positioned the lingering doubt theory for later expansion. Because the majority concluded that Redden used a “lingering doubt” strategy and that they “would not approve a district court’s finding otherwise,” Chandler seems slated to serve as a “benchmark for the lawyers and courts of this circuit.” Thus, future cases containing any argument that “appear[s] to fit hand-in-glove with Redden’s [lingering doubt] argument will be considered, as a matter of law, to be a ‘lingering doubt’ argument!” If Judge Tjoflat’s fears materialize, then Judge Wilson’s prophecy that Chandler “virtually forecloses any future Strickland claim of ineffective assistance during the penalty phase of a capital proceeding” may well come true.

278. See Chandler, 218 F.3d at 1339.
279. See id.
280. See id. at 1320 n.26, 1339; see also id. at 1349 (Barkett, J., dissenting) (implying that Judge Edmondson actually conceived the “lingering doubt” strategy: “Nor did the government suggest [Redden] had pursued such a strategy until after the issuance of the panel opinions.”); infra Part IV.B.1; Martin Interview, supra note 6 (relating John Martin’s assertion that the government had actually seized upon Judge Edmondson’s creation of the “lingering doubt” defense in Edmondson’s dissenting panel opinion). Thus, on balance, it appears possible that Judge Edmondson actually credited the government with making an argument that he himself first conceived. See Martin Interview, supra note 6.
281. Chandler, 218 F.3d at 1342.
282. See id. at 1339.
283. See id. at 1339 & n.20.
284. Id.
285. Id. at 1339 n.20.
286. Chandler, 218 F.3d at 1361 (Wilson, J., dissenting); see also infra Part V.
7. Summary and Conclusion

Because the district court made no findings of fact under the performance prong of Strickland, Judge Tjoflat declined to make findings of fact in that area on a "cold record," despite such an effort by Judge Edmondson writing for the majority and Judge Barkett writing in dissent. 287 His formal position notwithstanding, Judge Tjoflat left no doubt as to his assessment of Drew Redden's performance. 288 Like the majority, however, Tjoflat did not reach a conclusion on the prejudice prong of the Strickland test. 289 Judge Tjoflat's solution called for a remand to the district court to make findings of fact relating to that prong of the test. 290 Thus, because Judge Tjoflat did not make a finding on the prejudice prong of Strickland, it is conceivable that he might vote to affirm Chandler's sentence on a prejudice prong analysis on re-appeal. 291

B. Judge Barkett's Dissenting Opinion

1. The Performance Prong Analysis

Judge Barkett's analysis of Redden's performance concurred with Judge Tjoflat's in several respects. 292 Judge Barkett, in finding as a matter of fact that Redden's performance was constitutionally

287. Chandler, 218 F.3d at 1330, 1332.
288. Id. at 1336-40.
289. Id. at 1329.
290. Id. at 1340.
291. Presumably, had Tjoflat's view prevailed, on remand Judge Hancock would have drawn heavily on Judge Edmondson's panel and en banc performance prong analyses; in any event, it seems doubtful that Judge Hancock would have reversed his own finding on the prejudice prong, notwithstanding Judge Barkett's enlightened explanation of the law in that area. See infra Part IV.B.2.
292. This Comment does not cover the redundant topics at depth. Compare Chandler, 218 F.3d at 1328-40 (Tjoflat, J., concurring in part and dissenting in part), with id. at 1344-54 (Barkett, J., dissenting). Like Judge Tjoflat, Judge Barkett found that Redden did not dispute his failure to investigate the availability of mitigating evidence. See id. at 1344-47 (Barkett, J., dissenting). She also found the "lingering doubt" strategy to be a convenient creation, but credited Judge Edmonson with its origin, rather than the Government. See id. at 1349; see also supra Part IV.A.6. Finally, Judge Barkett found that both majority arguments downplaying Redden's need to put on character evidence—the "possibility of a harmful rebuttal" and the underwhelming nature of the evidence—were mere straw men. "Possibility of harmful rebuttal" was a straw man propped up by the majority, as was the argument that Redden concluded that the undiscovered evidence would not have been compelling. Chandler, 218 F.3d at 1351-53.
deficient, performed at least two salutary functions. First, she outlined exactly what the Strickland performance prong requires of trial counsel in terms of investigation into mitigating evidence, based on both Eleventh Circuit and Supreme Court precedent. Second, Judge Barkett, analogizing directly to Williams v. Taylor, made a strong argument that the Supreme Court should overturn Chandler’s death sentence to make its own ineffective assistance of counsel jurisprudence in death penalty cases internally consistent.

Judge Barkett described and cited substantial precedent for three propositions related to the necessary investigation for mitigating character evidence. First, at a minimum, trial counsel must give the defendant and his family a definition of character evidence and an explanation of its vital importance in a death-eligible sentencing trial. Second, trial counsel must ask the defendant and the defendant’s family for the names of potential witnesses. Third, trial counsel should follow up on whatever leads the defendant or the defendant’s family provide.

Regarding the tie to Williams v. Taylor, Judge Barkett noted that Williams’ trial counsel was deficient because he did not begin investigating for mitigating character evidence until one week before

293. See Chandler, 218 F.3d at 1344-49.
294. Id.
295. See id. at 1344-45, 1347-48.
296. See id. at 1345 & nn.5-7.
297. See id. at 1345 n.5 (citing Tyler v. Kemp, 755 F.2d 741, 744-45 (11th Cir. 1985); Peek v. Kemp, 784 F.2d 1479, 1494 & n.15 (11th Cir. 1986) (en banc)).
298. See id. at 1345 & nn.5-6 (citing Cargill v. Turpin, 120 F.2d 1366, 1386 (11th Cir. 1997); Bolender v. Singletary, 16 F.3d 1547, 1558 (11th Cir. 1994); White v. Singletary, 972 F.2d 1218, 1224-25 (11th Cir. 1992); Elledge v. Dugger, 823 F.2d 1439, 1445, modified on other grounds, 833 F.2d 250 (11th Cir. 1987); cf. Stevens v. Zant, 968 F.2d 1076, 1083-84 (11th Cir. 1992) (finding counsel effective where he tried to secure in-court presence of defendant’s relatives by telling defendant of its importance, asking him for names, and speaking with the two relatives the defendant mentioned)).
299. See Chandler, 218 F.3d at 1345 & nn.5-7 (comparing Jackson v. Harris, 42 F.3d 1350, 1367 (11th Cir. 1995); Blanco v. Singletary, 943 F.2d 1477, 1500-01 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) (find counsel’s performance deficient because of failure to follow up), with Cunningham v. Zant, 928 F.2d 1006, 1015-16 (11th Cir. 1991) (holding counsel competent because of follow-up actions)). But cf. Singleton v. Thigpen, 847 F.2d 668, 670 (11th Cir. 1988) (excusing trial counsel’s failure to locate mitigating character witnesses where he interrogated defendant and defendant’s family, but “they could not name anyone”).
the sentencing trial.\textsuperscript{300} Redden’s investigation was far more deficient, beginning only after the guilty verdict, which was less than twenty-four hours before the start of the sentencing trial.\textsuperscript{301} Using record evidence, Judge Barkett argued persuasively that Redden admitted that he did not conduct an investigation for mitigating character evidence.\textsuperscript{302}

Judge Barkett clarified that under \textit{Williams} trial counsel has an absolute obligation to investigate possible mitigation evidence.\textsuperscript{303} Regarding the majority’s holding that \textit{Williams} was not relevant to the case because “an investigation (even a nonexhaustive, preliminary investigation) is not required,” Judge Barkett pointed out that the majority’s citations to \textit{Strickland} are “precisely the opposite” of what the propositions stand for.\textsuperscript{304} \textit{Williams} does not establish a per se rule that trial counsel must present mitigating evidence, but it does stand for the proposition that “counsel’s decision not to present mitigating evidence must be reasonable.”\textsuperscript{305} Indeed, “it is axiomatic that counsel must perform at least a preliminary investigation before he or she is able to make an informed or ‘strategic’ decision about whether or not to further pursue that investigation.”\textsuperscript{306} According to Judge Barkett, the majority incorrectly relied on precedent that disclaimed the need for “thorough” investigation; such an approach simply does not “support the conclusion that counsel is not obligated to conduct \textit{any investigation at all}.”\textsuperscript{307}

Judge Barkett found that, in \textit{Williams v. Taylor}, the Court held that whether or not “counsel’s failure to conduct a thorough or complete investigation” resulted in prejudice under \textit{Strickland}, it was always \textit{per se} sufficient to satisfy the performance prong of the \textit{Strickland}

\textsuperscript{300} See \textit{Chandler}, 218 F.3d at 1344-45 (Barkett, J., dissenting).
\textsuperscript{301} See \textit{id}.
\textsuperscript{302} See \textit{id} at 1346-47 & nn.8-9; see also \textit{Martin Interview, supra} note 6 (declaring Drew Redden admitted to John Martin that “he just didn’t get around to [seeking mitigation evidence]”).
\textsuperscript{303} See \textit{Chandler}, 218 F.3d at 1347 (Barkett, J., dissenting).
\textsuperscript{304} \textit{Id}.
\textsuperscript{305} \textit{Id} at 1347 n.10.
\textsuperscript{306} \textit{Id} at 1348.
\textsuperscript{307} \textit{Id} at 1348 n.11 (referencing majority reliance on \textit{Williams v. Head}, 185 F.3d 1223, 1236-37 (11th Cir. 1999)).
test.\textsuperscript{308} Further, "[i]t is true that an attorney may, under some circumstances, make a strategic choice to curtail a particular investigation. But the Supreme Court has tied the reasonableness of such a choice to the amount of investigation backing that choice."\textsuperscript{309} Thus, when Judge Barkett applied the Williams analysis to Chandler, even on a cold record with no finding under the Strickland performance prong, the logical conclusion was that Redden was constitutionally ineffective.\textsuperscript{310}

\textbf{2. The Prejudice Prong Analysis}

Judge Barkett held that Redden's failure to discover the available mitigating evidence sufficiently prejudiced Chandler's case so as to require the court to overturn his death sentence under the Williams test for the Strickland prejudice prong.\textsuperscript{311} The twenty-seven witnesses Judge Hancock heard testified that Chandler was "compassionate,"\textsuperscript{312} "generous,"\textsuperscript{313} loving towards children, a good role model,\textsuperscript{314} respectful of and caring for the elderly,\textsuperscript{315} had strong religious beliefs,"\textsuperscript{316} was "patriotic,"\textsuperscript{317} had a strong work ethic\textsuperscript{318} and a non-violent disposition.\textsuperscript{319}

The stories of Chandler's acts of generosity and goodness comprise over three pages of the opinion.\textsuperscript{320} For example, Chandler would daily visit a severely injured childhood friend and colleague.\textsuperscript{321} Chandler inspired the man to learn to walk again, even though experts

\begin{footnotesize}
\textsuperscript{308} Chandler, 218 F.3d at 1349.
\textsuperscript{309} Id. at 1348.
\textsuperscript{310} See id. at 1349-51.
\textsuperscript{311} Id. at 1354.
\textsuperscript{312} Chandler, 218 F.3d at 1354 n.21 (citing eight examples).
\textsuperscript{313} Id. at 1354 n.22 (citing five examples).
\textsuperscript{314} Id. at 1354 n.23 (citing seven examples).
\textsuperscript{315} Id. at 1354 n.24 (citing five examples).
\textsuperscript{316} Id. at 1355 n.25 (citing four examples).
\textsuperscript{317} Id. at 1355 n.26 (citing three examples).
\textsuperscript{318} Id. at 1355 n.27 (citing nine examples).
\textsuperscript{319} Id. at 1355 n.28 (citing thirteen examples).
\textsuperscript{320} Id. at 1354-58.
\textsuperscript{321} Id. at 1355.
\end{footnotesize}
told the man it was an impossibility.\textsuperscript{322} Chandler provided food, transportation, and money to many people in the community when they were out of work.\textsuperscript{323} Chandler provided jobs, regardless of his needs, to unemployed acquaintances.\textsuperscript{324} Chandler paid for the burial of a neighbor’s son who died in an automobile accident because he knew the family had no money.\textsuperscript{325} When Elaine Freeman’s husband died, Chandler welcomed her into his home and told her to stay for as long as she needed, later refusing to accept repayment.\textsuperscript{326}

Chandler bought two pairs of new shoes for Marsha Heath’s son when he saw that the boy did not have any.\textsuperscript{327} Chandler always donated to charity, often giving all the money he had in his pockets.\textsuperscript{328} He paid utility bills for needy families and even cut and hauled firewood to people in need of, but without access to, firewood.\textsuperscript{329} Chandler was generous with his time as well as his money, building a wheelchair-accessible porch for a handicapped elderly neighbor so that the man could get into and out of his house more easily—donating both the labor and materials.\textsuperscript{330} Henry Lawler testified that Chandler had helped him build his house, laying the foundation and doing the masonry work on the fireplace.\textsuperscript{331} Chandler was generous to his employees as well, often giving them money and making sure they had food.\textsuperscript{332} Finally, everyone knew Chandler for his patience, caring attitude, and even for his willingness to play with children of the community.\textsuperscript{333}

In estimating the prejudicial effect of Redden’s failure to unearth all of this mitigating character evidence, Judge Barkett contrasted Chandler’s crime of procuring the murder of Marlin Shuler with

\begin{itemize}
\item \textsuperscript{322} Id.
\item \textsuperscript{323} Chandler, 218 F.3d at 1355-56.
\item \textsuperscript{324} Id. at 1357.
\item \textsuperscript{325} Id. at 1356.
\item \textsuperscript{326} Id.
\item \textsuperscript{327} See id.
\item \textsuperscript{328} Id. at 1356.
\item \textsuperscript{329} Chandler, 218 F.3d at 1357.
\item \textsuperscript{330} See id.
\item \textsuperscript{331} See id.
\item \textsuperscript{332} See id.
\item \textsuperscript{333} See id.
\end{itemize}
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Terry Williams' murder of Harris Stones. 334 Williams bludgeoned his victim to death with a mattock, robbed him, and left him "grasping [sic] for breath." 335 Judge Barkett reasoned that

[although any murder is to be condemned, it is indisputable that Terry Williams was convicted of committing a much more heartless and heinous crime . . . . He then went on a crime spree in which he savagely beat an elderly woman who was left in a "vegetative state" and was not expected to recover, set a fire outside a man's house before stabbing him during another robbery, and stole two cars. After his arrest, Williams set fire to the jail, for which he was convicted of arson, and "confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." In contrast, it was never disputed that Chandler was not present when the victim died, and that the actual shooter and the victim were both intoxicated and engaged in target practice with firearms. 336

Further, even the majority pointed out that the evidence of Chandler's guilt was "not overwhelming." 337 There was also "great contrast" between the criminal histories of Chandler and Williams. 338 Finally, while the mitigating evidence excluded from Williams' trial might "have opened the door to negative rebuttal evidence," the nature of Chandler's "evidence made it significantly less susceptible to such an attack." 339

334. See id. at 1358.
336. Chandler, 218 F.3d at 1358 (citations omitted). There is also no evidence that Drew Redden ever suggested that Jarrell might have killed Shuler accidentally, even though Judge Barkett's image of two drunken men with pistols taking target practice supports an inference of an accidental shooting. Compare id. at 1340-43 (excerpting Redden's entire opening statement and closing argument from the penalty trial), with id. at 1358 (containing Judge Barkett's illustrative characterization of the shooting scene). Arguably, the possibility of an accidental homicide would also support a reasonable lingering doubt argument in mitigation, especially since one of Jarrell's four versions of the story was that he shot Shuler accidentally. See id. at 1310-11.
337. See Chandler, 218 F.3d at 1358.
338. Id.
339. Id.
Judge Barkett contested the legal validity of the district court's rationale in concluding that the failure to elicit so much extraordinary evidence was not prejudicial to Chandler.\footnote{Id. at 1359.} First, regarding bias, "[b]y its very nature and definition, mitigating character evidence evinces a 'bias' in favor of the defendant; this is particularly true of mitigating character evidence that might persuade a jury not to impose a death sentence."\footnote{Id. at 1359.} Second, regarding the temporal remoteness of the evidence, Judge Barkett noted that many of Chandler's good acts "occurred within five years of the time that the government claims Chandler became a marijuana grower and dealer."\footnote{Id. at 1360.} In fact, other witnesses testified that they had regular contact with Chandler until the government arrested him.\footnote{See id.} Third, regarding the fact that many of the witnesses claimed no knowledge of Chandler's criminal activity and thus had "shown themselves to be ignorant of [his] character," Judge Barkett argued that [t]his statement conflicts with all the case law requiring that a defendant have the opportunity to present mitigating evidence as to the type of person the defendant has shown himself to be through his actions and behavior. This required mitigating evidence does not go to a defendant's culpability for the crimes of which he was convicted. . . . [T]he purpose of presenting character witnesses is to offer a complete view of the defendant, one that presents positive aspects of his humanity and individuality, so that the jury can weigh his good qualities against the nature of the crime committed to determine whether death is the appropriate sentence for [the defendant].\footnote{Id.}

Further, Judge Barkett repeated the twin holdings of \textit{Lockett}, "that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is
imposed," and *Woodson*, that "the fundamental respect for humanity . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Because the jury had to weigh the aggravating and mitigating factors in setting the sentence, the excluded evidence very well might have tipped the balance in Chandler's favor. Thus, Judge Barkett concluded that

[w]hen a lawyer does absolutely nothing to investigate whether mitigating evidence exists, he cannot be said to have made a strategic decision not to present that evidence. When that evidence does exist and it is reasonably probable that its presentation would have made a difference in the outcome, or conversely, that its absence "undermines confidence in the outcome," that lawyer cannot be said to have been "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." This is such a case. Accordingly, Ronnie Chandler is constitutionally entitled to a new sentencing hearing.

C. One Federal Footnote

Ronnie Chandler was tried, convicted, and sentenced in federal court. A recent case involving a similarly situated defendant makes for a striking comparison. Thomas Pitera, a.k.a. Tommy Karate, was convicted of committing a number of murders in New Jersey, in

347. *See id.* at 1360 n.32. The jury had to consider three aggravating factors: (1) that Chandler intentionally engaged in conduct designed to cause Marlin Shuler's death, (2) that Chandler "procured Shuler's killing by promising to pay something of pecuniary value," and (3) that Chandler engaged in "substantial planning and premeditation." *Id.* However, the jury rejected the premeditation aggravator, thus leaving the remaining aggravating factors and the two stipulated mitigating factors in "essential equipoise." *Id.*
348. *Id.* at 1361 (citations omitted).
349. *See Chandler*, 218 F.3d at 1305.
which he personally killed the victims and hacked their bodies to pieces before burying them in plastic bags.\textsuperscript{351} Pitera’s attorney called four witnesses at the sentencing trial—Pitera’s aunt, sister-in-law, and two cousins—all of whom testified as to their loving relationship with Pitera.\textsuperscript{352} The jury deliberated for four and a half hours before sentencing Tommy Karate to life in prison.\textsuperscript{353} Pitera remarked afterwards: “Ah, the jury had no balls.”\textsuperscript{354}

V. A FORMULA FOR DEFEATING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS—DEATH PENALTY CASES FOLLOWING CHANDLER

Chandler’s most remarkable features are arguably (1) its “Principles Regarding Performance,” (2) its creation of a “hypothetical attorney” who might have taken the same actions as the actual attorney did, and (3) its expansion of the Tarver lingering doubt doctrine.\textsuperscript{355} A glance at the first cases in Chandler’s wake may prove instructive as to the impact the holding is having on American criminal jurisprudence. Between the announcement of Chandler on July 21, 2000, and July 31, 2001, seven Eleventh Circuit opinions, six by panels of the United States Court of Appeals and one from the Southern District of Alabama, have examined, discussed, or cited Chandler.\textsuperscript{356} During the same period, the Fourth Circuit cited Chandler twice,\textsuperscript{357} the Eastern District of Louisiana\textsuperscript{358} and the Georgia Supreme Court\textsuperscript{359} once each, and the Tennessee Court of

\begin{itemize}
\item \textsuperscript{351} Id. at 1505.
\item \textsuperscript{352} Id. at 1506.
\item \textsuperscript{353} Id.
\item \textsuperscript{354} Id.
\item \textsuperscript{355} See infra notes 410-15 and accompanying text.
\item \textsuperscript{358} See United States v. Davis, 132 F. Supp. 2d 455, 463 (E.D. La. 2001).
\item \textsuperscript{359} See Head v. Carr, 544 S.E.2d 409, 424 (Ga. 2001).
\end{itemize}
Criminal Appeals three times. Thus, the case has played a role in fourteen opinions, thirteen of which involved the death penalty. Twelve cases upheld the death penalty out of the thirteen that initially imposed it. The Eleventh Circuit, where Chandler is mandatory, upheld all death sentences as appealed on ineffective assistance grounds. In the fourteen cases that have cited Chandler, seventeen of twenty-one citations, or eighty-one percent, refer to Judge Edmondson’s twelve “Principles Governing Performance” including the creation of the “hypothetical attorney.” Arguably, Chandler has gotten its most extensive workouts to date with the two most recent Eleventh Circuit cases, Grayson v. Thompson and Johnson v. Alabama.

In Grayson, Judge Hull’s opinion contains its own section captioned “General Principles,” one of which is a direct quote from Chandler. The petitioner argued ineffectiveness of counsel in the guilt-innocence trial when counsel failed to hire a forensic psychiatrist to attest to Grayson’s diminished capacity. Hull cited

[Footnotes]


361. See cases cited supra note 360. In Jones v. Harrellson, petitioner Vernon E. Jones was convicted of receiving stolen property in the second degree. See Jones, 2001 WL 530504, at *1.

362. See cases cited supra note 360. The exception was Davis, 132 F. Supp. 2d at 468, which held that a residual doubt strategy was available for jury consideration during sentencing proceedings.

363. See Grayson, 2001 WL 798633, at *1; Johnson, 2001 WL 769607, at *1; Brown, 2001 WL 735724, at *1; Housel, 238 F.3d at 1292; Gilreath, 234 F.3d at 548; Williamson, 221 F.3d at 1181-82.


367. See Grayson, 2001 WL 798633, at *21. “To state the obvious: the trial lawyers, in every case could have done something more or something different. So, omissions are inevitable. But the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled.” Id. (quoting Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (quoting Burger v. Kemp, 483 U.S. 776, 794 (1987))).

368. See id. at *24. The attorney had attempted to hire several experts, including a forensic psychiatrist, a forensic pathologist, and a serologist. See id. at *16. Alabama has a statutory cap of $500 in expert fees per death penalty case; counsel could not locate any expert willing to work for less than $1500 per day, grew discouraged, and did not even request extra money from the trial judge. See id.
the performance prong analysis in *Chandler* for the proposition that "lawyers do not enjoy the benefit of endless time, energy or financial resources. How a lawyer spends his inherently limited time and resources is also entitled to great deference by the court." The court stressed that defense counsel had ample opportunity to cross-examine the state's experts. Grayson also argued ineffectiveness of counsel at the sentencing trial because the attorney did not gather and present extensive evidence of Grayson's "impoverished and dysfunctional family background; [his] history of alcoholism; [his] intoxication at the time of the offense; [his] domination by his co-defendant; [his] remorse over [the victim's] death; and [his] family's desire that his life be spared." Judge Hull omitted the performance prong analysis because she found no way for Grayson to satisfy the prejudice prong.

Judge Hull quoted from Judge Cox's concurrence in *Chandler* that "[t]he ultimate question is whether Chandler has shown that any deficient performance prejudiced him such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different."

In *Johnson*, a death penalty case decided just days before *Grayson*, Judge Marcus relied extensively on *Chandler* to decide a claim of ineffective assistance of counsel during the guilt-innocence trial. Judge Marcus in particular relied on Judge Edmondson's "Principles" section from *Chandler*. Of course, Chandler included quotes from *Strickland, Darden, Burger*, and selected Eleventh

369. *Id.* at *24.
370. *See id.* at *23.
371. *Id.* at *28.
372. *Id.*
373. *Id.* (citing *Chandler*, 218 F.3d at 1328 (Cox, J., specially concurring)).
376. *Id.*
Circuit cases.\textsuperscript{377} \textit{Johnson}, however, exclusively cites \textit{Chandler}, with "citations and internal quotation marks omitted."\textsuperscript{378}

Other Eleventh Circuit decisions have similarly relied on the \textit{Chandler} ineffective assistance language. In \textit{Housel v. Head},\textsuperscript{379} the petitioner complained of ineffective assistance of counsel at both the guilt-innocence and sentencing trials.\textsuperscript{380} Trial counsel had failed to use an intoxication defense during guilt phase or to develop and present mitigation evidence during sentencing.\textsuperscript{381} Judge Cox’s opinion for a three-judge panel undertook an extensive performance prong analysis that cited \textit{Chandler} three times.\textsuperscript{382} Judge Cox found support for the proposition that “a failure to investigate is not a unique category of counsel omission that automatically satisfies \textit{Strickland}’s deficient-performance prong; rather, like all counsel conduct, it enjoys a presumption of reasonableness."\textsuperscript{383} Additionally, “[a]bsent a strategic choice” to investigate Housel’s life history, incidentally a choice that his trial attorney did not make, the attorney “could reasonably rely on . . . representations to him as to matters of Housel’s personal knowledge.”\textsuperscript{384} Finally, “abandoning one defense in favor of another that counsel reasonably perceives to be more meritorious is not deficient performance, even if it means that the jury does not hear certain kinds of mitigation evidence.”\textsuperscript{385}

In \textit{Williamson v. Moore},\textsuperscript{386} a Florida death penalty case where the petitioner alleged ineffectiveness at both the guilt-innocence and penalty trials, Judge Edmondson’s opinion cites \textit{Chandler} four times.

\begin{footnotesize}
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\item[	extsuperscript{377} See \textit{Chandler}, 218 F.3d at 1312-19.]
\item[	extsuperscript{378} \textit{Johnson}, 2001 WL 769607, at *11. Also see supra Parts III.B.1, IV.A.2 for a discussion of Judge Edmondson’s “Twelve Principles” and Judge Tjoflat’s analysis of the Edmondson “Principles.” Whether intended or not, \textit{Chandler} has instantly updated the standard death penalty ineffective assistance of counsel holdings from decades prior. See id.]
\item[	extsuperscript{379} 238 F.3d 1289 (11th Cir. 2001).]
\item[	extsuperscript{380} \textit{id.} at 1294.]
\item[	extsuperscript{381} \textit{id.}]
\item[	extsuperscript{382} \textit{id.} at 1294-95.]
\item[	extsuperscript{383} \textit{id.} at 1294.]
\item[	extsuperscript{384} \textit{id.} at 1295 (citing \textit{Chandler}, 218 F.3d at 1318).]
\item[	extsuperscript{385} \textit{id.} (citing \textit{Chandler}, 218 F.3d at 1320-21).]
\item[	extsuperscript{386} 221 F.3d 1177 (11th Cir. 2000).]
\end{enumerate}
\end{footnotesize}
in its three-page discussion on ineffective assistance of counsel.\textsuperscript{387} The judge found that "[t]he inquiry focuses on whether a reasonable attorney could have acted in the same manner as trial counsel did," that counsel has no obligation to pursue investigations that might prove "fruitless or even harmful," and that "a reasonable attorney could have decided not to call non-credible witnesses."\textsuperscript{388}

In \textit{Brown v. Jones},\textsuperscript{389} an Alabama death penalty case, the petitioner argued that his trial attorney was ineffective at both the guilt-innocence and sentencing trials for failing to investigate and present evidence of Brown's drug and alcohol abuse and its effects upon the defendant's mental state.\textsuperscript{390} Chief Judge Anderson's performance prong analysis was squarely based on \textit{Chandler}, noting that the omission "might be considered sound trial strategy," and that "the 'strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.'"\textsuperscript{391} However, the prejudice prong analysis does not mention \textit{Chandler}, citing instead to \textit{Strickland}, even though \textit{Chandler} had cited the exact quotes from \textit{Strickland}.\textsuperscript{392}

The remaining two Eleventh Circuit cases, \textit{Gilreath v. Head}\textsuperscript{393} and \textit{Jones v. Harrelson}\textsuperscript{394} are of slightly less interest. Although \textit{Gilreath} concerns denial of habeas corpus relief to a death row inmate, the case cites to \textit{Chandler} only once, and then merely to delineate the two-pronged \textit{Strickland} analysis for ineffective assistance.\textsuperscript{395} In \textit{Jones}, the petitioner, convicted of theft by receiving, challenged the effectiveness of his trial counsel.\textsuperscript{396} In affirming a conviction by a Magistrate Judge, District Judge Butler wrote approvingly of

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\item \textsuperscript{387} See \textit{id.} at 1180-82.
\item \textsuperscript{388} \textit{id.} at 1180-81. Missing from this discussion is that in the \textit{Chandler} proceedings, five circuit judges found Drew Redden's failure to investigate unreasonable, that the investigation would have been helpful, and that the witnesses were credible. See \textit{Chandler}, 218 F.3d at 1305.
\item \textsuperscript{389} No. 99-14261, 2001 WL 735724 (11th Cir. June 29, 2001).
\item \textsuperscript{390} \textit{id.} at \textsuperscript{*}2.
\item \textsuperscript{391} \textit{id.} at \textsuperscript{*}3 (citing \textit{Chandler}, 218 F.3d at 1314, 1316).
\item \textsuperscript{392} \textit{id.} at \textsuperscript{*}4.
\item \textsuperscript{393} 234 F.3d 547 (11th Cir. 2000).
\item \textsuperscript{395} \textit{Gilreath}, 234 F.3d at 550.
\item \textsuperscript{396} \textit{Jones}, 2001 WL 530504, at \textsuperscript{*}4.
\end{itemize}
\end{footnotesize}
"Chandler: "[G]iven the strong presumption in favor of competence, the [defendant's] burden of persuasion . . . is a heavy one.""  

The two Fourth Circuit cases that cite to Chandler, Frye v. Lee and Skipper v. Lee were both death penalty cases. Frye cited Chandler only once, holding that there was no need to perform a prejudice prong analysis where the petitioner had failed to meet the performance prong. Skipper also mentions Chandler only once, for the proposition that the fact "that trial counsel (at a post-conviction evidentiary hearing) admits that his performance was deficient matters little." The three Tennessee Court of Criminal Appeals cases all rely on Chandler to varying degrees and focus their reliance on the "Principles" section of Chandler. The Georgia Supreme Court case of Head v. Carr, on the other hand, heavily relies on Chandler in its prejudice prong analysis to deny the petitioner relief. Justice Thompson found that Carr's attorney was not deficient in presenting only Carr's mother and uncle as sentencing trial character witnesses, and that "it was not unreasonable for trial counsel to avoid presenting a large amount of character witnesses because . . . it would not have been effective." Thus, even though Chandler was cited to a similar fact pattern, the prejudice prong analysis followed by the court seems more analogous to Judge Hancock's district court treatment of the case.

397. See id. at *12 (quoting Chandler, 218 F.3d at 1314).
398. 235 F.3d 897 (4th Cir. 2000).
400. Frye, 235 F.3d at 899; Skipper, 2001 WL 1853330, at *1.
401. Frye, 235 F.3d at 907 n.12.
404. 544 S.E.2d 409 (Ga. 2001).
405. See id. at 424.
406. Id. (citing Chandler, 218 F.3d at 1321-25).
There is one case that has utilized Chandler to benefit a death penalty defendant.\textsuperscript{408} In United States v. Davis,\textsuperscript{409} Judge Berrigan upheld a life sentence granted in response to a lingering doubt argument that Davis' counsel successfully raised at a resentencing hearing.\textsuperscript{410} Thus, even though Chandler again received favorable treatment, Judge Edmondson's fondness for the lingering doubt defense served as the foundational argument in a decision upholding a life sentence.\textsuperscript{411}

CONCLUSION

There are at least two ways to view Chandler and its progeny. First, the case, albeit frequently cited, has served only to perpetuate the Eleventh Circuit's Strickland jurisprudence.\textsuperscript{412} That jurisprudence has generally been hostile to death row inmate attempts to convert their death sentences to life without parole.\textsuperscript{413} To that extent, the Eleventh Circuit has kept in line with the Supreme Court's own Strickland jurisprudence.\textsuperscript{414} After all, the line from Strickland to Darden to Burger to Chandler passes directly through the Eleventh Circuit.\textsuperscript{415} In that light, Williams v. Taylor appears as an aberration that would be rightly limited to its own peculiar facts.\textsuperscript{416} On the other hand, Chandler itself may be viewed as an aberration because Williams v. Taylor marks a softening of the Supreme Court's attitude toward the death penalty.\textsuperscript{417} From that perspective, Williams v. Taylor effectively overturned some of the Court's previous Strickland jurisprudence and requires that criminal defense attorneys in death
penalty cases investigate, discover, and present mitigating character evidence at the sentencing trial.\textsuperscript{418}

The \textit{Chandler} court arguably abandoned the \textit{Strickland} performance prong analysis, which utilized a reasonableness standard, by asking instead whether any hypothetical reasonable counsel in similar circumstances could have taken the actions of trial counsel.\textsuperscript{419} One dissenting judge argued that the Eleventh Circuit's decision "places the acceptable level of attorney assistance so low as to risk undermining the public's confidence in the criminal justice system."\textsuperscript{420}

\textit{Chandler}'s impact as Eleventh Circuit precedent and as persuasive authority in other jurisdictions remains to be seen. For now, the majority's opinion has taken root in a number of areas.\textsuperscript{421} First, \textit{Chandler} evinces a willingness by the Eleventh Circuit to step into the shoes of a lower court and fill in a missing \textit{Strickland} performance prong analysis.\textsuperscript{422} Despite Judge Tjoflat's argument against such an approach, it is now valid precedent.\textsuperscript{423} Second, the majority's "Principles Governing Performance" has rejuvenated and expanded the influence of \textit{Darden} and \textit{Burger}, as well as dusted off much of the recent Eleventh Circuit \textit{Strickland} case law.\textsuperscript{424} Most significantly, the \textit{Chandler} majority has now successfully transformed the "objective" analysis of trial counsel's performance into an analysis of a "hypothetical" attorney's conduct which may have no connection to the actual attorney's behavior.\textsuperscript{425} Although some might argue that \textit{Strickland}'s original "reasonable counsel" analysis was not much better, \textit{Chandler} increases appreciably, if not dramatically, the number of cases that will survive review in the

\begin{itemize}
\item \textsuperscript{418} See supra Parts II, IV.A-B.
\item \textsuperscript{419} See supra Parts III-IV.
\item \textsuperscript{420} Chandler v. United States, 218 F.3d 1305, 1343 (11th Cir. 2000) (Birch, J., dissenting). Judge Birch also opined that "[b]efore we, as a civilized society, condemn a man to death, we should expect and require more of an advocate." \textit{Id.}
\item \textsuperscript{421} See supra Part IV.A-B.
\item \textsuperscript{422} See supra Part IV.B.
\item \textsuperscript{423} See \textit{id}.
\item \textsuperscript{424} See supra Part IV.B.1.
\item \textsuperscript{425} See supra Part IV.A.
\end{itemize}
Eleventh Circuit.  If there is anything to applaud in the post-
Chandler Eleventh Circuit cases, it is that so far no one has gone as
far as citing to “Footnote 17,” which travels farthest down the road to
lowered attorney competence standards.  

An only slightly less striking feature of the majority opinion is the
assertion that Drew Redden’s failure to search for or produce
mitigation witnesses for the penalty trial was part of a strategic
decision to focus his efforts on a lingering doubt defense.  The
lingering doubt “hypothesis” is troubling for two reasons. First,
Strickland and its progeny indicate that a trial attorney’s strategic
decision will, except in the most extreme cases, insulate her from an
ineffective assistance of counsel claim in a habeas corpus hearing.
Further, as the Eleventh Circuit made clear in Tarver v. Hopper, a
decision to pursue a lingering doubt strategy at the penalty phase, to
the exclusion of other strategies, will be granted wide deference, even
if, as in Chandler, mitigating character evidence would have been
complementary with a lingering doubt strategy.  Second, and more
deeply troubling, is the Chandler majority’s apparent fabrication of
the lingering doubt strategy in order to shield Drew Redden’s trial
performance from serious scrutiny.  To the extent that may be
ascertained from the record, Redden never planned nor asserted a
lingering doubt defense. Redden was not consciously aware of relying
on a lingering doubt strategy at the sentencing trial, and never
asserted the use of a lingering doubt strategy in his testimony at the
habeas corpus hearing.  Indeed, it was Judge Edmondson who first
articulated a lingering doubt strategy, some four years after the habeas
corpus hearing and eight years after the original trial.  A “strategy,”

426.  See Martin Interview, supra note 6; see also Part IV.A-B.
427.  See Chandler, 218 F.3d at 1315 n.17. The particular footnote outlines that a case should not be
overturned on an ineffective assistance of counsel claim if a new attorney could render exactly the same
assistance in a new trial yet not be found ineffective. See id.
429.  See supra Parts I.B-C.
430.  See supra Part IV.A.
431.  See Martin Interview, supra note 6; see also supra Part IV.A.6.
432.  See Martin Interview, supra note 6; see also supra Parts III.B.2.a, IV.A.6, IV.B.1.
433.  See Martin Interview, supra note 6; see also supra Parts IV.A.6, IV.B.1.
is defined as "a careful plan or method," or "a clever stratagem."\(^{434}\)

An appellate court judge’s fabrication of a strategy eight years post hoc does not rise to the level of either a "careful plan or method" or a "clever stratagem," especially in the context of the performance of a trial attorney whose client was sentenced to death.\(^{435}\)

Jarrell’s voluntary intoxication on the day of Shuler’s murder may have reduced or increased Jarrell’s culpability as the shooter.\(^{436}\) However, it is unclear how that circumstance could create a lingering doubt that Chandler had initially offered Jarrell $500 to kill Shuler.\(^{437}\) Since it was undisputed that Jarrell had shot and killed Shuler, it was also obvious that he had some motive in committing the act.\(^{438}\) However, evidence of Jarrell’s intoxication does not show conclusively why he shot Shuler, whether it was because of his personal animus, Chandler’s offer to pay him $500, or some combination of the two.\(^{439}\) Thus Jarrell’s voluntary intoxication at the time of the shooting, whether it mitigated or aggravated his own culpability, arguably bore no relationship to whether or not Chandler was guilty of arranging murder for hire.\(^{440}\) Alternatively, even if the jury believed that Jarrell had to get drunk to kill Shuler, they could also believe Chandler had not procured the murder.\(^{441}\) Therefore, Judge Edmondson’s reliance on the phrase about Jarrell having consumed “twenty-three beers” in Drew Redden’s closing argument to provide a foundation for a lingering doubt mitigation strategy seems tenuous at best.\(^{442}\) Further, it seems that if Redden were indeed pursuing a lingering doubt strategy in mitigation, Jarrell’s intoxication could have been used to show that there was some possibility the killing was accidental. Redden’s failure during the penalty trial to even hint at that possibility, though far from

\begin{footnotesize}
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\item MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1158 (10th ed. 2001).
\item See Martin Interview, supra note 6; see also supra Parts IV.A.6, IV.B.1.
\item See supra Part III.A.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See supra Parts III.A, IV.A.6, IV.B.1.
\end{enumerate}
\end{footnotesize}
dispositive, certainly does not lend credence to Judge Edmondson’s lingering doubt hypothesis.\footnote{See Chandler v. United States, 218 F.3d 1305, 1340-43 (11th Cir. 2000) (Tjoflat, J., concurring in part and dissenting in part). Judge Tjoflat appended transcripts of Drew Redden’s opening statement and closing argument from the sentencing trial to his opinion. See id.}

To find so much grist for the mill in a dignified court’s resolution of any appeal, let alone an appeal in a capital case, creates an uneasy feeling in even the most disinterested observer.\footnote{See supra Parts IV.A-B.} To further find oneself questioning the reasoning of a majority that has affirmed a death sentence is even more disturbing.\footnote{See id.}

Thirty years ago, the Supreme Court overturned the death penalty laws nationwide because they led to arbitrary and capricious outcomes.\footnote{Supra Part I.B.} The thrust of the application of the death penalty in the United States since that time has been directed at removing the arbitrary element; the Supreme Court now appears well satisfied with the process.\footnote{See id.} The cases, however, seem to tell a different story. Chandler’s habeas counsel, Atlanta-based John Martin, will tell anyone who asks that it is practically impossible to predict whether a post-\textit{Furman} defendant would receive a death sentence. Presumably, many capital defenders would agree.\footnote{See Martin Interview, supra note 6.} That is the very system that thirty years ago \textit{Furman} said must cease.\footnote{See supra Part I.B.} However, it is the very same system set up by \textit{Gregg, Woodson, Lockett, Strickland}, and a line of cases continuing to the present day.\footnote{See supra Part I.B-C.} Maybe there are some defendants who deserve to be executed by the state for their crimes. But if one extracts several cases from the post-\textit{Furman} case law and the names of the defendants are David Washington, Willie Darden, Thomas Pitera, Chris Burger, Terry Williams and Ronnie Chandler, and you know that two of those defendants will live, is anyone sure that Ronnie Chandler is one of the men who deserves to die?\footnote{See supra Parts I-IV.}
That is the question a person who believes in the death penalty would ask.\textsuperscript{452} Conversely, a person who does not believe in the death penalty, instead of asking questions, might be happier moving to a nation that does not countenance the killing of any of its citizens.

\textit{Bill Cristman}\textsuperscript{453}

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\textsuperscript{452} See Little, \textit{supra} note 40, at 450-52 (questioning the dispersal of death sentences throughout the federal system).
\textsuperscript{453} The author wishes to thank his wife, Janet Cigainero, for her love and support; Professor Anne Emanuel, who graciously read several drafts of this Comment and made many valuable suggestions for improvement; Professor Palmer Singleton, who suggested the topic, read an early draft, and also made several helpful suggestions; special thanks to Jack Martin for his accessibility, practical insights, and kind encouragement of my research into the \textit{Chandler} case and Eleventh Circuit death penalty jurisprudence.