LIVING AND DYING WITH A DOUBLE-EDGED SWORD: MENTAL HEALTH EVIDENCE IN THE TENTH CIRCUIT'S CAPITAL CASES

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INTRODUCTION

In February 2010, a divided panel of the Tenth Circuit affirmed a federal district court's denial of a habeas corpus petition filed by Billy Ray Alverson, an Oklahoma state prisoner sentenced to death for first-degree murder. Among other allegations, Mr. Alverson contended that an Oklahoma trial court had violated his due process rights under *Ake v. Oklahoma*[1] by denying his request for funding for a neurological examination to assess the possible effects of head injuries that he had suffered as a child.[2] The state trial court had discounted the conclusion of a licensed clinical social worker that Mr. Alverson had shown signs of organic brain impairment and that further testing was warranted. The Oklahoma Court of Criminal Appeals affirmed that ruling on appeal and then denied post-conviction relief.[3]

Judge Paul Kelly dissented. In his view, the state trial court had erred when it failed to approve funds for neuropsychological testing. He reasoned that, "If Mr. Alverson had received a competent [neuropsychological] evaluation, he very well could have presented evidence that he was not a psychopath and that he suffered from an undiagnosed organic brain disorder reducing his culpability for his behavior."[4] In that event, Mr. Alverson would have been able to present this mitigating evidence, and a jury might well have sentenced him to life imprisonment rather than death.[5]

The contrasting opinions about the requested neuropsychological evaluation in *Alverson* reflect an ongoing and evolving debate in the

† Adjunct Professor of Law, Oklahoma City University; Law Clerk to the Honorable Robert H. Henry, United States Circuit Judge for the Tenth Circuit, 1994-2010. I would like to thank Judge Henry for sixteen rewarding years in his chambers: it was an honor and a privilege to serve with him. I would also like to thank Webster Cash, Lee Fanyo, and the advisors and editors of the *Denver University Law Review* for their tireless work and their guidance. Finally, I am deeply grateful to my wife Sheridan McCaffree, our children Robby and Aidan, and my mother Marjorie Ramana for their love, encouragement, and support. My father, the late Dr. C.V. Ramana, inspired my interest in mental health issues, and this article is dedicated to his memory.

1. 470 U.S. 68 (1985).
2. *See id.* at 83.
3. Alverson v. Workman, 595 F.3d 1142, 1151–52 (10th Cir. 2010) (quoting Alverson v. State, 983 P.2d 498, 511 n.34 (Okla. Crim. App. 1999)).
4. *Alverson*, 595 F.3d at 1170 (Kelly, J., dissenting).
5. *See id.*

Tenth Circuit's capital cases about the significance of evidence regarding the defendant's mental health—which may include not only evidence of organic brain damage but also evidence of cognitive impairments, mental illness without a discrete organic cause, and evidence that the defendant suffered "childhood privation and abuse."[6]

On the one hand, the court has stated that evidence like that concerning Mr. Alverson's alleged organic brain disorder "is exactly the sort . . . that garners the most sympathy from jurors" and that the significance of this kind of evidence cannot be overstated.[7] As a result, when a capital defendant's counsel has failed to conduct an adequate investigation regarding that evidence and has then failed to present it during sentencing, the Tenth Circuit has held that the defendant has been deprived of his right to the effective assistance of counsel under the Sixth Amendment.[8] Engaging in the two-part inquiry required by *Strickland v. Washington*,[9] the court has concluded that (1) defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"[10] and (2) counsel's errors rendered the sentencing proceedings unreliable, thereby warranting a second hearing at which the mitigating mental health evidence could be presented.[11]

On the other hand, the Tenth Circuit has also concluded that this same kind of evidence may constitute an aggravating circumstance that supports the prosecution's contention that the defendant should be sentenced to death.[12] The court has characterized this evidence as "a double-edged sword" and has held that counsel's failure to present it may well be a legitimate strategy designed to save the defendant's life and that the failure to present that evidence was thus not prejudicial.[13]

These conflicting characterizations of mental health evidence present considerable difficulties for capital defendants' counsel seeking to craft an effective strategy during the sentencing phase, as well as for reviewing courts that must assess that strategy under Sixth Amendment standards. In this Article, I outline the mitigating and aggravating sides of that "double-edged sword" by examining three of the Tenth Circuit's decisions that have assessed the effects of counsel's failure to present mental health evidence: *Smith v. Mullin*,[14] *Bryan v. Mullin*,[15] and *Wilson*

6. Smith v. Mullin, 379 F.3d 919, 943 (10th Cir. 2004).
7. *See* Anderson v. Sirmons, 476 F.3d 1131, 1147 (10th Cir. 2007) (quoting *Mullin*, 379 F.3d at 942).
8. *See, e.g.*, *Anderson*, 476 F.3d at 1142–48; *Mullin*, 379 F.3d at 938–44.
9. 466 U.S. 668, 687 (1984).
10. *Anderson*, 476 F.3d at 1142.
11. *See, e.g.*, *id.* at 1142–48; *Mullin*, 379 F.3d at 938–44.
12. *See, e.g.*, Gilson v. Sirmons, 520 F.3d 1196, 1244–50 (10th Cir. 2008); Bryan v. Mullin, 335 F.3d 1207, 1222–23 nn.21–22 (10th Cir. 2003) (en banc); McCracken v. Gibson, 268 F.3d 970, 980 (10th Cir. 2001).
13. *See Bryan*, 335 F.3d at 1222 n.21; *McCracken*, 268 F.3d at 980.
14. 379 F.3d 919 (2004).

v. Sirmons.[16] The cases reach different results. *Smith* concludes that it was patently unreasonable for counsel to fail to present the mental health evidence and that there was a reasonable probability that at least one juror would have returned a life sentence if he or she had heard the evidence that counsel failed to present. In contrast, *Bryan* holds that in light of the "double-edged" quality of similar mental health evidence, counsel made a reasonable strategic decision to withhold the evidence from the jury. *Wilson* concludes that, in light of the particular record before it, an evidentiary hearing is required to assess the significance of the mental health evidence.

Each approach is supported by Supreme Court precedent and empirical studies, both of which conclude that mental health evidence may be both mitigating and aggravating. In my view, that ambiguity, or "double-edgedness," suggests a heightened role for the factfinder—either a state court assessing a post-conviction Sixth Amendment claim for ineffective assistance of counsel based on the failure to present mental health evidence or a federal district court adjudicating a 28 U.S.C. § 2254 habeas corpus petition and, in some instances, vested with discretion to conduct an evidentiary hearing on such a claim. In the final section of this Article, I suggest that a more fact-based approach to the assessment of mental health evidence may help to resolve some of the apparent inconsistencies triggered by the doubled-edged characterization.

A. The Mitigating Edge in Smith v. Mullin

The circuit's decision in *Smith v. Mullin* highlights the mitigating edge of mental health evidence.[17] After a jury convicted Roderick Smith of the first-degree murder of his wife and four young stepchildren, recommending sentences of death (which the trial court imposed), Mr. Smith alleged in post-conviction proceedings in both state and federal court that he had received ineffective assistance of counsel at sentencing, in violation of his Sixth Amendment rights. In particular, Mr. Smith asserted that his trial counsel did not understand that his client's borderline mental retardation, mental illness, and organic brain impairment could be presented to the jury as grounds for rejecting a death sentence. Both the Oklahoma Court of Criminal Appeals and the federal district court rejected that claim.

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15. 335 F.3d 1207 (2003).

16. 536 F.3d 1064 (10th Cir. 2008), *aff'd on reh'g en banc sub nom.* Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009). On rehearing en banc, the Tenth Circuit held:

> [T]he panel in *Wilson* was correct in its holding that AEDPA deference does not apply when, pursuant to [Oklahoma Appellate] Rule 3.11, the [Oklahoma Court of Criminal Appeals] decides an ineffective assistance of counsel claim without consideration of non-record evidence that, "if true and not contravened by the existing factual record, would entitle the petitioner to habeas relief" under *Strickland*.

Wilson, 577 F.3d at 1287 (quoting Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998)). I do not consider that part of the *Wilson* holding in this Article.

17. *Smith*, 379 F.3d at 939–44.

The federal district court concluded that Mr. Smith's counsel's failure to present mitigating evidence constituted deficient performance, thereby establishing the first component of the *Strickland* inquiry.[18] However, it further concluded that counsel's failure to present mental health evidence was not prejudicial, reasoning that Mr. Smith's mental illness "tend[ed] to portray [Mr. Smith] as an unstable individual with very little control over his impulses" and would have "negated much of the mitigation evidence actually presented to the jury of [Mr. Smith's] good work history and friend's and relatives perception of [Mr. Smith] as a kind hearted person."[19] In short, in the district court's view, the mental health evidence offered by Mr. Smith at the evidentiary hearing was "double-edged" and thus did not warrant the grant of habeas corpus relief.[20]

The Tenth Circuit agreed with the district court that Mr. Smith's counsel's performance was deficient. That conclusion was based in part on the statement of Mr. Smith's trial counsel, who admitted at the evidentiary hearing "[a]stoundingly," that he was unaware that evidence of Mr. Smith's mental illness could be offered in support of the contention that a death sentence was not justified.[21] Because of that misunderstanding, counsel invoked only mitigating circumstances that involved Mr. Smith's surrender and confession to the police, his expression of remorse, the fact that he had not attempted to flee, a lack of stab wounds on some of the victims, and the fact that his life had value to his friends and family.[22]

Despite this rather cursory argument for a life sentence, there was significant evidence regarding Mr. Smith's mental health that his counsel could have presented. At the federal evidentiary hearing, Mr. Smith's counsel established that his client was completely illiterate, that his IQ was in the mentally retarded or borderline mentally retarded range, and that his cognitive abilities and his emotional development resembled that of a twelve-year-old child.[23] In addition, when he was a child, Mr. Smith had nearly drowned, and he had suffered brain damage as a result.[24] At the evidentiary hearing, a neuropsychologist testified that the near drowning could cause damage to those areas of the brain that are in-

18. *See id.* at 939.

19. *Id.* at 943 (second, third, and fourth alterations in original).

20. *Id.* at 943 n.11 (discussing the following Tenth Circuit decisions invoked by the district court in support of the characterization of mental health evidence as "double-edged"); *see also* McCracken v. Gibson, 268 F.3d 970, 980 (10th Cir. 2001); Cannon v. Gibson, 259 F.3d 1253, 1277–78 (10th Cir. 2001); Smith v. Massey, 235 F.3d 1259, 1282 (10th Cir. 2000); Davis v. Exec. Dir. of Dep't of Corr., 100 F.3d 750, 761 (10th Cir. 1996)).

21. *Smith*, 379 F.3d at 939.

22. *See id.* at 940.

23. *Id.* at 941.

24. *Id.*

volved in emotional regulation.[25] About individuals who have suffered such injuries, he explained:

> [T]heir emotional regulation is also disrupted, and so their behavior becomes erratic or out of control or aggressive, and any number of emotional problems can result that are usually not consistent with whatever is going on in the environment around them, and that represents the direct cause of the brain injury, as well as an inability to cope or interact with stress or what's going on in the environment in a way that most of us would see to be reasonable or prudent or understandable.[26]

In addition, Mr. Smith's mother offered testimony at the evidentiary hearing that corroborated the neuropsychologist's conclusions about the effect of the oxygen loss on Mr. Smith's mental functioning. She explained that Mr. Smith became "slower . . . [and] didn't act like he understood whatever I said to him."[27] These changes resulted in Mr. Smith being tormented by other children. He eventually finished high school but lived with his mother until he moved in with his wife and her four children.[28]

In contrast to the district court, the Tenth Circuit concluded that Mr. Smith's failure to present this mental health evidence to the jury at sentencing was prejudicial under the *Strickland* standard—there was a reasonable probability that, if the mental health evidence introduced at the evidentiary hearing had been offered at sentencing, the jury would have concluded that the "balance of aggravating and mitigating circumstances did not warrant death."[29] In that context, a reasonable probability meant less than a preponderance of the evidence, but a probability "sufficient to undermine confidence in the outcome."[30]

The *Smith* panel's conclusions as to deficient performance and prejudice are grounded in Supreme Court precedent regarding the presentation of mitigating evidence in capital sentencing proceedings. Accordingly, in order to elucidate the *Smith* decision as well as subsequent circuit decisions that focus on the mitigating edge of mental health evidence, I briefly outline the precedent that *Smith* applies.

1. Mitigating Evidence After *Woodson v. North Carolina*[31]

The path to the *Smith* panel's conclusion that "evidence of [his] mental retardation, brain damage, and troubled background constituted

25. *Id.*
26. *Id.*
27. *Id.* (alteration in original).
28. *Id.* at 941–42.
29. *Id.* at 942 (quoting Mayes v. Gibson, 210 F.3d 1284, 1290 (10th Cir. 2000)).
30. *Smith*, 379 F.3d at 942 (quoting Fisher v. Gibson, 282 F.3d 1283, 1307 (10th Cir. 2002)).
31. 428 U.S. 280 (1976).

mitigating evidence"[32] begins with the Supreme Court's decision in *Woodson v. North Carolina*. There, Justice Stewart's plurality opinion concluded that a state statute that made death the mandatory sentence for all persons convicted of first-degree murder violated the Eighth Amendment prohibition against cruel and unusual punishment, in part because the statute "fail[ed] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[33] The Court explained:

> [D]eath is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats 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.[34]

Two years later, in *Lockett v. Ohio*,[35] a plurality of the Court applied those principles to a state statute that required a death sentence unless the sentencing judge determined by a preponderance of the evidence that one of several specific mitigating factors existed.[36] In concluding that the statute violated the Eighth Amendment, the plurality explained:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[37]

Then, in *Eddings v. Oklahoma*,[38] the Court applied *Woodson* and *Lockett* to a sentencing proceeding in which the judge had ruled as a matter of law that he could not consider the circumstances of a sixteen-year-old capital defendant's troubled childhood.[39] The Court held that the re-

32. *Smith*, 379 F.3d at 942.
33. *Woodson*, 428 U.S. at 303.
34. *Id.* at 303–04 (citations omitted).
35. 438 U.S. 586 (1978).
36. *Id.* at 607 (citing OHIO REV. CODE ANN. § 2929.04(B) (West 1975)). Three of the factors to consider are whether: (1) "The victim of the offense induced or facilitated [the offense]"; (2) "It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation"; (3) "The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." § 299.04(B)(1)–(3).
37. *Lockett*, 438 U.S. at 604 (footnote omitted).
38. 455 U.S. 104 (1982).
39. *Id.* at 111–14. At sentencing, the defendant's juvenile officer testified that the defendant's parent had divorced when the defendant was five years old, that the defendant had lived without supervision, that his "mother was an alcoholic and possibly a prostitute," and that his father had used excessive physical punishment. *Id.* at 107.

fusal to consider those circumstances violated the Eighth Amendment, as construed by *Lockett*: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."[40] The evidence at issue was "relevant mitigating evidence."[41] Although in some cases, the Court stated:

> [S]uch evidence properly may be given little weight. . . . [W]hen the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.[42]

The Court subsequently explained that even "rather atypical" mitigating evidence may not be excluded, for example evidence that a defendant had a "habit of inhaling gasoline fumes" and "had once passed out" as a result, that after this incident "his mind tended to wander," that he "had been one of seven children in a poor family," "that his father had died of cancer," and, "that he had been "a fond and affectionate uncle."[43]

In *Penry v. Lynaugh*,[44] the Court offered a further explanation of the significance of mental health evidence. The defendant there had presented evidence of his mental retardation and abused childhood, but the trial court's instructions did not adequately instruct the jury on how to consider that information.[45] Concluding that the sentencing proceeding had violated the Eighth Amendment, the Court stated that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant."[46] "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[47]

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40. *Id.* at 113–14.
41. *Id.* at 114.
42. *Id.* at 115.
43. Abdul-Kabir v. Quarterman, 550 U.S. 233, 249 (2007) (discussing the mitigating evidence in Hitchcock v. Dugger, 481 U.S. 393, 397 (1987)).
44. 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).
45. *Penry*, 492 at 312. Instead, the instructions directed the jury to consider only the following questions in determining an appropriate sentence: (1) did the defendant act deliberately when he murdered the defendant?; (2) was there a probability that the defendant would be dangerous in the future?; and (3) did the defendant act unreasonably in response to provocation? *Id.* at 310.
46. *Id.* at 319.
47. *Id.* (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

2. *Williams* and *Wiggins*

Although *Woodson*, *Lockett*, *Eddings*, and *Penry* establish that Mr. Smith was entitled to present evidence regarding his cognitive impairments, brain damage, and difficult childhood, two more recent cases provided the Tenth Circuit with direct guidance regarding his ineffective assistance of counsel claim: *Williams v. Taylor*[48] and *Wiggins v. Smith*.[49]

In *Williams*, the defendant's trial counsel had offered as mitigating evidence at sentencing only "the testimony of the [defendant's] mother, two neighbors, and a taped excerpt from a statement by a psychiatrist."[50] The mother and neighbors described the defendant as a "nice boy" and "not a violent person."[51] The psychiatrist reported a statement by the defendant that during an earlier robbery the defendant had removed the bullets from a gun so that he would not hurt anyone.[52] During closing argument, the defendant's attorney requested the jury to spare his life because the defendant had turned himself in to the police.[53] However, in state post-conviction proceedings, Mr. Williams offered substantial evidence of a "nightmarish childhood" and a diagnosis of "borderline mentally retarded."[54] In addition, post-conviction counsel established that the defendant's parents had been imprisoned for the criminal neglect of their children and that the defendant, Williams had been severely beaten by his father.[55] The defendant also submitted evidence of his good behavior while incarcerated.[56]

Concluding that the Virginia Supreme Court had unreasonably applied federal law, the Supreme Court held that the defendant had established both components of his claim for ineffective assistance of counsel.[57] With regard to counsel's deficient performance, the Court concluded that counsel's failure to introduce voluminous amounts of mitigating evidence was not a tactical decision.[58] As to prejudice, the Court concluded that the Virginia Supreme Court had misread *Strickland*[59] and had also failed to evaluate the totality of mitigating evidence offered by the defendant.[60] In the Court's view, "the graphic description of Wil-

48. 529 U.S. 362 (2000).
49. 539 U.S. 510 (2003).
50. *Williams*, 529 U.S. at 369.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 395–96.
55. *Id.* at 395.
56. *Id.* at 396.
57. *Id.* at 396–97.
58. *Id.* at 396.
59. *Williams*, 529 at 391. In particular, in the Supreme Court's view, the Virginia Supreme Court had erred in holding that *Lockhart v. Fretwell*, 506 U.S. 364 (1993) had modified the standard for ineffective assistance of counsel claims set forth in *Strickland*.
60. *Williams*, 529 at 397.

liams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."[61] This evidence supported the contention that the defendant's behavior was "a compulsive reaction rather than the product of cold-blooded premeditation."[62]

Similarly, in *Wiggins*, during the state court sentencing proceedings, the defendant's counsel failed to challenge the prosecution's arguments for the death penalty with available evidence regarding the defendant's mental health.[63] In state post-conviction proceedings, the defendant offered a social history report prepared by a licensed social worker and based upon records from social service agencies, medical facilities and schools.[64] The report found that the defendant's mother was a chronic alcoholic who frequently left her children at home, "forcing them to beg for food and to eat paint chips and garbage."[65] The mother's abusive conduct, which included beating the defendant and holding his hand on a hot stove, led to his placement in foster care at age six, where he was subjected to physical and sexual abuse.[66] At sixteen, the defendant ran away from his foster home and began living on the streets.[67]

As in *Williams*, the Supreme Court concluded that the defendant had established both components of an ineffective assistance of counsel claim.[68] As to the deficient performance prong, the Court cited state practice standards[69] as well as the American Bar Association standards for capital defense work, which provide that investigations of mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[70] In light of those standards, the Court held that Mr. Wiggins' counsel's investigation of mitigating circumstances was unreasonably narrow in scope.[71] The evidence subsequently compiled in the state post-conviction proceedings (documenting

61. *Id.* at 398.
62. *Id.*
63. Instead, the defendant's counsel requested bifurcation of the sentencing proceedings. Counsel sought to first argue that the defendant did not kill the victim with his own hand and then to argue, in a second phase of the sentencing, that psychological reports and expert testimony demonstrated that the defendant had limited intellectual capacity and had not engaged in an aggressive pattern of behavior. When the judge denied the request for bifurcation, counsel made a proffer regarding this evidence. Wiggins v. Smith, 539 U.S. 510, 515–16 (2003).
64. *Id.* at 516.
65. *Id.* at 516–17.
66. *Id.* at 517.
67. *Id.*
68. *Id.* at 535.
69. "[S]tandard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report." *Id.* at 524.
70. *Id.* (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 11.4.1(C), at 93 (1989)).
71. *Wiggins*, 539 U.S. at 524.

Mr. Wiggins' "excruciating life history") was readily available to his trial counsel.[72]

As to prejudice, the Court observed that the sentencing jury heard evidence of only one mitigating factor—that Mr. Wiggins had no prior convictions.[73] The information in the life history report was a "powerful mitigating narrative."[74] In addition, in contrast to other defendants (particularly the petitioner in *Williams v. Taylor*), Mr. Wiggins did not have a record of violent conduct that could be used to rebut the evidence in the life history report.[75] Accordingly, if the evidence in that report had been introduced to the jury, there was a reasonable probability that at least one juror would have declined to impose the death penalty.[76]

3. *Smith*'s Application of *Williams* and *Wiggins*

In concluding that Mr. Smith had established both the deficient performance and prejudice prongs of the *Strickland* analysis, the Tenth Circuit applied *Williams* and *Wiggins*.[77] Observing that both Supreme Court decisions cited the ABA Guidelines statement that mental health evidence is "of vital importance to the jury's decision at the punishment phase,"[78] the *Smith* panel noted that the defendant's counsel had failed to offer any mental health evidence at sentencing.[79] Thus, his performance was clearly deficient under *Williams*, *Wiggins*, and the ABA Guidelines.[80]

With regard to prejudice, the Tenth Circuit explained that the circumstances in Mr. Smith's case were "quite similar" to those in *Williams*.[81] In both cases, counsel's failure to present mental health evidence meant that the jury never received an explanation for the defendant's conduct.[82] In both cases, the evidence that counsel failed to present was "consistent with the view that [the offense conduct] was a compulsive reaction rather than the product of cold-blooded premeditation."[83] The Tenth Circuit also noted that the evidence presented to the jury in *Williams* in support of the death penalty was quite strong, as it was in Mr. Smith's case.[84] Nevertheless, as in *Williams* and *Wiggins*, the fact that the mitigation case presented by Mr. Smith's counsel at sentencing was

72. *Id.* at 537–38.
73. *Id.* at 537.
74. *Id.*
75. *Id.*
76. *Id.*
77. Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004).
78. *Id.*
79. *See id.* at 944.
80. *See id.*
81. *Id.* at 943.
82. *Id.*
83. *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 398 (2000)).
84. *Smith*, 379 F.3d at 944.

"pitifully incomplete, and in some respects, bordered on the absurd,"[85]—when combined with the fact that the mental health evidence subsequently presented offered a compelling explanation for his behavior—was sufficient to undermine the Tenth Circuit's confidence in the death sentence and therefore establish prejudice.

4. Supporting Empirical Evidence

In addition to *Williams* and *Wiggins*, the *Smith* panel invoked findings by social scientists regarding the effect of mental health evidence on jurors in capital cases. According to the court, the mental health evidence that Mr. Smith's counsel failed to present "is exactly the sort of evidence that garners the most sympathy from jurors."[86]

First, the court cited the conclusions of a death penalty expert who testified at the federal evidentiary hearing that jurors "respond to and find mitigating [this type of evidence,] and [they] are more likely to vote for life rather than death sentences in cases where there is . . . clear and clearly presented evidence that the defendant has suffered some form of mental illness."[87] Next, the court cited a report from the Capital Jury Project about interviews with 153 jurors from forty-one capital murder cases in South Carolina.[88] With regard to mental health evidence, the jurors in the study were asked about the effects of evidence that: (1) "the killing was committed under the influence of extreme mental or emotional disturbance"; (2) "the defendant had a history of mental illness"; and (3) the defendant was mentally retarded.[89] In reporting the results, Professor Garvey characterized these three categories of mental health evidence as examples of reduced culpability.[90] Within that broad category, he distinguished "proximate reduced culpability" from "remote reduced culpability."[91] "Evidence of 'proximate' reduced culpability is evidence that 'suggests any impairment of a defendant's capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences.'"[92] Remote reduced culpability involves the defendant's character. It includes evidence that the defendant was abused as a child as well as "other deprivations that may have helped shape the defendant into the kind of person for whom a capital crime was a conceivable course of action."[93] As Professor Garvey explains, "[P]roximate

85. *Id.*
86. *Id.* at 942.
87. *Id.* (alterations in original).
88. *Id.* (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559 (1998)).
89. Garvey, *supra* note 88, at 1564–65.
90. *Id.* at 1562.
91. *Id.*
92. *Id.* (quoting Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 846 (1992) (book review)).
93. *Id.*

reduced culpability speaks to the defendant's lack of responsibility for what he has *done*; remote reduced culpability speaks to his lack of responsibility for who he *is*."[94] All three questions about the defendant's mental retardation or mental illness involved "proximate reduced culpability."[95]

The jurors' responses indicated that mental retardation had the strongest mitigating effect: 44.3% of them reported that they were much less likely to vote for the death penalty if this factor was present, and 29.5% stated that they would be slightly less likely to vote for the death penalty.[96] A history of mental illness or a particular mental illness that influenced the defendant during the killing were not afforded the same significance as evidence of mental retardation, but those factors were still regarded as having substantial mitigating effect: 26.7% of responding jurors stated that they would be much less likely to return a death sentence if the defendant had a history of mental illness, while 29.5% reported that they would be slightly less likely to do so.[97] If the killing was committed under the influence of extreme mental or emotional disturbance, the responding jurors reported approximately the same mitigating effect: 24.5% stated that they would be much less likely to vote for the death penalty, and 30.1% stated that they would be slightly less likely to vote for it.[98] Notably, the South Carolina jurors described other factors related to the defendant's mental health as significantly less mitigating. Only 18.5% ascribed any significant mitigating effect to the fact that the killing was committed under the influence of drugs and only 18.3% ascribed any such effect to the fact that the killing was committed under the influence of alcohol.[99] Similarly, with regard to evidence that the defendant had been seriously abused as a child and that the defendant had suffered extreme poverty as a child—examples of "remote reduced culpability" in Professor Garvey's scheme—the jurors reported a simi-

94. *Id.* (emphasis added).

95. *Id.* at 1564–65.

96. *Id.* at 1559. 23.5% of the responding jurors reported that they were just as likely to vote for the death penalty if the defendant was mentally retarded; 2.0% reported that they would be slightly more likely to vote for the death penalty in that circumstance, while 0.7% reported that they would be much more likely to vote for the death penalty. *Id.*

97. *Id.* 40.4% of the responding jurors stated that such evidence of mental illness would have no effect, 2.1% stated that such evidence would make them slightly more likely to vote for the death penalty, while 1.4% stated that the evidence would make them much more likely to vote for the death penalty. *Id.*

98. *Id.* at 1555. 37.1% of the responding jurors stated that they would be just as likely to impose the death penalty, 4.9 % stated that they would be slightly more likely to impose the death penalty, while 3.5% stated that they would be much more likely to impose the death penalty in this circumstance.

99. *Id.* at 1565. In particular, 6.2% of jurors reported that they would be much less likely to impose a death sentence if the defendant was under the influence of drugs at the time of the killing, while 12.3% reported that they would be slightly less likely to impose the death penalty in that circumstance. *Id.* at 1555. With regard to a defendant under the influence of alcohol, the percentages were 6.1 and 12.2. *Id.* Both questions involve "proximate reduced culpability" in Professor Garvey's scheme. *Id.* at 1562.

larly limited mitigating effect.[100] A third of the jurors would ascribe some mitigating effect to evidence that the defendant had been seriously abused as a child, while only 15% gave any significance to the fact that the defendant grew up in extreme poverty.[101]

The *Smith* court also cited a study reporting national polling data on attitudes toward the death penalty. The study found the fact that the defendant was mentally retarded "much more" mitigating than other factors.[102]

5. Rejection of the District Court's Double-Edged Sword Analysis

Finally, the *Smith* court rejected the district court's application of circuit precedent to find that evidence of Mr. Smith's mental illness and troubled childhood was "double-edged." The district court had reasoned that this evidence (which was offered at the federal evidentiary hearing) tended to portray Mr. Smith "as an unstable individual with very little control over his impulses" and would have "negated much of the mitigation evidence actually presented to the jury of [Mr. Smith's] good work history and friend's and relatives perception of [Mr. Smith] as a kind hearted person."[103] In the Tenth Circuit's view, these statements failed to acknowledge the fundamental purpose of presenting mitigating mental health evidence: to provide an explanation of how Mr. Smith's mental illness caused him to commit such a horrific crime. In addition, the *Smith* panel reasoned that the district court had misread circuit precedent. In the cases cited by the district court to support the double-edged characterization of Mr. Smith's evidence, the excluded mental health evidence would have placed other evidence of the defendant's aggressive and violent behavior before the jury, thereby undermining the mitigating effect.[104] In contrast, in Mr. Smith's case, the jury had already heard evidence of the "aggravating edge" of Mr. Smith's mental impairments.[105]

100. *Id.* at 1562.

101. *Id.* at 1565.

102. Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004) (citing Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1468–69 (1998)).

103. *Smith*, 379 F.3d at 943 (alterations in original).

104. *Id.* at 943 n.11 (citing McCracken v. Gibson, 268 F.3d 970, 979–80 (10th Cir. 2001); Cannon v. Gibson, 259 F.3d 1253, 1277–78 (10th Cir. 2001); Smith v. Massey, 235 F.3d 1259, 1282 (10th Cir. 2000); Davis v. Exec. Dir. of Dep't of Corr., 100 F.3d 750, 760–61 (10th Cir. 1996)).

105. *Mullin*, 379 F.3d at 943 n.11. In its subsequent decision in Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007), the Tenth Circuit followed *Smith*'s analysis closely in holding that the defendant's counsel's failure to present mental health evidence was both deficient and prejudicial. The mental health evidence there included testimony that the defendant "was raised in an environment of neglect and abuse," suffered from brain damage, and drug use, which the defendant had tried to overcome. *Id.* at 1143–44. The court explained that the defendant's brain damage might be perceived by lay persons as "'meanness' or antisocial behavior, but with expert evaluation and explanation is properly explained as deriving from disruption and impairments to the nervous system." *Id.* "Although the case against [the defendant] was strong and the murders in this case were horrific," the Tenth Circuit stated, "courts have not hesitated to grant relief in similar circumstances where the

B. The Aggravating Edge in Bryan v. Mullin[106]

In *Bryan v. Mullin*, a case decided one year before *Smith*, the Tenth Circuit characterized the mental health evidence in a capital case in much different terms. Like Mr. Smith, Robert Leroy Bryan was convicted of first-degree murder in an Oklahoma state court. The victim was Mr. Bryan's aunt, whose signature Mr. Bryan had attempted to forge on promissory notes and agreements purporting to pay him millions of dollars. Mr. Bryan had a history of organic brain disease, which may have been related to a severe case of diabetes. Four years before the murder of his aunt, Mr. Bryan had been charged with solicitation to commit another murder. In that prior case, the trial judge initially found Mr. Bryan incompetent to stand trial and sent him to a state psychiatric facility for treatment. There, psychiatrists concluded that Mr. Bryan suffered from an organic delusional disorder and was severely psychotic when he was first admitted to the hospital. They further concluded that Mr. Bryan's brain exhibited significant signs of atrophy. The psychiatrists treated him with an antipsychotic drug, and they then determined him to be competent.

After unsuccessfully challenging Mr. Bryan's competency, a public defender filed a notice that he intended to rely on an insanity defense. Mr. Bryan and his parents stated that they did not want to rely on that defense, and Mr. Bryan then hired new counsel. Neither at the guilt phase nor at sentencing did the retained counsel present any mental health evidence on behalf of Mr. Bryan.

After the Oklahoma state courts affirmed Mr. Bryan's conviction and death sentence, Mr. Bryan filed a federal habeas corpus action alleging ineffective assistance of counsel based on the failure to present mental health evidence during the guilt and sentencing phases of the trial. At an evidentiary hearing before the district court, Mr. Bryan offered a report from a psychiatrist that concluded that Mr. Bryan suffered from an "extensive paranoid delusional system [and] fragmentation of thought."[107] Similarly, a psychologist found that Mr. Bryan "suffer[ed] from a serious mental disorder which places into serious question . . . his legal culpability in the crimes for which he is charged."[108] A brain scan revealed that Mr. Bryan suffered from multiple areas of irreversible brain damage.[109]

Despite this information, which seemed to resemble what the *Smith* panel deemed "the sort of evidence that garners the most sympathy from

absence of available mitigation evidence left the jury with a 'pitifully incomplete' picture of the defendant." *Id.* at 1148 (quoting *Smith*, 379 F.3d at 944).

106. 335 F.3d 1207 (10th Cir. 2003) (en banc).

107. *Id.* at 1230 (Henry, J., concurring in part and dissenting in part).

108. *Id.*

109. *Id.* at 1231.

jurors,"[110] the Tenth Circuit, sitting en banc, affirmed the district court's denial of Mr. Bryan's ineffective assistance of counsel claim.[111] As to the guilt phase, the court concluded that the evidence available to Mr. Bryan's counsel at the time of the trial demonstrated that Mr. Bryan did not have a viable insanity defense.[112] As to the sentencing phase, the court held that the record indicated that Mr. Bryan's counsel understood the propriety of introducing mental health evidence as mitigation at sentencing, but that his counsel had made a reasonable strategic decision not to present the evidence—one that was "virtually unchallengeable" under the *Strickland* standard for determining whether counsel's performance was deficient.[113]

In the court's view, counsel had two legitimate reasons not to present the mental health evidence. First, Mr. Bryan's counsel "was concerned that testimony by either [the psychiatrist or the psychologist] might play into the prosecution's case that Bryan was a continuing threat to society."[114] In support of that concern, the court invoked an admission during the cross-examination of one of Mr. Bryan's attorneys during the federal district court hearing. Mr. Bryan's counsel answered in the affirmative to the questions, "[E]vidence of a psychological problem with the defendant . . . sometimes can be a double-edged sword in a capital case?"[115] Mr. Bryan's counsel was asked a second question: "[O]ften a jury might accept evidence of a psychological or emotional problem as evidence of aggravation?"[116] Mr. Bryan's counsel acknowledged that, "I've had that happen in several cases."[117] Second, Mr. Bryan's counsel believed that relying on the mental health evidence would be inconsistent with his defense in the guilt phase—that the prosecution had failed to prove that Mr. Bryan had committed the offense. In the court's view, Mr. Bryan's counsel had a reasonable concern that "an about-face during the penalty phase might compromise Bryan in the eyes of the jurors."[118]

Four circuit judges disagreed with that analysis.[119] However, as with *Smith*, there is Supreme Court precedent that supports the *Bryan* major-

110. *Smith*, 379 F.3d at 942.
111. *Bryan*, 335 F.3d at 1211.
112. *Id.* at 1219–20.
113. *Id.* at 1223–24; *see also* Strickland v. Washington, 466 U.S. 668, 690 (1984).
114. *Bryan*, 335 F.3d at 1222.
115. *Id.* at 1222 n.21.
116. *Id.*
117. *Id.*
118. *Id.* at 1223.
119. In the view of the dissent, "Mr. Bryan's counsel provided the most ineffective defense I have ever seen, amounting to a concession of guilt and relating none of the reams of compelling mitigating evidence." *Id.* at 1225 (Henry, J., concurring in part and dissenting in part). As to the deficient performance component of the *Strickland* inquiry, the dissent concluded that Mr. Bryan's counsel "made no attempt to provide the jury with the 'particularized nature of the crime and the particularized characteristics of the individual defendant.'" *Id.* at 1245 (quoting Gregg v. Georgia, 428 U.S. 153, 206 (1976)). As to prejudice, the dissent concluded that "[t]he compelling and extensive evidence of Mr. Bryan's history of mental illness creates a reasonable probability that the jury

ity's characterization of mental health evidence as an aggravating circumstance.

1. *Strickland v. Washington*, *Burger v. Kemp*,[120] and *Penry v. Lynaugh*

In *Strickland*—the decision that establishes the governing standard for ineffective assistance of counsel claims—the Supreme Court recognized that alleged mitigating evidence may also have an aggravating edge.[121] There, in preparing for a capital sentencing proceeding, the defendant's counsel conducted a very limited investigation. He spoke to the defendant about his background, and spoke by telephone with the defendant's wife and mother. Counsel did not search for character witnesses, and he did not request a psychological report. The defendant's counsel later explained that his conversations with his client did not indicate that the client had psychological problems.[122]

In post-conviction proceedings, the defendant alleged that he had received ineffective assistance of counsel in part because his attorney had failed to request a psychiatric report and had failed to investigate and present character witnesses.[123] The defendant submitted affidavits from friends, neighbors, and relatives as well as reports from a psychiatrist and psychologist stating that although he was not under the influence of extreme mental or emotional disturbance, he was "chronically frustrated and depressed because of his economic dilemma at the time of his crimes."[124]

After announcing a standard for assessing ineffective assistance of counsel claims, the Court applied it and found neither deficient performance nor prejudice.[125] As to prejudice, it reasoned that the evidence proffered in the post-conviction proceedings "would barely have altered the sentencing profile presented to the sentencing judge" and would "[i]ndeed . . . even have been harmful to his case: his 'rap sheet' would probably have been admitted into evidence, and the psychological reports would have directly contradicted [the defendant's] claim [at sentencing] that the mitigating circumstance of *extreme* emotional disturbance applied to his case."[126]

Three years later, in *Burger v. Kemp*, the Court engaged in similar reasoning. The defendant, who was seventeen at the time of the murder

would have concluded that the mitigating evidence outweighed the continuing threat aggravator and might also be viewed in a mitigating light as to past violent behavior." *Bryan*, 335 F.3d at 1245.

120. 483 U.S. 776 (1987).

121. S*trickland*, 466 U.S. at 700.

122. *Id.* at 672–73.

123. *Id.* at 675.

124. *Id.* at 675–76 (internal quotation marks omitted).

125. *Id.* at 687–99.

126. *Id.* at 700 (emphasis added).

of which he was convicted, alleged that he had received ineffective assistance of counsel because his attorney had failed to present evidence that the defendant had "an exceptionally unhappy and unstable childhood"[127] during which one of his stepfathers had beaten his mother in his presence and the other had encouraged him to take drugs.[128] At the time counsel was appointed, the defendant had an IQ of 82, functioned as a 12-year-old, and had been diagnosed as having psychological problems.[129] Nevertheless, in holding that the defendant had not received ineffective assistance of counsel, the Court concluded that the attorney's decision "not to mount an all-out investigation into [the defendant's] background in search of mitigating circumstances was supported by reasonable professional judgment."[130]

The Court explained that the record at sentencing established that the defendant had no adult criminal record.[131] Information concerning the defendant's troubled childhood could have revealed information about his use of drugs, various encounters with law enforcement, and his violent tendencies. The latter evidence could have undermined the defendant's contention in the guilt phase of the trial that he acted under the influence of a codefendant. The Court endorsed the reasoning of the district judge who conducted a hearing on the defendant's habeas corpus claim:

> On one hand, a jury could react with sympathy over the tragic childhood [the defendant] endured. On the other hand, since [the defendant's] sanity was not at issue in this case, the prosecution could use this same testimony, after pointing out that [the defendant] was nevertheless responsible for his acts, to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of [the] victim.[132]

Although it does not involve an ineffective assistance of counsel claim, the Court's decision in *Penry* expresses a similar view of mental health evidence. In holding that a Texas jury was not properly instructed on the significance of mental retardation as mitigating evidence, the Court explained that "[the defendant's] mental retardation and history of abuse [was] thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[133]

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127. Burger v. Kemp, 483 U.S. 776, 789 (1987).
128. *Id.* at 790.
129. *Id.* at 811 (Blackmun, J., dissenting).
130. *Id.* at 794.
131. *Id.* at 790.
132. *Id.* at 794.
133. Penry v. Lynaugh, 492 U.S. 302, 324 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

2. Tenth Circuit Decisions Supporting *Bryan*'s Double-Edged View

When the en banc panel decided *Bryan*, several circuit decisions had already concluded that evidence of a defendant's mental illness could be double-edged and that counsel's failure to present it was neither deficient nor prejudicial under *Strickland*. The circuit's cases explained the aggravating effects of this evidence in varying terms.

First, according to the court's decisions, the omitted evidence might depict the defendant as impulsive and violent and thus more likely to constitute a continuing threat to society, a characterization often argued by the prosecution as an aggravating circumstance in support of the death penalty. For example, in *Cannon v. Gibson*,[134] cited by the *Bryan* majority,[135] the court concluded that the defendant's brain damage and resulting mental disorder, which prevented him from using appropriate judgment, might "have negated much of the mitigation evidence actually adduced by trial counsel" and might have supported the prosecution's contention that the defendant was a continuing threat.[136]

The circuit has also held that omitted mental health evidence may reveal particular incidents of violent or antisocial behavior, thus undermining the defendant's mitigation arguments.[137] In this sense, the evidence may contradict a particular theme that the defendant has previously asserted. For example, in *Cannon v. Gibson*, the court observed that the defendant had presented mitigation evidence regarding his exemplary work history, acts of kindness, his strong and continuing attachment to his young daughter, his lack of a prior criminal record, and his good conduct as a prisoner.[138] By depicting the defendant as an unstable individual lacking impulse control, the omitted evidence would have undermined those arguments for a life sentence.[139]

134. 259 F.3d 1253 (10th Cir. 2001).

135. Bryan v. Mullin, 335 F.3d 1207, 1222 (2003) (en banc).

136. *Cannon*, 259 F.3d at 1277–78. Other Tenth Circuit decisions have reached the same conclusion. *See, e.g.*, McCracken v. Gibson, 268 F.3d 970, 978–80 (10th Cir. 2001) (concluding that omitted evidence of the defendant's psychological problems, including a diagnosis of bipolar disorder, substance abuse, borderline and antisocial personality disorders, and multiple severe bouts of depression and had exhibited suicidal thoughts and tendencies would have revealed the defendant's impulsive and violent character and "could have bolstered the jury's conclusion that [the defendant] represented a continuing threat to society (a factor . . . [the defendant] vigorously disputed during the [sentencing] proceedings)").

137. *See, e.g.*, Duvall v. Reynolds, 139 F.3d 768, 782 (10th Cir. 1998) (observing that "[t]estimony concerning [the defendant's] substance abuse would have resulted in the introduction of details of [his] prior convictions and violent conduct, which invariably resulted from his substance abuse" and that "[t]he jury could have perceived such evidence as aggravating rather than mitigating").

138. *Cannon*, 259 F.3d at 1277.

139. *Id.* at 1277–78.

C. Wilson v. Sirmons*: Rounding the Edges*

The circuit's decisions in *Smith* and *Bryan* adopt contrasting approaches to mental health evidence that are difficult to harmonize. As noted above, in post-conviction proceedings both defendants offered evidence of severe mental illness that their attorneys did not present at sentencing. Yet the court viewed the evidence of Mr. Smith's organic brain damage as humanizing him and potentially explaining "a shocking crime."[140] On the other hand, Mr. Bryan's counsel viewed his illness as supporting the prosecution's contention that he was a continuing threat to society and thus deserved the death penalty, and the Tenth Circuit concluded that that assessment was reasonable.[141] Although there are important differences in the facts of the two cases—particularly the resistance of Mr. Bryan and his family to the presentation of the mental health evidence, which was not shared by Mr. Smith and his family[142]—those differences do not seem sufficient to justify such different results.

To be sure, the difficulty is not merely a matter of the circuit's precedent. The Supreme Court's decisions in *Eddings*, *Burger*, and *Penry* characterize mental health evidence resembling that offered by Mr. Smith and Mr. Bryan as mitigating, aggravating, or both. The Court's decisions "call[] for a greater degree of reliability when the death sentence is imposed,"[143] but that degree of reliability seems difficult to obtain when one must assess the effect of omitted mental health evidence on a capital jury.

Although it does not completely resolve the tension between *Smith* and *Bryan*, the circuit's 2008 decision in *Wilson v. Sirmons* offers substantial guidance for assessing mental health evidence in capital cases. I read *Wilson* to call for more thorough scrutiny of counsel's decisions to forgo the presentation of mental health evidence, as well as a more fact-intensive approach to assessing the prejudicial effect of failing to introduce such evidence—including the determination of whether the evidence was indeed a double-edged sword. I first examine the *Wilson* decision and then consider its significance to the law of the circuit.

1. The Decision in *Wilson*

An Oklahoma jury convicted Michael Lee Wilson of first-degree murder and robbery with a dangerous weapon.[144] The victim was a clerk at a convenience store where Mr. Wilson also worked.[145] The jury found

140. Smith v. Mullin, 379 F.3d 919, 943 (10th Cir. 2004).

141. Bryan v. Mullin, 335 F.3d 1207, 1220 (2003) (en banc).

142. As noted above, Mr. Smith's mother testified to his mental illness at the federal evidentiary hearing. *See Smith*, 379 F.3d at 941.

143. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

144. Wilson v. Sirmons, 536 F.3d 1064, 1070 (10th Cir. 2008), *aff'd on reh'g en banc sub nom.* Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009)

145. *Id.* at 1071.

three aggravating circumstances: "(1) [that] the murder was especially heinous, atrocious, or cruel; (2) [that] the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) [that] it was probable that [Mr. Wilson] would . . . constitute a continuing threat to society."[146] The trial court followed the jury's recommendation and sentenced Mr. Wilson to death.[147]

a. Mental Health Evidence Presented at Trial

Even though Mr. Wilson's counsel was appointed two years earlier, he waited until three weeks before the trial to contact a mental health expert.[148] At that point, counsel hired a clinical psychologist, who then proceeded to interview Mr. Wilson and administer several psychological tests. The psychologist also reviewed school and medical records, and read statements from five of Mr. Wilson's acquaintances.[149]

During the sentencing proceedings, Mr. Wilson's counsel called six witnesses in support of the case for mitigation: the psychologist, two acquaintances from church, two teachers, and Mr. Wilson's mother. The psychologist testified that Mr. Wilson's IQ of 126 placed him in the superior range of intelligence, which meant that Mr. Wilson could "do something with himself."[150] The psychologist only briefly described the results of the other tests that he had administered. In particular, the psychologist informed the jury that Mr. Wilson had experienced "a severe mental disorder with many of the personality scales elevated," and "[t]hat would suggest that he has a severe personality disturbance."[151] The psychologist also presented a brief social history of Mr. Wilson. He described Mr. Wilson's father as someone who was active in drugs and alcohol and not involved in his son's life. The psychologist offered two pictures of Mr. Wilson: "On the one hand, you have the picture of the Sunday school-going child. On the other hand, you have the picture of the gang and the uninvolved father, who did not set a particularly good role model."[152]

The psychologist did not inform the jury of a more specific conclusion that he had drawn from the tests he administered before trial "that Mr. Wilson suffered from generalized anxiety disorder, bipolar disorder (severe without psychotic features), and post-traumatic stress disorder" as well as indications of "paranoid personality disorder . . . with passive-aggressive and schizotypal personality features."[153] During cross-

146. *Id.* at 1072 (citing OKLA. STAT. ANN. tit. 21, § 701.12(4), (5), (7) (West 2002)).
147. *Wilson*, 536 F.3d 1064 at 1072.
148. *Id.* at 1074–75.
149. *Id.* at 1075.
150. *Id.* at 1076.
151. *Id.*
152. *Id.*
153. *Id.* at 1075.

examination—which the Tenth Circuit would later describe as "a train wreck for Mr. Wilson"[154]—the psychologist agreed with the prosecutor that Mr. Wilson's test results supported the conclusion that Mr. Wilson was "a psychopath" and was "the most likely to reoffend, based on the studies."[155] The prosecutor invoked this testimony during closing argument, calling Mr. Wilson a "psychopathic killer based on the evidence."[156]

During the mitigation phase, Mr. Wilson's church acquaintances described him as "mannerable," "respectful," and "intelligent."[157] Mr. Wilson's teachers, who had not seen him for five to six years, described him as "respectful," "fun-loving," and a "very good student."[158]

Finally, Mr. Wilson's mother briefly testified, discussing Mr. Wilson's father and Mr. Wilson's participation in church.

b. New Mental Health Evidence on Appeal

During the direct appeal, Mr. Wilson's new counsel provided the psychologist with additional school and social service records as well as affidavits from Mr. Wilson's mother, sister, brother, and girlfriend (who was also the mother of his child). The psychologist then performed a second series of tests, which supported a diagnosis of paranoid schizophrenia. The psychologist further reported that Mr. Wilson had a "severe psychological disturbance with the possibility of delusions or hallucinations."[159] According to the psychologist, "Mr. Wilson believed that 'evil spirits' possessed him at times, and . . . it was 'possible [Mr. Wilson] could have been delusional at the time of the crime.'"[160] In his view, this information "may have helped the jury better understand [Mr. Wilson's] emotional illness and how he could have participated in the crime."[161]

The family members' affidavits also revealed new information that had not been disclosed to the jury: Mr. Wilson suffered from depression, concentration problems, and delusions. He heard voices and had frequent memory lapses. Throughout his life, Mr. Wilson had experienced violent nightmares, and he often suffered severe headaches that lasted for hours and sometimes days. The affidavits further stated that Mr. Wilson's father and brother were involved with drugs and gangs and that Mr. Wilson had been surrounded by gang activity as he grew up. In an affidavit filed in the direct appeal, the psychologist explained that his trial testimony

154. *Id.* at 1076.
155. *See id.*
156. *Id.*
157. *Id.* at 1075.
158. *Id.*
159. *Id.* at 1077.
160. *Id.* (second alteration in original).
161. *Id.*

"could have been improved upon enormously [if he had] been provided with the additional information [from the family members]."[162]

Based on this new information from the psychologist and the family members, Mr. Wilson argued on direct appeal that he had received ineffective assistance of counsel. The Oklahoma Court of Criminal Appeals rejected that claim, reasoning that the "mere fact [that] more evidence could have been presented is not, in itself, sufficient to show counsel was deficient."[163] Adjudicating Mr. Wilson's 28 U.S.C. § 2254 habeas corpus petition, the federal district court concluded that the Oklahoma court's ruling was not an unreasonable application of *Strickland*.

c. The Tenth Circuit's Analysis of Mr. Wilson's New Mental Health Evidence and His Ineffective Assistance of Counsel Claim

Mr. Wilson's appeal to the Tenth Circuit produced three opinions from the panel: the principal opinion by Judge McConnell, a concurrence by Judge Hartz, and a dissent by Judge Tymkovich.

Judge McConnell concluded that Mr. Wilson had established deficient performance under *Strickland*. As to prejudice, Judge McConnell observed, "It would be difficult, on this record, to conclude with any confidence that the jury's verdict would not have been affected by a proper presentation of the mental health evidence and related family history."[164] Because the federal district court had not reached the question of prejudice and because the facts alleged by Mr. Wilson, if true, would entitle him to a new sentencing proceeding at which the additional mental health evidence could be presented, Judge McConnell concluded that Mr. Wilson's ineffective assistance claim should be remanded to the district court for an evidentiary hearing.[165]

Judge Hartz did not join in Judge McConnell's analysis of Mr. Wilson's claim, but he concurred in the result.[166] In contrast, Judge Tymkovich dissented from Judge McConnell's analysis and the remand to the district court. In his view, Mr. Wilson had established neither deficient performance nor prejudice.[167] Each of the opinions offers a different assessment of Mr. Wilson's mental health evidence.

162. *Id.*

163. Wilson v. State, 983 P.2d 448, 472 (Okla. Crim. App. 1998) (citing Douglas v. State, 951 P.2d 651, 680 (Okla. Crim. App. 1997)).

164. *Wilson*, 536 F.3d at 1093.

165. *See id.* at 1086.

166. *See id.* at 1123–25 (Hartz, J., concurring in part and concurring in the result). After remand, the district court conducted an evidentiary hearing. On February 11, 2011, the court issued an opinion rejecting Mr. Wilson's ineffective assistance of counsel claim. The court concluded that the additional mental evidence offered at the evidentiary hearing would not have affected the jury's decision to impose the death penalty. 2011 WL 744661, at *26.

167. *See id.* at 1125–48 (Tymkovich, J., concurring in part and dissenting in part).

In Judge McConnell's view, the Supreme Court's decisions in *Williams* and *Wiggins*, as well as its 2005 decision in *Rompilla v. Beard*,[168] emphasized "the importance of thorough investigation—in particular, of mental health evidence—in preparation for the sentencing phase of a capital trial."[169] He contrasted the application of the *Strickland* standard in these cases to the narrower application in cases like *Burger v. Kemp*.

In his view, *Williams*, *Wiggins*, and *Rompilla* established three important principles. "First, the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident."[170] Second, in determining what constitutes a reasonable investigation, the court should first look to the American Bar Association Standards for capital defense work.[171] Finally, "because of the crucial mitigating role that evidence of a poor upbringing . . . can have in the sentencing phase, defense counsel must pursue this avenue of investigation with due diligence."[172]

From those principles, Judge McConnell concluded that: (a) counsel's failure to hire the psychologist until three weeks before trial, (b) his failure to interview family members, and (c) his failure to fully present to the jury the mental health assessment that the psychologist had already made constituted deficient performance. The first two deficiencies were apparent from the text of the ABA Guidelines, which stated that "preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case"[173] and that counsel should consider "[w]itnesses familiar with and evidence relating to the client's life . . . , from birth to the time of sentencing."[174]

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168. 545 U.S. 374 (2005). In *Rompilla*, the Court concluded that the defendant had received ineffective assistance of counsel even though counsel had interviewed five family members and three experts who evaluated the defendant's mental health at the time of the offense. However, counsel failed to examine a file regarding a prior conviction on which the prosecution relied in arguing for the death penalty. That file would have led to "a range of mitigation leads that no other source had opened up." *Id.* at 390. The information that counsel could have discovered included the fact that the defendant was "reared in [a] slum environment . . . came to [the] attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations . . . commonly related to over-indulgence in alcoholic beverages." *Id.* at 390–91 (first, third, and fourth alterations in original). "The same file disclose[d] test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling." *Id.* at 391. In the Court's view, "The accumulated entries would have destroyed the benign conception of [the defendant's] upbringing and mental capacity defense counsel had formed from talking with [the defendant] himself and some of his family members, and from the reports of the mental health experts." *Id.* Thus, the defendant had established both deficient performance and prejudice and was entitled to a new sentencing proceeding.

169. *Wilson*, 536 F.3d at 1083.

170. *Id.* at 1084.

171. *Id.* at 1084–85.

172. *Id.* at 1085.

173. *Id.* (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 11.8.3 (1989)).

174. *Id.* at 1087 (first alteration in original) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 11.8.3 (1989)).

As to the mental health evidence that Mr. Wilson's counsel had actually presented, Judge McConnell observed that the psychologist had testified about Mr. Wilson's mental illness in only the most general terms, stating that Mr. Wilson had a "severe mental disorder with many of the personality scales elevated" and that these elevated scales suggested that Mr. Wilson had "a severe personality disturbance."[175] The absence of a more particular explanation of Mr. Wilson's mental illness meant that the jurors could have regarded that illness as antisocial behavior or "meanness,"[176] rather than as providing an explanation for Mr. Wilson's behavior that could support his argument for a life sentence. The lack of specificity also left Mr. Wilson without an effective means of responding to the prosecution's claim that he was a psychopath.

As to prejudice, Judge McConnell's acknowledged that the issue was close. He wrote that "[t]here may well be grounds for skepticism"[177] that the jury could have been convinced to impose a life sentence if the psychologist had provided the more thorough diagnosis at which he later arrived. Yet, invoking Supreme Court and Tenth Circuit cases on the importance of mental health evidence, including *Penry*, *Rompilla*, *Eddings*, and *Smith*, he noted that the court did not "write on a blank slate"[178] and that such evidence could not be summarily discounted.[179]

Mr. Wilson's particular diagnosis added support to his claim of prejudice. In Judge McConnell's view:

> Diagnoses of specific mental illnesses such as schizophrenia or bipolar, which are associated with abnormalities of the brain and can be treated with appropriate medication, are likely to be regarded by a jury as more mitigating than generalized personality disorders, which are diagnosed on the basis of reported behavior, are generally inseparable from personal identity, and are often untreatable through medical or neurological means.[180]

In addition, based on this diagnosis, the psychologist could have testified about the ways in which Mr. Wilson could not conform his conduct to the law. And, the psychologist's testimony could have been buttressed by personal narratives from members of Mr. Wilson's family.[181]

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175. *Id.* at 1091.

176. *Id.* (quoting Anderson v. Sirmons, 476 F.3d 1131, 1144 (10th Cir. 2007)).

177. *Wilson*, 536 F.3d at 1093.

178. *Id.*

179. *See id.* at 1093–94. Like the *Smith* panel, Judge McConnell cited empirical studies demonstrating that "mental health evidence has a mitigating effect on juries." *Id.* at 1096 n.4. He also noted that there were some conflicting studies, that most of the data on which the studies were based was more than ten years old, and that more investigation would be useful. *Id.*

180. *Id.* at 1094.

181. *Id.* (stating that "[t]here is evidence that expert testimony on mental illness is most powerful when combined with narratives from lay witnesses such as family and friends") (citing Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1163–64, 1185 (1997)).

Finally, Judge McConnell's opinion acknowledged the potential "double-edged sword effect" of Mr. Wilson's mental health evidence. Agreeing that "[t]his [double-edged sword effect] could possibly be true,"[182] he added:

> [I]f true[,] the point would apply not just to this case, but also to [the Supreme Court's decisions in] *Williams*, *Wiggins*, and *Rompilla*, as well as [the Tenth Circuit's decisions in] *Anderson*, *Smith*, and many more decisions across the country holding that the failure of counsel to present mental health evidence of this sort was prejudicial.[183]

In Judge McConnell's view, those precedents did not allow the court to reject Mr. Wilson's claim of prejudice on the grounds that the mental health evidence was double-edged. He invoked the Tenth Circuit's statement in *Smith* that this kind of mental health evidence is "exactly the sort of evidence that garners the most sympathy from jurors."[184]

Moreover, in order to establish prejudice, Mr. Wilson was required to show only a reasonable probability that one juror would have voted differently. Although the additional mental health evidence might not have persuaded some jurors, Judge McConnell thought it just as likely that the additional evidence would have led at least one juror to have empathized with Mr. Wilson to the extent of returning a life sentence.

Although Judge Hartz did not join in Judge McConnell's analysis of Mr. Wilson's ineffective assistance claim, he did agree that the case should be remanded for an evidentiary hearing. In his view, Mr. Wilson's allegations, if true, would entitle him to relief. The record did not undermine his claim of deficient performance, and although "[p]erhaps the record undermines the claim of prejudice, . . . that issue was not addressed by the district court and should not be resolved in the first instance by [the Tenth Circuit]."[185]

Judge Hartz did express doubts about the strength of Mr. Wilson's claim. He shared many of Judge Tymkovich's thoughts about the perils of presenting mental health evidence in capital sentencing proceedings. He thought it plausible that Mr. Wilson's counsel might have reasonably decided, in light of the evidence of guilt (including a videotape of Mr. Wilson's conduct during the robbery and murder at the convenience store), that "a claim of mental illness would not get very far with the jury or would even be counterproductive."[186] However, the record did not establish that counsel actually made such a decision, and Supreme Court

182. *Wilson*, 536 F.3d at 1095.
183. *Id.* at 1095–96.
184. *Id.* at 1096 (quoting Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004)).
185. *Wilson*, 536 F.3d at 1124 (Hartz, J., concurring in part and concurring in the result).
186. *Id.*

precedent set a high standard for counsel in investigating and evaluating mental health evidence.

In contrast, in his dissenting opinion, Judge Tymkovich offered a detailed explanation as to why Mr. Wilson's counsel's performance was not deficient. In his view, counsel's pretrial investigation uncovered the bulk of the information that Mr. Wilson later submitted in the direct appeal, and counsel made a reasonable strategic judgment not to delve any further into Mr. Wilson's mental health problems in his sentencing presentation, but instead to emphasize his intelligence and capacity for reform. In contrast, the presentation of a schizophrenia diagnosis to the jury "could have made [Mr.] Wilson's mental health problems appear more intractable and untreatable, . . . add[ing] ammunition to the prosecution's case that [Mr.] Wilson was a dangerously ill person."[187] Judge Tymkovich invoked scholarship recognizing that "a mitigation defense based purely on the defendant's mental health can be risky."[188] As to prejudice, Judge Tymkovich noted that the jury had already heard evidence regarding Mr. Wilson's mental illness; there was no reasonable probability that the additional information from a more specific diagnosis would have led the jury to impose a life sentence.[189]

2. *Wilson*'s Significance

In many ways, the opinions in *Wilson* reflect the same conflict over the proper assessment of mental health evidence as the opinions in *Bryan*. Just as in *Bryan*, one opinion found the mental health evidence that the jury did not hear was highly mitigating, while the another saw in that same evidence a double-edged sword that defense counsel justifiably withheld from the jury to reduce the chance that it would find the defendant "dangerously ill."[190] Moreover, the fact that *Bryan* and *Wilson* come out differently—that the earlier case affirms the denial of relief on the grounds that the unpresented mental health evidence had an aggravating edge while the latter one remands for an evidentiary hearing because of the mitigating effect of that evidence—makes it difficult to discern a standard that can offer guidance in assessing similar evidence in future cases.

187. *Id.* at 1139 (Tymkovich, J., concurring in part and dissenting in part).

188. *Id.* at 1139–40; *see also* RUSSELL STETLER, MENTAL DISABILITIES AND MITIGATION 1 (2001), *available at* http://www.nynd-fpd.org/mental health/mental health mitigation.pdf (noting counsel's task to "overcome juror cynicism toward mental health issues in criminal cases"); James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 442–46 (1996) (noting difficulties of presenting mental illness as mitigation evidence); Leona D. Jochnowitz, *Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing*, 43 CRIM. L. BULL. 1, 1 (2007) (noting tendency of counsel to limit mitigation evidence "because it purportedly undermines residual doubt, because it has a double-edged effect of inspiring jury fears, or because it opens the door to unrevealed criminal history"); Sundby, *supra* note 181, at 1130–39 (explaining capital juror skepticism of mental health expert witnesses).

189. *See Wilson*, 536 F.3d at 1147 (Tymkovich, J., concurring in part and dissenting in part).

190. *Id.* at 1139.

Yet, in our view, there are some significant matters on which the *Wilson* opinions offer meaningful direction. First, Judge Hartz's concurrence agrees with Judge McConnell's view of the importance of thoroughly investigating potentially mitigating mental health evidence.[191] As some scholars have noted, the Supreme Court's older ineffective assistance of counsel opinions—like *Strickland* and *Burger*—permit rather cursory investigation of mental health evidence, reasoning that the unpresented evidence might support the prosecution's argument for aggravating factors.[192] The more recent cases (*Williams*, *Wiggins* and *Rompilla*) require a comprehensive investigation, following the ABA Guidelines view that "[d]ue to the extraordinary and irrevocable nature of the [death] penalty, at every stage of the proceedings counsel must make 'extraordinary efforts on behalf of the accused.'"[193] In its view of counsel's obligations, *Wilson* sides with the newer cases.[194]

Second, *Wilson* emphasizes that a court assessing an ineffective assistance of counsel claim based on the failure to present mental health evidence must examine the particular kind of evidence at issue. Some of that evidence, like that presented by the psychologist at the initial sentencing, may have only limited effect, while other evidence, like that presented after the psychologist had time to review more records and conduct more tests, may be significantly mitigating. Although Judge Hartz's concurrence does not endorse the details of Judge McConnell's analysis of the mental evidence, at the very least one can conclude that he was persuaded to remand the case for an evidentiary hearing based on the difference between the mental health evidence offered at sentencing and the mental health evidence offered subsequently in Mr. Wilson's direct appeal.

Third, Judge McConnell and Judge Hartz agree that the fact that certain mental health evidence may have a double edge does not end the inquiry. Further examination of that evidence may be useful in determining whether the defendant has established an ineffective assistance claim under *Strickland* and is therefore entitled to a new sentencing hearing.

191. *Id.* at 1124–25 (Hartz, J., concurring) (stating that "Judge McConnell's opinion establishes that the Supreme Court has set a high standard for defense counsel in capital cases with respect to investigating mitigation thoroughly before settling on a strategy").

192. Christopher Seeds, *Strategery's Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987, 1012 (2009).

193. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 1.1 cmt. introduction (2003), *reprinted in* 31 HOFSTRA L. REV. 913, 923 (2003).

194. Professor Seeds observes that "[the Supreme Court's] new cases emphasize the need for comprehensive life history investigation and endorse the ABA Death Penalty Guidelines, but leave the old law of *Burger* . . . standing." Seeds, *supra* note 192, at 1012.

D. The Double-Edged Sword After Wilson

The *Wilson* opinions also suggest several areas in which the law of the circuit may offer further guidance for assessing mental health evidence at issue in ineffective assistance of counsel claims in capital cases.

1. A Threshold Standard for Assessing Mental Health Evidence

Wilson's careful consideration of the defendant's particular diagnosis and its potential mitigating effect suggests that it may be useful in these circumstances to develop a threshold standard for evaluating mental health evidence—one that explains what sort of mental evidence is potentially mitigating enough to warrant further inquiry.[195] In fact, three Tenth Circuit cases decided after *Wilson* suggest that such a standard may be developing: *Gardner v. Galetka*,[196] *Fairchild v. Workman*,[197] and *Young v. Sirmons*.[198]

In *Gardner*, just as in *Wilson*, a capital defendant alleged in a federal habeas corpus action that a psychologist had been given insufficient time to prepare a presentation at sentencing about the mitigating effects of mental health evidence. Counsel contacted the psychologist only two days before the sentencing proceedings began.[199]

Despite that extreme delay, the Tenth Circuit held that the Utah Supreme Court's conclusion that the delay was not prejudicial was a reasonable application of *Strickland*.[200] Although he had minimal time to prepare, the psychologist had testified at the sentencing about the defendant's unstable background and his family's history of criminal and substance abuse.[201] The psychologist did offer additional testimony in state post-conviction proceedings. However, the difference between that testimony and his testimony at sentencing was unlike the "enormous" difference in the two assessments made by the psychologist in *Wilson*. In *Gardner*, there was nothing close to the "potent . . . form of mitigation" in *Wilson*—evidence of schizophrenia that was associated with abnormalities of the brain and could be treated.[202]

The court made a similar distinction in *Fairchild*, concluding that a capital defendant had presented only a "general and unfocused" argu-

195. *See* Samy Khalil, Note, *Doing the Impossible: Appellate Reweighing of Harm and Mitigation in Capital Cases After Williams v. Taylor, with a Special Focus on Texas*, 80 TEX. L. REV. 193, 209–18 (2001). The author argues that "once an appellate court finds that a defense attorney has failed to uncover and present a certain 'threshold' amount of mitigating evidence, the court should set aside a death sentence automatically, whatever the aggravating circumstances of a crime." *Id.* at 217. I do not make that argument here.

196. 568 F.3d 862 (10th Cir. 2009).

197. 579 F.3d 1134 (10th Cir. 2009).

198. 551 F.3d 942 (10th Cir. 2008).

199. *Gardner*, 568 F.3d at 880.

200. *Id.*

201. *Id.*

202. *See id.* at 883.

ment in state court proceedings that his trial counsel did not present evidence of conduct that could have caused head injuries (drug use, fighting, and amateur boxing), but that the defendant had then presented a potentially meritorious claim in federal court, one based on the claim that counsel had failed to investigate available evidence that the defendant suffered from organic brain damage.[203]

Finally, in *Young*, the court held that new mental health evidence offered in state-post conviction proceedings would not have had a significant mitigating effect, and it offered some explanation for that assessment.[204] In the post-conviction proceedings, the defendant had presented affidavits from family members, friends, and two psychologists, and he claimed that his counsel should have presented that evidence at sentencing.[205] Concluding that the defendant had failed to establish prejudice under *Strickland*, the court stated that none of the evidence was "so unusual as to place [the defendant] outside the realm of the average person."[206] Unlike many capital defendants, the defendant appeared to have had a generally normal and happy childhood.[207] In the court's view, the two psychologists' affidavits did not establish that the causes of the defendant's emotional distress were "substantially out of the ordinary."[208] One of them concluded that the defendant likely suffered from a "Compulsive Personality Disorder," but he added that "[t]his type of psychiatric disorder is not typically associated with the commission of homicide."[209] That concession deprived the diagnosis of the kind of explanatory power of other kinds of mitigating mental health evidence.[210]

In my view, these decisions are helpful in clarifying the court's assessment of mental health evidence in ineffective assistance claims, and in grappling with its potential double-edged effects. A defendant's evidence may fall short of a threshold standard for mitigating effect for a variety of reasons: because it does not sufficiently explain the defendant's conduct, because it would likely fail to elicit sympathy from a sentencing jury, or, under the Supreme Court's reasoning in *Williams*, because it would not "influence[] the jury's appraisal of [the defendant's] moral culpability" or show that "his [or her] violent behavior was a com-

203. Fairchild v. Workman, 579 F.3d 1134, 1149–51 (10th Cir. 2009). The court therefore remanded the case to the district court for a determination of whether the defendant should be allowed to exhaust his claim. *Id.* at 1155.

204. Young v. Sirmons, 551 F.3d 942, 968–69 (10th Cir. 2008).

205. *Id.* at 961–66.

206. *Id.* at 968.

207. *Id.*

208. *Id.*

209. *Id.* (alteration in original).

210. *See, e.g.*, Smith v. Mullin, 379 F.3d 919, 943 (10th Cir. 2004) (concluding that evidence of the defendant's mental retardation, brain damage, and troubled background could explain "these outbursts of violence and [how they] caused this 'kind hearted' person to commit such a shocking crime").

pulsive reaction rather than the product of cold-blooded premeditation."[211]

By articulating a threshold standard regarding the mitigating effect of mental health evidence, the Tenth Circuit may be able to offer useful guidance to courts adjudicating ineffective assistance of counsel claims. In particular, if the additional mental health evidence falls short of that threshold standard, then courts need not assess its potential aggravating effects. On the other hand, if the evidence meets that standard, then an explanation of why that standard has been met may assist courts in weighing the mitigating and aggravating effects.

2. Assessment of the Aggravating Effects of Mental Health Evidence on an Incremental Basis

Professors John Blume and Shari Lynn Johnson are two of the harshest critics of the courts' application of the double-edged sword analysis in assessing mental health evidence in ineffective assistance claims in capital cases.[212] They write that the doctrine is "[e]mpirically [i]ndefensable and [d]octrinally [d]isastrous."[213] Yet Professors Blume and Johnson acknowledge that some evidence concerning a defendant's mental health can be aggravating. For example, if the defendant tortured his victim, evidence of that conduct, although it indicated mental illness, would more likely support the prosecution's argument for the death penalty than rebut it.[214]

Nevertheless, Blume and Johnson object to the way in which the double-edged sword conception of mental illness evidence can truncate the *Strickland* inquiry. Criticizing the Fourth Circuit's decisions, they observe that "[t]here is no need to calculate prejudice in the context of the case, because the Fourth Circuit simply presumes lack of prejudice by affixing the 'double-edged' label to the unpresented mitigating evidence."[215]

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211. Williams v. Taylor, 529 U.S. 362, 398 (2000).

212. *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 MD. L. REV. 1480 (1999).

213. *Id.* at 1501. Professors Blume and Johnson contend that "[t]he double-edged sword doctrine hypothesizes that evidence that seems intuitively mitigating may be, in the minds of some jurors, actually aggravating." *Id.* at 1502. They reason that, for some subset of jurors, "psychological evidence which decreases the defendant's moral culpability may be interpreted as also increasing his future dangerousness, and for some subset of this subset, that that increase in perceived future dangerousness will outweigh the decrease in perceived culpability, thereby increasing the likelihood of a death sentence." *Id.* In their view, even though this empirical proposition is "undoubtedly true," it does not establish that a jury would be more likely to return a death sentence because of this evidence. *Id.* That is because not all jurors will share this view of the connection between mental health evidence and future dangerousness. *See id.* They also argue that the *Strickland* standards are sufficient to analyze deficient performance and prejudice, without the gloss of the double-edged sword doctrine. *Id.* at 1504–07.

214. *Id.* at 1502–03.

215. *Id.* at 1506.

In my view, the Tenth Circuit has sometimes engaged in similar labeling and, as a result, has not undertaken a case-specific analysis of the mental health evidence at issue. As I have noted, in concluding that the mental health evidence that had not been presented until the post-conviction proceedings was double-edged, the court in *Bryan* relied upon testimony from one of the defendant's attorneys that "evidence of a psychological problem with the defendant . . . can sometimes be a double-edged sword." [216] The former counsel admitted that "in several cases" the jury had accepted "evidence of psychological or emotional problems as evidence of aggravation."[217] There is scant discussion in the majority opinion of the particular mental illness suffered by the defendant and whether the jury would have regarded that particular illness as aggravating or mitigating.

As I have noted, the Tenth Circuit's decisions have offered three explanations of the ways in which juries may perceive mental health evidence as an aggravating circumstance. First, the evidence may support the prosecution's contention that the defendant is impulsive and violent, and therefore a continuing threat. Second, it may undermine a theme or contention that the defendant has offered in the guilt phase of the trial or as part of the case for mitigation (for example that the defendant did not commit the crime or played a minimal role in it or that, except for the crime at issue, the defendant has been a good citizen). Third, the mental health evidence may reveal particular instances of other criminal or anti-social behavior that could support the prosecution's arguments that aggravating circumstances justify the death penalty. Yet, for each of these potential aggravating aspects of the mental health evidence, there may be case-specific reasons why a jury might not perceive the evidence to support a death sentence.

Most importantly, the defendant's mental illness may be treatable. Indeed, in remanding for an evidentiary hearing, Judge McConnell's opinion in *Wilson* relies in part on medical literature indicating that the symptoms of the schizophrenia suffered by the defendant there could improve with medication.[218]

Similarly, the commentary to the ABA Guidelines cites studies showing that "future dangerousness is on the minds of most capital jurors, and is thus at issue in virtually all capital trials, whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration."[219] However, in light of juries' overriding concern with defen-

216. Bryan v. Mullin, 335 F.3d 1207, 1223 n.21 (10th Cir. 2003).

217. *Id.*

218. Wilson v. Sirmons, 536 F.3d 1064, 1094 (10th Cir. 2008) (observing that "[d]iagnoses of specific mental illnesses such as schizophrenia or bipolar . . . are associated with abnormalities of the brain and can be treated with appropriate medication").

219. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.11 cmt. (2003), *reprinted in* 31 HOFSTRA L. REV. 913, 1062 (2003)

dants' future dangerousness, the Guidelines' directive is *not* to avoid the presentation of mental health evidence. Instead, the commentary explains, "[C]ounsel should give serious consideration to making an explicit presentation of information on [the defendant's future dangerousness]."[220] In addition to testimony about the treatment of the mental illness, the evidence could include information about the defendant's adaptation to the prison environment or other evidence rebutting the continuing threat allegation.[221]

With regard to the possibility that mental illness evidence may conflict with other themes or contentions offered by the defense, I note that the Supreme Court addressed this issue in *Wiggins*.[222] There, the defendant's attorney had argued during the guilt stage that the defendant was not directly responsible for the murder.[223] Although the Court stated that it might have been strategically defensible for an attorney to have pursued that theme during the guilt phase, such a strategy was not necessarily inconsistent with the presentation of the defendant's troubled background during sentencing.[224] In addition, in light of the strength of the available mitigation evidence that the defendant's attorney's did not present, a reasonable attorney might have focused on the mitigation case at sentencing rather than the weaker arguments during the guilt phase. Accordingly, with regard to the potential conflict between mental evidence and other defense themes and contentions, there may well be case-specific considerations indicating that the evidence is not double-edged, at least not to the degree that reasonable counsel should completely exclude it from the mitigation case.

Similar case-specific considerations may apply to the instances of criminal or anti-social behavior that mental health evidence may reveal. The Supreme Court's 2009 decision in *Porter v. McCollum*[225] illustrates that point.

In *Porter*, the Court overturned an Eleventh Circuit decision, concluding that the Florida Supreme Court had unreasonably applied *Strickland*, and held that the defendant's counsel's performance was both deficient and prejudicial.[226] Counsel had failed to present evidence that his client had served in horrific battles in the Korean War, had struggled to recover upon return from the war, had a childhood history of physical abuse, and had been diagnosed with brain abnormalities.[227] In rejecting

(quoting John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 CORNELL L. REV. 397, 398–99 (2001)).

220. *Id.*
221. *Id.*
222. Wiggins v. Smith, 539 U.S. 510, 515 (2003).
223. *Id.*
224. *Id.* at 535.
225. 130 S. Ct. 447 (2009) (per curiam).
226. *Id.* at 452–55.
227. *Id.* at 453.

the defendant's ineffective assistance of counsel claim, the Florida Supreme Court had concluded that counsel's failure to offer the military records was not prejudicial because they revealed that the defendant had gone AWOL on several occasions and had been court-martialed.[228] In its view, "These periods of desertion would have significantly impacted upon any mitigating effect that the evidence would have had, and indeed they would have reduced this impact to inconsequential proportions."[229]

The Supreme Court disagreed. It concluded that the evidence that the defendant was AWOL was consistent with the overall theory of mitigation that he had presented in post-conviction proceedings—that his combat experience caused immense stress and substantial emotional and mental difficulties.[230] The Florida Supreme Court's conclusion that the AWOL evidence was merely aggravating "reflect[ed] a failure to engage with what [the defendant] actually went through in Korea."[231]

Porter thus supports the view that even though mental health evidence may reveal instances of criminal or antisocial behavior, that fact may not justify withholding the evidence from the jury. As in *Porter*, the explanatory impact of that mental health evidence may outweigh its aggravating effects.[232] The potential double-edged quality of mental health evidence should therefore trigger a case-specific inquiry rather than foreclose it.

3. *Sears v. Upton*[233]

The Supreme Court's most recent decision on mental health evidence in capital cases offers further support for the fact-specific approach to assessing mental heath evidence. In *Sears*, the evidence that defendant's counsel failed to present included the defendant's childhood experiences of sexual abuse, a severe learning disability, and brain damage caused by several serious head injuries and drug and alcohol abuse. In post-conviction proceedings, the Georgia trial court agreed with the defendant that his counsel's performance was deficient, but it rejected his claim of prejudice, reasoning that because his counsel had presented a reasonable alternative theory of mitigation—involving the impact of the

228. Porter v. State, 788 So. 2d 917, 924–25 (Fla. 2001).
229. *Id.* at 925.
230. *Porter*, 130 S. Ct. at 455.
231. *Id.*
232. The Third Circuit's decision in *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009), follows the reasoning of *Porter*. Even though the defendant's mental health history, which his counsel had failed to present, included evidence that the defendant was "a sadistic and dangerous sexual deviate who committed at least one prior act" that resembled the crime at issue, the court concluded that the defendant's mental health history acted "as a common thread that ties all this evidence together." *Id.* at 129. "A single juror may well have believed that this unifying factor explained [the defendant's] horrific actions in a way that lowered his culpability and thereby diminished the justification for imposing the death penalty." *Id.*
233. 130 S. Ct. 3259 (2010).

defendant's execution on the defendant's family—any finding of prejudice would be speculative.

The Court identified two errors in the Georgia court's analysis. First, the state court's finding that the defendant's counsel had formulated a mitigation theory that was reasonable "in the abstract,"[234] did not excuse it from engaging in a fact-specific prejudice inquiry. Second, the court should have considered the new mental health evidence, along with the evidence that counsel actually presented, to determine whether the defendant had established a reasonable probability of a different result.[235] The Supreme Court therefore remanded the case to the Georgia court for a "probing and fact-specific analysis"[236] of the prejudice component of the defendant's ineffective assistance claim.

Significantly, the Court remanded for that inquiry even though some of the omitted mental health evidence was double-edged. As Justice Scalia observed in his dissent, a psychiatrist who examined the defendant found him to be "a narcissist" with a "grandiose" opinion of himself, as well as "arrogant and self-centered."[237] However, even though the dissent concluded that it was more likely that the defendant's "profound personality disorder, . . . made him exactly the kind of person who would commit heinous crimes in the future," a majority of the Supreme Court was not convinced that this assessment of the mental health evidence should foreclose further inquiry. Instead, in the majority's view, competent counsel "should have been able to turn some of the adverse evidence into a positive—perhaps in support of a cognitive deficiency mitigation theory."[238] Although the evidence might not have made the defendant more likeable to the jury, the Court concluded, "it might well have helped the jury understand [the defendant], and his horrendous acts."[239]

The Court's decision in *Sears* thus confirms both the explanatory force of mental health evidence that the Tenth Circuit recognized in *Smith* and the importance of the fact-specific inquiry addressed in *Wilson*.

CONCLUSION

The Constitution requires a heightened standard of reliability in the application of the death penalty. It also entitles the defendant in a capital case to present evidence a broad range of mitigating evidence, including evidence of his or her own mental illness. Yet when courts assess mental

234. *Id.* at 3265.
235. *Id.* at 3265–66.
236. *Id.* at 3266.
237. *Id.* at 3270 (Scalia, J., dissenting).
238. *Id.* at 3264 (majority opinion).
239. *Id.*

health evidence in capital cases, that heightened reliability often seems hard to attain.

Thus, in the Tenth Circuit, Roderick Smith and Robert Leroy Bryan received strikingly different opinions about the impact of the mental health evidence that their trial counsel failed to present. One, Mr. Smith, was informed by the court that the omitted evidence was highly mitigating, that his attorney's failure to present it violated his Sixth Amendment right to effective assistance of counsel, and that he was entitled to a new sentencing hearing. The other, Mr. Bryan, learned that the additional mental health evidence was a double-edged sword that his counsel had made a reasonable strategic decision to exclude. The mental health evidence that Mr. Bryan presented in habeas corpus proceedings was never heard by a jury, and he was executed.

As troubling as those different results may be, the *Smith* and *Bryan* decisions are each supported by Supreme Court precedent. The Court's decisions hold that mental health evidence is sometimes mitigating, sometime aggravating, and sometimes both. How a court will characterize the evidence in a particular case can be quite difficult to predict.

The Tenth Circuit's decision in *Wilson* further illustrates the challenges in assessing mental health evidence. There, the three panel members reached three different conclusions. For Judge McConnell, Mr. Wilson's additional mental health evidence warranted further proceedings, allowing him the opportunity to show a reasonable probability that, with further insight into his mental state, a jury would have returned a life sentence. In contrast, Judge Tymkovich concluded that the evidence proffered by Mr. Wilson in post-conviction proceedings could have supported the prosecution's contention that he was a continuing threat and that, as a result, his trial counsel made a reasonable strategic judgment to exclude it. Judge Hartz, the third member of the *Wilson* panel, agreed only with the result of Judge McConnell's analysis—that a remand for an evidentiary hearing was warranted.

In my view, that narrow point of agreement offers some hope for developing a more coherent approach to mental health evidence in capital cases. The Supreme Court's decisions in this area, beginning with *Williams*, *Wiggins*, and *Rompilla* and continuing through its more recent decisions in *Porter* and *Sears* indicate that the assessment of mental health evidence not presented to a jury may depend on a number of case-specific, fact-intensive considerations: whether the illness is treatable; how the structured prison setting would affect it; whether evidence regarding the illness would have open the door for the prosecution to introduce episodes of violent or antisocial conduct to support its contention that the defendant was a continuing threat; whether the evidence would have undermined another viable theme or argument of the defense; and whether, despite potentially aggravating effects, the explanatory power of additional mental health evidence would have outweighed its detri-

mental impact. As the *Wilson* panel concluded, evidentiary hearings may allow those considerations to be more fully explored.

The Supreme Court's decision in *Sears* supports that view. There, the Court drew a contrast between (1) a state appellate court's conclusion that defense counsel's decision to exclude mental health evidence was reasonable in the abstract; and (2) a probing and fact-specific analysis of that evidence. It concluded that the latter was required. Although the assessment of mental health evidence in capital cases will continue to present enormously difficult challenges, the kind of inquiry required in *Sears* may bring the courts closer to the heightened reliability that they should strive to obtain.