DEATH PENALTY — RIGHT TO COUNSEL — NINTH CIRCUIT AFFIRMS THAT COURTS MUST CONSIDER AGGRAVATING IMPACT OF EVIDENCE WHEN EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. — *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012).

One of the Constitution's many mechanisms for protecting individual liberty is the Sixth Amendment's guarantee of "the Assistance of Counsel" for those individuals accused of crimes.[1] This guarantee requires more than just any counsel: defendants also have a right to counsel that provides effective assistance.[2] Nearly thirty years ago, in *Strickland v. Washington*,[3] the Supreme Court developed a standard for evaluating claims of ineffective assistance of counsel: defendants must prove both counsel's deficient performance and resulting prejudice.[4] Though, as many scholars have argued, it is particularly difficult for capital defendants to succeed under this standard,[5] it is not impossible. Recently, in *Stankewitz v. Wong*,[6] the Ninth Circuit vacated the death sentence of California's longest-serving death row inmate,[7] holding that his lawyer's failure to investigate and present relevant mitigating evidence at sentencing constituted ineffective assistance. The court also affirmed that when evaluating prejudice, it must consider potential aggravating effects of mitigating evidence, thus bringing the circuit in line with controlling ineffective assistance doctrine. But the majority failed to conduct a clear analysis under this standard, giving lower courts little guidance on weighing such aggravating evidence and leaving open the question of what balance of mit-

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[1] U.S. CONST. amend. VI.

[2] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[3] 466 U.S. 668 (1984).

[4] Though *Strickland* was a capital case, its test for ineffective assistance of counsel became the test for noncapital cases as well. On the deficiency prong of this two-part test, a defendant must "show[] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To be deficient, such an error-ridden performance must fall "below an objective standard of reasonableness." *Id.* at 688. To prove prejudice, a defendant must "show[] that counsel's errors were so serious as to deprive the defendant of a fair trial . . . whose result is reliable." *Id.* at 687.

[5] *See, e.g.*, Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 98 (2010) (claiming that *Strickland* "single-handedly rendered it nearly impossible for a capital defendant to demonstrate that he was the victim of ineffective assistance of counsel"); Kenneth Williams, *Does* Strickland *Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1461 (2009) ("The [*Strickland*] prejudice standard has proven to be so onerous that few defendants are able to satisfy it.").

[6] 698 F.3d 1163 (9th Cir. 2012).

[7] *See* Chad Bray, *California's Longest-Serving Death Row Inmate Wins in Ninth Circuit*, WALL ST. J. (Oct. 29, 2012, 4:01 PM), http://blogs.wsj.com/law/2012/10/29/court-sets-aside-capital-sentence-of-californias-longest-serving-death-row-inmate.

igating and aggravating effects produces a "reasonable probability" of a sentence other than death, as required by *Strickland*.[8]

In 1978, a jury convicted Douglas R. Stankewitz of murder and sentenced him to death.[9] During sentencing, Stankewitz's lawyer offered a limited presentation after overlooking a significant amount of potentially mitigating evidence in Stankewitz's background by declining to investigate his client's life history.[10] After unsuccessful appeals in California state courts, Stankewitz challenged both the guilt and penalty phases of his trial in a federal habeas petition, which the district court denied in its entirety.[11] In 2004, the Ninth Circuit reversed on Stankewitz's penalty-phase claim of ineffective assistance of counsel,[12] finding that were his assertions true, his trial lawyer's failure to investigate Stankewitz's background and present available mitigating evidence "would establish that [Stankewitz] received ineffective assistance at his penalty phase proceeding."[13] The circuit court remanded for an evidentiary hearing on Stankewitz's allegations.[14]

On remand in 2009, the district court expanded the record with thousands of pages of new documents, including reports by probation officers and psychological evaluations.[15] After examining the new record, the court found that "Stankewitz was psychologically and emotionally damaged by his upbringing"[16] and that he "had a very severe substance abuse problem that began at age 10."[17] The court held that counsel had been ineffective and granted Stankewitz habeas relief, vacating his death sentence and ordering the state to resentence him to life without parole or initiate proceedings to retry his sentence.[18]

The Ninth Circuit affirmed. Writing for the panel, Judge Fisher[19] held that the performance of Stankewitz's lawyer qualified as constitutionally ineffective under *Strickland*, and thus the district court properly granted Stankewitz a writ of habeas corpus.[20] After determining the proper standard of review,[21] Judge Fisher addressed the question

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[8] 466 U.S. at 694.

[9] *Stankewitz*, 698 F.3d at 1165.

[10] *Id.* at 1165–66.

[11] *Id.* at 1165.

[12] Stankewitz v. Woodford, 365 F.3d 706, 708 (9th Cir. 2004).

[13] *Stankewitz*, 698 F.3d at 1166.

[14] *Id.*

[15] *Id.*

[16] Stankewitz v. Wong, 659 F. Supp. 2d 1103, 1111 (E.D. Cal. 2009).

[17] *Stankewitz*, 698 F.3d at 1167.

[18] *Stankewitz*, 659 F. Supp. 2d at 1112.

[19] Judge Fisher was joined by Judge Bybee.

[20] *See Stankewitz*, 698 F.3d at 1165, 1176.

[21] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code), did not apply to this case because Stankewitz filed his original habeas petition before AEDPA's effective date. *See*

of whether Stankewitz's trial counsel was ineffective under the *Strickland* standard.[22] He rejected the State's argument that counsel's possession of files containing much of the relevant mitigating evidence established the existence of a reasonable investigation.[23] The fact that counsel failed to investigate any of the evidence in the files he inherited from the lawyer who preceded him on Stankewitz's case, despite "tantalizing indications" of useful information,[24] was actually "evidence of — not an excuse for — his deficiency."[25] Also, even if counsel knew of all the mitigating evidence within the files he possessed, he offered no strategic reason for declining to present the evidence at trial.[26] Altogether, Judge Fisher concluded, "counsel's failure to investigate and present mitigating evidence [could not] be rationalized on any tactical ground," making his performance constitutionally deficient.[27]

Having found that Stankewitz satisfied the first *Strickland* prong, deficiency, Judge Fisher turned to the second, prejudice. When challenging death sentences under ineffective assistance claims, defendants must prove a "reasonable probability" that the sentencer would not have imposed death had counsel not been deficient.[28] Here, Judge Fisher affirmed that when evaluating the possible prejudicial impact of mitigating evidence, "the proper legal standard requires consideration of both the potential aggravating impact and the potential mitigating impact of the proffered evidence."[29] The Supreme Court had recently reiterated that standard in *Wong v. Belmontes*,[30] in which the Court had declined to find ineffective assistance even though counsel

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Stankewitz v. Woodford, 365 F.3d 706, 713 (9th Cir. 2004). Therefore, the circuit court reviewed the district court's factual findings for clear error and the legal question of ineffective assistance de novo. Judge Fisher concluded that the court did not clearly err in "concluding that Stankewitz was severely damaged by his upbringing," *Stankewitz*, 698 F.3d at 1168, or in its findings related to Stankewitz's substance use and abuse, *id.* at 1169.

[22] Judge Fisher affirmed the Ninth Circuit's prior conclusion that "Stankewitz's supposed opposition to a penalty phase defense does not excuse [counsel's] failure to investigate and present mitigating evidence." *Stankewitz*, 698 F.3d at 1170; *see also Stankewitz*, 365 F.3d at 721–22.

[23] *See Stankewitz*, 698 F.3d at 1171.

[24] *Id.* (quoting *Stankewitz*, 365 F.3d at 720).

[25] *Id.* at 1172; *cf. generally* Wiggins v. Smith, 539 U.S. 510 (2003) (finding ineffective assistance where counsel failed to extend investigation to client's life history, even though records in counsel's possession suggested that more investigation might produce an abundance of mitigating evidence); Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007) (finding ineffective assistance where counsel knew that client had been diagnosed with mental illness and had a drug problem but chose not to contact any psychologists or investigate the effects of client's drug use).

[26] *See Stankewitz*, 698 F.3d at 1172. *Strickland* generally requires a "heavy measure of deference" to counsel's strategic judgments. Strickland v. Washington, 466 U.S. 668, 691 (1984); *see also* Cullen v. Pinholster, 131 S. Ct. 1388, 1408 (2011).

[27] *Stankewitz*, 698 F.3d at 1172.

[28] *See Strickland*, 466 U.S. at 695 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.).

[29] *Stankewitz*, 698 F.3d at 1175.

[30] 130 S. Ct. 383 (2009).

had failed to investigate and present available mitigating evidence in the sentencing phase of a capital trial. The Court had held that the defendant, Belmontes, could not show prejudice under the reasonable probability standard for two reasons: First, had counsel presented certain additional mitigating evidence, the prosecution could have introduced aggravating evidence that Belmontes was likely responsible for a different, unsolved murder.[31] Second, much of the new mitigating evidence would have been "merely cumulative of the substantial humanizing evidence [Belmontes's] counsel had already presented."[32] Judge Fisher acknowledged that some of Stankewitz's evidence might have had aggravating impacts, but found that the facts of *Belmontes* and *Stankewitz* differed significantly enough that evaluations of any negative impact of mitigating evidence in the two cases could produce opposite results.[33] Judge Fisher also noted that the jury's difficulty in reaching a unanimous verdict indicated possible prejudice.[34] Ultimately, he held that counsel's deficiency caused prejudice against Stankewitz and affirmed the district court's decision to grant habeas and vacate Stankewitz's death sentence, leaving the state to choose whether to retry Stankewitz's sentence within ninety days or to resentence him to life without possibility of parole.[35]

Judge O'Scannlain dissented, arguing that the court should have remanded the case for weighing of the mitigating and aggravating effects of the new evidence. He agreed that the correct legal standard for cases concerning counsel's failure to present mitigating evidence must include consideration of possible drawbacks of such evidence, but argued that due to Ninth Circuit precedent, the district court analyzed the case without properly considering aggravating effects.[36] Judge O'Scannlain argued that the majority's "unpersuasive prejudice analysis"[37] demonstrated the difficulty of evaluating prejudice without a properly grounded district court opinion. Because district courts are

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[31] *See id.* at 390–91.

[32] *Stankewitz*, 698 F.3d at 1173; *see also Belmontes*, 130 S. Ct. at 388 ("The sentencing jury was thus 'well acquainted' with Belmontes' background and potential humanizing features. Additional evidence on these points would have offered an insignificant benefit, if any at all.") (citation omitted) (quoting Schriro v. Landrigan, 550 U.S. 465, 481 (2007)).

[33] *See Stankewitz*, 698 F.3d at 1173–74.

[34] *Id.* at 1175; *cf.* Wiggins v. Smith, 539 U.S. 510, 537 (2003) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.").

[35] *Stankewitz*, 698 F.3d at 1176.

[36] *See id.* at 1176–77 (O'Scannlain, J., dissenting).

[37] *Id.* at 1179; *see also id.* at 1178 ("The majority's analysis shows only that this case may be closer than *Belmontes*. That does not say much."); *id.* at 1179 ("[T]he majority gives no persuasive grounds for concluding that Stankewitz has demonstrated a reasonable probability that his sentence would have been different with his mitigation evidence.").

well suited for such a "difficult weighing of voluminous evidence,"[38] he believed the right approach would have been to clarify the legal standard — which "would have done a service to [Ninth] [C]ircuit law"[39] — and remand the case yet again to allow the district court to evaluate Stankewitz's claims under the correct standard.[40]

In *Stankewitz*, the Ninth Circuit resolved a longstanding inconsistency between its own cases and Supreme Court precedent for ineffective assistance cases where counsel fails to present mitigating evidence. By acknowledging that courts must consider potential aggravating effects of such evidence when evaluating claims of prejudice, the court aligned with controlling case law on *Strickland* and its burden of reasonable probability. But the majority failed to clarify *how* it weighed the defendant's mitigating and aggravating factors under this standard, providing lower courts with little practical guidance on when the balance of likely effects does or does not produce a reasonable probability that the sentence would have been different.

As early as *Strickland*, the Supreme Court recognized the need for careful consideration of "the totality of the evidence," including both aggravating and mitigating factors, in death sentencing cases.[41] The Court has also acknowledged that certain types of mitigating evidence, rather than serving only to humanize defendants, can also be aggravators that may influence juries to give death sentences. For example, in *Penry v. Lynaugh*,[42] the Court noted that the petitioner's mitigating evidence, which included mental retardation and a history of abuse, was a "two-edged sword" that both reduced his blameworthiness for his crime and suggested that he might be dangerous in the future.[43] In addition, the Court has continued to emphasize the importance of weighing mitigating and aggravating factors against each other,[44] reaffirming

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[38] *Id.* at 1179.

[39] *Id.*

[40] *Id.* at 1177.

[41] Strickland v. Washington, 466 U.S. 668, 695 (1984).

[42] 492 U.S. 302 (1989).

[43] *Id.* at 324; *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002). Many other characteristics could fall into the same category: both youth and mental illness, for example, can suggest that a person is less than fully responsible for his actions, but juries may be reluctant to offer a life sentence to someone who presumably has many years left to kill again or is mentally ill and thus may be viewed as unpredictable.

[44] *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 534 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); Williams v. Taylor, 529 U.S. 362, 396 (2000) (acknowledging the existence of aggravating evidence that could be introduced along with additional mitigating evidence, but finding a "comparatively voluminous amount of evidence that did speak in [the defendant's] favor"). *But see generally* Rompilla v. Beard, 545 U.S. 374 (2005) (considering available mitigating evidence — including mental retardation, mental health problems, childhood abuse, and alcoholism — without acknowledging the possible aggravating effects of such evidence).

in *Belmontes* that the trier of fact must consider all evidence — both "the good and the bad" alike — in evaluations of prejudice.[45]

Before *Stankewitz*, the Ninth Circuit seemed to discount this type of reasoning, often failing to acknowledge the "drawbacks of ostensibly mitigating evidence"[46] in the circuit's death penalty cases. In these previous cases, the court did engage in limited weighing of factors, recognizing the need to assess mitigating evidence against separate aggravating circumstances, but it often ignored the two-edged qualities of the mitigating evidence.[47] In *Stankewitz*, however, Judge Fisher explicitly stated that "the proper legal standard requires consideration of both the potential aggravating impact and the potential mitigating impact of the proffered evidence."[48] *Stankewitz* is therefore a new — for the Ninth Circuit — and accurate articulation of existing case law on ineffective assistance of counsel in capital cases, uniting the *Strickland*/*Belmontes* mandate to weigh all available evidence and the *Penry* acknowledgement that certain types of evidence are double edged.

At the same time, because the Ninth Circuit did not clarify how it weighed the evidence's mitigating and aggravating effects, it failed to apply its newly articulated standard in clear accordance with *Strickland*'s stated burden of proof. Namely, the court did not persuasively explain how Stankewitz demonstrated a reasonable probability — one "sufficient to undermine confidence in the outcome"[49] — that the jury would not have imposed a death sentence but for counsel's deficiency. Judge O'Scannlain's argument that the majority conducted a "thin prejudice analysis"[50] is compelling in light of this burden.

Rather than clearly balancing the effects of Stankewitz's evidence, the majority devoted most of its prejudice discussion to distinguishing *Belmontes*, arguing that Stankewitz's position was the "polar opposite"

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45 Wong v. Belmontes, 130 S. Ct. 383, 390 (2009).

46 *Stankewitz*, 698 F.3d at 1179 (O'Scannlain, J., dissenting).

47 *See, e.g.*, Detrich v. Ryan, 677 F.3d 958, 984–87 (9th Cir. 2012) (considering neuropsychological deficits as mitigating because they affected defendant's ability to control his actions); Belmontes v. Ayers, 529 F.3d 834, 864–68 (9th Cir. 2008) (finding defendant's "difficult childhood, serious physical illness, [and] drug abuse," *id.* at 864, to be mitigating), *rev'd sub nom.* Wong v. Belmontes, 130 S. Ct. 383; Lambright v. Schriro, 490 F.3d 1103, 1122–28 (9th Cir. 2007) (finding that defendant's traumatic childhood, drug addiction, and mental health problems were mitigating without considering the resulting sociopathic behavior); Ainsworth v. Woodford, 268 F.3d 868, 874–78 (9th Cir. 2001) (counting defendant's near-constant substance abuse as mitigating).

48 *Stankewitz*, 698 F.3d at 1175. Notably, *Belmontes* reversed the Ninth Circuit, which then had no choice but to affirm the *Belmontes* standard in order to bring Ninth Circuit doctrine in line with Supreme Court precedent. Other circuits have also affirmed the *Belmontes* standard. *See, e.g.*, Rabindranath Ramana, *Living and Dying with a Double-Edged Sword: Mental Health Evidence in the Tenth Circuit's Capital Cases*, 88 DENV. U. L. REV. 339, 340 (2011).

49 Strickland v. Washington, 466 U.S. 668, 694 (1984).

50 *Stankewitz*, 698 F.3d at 1178 (O'Scannlain, J., dissenting).

of Belmontes's.[51] While in *Belmontes* the sentencing jury had already heard much of the humanizing *mitigating* evidence, Stankewitz's prosecutor had already introduced substantial *aggravating* evidence, making any negative impact of new evidence "marginal relative to the evidence of antisocial behavior already before the jury."[52] This argument demonstrated that Stankewitz's case was distinct from Belmontes's, a conclusion even the dissent acknowledged was accurate.[53] However, the majority was less successful at showing why Stankewitz's proffered evidence had a reasonable probability of reversing his jury's sentencing decision. As Judge O'Scannlain noted, it "does not say much" that Stankewitz's prejudice case was closer than the "unanimous and summary" *Belmontes* decision.[54] Apparently recognizing this problem, the majority turned to the Supreme Court case of *Wiggins v. Smith*,[55] in which the Court found ineffective assistance on the grounds that counsel overlooked evidence "relevant to assessing [the] defendant's moral culpability."[56] Because Stankewitz's evidence had similar relevance, Judge Fisher held, it also crossed the threshold of the reasonable probability standard.[57] Yet, as Judge Fisher admitted, unlike Wiggins's, "Stankewitz's history is certainly not benign."[58]

Because *Strickland* places the burden of proof of reasonable probability on defendants, the distinction between Wiggins and Stankewitz is more important than Judge Fisher suggested. During sentencing, the jury heard "substantial evidence of Stankewitz's violent, antisocial behavior."[59] For example, witnesses testified that Stankewitz had committed an armed robbery and kidnapping, a stabbing, and several attacks on individuals, including an elderly man and police officers.[60] Perhaps jurors were so overwhelmed by the aggravating evidence they had already heard about Stankewitz that no mitigating evidence, even if "relevant to his moral culpability,"[61] could persuade them to render a sentence other than death. Additionally, though the majority argued that the aggravating effects of new evidence would not likely worsen

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[51] *Id.* at 1174 (majority opinion).

[52] *Id.* Furthermore, the State failed to identify any mitigating evidence that would be as damaging as the evidence of a second murder in *Belmontes*. *See id.*

[53] *See id.* at 1178 (O'Scannlain, J., dissenting).

[54] *Id.*

[55] 539 U.S. 510 (2003).

[56] *Id.* at 535. Counsel failed to investigate the defendant's personal history beyond a presentence investigation report and foster care records from the Baltimore City Department of Social Services. Further investigation would have revealed mitigating evidence from Wiggins's childhood, including severe physical and sexual abuse by various parental figures. *See id.* at 524–26.

[57] *See Stankewitz*, 698 F.3d at 1175.

[58] *Id.*

[59] *Id.* at 1174.

[60] *Id.*

[61] *Id.* at 1175.

the jury's negative perception of Stankewitz, a jury could conceivably view the total aggravating evidence and effects as cumulative rather than redundant. For example, perhaps Stankewitz's jurors would have seen his new evidence — namely, his psychological damage and lifelong substance abuse — as confirmation of the violent, antisocial personality that the prosecutor presented rather than as a sympathetic explanation for his actions. The mere introduction of new, mitigating information does not necessarily outweigh any existing aggravating factors, so showing that Stankewitz's mitigating evidence was at least unlikely to have favored the prosecution[62] is thus not the same as necessarily undermining the reliability of the sentencing phase's result.[63]

Because the *Belmontes* and *Wiggins* defendants differed meaningfully from Stankewitz, Judge Fisher's focus on distinguishing *Belmontes* and analogizing to *Wiggins* was insufficient to weigh the mitigating and aggravating effects of the evidence at issue here. The court was not necessarily wrong, but merely failed to prove its claim clearly, given *Strickland*'s burden of proof.[64] Therefore, while *Stankewitz* ostensibly provides a clearer legal standard for Ninth Circuit ineffective assistance cases with missing mitigating evidence, it demonstrates the very real difficulty of predicting juries' likely responses to missing information[65] and leaves lower courts with little additional information about the practical, important exercise of weighing the mitigating and aggravating effects of new evidence.

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[62] *See id.* ("[T]he probability that the proffered mitigation evidence would have cut in the prosecution's favor is low given that the jury was already aware of Stankewitz's violent, antisocial behavior.").

[63] This uncertainty may result in part from the case's particular circumstances. Perhaps if the jury had not already heard about the negative effects of Stankewitz's mitigating evidence, the circuit court would have been more precise about how it weighed mitigating and aggravating effects. *Cf.* Porter v. McCollum, 130 S. Ct. 447, 454 (2009) (holding that new mitigating factors outweighed aggravating factors, since one of defendant's statutory aggravators had been invalidated).

[64] The majority did attempt to satisfy *Strickland*'s burden of proof by noting that Stankewitz's jury had a difficult time reaching unanimity on his death sentence. *Stankewitz*, 698 F.3d at 1175. Under *Wiggins*, which urged that the relevant question in capital cases is whether "there is a reasonable probability that at least one juror would have struck a different balance" if the jury could have placed the defendant's "excruciating life history on the mitigating side of the scale," Wiggins v. Smith, 539 U.S. 510, 537 (2003), Stankewitz's conflicted jury may have indicated prejudice. However, the majority still did not clarify what constitutes a "reasonable probability" in light of aggravating effects of the defendant's life history.

[65] *See* Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) ("[I]t is often very difficult to tell whether a defendant . . . would have fared better if his lawyer had been competent. . . . [I]t may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against . . . a shrewd, well-prepared lawyer."); *see also* Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 169 (2001) ("[I]t is often impossible to conclude whether there was a reasonable probability that the outcome would have been different. Using the prejudice prong to judge the performance of an attorney during the penalty portion of the trial . . . is an attempt at an objective standard in a subjective phase.").