

法學英文

林利芝 / 編著

攻略 III

Legal English




新學林出版股份有限公司

法學英文 攻略

Legal English

本書每一篇皆從英文原文的案例出發，到最後的測驗複習，每一環節的精心設計都出自於作者自身教學經驗所得。經由這樣的導引，讀者可以逐步攻略法學英文當中的“閱讀技巧”、“搜尋技巧”、“分析技巧”以及“寫作技巧”。這些技巧可以幫助讀者眼明手快地找出法律爭議，自信滿滿地去適用解決爭議的法律或法則，並且能舉一反三地將法律或法則靈活運用在其他的具體事實情況。經過這樣長期的訓練累積，讀者便能有條理地分析與應用，進而躋身成為具有十足國際競爭力的法律人。

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地址：台北市信義路三段106號6樓之4
TEL: (02) 2700-1808 FAX: (02) 2705-9080
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作 者：林利芝

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L e g a l E n g l i s h



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寫在前面

許多法律人認為，目前律師考試科目並無法學英文一門，因此對於學校所開設的英美法學習較不熱衷。雖然通過律師考試是目前成為我國律師的主要途徑，但是臺灣的法律系學生與律師必須了解，對身處於國際地球村時代的法律人而言，涉獵多國法律是相當必要的，而英美法更應是學習外國法律的重點。

學習英美法，從案例直攻，對於法律人有很多的好處：

第一，幫助法律人打破平日所自囿的思考模式，以更開闊的視野面對律師考試或其他類型的考試。像是法學英文“閱讀技巧”的訓練，可以幫助讀者迅速找出法律爭議。“搜尋技巧”可以用來確認適用在法律爭議上的法律或法則。“分析技巧”可以將正確的法律或法則適用在具體的事實情況。而“寫作技巧”則能幫助讀者有條理地分析考題。

第二，讀者可以從案例的研讀學習到律師執業技巧，對日後的生涯規劃有相當大的幫助。臺灣的經濟繁榮和政治安定吸引許多外國人士來臺觀光或投資，每分鐘有數以百計的國際商業交易，每天更有數以千計的臺灣旅客在世界各國旅行。面對往來頻繁，像是造成死亡或人身財產傷害的犯罪行為、違約行為、和侵權行為在臺灣境內、外層出不窮，而這些紛爭皆需倚靠律師的協助來解決。尤其臺灣已經加入世界貿易組織，在不久的將來，外國律師將被允許在臺灣執行涉外法律事務。屆時，唯有法學英語流利、精通外國法律（尤其是英美法）、並且具備解決跨國爭議經驗的本國律師，才能輕鬆面對外國律師（尤其是美國律師）競爭下的強大壓力。

第三，對於想要精通專利法、著作權法、商標法、營業秘密法、及公平交易法等新興法律領域的讀者有非常大

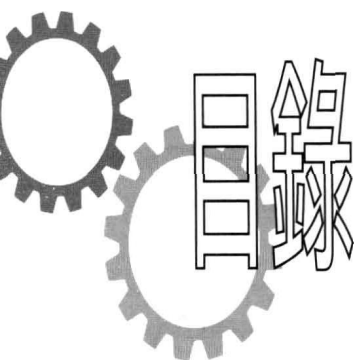


的幫助。臺灣許多法律受到英美法，尤其是美國法的影響甚深。眾多法律的制定與修正，亦經常借鏡美國的相關的法律制度。研讀美國法律和案例的英文原文，很自然地會學習到法律條文中專用的法學英文字彙，並且直接地了解這些法律設計的目的，進而去比較我國與美國法律的差異與制度的優劣，最後有能力去重新審視並建構適合我國國情的法律。

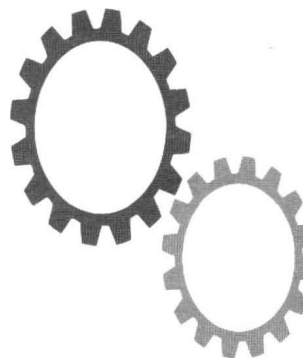
第四，對於具有提昇台灣國際競爭力使命的法律人更需要藉由法學英文的研讀增強自己的實力。以目前臺灣的形勢迫切地需要兼備英語能力的律師，代表臺灣出席世界貿易組織(WTO)或其他國際組織。雖然臺灣已在國際上擔當大任，但是因為中國大陸的阻撓和打壓，使得臺灣不被認同是一個“主權獨立”的國家，而無法成為聯合國的會員。為突破中國大陸所造成的政治孤立，臺灣雖然積極地參與許多國際組織，但是在多國貿易協商中，因缺乏強勢的法律代表捍衛臺灣人民的權益，經常使台灣在國際上屈居下風。英語已然是全世界通用的語言，而法律則是全世界統合的基礎，必須了解只有仰賴全世界都聽得懂的語言，表達立場才能突破台灣現有的格局，與世界各國建立起此對等的聯繫。

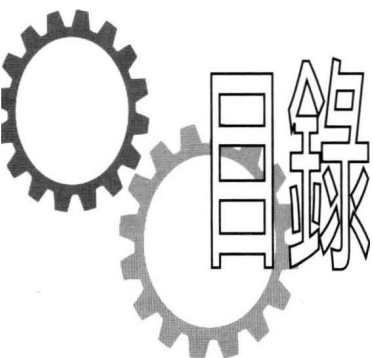
本書的目的是希望法律人在了解到學習法律英文的好處以及重要性之後，能用不同的心情面對這門學科。也希望藉由本書可以減少法律人在學習英美法時所產生的焦慮與苦惱。本書是根據作者身為美國法學院J.D.學生的經驗來撰寫，希望讀者在閱讀本書之後能用更寬闊的視野面對自己的法律專業。

林利芝 台北，2004.03

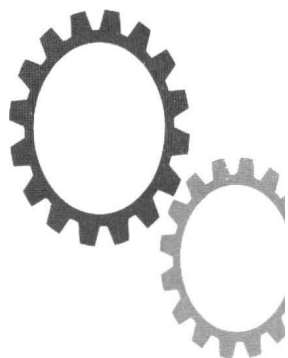


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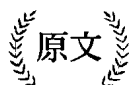
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Ineffective Assistance of Counsel 律師無效協助辯護

此篇英文原文是摘錄自美國最高法院判決
Kevin Wiggins v. Sewall Smith, 539 U.S. 510 (2003).



原文

On September 17, 1988, police discovered 77-year-old Florence Lacs drowned in the bathtub of her ransacked apartment in Woodlawn, Maryland. The State indicted petitioner for the crime on October 20, 1988, and later filed a notice of intention to seek the death penalty. Two Baltimore County public defenders, Carl Schlaich and Michelle Nethercott, assumed responsibility for Wiggins' case. In July 1989, petitioner elected to be tried before a judge in Baltimore County Circuit Court. On August 4, after a 4-day trial, the court found petitioner guilty of first-degree murder, robbery, and two counts of theft.

After his conviction, Wiggins elected to be sentenced by a jury, and the trial court scheduled the proceedings to begin on October 11,

1989. On September 11, counsel filed a motion for bifurcation of sentencing in hopes of presenting Wiggins' case in two phases. Counsel intended first to prove that Wiggins did not act as a "principal in the first degree," -- i.e., that he did not kill the victim by his own hand. Counsel then intended, if necessary, to present a mitigation case. In the memorandum in support of their motion, counsel argued that bifurcation would enable them to present each case in its best light; separating the two cases would prevent the introduction of mitigating evidence from diluting their claim that Wiggins was not directly responsible for the murder.

On October 12, the court denied the bifurcation motion, and sentencing proceedings commenced immediately thereafter. In her opening statement, Nethercott told the jurors they would hear evidence suggesting that someone other than Wiggins actually killed Lacs. Counsel then explained that the judge would instruct them to weigh Wiggins' clean record as a factor against a death sentence. She concluded: "You're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no convictions for prior crimes of violence and no convictions, period. . . . I think that's an important thing for you to consider." During the proceedings themselves, however, counsel introduced no evidence of Wiggins' life history.

Before closing arguments, Schlaich made a proffer to the court, outside the presence of the jury, to preserve bifurcation as an issue for appeal. He detailed the mitigation case counsel

would have presented had the court granted their bifurcation motion. He explained that they would have introduced psychological reports and expert testimony demonstrating Wiggins' limited intellectual capacities and childlike emotional state on the one hand, and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world on the other. At no point did Schlaich proffer any evidence of petitioner's life history or family background. On October 18, the court instructed the jury on the sentencing task before it, and later that afternoon, the jury returned with a sentence of death. A divided Maryland Court of Appeals affirmed.

In 1993, Wiggins sought post-conviction relief in Baltimore County Circuit Court. With new counsel, he challenged the adequacy of his representation at sentencing, arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. To support his claim, petitioner presented testimony by Hans Selvog, a licensed social worker certified as an expert by the court. Selvog testified concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents. Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, Selvog chronicled petitioner's bleak life history.

According to Selvog's report, petitioner's mother, a chronic

alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner -- an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

During the post-conviction proceedings, Schlaich testified that he did not remember retaining a forensic social worker to prepare a social history, even though the State made funds available for that purpose. He explained that he and Nethercott, well in advance of trial, decided to focus their efforts on "retrying the factual case" and disputing Wiggins' direct responsibility for the murder. In April 1994, at the close of the proceedings, the judge observed from the bench that he could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, "not to do a social history, at least to see what you have got, to me is absolute error. In October 1997, however, the trial court

denied Wiggins' petition for post-conviction relief. The court concluded that "when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel."

The Maryland Court of Appeals affirmed the denial of relief, concluding that trial counsel had made "a deliberate, tactical decision to concentrate their effort at convincing the jury" that appellant was not directly responsible for the murder. The court observed that counsel knew of Wiggins' unfortunate childhood. They had available to them both the presentence investigation (PSI) report prepared by the Division of Parole and Probation, as required by Maryland law, as well as "more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation." The court acknowledged that this evidence was neither as detailed nor as graphic as the history elaborated in the Selvog report but emphasized that "counsel did investigate and were aware of appellant's background." Counsel knew that at least one uncontested mitigating factor--Wiggins' lack of prior convictions--would be before the jury should their attempt to disprove Wiggins' direct responsibility for the murder fail. As a result, the court concluded, Schlaich and Nethercott "made a reasoned choice to proceed with what they thought was their best defense."

In September 2001, Wiggins filed a petition for writ of habeas corpus in Federal District Court. The trial court granted him relief, holding that the Maryland courts' rejection

of his ineffective assistance claim “involved an unreasonable application of clearly established federal law.” The court rejected the State’s defense of counsel’s “tactical” decision to “retry guilt,” concluding that for a strategic decision to be reasonable, it must be “based upon information the attorney has made after conducting a reasonable investigation.” The court found that though counsel were aware of some aspects of Wiggins’ background, that knowledge did not excuse them from their duty to make a “fully informed and deliberate decision” about whether to present a mitigation case. In fact, the court concluded, their knowledge triggered an obligation to look further.

Reviewing the District Court’s decision *de novo*, the Fourth Circuit reversed, holding that counsel had made a reasonable strategic decision to focus on petitioner’s direct responsibility. The court contrasted counsel’s complete failure to investigate potential mitigating evidence in *Wiggins v. Corcoran*, with the fact that Schlaich and Nethercott knew at least some details of Wiggins’ childhood from the PSI and social services records. The court acknowledged that counsel likely knew further investigation “would have resulted in more sordid details surfacing,” but agreed with the Maryland Court of Appeals that counsel’s knowledge of the avenues of mitigation available to them “was sufficient to make an informed strategic choice” to challenge petitioner’s direct responsibility for the murder. The court emphasized that conflicting medical testimony with respect to the time of death, the absence of direct evidence against Wiggins, and unexplained forensic evidence at the crime scene supported counsel’s strategy. We granted