

# THE ABA GUIDELINES: A HISTORICAL PERSPECTIVE

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## I. INTRODUCTION

Some criminal defense lawyers are justly proud to boast to their clients that they can offer the best defense that money can buy. Others represent only indigent clients. Clients facing the death penalty are invariably poor. The standards that have developed in capital defense practice reflect the strategies, experiential expertise, and collective wisdom of the public defenders, court-appointed panel lawyers, low-salaried lawyers from nonprofits, and pro bono volunteers who have represented indigent capital defendants successfully. In this Article, we review how the standards of practice in the development of mitigating evidence—a core component of capital defense practice—evolved from the reinstatement of the death penalty in the 1970s,<sup>1</sup> to the publication of the original edition of the American Bar Association (“ABA”) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“Guidelines”)<sup>2</sup> in 1989.

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1. See generally EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA (2013) (discussing the history of Supreme Court cases in the 1970s that first voided all existing death penalty statutes, and then found new guided-discretion statutes constitutional).

2. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter ABA GUIDELINES (1989)], available at [www.ambar.org/1989Guidelines](http://www.ambar.org/1989Guidelines). These guidelines were later revised in 2003. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES], available at <http://www.ambar.org/2003Guidelines>. The revision reflected an

The need for this historical perspective stems from the occasional inaccurate suggestion that the Guidelines are the work of elite high paid professionals, or the musings of academics with no grounding in actual practice. In his concurrence in *Bobby v. Van Hook*,<sup>3</sup> Justice Alito disparaged the Guidelines as having no “special relevance” to Sixth Amendment performance standards.<sup>4</sup> He described the ABA as a “private group with limited membership,” whose views—“not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines”—“do not necessarily reflect the views of the American bar as a whole.”<sup>5</sup> Thus, the Guidelines, in the Justice’s opinion, do not merit a “privileged position” in determining the obligations of capital defense counsel.<sup>6</sup> No other Justice joined in this concurrence, but the Court’s majority faulted the Sixth Circuit for judging trial counsel’s performance in the 1980s based on revised Guidelines published in 2003 “without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial.”<sup>7</sup>

Historical clarification is also particularly important today because of the funding crises in our courts, causing even less hostile jurists to express anxiety about how much justice we can afford. On the occasion of an event celebrating the fiftieth anniversary of *Gideon v. Wainwright*,<sup>8</sup> the landmark ruling recognizing that indigent defendants are entitled to a lawyer at public expense, Justice Kagan gave a speech reminding us that poor people are *not* entitled to “the best defense money can buy.”<sup>9</sup> She resorted to the familiar automotive metaphor to remind everyone that a poor person’s right to counsel means only an inexpensive defense—in

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enormous effort by the ABA Death Penalty Representation Project (“Project”), which recruited the advisory committee, worked with it, assisted contractors in drafting revisions and with Professor Eric Freedman in preparing the Commentary, and finally shepherding the revised Guidelines through the ABA’s internal review process. The result is the singular accomplishment of the Project over the preceding decade.

3. 558 U.S. 4 (2009) (per curiam).

4. *Id.* at 13-14 (Alito, J., concurring).

5. *Id.* at 14.

6. *Id.*

7. *Id.* at 7-8 (majority opinion).

8. 372 U.S. 335 (1963) (establishing indigent defendants’ right to counsel in state court criminal cases).

9. *Id.*; Andrew Ramonas, *Kagan, Holder Address the Five Decades Since Historic Gideon Decision*, BLT: BLOG LEGAL TIMES (Mar. 18, 2013), <http://www.legaltimes.typepad.com/blt/2013/03/kagan-holder-address-the-five-decades-since-historic-gideon-decision.html>; Debra Cassens Weiss, *Kagan Says Poor Defendants Are Entitled to a “Ford Taurus” Defense*, A.B.A. J. (Mar. 19, 2013, 12:00 PM), [http://www.abajournal.com/news/article/kagan\\_says\\_poor\\_defendants\\_are\\_entitled\\_to\\_a\\_ford\\_taurus\\_defense](http://www.abajournal.com/news/article/kagan_says_poor_defendants_are_entitled_to_a_ford_taurus_defense).

car terms, something like a Ford Taurus, not a Cadillac.<sup>10</sup> She said: “We don’t have the resources to make [a Cadillac defense] happen. . . . And I’m not sure if we did have the resources that that’s exactly what we should want.”<sup>11</sup> Justice Kagan continued by stating: “[L]awyers in criminal courts are necessities, not luxuries.”<sup>12</sup> Unfortunately, some courts and legislatures still view a poor defendant’s entitlement to legal representation as a constitutional extravagance—even when that indigent person’s life is at stake.

## II. THE EFFECTIVE RESPONSE TO THE POST-*FURMAN V. GEORGIA* FRAMEWORK

In 1972, the U.S. Supreme Court decided *Furman v. Georgia*,<sup>13</sup> which struck down all then existing death penalty statutes.<sup>14</sup> Most of the states that had the death penalty on their books immediately enacted new capital punishment statutes that attempted to address the Court’s concerns by eliminating arbitrariness.<sup>15</sup> By 1976, five of the new statutes had reached the Supreme Court.<sup>16</sup> North Carolina and Louisiana had attempted to eliminate jurors’ unfettered discretion by making the death penalty mandatory for certain narrowly defined murders, but the high court declared their mandatory statutes unconstitutional.<sup>17</sup> In striking down the mandatory statutes, the Court explained that individualized sentencing is constitutionally required in capital cases:

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 in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It

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10. Ramonas, *supra* note 9.

11. *Id.*

12. *Id.*

13. 408 U.S. 238 (1972).

14. *Id.* at 239-40 (finding the death penalty arbitrary and unconstitutional as applied when jurors have unfettered discretion to impose it).

15. *See* *Gregg v. Georgia*, 428 U.S. 153, 179-81 (1976) (noting that at least thirty-five states had enacted new death penalty statutes).

16. *See* *Gregg*, 428 U.S. at 161-62; *Roberts v. Louisiana*, 428 U.S. 325, 328-31 (1976); *Jurek v. Texas*, 428 U.S. 262, 267-68 (1976); *Proffitt v. Florida*, 428 U.S. 242, 246-47 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 285-87 (1976).

17. *Roberts*, 428 U.S. at 328-31; *Woodson*, 428 U.S. at 285-87; *see* MANDERY, *supra* note 1, at 336-53 (discussing how the Court chose which cases to review, and how individual Justices analyzed them). *But see* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 378 n.4 (2010) (“That each of these five cases involved a white defendant suggests that the avoidance of race discrimination issues may also have been a factor in the selection.”).

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 . . . .

. . . .  
While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, [] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.<sup>18</sup>

The new statutory frameworks of Georgia, Florida, and Texas, however, survived Supreme Court scrutiny.<sup>19</sup> All three statutes guaranteed that death-sentenced prisoners would have an automatic appeal to their highest state courts.<sup>20</sup> All three established bifurcated trials, with one phase to determine whether the defendant was guilty of the alleged capital murder, and a second phase to determine the sentence.<sup>21</sup> In *Gregg v. Georgia*,<sup>22</sup> the Court praised the framework proposed in the Model Penal Code in 1962, whereby jurors would be guided by defined aggravating factors, narrowing eligibility for the death penalty, and mitigating factors that would offer broad leeway to dispense mercy.<sup>23</sup> As Professor Craig Haney has astutely pointed out, “there was

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18. *Woodson*, 428 U.S. at 304 (citation omitted).

19. *Gregg*, 428 U.S. at 207; *Jurek*, 428 U.S. at 268; *Proffitt*, 428 U.S. at 259-60; see also MANDERY, *supra* note 1, at 439-40 (noting that Justice Stevens later regretted the decision in *Jurek*, stating in a post-retirement interview: “I think upon reflection, we should have held the Texas statute—which was challenged in the fifth case—to fit under the mandatory category and be unconstitutional. In my judgment, we made a mistake on that case.”).

20. *Gregg*, 428 U.S. at 166-67; *Jurek*, 428 U.S. at 276; *Proffitt*, 428 U.S. at 250.

21. *Gregg*, 428 U.S. at 158; *Jurek*, 428 U.S. at 276; *Proffitt*, 428 U.S. at 250.

22. 428 U.S. 153 (1976).

23. *Id.* at 191-92 (quoting the Model Penal Code: “The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence.”). Once the Court approved the Georgia statute, “the [Model Penal Code] became the basis, essentially, for every American death penalty statute.” MANDERY, *supra* note 1, at 306; see ABA GUIDELINES, *supra* note 2, Guideline 10.11, at 1059 n.274 (“In fact, most statutory mitigating circumstances, which were typically adapted from the Model Penal Code, are ‘imperfect’ versions of first phase defenses such as insanity, diminished capacity, duress, and self-defense.”). It should be noted, however, that this language was later explicitly *withdrawn* from the Model Penal Code. In 2009, the American Law Institute Council (“Institute”) voted “overwhelmingly” to accept the resolution adopted by the Institute’s membership at its annual meeting to withdraw the relevant section of the Model Penal Code “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” See Press

literally *no* mitigation whatsoever presented to the jurors” who had sentenced Troy Gregg to death, and this absence of mitigation was “apparently so insignificant to the Justices” that “not one of them saw fit to mention it anywhere in their opinions.”<sup>24</sup> He notes the particular irony in *Gregg*, because “‘mitigation’ was explicitly identified as one of the key components in the new and improved death penalty statutes that the Court found constitutional.”<sup>25</sup>

It is not surprising that some lawyers were initially confused about what could be presented as mitigating evidence. In the syllabus of a 1978 “Strategy Seminar on Death Penalty Trials” in California, one veteran public defender wrote:

Most of the doubt and uncertainty lies within the penalty phase. Although strong arguments can be made for allowing the defendant to produce evidence going to such matters as common mercy, defendant’s total value within the community, his character, history, and background, the more strict and severe interpretation is one that admits the production of evidence of only specifically enumerated factors. Large wars can be expected to be waged in that never-never land falling between paragraph one with its broad expansive admissions of proofs and paragraph five with its rather stringent limitations.<sup>26</sup>

Just a few months later, the Supreme Court provided clarification in a case from Ohio. Sandra Lockett challenged the constitutionality of an Ohio statute because it did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and relatively minor role in the crime.<sup>27</sup> The Court concluded that the Eighth and Fourteenth Amendments require that the

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Release, Am. Law Inst., Message from Director Lance Liebman (on file with the *Hofstra Law Review*).

24. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 835-36 (2008).

25. *Id.* at 836.

26. James Jenner, *The California Death Penalty: Trial Tactical Considerations*, in CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN COOPERATION WITH CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, STRATEGY SEMINAR ON DEATH PENALTY TRIALS, Hastings College of the Law, San Francisco, Mar. 24-25, 1978, at 15-16, 24 (referring to then Calif. Penal Code § 190.3, in which ¶ 1 provided for any evidence relevant to mitigation, while ¶ 5 enumerated only ten specific factors which the trier “shall take into account”). There was similar confusion in other jurisdictions. See, e.g., Verlin R. F. Meinz & Mark Schuster, *Mitigation Under the Illinois Death Penalty Act*, ILL. B.J., June 1981, at 606, 606, 608, 611-12 (noting tension between the statutory list of mitigating factors and the broader right to present other mitigating facts, as well as the vagueness of an “extreme mental or emotional disturbance” that is “not such as would constitute a defense to prosecution”).

27. *Lockett v. Ohio*, 438 U.S. 586, 597 (1978).

sentencer “not be precluded from considering, *as a mitigating factor*, any aspect of 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.”<sup>28</sup>

Meanwhile, practitioners in the South were aggressively developing strategies to investigate and present effective mitigating evidence—and embracing multidisciplinary teamwork as early as 1976.<sup>29</sup> Dennis N. Balske, an attorney then practicing with the Southern Poverty Law Center in Alabama, also stressed the need for teams in a 1979 law review article:

No attorney should ever solo a capital case. There are simply too many things going on for one attorney to manage. Moreover, it is difficult to maintain one’s sanity under such intense pressure without the support of another attorney. Thus, as an absolute minimum, every capital case should have two defense attorneys.<sup>30</sup>

The article also emphasized the importance of investigation,<sup>31</sup> consistent theories in both phases,<sup>32</sup> and preparation of penalty phase strategy and evidence far in advance of trial, so that “rather than scurrying around to discover information to save your client, your job will consist of administering the most persuasive presentation possible from the wealth of information already accumulated, in such a way as to complement, through consistency, your trial presentation.”<sup>33</sup> Balske also appreciated

28. *Id.* at 604.

29. See Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1123 & n.51 (2003) (“Millard Farmer, an attorney who assisted with the Team Defense Project in Georgia in 1976, was one of the first to articulate the team concept in capital defense work. The project employed an interdisciplinary approach and strategies that reached beyond the courtroom in representing its clients.” (footnote omitted)); see also Michael G. Millman, *Interview: Millard Farmer*, FORUM, Nov.-Dec. 1984, at 31, 31-32; Team Defense Project, *Team Defense in Capital Cases*, FORUM, May-June 1978, at 24, 24.

30. Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 336 (1979). By 1982, Balske’s admonition never to “solo” a capital case was successfully litigated by a court-appointed lawyer in California. See *Keenan v. Superior Court of S.F.*, 640 P.2d 108, 113-14 (Cal. 1982) (granting mandamus to compel appointment of second counsel because of complex factual and legal issues in capital case); see also ABA GUIDELINES (1989), *supra* note 2, Guideline 2.1 (requiring two qualified attorneys at trial, on appeal, and in post-conviction).

31. Balske, *supra* note 30, at 352; see also ABA GUIDELINES (1989), *supra* note 2, Guideline 11.4.1 (requiring that “independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial” should begin “immediately upon counsel’s entry into the case and should be pursued expeditiously”).

32. Balske, *supra* note 30, at 353; see also ABA GUIDELINES (1989), *supra* note 2, Guideline 11.7.1(A)–(B) (requiring counsel to formulate a defense theory “that will be effective through both phases,” and seek to minimize inconsistencies).

33. Balske, *supra* note 30, at 353-54; see also ABA GUIDELINES (1989), *supra* note 2, Guideline 11.8.3(A) (requiring sentencing preparation to commence “immediately upon counsel’s entry into the case”).

the power of transformative stories of redemption, so he did not imagine mitigation as being limited to the client's pre-offense background: "Importantly, the life story must be complete. That is, it must include information up to the day of the sentencing hearing itself."<sup>34</sup>

The details of teamwork also quickly evolved. It was not long before lawyers appreciated the value of having someone give undivided attention to the client and the development of mitigating evidence. One lawyer in California hired a former *New York Times* reporter to investigate the life history of his client. The reporter, Lacey Fosburgh, was teaching at the Journalism School at the University of California, Berkeley, and she had previously written *Closing Time: The True Story of the "Goodbar" Murder*, a best seller about a case that she had covered for the newspaper.<sup>35</sup> Her account of her experience assisting in the successful representation of a capital client was published in 1982:

[A] significant legal blind spot existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process. Neither one was suited to the task at hand here—namely discovering and then communicating the complex human reality of the defendant's personality in a sympathetic way.

. . . .

Significantly, the defendant's personal history and family life, his obsessions, aspirations, hopes, and flaws, are rarely a matter of physical evidence. Instead they are both discovered and portrayed through narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech—things that to a jury convey as much information, if not more, as any set of facts. But all of this is hard to recognize or develop, understand or systematize without someone on the defense team having it as his specific function. *This person should have nothing else to do* but work with the defendant, his family, friends, enemies, business associates and casual acquaintances, perhaps even duplicating some of what the private detective does, but going beyond that and looking for more. This takes a lot of time and patience.<sup>36</sup>

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34. Balske, *supra* note 30, at 357-58; *see also* ABA GUIDELINES (1989), *supra* note 2, Guideline 11.8.6(A)–(B) (noting that counsel should consider presenting evidence of the "rehabilitative potential of the client," in addition to information from his medical, educational, military, employment, family, and social history); *see also* Skipper v. South Carolina, 476 U.S. 1, 4-5 (1985) (evidence of positive jail adjustment is relevant as mitigation, even though it "would not relate specifically to petitioner's culpability for the crime he committed").

35. *See generally* LACEY FOSBURGH, *CLOSING TIME: THE TRUE STORY OF THE "GOODBAR" MURDER* (1977).

36. Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, FORUM, Sept.-Oct. 1982, at 31, 32 (emphasis added).

By the mid-1980s, there was also increasing recognition of the need for multidisciplinary teams, including nonlawyers, who would give fulltime attention to social history investigation.<sup>37</sup> In 1986, social workers Cessie Alfonso and Katharine Baur wrote about their experience in capital defense teams over the preceding five years, “bridg[ing] the gap” between attorneys and clients’ families, fostering closer cooperation between clients and attorneys, and using psychosocial expertise to help shape the mitigation narrative.<sup>38</sup> Attorneys David C. Stebbins and Scott P. Kenney reiterated the importance of capital defense counsel being team players, and bluntly acknowledged that lawyers just do not have the “psycho-social” expertise that mitigation work requires.<sup>39</sup> They stressed the importance of parallel tracks of investigation: “Upon appointment to a capital case, two concurrent investigations should be begun by separate and distinct investigatory personnel. The criminal investigation is self-explanatory. A social investigation or social history is a creature of capital litigation, however, and is a key to a successful mitigation.”<sup>40</sup> Stebbins and Kenney also noted how social history is the key to reliable mental health assessments in capital cases: “Without a complete social history, any psychological examination is incomplete and the resulting opinions, conclusions, or diagnoses are subject to severe scrutiny.”<sup>41</sup> Another article in 1987 concluded: “The mitigation specialist is a professional who, as attorneys across the nation are recognizing, should be included and will be primary to the defense team.”<sup>42</sup> These authors also stressed the importance of engaging the services of a mitigation specialist at the

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37. See, e.g., Cessie Alfonso & Katharine Baur, *Enhancing Capital Defense: The Role of the Forensic Clinical Social Worker*, CHAMPION, June 1986, at 26, 26-27; David C. Stebbins & Scott B. Kenney, *Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, CHAMPION, Aug. 1986, at 14, 16-17.

38. Alfonso & Baur, *supra* note 37, at 26-27.

39. Stebbins & Kenney, *supra* note 37, at 16, 18 (stating that “capital defense attorney[s] must recognize that the profession demands a higher standard of practice in capital cases”).

40. *Id.* at 16-17.

41. *Id.* at 17. This point was subsequently stressed in numerous articles on the standard of care in capital mental health assessments, noting that independently corroborated social history is the foundation of reliable assessments. See Richard G. Dudley Jr., & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 966-71 (2008); Douglas S. Liebert & David V. Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15 AM. J. FORENSIC PSYCHIATRY 43, 46-48 (1994); George W. Woods et al., *Neurobehavioral Assessment in Forensic Practice*, 35 INT’L J.L. & PSYCHIATRY 432, 433 (2012); see also Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC L. REV. 407, 410, 417-18 (2014) (noting how the importance of independent corroboration has been acknowledged in the mental health field as early as the 1980s).

42. James Hudson et al., *Using the Mitigation Specialist and the Team Approach*, CHAMPION, June 1987, at 33, 36.

outset of the case: “Since the penalty phase is *always* a possibility and the entire case strategy needs to be planned and prepared around mitigation, the mitigation specialist should be obtained as soon as the attorney is retained or assigned.”<sup>43</sup>

Guidance from the Supreme Court stressed the importance of understanding what shaped the capital client in his developmental years. Monty Lee Eddings was sixteen when he killed an Oklahoma highway patrol officer.<sup>44</sup> He was certified to stand trial as an adult, and pled *nolo contendere* in the district court.<sup>45</sup> Evidence of aggravating and mitigating circumstances was presented to the trial judge, including extreme violence inflicted by his father and the young man’s emotional disturbance, but the judge stated that the court, “*in following the law,*” could not “*consider the fact of this young man’s violent background.*”<sup>46</sup> Following the rule announced in *Lockett v. Ohio*,<sup>47</sup> the Supreme Court reversed, holding that capital sentencers may not exclude mitigating evidence from their consideration.<sup>48</sup> The Court went on to discuss the special mitigating qualities of youth and the vulnerability of the developmental years:

The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment” expected of adults.<sup>49</sup>

In 1983, Professor Gary Goodpaster published an article, entitled *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, that was widely read and frequently cited.<sup>50</sup> He discussed trial

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43. *Id.* at 34.

44. *Eddings v. Oklahoma*, 455 U.S. 104, 105-06 (1982). An amicus curiae brief was filed by M. Gail Robinson, Kevin M. McNally, and J. Vincent Aprile II for Kentucky Youth Advocates et al. *Id.* at 105 n.\*. Mr. McNally was at the beginning of his distinguished career as a capital defender.

45. *Id.* at 106.

46. *Id.* at 107-09.

47. 438 U.S. 586, 616-17 (1978) (finding that sentencing authorities may consider mitigating circumstances).

48. *Eddings*, 455 U.S. at 114-15.

49. *Id.* at 115-16 (footnotes omitted) (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

50. See generally Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983). The article was cited four times in *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984); *id.* at 716 nn.13-15, 718 (Marshall, J., dissenting).

counsel's "duty to investigate the client's life, history, and emotional and psychological make-up" in death penalty cases.<sup>51</sup> He continued:

There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized.<sup>52</sup>

Multiple articles in *The Champion*, the monthly magazine of the National Association of Criminal Defense Lawyers, reiterated these points in the 1980s, and reflected how the experience of capital defense lawyers in diverse locations led them to the same conclusions.<sup>53</sup> Other *Champion* articles in this period focused on the other myriad complexities of capital defense representation.<sup>54</sup>

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Justice Marshall referred to the article as "a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings." *Id.* at 716 n.15.

51. Goodpaster, *supra* note 50, at 323-24.

52. *Id.* at 324 (footnote omitted). The Supreme Court had noted, the year before, that in death penalty cases "[e]vidence of a difficult family history and of emotional disturbance [was already] typically introduced by defendants in mitigation." *Eddings*, 455 U.S. at 115.

53. See, e.g., Dennis N. Balske, *The Penalty Phase Trial: A Practical Guide*, CHAMPION, Mar. 1984, at 40, 42 (stating that capital defense counsel "must conduct the most extensive background investigation imaginable. You should look at every aspect of your client's life from birth to present. Talk to everyone that you can find who has ever had any contact with the defendant."); Jeff Blum, *Investigation in a Capital Case: Telling the Client's Story*, CHAMPION, Aug. 1985, at 27, 27-28 (describing the methodology for mitigation investigation); Robert R. Bryan, *Death Penalty Trials: Lawyers Need Help*, CHAMPION, Aug. 1988, at 32, 32 ("There is a requirement in every case for a comprehensive investigation not only of the facts but also the entire life history of the client."); Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must Be Different, Too*, CHAMPION, Mar. 1984, at 8, 12 (explaining that capital trials can never be tried by a lone defense counsel). Another early summary of the contours of mitigation investigation was published by the National Jury Project and widely circulated at training conferences in the 1980s. See Lois Heaney, *Constructing a Social History*, in NATIONAL JURY PROJECT, CAPITAL TRIALS: JUROR ATTITUDES AND SELECTION STRATEGIES 11 (1983).

54. For topics including: *voir dire*, see John L. Carroll, *Voir Dire for Capital Trials*, CHAMPION, Mar. 1984, at 23, 24 (discussing the importance of jury consultants' need to observe verbal responses, as well as body language); purely legal issues, see Gail R. Weinheimer & Michael G. Millman, *Legal Issues Unique to the Penalty Trial*, CHAMPION, Mar. 1984, at 33, 33; defense closing at penalty phase, see Dennis N. Balske, *Putting It All Together: The Penalty-Phase Closing Argument*, CHAMPION, Mar. 1984, at 47, 48-49 (noting the need to provide explanation, and stress each juror's personal responsibility); improper prosecutorial closing arguments, see Margery M. Koosed, *Prosecutorial Misconduct in the Penalty Phase Closing Argument—The Improper Invitation to Kill*, CHAMPION, Nov. 1985, at 40, 40-41 (discussing the importance of recognizing improprieties and timely objections); jury instructions, see Stephen Ellmann, *Instructions on Death: Guiding the Jury's Sentencing Discretion in Capital Cases*, CHAMPION, Apr. 1986, at 20, 20, 22, 24, 28 (noting the importance of instructions in defining aggravation and mitigation, establishing burdens of proof, and explicating weighing process); federal habeas corpus, see Margery Malkin

### III. THE ARTICULATION OF STANDARDS

Defendants facing capital punishment have always been poor, so the practitioners who have developed skills and expertise in effective capital defense representation have invariably been public defenders, private counsel appointed by the courts, lawyers at nonprofits that filled the void in the harshest jurisdictions, and legions of unpaid pro bono volunteers. Not surprisingly, the first organization to attempt to set out standards in capital defense was the nation's leading association of counsel for the indigent, the National Legal Aid and Defender Association ("NLADA").<sup>55</sup> The much larger ABA had previously published more general standards relating to criminal defense practice, and these standards already placed important emphasis on the need for investigation. When the ABA published the second edition of its "Standards for Criminal Justice (the Defense Function)" in 1980, Standard 4.4-1 noted: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case *and the penalty in the event of conviction.*"<sup>56</sup> The Commentary added: "Facts form the basis of effective representation."<sup>57</sup>

After a period of years of drafting and circulating preliminary versions, the NLADA published its "Standards for the Appointment of Defense Counsel in Death Penalty Cases" in 1985.<sup>58</sup> While the text was not amended, the name of the document was changed between 1987 and 1988 to "Standards for the Performance of Counsel in Death Penalty

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Koosed, *Federal Habeas Corpus Relief—Avoiding [a] Comity [of] Errors*, CHAMPION, Jan.-Feb. 1987, at 28, 28-29 (recognizing the importance of "constitutionalizing" claims raised in state courts at trial, on appeal, and in post-conviction); the role of religion in capital trials, see Jeff Blum, *The Ten Commandments of Religious Testimony*, CHAMPION, Apr. 1987, at 23, 23 (discussing the pros and cons of religious testimony); and accomplice liability, see Randall L. Porter, *May an Accomplice Receive the Death Penalty? The Tison v. Arizona Answer*, CHAMPION, Aug. 1987, at 24, 24, 28. For articles on intellectual impairment, see George S. Baroff & Stephen C. Freedman, *Mental Retardation and Miranda*, CHAMPION, Apr. 1988, at 6, 6-7, John H. Blume, *Representing the Mentally Retarded Defendant*, CHAMPION, Nov. 1987, at 32, 32, and Mary Swift, *Representing the Developmentally Disabled Offender*, CHAMPION, Apr. 1988, at 10, 10-11.

55. *Standards for the Appointment of Counsel in Death Penalty Cases*, NAT'L LEGAL AID & DEFENDER ASS'N, [http://www.nlada.org/Defender/Defender\\_Standards/Standards\\_For\\_Death\\_Penalty?printable=yes](http://www.nlada.org/Defender/Defender_Standards/Standards_For_Death_Penalty?printable=yes). (last visited Apr. 12, 2015) [hereinafter NLADA Standards].

56. ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-4.1 (Supp. 1986) (emphasis added).

57. *Id.* Commentary.

58. The Introduction to the Standards for the Appointment of Defense Counsel in Death Penalty Cases describes how the ABA's Standing Committee on Legal Aid and Indigent Defendants ("SCLAID") provided initial support to NLADA as it developed the death penalty standards "over the course of several years." ABA GUIDELINES (1989), *supra* note 2, at Introduction.

Cases” (adopted December 1, 1987, and amended November 16, 1988) (“Standards”).<sup>59</sup> In February 1988, the NLADA referred its Standards to the ABA’s Standing Committee on Legal Aid and Indigent Defendants.<sup>60</sup> The Standards were then further circulated within the ABA, which incorporated some concerns expressed by its Criminal Justice Section and changed the name from Standards to Guidelines.<sup>61</sup> The ABA House of Delegates formally adopted the Guidelines at its 1989 Midyear Meeting.<sup>62</sup> When the Guidelines were published by the ABA, each black letter Guideline was explained by a commentary, with reference to supporting authorities.<sup>63</sup> The Commentary cited some of the articles that have been mentioned in this Article,<sup>64</sup> as well as capital trial manuals from multiple jurisdictions, including California,<sup>65</sup> Indiana,<sup>66</sup> Kentucky,<sup>67</sup> Ohio,<sup>68</sup> and Tennessee.<sup>69</sup>

Thus, the ABA Guidelines were the product of the dedicated indigent defense professionals, who were representing capital clients effectively, and who freely shared their knowledge and experience through *The Champion*, training programs, and the manuals that recirculated much of the best material.<sup>70</sup> As the Introduction to the 1989 Guidelines explained: “[T]hey enumerate the minimal resources and practices necessary to provide effective assistance of counsel.”<sup>71</sup> They were never meant to be aspirational. As the Introduction to NLADA’s original edition said in 1985: “‘Should’ is used as a mandatory term—what counsel ‘should’ do is intended as a standard to be met now, not an ideal to be attained at a later time.”<sup>72</sup> The Introduction also noted the

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59. NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1987) (amended 1988), available at [www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/National/NLADA\\_DP\\_Apptmt\\_Std\\_1987.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/NLADA_DP_Apptmt_Std_1987.authcheckdam.pdf).

60. ABA GUIDELINES (1989), *supra* note 2, at Introduction.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Guideline 1.1 Commentary, at n.28 (citing Goodpaster, *supra* note 50).

65. *Id.* Guideline 11.7.3 Commentary, at n.3 (citing CAL. ATTORNEYS FOR CRIMINAL JUSTICE/CAL. PUB. DEFENDER ASS’N, CALIFORNIA DEATH PENALTY TRIAL MANUAL (1986)).

66. *Id.* Guideline 1.1 Commentary, at n.21 (citing IND. PUB. DEFENDER COUNCIL, INDIANA DEATH PENALTY DEFENSE MANUAL (1985)).

67. *Id.* Guideline 8.1 Commentary, at n.5 (citing DEP’T OF PUB. ADVOCACY, KENTUCKY PUBLIC ADVOCATE DEATH PENALTY MANUAL (1983)).

68. *Id.* Guideline 11.6.3 Commentary, at n.3 (citing OHIO DEATH PENALTY TASK FORCE & OHIO CRIMINAL DEF. LAWYERS ASS’N, OHIO DEATH PENALTY MANUAL (1981)).

69. *Id.* Guideline 11.5.1 Commentary, at n.2 (citing TENN. ASS’N OF CRIMINAL DEF. LAWYERS, TOOLS FOR THE ULTIMATE TRIAL: TACDL DEATH PENALTY DEFENSE MANUAL (1985)).

70. *See generally id.*

71. *Id.* at Introduction.

72. NLADA Standards, *supra* note 55; *see also* Russell Stetler & W. Bradley Wendel, *The*

reality that “poor defendants in this country who face the ultimate criminal sanction—death—frequently do not receive adequate representation from their government-supplied lawyers.”<sup>73</sup>

#### IV. CONCLUSION: HARDLY A “CADILLAC DEFENSE”

National standards of practice in capital defense are important for counsel at every stage of representation. Counsel invoke the current national standards in both pretrial and post-conviction proceedings in order to obtain adequate time and funding for investigative and expert services. In post-conviction proceedings, counsel also need to establish what the national standards were at the time of the original prosecution, in order to provide courts with an objective means of assessing trial counsel’s performance. As Russell Stetler and W. Bradley Wendel have explained:

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases . . . continue to stand as the single most authoritative summary of the prevailing professional norms in the realm of capital defense practice. Hundreds of court opinions have cited to the Guidelines. They have been particularly useful in helping courts to assess the investigation and presentation of mitigating evidence in death penalty cases.<sup>74</sup>

It is critical to demonstrate to our courts how the Guidelines embody not a “Cadillac defense,” but the minimum standards developed by successful capital defenders throughout the modern era.

This Article has briefly surveyed the experience that led to the original Guidelines in 1989.<sup>75</sup> However, capital defense practice was not frozen in time in 1989. This practice is dynamic in every sense, and the 2003 revision reflected continuing advances.<sup>76</sup> The more extensive Commentary that accompanied the 2003 edition,<sup>77</sup> with its 357 footnotes, clearly shows the influence of the effective practice from the

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*ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 639 (2013) (“Standards of care in the legal profession . . . reflect the judgment of courts concerning what lawyers *ought* to do, rather than what a numerical majority of lawyers in fact do.”).

73. NLADA Standards, *supra* note 55.

74. Stetler & Wendel, *supra* note 72, at 635 (citations omitted); *see also* ABA, LIST OF CASES CITING TO THE 1989 ABA GUIDELINES, *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/death\\_penalty\\_representation/1989list.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989list.authcheckdam.pdf); ABA, LIST OF CASES CITING TO THE 2003 ABA GUIDELINES, *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/death\\_penalty\\_representation/2003list.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003list.authcheckdam.pdf).

75. *See supra* Parts II–III.

76. ABA GUIDELINES, *supra* note 2, Commentary to Guideline 1.1, at 920–22.

77. *Id.*

1990s that contributed to the important revision.<sup>78</sup> New York's brief experiment with capital punishment illustrates how these same influences shaped the performance of an effective capital defense system that modeled many of the practices codified in the 2003 revision.<sup>79</sup>

When New York enacted a death penalty statute in 1995, the legislation created a Capital Defender Office ("CDO") with a mandate to ensure that capital charged defendants received effective representation.<sup>80</sup> The newly created office was the first of its kind—that is, the first publicly funded, statewide indigent defense organization dedicated uniquely to the representation of capital charged clients.<sup>81</sup> The CDO hired staff who had capital experience in other states, including Alabama, California, Florida, Georgia, New Jersey, South Carolina, and Texas. The number of investigators and mitigation specialists on staff was roughly equal to the number of trial lawyers. Every case was staffed with a team of at least two lawyers, an investigator, and a mitigation specialist. While the statute was operational, 877 defendants were charged with potential death-eligible offenses, entitling them to capital qualified counsel (either CDO staff attorneys or private attorneys who had received specialized training through the CDO, and whom the CDO recommended for court appointment).<sup>82</sup> Only seven death sentences were imposed, and all of them were ultimately overturned.<sup>83</sup> The day-to-day practice of the CDO was not an idiosyncratic invention of its management, but rather a

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78. See generally *id.*

79. See generally *id.*

80. *History*, CAP. DEFENDER OFF., <http://www.nycdo.org> (last visited Apr. 12, 2015).

81. Stetler served as the CDO's Director of Investigation and Mitigation from its inception in 1995, until the New York death penalty was abandoned after the state's highest court found the statute unconstitutional in *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). Following the decision, the State Assembly held five public hearings from December 15, 2004 through February 11, 2005, and took no steps toward correcting the statutory infirmity, thereby ending the death penalty in New York. N.Y. STATE ASSEMBLY, THE DEATH PENALTY IN NEW YORK 1-3, 14-15 (2005), available at <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>. The details concerning the CDO discussed herein are based on the author's personal knowledge of its operation.

82. These statistics were maintained by the CDO and reported by the former capital defender Kevin M. Doyle. E-mail from Kevin M. Doyle, Capital Defender, to authors (Oct. 17, 2012, 5:37 PM) (on file with the *Hofstra Law Review*).

83. Six death sentences were overturned by the New York Court of Appeals. See *People v. Taylor*, 878 N.E.2d 969, 984 (N.Y. 2007); *People v. Shulman*, 843 N.E.2d 125, 140 (N.Y. 2005); *LaValle*, 817 N.E.2d at 368; *People v. Mateo*, 811 N.E.2d 1053, 1083 (N.Y. 2004); *People v. Cahill*, 809 N.E.2d 561, 594 (N.Y. 2003); *People v. Harris*, 779 N.E.2d 705, 728-29 (N.Y. 2002). The case of the remaining death-sentenced prisoner, Nicholson McCoy, was resolved following the *LaValle* decision. See William Glaberson, *Across New York, a Death Penalty Stuck in Limbo*, N.Y. TIMES, Aug. 21, 2004, at A1; Robert Gearty & Bill Hutchinson, *Sentenced to Life, Killer Yawns!*, N.Y. DAILY NEWS (Sept. 10, 2004, 12:00 AM), <http://www.nydailynews.com/archives/news/sentenced-life-killer-yawns-article-1.599385>.

simple attempt to implement the techniques developed by experienced capital defense practitioners all over the country that were the subject of regular presentations at national training programs.

The 2003 edition of the Guidelines contains some eighty footnotes citing to the law review articles of David Baldus,<sup>84</sup> Sandra Babcock,<sup>85</sup> Vivian Berger,<sup>86</sup> John Blume,<sup>87</sup> Stephen Bright,<sup>88</sup> Randall Coyne,<sup>89</sup> Phyllis Crocker,<sup>90</sup> James Ellis,<sup>91</sup> Lyn Entzeroth,<sup>92</sup> Eric M. Freedman,<sup>93</sup> Ruth Friedman,<sup>94</sup> William Geimer,<sup>95</sup> Craig Haney,<sup>96</sup> Jeffrey Kirchmeier,<sup>97</sup> James Liebman,<sup>98</sup> Ruth Luckasson,<sup>99</sup> Andrea Lyon,<sup>100</sup> Michael Mello,<sup>101</sup> Michael Radelet,<sup>102</sup> Clive Stafford-Smith,<sup>103</sup> Carol Steiker,<sup>104</sup> Jordan Steiker,<sup>105</sup> Bryan Stevenson,<sup>106</sup> Scott Sundby,<sup>107</sup> Kim Taylor-Thompson,<sup>108</sup> Welsh White,<sup>109</sup> and Larry Yackle,<sup>110</sup> among others. While most of these authors ultimately had an academic affiliation, the vast majority also had experience as capital practitioners. Some two dozen footnotes cited to defense bar publications, such as *The*

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84. ABA GUIDELINES, *supra* note 2, Guideline 10.10.2, at 1053 n.269.

85. *Id.* Guideline 10.5, at 1013 n.193.

86. *Id.* Guideline 4.1, at 959 n.104.

87. *Id.* Guideline 10.10.2, at 1051 n.259, 1052 n.261, 1053 n.263; *id.* Guideline 10.11, at 1062 n.287, 1069 n.317.

88. *Id.* Guideline 1.1, at 926 n.18, 928 n.29, 964 n.109; *id.* Guideline 10.10.2, at 1053 n.264.

89. *Id.* Guideline 10.1, at 991 n.155; *id.* Guideline 10.11, at 1067 n.305.

90. *Id.* Guideline 10.11, at 1069 n.315.

91. *Id.* Guideline 10.5, at 1009 n.183.

92. *Id.* Guideline 10.1, at 991 n.155.

93. *Id.* Guideline 1.1, at 935 n.52, 937 n.63; *id.* Guideline 4.1, at 957 n.99; *id.* Guideline 10.4, at 1004 n.174; *id.* Guideline 10.7, at 1018 n.202.

94. *Id.* Guideline 9.1, at 985 n.136, 986 n.139.

95. *Id.* Guideline 1.1, at 930 n.37.

96. *Id.* Guideline 4.1, at 956 n.93; *id.* Guideline 10.7, at 1026 n.219; *id.* Guideline 10.11, at 1060 n.277, 1061 n.278.

97. *Id.* Guideline 1.1, at 928 n.29; *id.* Guideline 7.1, at 974 n.127.

98. *Id.* Guideline 1.1, at 928 n.29, 929 n.34, 932 n.46, 936 n.56, 938 n.68; *id.* Guideline 10.10.2, at 1052 n.261.

99. *Id.* Guideline 10.5 at 1009 n.183.

100. *Id.* Guideline 1.1, at 923 n.3, 926 n.18; *id.* Guideline 10.7, at 1016 n.197, 1025 n.215; *id.* Guideline 10.11, at 1059 nn.272-73.

101. *Id.* Guideline 1.1, at 931 n.40.

102. *Id.* Guideline 1.1, at 937 n.64.

103. *Id.* Guideline 9.1, at 986 n.136.

104. *Id.* Guideline 10.11, at 1059 n.274.

105. *Id.*

106. *Id.* Guideline 9.1, at 985 n.136, 986 n.139.

107. *Id.* Guideline 10.11, at 1059 n.273, 1061 n.279, 1062 nn.284-85, 1063 n.288.

108. *Id.* Guideline 1.1, at 930 n.37; *id.* Guideline 8.1, at 979 n.130.

109. *Id.* Guideline 1.1, at 923 n.3; *id.* Guideline 10.2, at 991 n.155; *id.* Guideline 10.5, at 1008 n.180, 1009 nn.181 & 185; *id.* Guideline 10.9.1, at 1041 n.245; *id.* Guideline 10.10.1, at 1047 n.256; *id.* Guideline 10.11, at 1061 n.280, 1064 n.292, 1067 n.308, 1068 n.312.

110. *Id.* Guideline 1.1, at 929 n.34.

*Champion* (published by the National Association of Criminal Defense Lawyers) and *Indigent Defense* (published by the NLADA).<sup>111</sup> The authors of these articles were also seasoned practitioners, including John Blume,<sup>112</sup> Stephen Bright,<sup>113</sup> James J. Clark,<sup>114</sup> Marshall Dayan,<sup>115</sup> Kevin M. Doyle,<sup>116</sup> Edith Georgi Houlihan,<sup>117</sup> Rick Kammen,<sup>118</sup> Kevin McNally,<sup>119</sup> Edward C. Monahan,<sup>120</sup> Lee Norton,<sup>121</sup> Michael Ogul,<sup>122</sup> Russell Stetler,<sup>123</sup> and Mary Ann Tally.<sup>124</sup> Over a dozen other footnotes referenced the trial manuals of Alabama,<sup>125</sup> California,<sup>126</sup> Florida,<sup>127</sup> Kentucky,<sup>128</sup> and Texas.<sup>129</sup> There were: a half dozen citations to the fourth edition of *Federal Habeas Corpus Practice and Procedure*, the authoritative treatise in this complex area of capital law;<sup>130</sup> references to the major death penalty cost studies by the Spangenberg Group<sup>131</sup> and U.S. District Court Judge James R. Spencer's subcommittee on the cost of the federal death penalty;<sup>132</sup> and, notes identifying significant new

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111. *Id.* Guideline 1.1, at 926 n.18, 960 n.108, 1004 n.177, 1008 n.180, 1022 n.210, 1027 nn.224 & 226, 1030 n.227, 1040 n.242, 1053 n.263, 1060 n.275, 1067 n.305.

112. *Id.* Guideline 4.1, at 956 n.96.

113. *Id.* Guideline 1.1, at 926 n.18, 928 n.29; *id.* Guideline 5.1, at 964 n.109; *id.* Guideline 10.4, at 1004 n.177; *id.* Guideline 10.7, at 1027 n.224; *id.* Guideline 10.8, at 1030 n.227, 1032 nn.232 & 234, 1033 nn.237 & 240; *id.* Guideline 10.10.1, at 1048 n.258; *id.* Guideline 10.10.2, at 1053 nn.264 & 267.

114. *Id.* Guideline 4.1, at 960 n.108; *id.* Guideline 10.4, at 1003 n.173, 1004 n.177.

115. *Id.* Guideline 10.10.2, at 1053 n.263.

116. *Id.* Guideline 10.5, at 1008 n.180; *id.* Guideline 10.9.1, at 1041 n.245.

117. *Id.* Guideline 10.11, at 1060 n.275.

118. *Id.* Guideline 10.5, at 1007 n.178, 1010 n.186.

119. *Id.* Guideline 10.9.1, at 1040 n.242.

120. *Id.* Guideline 10.4, at 1004 n.177.

121. *Id.* Guideline 10.5, at 1007 n.178, 1010 n.186.

122. *Id.* Guideline 10.11, at 1067 n.305.

123. *Id.* Guideline 4.1, at 959-60 n.105; *id.* Guideline 10.7, at 1022 n.210, 1027 n.226; *id.* Guideline 10.9.1, at 1042 n.249; *id.* Guideline 10.15.1, at 1085 n.348.

124. *Id.* Guideline 1.1, at 926 n.18.

125. *Id.* Guideline 10.7, at 1022 n.211, 1024 n.214; *id.* Guideline 10.8, at 1033 n.238.

126. *Id.* Guideline 10.8, at 1034 n.241; *id.* Guideline 10.14, at 1077 n.329.

127. *Id.* Guideline 10.5, at 1009 n.182, 185; *id.* Guideline 10.7, at 1022 n.211.

128. *Id.* Guideline 10.4, at 1003 n.173.

129. *Id.* Guideline 4.1, at 960 n.105; *id.* Guideline 10.4, at 1002 nn.168 & 170.

130. *Id.* Guideline 1.1, at 928 n.28 (citing RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2(a), at 482 (4th ed. 2001)); *see also id.* at 929 n.33, 932 n.45; *id.* Guideline 10.7, at 1016 n.195; *id.* Guideline 10.10.2, at 1052 n.260; *id.* Guideline 10.12, at 1075 n.325; *id.* Guideline 10.15.1, at 1084 n.344.

131. *Id.* Guideline 1.1, at 932 n.47 (citing THE SPANGENBERG GRP., ABA POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POSTCONVICTION DEATH PENALTY CASES (1996)); *see also id.* Guideline 6.1, at 968 n.118, 969 n.119; *id.* Guideline 9.1, at 986-87 nn.138 & 141-42.

132. *Id.* Guideline 4.1, at 955 n.91 (citing Subcomm. on Federal Death Penalty Cases, Comm. on Defender Servs., Judicial Conference of the U.S., *Federal Death Penalty Cases*:

publications relating to mental health issues affecting capital clients.<sup>133</sup> The notes also fully incorporated then existing jurisprudence, including many cases in which counsel had been held ineffective for failing to do what the Guidelines said they were supposed to do.<sup>134</sup> These sources are precisely the kinds of contemporaneous supporting authorities specified by Justice Stevens in *Padilla v. Kentucky*,<sup>135</sup> as reflecting prevailing professional norms—in addition to “American Bar Association standards and the like.”<sup>136</sup>

Two abiding principles stand out when we view the Guidelines from a historical perspective: the centrality of teamwork as a core tenet in capital defense; and the importance of cooperation among the successive teams that may represent a capital client over the long life of the case. Guideline 10.13(D) discusses trial counsel’s obligation to cooperate “with such professionally appropriate legal strategies as may

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*Recommendations Concerning the Cost and Quality of Defense Representation* (1998)); see also *id.* at 960 n.107; *id.* Guideline 6.1, at 968 nn.115-16; *id.* Guideline 9.1, at 986 n.140.

133. *Id.* Guideline 4.1, at 956 n.93 (citing Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 839-44 (1986)); *id.* at 956 n.97 (citing Liebert & Foster, *supra* note 41, at 43-64); *id.* Guideline 10.4, at 1007 n.178 (citing Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 586-87 (1988)); *id.* Guideline 10.7, at 1026 n.218 (citing TERRY A. KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 33-34 (1999)).

134. See *id.* Guideline 1.1, at 935 n.53; *id.* Guideline 10.6, at 1013 n.194; *id.* Guideline 10.7, at 1016 n.197, 1018 n.204, 1021 n.205-08; *id.* Guideline 10.8, at 1030 n.227; *id.* Guideline 10.11, at 1060 n.277, 1061 nn.281-82, 1062 n.288, 1064 n.294, 1067 n.307, 1068 nn.311-12, 1070 n.319; *id.* Guideline 10.12, at 1073 n.323. For an explanation of cases of effective assistance gleaned from public media, see, for example, *id.* Guideline 1.1, at 935 n.52; *id.* Guideline 10.7, at 1027 n.226; *id.* Guideline 10.9.1, at 1040 n.243; *id.* Guideline 10.11, at 1063 n.290.

135. 599 U.S. 356 (2010).

136. *Id.* at 366; see also Stetler & Wendel, *supra* note 72, at 670-71. Justice Stevens’s analysis in *Padilla* was endorsed in *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam), a capital case finding counsel ineffective for failing to know current law relating to funding for experts. The opinion quotes the first two sentences of Justice Stevens’s articulation verbatim. Several commentators have also noted that appellate courts review “the penalty records of only those cases in which death verdicts were rendered,” so that

there is no reason . . . that judges have any special expertise or range of experience in reaching conclusions about how background and social history actually affect the life . . . of a capital defendant, or the way in which evidence about these factors can influence the decisionmaking of (especially) life-sentencing capital jurors.

Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 606-07 (1995); see also Sean D. O’Brien & Kathleen Wayland, *Implicit Bias and Capital Decisionmaking: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751, 760 n.55 (2015) (noting that reasoning based on comparing strategies of cases that all resulted in death sentences is “analogous to the medical field drawing performance standards almost exclusively from cases in which the patient died”); accord Stetler & Wendel, *supra* note 72, at 676-81.

be chosen by successor counsel” in post-conviction.<sup>137</sup> In a sense, the cooperation between successive counsel is no more than a temporal extension of the concept of teamwork. Capital representation demands diverse, multidisciplinary teams where the views of every member—past and present—are valued at every stage of litigation, and where everyone shares a continuing commitment to high quality representation when a client’s life hangs in the balance.

The Guidelines, as revised in 2003, did not magically emerge from the word processors of agenda-driven activists or the imagination of elitist academics. They reflect nothing more than the collective experience and expertise of the public defenders, court-appointed panel lawyers, underfunded nonprofits, and pro bono volunteers who had effectively litigated capital cases in the 1990s. Effective practice continues to evolve, and, in turn, the lessons of that evolving capital defense practice continue to be reflected in further applications of the Guidelines, such as the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases,<sup>138</sup> and the efforts of experts to codify best practices in the pages of the *Hofstra Law Review* and elsewhere. Prevailing norms also continue to evolve.<sup>139</sup> It is a tribute

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137. ABA GUIDELINES, *supra* note 2, Guideline 10.13(D), at 1074. However, the need for mutual respect and cooperation gives rise to a reciprocal duty. There has been increasing recognition on the part of successor counsel of the need to reach out to predecessor counsel before raising claims of ineffective assistance of counsel. See Tigran W. Eldred, *Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*, 42 HOFSTRA L. REV. 473, 485 (2014) (advocating strategies for successor counsel to reduce implicit motivation and bias in order to facilitate cooperation of predecessor counsel). In his Introduction to Part Two of the Symposium Issue in which this article appeared, Professor Eric M. Freedman reinforced the need for thoughtful and candid efforts by post-conviction counsel:

Knowing of the importance of the continuing duty, and the spotty record of prior counsel in adhering to it, effective successor counsel—who, after all, controls the timing of the filing of the allegation of ineffective assistance—should reach out to prior counsel beforehand in order to encourage her to perceive herself as an ongoing member of the defense team, and if possible, to gain her assistance in framing the post-conviction claims in a mutually acceptable manner, as Professor Eldred suggests. Under most circumstances, there is little justification for a scenario in which prior counsel hears of the ineffectiveness claim for the first time when the prosecutor reads her inflammatory excerpts over the telephone—a scenario strongly calculated to provoke exactly the set of counter-productive reactions that successor counsel should be seeking to avoid.

Eric M. Freedman, *Introduction: The Continuing Quest for High-Quality Defense Representation in Capital Cases*, 42 HOFSTRA L. REV. 383, 387 n.39 (2013) (citation omitted).

138. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, in 36 HOFSTRA L. REV. 677 (2008).

139. Consider, for example, that a great capital defense lawyer of the pre-*Furman* period, Clarence Darrow, believed that he could detect jurors’ receptivity to mercy based on nationality and religion. See Ross L. Hindman, *Personal and Impersonal Uses of Professional Folklore:*

to the whole capital defense bar that we can expect this process to be ongoing as long as the ultimate criminal sanction—execution—remains available in any jurisdiction.

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*Peremptory Jury Challenges by Lore and in Fact*, 8 KAN. J. SOC. 116, 119, 125 (1971) (citing Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 36, 36) (noting that Darrow believed that the Irish were “emotional, kindly, and sympathetic,” whereas “[t]here is no warmth in the Presbyterian”). Compare the great lawyer’s approach with what is widely accepted today as best capital practice. For an explanation of this practice, see generally Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, CHAMPION, Nov. 2010, at 18, 18. It should be assumed that today’s approach, too, will evolve. Future practitioners may be found ineffective for employing techniques and strategies that would have been state-of-the-art at a prior time.