HOFSTRA LAW REVIEW

SYMPOSIUM

THE TENTH ANNIVERSARY OF THE ABA CAPITAL DEFENSE GUIDELINES: THE ROAD TRAVELED AND THE ROAD TO BE TRAVELED

PART ONE
Eric M. Freedman
Monroe H. Freedman
Meredith Martin Rountree
Robert C. Owen
Russell Stetler
W. Bradley Wendel

PART TWO
Eric M. Freedman
Judge Mark W. Bennett
Robin M. Maher
David M. Siegel
Tigran W. Eldred
Kathleen Wayland
Sean D. O’Brien
Jie Yang

PART THREE
Eric M. Freedman
Russell Stetler
Aurélie Tabuteau
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INTRODUCTION

Eric M. Freedman*

Ten years ago, the American Bar Association ("ABA") published a revised version of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("Guidelines"),1 and the Hofstra Law Review published a symposium to mark the occasion. The Guidelines emphasized then that they were “not aspirational,” but rather embodied “the current consensus about what is required to provide effective defense representation in capital cases.”2 Today, the Guidelines “stand as the single most authoritative summary of the prevailing professional norms in the realm of capital defense practice,” having been cited hundreds of times by courts from the Supreme Court of the United States on down.3 While this development may be satisfying to the many

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2. Id. Guideline 1.1 hist. n., at 920.
dedicated professionals involved in the development of the Guidelines, there is certainly no cause for complacency.

First, the situation on the ground is still very far from satisfactory. Second, as in any professional field, the standard of care is not fixed but evolves as new knowledge emerges from experience and study. All of the contributions to this Symposium honoring the tenth anniversary of the Guidelines address these issues.

Part One of the Symposium begins with my piece: Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster. Although the Guidelines mandate effective counsel at every stage of capital proceedings, the implementation of this standard with respect to state post-conviction proceedings has been widely unsatisfactory because even where nominal standards exist there is no effectual enforcement mechanism. My Article suggests that recent Supreme Court decisions might provide the legal tools and institutional incentives for both the state and federal governments to work towards ameliorating the situation:

If the states create robust processes for post-conviction review, the federal courts will under [Cullen v.] Pinholster treat their individual outcomes with greater respect than before. But if the states fail to do so, they are now vulnerable not only to structural assaults for failing to provide due process but also to case-specific challenges based on the

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6. The Symposium is being published in two parts. Part One appears in this issue, and Part Two is scheduled to appear in Volume 42.1 of the Hofstra Law Review.


8. ABA GUIDELINES, supra note 1, Guideline 1.1(B), at 919.

9. See, e.g., supra text accompanying note 5; see also Freedman, supra note 7, at 596 n. 35.
equitable rule of *Martinez* [*v. Ryan*]. Providing competent counsel in state post-conviction proceedings, in capital cases first of all, is an easy way for the states to push back on both fronts.10

The federal courts, for their part, save resources and adjudicate more sure-footedly when the states give death-row inmates high quality post-conviction proceedings.11 The role of capital defense lawyers is to seek implementation of the Guidelines and to encourage both state and federal courts to take a system-wide perspective.

My colleague, Professor Monroe H. Freedman, has devoted much of his long career to efforts to improve criminal defense advocacy. In his *Professional Discipline of Death Penalty Lawyers and Judges*,12 he considers one way in which the Guidelines have almost never been enforced: by disciplining defense lawyers who perform incompetently and judges who appoint them.13 He finds that the appropriate tools are in place but are simply not utilized, notwithstanding numerous instances in which they should be.14

Meredith Martin Rountree and Robert C. Owen, both highly experienced capital defenders who teach at the University of Texas, focus on another weakly enforced aspect of the Guidelines. Their *Overlooked Guidelines: Using the Guidelines to Address the Defense Need for Time and Money*15 highlights the often-neglected fact that the Guidelines impose duties on governments—on whom constitutional obligations rest—as well as on individual defense lawyers.16 In concrete terms, this means that jurisdictions are required to provide the resources necessary for the capital defense team to provide high-quality legal representation.17 The authors call upon counsel to use the Guidelines to illuminate the widespread failure of governments to abide by their institutional responsibilities.18

The final Article in this Part of the Symposium addresses the issue of defining the standard of care in a complex and rapidly moving field. Russell Stetler, the National Mitigation Coordinator for the federal death penalty projects, and Professor W. Bradley Wendel of Cornell Law

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11. *Id.* at 601-02.
13. *Id.* at 607, 620-21.
14. *Id.* at 603-04.
16. *Id.* at 633-34.
School, whose fields include both legal ethics and torts, contribute *The ABA Guidelines and the Norms of Capital Defense Representation*,\(^1\) which offers clear practical guidance to courts evaluating attorney performance. The authors emphasize that the standard of practice is set by those professionals who perform well, not those who are mediocre or worse, and that, as the overall levels of performance in the discipline improve, the standard evolves accordingly.\(^2\)

The tenth anniversary of the ABA Guidelines marks a milestone but decidedly not an endpoint. There is still far to go before the country achieves “high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.”\(^3\) The authors and editors of this Symposium hope that it constitutes a step in that direction.

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2. *See id.* at 639, 695-96.
3. ABA GUIDELINES, *supra* note 1, Guideline 1.1(A), at 919.
ENFORCING THE ABA GUIDELINES IN CAPITAL STATE POST-CONVICTION PROCEEDINGS AFTER MARTINEZ AND PINHOLSTER

Eric M. Freedman*

I. INTRODUCTION: THE LONG ARC TOWARDS JUSTICE

The American Bar Association (“ABA”) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases1 (“Guidelines”) mandate “high quality legal representation in accordance with these Guidelines” from the moment of arrest until the prosecution is no longer entitled to seek the death penalty.2 Commentators have long urged the Supreme Court to translate this sound policy—one that would benefit the states as well as prisoners3—into an explicit rule of constitutional law requiring the states to provide effective counsel in capital state post-conviction proceedings.4

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I serve as Reporter for the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003). The opinions expressed herein, however, are mine alone. I have provided professional assistance to the defense teams in a number of the cases cited in this Article.

This Article has benefitted from thoughtful input during its drafting by Ty Alper, Justin F. Marceau, and Giovanna Shay.


In a line of cases reaching its nadir in Coleman v. Thompson, the Supreme Court has refused. More recently in Martinez v. Ryan, a 2012 non-capital case, the Court declined to modify its constitutional views. But it ruled for the prisoner, in an opinion that Justice Antonin Scalia described in dissent as having “essentially the same practical consequences as a holding that collateral-review counsel is constitutionally required” in capital and non-capital cases alike. Justice Scalia may well be right, at least to the extent that the states will decide that their only reasonable choice is to provide effective counsel for every indigent capital petitioner pursuing state post-conviction relief. But if so, this welcome development will result not just from the pressure that the states experience from the defendant’s victory in Martinez but also from the converging pressure created by the state’s victory the previous year in Cullen v. Pinholster.

In combination, “[t]he confluence of pressures now centered on state post-conviction proceedings could yield genuine benefits to the entire criminal justice system and all of its stakeholders.” Read together the two decisions encourage “the state and national governments [to] each discharge their duties responsibly,” with the result that “the federal system will be working as it should: efficiency will be furthered while at the same time ‘a double security arises to the rights of the people.’”

II. MARTINEZ: PROCEDURAL AND SUBSTANTIVE IMPLICATIONS

The defendant’s legal argument in Martinez was straightforward. The state unquestionably had the duty to provide him with the effective assistance of counsel at trial. But if under state law he could assert a
claim of ineffective assistance of trial counsel only in post-conviction proceedings, and if he had no right to the effective assistance of counsel to bring that claim in those proceedings, then the state could effectively nullify its duty both practically, by failing to provide a lawyer to litigate the claim properly, and legally, by triggering a procedural default that would preclude federal habeas review of the claim. In response, the *Martinez* Court eschewed recognition of a constitutional right to the effective assistance of counsel in state post-conviction proceedings but instead held by a seven to two vote that, where state post-conviction is the mandatory initial opportunity to raise a substantial claim of ineffective assistance of trial counsel and the federal habeas court counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.

14. For this reason, the Court had explicitly carved out ineffective assistance of trial counsel claims from its decision in *Coleman v. Thompson*, that there is no constitutional right to counsel on state collateral review and the appropriate “allocation of costs” between the state and the petitioner is to require “petitioner [to] bear the burden of a failure to follow state procedural rules,” even if the burden in question is that he is executed with potentially meritorious claims unreviewed by any state or federal court. *Coleman v. Thompson*, 501 U.S. 722, 754-55 (1991); see Eric M. Freedman, *Habeas Corpus Cases Rewrote the Doctrine*, NAT’L J., Aug. 19, 1991, at S6 (objecting that under *Coleman*, where the capital petitioner forfeited all federal claims because state post-conviction counsel filed papers three days late, “the system works only one way: A lawyer may default on claims on behalf of a petitioner, but a petitioner may not attack the lawyer as ineffective for having done so”).

15. The Court subsequently clarified this element of the rule. See *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (holding that where the “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies”).

16. In explicating this standard the Court wrote:

To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” Cf. *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d931 (2003) (describing standards for certificates of appealability to issue).


This passage is of central importance because the *Miller-El* standard is whether “jurists of reason could disagree with the district court’s resolution of [the] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further,” rather than whether the court believes that the petitioner will ultimately “demonstrate an entitlement to relief.” *Miller-El v. Cockrell*, 537 U.S. 322, 327, 337 (2003). The rationale for the Court’s adoption of the standard was evidently that in the *Martinez* context, as in that of *Miller-El*, the issue for decision is the threshold one of whether the petitioner will be allowed to litigate on the merits.

would otherwise be unable to reach that claim because of a procedural default during state post-conviction proceedings, the federal habeas court may exercise its equitable discretion to forgive the procedural default if the state failed to appoint effective (or any) post-conviction counsel for the prisoner.\textsuperscript{17}

As Justice Scalia accurately pointed out in dissent, the logical boundaries of this decision are fuzzy.\textsuperscript{18} On the procedural front, there seems no apparent reason why the ruling should be limited to situations in which the ineffectiveness of post-conviction counsel causes the claim of ineffectiveness of trial counsel to be defaulted in federal court. Suppose instead that the claim is barred there because of counsel’s failure to meet the statute of limitations for the filing of a federal habeas petition.\textsuperscript{19} The Court has already held that statute to be subject to equitable tolling, and has specifically ruled that abandonment by one’s state post-conviction attorney is a circumstance causing a federal court to exercise its equitable discretion in a petitioner’s favor.\textsuperscript{20}

\begin{thebibliography}{99}

\bibitem{McQuigg} Cf. McQuigg v. Perkins, 133 S. Ct. 1924, 1931-34 (2013) (holding that showing of actual innocence, previously held to be effectual to overcome a procedural default, would also serve as equitable exception overcoming a federal filing deadline).

\bibitem{Maples} See Maples v. Thomas, 132 S. Ct. 912, 927 (2012); Holland v. Florida, 130 S. Ct. 2549,

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ineffectiveness of state post-conviction counsel must be another, particularly in circumstances where the petitioner has exercised due diligence and the underlying claim is strong. Similarly, suppose the ineffectiveness of post-conviction counsel causes the claim to come to federal court unexhausted, a circumstance which, because the statute of limitations has subsequently run, threatens to bar the claim forever. Even before Martinez, there was very visible authority for the proposition that the ineffective assistance of state post-conviction counsel in creating that circumstance would excuse the failure to exhaust. On remand from Rhines v. Weber,21 the District Court, whose ruling had been affirmed by the Supreme Court, squarely held that ineffectiveness of state post-conviction counsel constituted “good cause” for petitioner’s failure to exhaust, thereby entitling him to the benefits of the equitable stay and abatement procedure the Court had just created.22 That result, correct under Rhines, would be equally so under Martinez. So too, in light of the policy-driven reading that the Court has given to the statutory restrictions on “second or successive” habeas petitions—self-consciously refusing to attribute a literal meaning to the language of 28 U.S.C. § 2244(b)23—that may well be circumstances under which the ineffectiveness of state post-conviction counsel should cause a federal court to conclude that the second-in-time petition before it is not “second or successive.”24

Ineffective state post-conviction counsel might also “fail[] to develop the factual basis of a claim” of trial counsel ineffectiveness, with the result that 28 U.S.C. § 2254(e)(2) barred the federal habeas court from considering the evidence.25 In that case, the federal court should in equity consider the evidence that post-conviction counsel

2560 (2010); Adam Liptak, Lawyers Stumble, and Clients Take Fall, N.Y. TIMES, Jan. 8, 2013, at A12 (identifying “the larger question that runs through these cases: why is it morally permissible to blame clients for their lawyers’ mistakes?”).


24. The Supreme Court has reached this conclusion not only in Panetti, but also in Slack v. McDaniel, 529 U.S. 473, 485-89 (2000) (holding, “[a] habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition”); Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45 (1998) (refusing to count prematurely-assessed claim, see also, e.g., Phillips v. Seiter, 173 F.3d 609, 610-11 (7th Cir. 1999) (involving earlier application filed in wrong district dismissed for lack of jurisdiction); Benton v. Washington, 106 F.3d 162, 164-65 (7th Cir. 1996) (involving earlier application dismissed for failure to pay filing fee).

25. See Williams v. Taylor, 529 U.S. 420, 432(2000) (holding that “a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel”).
ought to have presented. Not only is it axiomatic that "[e]quity looks upon that as done that ought to have been done,"26 but, more practically, *Martinez* will do nothing to help the federal habeas petitioner if the District Court considers his underlying claim of trial court ineffectiveness on the very record that he asserts was flawed by the ineffective assistance of state post-conviction counsel.27

On the substantive front, the equitable rationale of *Martinez* should apply to a number of claims other than ineffective assistance of trial counsel.28 The state’s duty to provide effective assistance is, of course, well established and fundamental to justice.29 But there are other basic trial rights in that category, which by their very nature can only be effectively enforced in post-conviction proceedings.30 Consider, for example, situations involving the prosecution’s failure to disclose exculpatory evidence31 or deals with witnesses,32 its use of perjured testimony,33 or its suppression of evidence by the use of threats.34 Is it equitable for a state to be able to evade federal review of such claims by contriving that the petitioner never has effective counsel to pursue them?

These and other open questions surrounding *Martinez* might certainly encourage a state that did not previously provide effective post-conviction counsel to do so, at least in capital cases, as a safeguard against having convictions overturned on federal habeas corpus review.35

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27. See Mann v. Moore, No. 13-11322-P, slip op. at 19-20 (11th Cir. Apr. 9, 2013) (Martin, J., dissenting).
28. This assertion finds support both in legal logic and in the Court’s explicit statement of the importance of the ongoing application of the equitable principles traditionally guiding habeas corpus, see Eric M. Freedman, Habeas Corpus as a Common Law Writ, 46 Harv. C.R.-C.L. Rev. 591, 607 n.85 (2011), to the habeas regime created by AEDPA. See Holland v. Florida, 130 S. Ct. 2549, 2560-61 (2010).
29. See *Martinez*, 132 S. Ct. at 1317 (majority opinion).
30. There are also situations in which the right (e.g., not to be executed if mentally retarded) might be vindicated as part of the trial or in some sort of collateral proceeding, depending on how the state chooses to arrange its criminal justice system. In such situations the state should—as a constitutional, not an equitable, matter—be held to the standard that would apply at a criminal trial regardless of how the proceedings are organized. See Hooks v. Workman, 689 F.3d 1148, 1183-85 (10th Cir. 2012) (holding that capital petitioner was constitutionally entitled to effective assistance of counsel at mental retardation hearing notwithstanding that state conducted it post-conviction).
35. Most death penalty states already provide counsel in capital cases, although the requirements for—and realities of—effective performance vary widely. See Maples v. Thomas, 132 S. Ct. 912, 918 (2012) (reporting that Alabama is “[n]early alone” in failing to provide counsel to indigent defendants in capital cases); ABA Guidelines, supra note 1, Guideline 2.1 & cmt., at 939, 941 (requiring that states create a plan for conforming to Guidelines and observing that “[t]he
But that would not be the only consideration bearing upon the decision. Surveying the current legal terrain, a state would appropriately take into consideration not just the threat of loss represented by *Martinez* but also the hope of gain offered by *Pinholster*.

### III. *Pinholster*: Due Process as the Price of Deference

Nothing in the federal Constitution requires the states to provide for post-conviction proceedings in criminal cases. But they have long done so, with two salient legal consequences:

1. State post-conviction systems must provide due process. As the Court has recently reiterated, their failure to do so is subject to attack under 42 U.S.C. § 1983.  

2. Where a state post-conviction system exists, a state prisoner must invoke it as a pre-condition to the grant of federal habeas relief unless it is unavailable or “ineffective to protect the rights of the applicant.”

AEDPA contains various limitations on the courts’ authority to grant the writ to state prisoners, including the provision of 28 U.S.C. § 2254(d)(1) that “with respect to any claim that was adjudicated on the merits in State court proceedings” the writ shall not be granted unless

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37. 28 U.S.C. § 2254(b)(1) (2006); cf. *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007) (refusing to defer to state courts’ factual finding that petitioner was mentally competent because their fact-finding process was inadequate); Freedman, *Fewer Risks*, supra note 3, at 189 (observing that a state post-conviction system that “cannot be effectually employed without the aid of a competent attorney” should meet § 2254(b)(1)’s description).

38. 28 U.S.C. § 2254(d)(1). If this pre-condition does not apply, neither does the remainder of the section. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-99, 1401 (2011); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) (“Because the state court did not decide whether [petitioner]’s counsel was deficient, we review this element of [petitioner]’s *Strickland* claim *de novo*.”); *Cone v. Bell*, 556 U.S. 449, 472 (2009) (“Because the Tennessee courts did not reach the merits of Cone’s *Brady* claim, federal habeas review is not subject to the deferential standard . . . [and instead], the claim is reviewed *de novo*.”); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (“Because the state courts found the representation adequate, they never reached the issue of prejudice . . . and so we examine this element of the *Strickland* claim *de novo*.”) (citations omitted) (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)).
that adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Construing this provision as a threshold barrier to fact-finding by the District Court, Pinholster held that in determining whether petitioner has met the standard the federal habeas court must confine itself at the outset to a consideration of the record that the state courts had before them.

In performing this task, the District Court is ordinarily to presume the truth of the facts found by the state courts, as 28 U.S.C. § 2254(e)(1) requires. To the extent that the state courts have not made factual determinations but instead summarily dismissed a claim, the federal court must accept the movant’s factual allegations in the state court petition as true—just as the state courts were required to do under basic due process norms.

Even where the state courts have found facts, however, the presumption of correctness has a critical exception for situations where the petitioner has not been given a full and fair opportunity to develop his claim in the state post-conviction proceedings that are to form the basis for the federal court’s determination. Scott Lynn Pinholster did not invoke this exception. Had he done so and succeeded, the Court would have ordered the District Court to determine the facts de novo. The stated basis for that order would most likely have been a construction of AEDPA—one that the Court would have been strongly driven to adopt by its powerful rule of reading statutes to avoid a serious

40. See Pinholster, 131 S. Ct. at 1398.
41. The next paragraph of text parses the “ordinarily.”
42. See Pinholster, 131 S. Ct. at 1402 n.12; Herman v. Claudy, 350 U.S. 116, 123 (1956) (reversing state Supreme Court for summarily denying habeas petition on merits simply based on respondent’s denial and without providing evidentiary hearing). Thus, where there has been no fact-finding in state court, the question on federal habeas becomes whether, assuming the truth of all of the facts the petitioner proffered to the state courts, those courts’ legal determination that the petitioner failed to state a claim for relief was “contrary to” or involved an “unreasonable application of” clearly established federal law. See Morris v. Thaler, 425 Fed. App’x 415, 418, 420 (5th Cir. 2011) (reversing District Court for failing to grant petitioner’s allegations required presumption of truth).
43. See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.1[b] (6th ed. 2011). There is an exhaustive discussion describing the effects of deficient state post-conviction processes on federal habeas corpus adjudication as well as an extended argument that the states are constitutionally required to provide competent post-conviction counsel in capital cases, in id. at ch. 7.
44. On the contrary, his position was that the record compiled in state court fully supported his position. See Pinholster, 131 S. Ct. at 1402 n.11.
45. The details have been lucidly set forth in Justin F. Marceau, Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications, 62 HASTINGS L.J. 1, 57-64 (2011).
CONCLUSION: FEDERALISM AS A PROTECTOR OF LIBERTY

In refusing to hold that the Constitution required the states to provide counsel to state post-conviction petitioners, the Supreme Court began its Coleman opinion with the noxious sentence: “This is a case about federalism.”

Federalism, Justice Harold Blackmun correctly retorted, “has no inherent normative value” but rather is a device that

46. See, e.g., Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299-301 (2001) (construing statute to permit habeas relief, thereby avoiding substantial constitutional question under Suspension Clause); United States v. X-Citement Video, Inc., 513 U.S. 64, 68-69 (1994) (applying rule that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions since “[w]e do not assume that Congress, in passing laws, intended [arguably unconstitutional] results”); Pub. Citizen v. United States Dep’t of Justice, 491 U.S. 440, 465-67 (1989) (applying rule as decisive consideration where other interpretive factors resulted in a close question); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (noting that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . This cardinal principle has its roots in Chief Justice Marshall’s [1804] opinion for the Court in Murray v. The Charming Betsy . . . and has for so long been applied by this Court that it is beyond debate”) (citations omitted) (citing Murray v. Schonner Charming Betsy, 6 U.S. 64, 118 (1804)); United States ex rel. Att’y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) (stating that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter”); Note, THE AVOIDANCE OF CONSTITUTIONAL QUESTIONS AND THE PRESERVATION OF JUDICIAL REVIEW: FEDERAL COURT TREATMENT OF THE NEW HABEAS PROVISIONS, 111 HARV. L. REV. 1578, 1585-87 (1998).

47. See Moore v. Dempsey, 261 U.S. 86, 92 (1923) (holding that state post-conviction processes were not “sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself”). Petitioner’s brief had explicitly sought to distinguish the seemingly adverse precedent of Frank v. Mangum, 237 U.S. 309 (1915) by arguing that the state post-conviction proceedings in Frank had taken place before a dispassionate tribunal that had the authority to find the facts, while in Moore the facts were determined on a motion for a new trial by the very judge whose conduct was in question and whose decision could only be reviewed for legal error. Moore, 261 U.S. at 90-92; see Eric M. Freedman, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 80-81 (2001) (discussing Moore and Frank).


“secures to citizens the liberties that derive from the diffusion of sovereign power.”\textsuperscript{50} To take maximum advantage of that device, “[a]mbition must be made to counteract ambition.”\textsuperscript{51}

In the aftermath of \textit{Martinez} and \textit{Pinholster}, both the state and federal governments have strong self-interests in strengthening state post-conviction systems, specifically through the appointment of effective counsel for capital petitioners. If the states create robust processes for post-conviction review, the federal courts will under \textit{Pinholster} treat their individual outcomes with greater respect than before. But if the states fail to do so, they are now vulnerable not only to structural assaults for failing to provide due process\textsuperscript{52} but also to case-specific challenges based on the equitable rule of \textit{Martinez}. Providing competent counsel in state post-conviction proceedings, in capital cases first of all, is an easy way for the states to push back on both fronts.

Because the law regarding effective assistance of counsel is distinctly government-friendly,\textsuperscript{53} this reform is likely under current conditions to insulate most state post-conviction systems from successful structural attacks, while any attempt by the states to meet their due process obligation without providing lawyers seems increasingly unlikely to succeed.\textsuperscript{54} “It is easy to see how a state might provide lawyers and still maintain an unfair post-conviction system (e.g., by denying discovery), but it is hard to see how a state might maintain a fair post-conviction system and not provide lawyers.”\textsuperscript{55}

But even if the states fend off systemic lawsuits, each individual petitioner who was not given an effective post-conviction counsel will still be able to mount a \textit{Martinez} attack. Even on a reasonably narrow reading of the case many such claims will be meritorious.\textsuperscript{56}

\textsuperscript{50} Coleman, 501 U.S. at 759 (Blackmun, J., dissenting).
\textsuperscript{51} The Federalist No. 51 (James Madison), \textit{supra} note 12, at 294.
\textsuperscript{52} See Justin F. Marceau, Challenging the Habeas Process Rather Than the Result, 69 Wash. & Lee L. Rev. 85, 92 (2012); \textit{supra} text accompanying note 36.
\textsuperscript{53} See ABA Guidelines, \textit{supra} note 1, Guideline 1.1 cmt., at 930 (observing that, “[u]nder the standards set out by the Supreme Court for reviewing claims of ineffective assistance of counsel, even seriously deficient performance all too rarely leads to reversal”) (footnote omitted).
\textsuperscript{54} The states’ situation in this respect was already vulnerable even before the most recent cases. See Freedman, Fewer Risks, \textit{supra} note 3, at 190.
\textsuperscript{55} Freedman, \textit{State Post-Conviction Remedies}, \textit{supra} note 11, at 299.
\textsuperscript{56} For example, in Gallow v. Cooper, No. 12-7516, 2013 WL 3213609, at *1 (U.S. June 27, 2013) (respecting denial of petition for certiorari) Justices Stephen Breyer and Sonia Sotomayor observed that “[a] claim without any evidence to support it might as well be no claim at all.” Therefore, they continued, if state post-conviction counsel’s ineffectiveness in failing to produce evidence of trial counsel’s ineffectiveness led to an adverse finding of fact in state court (rather than a default), there exists “a strong argument” that \textit{Martinez} should apply to preclude application of \textit{Pinholster}. Id.

A similarly forceful argument could be made with respect to the substantive claims canvassed, \textit{supra} text accompanying notes 31-34, and an even more forceful one in the specifically
The interests of the federal government, for its part, lie in the direction of insisting that the states provide fully effective systems of post-conviction review.57 Because a state is not entitled to benefit in federal court from prior proceedings that fall below constitutional minima,58 a federal court cannot rely upon such proceedings and therefore must do the work itself.59 For example, while a federal court may in many circumstances rely upon the results of a fairly conducted state evidentiary hearing, it must find the facts for itself if a hearing that should have been held was not.60 Similarly, the less legal analysis a state post-conviction court does, the more a federal habeas court must do.61

Moreover, there is an inverse relationship between the states’ costs in providing post-conviction counsel and the federal government’s costs in providing counsel for federal habeas corpus proceedings.62 Federal law provides for the appointment of qualified counsel in habeas corpus proceedings that challenge state capital convictions.63 Under the Guidelines, one of such counsel’s key duties is to recognize and attempt to overcome any procedural blunders committed by state post-conviction attorneys—a duty whose competent discharge involves significant expense.64 If appointed federal habeas counsel fails to do this job effectively, a petitioner may be able to assert rights flowing from the federal statutory mandate for qualified federal habeas counsel,65 even in the capital context of a claim of incompetency to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). Not only is that claim deeply rooted in traditional common law equitable notions, see id. at 406-09, but the Court has made quite clear that state procedures for its adjudication will receive close scrutiny. See Panetti v. Quarterman, 551 U.S. 930, 948-54 (2007) (giving no deference to a finding of Ford competency that state courts reached by a process inadequate for reaching reasonably correct results).

58 See, e.g., Johnson v. Mississippi, 486 U.S. 578, 584-86 (1988) (holding the state is not entitled to rely in capital sentencing on conviction that had been vacated for failure to provide defendant with counsel).
59 See supra text accompanying notes 47-48.
60 See supra text accompanying note 48.
61 See ABA GUIDELINES, supra note 1, Guideline 1.1 cmt., at 929-30; see also supra note 38.
62 The remainder of this paragraph is drawn from Freedman, Fewer Risks, supra note 3, at 190-91.
though he could not predicate a habeas corpus claim directly on the ineffective assistance of state post-conviction counsel. Thus, whether appointed federal habeas counsel performs well or badly in cleaning up the mess left behind by ineffective lawyers in state capital post-conviction proceedings, the federal government bears significant costs caused by the states’ failure to provide competent counsel in the first place.

The longstanding policy of the ABA has been to take no position on the desirability of the death penalty, provided that it is not inflicted on mentally retarded persons, juveniles, or those not represented throughout the process in accordance with its Guidelines. The ABA has already achieved the first two of these goals through Supreme Court decisions. If lawyers and judges make appropriate use of *Martinez* and *Pinholster*, ten years from now we may be able to say the same about the third.


66. See 28 U.S.C. § 2254(i) (2006) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under § 2254.").


PROFESSIONAL DISCIPLINE OF DEATH PENALTY LAWYERS AND JUDGES

Monroe H. Freedman*

I. INTRODUCTION

On this, the fiftieth anniversary of Gideon v. Wainwright’s\(^1\) broken promise,\(^2\) I have been asked to propose guidelines that (a) provide professional discipline of lawyers who fail to provide competent representation in death penalty cases, but that (b) do not discourage good lawyers from taking death cases or from cooperating with successor counsel who is trying to show that the lawyers were ineffective at trial.

It is a pointless exercise. And I have added another pointless exercise, drafting guidelines that will discipline judges who appoint lawyers in death cases whom the judges know or should know will give incompetent representation.

The assignment is pointless, because we already have ample rules and guidelines to do the job. This is shown by a small number of disciplinary proceedings that have been brought. In general, however, disciplinary bodies are either inadequately equipped to enforce existing rules, or they prefer to let the “machinery of death” continue to grind on, defying due process and destroying lives.\(^3\)

Before getting into the substance of these issues, it is important to note the difference between rules and guidelines. As explained in the

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2. See id. at 344 (explaining that before a state can imprison an indigent person as a felon, due process requires that the state provide him with the guiding hand of counsel at every step of the proceedings against him).
Scope section of the Model Rules of Professional Conduct ("Model Rules"), the comments to the rules are intended as "guides to interpretation" but they "do not add obligations to the Rules." Specifically, if a comment appears to expand or contract its rule, it is the text of the rule, not the comment, that is "authoritative." Similarly, ABA standards are ordinarily guides with the same effect as comments.

Significantly, however, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases states that the commentary of the original edition of the Guidelines said that "it was designed to express existing 'practice norms and constitutional requirements.' This thought has been moved to the black letter in order to emphasize that these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases." However, the ABA standards would only be binding on courts and disciplinary authorities in jurisdictions that have adopted these Guidelines. Even if not adopted in a particular jurisdiction, however, the Guidelines would be persuasive authority.

II. PROVISIONS FOR DISCIPLINING INCOMPETENT REPRESENTATION

A. The Model Rules

Model Rule 1.1 provides the basis for discipline of incompetent lawyers, without the need for additional guidelines. The Rule requires a lawyer to provide competent representation to a client. The Rule then defines competence as requiring "the legal knowledge, skill,
thoroughness and preparation reasonably necessary for the representation.”\textsuperscript{12} Also, the Comment to Rule 1.1 mentions the “specialized nature of the matter” as relevant to assessing requisite competence, and notes that “[e]xpertise in a particular field of law may be required in some circumstances.”\textsuperscript{13} In addition, the Comment recognizes that “what is at stake” is relevant to determining that a matter is one that can require “more extensive treatment than matters of lesser . . . consequence.”\textsuperscript{14}

Accordingly, professional discipline is justified, and has long been justified, whenever a lawyer provides incompetent representation in a death penalty case.

\textit{B. The ABA Defense Function Standards}

For two decades—since their promulgation in 1993—the Defense Function Standards have reinforced the criminal defense lawyer’s obligation of competent representation. Standard 4-1.2(b) defines defense counsel’s “basic duty” to include “effective, quality representation.”\textsuperscript{15} With specific reference to death penalty cases, Standard 4-1.2(c) notes that “the death penalty differs from other criminal penalties in its finality,” and requires that counsel render “extraordinary efforts on behalf of the accused.”\textsuperscript{16} The Comment to the Standard explains further: “Because the client’s life is on the line, . . . defense counsel should endeavor . . . to leave no stone unturned in the investigation and defense of a capital client.”\textsuperscript{17}

\textit{C. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases}

The Commentary to Guideline 1.1 of the Guidelines explains that capital “cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in

\begin{itemize}
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} \textit{Id.} \textsuperscript{cmt. ¶ 1.}
\item \textsuperscript{14} \textit{Id.} \textsuperscript{cmt. ¶ 5.}
\item \textsuperscript{15} \textit{ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-1.2(b) (3d ed. 1993).}
\item \textsuperscript{16} \textit{Id.} at 4-1.2(c).
\item \textsuperscript{17} \textit{Id.} standard 4-1.2 cmt.
ordinary criminal cases.” Accordingly, under the commentary to Guideline 1.1, it is noted that it is widely accepted that “the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master. . . . Counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns.” Counsel must therefore “be able to develop and implement advocacy strategies applying existing rules in the . . . environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.”

After requiring that each jurisdiction develop and publish qualification standards for defense counsel, Guideline 5.1 stipulates that these standards should ensure:

1. That every attorney representing a capital defendant has:
   a. obtained a license or permission to practice in the jurisdiction;
   b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
   c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
   a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
   b. skill in the management and conduct of complex negotiations and litigation;
   c. skill in legal research, analysis, and the drafting of litigation documents;
   d. skill in oral advocacy;
   e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

18. ABA Guidelines, supra note 8, Guideline 1.1 cmt., at 923.
19. Id.
f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
g. skill in the investigation, preparation, and presentation of mitigating evidence; and
h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements. 21

These Guidelines have been in effect for ten years. 22 Nevertheless, neither these Guidelines nor widely adopted ethical rules regarding competence have resulted in a significant number of disciplinary proceedings against lawyers who fall far short of the requisite level of competence.

III. DISCIPLINARY PROCEEDINGS AGAINST INCOMPETENT LAWYERS IN CAPITAL CASES SHOW THAT THE PRESENT RULES ARE ADEQUATE BUT Seldom USED

A. A Vivid Illustration of the Failure of Disciplinary Rules

1. The Facts of Maples v. Thomas 23

In a case involving the doctrine of res ipsa loquitur (meaning, “the thing speaks for itself”), the Mississippi Supreme Court held: “We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless.” 24 The chewing tobacco case comes to mind when reviewing the United States Supreme Court opinion in Maples v. Thomas, which provides a vivid, speaks-for-itself account of multiple instances of incompetent representation by lawyers in a capital case. 25

Cory Maples was represented at trial by two court-appointed lawyers who were “minimally paid and with scant experience in capital

21. Id. Guideline 5.1(B), at 961–62.
22. The Guidelines were “approved . . . on February 10, 2003.” Id. intro. at 916.
cases.” 26 Indeed, one of Maples’s trial lawyers had never before served in a capital case and the other had never tried the penalty phase of a capital case. 27 To carry out the high quality representation that is necessary in the complexities of a capital case, 28 these inexperienced lawyers received twenty dollars an hour for work on the case out-of-court (capped at $1000) and forty dollars an hour for work in court. 29 Not surprisingly, in his collateral attack on his conviction and death sentence, Maples asserted that his trial lawyers “failed to develop and raise an obvious intoxication defense, did not object to several egregious instances of prosecutorial misconduct, and woefully underprepared for the penalty phase of his trial.” 30

In Maples’s post-conviction proceedings, three associates in the New York office of Sullivan & Cromwell, at least one partner in that firm, and the firm itself, were involved in Maples’s representation. 31 Two of his lawyers of record, Jaasi Munanka and Clara Ingen-Housz, were associates with the firm. 32 The partner overseeing the representation was Marc De Leeuw. 33 In addition, another associate in the firm, Felice Duffy, worked on the case. 34

The law firm shared responsibility for Maples’s representation, because a premise of the lawyers’ ethics is that “each lawyer [in the firm] is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.” 35 Also, “a firm of lawyers

27. Id. at 918.
28. See ABA GUIDELINES, supra note 8, Guideline 1.1(A), at 919.
30. Id. at 919.
31. Id. at 918, 925. A Legal Aid lawyer entered an appearance before the Sullivan & Cromwell lawyers did so. Maples v. Campbell, CV03-B-2399-NE, 2007 U.S. Dist. LEXIS 101481, at *1 (N.D. Ala. Sept. 26, 2007); Maples v. Campbell, 5:03-CV-2399-SLB-PWG, 2006 U.S. Dist. LEXIS 98980, at *1 (N.D. Ala. Sept. 29, 2006). When the petition for relief was filed in the trial court, the two Sullivan lawyers and local counsel signed a verification that they were the three lawyers in the matter for Maples, and that they were the lawyers who were to receive all notices in the case. See Maples, 132 S. Ct. at 918-19.
32. Maples, 132 S. Ct. at 918.
33. Id. at 925 (“[P]artner Marc De Leeuw stated that he had been ‘involved in [Maples’] case since the summer of 2001.’”) (second alteration in original).
34. Id. (“Another Sullivan & Cromwell attorney, Felice Duffy, stated, in an affidavit submitted to the Alabama trial court in September 2003, that she ‘ha[d] worked on [Maples’] case since October 14, 2002.’”) (alterations in original).
is essentially one lawyer for purposes of the rules governing loyalty to the client . . . .”\textsuperscript{36} This is so regardless of whether the firm is identified when a member of the firm signs on as counsel of record.\textsuperscript{37} “When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained . . . .”\textsuperscript{38}

Moreover, “[a] law firm is required to ensure that the work of partners and associates is adequately supervised. . . . taking into account. . . the experience of the [lawyer] whose work is being supervised.”\textsuperscript{39} “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the [applicable ethical rules].”\textsuperscript{40} In Maples’s case, the partner in the supervisory position was De Leeuw.\textsuperscript{41}

In addition, at least one partner in a firm is required to make reasonable efforts to establish policies and procedures that ensure that all lawyers in the firm conform to the Model Rules, including “identify[ing] dates by which actions must be taken in pending matters . . . .”\textsuperscript{42} As discussed below, a crucial filing date was missed by Maples’s lawyers.\textsuperscript{43} The partner responsible for establishing the policies and procedures in this regard might have been De Leeuw or it might have been one or more other partners, potentially adding to the list of culpable lawyers.\textsuperscript{44}

In addition to the Sullivan & Cromwell lawyers implicated in Maples’s representation, John Butler was also an attorney of record in the case.\textsuperscript{45} Under Alabama law, a local attorney’s name must appear on all documents filed in a case in which out-of-state lawyers are counsel of

\textsuperscript{36} Id.
\textsuperscript{37} Although the Sullivan & Cromwell lawyers do not include the firm’s name when they become counsel of record in pro bono cases, the firm, with justifiable pride, takes credit for its pro bono litigation on its website. See Pro Bono, SULLIVAN & CROMWELL LLP, http://www.sullcrom.com/about/probono/ (last visited July 18, 2013).
\textsuperscript{38} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31 cmt. f (2000).
\textsuperscript{39} N.Y. RULES OF PROF’L CONDUCT R. 5.1(c) (2012). This provision of the New York Rules is not in the Model Rules.
\textsuperscript{40} MODEL RULES OF PROF’L CONDUCT R. 5.1(b) (2007).
\textsuperscript{42} MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. ¶ 2 (2007).
\textsuperscript{43} See infra text accompanying notes 51–69.
\textsuperscript{44} For example, Sullivan & Cromwell has stated on its website that it “created the position of Special Counsel for Pro Bono to enhance the Firm’s deep commitment to pro bono work and broaden the opportunities and types of pro bono matters available. In addition, the Firm has designated a day-to-day coordinator of pro bono activities.” Pro Bono, supra note 37.
\textsuperscript{45} Maples, 132 S. Ct. at 919.
record, and the local lawyer must “accept joint and several responsibility with the foreign attorney to the client . . . in all matters [relating to the case].” 46 “Butler told the Sullivan & Cromwell lawyers, [that] he could not ‘deal with substantive issues in the case.’” 47 However, it does not appear that this disclaimer to out-of-state lawyers could absolve Butler of duties imposed upon him by the Alabama State Bar Rules. Note, too, that Butler, by his own admission, was unable to provide the high quality representation that is necessary in the complex litigation of a capital case. 48

Having entered their appearances on Maples’s behalf, Munanka and Ingen-Housz assisted him in filing a petition for post-conviction relief under Alabama rules. 49 “The State responded by moving for summary dismissal” and the trial court denied the State’s motion. 50

Some seven months later, without having attempted to get a hearing on Maples’s petition or having taken any further action in the trial court, Munanka and Ingen-Housz left Sullivan & Cromwell, taking positions that precluded them from working further on Maples’s case. 51 Neither lawyer told Maples of their departure, and neither sought leave to withdraw from the representation, nor did any other Sullivan & Cromwell lawyer enter an appearance on Maples’s behalf or otherwise notify the court of any change in his representation. 52

An additional nine months of inaction by Maples’s lawyers then passed with Munanka, Ingen-Housz, and Butler as his only attorneys of record. 53 At that point, the trial judge, without holding a hearing, entered an order denying Maples’s petition, and the clerk of court mailed copies of the order to Maples’s three attorneys of record. 54 When the copies arrived at Sullivan & Cromwell, a mailroom employee returned them unopened to the court clerk, with a stamp indicating that Munanka was

46. Id. at 918-19 (alterations in original) (quoting RULES GOVERNING ADMISSION TO THE ALABAMA STATE BAR R. VII(C) (2003)).
47. Id. at 919.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id. at 919-20.
unknown and that Ingen-Housz had left the firm.\textsuperscript{55} The court clerk did nothing further.\textsuperscript{56} Nor did Butler do anything, assuming that the Sullivan & Cromwell lawyers were still on the case and would take the necessary action.\textsuperscript{57}

Forty-two days after the petition was denied, the time ran out to file a notice of appeal.\textsuperscript{58} About a month thereafter, the Alabama Attorney General informed Maples that he had four weeks to file a federal habeas petition, and Maples’s mother telephoned Sullivan & Cromwell to ask about the case.\textsuperscript{59} De Leeuw and two associates then asked the trial judge to change the record to give them more time to file the state notice of appeal, but the judge, noting that only Munanka and Ingen-Housz were attorneys of record, said that he was “unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for the petitioner.”\textsuperscript{60} The judge added, rhetorically, “[h]ow . . . can a Circuit Clerk in Decatur, Alabama, know what is going on in a law firm in New York, New York?”\textsuperscript{61}

Thereafter, the Alabama Court of Criminal Appeals denied a request for leave to file an out-of-time appeal, noting that Butler’s receipt of the order was sufficient to put all counsel for Maples on notice.\textsuperscript{62} The Alabama Supreme Court summarily affirmed the Court of Criminal Appeals, and the Supreme Court denied certiorari.\textsuperscript{63}

It appears, therefore, that at least five or six lawyers, and a law firm, were guilty of incompetence in the state post-conviction phase of Cory Maples’s case. This incompetence cannot be avoided by blaming the mailroom employee at Sullivan & Cromwell or the clerk of the Alabama court.\textsuperscript{64} For seven months before leaving Sullivan & Cromwell, Munanka and Ingen-Housz failed to seek a hearing on Maples’s petition

\begin{itemize}
\item \textsuperscript{55} Id. at 920.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. at 920–21.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id. at 921.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} In handling this appeal, Sullivan & Cromwell had a conflict of interest, leading it to attempt to place the blame on a clerk rather than on its own abandonment of Maples. See id. at 925 n.8.
\end{itemize}
or to take any other action in the trial court. In addition, neither lawyer told Maples of their departure from the firm and from his case, and neither sought leave to withdraw from the representation. Nor did any other Sullivan & Cromwell lawyer enter an appearance on Maples’s behalf or otherwise notify the court of any change in his representation. Moreover, after Munanka and Ingen-Housz departed, none of Maples’s lawyers took any action for nine months, leaving Munanka, Ingen-Housz, and Butler as Maples’s only attorneys of record.

With good reason, therefore, all nine Supreme Court Justices agreed, in Maples’s federal habeas corpus appeal to the Court, that Maples’s lawyers had not performed competently. As a result of that incompetence, Maples was left to die.

2. The Failure of Disciplinary Action in Maples v. Thomas

As shown above, existing disciplinary rules and other authorities provide ample grounds for professional discipline of the lawyers in Maples’s case. Earlier reference has been to the ABA’s Model Rules of Professional Conduct. New York, where the Sullivan & Cromwell lawyers were located, like virtually every state, has adopted ethical rules that are patterned on the Model Rules.

Accordingly, Jorge Dopico, Chief Counsel of the Departmental Disciplinary Committee in New York’s First Judicial Department, sua sponte undertook an ethics investigation of Jaasi Munanka. However,
the Disciplinary Committee then decided that “there is no basis for taking disciplinary action” against Munanka and closed the matter.\textsuperscript{73} Unfortunately, neither Dopico nor the Committee has given any reasons for the Committee’s decision. Also, Munanka’s lawyer, while complaining that the amicus brief filed by ninety-two ethics professors and practitioners was based on erroneous facts, chose not to indicate which facts were erroneous and what the correct facts were.\textsuperscript{74}

The facts relied upon in the amicus brief were based directly on those related by the Supreme Court\textsuperscript{75} and, as shown above, incompetence on Munanka’s part is clear on those facts. We can only speculate, therefore, about what, if anything, the Supreme Court might have gotten wrong and what the reason might have been for the Committee’s decision to end its inquiry. A possibility is that Munanka did expressly relinquish all responsibility to De Leeuw, the supervising partner. Even then, however, Munanka failed to obtain leave of the Alabama court to withdraw as counsel of record;\textsuperscript{76} therefore, as far as the clerk was aware, Munanka remained one of the lawyers responsible for receiving notices in Maples’s case. The same, of course, would be true


\footnotesize{\textsuperscript{74} Email from author to Kevin D. Evans, Attorney (Feb. 12, 2013) (on file with the Hofstra Law Review). Mr. Evans replied that, “what was done to Mr. Munanka in the Supreme Court... was to vilify him based on a false, distorted and warped record..." He added, however, that under Rule 1.6 and related authority, Mr. Munanka is “unable absent consent from Mr. Maples to share the full, underlying record. We have asked for permission to share the full record from Mr. Maples, and our request has gone unanswered.” Id.}

\footnotesize{\textsuperscript{75} Letter from Kevin D. Evans, Attorney, to Authors and Signatories of Amici Curiae Brief of Legal Ethics Professors and Practitioners and the Ethics Bureau at Yale in Maples v. Thomas Supreme Court Case No.10-63 (Jan. 19, 2013), available at http://www.legalethicsforum.com/files/letter-re-mr.-munanka---maples-v.-thomas1.pdf.}

\footnotesize{\textsuperscript{76} Maples v. Thomas, 132 S. Ct. 912, 916-17 (2012).}
of Ingen-Housz, who does not appear to have been the subject of any ethics investigation.

Moreover, regardless of any facts that might conceivably have led the Disciplinary Committee to end the investigation of Munanka, it is beyond understanding why disciplinary action has not been taken in New York against De Leeuw, Duffy, Brewer, and/or the firm of Sullivan & Cromwell. Like a human toe in chewing tobacco, Maples’s abandonment by his lawyers to die without due process speaks for itself. Somebody in a law firm in New York, New York had been very careless.\footnote{77}

\textbf{B. A Case in Which Disciplinary Action Has Been Taken}

As demonstrated above, additional rules providing for professional discipline of incompetent lawyers in death penalty cases are pointless, because the current rules are ample. In fact, existing rules have been used, albeit in a small number of cases, to sanction incompetent representation in capital cases. Here is an abandonment case in which, unlike \textit{Maples v. Thomas}, disciplinary action was taken against the incompetent lawyer.

In \textit{Myers v. Allen},\footnote{78} Robin D. Myers, was found guilty of murder by an Alabama jury.\footnote{79} The jury recommended life without parole, but the trial court overruled the jury and, without any discussion, sentenced Myers to death.\footnote{80} The Alabama courts affirmed the conviction and sentence, and the Supreme Court denied certiorari.\footnote{81}

Shortly thereafter, attorney Earle Schwarz, representing Myers pro bono in post-conviction proceedings, filed a petition in the circuit court of Alabama.\footnote{82} However, Schwarz failed to comply with the Alabama post-conviction deadlines.\footnote{83} As the court stated in \textit{Myers}, Schwarz had

\begin{footnotes}
\item[77] It is possible that the Disciplinary Committee issued letters of reprimand to one or more lawyers, in which case the Committee’s action would not have been made public. Even if such action was taken, however, it would be grossly inadequate in view of the extent of the incompetence and the fact that it occurred in a capital case.
\item[78] 420 F. App’x 924 (11th Cir. 2011).
\item[79] \textit{Id.} at 925.
\item[80] \textit{Id.} at 926.
\item[82] \textit{Myers}, 420 F. App’x at 926.
\item[83] \textit{Id.}
\end{footnotes}
sixty days to assemble affidavits in support of Myers’s substantive claim, but he failed to do so.\footnote{84} Schwarz instead waited until the deadline to request more time.\footnote{85} The court denied this request and also denied the petition without a hearing.\footnote{86} Schwarz then filed Myers’s appeal to the Alabama Court of Criminal Appeals, “but after filing the briefs, he abandoned Myers without telling either Myers or the courts of his abandonment.”\footnote{87} Although the court denied Myers’s appeal in February 2003, Myers still “believed [that] his appeal was pending until February 2004, when the Alabama Attorney General sent Myers a copy of a letter mailed to Schwarz advising [him] that [the prosecution was] seeking an execution date because Myers’s time for filing appeals has expired.”\footnote{88} Myers was then assisted by other prisoners with locating new counsel.\footnote{89} This counsel then filed a federal habeas petition on March 25, 2004.\footnote{90}

After hearing the evidence, a magistrate judge ruled against Myers on the merits of his petition, and the Eleventh Circuit affirmed.\footnote{91} In addition, the magistrate filed a formal complaint against Schwarz in Tennessee, where Schwarz was a member of the bar and employed by a law firm.\footnote{92} The magistrate’s complaint alleged that Schwarz had willfully neglected the representation of his client.\footnote{93}

In response to this complaint, the Tennessee Board of Professional Responsibility found that Schwarz had neglected his client’s legal matter in a death penalty case and issued a public censure against him.\footnote{94} Although this is a lenient sanction for a lawyer who abandoned a client in a capital case without telling either the client or the courts of his abandonment, the case at least demonstrates that disciplinary action is possible under existing rules.

\footnote{84}{Id.}
\footnote{85}{Id.}
\footnote{86}{Id.}
\footnote{87}{Id. (footnote omitted).}
\footnote{88}{Id.}
\footnote{89}{Id.}
\footnote{90}{Id.}
\footnote{91}{Id. at 926, 928.}
\footnote{92}{Id. at 926 nn.2-3.}
\footnote{93}{Informational Release, Board of Prof’l Responsibility, Supreme Court of Tenn., Memphis Lawyer Publicly Censured, (Apr. 29, 2005), available at http://www.tbpr.org/NewsAndPublications/Releases/PDFs/Schwartz%2027660-9%20rel632503903275558402.pdf.}
\footnote{94}{Id.}
IV. PROVISIONS FOR DISCIPLINING JUDGES WHO KNOWINGLY APPOINT INCOMPETENT LAWYERS IN CAPITAL CASES

A. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

These Guidelines, which have been in effect for ten years, have been discussed above. They require each jurisdiction to develop and publish standards for appointment of defense counsel that ensure, among other things, that each capital defendant within the jurisdiction receives high quality legal representation, and that every lawyer in a capital case has “demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases . . . .” These standards apply to appointment of counsel who are competent to handle capital cases. They are therefore directed to judges.

B. ABA Model Code of Judicial Conduct

The current Model Code of Judicial Conduct (“MCJC”) was adopted in February 2007. The Canons are “overarching principles of judicial ethics that all judges must observe,” and the Rules provide the basis for judicial discipline. The provisions referred to here are similar to those in the 1990 MCJC.

Under the MCJC, a judge is required to “comply with the law,” which includes the Code of Judicial Conduct, court rules, statutes, constitutional provisions, and decisional law. Also, “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially,” and “perform [all] judicial and administrative duties, competently and diligently.”

95. See supra Part II.C.
96. ABA GUIDELINES, supra note 8, Guideline 5.1, at 961.
97. Guideline 3.1(B) expresses a preference that appointments be given to a “Responsible Agency” that is “independent of the judiciary . . . .” Id. Guideline 3.1(B), at 944.
98. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT, at xv (2d ed. 2011).
99. Id. at scope ¶ 2. The Comments “provide guidance regarding the purpose, meaning, and proper application of the Rules.” Id. at scope ¶ 3.
100. Id. at r. 1.1.
101. Id. at scope p. 11.
102. Id. at r. 2.2 (footnotes omitted).
103. Id. at r. 2.5.
The MCJC therefore requires judges to appoint lawyers who have both the requisite competence and the requisite ability to provide constitutionally effective assistance of counsel in capital cases, and a judge’s willful failure to do so is a ground for judicial discipline.

C. Code of Conduct for United States Judges

The Code of Conduct for United States Judges was adopted by the Judicial Conference in 1973, and was revised in 1987, 1992, and 1996. Canon 2A provides that a judge should comply with the law and act “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 3A(4) requires a judge to accord every person who is legally interested in a proceeding, or the person’s lawyer, “the full right to be heard according to law.” Also, “[i]n disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of parties to be heard . . . .” In addition, when a judge becomes aware of reliable evidence indicating a likelihood of unprofessional conduct by a lawyer, the judge should initiate appropriate action.

The Code of Conduct for federal judges therefore requires judges to appoint lawyers who have both the requisite competence and the requisite ability to provide constitutionally effective assistance of counsel in capital cases, and a judge’s willful failure to do so is a ground for judicial discipline.

V. The Failure of Judges to Appoint Lawyers Who Have the Requisite Competence to Provide Constitutionally Effective Assistance of Counsel in Capital Cases

Judges have too often selected court-appointed lawyers precisely because the lawyers are incompetent and can be counted on to move the courts’ calendars quickly by entering hasty guilty pleas in virtually all

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105. Id. Canon 2A.
106. Id. Canon 3A(4).
107. Id. Canon 3A(5) cmt.
108. Id. Canon 3B.
cases. In those few cases in which the accused insists on his right to trial by jury, the trials typically move rapidly because the court-appointed lawyers frequently file no motions, conduct no investigations, and do little to impede the speedy disposal of the case from charge, to guilty verdict, to imprisonment.

For example, an extensive study under the auspices of New York University Law School’s Center for Research in Crime and Justice found that New York’s court-appointed lawyer system has failed to provide any semblance of effective assistance of counsel to indigent defendants. The lawyers are paid on the basis of vouchers for the time spent on each case. There is every incentive, therefore, for the lawyers to record faithfully, if not to exaggerate, the time they have spent. Yet the vouchers reveal the following statistics:

- Interviewing and counseling
  No time recorded for interviewing and counseling the client in 74.5% of the homicide cases, or in 82% of other felony cases,

- Discovery
  No time recorded for discovery in 92.1% of the homicide cases or in 93.6% of other felony cases,

- Investigation
  No time recorded for investigations in 72.8% of the homicide cases or in 87.8% of other felonies; and

- Pre-Trial Motions
  No time recorded for written pre-trial motions in 74.5% of the homicide cases or in 80.4% of other felonies.

The NYU Study nevertheless concluded that this system of incompetent, ineffective court-appointed lawyers “must be understood as


110. There are, of course, some court-appointed lawyers who provide highly competent and zealous representation. One example is Abe Fortas, who was appointed by the Supreme Court to represent Clarence Gideon in his appeal. Order No. 1011, 370 U.S. 932 (1962).


112. Id. at 758.

113. Id. at 761.

114. Id. at 762.

115. Id. at 767.
a success from the perspective of those who designed the system and now maintain it.” The purpose of the system, which makes it a success, is making the criminal law “a more effective means for securing social control [of indigent defendants] at minimal expense to the state and to the private bar, ... by compelling guilty pleas and by other non-trial dispositions.” That explains—but hardly justifies—the fact that judges are appointing and reappointing defense lawyers who are not dedicated to competent, effective representation, but rather to helping the judges to move their calendars.

The research for the NYU Study was conducted between 1984 and 1985, but circumstances have not changed for the better since that time. Indeed, “there is uncontroverted evidence that funding still remains woefully inadequate and is deteriorating in the current economic difficulties that confront the nation.”

For example, in Corey Maples’s case, the Alabama Appellate Court Justices filed an amicus brief with the Supreme Court explaining that no experience with capital cases is required for appointments of counsel and that appointed counsel need only have had “five years prior experience in the active practice of criminal law.” Moreover, the state neither provides nor requires appointed counsel to gain any capital-case education or training. Accordingly, the trial judge in Maples appointed one lawyer who had never before tried a capital case, and another lawyer who had never before tried the penalty phase of a capital case.

I am aware of no instance of a judge who has been disciplined for knowingly appointing, or even for reappointing, incompetent counsel in a capital case.

116. Id. at 876.
117. Id. at 877 (footnote omitted).
118. See id. at 581 n.**.
119. NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, at xi (2009); see also ABA, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS (2006); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISED 1-8 (2006); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 4-5 (2001); Klein, supra note 109, at 1387-88; Tabak, supra note 109, at 1111.
121. Id.
122. Id. at 918.
Rule 3.1(B) of the Guidelines recommends that appointments of counsel in capital cases be made by a “Responsible Agency” that is “independent of the judiciary” and of elected officials.\(^{123}\) One reason that such an independent agency is necessary is the frequency with which judges appoint inadequate counsel in capital cases.\(^{124}\) Another is the political pressures on judges who are subject to reelection, and upon elected officials to appear tough on crime.\(^{125}\) A third reason is the judges’ conflict of interest when they are called upon in habeas proceedings to assess the competence of the lawyers whom they have been responsible for appointing.

VI. PREVENTING PUNISHMENT OF COMPETENT DEFENDERS

I have been asked also to draft rules to protect good capital defenders from discipline, or from being punished for cooperating with efforts to establish ineffective representation at trial (which may be for reasons other than incompetence). As discussed above, lawyers who demonstrate gross incompetence in capital cases are not subjected to sanctions or may receive, at most, private letters of reprimand or a censure. Nevertheless, competent lawyers have been subjected to punishment.

For example, in *In re Jim Marcus and Richard Burr*,\(^{126}\) two highly competent lawyers were held in contempt for zealously and competently representing a client facing execution.\(^{127}\) The asserted ground was that the lawyers violated a rule providing for contempt proceedings against a capital defender who files a pleading within seven days preceding an applicant’s execution.\(^{128}\)

Pursuant to a safe-harbor provision in the rule, Marcus and Burr filed a statement with the court explaining in detail why it was

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123. *ABA Guidelines, supra* note 8, Guideline 3.1(B), at 944.
125. Tabak, *supra* note 109, at 1106-08.
128. *In re Marcus* (Justia, Tex. Case Law). The Rule explains that if execution is scheduled for a Wednesday at 6:00 p.m. and an application is filed on the preceding Wednesday at 8:00 a.m., the Rule will have been violated. TEX. CT. CRIM. APP. MISC. R. 11-003.
impossible to file a timely pleading. In their statement, the lawyers explained that they had entered the case having learned belatedly that a death row inmate no longer had habeas counsel, and that they had then learned further that the previous lawyers had been incompetent. Without giving any reason for finding the explanation insufficient, the court held the lawyers in contempt and fined each of them $500. Ironically, the court took no action against court-appointed chief trial counsel and court-appointed state habeas counsel in the case, both of whom clearly had been incompetent.

In any event, no guidelines could prevent a state from holding lawyers in contempt for violating a state filing rule, no matter how arbitrarily the rule might be applied. The same is true with regard to a state rule sanctioning a lawyer for cooperating with successor counsel in making a claim of ineffective representation. Similarly, no guideline would prevent a state from otherwise wrongfully disciplining a competent capital defender.

VII. CONCLUSION

Judges knowingly appoint and reappoint incompetent lawyers in capital cases, and disciplinary authorities fail to impose sanctions on judges and lawyers who violate ethical rules that have existed for substantial periods of time. It is therefore pointless to draft additional rules for the same purpose.

131. In re Marcus (Justia, Tex. Case Law). The fine was suspended on condition that the lawyers not thereafter violate the filing rule.
132. See id. (only requiring the appearance of attorneys Marcus and Burr).
OVERLOOKED GUIDELINES:
USING THE GUIDELINES TO ADDRESS THE
DEFENSE NEED FOR TIME AND MONEY

Meredith Martin Rountree*
Robert C. Owen**

I. INTRODUCTION

In 2003, Professor Eric M. Freedman, Reporter for the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”), observed that one of the ABA Guidelines’ central virtues was to recognize that the death penalty is expensive.¹ Fairness in the application of the ultimate punishment requires governments to develop systems to allocate essential resources, like compensation for counsel and funds for experts and investigators.² Ten years later, this Article revisits Professor Freedman’s observation by exploring the question of resources and urging counsel to increase their use of the ABA Guidelines in fighting for the irreducible minima of reasonably effective representation: time and money.

II. WHAT IT TAKES TO REPRESENT A CLIENT FACING THE DEATH PENALTY

Recognizing that “death penalty cases have become . . . specialized,”³ the ABA Guidelines emphasize that their

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2. See id. at 1102-03.
“extraordinary complexity and demands” require from defense counsel a “significantly greater degree of skill and experience.” Counsel’s work is “uniquely demanding,” because of the extensive skills, wide-ranging knowledge, and informed strategic judgment that counsel must bring to each case. As Justice Harold Blackmun observed: “The unique, bifurcated nature of capital trials and the special investigation into a defendant’s personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials.”

Trial and post-conviction counsel must investigate the facts of the case exhaustively, informed by a command of the legal implications of, for example, neuropsychological or forensic findings. Counsel, at all stages, must stay abreast of legal developments and complex procedural rules where a misstep can forfeit a legal claim and doom the client. Each must establish a “special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.” Counsel in clemency proceedings must ensure that clemency provides a meaningful “fail-safe” to correct oversights by the criminal justice system.

Not surprisingly, “[s]tudies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters.” Notwithstanding this informed consensus, underfunding of defense services historically has been a chronic problem, leading the ABA Guidelines to emphasize the importance of adequate funding and to identify and condemn certain practices (for example, flat fees and compensation caps) as improper. Moreover, adequate payment for the time spent on the case by defense counsel is not the only concern; resources for investigative and expert assistance are also indispensable to effective representation.

4. Id. at 921.
5. Id. at 923.
7. ABA GUIDELINES, supra note 3, Guideline 1.1 cmt., at 925-26, 930.
8. See id. at 931-32.
9. Id. at 925-26. The ABA Guidelines also discuss a duty to remain in contact with the client as a bulwark against mental deterioration. See id. Guideline 10.15.1 cmt., at 1082-83.
10. Id. Guideline 1.1 cmt., at 937.
11. Id. Guideline 6.1 cmt., at 967.
III. WHAT THE ABA GUIDELINES PROVIDE

In response to these concerns, the ABA Guidelines directly addressed funding and workload. Lawyers should also not be permitted to take on more work than they can handle. “The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.” Further, “[c]ounsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.”

With respect to paying for the defense of capital cases, the ABA Guidelines make clear not only that “the full cost of high quality legal representation” must be funded, but that defense counsel “should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty [cases].” To that end, the ABA Guidelines specifically condemn “[f]lat fees, caps on compensation, and lump-sum contracts” as improper limits on fair and adequate compensation. They further require that appointed counsel “be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction,” that “[p]eriodic billing and payment should be available,” and that no distinction be made between payment for in-court and out-of-court services.

Further, “[n]on-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.”

15. Id. Guideline 10.3, at 996. Mark E. Olive and Russell Stetler observed that “[w]orkload issues are so important that both the ABA Guidelines and the Supplementary Guidelines discuss them twice, at Guideline 6.1 and 10.3 (from supervisory and individual perspectives, respectively).” Mark E. Olive & Russell Stetler, Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction, 36 HOFSTRA L. REV. 1067, 1083 n.67 (2008).
17. Id. Guideline 9.1(B)(1), at 981.
19. Id. Guideline 9.1(C), at 981-82.
IV. WE KNOW THERE ARE SYSTEMIC DEFICIENCIES

The Death Penalty Moratorium Implementation Project of the American Bar Association (“ABA”), has conducted assessments of whether, among other things, individual states are complying with the ABA Guidelines with respect to funding capital defense. The states assessed thus far—Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, and Tennessee—have not generally fared well.

Where the Assessment Teams had enough information to reach a conclusion, they found that most states—Alabama, Florida, Georgia, Kentucky, Missouri, Ohio, Pennsylvania, and Tennessee—did not adequately fund defense services. The Assessment Teams noted instances of precisely the kinds of funding arrangements the ABA Guidelines specifically identified as deficient, including fee caps in Alabama and flat fees in Pennsylvania. Georgia provided no resources for counsel or expert and investigative services in state post-conviction or clemency. Florida lawyers have persistently challenged their state’s compensation schemes as unconstitutional and inadequate.

Fees may not cover basic overhead, even as capital cases can monopolize an attorney’s practice. Some jurisdictions use lump sum

20. Given this fact, it is likely no coincidence that a list of the “top ten” death penalty states, ranked by number of death row inmates, includes six of these eight states—Tennessee (10), Georgia (9), Ohio (7), Alabama (5), Pennsylvania (4), and Florida (2). Facts about the Death Penalty, DEATH PENALTY INFO. CENTER 2 (Feb. 4, 2013), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.


24. JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 79-80 (2010) [hereinafter SPENCER REPORT
payments or compensation caps to restrict the amounts paid to counsel and for other necessary services. In Texas, for example, court-appointed post-conviction counsel (of which only one is appointed, contrary to ABA Guideline 4.1) is paid no more than $25,000 for a capital case, which must cover not only counsel’s legal services, but all other costs associated with the representation.25 Assuming the accuracy of a Spangenberg study cited in the ABA Guidelines, which estimated that the average post-conviction case demands over 3300 hours of attorney time,26 counsel in such Texas cases will be paid less than $8 an hour—and that assumes she obtains no expert services for investigation, mental health investigation and examination, or forensic analysis. The effect of the limited pot is:

   to discourage requests for the investigative and expert assistance that is essential to the meaningful litigation of a state habeas case. Once a case’s allocated funds have been exhausted, appointed counsel is forced to make the untenable choice between working for free—paying additional investigative costs out of pocket and endangering their law practices—and cutting corners in the cases to which they have been appointed.27

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25. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2A(a) (West 2005). Fortunately, and in an example of positive systemic change, the Texas Legislature—in part to address widespread complaints about the persistently low quality of post-conviction legal representation in Texas death penalty cases—recently created the Office of Capital Writs (“OCW”) to replace the former ad hoc appointment scheme. See Brandi Grissom, Trying to Restore Integrity to Death Row Defense, TEX. TRIB., July 6, 2010, http://www.texastribune.org/2010/07/06/trying-to-restore-integrity-to-death-row-defense, and the Spencer report provided that:

   Another judge said he had to let a lawyer withdraw from a case because he was unable to bear the financial cost of shutting down the rest of his practice indefinitely. Defending one of these cases requires “complete commitment,” said another judge. They are enormous and long-term and it is “almost impossible to know when the commitment will end, making it hard to plan for the future.”

   SPENCER REPORT (2010 Update), supra, at 79.

26. ABA GUIDELINES, supra note 3, Guideline 6.1 cmt., at 969.

As the Kansas Supreme Court recently observed in *State v. Cheatham*, such practices create a substantial risk that the client will be denied adequate representation. The court stated that, “the Guidelines unequivocally disapprove of flat fees in death penalty cases precisely because such fee arrangements pit the client’s interests against the lawyer’s interest in doing no ‘more than what is minimally necessary to qualify for the flat payment.’”

The consequences of such efforts to administer the death penalty “on the cheap” are easy to predict. The 2010 findings of the *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (“Spencer Report (2010 Update)”) make clear that money matters:

> Individuals whose defense cost less than $320,000 in combined attorney and expert assistance – the lowest one-third of federal capital trials – had a 44 percent chance of being sentenced to death at trial. Individuals whose total representation costs were above that amount – the remaining two-thirds of defendants – had a 19 percent chance of being sentenced to death. Defendants in the low-cost group thus were more than twice as likely to be sentenced to death.

The question of workload is intimately related to funding issues. A lawyer facing financial concerns may undertake additional cases. The demands of those cases, in turn, may result in her spending less time with her capital client, as the *Cheatham* court makes clear:

> [Trial counsel], a solo practitioner with a “high volume” law practice requiring near daily court appearances, would have little financial incentive to invest the significant time commitment a capital case requires. On the contrary, his incentive would have been to pay attention to those cases whose billable hours were more likely to produce actual income. [Trial counsel] even concedes this point by testifying that he told Cheatham he was not going to be concentrating full-time on [Cheatham’s] case because “[h]e had to earn a living.”

The case of condemned Texas prisoner Anthony Medina and his court-appointed trial counsel (Mr. Guerinot) provides a painful, yet...
useful example. Mr. Medina’s post-conviction counsel tracked Mr. Guerinot’s case commitments from the time he was appointed to Mr. Medina’s case through the trial. In addition to his part-time job as City Attorney in the Houston suburb of Humble, Mr. Guerinot maintained an active felony defense practice. Mr. Medina was Mr. Guerinot’s fourth client in six months to receive the death penalty, and was just one of Mr. Guerinot’s 174 clients during the six and a half months he spent representing Mr. Medina. Indeed, Mr. Guerinot was actively in trial on other felony cases for more than half the time he nominally represented Mr. Medina. The following chart demonstrates graphically Mr. Medina’s long odds against getting his lawyer’s attention:

Another noteworthy aspect of Mr. Guerinot’s eye-popping workload is that all 174 felony cases and each of the four capital cases he tried during this six and a half month period were from a single county. Plainly, Harris County, Texas—home to Houston, the nation’s fourth-largest city by population and a longtime hotbed of death penalty litigation—had no “effectual mechanisms to ensure” that Mr. Guerinot’s

34. Id. at 28-29.
35. Id. at 28.
36. Id.
workload would “enable[] [him] to provide each client with high quality legal representation in accordance with these Guidelines.”

The Spencer Report (2010 Update) finding that “the more hours [that are] dedicated to a case, the lower the risk of a death sentence” reminds us that time, in addition to money, is an essential resource for counsel.

V. GUIDELINES REGARDING THESE CRUCIAL RESOURCES APPEAR UNDERUTILIZED

Without a doubt, indigent defenders have waged heroic battles to obtain resources for their unpopular clients. Despite the centrality of questions of time and money, however, the ABA Guidelines’ unequivocal insistence that these resources be made available to counsel has not featured prominently in judicial opinions in death penalty cases. As of January 28, 2013, ABA Guideline 6.1 has been cited in four court opinions, Guideline 10.3 in one, and Guideline 9.1 in three. By contrast, as of January 8, 2013, ABA Guideline 10.11 (“The Defense Case Concerning Penalty”) has been cited twenty-seven times and ABA Guideline 10.7 (“Investigation”) has been cited fifty-four times. To be sure, ABA Guidelines 10.7 and 10.11 are essential to explaining deficiencies in capital defense that are all too common. Even the Cheatham court acknowledged that although it was “obvious” that Cheatham’s trial counsel had spent little time preparing the defense, such deficient performance constituted “ineffective assistance” only if it could be “tied to specific trial errors” rather than considered on its own. At the same time, Cheatham’s discussion of the ABA Guidelines’ workload requirements provided the court with the important opportunity to contextualize those demands and thereby make deficient attorney performance more understandable.

Using the ABA Guidelines to explain poor attorney performance is useful retrospectively, for example, in raising an ineffective assistance of counsel claim. But it is also essential for making a record throughout a

37. ABA GUIDELINES, supra note 3, Guideline 6.1, at 965.
38. SPENCER REPORT (2010 Update), supra note 24, at 48.
39. Of course, litigants may be using the ABA Guidelines in their pleadings but, for whatever reason, courts are not incorporating those arguments into their rulings.
40. This result was obtained by searching Westlaw for “American Bar Association” and “death penalty” and “[6.1 or 9.1 or 10.3]” in both the “Allstates” and “Allfeds” databases.
41. See Summary of Cases Citing 2003 ABA Guidelines, AM. BAR ASS’N 26-55, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003summary.authcheckdam.pdf (last updated Jan 8, 2013) (listing and describing the fifty-four cases in which Guideline 10.7 is cited); see also id. at 66-78 (listing and describing the twenty-seven cases in which Guideline 10.11 is cited).
capital proceeding of what resources counsel needs in order to perform effectively—not merely for instrumental purposes, but for the sake of holding public institutions accountable in a particular case. When an attorney refuses to proceed without adequate resources and cites the ABA Guidelines, she puts the court on notice of the real demands of a capital trial and signals that this case must be understood within a larger institutional framework. Defense counsel in New Mexico used ABA Guideline 9.1 (among other authorities) in precisely that fashion to win a stay of a death penalty prosecution where reasonable resources had not been forthcoming. The court found that:

Because of the extraordinary demands on capital defense attorneys, the American Bar Association has condemned flat fees, caps on compensation, and lump-sum contracts in death penalty cases. Rather than a flat fee or a capped rate, the *ABA Guidelines* stress that “[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.”

The New Mexico Task Force reached a similar conclusion, stating that “Defense counsel in capital cases should receive . . . compensation[ ] commensurate with their expertise and the burden of the work and without caps. New Mexico should eliminate flat fee arrangements in capital cases.” The Task Force further noted that flat fees and caps are “an attempt to hide the true costs of capital litigation at the expense of contract counsel and, ultimately, his or her client.”

Although we are not prepared to condemn a flat fee structure or cap in all capital cases, we cannot overemphasize that the case before us is unusually protracted because of its extraordinary complexity. We have found that the attorneys for the defendants are not receiving adequate compensation, thus giving rise to a presumption of ineffective assistance of counsel.

Confronted with a well-developed factual record, the New Mexico Supreme Court was compelled to acknowledge what Professor Freedman took care to emphasize in 2003: these ABA Guidelines

43. In a recent Texas capital case, lead defense counsel was forced to withdraw, along with his lead investigator and mitigation specialist, because of a disagreement with the trial court concerning “the application of the American Bar Association guidelines of representation in capital cases;” another attorney familiar with the matter confirmed that the struggle between defense counsel and the court involved “funding for the defense.” See Jazmine Ulloa, *New Defense Attorney Named*, AUSTIN AM.-STATESMAN, Dec. 11, 2012, at B1.
45. *Id.* (second alteration in original) (citations omitted).
articulate what the system must provide to administer real justice. Every lawyer who explicitly advises a court of the state’s failure to meet the ABA Guidelines with respect to resources and workload bears witness to systemic deficiencies. In some cases, these deficiencies may contribute to disparities that reveal the existing death penalty system as illegitimate. For example, the Spencer Report (2010 Update) noted an unsettling association between low-cost federal capital trials and geography:

A state’s per capita execution rate was highly predictive of the defense cost of federal capital trials brought in that state. Although there were some exceptions, in general defense resources spent on federal capital trials were lowest in those states that had the highest per capita execution rates. Just six percent of low-cost trials were brought in states without the death penalty, whereas 28 percent of all other federal capital trials occurred in states without the death penalty.47

As the Spencer Report (2010 Update) notes, Circuit policies regarding compensation can contribute to geographic disparities. For example, both the Fourth and Fifth Circuits enforce a policy that presumes that attorney fees over $100,000 in a federal capital trial are excessive—where the Spencer Report (2010 Update) found that $353,000 was the median for counsel costs where a case proceeds to trial.48 Similarly, the Fifth Circuit imposes a presumptive per-case fee cap of $35,000 on district court proceedings in capital cases brought under 28 U.S.C. § 2254,49 and has even elected to cut defense counsel’s compensation where, for example, counsel is employed by a non-profit organization, even though that organization is supported in part by court

46. See Freedman, supra note 1, at 1102-03 (observing that effective capital representation, which the states are constitutionally obligated to provide, “is the result of a system for its provision . . . that provides [counsel] with the back-up necessary to perform effectively,” and that “the revised Guidelines state the point especially forcefully”).
47. SPENCER REPORT (2010 Update), supra note 24, at 53 (footnote omitted).
49. FIFTH CIRCUIT SPECIAL PROCEDURES, supra note 48. Thus, in § 2254 cases where the district court appoints two defense counsel, as ABA Guideline 4.1 requires, each attorney faces a fee cap of $17,500. See ABA GUIDELINES, supra note 3, Guideline 4.1, at 952.
fees. Judge Edith H. Jones, who as Chief Judge of the Fifth Circuit reviewed attorney fees for death penalty cases in that jurisdiction until recently, recommended in 2011 that judges contain costs by, among other things, not authorizing multiple types of experts (for example, “three psychiatric/psychologist/neurologist-type experts in pursuit of various Atkins and mitigation claims” or “experts in Mexican culture, tattoos, and jury consultants”). By contrast, the Ninth Circuit anticipates individualized case budgeting in district court, a mechanism recommended by the Spencer Report (2010 Update). In that Circuit, supplemental approval is required only if the over-budget compensation exceeds $15,000 (more than a third of the total anticipated expenditure in the Fifth Circuit for district court proceedings) or more than ten percent of the original budget.

VI. CONCLUSION

Even the most cursory review of Supreme Court cases within the past ten years reveals the indisputably salutary impact of the ABA

50. Letter from Joseph L.S. St. Amant, Senior Conference Attorney, Court of Appeals for the Fifth Circuit, to Naomi Terr, Tex. Defender Serv. (Mar. 31, 2011) (on file with authors). By contrast, the Fourth Circuit presumes excessive requests for compensation in excess of $50,000 per attorney at the district court level or $30,000 per attorney on appeal. FOURTH CIRCUIT SPECIAL PROCEDURES, supra note 48.

51. Memorandum from Edith H. Jones to All Chief Circuit Judges, All Circuit Execs., & Gary Bowden 2–4 (Mar. 11, 2011) (on file with authors). But see ABA GUIDELINES, supra note 3, Guideline 4.1 cmt., at 956. The ABA Guidelines state that:

[I]t might well be appropriate for counsel to retain an expert from an out-of-state university familiar with the cultural context by which the defendant was shaped. . . . While resources are not unlimited, of course, jurisdictions should also be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.

Id. at 957 (footnote omitted). Furthermore, the ABA Guidelines commonsensically assume that experts specializing in various subjects may be needed on the same case. Id. at 958–59; see, e.g., Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1999) (holding that, although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, they were ineffective in failing to consult a neurologist or toxicologist who could have explained the neurological effects of defendant’s extensive exposure to pesticides); see also Eric M. Freedman, The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings, 51 APP. PRAC. & PROCESS 325, 341 (2003) (“By definition, a lawyer cannot know what an investigation will turn up until the investigation is done—that is precisely why one investigates.”).

The then-Chief Judge also warned against having “close relatives as paid members of the defense team.” Memorandum from Edith H. Jones to All Chief Circuit Judges, All Circuit Executives, & Gary Bowden, supra, at 2. This has generally been understood as a criticism of having death penalty specialists who happen to be married to each other working together on cases, though certainly husband-wife law firms, like parent-child ones, are not unusual in legal practice.

52. SPENCER REPORT (2010 Update), supra note 24, at 115–18.

Guidelines on the quality of capital defense, especially with respect to the importance of a thorough investigation at both phases of trial and a team approach to the litigation. While courts may not always grant the ABA Guidelines, the deference we believe they are due as an expression of the existing national standard of practice in death penalty cases, judges nonetheless have acknowledged the existence and importance of these standards. We must progressively expand our use of the ABA Guidelines to confront, as explicitly as we can, the systemic failures that deny justice in capital cases, including those discussed here—compensation and workload. Governments and courts around the country have had to contend with the fiscal challenges of the Great Recession in deciding on compensation and workloads, but as Professor Freedman and others have emphasized, ignoring the extraordinary costs of a death penalty prosecution does not make them go away. It merely shifts them onto capital defendants and their already outmanned attorneys. As one lawyer put it, explaining why the defense team did not travel from Wyoming to Nebraska to investigate their client’s background:

[W]e were at the cap. I mean, I -- my wife and I have talked a lot about this and worried through it about why we didn’t go to Nebraska and, frankly, I think now that we should have spent our own money and went to Nebraska, although I don’t know how we could have done that. It would have cost us 10, 15,000 bucks by the time it was over with. I really didn’t have the money.

I did have financial problems and for me to take 10 or $15,000 and spend it on -- I don’t know that that was even possible, but that should have been done . . .

Relying on individuals to shoulder personally the financial cost of the death penalty that rightly belongs to society at large, creates an undeniable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Until adequate time and money for defending such cases are guaranteed, this will not be a system that provides equal justice under the law.

55. Freedman, supra note 1, at 1101.
THE ABA GUIDELINES AND THE NORMS OF CAPITAL DEFENSE REPRESENTATION

Russell Stetler*  
W. Bradley Wendel**

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("Guidelines"), as revised in 2003,1 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 the Guidelines.2 They have been particularly useful in helping courts to assess the investigation and presentation of mitigating evidence in death penalty cases. This Article will discuss how these Guidelines have come to reflect prevailing professional norms in this critical area of capital defense practice3 and how that practice has developed in the era of the modern U.S. death penalty. One of the principal arguments we will make in this Article is that courts interpreting the Sixth Amendment’s guarantee of effective assistance of counsel should look to what competent lawyers ought to do rather than what some lawyers appointed to represent capital defendants

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actually do. Looking to the prevailing practices or customs of some segments of the defense bar to set the standard of competent performance in capital cases may have the effect of ratifying inadequate representation. Courts should instead consider authoritative statements by the profession concerning the competence that may reasonably be demanded of attorneys in this vital role.

I. INTRODUCTION: THE “CARDIAC SURGERY OF LEGAL REPRESENTATION”

The example of investigating mitigating evidence shows the role of professional guidelines in setting the standard of competent performance for lawyers. Clearly established federal law, as determined by the U.S. Supreme Court, holds that the Sixth Amendment’s guarantee of effective representation requires a thorough investigation of potential mitigating evidence in death penalty cases. Beginning in 2000, the Court has confirmed this point in five cases—Williams v. Taylor,4 Wiggins v. Smith,5 Rompilla v. Beard,6 Porter v. McCollum,7 and Sears v. Upton.8 In each of these cases, the Court found trial counsel ineffective for failing to investigate potential mitigating evidence. Every case except Sears was tried in the 1980s, and Sears was tried in 1993.

In Williams, the Court reaffirmed an all-encompassing view of mitigation and found trial counsel ineffective for failing to prepare the mitigation case until a week before the 1986 trial.9 The Court additionally found trial counsel ineffective for failing to conduct an investigation of the readily available mitigating evidence (nightmarish childhood, borderline retardation, model prisoner status, etc.).10 In Wiggins, a case tried in 1989, trial counsel were found deficient in their performance even though they had had their client examined by one mental health expert, because they failed to conduct a complete social history investigation in accordance with the original edition of the Guidelines (published in 1989).11 “Despite these well-defined norms,
however, counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources.”

In Rompilla, tried in 1988, counsel were found deficient “even when a capital defendant’s family members and the defendant himself had suggested that no mitigating evidence was available,” and despite consulting three mental health experts. Similarly, in Porter, also tried in 1988, counsel were found deficient despite a “fatalistic [and] uncooperative” client because “that does not obviate the need for defense counsel to conduct [a thorough] mitigation investigation.”

Quoting Williams, the Court in Porter reaffirmed this duty: “It is unquestioned that under the prevailing professional norms at the time of Porter’s trial, counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background.’” Among the mitigation evidence that Porter’s counsel failed to present was “brain damage that could manifest in impulsive, violent behavior.” In Sears, the Court found trial counsel ineffective in the 1993 trial even though they had presented seven witnesses in the penalty proceedings. The Court noted: “We have never limited the prejudice inquiry under Strickland to cases in which there was only ‘little or no mitigation evidence’ presented . . . ” Post-conviction evidence emphasized significant frontal lobe brain damage causing deficiencies in cognitive functioning and reasoning.

While these five cases illustrate the Court’s guiding principle linking effective capital defense representation to thorough mitigation investigation, many judges and justices—and indeed many lawyers—remain confused about exactly what the prevailing norms are now or what they were at the time when an old case went to trial. To elucidate norms, whether then or now, we must begin with an understanding of how norms and standards come to be established. Professor Lawrence J. Fox has referred to capital defense representation as the “cardiac surgery
of legal representation.”

21. Lawrence J. Fox, Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities, 36 Hofstra L. Rev. 775, 777 (2008) [hereinafter Capital Guidelines]. Professor Fox traces the specific performance standards articulated in the 2003 Guidelines and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, in 36 Hofstra L. Rev. 677 (2008) [hereinafter Supplementary Guidelines], to fundamental ethical duties first adopted by the ABA as rules of professional conduct over a century ago. He notes that “there is universal recognition that the rules establish measurable levels of performance that lawyers are in fact expected to achieve.” Capital Guidelines, supra, at 775-76. He continues: “Indeed, in this author’s opinion, the core principles expressed in the ABA Guidelines, commentary, and Supplementary Guidelines are no more than detailed, contextualized explanations of counsel’s existing obligations under the Model Rules of Professional Conduct.” Id. at 776. He concludes: “The ABA Guidelines set forth a thorough commentary of the critical factors one would need to evaluate to determine competence in the area of capital defense.” Id. at 777. In an earlier article, Professor Fox stated:

Even if former counsel is not prepared to move heaven and earth to save the former client, the new ABA Guidelines officially recognize an idea that has already been commonly acknowledged in practice—that the former lawyer has a significant obligation to help extricate the former client from his present plight. And once it is understood that this long-standing obligation has a firm foundation in the mandates of our profession’s rules of professional conduct, the former counsel should recognize that what he or she has is not merely a hortatory goal, but a firm obligation.


22. See, for example, Opinion 9.10 of the American Medical Association’s Code of Medical Ethics, which states:

Medical society ethics committees, hospital credentials and utilization committees, and other forms of peer review have been long established by organized medicine to scrutinize physicians’ professional conduct. At least to some extent, each of these types of peer review can be said to impinge upon the absolute professional freedom of physicians. They are, nonetheless, recognized and accepted. . . . They balance the physician’s right to exercise medical judgment freely with the obligation to do so wisely and temperately.

representation is set not by just any lawyer who happens to have a bar card but by the professionals who specialize in this complex area of practice.  

Although the rule is sometimes stated that the standard of care in medical malpractice cases is set by prevailing professional norms, the reality is more complex. Courts do refer to prevailing professional norms but take a critical attitude toward them. It is not simply a matter of surveying the medical profession to ascertain what is the usual practice. Rather, courts look for evidence of considered judgment within the profession concerning the standard of care. In many instances, considered medical judgment will be reflected in the prevailing standards of practicing physicians. In other cases, however, the bulk of medical practitioners considered as a whole have failed to adopt a practice that is in the best interests of patients. Numerous state court decisions refer to the standard of a reasonable and prudent physician, as opposed to that of the custom of the profession.  

Standards of care in the legal profession similarly reflect the judgment of courts concerning what lawyers ought to do, rather than what a numerical majority of lawyers in fact do. In other words, the objective standard of the reasonable professional is prescriptive as well as descriptive. It is informed by evolving norms within the profession but not limited to them. Just as it is possible for experienced physicians to consider prevailing practices and conclude that physicians should be doing more to protect patients, the legal profession may reflect on the customs of the defense bar and conclude, in some cases, that lawyers could do a better job. For example, if scientific research discloses new findings about how people make decisions, defense lawyers ought to be expected to put reasonable effort into learning about it rather than simply relying on the way they have always defended cases. As discussed in few cases of the disease and lack expertise in the complex surgery and chemotherapy that can prolong life.” Id. The study analyzed medical records of 13,321 women with ovarian cancer diagnosed from 1999 to 2006 in California and found that “[o]nly 37 percent received treatment that adhered to guidelines set by the National Comprehensive Cancer Network, an alliance of 21 major cancer centers with expert panels that analyze research and recommend treatment.” Id.  


25. See Peters, supra note 24, at 172-76 (citing state court cases referring to this standard).
Part II, the objective standard of reasonableness articulated in Strickland v. Washington is best understood as using the considered judgment of the legal profession as a benchmark rather than mere custom. As we will argue in Part III, it is particularly important for courts to rely on official statements such as the Guidelines rather than look only to the practices of lawyers representing capital defendants because of the tendency of all decision-makers, including judges, to make erroneous judgments based on incomplete evidence.

Standards in medicine rely heavily on scientific advancements based on rigorous clinical research. The dean of one medical school in the Northeast reportedly told each first-year class at the beginning of the term, “Half of what we are going to teach you is wrong, and half of it is right. Our problem is that we don’t know which half is which.”

Treatment guidelines evolve based on advances in scientific knowledge. Capital defense representation has a more attenuated link to science, but it is nonetheless important to note where the links do exist—in social science and in our rapidly advancing understanding of the neurobiology of brain-behavior relationships.

A robust body of empirical social science research informs capital defense practitioners’ understanding of how jurors make life and death decisions in the selection phase of capital trials. The Capital Jury Project (“CJP”) was “[i]nitialized in 1991 by a consortium of university-based researchers with support from the National Science Foundation.” Over the next two decades, the CJP interviewed 1198 jurors from 353 capital trials in fourteen states, using structured interviews of three to four hours in duration. Some fifty articles based on the CJP data have been published, along with books and doctoral dissertations, completed and in progress. The interviews elicit both predetermined response options to structured questions and narrative accounts in jurors’ own words in

response to open-ended questions. These empirical findings have provided capital defense practitioners with an informed basis for investigating and presenting the kinds of mitigating evidence that jurors have found effective, in the most effective manner, and at all stages of the trial (including voir dire and the guilt-innocence phase) because of the well-documented conclusion that nearly half of the jurors believed they knew what the punishment should be before the sentencing phase of the trial began. In addition to the CJP’s body of work, capital defense


32. See Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1571 tbl.8 (1998) (finding mental illness, mental impairment, and acceptance of responsibility highly mitigating, as well as child abuse carrying weight); Stephen P. Garvey, The Emotional Economy of Capital Sentencing, 75 N.Y.U. L. REV. 26, 26, 63-64 (2000) (finding how empathy decreases the likelihood that jurors will vote for death but that the sentencing process systematically distances jurors from defendants); Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 CORNELL L. REV. 1557, 1574-75, 1590-91 (1998) (finding a denial defense more likely to result in a death sentence, and without acceptance of responsibility, jurors are more cynical about child abuse and other mitigation). Several articles have also examined what makes jurors choose death rather than life: William J. Bowers et al., The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 413, 429-31 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter AMERICA’S EXPERIMENT] (discussing the effects of the manner of the killing, legal misunderstanding of presumption of death, and defendant’s perceived demeanor on jurors’ decision to impose the death penalty); Michael E. Antonio et al., Capital Juries as the Litmus Test of Community Conscience for the Juvenile Death Penalty, 87 JUDICATURE 274, 280 (2004) (discussing how defendant’s courtroom demeanor is key in influencing impressions jurors have of the defendant, including whether attorneys seemed to have a close relationship with the defendant); Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse, 66 BROOK. L. REV. 1011, 1041 (2001) (finding that close to five out of ten jurors believed they must impose death penalty if crime was “heinous, vile or depraved,” with four out of ten believing death to be necessary based on a finding of future dangerousness); John H. Blume et al., Future Dangerousness in Capital Cases: Always “At Issue,” 86 CORNELL L. REV. 397, 407 & tbl.2 (2001) (finding nearly seventy percent of jurors reported that preventing defendant from killing was important even though the prosecution did not put future dangerousness “at issue”).


34. See AMERICA’S EXPERIMENT, supra note 32, at 425-28 (explaining that most jurors reported discussing punishment during the guilt phase and that the earlier the punishment decision is made, the more likely it is for death); Bowers, supra note 28, at 1091 & tbl.8, 1092 (explaining that a “good many” of the jurors were “absolutely convinced” of the appropriate punishment—usually death—before the sentencing phase even began); William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision
practice has been informed by the research of many other academics who have studied aspects of capital punishment. For example, Craig Haney, a social psychologist from the University of California, Santa Cruz, has published widely on research related to mitigation. Michael L. Radelet, a sociologist from the University of Colorado and a prolific author on race effects, deterrence, wrongful convictions, and other issues, has long maintained a chronological inventory of every non-statutory mitigating factor ever found in a Florida death penalty case.

As Professor Haney has pointed out, “The legal standards governing capital mitigation evolved over the same period that a number of important developments were taking place in psychology and related disciplines.” Professor Haney has emphasized research in social psychology in particular, but his point extends to other scientific advances over the past thirty years. These include the revolution in neurobiology following technological breakthroughs in neuroimaging, allowing scientists to study brain functioning in real time, the decoding of the human genome and breakthrough research in the genetic

Making, 83 CORNELL L. REV. 1476, 1488 & tbl.1, 1491-92 (1998) (explaining that interviews with 864 capital jurors in eleven states revealed that almost half of those jurors believed they knew what the punishment should be before the sentencing phase of trial began and that approximately seventy-five percent of those jurors never wavered from their initial choice). This research has led to the well-established capital defense practice of “frontloading” mitigating evidence during voir dire and the guilt-innocence phase of the trial. John H. Blume et al., Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation, 36 HOFSTRA L. REV. 1035, 1044 (2008).


38. See, e.g., RITA CARTER, MAPPING THE MIND 13 (1998) (summarizing how neuroimaging has permitted localization of brain activity that creates specific experiences and behavioral responses).
epidemiology of mental illness, advances in psychopharmacology and neurochemistry, and the study of gene-environment interactions rendering the traditional nature versus nurture debate obsolete and giving rise to epigenetics (non-DNA based changes in gene function). In addition, two wars have tragically heightened our awareness of the consequences of trauma and traumatic brain injury. Capital defense practitioners have been obliged to keep current with all of these complex scientific developments.

Many of the post-*Furman v. Georgia* statutory sentencing schemes followed the *Model Penal Code*, in which two of the model mitigating factors explicitly involve mental or emotional disturbance and impaired capacity. Not surprisingly, expert testimony in capital


42. See, e.g., CENTER FOR MIL. HEALTH POL’Y RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY, at vii (Terri Tanielian & Lisa H. Jaycox eds., 2008) (explaining how modern medicine and technology have increased the “invisible wounds” surviving servicemembers suffer from deployment experiences and the resulting intensification of studies to address mental injuries); Richard A. Bryant et al., Implications for Service Delivery in the Military, in PTSD AND MILD TRAUMATIC BRAIN INJURY 235, 235-36, 237 tbl.12.1 (Jennifer J. Vasterling et al. eds., 2012); Kathleen Wayland, The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations, 36 HOFSTRA L. REV. 923, 929 (2008).

43. See ABA GUIDELINES, supra note 1, Guideline 8.1, at 976-77 (noting that Guideline 8.1.B.10 and 8.1.C require the re-training of lawyers in current scientific developments every two years); SUPPLEMENTARY GUIDELINES, supra note 21, Guideline 8.1, at 685 (noting that Guideline 8.1 requires annual re-training of relevant practitioners).

44. 408 U.S. 238 (1972) (per curiam).

45. See, e.g., MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). For statutory mitigating factors which track the language proposed by the *Model Penal Code*, see, for example, the lists in 18 U.S.C. § 3592 (2006); ALA. CODE § 13A-5-51 (2006); ARIZ. REV. STAT. ANN. § 13-701-E (2010); ARK. CODE ANN. § 5-4-605 (2006); CAL. PENAL CODE § 190.3 (West 2008); COLO. REV. STAT. ANN. § 18-1.3-1201 (4) (West 2004); FLA. STAT. ANN. § 921.141(6) (West 2006); 720 ILL. COMP. STAT. ANN. 5 § 9-1.c (West 2002); IDAHO CODE ANN. § 35-50-2-9.c (West 2012); KY.
sentencing proceedings began as soon as the new statutes were enacted in the 1970s.\textsuperscript{46} By the mid-1980s, in a case involving a delusional defendant named Glen Burton Ake, the Supreme Court held that an indigent capital defendant had a right to a psychiatric evaluation at state expense.\textsuperscript{47} Capital defense practitioners repeatedly stressed the value of multidisciplinary teams with a variety of perspectives. Writing in 1984, capital litigator Kevin McNally noted: “We must try death cases, or negotiate them, by understanding the people involved, not by reading the statute. Who better to help us than those who study, and sometimes negotiate them, by understanding the people involved, not by reading the statute?"\textsuperscript{48} Forensic social workers wrote that their “psychosocial expertise” had proven useful in enhancing capital defense in the early 1980s.\textsuperscript{49} Only expert testimony could offer an interpretive framework for understanding mitigating evidence. As David C. Stebbins and Scott P. Kenney wrote: “Friends, family members, neighbors, teachers, prison personnel, etc., can testify to facts, but cannot render opinions as to how the family background, life experiences, physical and psychological conditions bear on the creation of the person whose life or

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\item REV. STAT. ANN. § 532.025(2)(b) (LexisNexis 2008); LA. CODE CRIM. PROC. ANN. art. 905.5 (2008); MISS. CODE ANN. § 99-19-101(6) (West 2006); MO. ANN. STAT. § 565.032.3 (West 2012); MONT. CODE ANN. § 46-18-304 (2011); N.C. GEN. STAT. ANN. § 15A-200(f) (2011); NEB. REV. STAT. ANN. § 29-2523(c) (West 2009); NEV. REV. STAT. ANN. § 200.035 (West 2000); N.H. REV. STAT. ANN. § 630.5 VI (2007); N.J. STAT. ANN. § 2C:11-3 c(5) (West 2005); N.M. STAT. ANN. § 31-20A-6 (West 2003); OBO REV. CODE ANN. § 2929.04(B) (West 2006); 42 PA. CONS. STAT. ANN. § 9711(e) (West 2007); S.C. CODE ANN. § 16-3-20(C)(b) (2003); TENN. CODE ANN. § 39-13-204(j) (2010); UTAH CODE ANN. § 76-3-207(4) (LexisNexis 2012); VA. CODE ANN. § 19.2-264.4 B (2008); WASH. REV. CODE ANN. § 10.95.070 (West 2012); and WYO. STAT. ANN. § 6-2-102(j) (2011); see also Gregg v. Georgia, 428 U.S. 153, 193 n.44 (1976) (quoting the Model Penal Code with approval); OKLA. UNIF. JURY INSTRUCTIONS - CRIM. § 4-79 (West 2007).


47. Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (holding that denial of expert psychiatric assistance to indigent defendant where sanity was a significant factor at both guilt and penalty phases of trial constituted a denial of due process).


49. Cessie Alfonso & Katharine Baur, Enhancing Capital Defense: The Role of the Forensic Clinical Social Worker, CHAMPION, June 1986, at 26, 26 (citing their experience in “the last five years”).
death is to be decided.”

Other articles focused on representing capital clients with disabling mental impairments.

Meanwhile, public psychiatric hospitals had been closed, community mental health services were being defunded, and jails and prisons were becoming the de facto care providers to an enormous number of indigent persons with mental illness. By 2005, the Bureau of Justice Statistics found that more than half of all prison and jail inmates had mental health problems. Capital practitioners came to understand that mental disorders and impairments often interfere with the defense team’s efforts to build a relationship of trust with their clients and self-destructive behaviors often reflect underlying mental disorders.

The Supreme Court’s death penalty jurisprudence has also underscored how important it is for capital practitioners to understand emerging neuroscience and related developments in psychiatry and psychology. In 2002, the Court established a categorical ban on executing people with mental retardation (now referred to as intellectual disability). Three years later, the Court also prohibited the execution of people whose crimes were committed before they had reached eighteen


51. See, e.g., John Blume, Representing the Mentally Retarded Defendant, CHAMPION, Nov. 1987, at 32, 32-38; Mary Swift, Representing the Developmentally Disabled Offender, CHAMPION, Apr. 1988, at 10, 10-11, 41.

52. See Terry A. Kupers, Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It 11-14 (1999) (discussing the insufficiency of community funding following deinstitutionalization and also explaining the higher prevalence of mental health problems among the incarcerated, exacerbated by changes in conditions of confinement); Fuller Torrey, Out of the Shadows: Confronting America’s Mental Illness Crisis 8, 9 fig.1.2 (1997) (demonstrating that the hospitalized mentally ill population reduced from approximately 565,000 in 1955 to approximately 70,000 in 1995).


54. See Russell Stetler, Mental Disabilities and Mitigation, CHAMPION, Apr. 1999, at 49, 49.

55. See John H. Blume, Killing the Willing: “Volunteers,” Suicide and Competency, 103 Mich. L. Rev. 939, 962 & tbl.2, 963 (2005) (explaining that analysis of 106 “volunteer” executions of prisoners who had waived appeals found that eighty-eight percent had struggled with mental illness and/or substance abuse, including fourteen with schizophrenia, others with delusions, twenty-three with depression or bipolar disorder, and ten with post-traumatic stress disorder).

years of age. \textsuperscript{57} Amicus briefs in support of the ban on juvenile executions presented evidence that the brain is not fully developed until individuals reach their early twenties, thereby providing a scientific understanding of youthful impulsivity. \textsuperscript{58} In all five cases where the Court has found trial counsel ineffective for failing to conduct thorough mitigation investigations, the Court noted the evidence of cognitive impairment and brain damage presented in post-conviction proceedings. \textsuperscript{59}

II. \textbf{The Strickland Standard}

In 1984, Justice Sandra Day O’Connor delivered the opinion in which the Supreme Court attempted to set out “the proper standards for judging a criminal defendant’s contention that the Constitution requires a conviction or death sentence to be set aside because counsel’s assistance at the trial or sentencing was ineffective.” \textsuperscript{60} She began by reciting the grisly facts of the crimes that had led to David Leroy Washington’s death sentence (crimes that “included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft” over a ten-day period). \textsuperscript{61} She also noted that the State of Florida had appointed “an experienced criminal lawyer.” \textsuperscript{62} Mr. Washington, however, did not follow counsel’s advice. \textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{57} Roper v. Simmons, 543 U.S. 551, 574 (2005).
  \item \textsuperscript{59} Sears v. Upton, 130 S. Ct. 3259, 3261–62 (2010) (per curiam) (quoting an expert’s opinion that “Sears performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning” partly due to “significant frontal lobe brain damage,” and explaining that Sears had “problems with planning, sequencing and impulse control”); Porter v. McCollum, 558 U.S. 30, 36 (2009) (per curiam) (explaining that Porter had “substantial difficulties with reading, writing, and memory,” along with “cognitive defects,” and that state experts could not “rule out a brain abnormality”); Rompilla v. Beard, 545 U.S. 374, 390–93 (2005) (noting that Rompilla had a “third grade level of cognition after nine years of schooling,” suffered from “organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions,” and that Rompilla’s “IQ was in the mentally retarded range”); Wiggins v. Smith, 539 U.S. 510, 518, 523 (2003) (noting that social service records documented “borderline retardation” and that testing determined Wiggins to have “an IQ of 79 [and] difficulty coping with demanding situations”); Williams v. Taylor, 529 U.S. 362, 370 (1999) (noting that Williams was “borderline mentally retarded,” with “mental impairments” possibly “organic in origin”).
  \item \textsuperscript{60} Strickland v. Washington, 466 U.S. 668, 671 (1984).
  \item \textsuperscript{61} Id. at 671–72.
  \item \textsuperscript{62} Id. at 672.
\end{itemize}
He confessed to the murders, waived his right to a jury trial, and pleaded guilty to all charges, including three counts of capital murder.\textsuperscript{64} He also waived his right to an advisory jury (against counsel’s advice) and chose to be sentenced by the trial judge without a jury recommendation.\textsuperscript{65}

In the plea colloquy, Mr. Washington told the court that he had no significant prior criminal record (beyond “a string of burglaries”), that he was under “extreme stress caused by his inability to support his family,” and that he accepted responsibility for the crimes.\textsuperscript{66} Trial counsel conducted almost no investigation in preparation for the sentencing hearing. He spoke with Mr. Washington about his background, talked with Mr. Washington’s wife and mother by telephone (“though he did not follow up on the one unsuccessful effort to meet with them”), “did not otherwise seek out character witnesses,” and saw no reason to request a psychiatric examination.\textsuperscript{67} Justice O’Connor summed up trial counsel’s strategy:

Counsel decided not to present and hence not to look further for evidence concerning respondent’s character and emotional state. That decision reflected trial counsel’s sense of hopelessness about overcoming the evidentiary effect of respondent’s confessions to the gruesome crimes. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent’s background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own.\textsuperscript{68}

At sentencing, trial counsel put forth no evidence but instead argued that Mr. Washington’s remorse and acceptance of responsibility justified sparing his life because he was “fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances.”\textsuperscript{69} The trial judge nonetheless found that all three murders were especially heinous, atrocious, and cruel; were committed

\begin{itemize}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{Id.} at 672-73.
\item \textsuperscript{68} \textit{Id.} at 673 (citations omitted).
\item \textsuperscript{69} \textit{Id.} at 673-74.
\end{itemize}
in the course of at least one other violent felony; involved pecuniary gain; and were committed to avoid arrest and hinder law enforcement. Though the judge acknowledged that “there was no admitted evidence of prior convictions,” he noted that Mr. Washington had “stated that he engaged in a course of stealing.” The judge found that the aggravating circumstances clearly far outweighed the mitigation and imposed three death sentences for the murders and prison terms for the other crimes.

Mr. Washington raised claims of ineffective assistance of counsel in state collateral proceedings but was denied relief without an evidentiary hearing. The Florida Supreme Court affirmed the denial of relief. The claims were then litigated in the United States District Court for the Southern District of Florida. Habeas corpus counsel offered proof in the form of affidavits and reports. Both trial counsel and the trial judge testified at an evidentiary hearing. The District Court faulted trial counsel for “errors in judgment” for failing to investigate non-statutory mitigation but found no prejudice. On appeal, the case ultimately went en banc to the newly formed Court of Appeals for the Eleventh Circuit. According to Justice O’Connor: “The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards.”

Superintendent Charles E. Strickland petitioned for a writ of certiorari. Justice O’Connor noted that the petition “present[ed] a type of Sixth Amendment claim that this Court ha[d] not previously considered in any generality.”

Justice O’Connor’s opinion is full of cautionary admonitions: “Judicial scrutiny of counsel’s performance must be highly deferential”;

70. Id. at 674.
71. Id.
72. Id.
73. Id. at 675.
74. Id. at 675-76.
75. Id. at 678.
76. Id.
77. Id.
78. Id.
79. Id. at 678-79.
80. Id. at 679.
81. Id.
82. Id. at 683.
83. Id.
“every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”

Furthermore, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”

She raised the specter of “intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation” affecting counsel’s “willingness to serve” and undermining “trust between attorney and client.”

Finally, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”

Turning to the prejudice prong, Justice O’Connor wrote that the “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

The reviewing court “must consider the totality of the evidence before the judge or jury.”

There is no need for a court to address both prongs or to address them in a particular order, and “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”

Mr. Washington lost on both prongs—“a double failure.” He had not shown that the “justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in [his] counsel’s assistance” or that his sentencing proceeding was “fundamentally unfair.”

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84. *Id.* at 689.
85. *Id.*
86. *Id.* at 690.
87. *Id.* at 690-91. “And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.” *Id.* at 691.
88. *Id.* at 694.
89. *Id.* at 695.
90. *Id.* at 697.
91. *Id.* at 700.
92. *Id.* Mr. Washington was executed on July 13, 1984. *Execution List: 1976 - Present*, FLA.
Dissenting, Justice Thurgood Marshall found the majority opinion had offered little guidance:

To tell lawyers and the lower courts that counsel for a criminal defendant must behave “reasonably” and must act like “a reasonably competent attorney[]” is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes “professional” representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel.93

Having handled death penalty trials and appeals himself, Justice Marshall was in the unusual position of understanding the unique responsibilities involved.94

A. Two Conceptions of Objectivity

In attempting to articulate the meaning of “actual ineffectiveness,”95 Justice O’Connor stated at the outset: “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”96 She immediately added that this same principle applies to capital sentencing.97 She then formulated the two-pronged test that has guided Sixth Amendment jurisprudence ever since:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires

93. Strickland, 466 U.S. at 707-08 (Marshall, J., dissenting) (citation omitted).
95. Strickland, 466 U.S. at 686 (majority opinion) (internal quotation marks omitted).
96. Id.
97. Id.
showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.98

Prong one required that counsel’s performance fell below an objective standard of reasonableness.99 Justice O’Connor wrote that the Sixth Amendment “relies instead on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”100 The idea of an objective standard is central to the Strickland analysis, and it is important to understand exactly what is meant by objectivity here.

In tort law, where the objective standard of reasonableness underpins virtually the entire field, objectivity can mean one of two things: First, it can refer to the defendant’s compliance with some external standard, as distinguished from the defendant acting to the best of his or her (subjective) ability. This conception of objectivity is embodied in the classic case of Vaughan v. Menlove,101 which held that the defendant may have been negligent despite having “acted honestly and bona fide to the best of his own judgment.”102 Out of ignorance or perhaps a cognitive disability,103 the defendant failed to realize that making big piles of rotting hay created a risk of spontaneous combustion.104 When the resulting fire consumed a neighbor’s house, the defendant was held to the standard of “care taken by a prudent man” who presumably would have known not to pile up rotting hay.105

The second sense of objectivity relates to how courts should ascertain the standard of care taken by a prudent man or, in modern

98. Id. at 687.
99. Id. at 688.
100. Id. (citation omitted).
102. Id. at 493.
103. Vaughan is frequently cited for the proposition that people of below-average intelligence are still held to the standard of the ordinarily prudent person. See, e.g., PROSSER AND KEETON ON THE LAW OF TORTS § 31 (W. Page Keeton et al. eds., 5th ed. 1984) (explaining that “society may require of a person not to be awkward or a fool”).
105. Id. at 490, 493.
terms, the reasonable person. Here there are two different ways in which one can understand the objective standard of care. One possibility is that the inquiry is strictly empirical or statistical; that is, one can conduct surveys or otherwise measure what people actually do, with the median result representing the “reasonable person” standard of care. The Vaughan case would therefore be analyzed by asking a bunch of farmers in the surrounding countryside what they do with their hay. Despite the appeal of this empirical approach, it is not what courts mean by objectivity. Instead, objectivity connotes a critical normative approach to setting the standard. Courts require legal standards that are capable of providing guidance in determining liability, but there is a further rationale behind the objectivity of the negligence standard. Tort law prescribes the level of care people owe to each other and, as such, is concerned with normative notions such as rights and responsibilities. Objective standards establish the level of care someone may be said to deserve. Justice Oliver Wendell Holmes Jr.’s commentary on the negligence standard is justifiably famous:

If... a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect.

106. One of the most influential articles in tort law, and what is still the starting point for analysis of these issues today, is Clarence Morris’s 1942 article on the role of custom in negligence law. Clarence Morris, Custom and Negligence, 42 COLUM. L. REV. 1147 (1942). Morris has this to say about the distinction between the statistical and the normative sense of the objective standard of reasonableness:

The notion that establishing negligence is only a matter of discovering whether the defendant departed from customary ways is hard to down, and too often courts have said or held that conformity to custom is due care. The persistence of the notion that the ordinarily prudent man, or the man of average prudence, is a composite of actual people may stem from the ease with which value judgments can be mistaken for statistical descriptions and vice versa... In the first sense, a question of ordinary care could be answered only by finding out what people have done, and by striking a statistical average for a test. In the second sense a question of ordinary care could be answered only by deciding what should be expected of the great mass of mankind and by using that decision as a criterion of satisfactory care... But there is a difference. Oft-recurring behavior is not necessarily satisfactory. We can ill-afford to let those whose interest may run counter to paying the bill for sufficient, and sometimes expensive, safeguards escape liability because all of them are guilty of the same shortcomings. While many business usages are satisfactory, some are not, and we dare not make conformity (average care) the sole test of satisfactory care.

Id. at 1154-55.
His neighbors accordingly require him, at his proper peril, to come up to their standard . . . .

The extent of the neighbors’ legal protection from accidental fires is determined by the extent of caretaking courts will deem reasonable. The ignorant farmer’s neighbors demand a certain level of care from him, because he is in a position to cause them harm if he is careless. The objective standard of reasonableness is the mechanism by which all of our rights to physical integrity and the security of our property are determined. For this reason, courts should look to what actors should do as opposed to what they sometimes do in fact. Unfortunately, the Strickland case has led to confusion about the nature of the objective standard of constitutional effectiveness.

Justice O’Connor’s choice of Michel v. Louisiana as precedent in Strickland was foreboding. In Michel, the Court addressed two cases in which three young African American men had been sentenced to death for aggravated rape. Each prisoner had challenged the composition of the grand jury that indicted him, alleging systematic exclusion of people of color. The Louisiana state courts found the challenges waived, because they had not been made before the expiration of the third judicial day following the end of the grand jury’s term, as required by state statute. Only one of the three defendants (Edgar Labat) had a lawyer who was appointed well before the termination of the grand jury and his effectiveness was challenged for failing to raise the issue. The Supreme Court briskly disposed of the challenge to the effectiveness of trial counsel E. I. Mahoney and then vouched for his competence:

Mr. Mahoney had a reasonable time in which to file his motion to quash, but did not do so. It was stated on oral argument that he was 76 or 77 years old when he took the case, and was ill in bed during several months of the year. The trial court and the Supreme Court of Louisiana held that the facts did not show a lack of effective counsel. . . . There is

110. Michel, 350 U.S. at 93.
111. Id.
112. Id.
113. See id. at 95-100.
little support for the opposite conclusion in the record. Mr. Mahoney was a well-known criminal lawyer with nearly fifty years' experience at the bar. There is no evidence of incompetence. The mere fact that a timely motion to quash was not filed does not overcome the presumption of effectiveness. The delay might be considered sound trial strategy. 114

Mr. Mahoney had been appointed to represent Mr. Labat on January 5, 1951. 115 As the Court noted: “Thereafter the status of the case remained unchanged for more than a year. The next entry is dated January 29, 1952, when Mr. Mahoney asked leave to withdraw.” 116 Successor

114. Id. at 100-01 (footnote omitted) (citation omitted). The footnote further eulogized trial counsel as: an exceptionally qualified counsel. On June 1, 1955, the legal profession in New Orleans honored him with a plaque which cited him as “an astute and honored criminal lawyer who has ever been mindful of the oath administered him 52 years ago to uphold the law and to guarantee to each accused his day in court.” As pointed out in the State’s brief, whether or not to make an immediate attack on the grand jury was entirely within the discretion of Mr. Mahoney and there were valid reasons for not doing so at the time. Id. at 101 n.7. Justice William O. Douglas, dissenting, with Justice Hugo Black and Chief Justice Earl Warren, concurring, would have reversed the convictions of Clifton Poret and John Michel to provide the defendants with “an opportunity to come forward with their evidence that the grand juries which indicted them were unconstitutional because of the systematic exclusion of Negroes from the panels.” Id. at 106 (Douglas, J., dissenting). Justice Black noted in dissent that thirty-two percent of the population in Orleans Parish were people of color, but “[o]nly once within the memory of people living in that parish had a colored person been selected as a grand juror. That juror, who happened to look like a white man, was selected under the mistaken idea that he was one. The foregoing facts are not disputed here.” Id. at 102 (Black, J., dissenting). Race permeated these cases. The trial court “sustained an objection of the district attorney to defense counsel repeatedly referring to appellant [Michel] in the presence of the prospective jurors as ‘this boy’” but found there was no prejudice because the jury was instructed to determine guilt purely based on the evidence and the law. State v. Michel, 74 So. 2d 207, 213 (1954). Labat and his codefendant, Poret, ultimately won relief based on the exclusion of African Americans and “daily wage earners” from Orleans Parish jury panels. Labat v. Bennett, 365 F.2d 698, 723, 727 (5th Cir. 1966). “Nine times courts stayed their execution; once, less than three hours before they were to be strapped in the electric chair.” Id. at 701. John Michel, however, was executed on May 31, 1957. See William J. Bowers et al., Legal Homicide: Death as Punishment in America, 1864-1982 app., at 445 (2d ed. 1984). He appears as “John Joseph Michaels” in the appendix to this reference, based on the lists originally compiled by Negley K. Teeters and Charles J. Zibulka and later updated by M. Watt Espy, Jr. Id. However, Michel’s execution was confirmed by Louisiana researcher Linda LaBranche, Ph.D., in an e-mail to Russell Stetler on November 8, 2012, based on her research at a University of Michigan database on June 12, 2000. E-mail from Linda LaBranche, Ph.D., to author Russell Stetler (Nov. 8, 2012, 11:38 AM) (on file with author and Hofstra Law Review).

115. Michel, 350 U.S. at 100.

116. Id.
counsel filed a challenge to the grand jury composition, but its term had already expired a year before.  

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B. Reasonableness and the ABA Guidelines

Justice O'Connor acknowledged the utility of American Bar Association ("ABA") standards in assessing deficient performance:

Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.  

\[118\]

It is important to focus on Justice O'Connor's concern in this passage with the independence of the bar. She cautions federal courts against constitutionalizing standards of practice, not against considering the Guidelines and other sources of guidance. Various justices have expressed concern about attempts by the Court to establish norms of professional conduct in the absence of authority to do so. For example, Justice William Brennan, concurring in Nix v. Whiteside,  

\[119\] emphasized that the case stands only for the proposition that there was no Sixth Amendment violation where the lawyer followed the prescriptions of the then-existing Iowa Code of Professional Responsibility and warned his

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117. Id. The critical motion would have required little from Mr. Mahoney. Earlier in the opinion, the Court had noted that the required motion in Louisiana was "a short, simple document easily prepared in a single afternoon." Id. at 94. Footnote 2 quoted Michel's four-paragraph motion verbatim. Id. at 94 n.2.

118. Strickland v. Washington, 466 U.S. 668, 688-89 (1984) (citation omitted) (citing ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 4–4.1 cmt. (2d ed. 1980) [hereinafter STANDARDS FOR CRIMINAL JUSTICE]). Justice O'Connor implicitly recognized that these standards were useful guides even though they were published in 1980—two years after Mr. Washington had been convicted and sentenced to death. Id. at 675, 688.

client not to testify falsely.\textsuperscript{120} Justice Harry Blackmun also concurred and warned that courts should not involve themselves in the “thorny problem” of what a criminal defense lawyer should do when faced with client perjury.\textsuperscript{121} In both \textit{Nix} and \textit{Strickland}, the Court considered authoritative statements \textit{by the profession} concerning the duties of defense counsel and emphasized that these statements, rather than the Court’s own views, ought to determine the standard of competent representation. Thus, when Justice O’Connor warns against the creation of “detailed guidelines for representation,”\textsuperscript{122} she is addressing courts that may be tempted to second-guess the considered judgment of the legal profession, not expressing the view that courts should not be guided by authoritative statements such as the Guidelines, the old Model Code, or the newer Model Rules.

III. THE SUPREME COURT’S INTERNAL DEBATE OVER THE ABA GUIDELINES

\textbf{A. The Guidelines as Evidence of the Standard of Effective Representation}

In 2000, sixteen years after \textit{Strickland}, the Supreme Court found trial counsel ineffective in the preparation of the penalty phase of a death penalty case for the first time. Writing for the Court’s majority in \textit{Williams v. Taylor}, Justice John Paul Stevens used the same ABA Standards for Criminal Justice (“The Defense Function”)\textsuperscript{123} that Justice O’Connor had cited in \textit{Strickland} in support of the view that it was objectively unreasonable not to have conducted a thorough mitigation investigation:

\begin{quote}
[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams’ favor was not justified by a tactical decision to focus on Williams’ voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel
\end{quote}

\begin{enumerate}
\item Id. at 177 (Brennan, J., concurring).
\item Id. at 177-78 (Blackmun, J., concurring).
\item \textit{Strickland}, 466 U.S. at 689.
\item Williams v. Taylor, 529 U.S. 362, 396 (2000).
\end{enumerate}
did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.  

A year later, Justice O’Connor voiced her own concern about the quality of lawyering in capital cases and the risk of wrongful executions. Addressing the Minnesota Women Lawyers Association on July 2, 2001, she said, “If statistics are any indication, the system may well be allowing some innocent defendants to be executed.” She continued, “Perhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”

Significantly, it was Justice O’Connor who first cited the Guidelines. In reversing the death sentence of Kevin Wiggins, she began by referring to the general ABA defense function standards previously cited in Strickland and Williams, noting that trial counsel’s conduct “fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as ‘guides to determining what is reasonable.’” She then acknowledged the specific death penalty guidelines, first published by the ABA in 1989:

The ABA Guidelines provide that investigation into mitigating evidence “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1.(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only a rudimentary knowledge of his history from a narrow set of sources. Cf. id., 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards

124.  Id. at 396 (citing STANDARDS FOR CRIMINAL JUSTICE, supra note 118, Standard 4–4.1 cmt.).
126.  Id.
for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1982) (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing.... Investigation is essential to fulfillment of these functions”).

In the Rompilla case in 2005, Justice David Souter, writing for the Court's majority, discussed multiple iterations of the general ABA Standards from the early 1980s and the Guidelines, first published by the ABA in 1989, when explaining why counsel were ineffective for failing to obtain a court record of a conviction that the prosecutors intended to introduce as aggravating evidence. He began thus:

The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla’s trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one:

“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. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.”

ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.).


128. Id. at 524-25 (citations omitted) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(C) (1989), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf [hereinafter 1989 ABA GUIDELINES]. It should be noted that Justice O’Connor did not hesitate to cite the 1989 Guidelines even though Mr. Wiggins was tried in that same year. Wiggins, 539 U.S. at 514-15.


130. Id. at 387 n.6 (quoting ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Guideline 4-4.1, at 181 (3d ed. 1993)).
Justice Souter next quoted *Wiggins* and *Strickland* on the value of the ABA Standards as guides to determining what is reasonable, followed by a lengthy footnote discussing the death penalty guidelines in considerable detail:

In 1989, shortly after Rompilla’s trial, the ABA promulgated a set of guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter 1989 ABA Guidelines or Guideline). Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly forceful directive: “Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports.” Guideline 11.4.1.D.4. When the United States argues that Rompilla’s defense counsel complied with these Guidelines, it focuses its attentions on a different Guideline, 11.4.1.D.2. Guideline 11.4.1.D.2 concerns practices for working with the defendant and potential witnesses, and the United States contends that it imposes no requirement to obtain any one particular type of record or information. But this argument ignores the subsequent Guideline quoted above, which is in fact reprinted in the appendix to the United States’s brief, that requires counsel to “‘make efforts to secure information in the possession of the prosecution or law enforcement authorities.’”

Later, and current, ABA Guidelines relating to death penalty defense are even more explicit:

“Counsel must . . . investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction.” ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7, comment. (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1027 (2003) (footnotes omitted).

Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S., at 524. (“The ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor’” (quoting 1989 ABA Guideline 11.4.1.C; emphasis in original)). For reasons given in the text, no such further investigation
was needed to point to the reasonable duty to look in the file in question here."

Justice Anthony Kennedy, however, in a dissent joined by Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas, vehemently disagreed. Justice Kennedy insisted that ABA Standards are a “useful point of reference,” but “only guides,” whereas the majority was “parsing the guidelines as if they were binding statutory text.” Moreover, the majority had overturned a decision by the Third Circuit Court of Appeals that had been written by then Judge Samuel Alito, who joined the High Court less than a year later, replacing Justice O’Connor.

B. The Role of Prevailing Practices (or Custom) in Establishing Standards of Care

From the analogous perspective of tort law and theory, one can see that Justice Kennedy is setting up a false dichotomy. Standards need not be either merely a “useful point of reference” or a binding statute. Instead, there should be a rebuttable presumption that compliance with authoritative professional standards is required. Courts in torts cases tend to be skeptical of the defensive use of custom—that is, the argument by a defendant that, having complied with a prevailing practice in the industry, it should be deemed for that reason not to have been negligent. As Richard Posner explains, compliance with custom is not dispositive of negligence in these cases because an industry may not have an incentive to take precautions to protect people who cannot bargain directly with actors in the industry. On the other hand, where “the type of accident is dangerous only to the industry’s customers, the level of precautions taken by sellers is more likely to be efficient.” Posner then goes on to explain that courts are more deferential to custom in professional malpractice cases because “[t]he potential injurers (doctors) have an incentive independent of the law to provide the level of care for

131. Id. at 387 & n.7 (quoting ABA GUIDELINES, supra note 1, Guideline 10.7 cmt., at 1015) (citing 1989 ABA GUIDELINES, supra note 128, Guideline 11.4.1.C-D).  
132. Id. at 400 (Kennedy, J., dissenting).  
133. Id. at 393 (majority opinion); Rompilla v. Horn, 355 F.3d 233, 235 (3d Cir. 2004).  
134. Rompilla, 545 U.S. at 400.  
136. Id.
which potential victims are willing to pay, because the latter are customers.\textsuperscript{137} Richard Epstein similarly argues that the custom of practicing physicians is likely to reflect the standard of care that ought to be enforced, because physicians have numerous incentives not to provide substandard care to patients: “Physicians and other health care providers operate under multiple constraints: the glare of publicity when things go wrong; the censure of their colleagues; peer review; revocation of hospital privileges; a referral network; licensing; and the pressure to do a good job when life is on the line.”\textsuperscript{138} Of course, even a defendant represented by a highly skilled lawyer may receive the death penalty, but there are also numerous instances of lawyers known to be incompetent who are evidently unaffected by the criticism of their peers or “the pressure to do a good job when life is on the line.”

There is less reason to be tolerant of prevailing practices in an industry where practitioners do not have similar incentives to deliver high-quality services to clients. Virtually all of the considerations mentioned by Epstein do not apply to the average lawyer in a capital case. Outside of the rare notorious case, like the sleeping lawyer in \textit{Burdine v. Johnson},\textsuperscript{139} there is very little publicity when a capital defense lawyer is incompetent. Lawyers do not have to worry about anything like revocation of hospital staff privileges, particularly since many courts are desperate to maintain a roster of lawyers willing to take appointed-counsel cases.\textsuperscript{140} Referral networks are similarly not an issue when many lawyers obtain clients by court appointment. Incompetence alone is hardly ever a ground for professional discipline, because state

\begin{enumerate}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Richard A. Epstein, Torts § 6.2, at 140-41 (1999).}
\item \textsuperscript{139} 262 F.3d 336, 338 (5th Cir. 2001) (en banc); see also Henry Weinstein, \textit{Inmate in Sleeping-Lawyer Case Pleads Guilty}, L.A. TIMES, (June 20, 2003), http://articles.latimes.com/2003/jun/20/nation/na-sleep20.
\item \textsuperscript{140} For this reason and the ones noted in the remainder of this paragraph, commentators have repeatedly emphasized the importance of the mandate of ABA Guideline 3.1 that appointment of counsel in capital cases be the responsibility of an agency “independent of the judiciary.” ABA GUIDELINES, supra note 1, Guideline 3.1, at 944. See, e.g., Ronald J. Tabak, \textit{Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases}, 31 HOFSTRA L. REV. 1105, 1105, 1111-12 (2003). Although less frequently addressed by courts, the Guidelines impose duties, not just on individual lawyers, but also on the states, which bear the ultimate responsibility for carrying out the commands of the Constitution. See Eric M. Freedman, \textit{Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines}, 31 HOFSTRA L. REV. 1097, 1102-03 (2003).
\end{enumerate}
bar grievance committees do not have the resources to investigate and prosecute negligent lawyers who do not commit some other violation, such as stealing from clients. 141 Censure of one’s colleagues is apparently not a concern for the numerous criminal defense lawyers with multiple former clients on death row. 142

Criminal defense lawyers may care about their reputation, but often it is a reputation for qualities other than effective service to their clients. In a still relevant, famous paper from 1967, sociologist Abraham Blumberg analogized criminal defense lawyers to double agents who have to maintain working relationships with regular court personnel (for example, judges, prosecutors, clerks, and bailiffs) as well as with their clients. 143 The professional performance of defense lawyers depends to a significant extent upon having a good reputation with judges and prosecutors. Many lawyers rely on judges to appoint them as defense counsel. All lawyers need to be able to obtain favorable pleas for their clients, since so many cases are resolved by plea bargains. 144 Defense lawyers need to maintain good relationships on a daily basis with prosecutors and judges, requiring, above all, a reputation for being reasonable and not overly aggressive, in order to represent their clients effectively in the process of negotiating a plea bargain. They have an incentive to appear to their client as a fierce, zealous advocate for the interests of the client in that one case but, in addition, they have an incentive to be cooperative and reasonable with other court personnel

141. See, e.g., Manuel R. Ramos, Legal Malpractice: The Profession’s Dirty Little Secret, 47 VAND. L. REV. 1657, 1695-97 (1994) (arguing that the organized bar lacks the resources to take on the problem of incompetence through the disciplinary process). In one California case, a lawyer was suspended for one year after he was held to be ineffective in a death penalty case. See Attorney Search: Jefferson M. Parrish Jr., - #32607, STATE BAR OF CAL., http://members.calbar.ca.gov/yal/Member/Detail/32607 (last visited July 18, 2013) (listing discipline with actual suspension on June 29, 1990 and eligibility to practice restored on June 29, 1991). But the circumstances of the case were egregious. Unlike the “sleeping lawyer” in Texas, the California lawyer testified that he was often up all night during the capital trial. “Specifically, he stated that before and during trial he was gambling heavily, and may have gambled until 2 or 3 a.m. three or four times during the work week and three days straight weekend without sleeping, and that as a consequence he was not mentally alert.” People v. Ledesma, 729 P.2d 839, 854 (Cal. 1987). Trial counsel admitted accruing gambling debts of $35,000. Id. Other witnesses also testified to his “compulsive gambling” and use of methamphetamine (“about $1,500 to $2,000 worth a month”). Id.
142. See infra notes 250-60 and accompanying text.
144. See Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).
across the long run of all of the cases they handle. In the jargon of game theory, clients are one-shot players and defense lawyers are repeat players. Thus, defense lawyers may put on a big show of acting aggressively but, in fact, they are concerned not to be perceived by judges and prosecutors as unreasonable.

While tort law might defer to prevailing practices—that is, custom—of practicing physicians, there is considerably less justification for deferring to the customs of any random roster of court-appointed lawyers. As the Second Restatement of Torts admonishes courts: “No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community.”

Epstein, in an influential article on the use of custom in tort law, notes that most industries have an incentive to exercise reasonable care for the protection of their customers. If riders kept getting injured at an amusement park or customers frequently got food poisoning at a restaurant, people would stop going there. In cases involving informed consumers who have choices about where to do business, Epstein argues, courts can rely upon “the practices formulated by those who have powerful incentives to get things right.” Tort duties to customers may therefore generally follow industry custom. The situation is very different in stranger cases where potential victims cannot bargain with those who may harm them and cannot demand additional care to be taken. In those cases, the custom of the industry does not reflect what informed consumers would bargain for in terms of safety. “Short of liability, the railroads have little incentive to take into account the injuries suffered by small children who play about their turntables.”

Thus, custom should not be used in stranger cases; it has

145. Restatement (Second) of Torts § 295A cmt. c (1965). In Mayhew v. Sullivan Mining Co., the court noted:

If the defendants had proved that in every mining establishment that has existed since the days of Tubal-Cain, it has been the practice to cut ladder-holes in their platforms, situated as this was while in daily use for mining operations, without guarding or lighting them, and without notice to contractors or workmen, it would have no tendency to show that the act was consistent with ordinary prudence.

Mayhew v. Sullivan Mining Co., 76 Me. 100, 112 (1884).


147. Id. at 24.

148. Id. at 20.
the effect of ratifying the slipshod practices of those who lack incentives to get things right. For this reason, Epstein argues for strict liability in stranger cases. 149

One of the principal insights of viewing the Guidelines through the lens of tort law is that the background to their development resembles a stranger case much more closely than a customer case. Reliance on custom makes sense where similarly situated parties have, over a series of repeated interactions, been able to propose and bargain over their respective legal rights and duties, including how much care is to be taken for one another’s well-being. 150 Even in an employment setting, sometimes taken as an instance of unequal bargaining power, some employers may find themselves in a competitive market and will have an incentive to offer a safe workplace as a means of attracting and retaining employees. 151 One can hardly imagine a less suitable case than capital defense representation for the application of a consensual, bargaining-based, “customer” account of reliance on industry custom. Many capital defendants lack the capacity to engage meaningfully at all with their appointed counsel, let alone to bargain effectively for additional protection. 152 Mistrust is pervasive in criminal defense representation, with defendants often viewing their lawyers (sometimes not unreasonably) as part of the institutional mechanism that is trying to put them in prison or the death chamber. 153 Many criminal defendants would

149. Id. at 17-20. Another way to understand the relationship between a criminal defendant and defense counsel is a situation in which only one of the parties, the lawyer, can take precautions. Economic theorists of tort law advocate for strict liability in these “unilateral care” situations. Mark F. Grady, Res Ipsa Loquitur and Compliance Error, 142 U. PA. L. REV. 887, 893 (1994).


151. Id. at 22. The railroad case described by Epstein was decided before the widespread adoption of workers’ compensation statutes, which preempted common law tort causes of action brought by employees arising out of injuries in the workplace. See id. at 17. Nevertheless, it is a useful example because it is a sympathetic explanation for the court’s reliance on custom in what seems to be a rather Dickensian environment. The point of the citation is that the case for the reliance on custom in the capital defense representation context is even less persuasive than in the workplace.

152. Indeed, the commentary to ABA Guideline 10.5 advises that “the prevalence of mental illness and impaired reasoning is so high in the capital defendant population” that counsel should assume the client to be “emotionally and intellectually impaired.” ABA GUIDELINES, supra note 1, Guideline 10.5 cmt., at 1007 & n.178.

153. See, for example, People v. Huffman, 71 Cal. Rptr. 264 (Cal. Ct. App. 1977), where the court rejected: a claim of inadequacy of counsel by public defender who (1) did not voir dire the jury, (2) made no objection to any evidence during the presentation of the prosecution’s case,
hardly know what highly skilled legal representation consists of, so they would not have any idea what terms to seek in a bargain with their lawyer. Clients also reasonably believe that their lawyers are ethically obligated to provide effective representation, quite apart from what agreement they make with their clients about the quality of representation to provide.

Guidelines prepared by impartial experts accordingly offer two benefits. They indicate what quality of representation a competent professional ought to provide, without deferring to the standards of practice (for example, custom) of lawyers who may have incentives that work against the provision of high-quality client service. In addition to

(3) made no opening statement, (4) cross-examined no prosecution witnesses, (5) presented no evidence on behalf of the defendant, and (6) waived argument to the jury. Id. at 265-66. The California Court of Appeals memorably quotes the defendant saying, “I need a lawyer, not a dump truck.” Id. at 270. The Court then explained:

For the benefit of the uninitiated, “dump truck” is a term commonly used by criminal defendants when complaining about the public defender. The origins of the phrase are somewhat obscure. However, it probably means that in the eyes of the defendant the public defender is simply trying to dump him rather than afford him a vigorous defense. It is an odd phenomenon familiar to all trial judges who handle arraignment calendars that some criminal defendants have a deep distrust for the public defender. This erupts from time to time in savage abuse to these long-suffering but dedicated lawyers. It is almost a truism that a criminal defendant would rather have the most inept private counsel than the most skilled and capable public defender. Often the arraigning judge appoints the public defender only to watch in silent horror as the defendant’s family, having hocked the family jewels, hire a lawyer for him, sometimes a marginal misfit who is allowed to represent him only because of some ghastly mistake on the part of the Bar Examiners and the ruling of the Supreme Court in Smith v. Superior Court. . . .

Id. at 267 n.2; see also ROBERT HERMANN, ERIC SINGLE & JOHN BOSTON, COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA 156-57 (1977) (explaining that study obtaining data from Los Angeles, New York, and Washington, D.C. found pervasive antipathy of unexpected magnitude toward publicly paid defense lawyers, especially those in defender offices); Jonathan D. Casper, Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender, Yale Rev. L. & Soc. Action, Spring 1971, at 4, 6. Client distrust of lawyers paid from public funds poses acute problems in capital cases because of the need to conduct mitigation investigations which invade the most sensitive areas in a client’s life and plea discussions that typically require clients to agree to a sentence of life without the possibility of parole. See Russell Stetler, Commentary on Counsel’s Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1), 31 Hofstra L. Rev. 1157, 1162-64 (2003) (discussing barriers to trust and strategies for building relationships of trust). On the other hand, a recent survey by RAND researchers found that, regardless of clients’ beliefs, public defenders in Philadelphia obtained significantly better results than court-appointed private counsel in homicide cases: compared to appointed counsel, public defenders reduced their clients’ murder conviction rate by nineteen percent and lowered the probability that their clients would receive a life sentence by sixty-two percent. James M. Anderson & Paul Heaton, How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes, 122 Yale L.J. 154, 159 (2012).

154. See, e.g., ABA GUIDELINES, supra note 1, Guideline 1.1, at 919 (explaining that the
improving the quality of standards, guidelines have the potential of improving compliance with standards. The New Yorker writer Atul Gawande has discussed the importance of checklists in aviation and medicine. The role of checklists in aviation is not to establish a new standard of care which pilots had previously not complied with; rather, it is to ensure that in a high-workload environment full of distractions, vital steps in a process are not overlooked. Giving greater effect to the Guidelines may help focus the attention of lawyers on aspects of the representation they may have missed due to a deadline or the press of other business. Capital defense attorney David Bruck has developed a checklist-based approach to the Guidelines, acknowledging that they are long and complex but arguing that, as in medicine and aviation, complexity may be managed for the benefit of others with discipline and attention to procedures. Bruck’s checklist addresses a variety of common problems. For example, sometimes the court has approved funding for two seemingly qualified lawyers, a fact investigator, and a mitigation specialist, but the team exists only on paper because it does not meet regularly, communication is inadequate, and the lawyers do not sufficiently value the contributions of the non-lawyers. Another common problem arises when lawyers try to handle too many cases. A

objective of the Guidelines “is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation”).

155. See Grady, supra note 149, at 897-98 (illustrating, in terms of negligence, the distinction “between the quality and the rate of precaution”).


157. Tragic commercial aviation accidents have been attributed solely to the failure of the flight crew to perform an essential step in a process, such as selecting the appropriate flap setting for takeoff. See, e.g., NAT’L TRANSP. SAFETY Bd., AIRCRAFT ACCIDENT REPORT, at i-ii (1988), available at http://libraryonline.erau.edu/online-full-text/ntsb/aircraft-accident-reports/AAR88-05.pdf (reporting on the crash of Northwest Airlines flight 255 on August 16, 1987 at the Detroit Metropolitan Wayne County Airport). There was some evidence that the crew was simply having an “off day,” and the first officer may have been distracted by other duties at the moment he ordinarily would have set the flaps for takeoff. Id. at 59-60. The crash, which killed 154 people on the plane and two on the ground, would almost certainly have been prevented by the use of the taxi/pre-takeoff checklist. Id. at ii, 68.


159. See id. at 6-7; see also Johnson v. United States, 860 F. Supp. 2d 663, 913 (N.D. Iowa 2012) (finding ineffective assistance in penalty phase in a section 2255 case despite what the district court “believed was a ‘dream team’” of three lawyers, an investigator, a mitigation specialist, and multiple mental health experts when they failed to function as a team).

160. See BRUCK, supra note 158, at 6-7.
dysfunctional team is no more effective than a lawyer with no team at all, and a lawyer with too many cases simply cannot devote the time required for quality representation.

As a result, the Guidelines are most usefully understood not as a quasi-statutory source of binding duties, or as merely another data point in the analysis of objectively reasonable representation, but as a presumptive source of guidance for courts and lawyers. If, as the law and economic analysis predict, capital defense lawyers had sufficient incentives to provide high-quality legal services to their clients in most cases, then it would be reasonable for courts to defer to professional custom in setting the standard of constitutional effectiveness. As Epstein notes, however, “The entire debate is over the question of the rate of convergence” between professional custom and what is actually required by an objective standard of reasonableness. 161 There seems to be little doubt that the rate of convergence in capital defense is far from ideal, and that many lawyers deliver careless and slipshod service in far too many cases. In light of this divergence, the Supreme Court ought to be looking to a source of norms that is clear, reliable, stable, and informed by significant professional expertise. Unfortunately, the Court has been inconsistent in its use of the Guidelines. In the last two per curiam decisions finding trial counsel ineffective in capital cases, Porter v. McCollum and Sears v. Upton, the Court conspicuously omitted explicit reference to the ABA standards and guidelines. 162 Both cases allude to counsel’s “obligation to conduct a thorough investigation of the defendant’s background,” 163 citing to Williams v. Taylor at the very point where the ABA was mentioned in that opinion. 164

Meanwhile, in a per curiam opinion denying an ineffectiveness claim in Bobby v. Van Hook, 165 the Court chastised the Sixth Circuit Court of Appeals for misusing the Guidelines in two ways. 166 The Court continued to agree that “[r]estatements of professional standards . . . can be useful as ‘guides’ to what reasonableness entails, but only to the

163. Sears, 130 S. Ct. at 3265 (quoting Williams v. Taylor, 529 U.S. 362, 396 (2000)) (internal quotation marks omitted); Porter, 558 U.S. at 39 (quoting Williams, 529 U.S. at 396) (internal quotation marks omitted).
164. Williams, 529 U.S. at 396.
166. Id. at 8.
extent they describe the professional norms prevailing when the
representation took place." The Court asserted that the Sixth Circuit
had simply judged old conduct by newly published norms: “Judging
counsel’s conduct in the 1980s on the basis of these 2003 Guidelines—
without even pausing to consider whether they reflected the prevailing
professional practice at the time of the trial—was error.” Furthermore,
the Sixth Circuit Court of Appeals had (again) parsed the Guidelines like
binding statutory text: “To make matters worse, the Court of Appeals
(following Circuit precedent) treated the ABA’s 2003 Guidelines not
merely as evidence of what reasonably diligent attorneys would do, but
as inexorable commands . . . .” No other justice joined a vitriolic
concurrence by Justice Alito, in which he asserted that the Guidelines
had no “special relevance” to Sixth Amendment performance
standards. He dismissed the ABA as “a private group with limited
membership,” not reflecting the views of the American bar as a whole
and thus not meritng a “privileged position” in determining the
obligations of a capital defense attorney.

167. Id. at 7.
168. Id. at 8. Of course, five years earlier, the Court had cited the 2003 Guidelines when
175, 190-91 (2003).
169. Bobby, 558 U.S. at 8. It should be noted that the Supreme Court has also used the
language of obligation and command. See Rompilla v. Beard, 545 U.S. 374, 387 n.7 (2005)
(explaining that Guideline 11.4.1.D.4 “require[es]” counsel to obtain information in possession of
prosecution and law enforcement); Williams, 529 U.S. at 396 (explaining defense counsel’s
“obligation to conduct a thorough [background] investigation”).
171. Id. at 14. The relevant criterion of reliability is not whether some percentage of lawyers
belongs to the ABA but whether the process by which the ABA constitutes a study and drafting
committee is likely to produce a document that reflects the considered judgment of lawyers with
expertise in the issues considered. By analogy, suppose the American College of X Physicians—fill
in any medical specialty—had a membership comprising only twenty-five percent of physicians
who practice in that area. Suppose further that this association has a tradition of consulting with
academic and practicing physicians with excellent reputations, spending as much time and effort as
necessary to study issues thoroughly, and of producing reports and recommendations that are
influential in the community of practitioners. The relatively low percentage of physician members
seems much less important than the expertise of committee personnel, the study and drafting
process, and the reception of the association’s reports in the professional community. The processes
of drafting the Guidelines and the Supplementary Guidelines conform closely to this hypothetical.
They are described respectively in the Introduction and Acknowledgements in ABA GUIDELINES,
supra note 1, at 915-16, and in Sean D. O’Brien’s article, When Life Depends on It: Supplementary
Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L.
As the Court’s criticism of the Sixth Circuit in Bobby shows, courts should not assume that the Guidelines translate into constitutional standards in all respects. They are evidence of what reasonable lawyers would do, but they are not necessarily conclusive or even presumptive evidence. (Procedurally speaking, this means they do not shift the burden to the respondent to disprove ineffectiveness, but they do satisfy the petitioner’s burden of production on the element of error.) In this respect, the Guidelines are similar to the ABA’s Model Rules of Professional Conduct (“MRPC”) and the versions of the Model Rules adopted by state courts. The Scope section at the beginning of the MRPC disclaims any intention by the ABA to create implied civil rights of action for the violations of the rules, but it notes that “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standards of conduct.”

There is nothing inappropriate about using ethics rules promulgated by the profession as a source of guidance in evaluating the conduct of lawyers. Accordingly, the plaintiff in a civil malpractice action is generally required to introduce expert testimony to establish the standard of care. An expert may rely on disciplinary rules as evidence of the standard of care, but the ultimate inquiry is always whether the attorney’s conduct satisfied the standard of skill and knowledge ordinarily possessed by lawyers under similar circumstances.

The modifier, “under the circumstances,” which is part of the reasonableness inquiry throughout tort law, suggests that the Sixth Circuit in Bobby may have erred in judging past conduct according to more recently published standards. In Bobby, however, the record did not disclose whether an expert would have testified that a reasonable lawyer in the 1980s would have done what the 2003 Guidelines required—not because the conduct was required by the Guidelines, but because reasonable lawyers under the circumstances in the 1980s would have done something which the ABA only subsequently got around to codifying in the Guidelines. The inquiry in Sixth Amendment ineffectiveness cases, just as in civil tort actions, is whether a lawyer behaved reasonably. It is important to resist the temptation to

173. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6, at 52 (1986).
175. See Bobby, 558 U.S. at 7-8 (majority opinion).
oversimplify this inquiry. As discussed previously, prevailing custom does not necessarily establish what is reasonable. As Bobby shows, merely citing the Guidelines is also insufficient to establish reasonableness. The standard of reasonableness in capital defense representation, like all normative standards in tort law, is a subject for critical, reflective analysis by courts, informed by the judgment of lawyers with the relevant expertise, training, and judgment. The judgment of experts may be, in turn, informed by professional standards, statements, scholarship, amici curiae, and other authoritative sources of guidance.

IV. JUSTICE STEVENS’S GUIDANCE: PADILLA V. KENTUCKY

Fortunately, in Padilla v. Kentucky,176 Justice John Paul Stevens offered a more evenhanded approach when addressing prevailing norms in a noncapital case involving the “collateral” consequences of a criminal conviction arising from bad advice from a criminal defense lawyer.177 Jose Padilla faced deportation after relying on his trial lawyer’s erroneous advice when pleading guilty to drug charges that made his deportation virtually mandatory.178 The Kentucky Supreme Court “held that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a ‘collateral’ consequence of his conviction.”179 The Supreme Court granted certiorari and disagreed in Padilla v. Kentucky.180

Writing for the Court’s majority, Justice Stevens provided a succinct tutorial on how to assess the objective test of deficient performance:

Under Strickland, we first determine whether counsel’s representation “fell below an objective standard of reasonableness.” Then we ask whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal

176. 130 S. Ct. 1473 (2010).
177. Id. at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).
178. Id. at 1477 & n.1.
179. Id. at 1478 (citing Padilla, 253 S.W.3d at 483).
180. Padilla, 130 S. Ct. at 1478.
community: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” We long have recognized that “[p]revailing norms of practice as reflected in American Bar Association standards and the like...are guides to determining what is reasonable....” Although they are ‘only guides,’ and not ‘inexorable commands,’ these standards may be valuable measures of the prevailing professional norms of effective representation...” 181

Justice Stevens went on to discuss how “[t]he weight of prevailing professional norms supports the view that [criminal defense] counsel must advise her client regarding the risk of deportation.” 182 He then enumerated a long list of contemporaneous supporting authorities, including: Performance Guidelines for Criminal Representation published by the National Legal Aid and Defender Association (1995); books on plea bargaining (1997), the law of sentencing (2004), and the criminal defense of immigrants (2003); a law review article (2002); and an article from The Champion, the monthly magazine of the National Association of Criminal Defense Lawyers (2007). 183 He also quoted favorably from the Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as amici curiae: “[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients....” 184 Justice Stevens’s comprehensive list provides useful guidance for identifying the equivalent authorities in the context of capital defense.

V. THE EVOLUTION OF NORMS REFLECTED IN THE (EVOLVING) ABA GUIDELINES

The need for thorough investigation of both guilt and penalty issues has been apparent throughout the era of the modern, post-Furman death penalty. When the ABA published the second edition of its Standards for Criminal Justice in 1980, Standard 4.4–1 described the duty of

182. Padilla, 130 S. Ct. at 1482.
183. Id. at 1482–83.
184. Id. at 1482 (alteration in original) (internal quotation marks omitted).
defense counsel to investigate as follows: “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.”\textsuperscript{185} The commentary to this Standard noted concisely, “Facts form the basis of effective representation.”\textsuperscript{186} In discussing mitigation, the commentary continued, “Information concerning the defendant’s background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself.”\textsuperscript{187} These ABA Standards were cited by Justice Stevens in Williams v. Taylor in reference to counsel’s obligation to conduct a thorough investigation of a capital defendant’s background.\textsuperscript{188}

These ABA Standards covered criminal defense generally. Discussions of capital defense provided more specific detail about counsel’s duties in investigating mitigating evidence. As early as 1979, Dennis N. Balske (a capital-defense litigator then practicing in the South) emphasized, “Importantly, the life story must be complete.”\textsuperscript{189} In 1983, Professor Gary Goodpaster discussed in another widely circulated law review article trial counsel’s “duty to investigate the client’s life history, and emotional and psychological make-up” in capital cases.\textsuperscript{190} He wrote:

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

\begin{footnotesize}
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\item \textsuperscript{185} \textit{Standards for Criminal Justice}, supra note 118, Standard 4–4.1 (emphasis added).
\item \textsuperscript{186} \textit{Id.} Standard 4–4.1 cmt.
\item \textsuperscript{187} \textit{Id.;} see also Joseph B. Cheshire V, Ethics and the Criminal Lawyer: The Perils of Obstruction of Justice, CHAMPION, Jan.-Feb. 1989, at 12, 12 (“Defense counsel have a right and a duty to approach and interview every witness that might have any information regarding the particular issue involved in their client’s case.”).
\item \textsuperscript{188} Williams v. Taylor, 529 U.S. 362, 396 (2000).
\end{enumerate}
\end{footnotesize}
importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized.191

Writing in The Champion in 1984, Mr. Balske advised capital defense counsel that they “must conduct the most extensive background investigation imaginable. You should look at every aspect of your client’s life from birth to present.”192

At the beginning of the 1980s, a capital defense lawyer in California hired a former New York Times reporter to investigate the life history of his client. The reporter, the late Lacey Fosburgh, had previously written Closing Time: The True Story of the “Goodbar” Murder—a best-selling book about a murder case she had covered for the newspaper.193 After her successful work in developing the capital client’s mitigation evidence, Ms. Fosburgh wrote about the critical role she had played:

[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

191. Id. at 324 (footnote omitted). The Supreme Court recognized very early that in death penalty cases, “Evidence of a difficult family history and of emotional disturbance [was already] typically introduced by defendants in mitigation.” Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

192. Dennis Balske, The Penalty Phase Trial: A Practical Guide, CHAMPION, Mar. 1984, at 40, 42; see also 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.”); Stebbins & Kenney, supra note 50, at 18 (“The capital defense attorney must recognize that the profession demands a higher standard of practice in capital cases . . . .”).

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.  

Capital defense counsel across the country soon recognized the value of non-lawyers with expertise in the development of mitigating evidence—ultimately referred to as “mitigation specialists.” The California defense bar prominently featured one such non-lawyer on the cover of its monthly magazine Forum (published by California Attorneys for Criminal Justice) in 1987. The accompanying interview described how the mitigation investigator is “[d]ifferent from an investigator in that the whole emphasis on what I do has to do with the social and psychological factors in a person’s life—their biographical history.” A mitigation consultant from New Jersey appeared on the magazine’s cover the following year. She had co-authored an article in The Champion in 1986 discussing how forensic social workers could enhance capital defense. The following year, another article in the national defense-bar monthly commented tersely, “The mitigation specialist is a professional who, as attorneys across the nation are now recognizing, should be included and will be primary to the defense team.”

In 1998, a committee of federal judges examining costs of the federal death penalty noted that “[t]he work performed by mitigation specialists is work which otherwise would have to be done by a lawyer,


197 Id.


199 Cessie Alfonso & Katharine Bauer, Enhancing Capital Defense: The Role of the Forensic Clinical Social Worker, CHAMPION, June 1986, at 26, 26-29.

200 James Hudson et al., Using the Mitigation Specialist and the Team Approach, CHAMPION, June 1987, at 33, 36.
rather than an investigator or paralegal. Their report noted that mitigation specialists “have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant’s life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary materials for them to review.”

In an affidavit detailing the professional norms existing at the time of a defendant’s trials in 1987 and 1990, Russell Stetler explained:

The 1989 edition of the ABA Guidelines reflected a national consensus among capital defense practitioners based on their practices in the 1980s. These Guidelines were the result of years of work by the National Legal Aid and Defender Association (NLADA) to develop standards to reflect the prevailing norms in indigent capital defense. NLADA published its Standards for the Appointment of Defense Counsel in Death Penalty Cases ... in 1985. With initial support from the ABA’s Standing Committee on Legal Aid and Indigent Defendants (SCLAID), NLADA developed its expanded Standards for the Appointment and Performance of Defense Counsel in Death Penalty Cases ... over the course of several years. In February 1988, NLADA referred the Standards to SCLAID, which reviewed them and circulated them to appropriate ABA sections and committees. SCLAID incorporated the only substantive concerns expressed (by the Criminal Justice Section) and changed the nomenclature to “Guidelines” as more appropriate than “Standards.” Each black-letter guideline was explained by a commentary, with references to supporting authorities.

The revision of the Guidelines in 2003 reflected the evolution of national capital defense practice in the 1990s. The revised Guidelines emphasized that lead counsel at any stage of capital representation (trial or post-conviction) should assemble a defense team as soon as possible after designation with at least one mitigation specialist and at least one member qualified by training and experience to screen individuals for...
the presence of mental or psychological disorders or impairments in order to conduct a thorough and independent investigation relating to penalty. The original edition of the Guidelines, adopted in 1989, had simply advised counsel to begin investigation immediately upon counsel’s entry into the case and to “discover all reasonably available mitigating evidence.” The 1989 Guidelines also advised counsel to retain experts for investigation and “presentation of mitigation.”

VI. APPELLATE COURTS NEVER SEE CAPITAL CASES THAT AVOID THE DEATH PENALTY

On April 9, 2001, Justice Ruth Bader Ginsburg vented her frustration about the quality of trial representation in the capital cases that ultimately reach the High Court: “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution [stay] petitions, in which the defendant was well represented at trial.” Following her speech, Justice Ginsburg added that “People who are well represented at trial do not get the death penalty.” A corollary of Justice Ginsburg’s observation is that the Justices—and, for that matter, most of the appellate judges as well—never see capital cases that have been well litigated and avoided a death sentence. As we will see in Part VIII, the vast majority of death-eligible cases do not end in death sentences.

On the post-\textit{Furman} Court, only Justice Marshall brought the personal experience of representing capitally charged clients at trial and in post-conviction proceedings. But even he had never prepared for the penalty phase of a bifurcated proceeding. Few judges anywhere on the federal bench have done so. One of the rare exceptions, Judge Helen G. Berrigan of the United States District Court of the Eastern District of Louisiana, had worked as a volunteer lawyer in jurisdictions where

\begin{itemize}
  \item 204. ABA GUIDELINES, supra note 1, Guideline 10.4, at 999-1000.
  \item 205. Id. Guideline 10.7, at 1015.
  \item 206. 1989 ABA GUIDELINES, supra note 128, Guideline 11.4.1(C).
  \item 207. Id. Guideline 11.4.1(D)(7).
  \item 210. See KING, supra note 94, at 338-42.
\end{itemize}
resources were scarce or nonexistent. She offered this candid self-description when she published an article entitled *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench:*

The author, as a lawyer, handled the penalty phase of a number of capital cases in the 1980s and early 1990s on a pro bono basis. She had never heard of a mitigation specialist. She did her own investigation and she attributes what success she had largely to extraordinary luck, time-consuming doggedness, and a sunny, non-threatening demeanor.211

Unfortunately, some jurists in the appellate realm seem to assume that the cases that come before them constitute the relevant universe defining prevailing practices. The Court’s analysis in *Cullen v. Pinholster*212 provides a perverse illustration of this fallacy. Scott Pinholster was tried in Los Angeles in 1984.213 His trial counsel called only one witness in the penalty phase, Mr. Pinholster’s mother, while the prosecution called eight witnesses to testify about past threats and violent behavior.214 Trial counsel moved to exclude the prosecution witnesses for lack of notice, but the motion was denied after a hearing.215 Justice Thomas, writing for the majority, viewed counsel as employing a sound strategy:

[If] their motion were denied, counsel were prepared to present only Pinholster’s mother in the penalty phase to create sympathy not for Pinholster, but for his mother. After all, the “‘family sympathy’” mitigation defense was known to the defense bar in California at the time and had been used by other attorneys.216

In support of the dubious proposition that the “family sympathy” mitigation defense was “known to” the California defense bar, Justice Thomas transformed two largely irrelevant and patently unsuccessful cases into a putative standard. He cited the dissent of Chief Judge Alex

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212. 131 S. Ct. 1380 (2011).
213. *Id.* at 1395, 1407.
214. *Id.* at 1396.
215. *Id.* at 1395.
216. *Id.* at 1404 (emphasis added).
Kozinski of the Ninth Circuit Court of Appeals.\footnote{217}{Id. (citing Pinholster v. Ayers, 590 F.3d 651, 707 (9th Cir. 2009) (Kozinski, C.J., dissenting)).} Chief Judge Kozinski, in turn, cited two cases, both of which also ended in death sentences.\footnote{218}{Pinholster, 590 F.3d at 707 (citing People v. Cooper, 809 P.2d 865 (Cal. 1991), and In re Visciotti, 926 P.2d 987 (Cal. 1996)).} On closer inspection, we find that neither case relied on only one mitigation witness, as Mr. Pinholster’s counsel attempted to do. Both cases involved multiple mitigation witnesses.\footnote{219}{In re Visciotti, 926 P.2d at 993; Cooper, 809 P.2d at 880.} In addition, one involved a lawyer who had never handled a penalty phase before or successfully used “family sympathy” for anything relevant to any of his cases.\footnote{220}{Cooper, 809 P.2d at 880.}

One case had nothing explicitly to do with “family sympathy” mitigation. In the sentencing phase of Kevin Cooper’s trial (moved from San Bernardino to San Diego County on change of venue), “The defense presented several friends and relatives of defendant who testified about his good qualities and their continuing love for him.”\footnote{221}{Cooper, 809 P.2d at 880.} The jury was expressly not permitted to consider the impact his execution would have on his family members.\footnote{222}{Id. at 908.} The other case, involving John Louis Visciotti, was tried in Orange County, California and did involve the “family sympathy” strategy.\footnote{223}{In re Visciotti, 926 P.2d at 993.} However, Mr. Visciotti’s counsel had never tried a capital case to a jury before or handled a penalty phase.\footnote{224}{Id.} He did not investigate Mr. Visciotti’s family: \textit{because they were paying his bill. }\footnote{225}{Id. at 990, 993-94.} The California Supreme Court found that “in none of [defense counsel’s] self-described successful presentations of a family sympathy defense in prior cases was family sympathy evidence relevant to any issue in the case and in none could the effort be accurately described as ‘successful.’”\footnote{226}{Id. at 993.} Trial counsel’s belief in this defense theory apparently arose from media coverage of a noncapital drug case he had heard about:

The other basis for counsel’s hope that family sympathy might sway the jury was his belief that, in a widely reported case in which [trial counsel] had no involvement, a jury acquitted the defendant of a
narcotics-related charge and in doing so was influenced to accept an entrapment defense by the loyalty displayed by the defendant’s wife who was regularly in attendance at the trial.\textsuperscript{227}

In Mr. Pinholster’s case, Justice Thomas also blamed the dissent (by Justice Sonia Sotomayor) for offering no evidence of a different standard. He averred that the dissent:

\begin{quote}
\textit{cites no evidence . . . that such an approach [i.e., the family sympathy defense] would have been inconsistent with the standard of professional competence in capital cases that prevailed in Los Angeles in 1984. Indeed, she does not contest that, at the time, the defense bar in California had been using that strategy.}\textsuperscript{228}
\end{quote}

Of course, Justice Sotomayor was in no better position than any of the other Justices to know what the prevailing norms were. She, too, had seen only the unsuccessful cases which reached the Court because death sentences had been imposed.

The problem with appellate judges drawing conclusions based upon the small universe of cases over which they have presided is increasingly well understood by psychologists who study judgment and decision-making. It is not a problem specific to judges but one that affects all humans due to our cognitive makeup. To put it very plainly, the trouble is that people are simply not very good intuitive scientists.\textsuperscript{229} They tend to rely on unconscious, intuitive shortcuts (known as heuristics), which most of the time work fairly well.\textsuperscript{230} Heuristics allow us to make fast, effortless decisions, thereby conserving cognitive resources for tasks that demand effortful reflection.\textsuperscript{231} Unfortunately, heuristics also lead to certain predictable errors. Consider, for example, the availability heuristic.\textsuperscript{232} If asked to estimate the likelihood of a hurricane or an act of

\begin{itemize}
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Cullen v. Pinholster, 131 S. Ct. 1388, 1407 (2011).
\item \textsuperscript{229} See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 112-13 (2011).
\item \textsuperscript{230} See id. at 97-99.
\item \textsuperscript{231} See id.
\item \textsuperscript{232} See MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 18-19 (2009); KAHNEMAN, supra note 229, at 81; RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 24-26 (rev. ed. 2009); see also Thomas Gilovich & Dale W. Griffin, Judgment and Decision Making, in HANDBOOK OF SOCIAL PSYCHOLOGY 542 (Susan T. Fiske et al. eds., 5th ed. 2010). The paper by Amos Tversky and Daniel Kahneman, which was a significant basis for Kahneman’s recent Nobel Prize, is reprinted in Kahneman’s book, THINKING, FAST AND SLOW. See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Sci. 1124 (1984), reprinted in KAHNEMAN, supra
terrorism, most people will come up with a number that is greatly in
excess of the actual risk. The reason is that certain events are highly
“available” to our intuitive processing system, meaning that it is easy to
call examples to mind. Just the word “terrorism” conjures an
immediate association with images of the burning World Trade
Center towers. Because it is easy (in fact, unconscious and effortless) to
recall an example of an event, people tend to overestimate the likelihood
of its occurrence.

Related to the availability heuristic is the problem of confirmation
bias. Once we have an idea in mind, we tend to seek out—again,
without being aware we are doing so—evidence that tends to confirm
our belief and ignore evidence that tends to disconfirm it. This is the
case even though, logically speaking, disconfirming evidence provides
much more reliable information regarding the reliability of a belief.
Due to the unconscious nature of this effect, we sometimes do not
realize that seemingly logical reasoning is in fact the product of an
unconscious mechanism that seeks to defend beliefs already arrived at
through another unconscious process. A striking demonstration of this
tendency, which has obvious implications for this Article, is a study in
which participants were asked to review evidence for and against the
deterrent effect of the death penalty. Participants who had previously
identified themselves as supporters of the death penalty judged evidence
against its deterrent effect to be unpersuasive. What is more, they
were able to concoct a seemingly logical explanation based on
methodological flaws they perceived in the studies. Of course,
opponents of the death penalty reached exactly the opposite conclusion
and had mirror-image objections to studies purporting to show the
effectiveness of the death penalty at deterring crime. People do not

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note 229, at 419, 425-47 (discussing the availability heuristic in more detail).
233. See Tversky & Kahneman, supra note 229, at 419, 425.
234. Id.
235. Id.
236. See Gilovich & Griffin, supra note 232, at 546.
237. Charles G. Lord et al., Biased Assimilation and Attitude Polarization: The Effects of Prior
Theories on Subsequently Considered Evidence, 373. PERSONALITY & SOC. PSYCHOL. 2098, 2099
(1979).
238. Id.
239. Id.
240. Id. at 2101, 2102 & tbl.1.
241. Id. at 2103 tbl.2.
242. Id. at 2102 & tbl.1.
review evidence rigorously as a statistician would; rather, they reach conclusions based on unconscious processes and then become very resistant to disconfirming evidence.\footnote{A well-known paper by Tom Gilovich of the Cornell University Psychology Department and his colleagues showed that, despite the ardent belief of basketball fans, there is no such thing as a player having a “hot hand.” Thomas Gilovich et al., The Hot Hand in Basketball: On the Misperception of Random Sequences, 17 COGNITIVE PSYCHOL. 295, 313 (1985). That is, players who have recently made a series of field goals or free throws are not any more likely to make the next shot. \textit{Id.} at 309. Gilovich and his co-authors reached this conclusion after studying thousands of sequences of shots, and no one has ever shown the study to be flawed. \textit{See id.} at 304-05. Nevertheless, no less an authority than former Boston Celtics coach Red Auerbach reacted angrily to the study, saying: “Who is this guy? So he makes a study. I couldn’t care less.” KAHNEMAN, \textit{supra} note 229, at 116-17 (internal quotation marks omitted).}

Based on this research, it is apparent that a judge who sees only lousy performances by lawyers is likely to overestimate their prevalence. Cases in which a capital defendant was well-represented often result in either a favorable plea deal or a sentence less than death. Naturally enough, those cases do not result in appeals in which the performance of counsel at sentencing is evaluated by an appellate court. Judges are therefore trying to infer a conclusion about what good lawyers should do, based on a sample of cases handled badly. It would be virtually impossible, in those circumstances, for a judge to reach a conclusion that is reliable. Appellate judges considering direct appeals and collateral review proceedings are already dealing with a biased sample, but in addition, they encounter the availability heuristic. It is easier to think of an example of a massive screw-up by a lawyer—because it is dramatic and memorable—than to recall an instance of excellent representation. Thus, judges tend to overestimate the frequency with which lawyers make mistakes. In the case described above, the Justices offered conjectures back and forth concerning the prevalence of the use of the “family sympathy” defense by lawyers in California.\footnote{See \textit{supra} notes 212-17 and accompanying text.} Given the small sample size and the availability of the case before them, however, it is highly unlikely that they would have been able to reach a reliable conclusion on the issue of whether this defense was in line with the practices of reasonable professionals. More reliable evidence could have come from an expert who could testify about a number of cases based on a careful statistical analysis or from decisions of professional standard-setting institutions such as the ABA, which are in a better position to make an objective assessment.
VII. QUANTITY OF EXPERIENCE DOES NOT NECESSARILY ESTABLISH COUNSEL’S QUALIFICATIONS

One of the critical revisions of the Guidelines in 2003 addressed the issue of capital defense counsel’s qualifications in a new way. The original edition in 1989 included Guideline 5.1—Attorney Eligibility—and specified elaborate quantitative qualifications. Lead trial counsel assignments, for example, were to be distributed to practitioners with “at least five years litigation experience in the field of criminal defense,” and:

prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials . . .

Practitioners realized, however, that there were many individuals who met these nominal criteria but whose performance consistently fell below the norms of the capital defense community. Many individuals with heavy capital caseloads did not attend regular training. They managed their caseloads poorly, and they dispatched their clients to death row with regularity. An influential essay by a leading capital defense lawyer made the point succinctly: “Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.”

In 2010, journalist Adam Liptak wrote about one such overworked trial lawyer in Texas:

A good way to end up on death row in Texas is to be accused of a capital crime and have Jerry Guerinot represent you.

246. Id. Guideline 5.1(A)(ii).
247. Id. Guideline 5.1 (A)(iii).
Twenty of Mr. Guerinot’s clients have been sentenced to death. That is more people than are awaiting execution in about half of the 35 states that have the death penalty.249

The lawyer did not respond to Liptak’s messages seeking comment, but he had previously told a London newspaper that “judges only gave him tough cases.”250 He told that newspaper, “The easy ones, somehow, never came to me. . . . I think it’s a recognition that if I represent them, the state is in for one hell of a fight. Nothing goes down easy.”251 Liptak cited an analysis in the Houston Chronicle in 2009 that found that the lawyer “had represented 2,000 felony defendants in 2007 and 2008—far above the caseload limits recommended by bar associations and other groups that take criminal defense work seriously.”252 There is no doubt that the Texas lawyer was experienced, but grave doubt remains about his skills, knowledge, commitment, and performance.

Wyoming has had only six death sentences in the post-Furman era,253 but four of the six prisoners were represented at trial by the same public defender.254 All of his capital trials ended in death sentences.255

The Los Angeles Times published a feature story about a Long Beach, California attorney who had had eight clients sentenced to death, noting, “That is a Death Row record no prosecutor can match. . . . Some lawyers joke that he has his ‘own wing’ at San Quentin.”256

A column in the Philadelphia Inquirer focused on one recent case but described the woeful performance of “court-appointed lawyers who

250. Id.
251. Id. (internal quotation marks omitted).
252. Id.
255. Ted Rohrlich, The Case of the Speedy Attorney, L.A. TIMES, Sept. 26, 1991, at A1 (“Some defense attorneys take months to try capital cases; this one is known to spend a few days, or less.”).
have represented scores of other indigent defendants." The column summarized the court record as follows:

There isn’t a single motion filed by the attorneys in defense of their client. Nor is there a request for a jury questionnaire, which is standard in most jurisdictions that regularly handle capital cases, or for a mitigation specialist to prepare a case against the death penalty. Indeed, the only motion in the record was handwritten by the defendant. Prison logs indicate that his lawyers visited him a total of three times.

In 2003, Guideline 5.1 of the Guidelines was revised to eliminate quantitative measures altogether and to stress instead commitment to high-quality representation and special skills and knowledge relevant to capital cases. The Commentary to Guideline 5.1 notes that:

the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney’s qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.

VIII. THE MAJORITY OF CAPITAL CASES AVOID THE DEATH PENALTY

There is no nationwide database that tracks all the potential death penalty cases pending in the trial courts across the country. Even statewide tracking of capital cases is rare because few of the death penalty jurisdictions have established agencies that are funded to discover this information and have statutory authority to obtain it. New York State was an exception. The legislation that enacted the death


259. ABA GUIDELINES, supra note 1, Guideline 5.1, at 961-62.

260. Id. Guideline 5.1 cmt., at 963-64.
penalty in New York in 1995 also created a Capital Defender Office (“CDO”) with a mandate to ensure that capitally-charged defendants received effective representation.\footnote{1995 N.Y. Laws 16-17.} Prosecutors were required to notify the CDO whenever anyone was arrested for first-degree murder.\footnote{Id. at 17-18.} Such defendants were then eligible for capitally qualified counsel (either staff attorneys from the CDO or private attorneys who had received specialized training through the CDO) unless and until the prosecution advised the court on the record that death had been precluded as a potential punishment.\footnote{Id. at 16-19; see also N.Y. JUD. LAW § 35-b (McKinney 2002).}

New York’s post-\textit{Furman} experiment with a death penalty system began on September 1, 1995, and effectively ended on June 24, 2004, when the state’s highest court found the statute unconstitutional.\footnote{People v. LaValle, 817 N.E.2d 341, 365 (N.Y. 2004) (holding unconstitutional state deadlock instruction as creating substantial risk of coercing jurors into sentencing a defendant to death for fear that court would impose a parole-eligible sentence in the event of failure to reach unanimity in the penalty phase); N.Y. STATE ASSEMBLY, THE DEATH PENALTY IN NEW YORK 14-15 (2005), available at http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf. The court’s decision left the remainder of the statute intact and would have permitted the Legislature to correct the statutory infirmity. LaValle, 817 N.E.2d at 344. Instead, the State Assembly held five public hearings conducted by its standing committees on Codes, Judiciary, and Correction from December 15, 2004 through February 11, 2005. N.Y. STATE ASSEMBLY, \textit{supra}, at 1-3. The Legislature took no steps toward correcting the statutory infirmity, and the death penalty was no longer operational. See id. at 1.}

While the statute was operational, 877 defendants were charged with potential death-eligible offenses, entitling them to capitally qualified counsel.\footnote{These statistics were maintained by the New York State Capital Defender Office and reported by former capital defender Kevin M. Doyle in an e-mail to Russell Stetler on October 17, 2012. E-mail from Kevin M. Doyle to author Russell Stetler (Oct. 17, 2012, 5:37 PM)(on file with author and \textit{Hofstra Law Review}).} The statute imposed a deadline of 120 days after arraignment in the trial court for prosecutors to decide whether they would actually seek to impose the death penalty in the individual case.\footnote{N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2004).} Over ninety percent of the cases were decapitalized (for example, prosecutors elected to seek life without parole, rather than the death penalty, as the maximum punishment), and only fifty-eight went forward as death penalty prosecutions.\footnote{E-mail from Kevin M. Doyle to Russell Stetler, \textit{supra} note 265.} Many of those cases were still resolved by negotiated disposition, including two that were resolved after conviction.
in the trial court. 268 Only seven death sentences were imposed (and all of them were ultimately overturned). 269 By any calculus, the vast majority of cases did not end in death sentences.

Funding cuts have prevented any agency from continuing to track all of the death penalty cases in California, but in the early post-Furman years the Office of the State Public Defender did track all cases in order to make reliable forecasts of its own appellate caseload. 270 Cases were tracked from the introduction of the new death penalty statute in 1977 through December 31, 1989 (the very period in which the Pinholster case, discussed in Part VI, was tried in Los Angeles). 271 Over ninety percent of potential capital cases avoided the death penalty: 3425 cases were filed, but only 319 death sentences were imposed statewide (9.3 percent). 272 In Los Angeles, 1711 cases were filed, with only ninety-nine death sentences imposed (5.7 percent). 273

The Committee on Defender Services of the Judicial Conference of the United States created a Subcommittee on Federal Death Penalty Cases, chaired by the Honorable James R. Spencer. 274 The subcommittee’s initial report was issued in May 1998, and its


270. See CALIFORNIA APPELLATE PROJECT: INVESTIGATING HABEAS CORPUS CLAIMS (1994) (providing county breakdown of death penalty cases based on data compiled by the Office of the State Public Defender) (on file with authors and Hofstra Law Review).

271. Id.

272. Id.

273. Id. The number of penalty trials statewide was 675; the number in Los Angeles was 220.

274. RECOMMENDATIONS CONCERNING DEFENSE REPRESENTATION, supra note 195.
recommendations were adopted by the Judicial Conference of the United States on September 15, 1998. An update released in September 2010 provided data on federal capital defendants during the period from 1989 to 2009. The update noted that the data employed “should be viewed as a good estimate,” rather than a precise count, but also that the numbers are conservative in the sense that they count only death-eligible cases that were actually or likely to be filed in federal court:

In this report, the term “death-eligible” refers to a case that is expected to be or already has been filed in federal court and in which at least one count of the indictment alleges or is expected to allege an offense for which the death penalty is a possible punishment. It is essential to note that such federal death-eligible cases do not constitute the entire universe of “potential” federal death penalty prosecutions. Rather, these death-eligible federal cases are themselves the result of a selection process. As a jurisdictional matter, most federal death penalty cases could be prosecuted in either federal or state court. Federal authorities, often in consultation with state law enforcement agencies, determine whether and where to bring the prosecution, a decision that may turn on any one of a number of factors. This research has found no source from which the number of all such potential federal death penalty cases can readily be ascertained.

The update identified 2975 “death-eligible” federal capital defendants from 1989 through 2009 and found that the Attorney General authorized 463 of those cases to proceed capitally. By the end of 2009, 262 authorized defendants had been tried, and sixty-eight of those who proceeded to trial were sentenced to death. Thus, three-quarters of the defendants in authorized cases avoided the death penalty at trial. Others avoided the death penalty through plea bargains.

276. Id. at 4 & 5 fig.1.
277. Id. at 4 & n.6.
278. Id. at 5 fig.1 (“‘Death-Eligible’ Federal Capital Defendants, 1989-2009, by Calendar Year of Indictment.”).
279. Id. at 8 fig.2 (“U.S. Department of Justice Capital Authorizations, 1989-2009, by Year of Authorization.”).
280. Id. at 8-10.
281. Id. at 9 n.14.
scant two percent of the “death-eligible” federal defendants received the death penalty.\textsuperscript{282} Professor John J. Donohue III, a lawyer and economist at Stanford University, published a comprehensive review of the application of the death penalty in Connecticut from 1973 to 2007.\textsuperscript{283} He found that out of 4686 murders in the sample period, there were 205 death-eligible cases that resulted in a homicide conviction, of which 138 were charged with a capital felony.\textsuperscript{284} Of the 138 capital charged cases, forty-six defendants were permitted to plead guilty to a noncapital offense.\textsuperscript{285} Sixty-six of the remaining ninety-two were convicted of a capital felony and twenty-six were acquitted of capital felony charges.\textsuperscript{286} Of those sixty-six defendants convicted of a capital felony, twenty-nine proceeded to a death penalty sentencing hearing, resulting in nine sustained death sentences and one execution.\textsuperscript{287} For most death penalty jurisdictions, it is difficult to find reliable statistics comparable to those we have just discussed. The statistical snapshots that can be found are for the most part in academic and journalistic studies focused on other issues, such as the impact of race and geography, relative rates of judge and jury death sentencing, and comparison of military and civilian systems. The datasets in these snapshots are not uniform. Statutes vary in terms of death eligibility, notice requirements, eligibility for capitally qualified counsel, etc. Even the seemingly simple task of counting the number of death sentences imposed requires metric conventions about how to count the outcomes of resentencing proceedings. The number of “cases” sometimes refers to trials, rather than defendants. Nonetheless, even with all of their limitations, the available studies consistently indicate that most death-eligible cases avoid death sentences.

\textsuperscript{282} Id. at 5 fig.1, 10.


\textsuperscript{284} Id.

\textsuperscript{285} Id.

\textsuperscript{286} Id.

\textsuperscript{287} Id. The only prisoner executed in Connecticut was Michael Ross, who waived his appeals. Ross v. Lantz, 408 F.3d 121 (2d Cir. 2005) (per curiam), stay denied, 544 U.S. 1028 (2005). There were no involuntary executions prior to abolition of the death penalty in that state in 2012.
A study by reporters for the Atlanta Journal-Constitution examined murder convictions in Georgia from 1995 to 2004, including 1315 cases eligible for the death penalty. Prosecutors sought the death penalty in roughly one-fourth of these cases (344). Most were then resolved by plea agreements, but 127 went to trial and fifty-seven defendants received death sentences (including eight whose cases were overturned and who were not resentenced to death). Thus, death sentences imposed represented 44.8 percent of the cases that went to trial (57 of 127), 16.5 percent of the cases where prosecutors sought death (57 of 344), and 4.3 percent of the death-eligible cases (57 of 1315).

An analysis by the North Carolina Office of Indigent Defense Services of all potentially capital cases with warrant dates after July 1, 2001 found that “over 83 percent ended in a conviction of second degree murder or less; over 12 percent ended in a voluntary dismissal, no true bill, or no probable cause finding; and 45 percent ended in a conviction of less than second degree murder.” For “proceeded capital cases” (where the prosecution pursued the death penalty at some point), “60 percent ended in a conviction of second degree murder or less; 22 percent ended in a conviction of less than second degree murder; and 3 percent ended in a death verdict.”

The South Carolina Commission on Indigent Defense opened a Capital Trial Division in September 2008. According to data compiled by that office, forty-four death penalty cases (trials, retrials, or resentencings) were closed between September 2008 and October 16, 2012, resulting in six death sentences imposed by a jury and one by a
judge (death sentences in about sixteen percent of authorized cases).\textsuperscript{295} A review of cases litigated before the Capital Trial Division opened looked at the wider pool of cases that were potentially death-eligible under the broad South Carolina statute.\textsuperscript{296} Using “court files, contemporary news accounts, and other publicly available information” to profile 151 homicides in Charleston County between 2002 and 2007, the researchers found “115—fully 76 percent—involved facts that would support the existence of at least 1 statutory aggravating circumstance sufficient to render them eligible for the death penalty, but only 5 (4.3 percent) were actually prosecuted as death penalty cases—with 1 resultant death sentence.”\textsuperscript{297} They found similar results in Richland County: 117 cases prosecuted capitally out of 152 potentially eligible cases—again with a single death sentence.\textsuperscript{298} The researchers also found that the State sought death sentences in 226 cases statewide from 1995 to 2007.\textsuperscript{299} They looked closely at 124 cases from the counties that produce the greatest number of death sentences and found death verdicts in only nine of the 124 cases.\textsuperscript{300}

Another study analyzed all murder indictments in Kentucky between December 22, 1976 (the effective date of the capital statute) and October 1, 1986, and identified 864 cases resulting in murder convictions.\textsuperscript{301} Prosecutors pursued capital punishment at some point in 557 cases but only 104 went to trial in front of death-qualified juries, with 35 death sentences imposed.\textsuperscript{302}

Based on an analysis of 3442 murders and non-negligent homicides during the years 2001 through 2010, the Indiana Public Defender Council could not determine “how many of these homicides were

\textsuperscript{295} Id. That office represented twenty-four of the forty-four defendants, only one of whom received a death sentence. Id.

\textsuperscript{296} John H. Blume et al., When Lightning Strikes Back: South Carolina’s Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era, 4 CHARLESTON L. REV. 479, 494-98 (2010) [hereinafter Blume et al., When Lightning Strikes Back].

\textsuperscript{297} Id. at 499 & n.87.

\textsuperscript{298} Id. at 500; E-mail from Emily C. Paavola, Capital Trial Div., S.C. Comm’n on Indigent Def., to author Russell Stetler (Oct. 18, 2012, 6:59 AM) (on file with author and Hofstra Law Review).

\textsuperscript{299} Blume et al., When Lightning Strikes Back, supra note 296, at 531.

\textsuperscript{300} Id.; E-mail from Emily C. Paavola to Russell Stetler, supra note 298.


\textsuperscript{302} Id. at 495.
eligible for a death penalty request, meaning that 1 or more of the 16 aggravating circumstances could be alleged and the defendant was 18 or older,” but concluded, “Prosecuting attorneys actually requested the death penalty in 38 of these homicides, 9 of the cases proceeded to a capital trial, and 6 actually resulted in death sentences.”

The Missouri Department of Corrections published sentencing data for first-degree murder cases from Fiscal Year 1990 through Fiscal Year 2006, showing eighty-seven death sentences imposed compared to 714 sentences of life without parole (meaning 10.9 percent of cases ending in death sentences).

The late Professor David C. Baldus and his colleagues analyzed the 185 prosecutions of death-eligible offenders in Nebraska from 1973 to 1999. They found that death was waived by the State in over half of the cases (96 of 185). Of the remaining eighty-nine (forty-eight percent) that proceeded to a penalty trial, only twenty-nine resulted in death sentences (about one-third of the cases that proceeded to trial, or about sixteen percent of all the death-eligible cases).

A study of death sentencing from 1980 through 1999 in Colorado identified 110 defendants against whom the death penalty was sought. Thirty-seven of the 110 cases went to a penalty phase, but the sentencing authority (judge or jury) imposed death sentences on only thirteen of the defendants (11.8 percent).

A study in New Mexico identified 211 death penalty cases filed from July 1, 1979 through December 31, 2007, of which 203 had been concluded. Nine cases were dismissed before trial; almost half (47.8 percent) were resolved with a plea bargain that precluded a death

306. Id.
307. Id.
309. Id. at 573.
sentence; 46.9 percent went to trial. Roughly twenty-five percent of the concluded cases proceeded to a penalty phase, and juries returned fifteen death sentences (7.11 percent of the 211 cases).

In a study funded by the state of Maryland, criminologist Raymond Paternoster and his colleagues identified 1311 cases eligible for the death penalty from 1978 to 1999 (out of nearly 6000 first- and second-degree murder cases), with death sentences imposed in seventy-six cases.

Even in Delaware, which has a high death-sentencing rate in relation to the number of murders, the most comprehensive study found a total of forty-nine death sentences in Delaware since 1972, resulting from 138 trials and resentencings, including defendants who had more than one trial or sentencing.

The majority of death-eligible cases under the military capital punishment system have also avoided death sentences. A study by Professors Catherine M. Grosso, David C. Baldus, and George Woodworth found that 104 death eligible cases for murder committed by United States military personnel were prosecuted from 1984 through 2005, resulting in the imposition of fifteen death sentences.

One additional dataset illustrates how the overwhelming majority of cases in which appellate and habeas corpus courts found reversible error resulted in sentences less than death on retrial. In 2000, Professors James S. Liebman and Jeffrey Fagan and doctoral candidate Valerie West published a massive study in which they examined error rates in 4578

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311. Id.
312. Id.
314. Sheri Lynn Johnson et al., The Delaware Death Penalty: An Empirical Study, 97 IOWA L. REV. 1925, 1938 & n.70 (2012); E-mail from John H. Blume to author Russell Stetler (Oct. 29, 2012, 4:30 PM) (on file with author and the Hofstra Law Review). The authors note that prior studies had revealed that, in relation to the number of murders, Delaware has the third-highest death sentencing rate in the United States. Johnson et al., supra, at 1928 (citing John Blume et al., Explaining Death Row’s Population and Racial Composition, 1 J. EMPIRICAL LEGAL STUD. 165, 172 (2004)).
state capital cases for the period 1973 to 1995. Of those whose capital judgments were overturned, eighty-two percent received a sentence less than death when the case was remanded to the trial court. In fact, “7 percent were found to be innocent of the capital crime.”

The five cases overturned by the Supreme Court for failure to investigate mitigation thoroughly provide further support for the proposition that effectively litigated cases are likely to avoid death sentences. Four of the five individuals subsequently received sentences of less than death, and one case is pending as of this writing. Terry Williams received a life sentence by negotiated disposition in Danville, Virginia in 2000. On October 15, 2004, the State of Maryland agreed to a disposition sending Kevin Wiggins to a state facility for mental health treatment and rehabilitation services but making him eligible for parole immediately based on time already served. On August 13, 2007, the Lehigh County, Pennsylvania District Attorney’s Office stipulated to a life sentence for Ronald Rompilla. On July 21, 2010, the Brevard-Seminole, Florida State Attorney’s Office announced that it would allow George Porter, Jr., to be resentedenced to life because of his age (seventy-eight), stating “if we were to seek and obtain [the death penalty], it would never be executed.”

Finally, continuing reports from trial courts across the country in cases involving highly aggravated murders and horrendous loss of life demonstrate that death sentences are never automatic or inevitable. High-profile examples include the cases of Lee Boyd Malvo, the so-

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317. Id. at 68.
318. Id. at ii.
319. Id. (emphasis omitted).
called “Beltway Sniper”; Zacarias Moussaoui, the alleged twentieth hijacker of the September 11th attacks; Terry Nichols, tried twice (in federal and then state court) for the Oklahoma City bombing; and Brian Nichols (convicted of killing a judge, a court reporter, a deputy, and a U.S. Customs agent during his escape from an Atlanta courthouse hearing on other charges). More mundane examples occur week after week in courtrooms across the country as jurors choose life sentences for serial killers, cop killers, child killers, and others guilty of the most reviled and abhorrent crimes.

324. [Source: https://www.cnn.com/2004/LAW/03/10/sniperv.malvo/]

325. [Source: Jerry Markon & Timothy Dwyer, Jurors Reject Death Penalty for Moussaoui, WASH. POST, May 4, 2006, at A1.]


convictions have dramatically altered the public policy debate on capital punishment, mitigation evidence has continued to bring life sentences even in the face of overwhelming evidence of guilt.\(^{329}\) The rarity of death sentences is a fact that the Supreme Court has recognized in assessing the relative severity of life without parole sentences for juveniles and adults.\(^{330}\) As the quality of capital defense representation increases and the number of death sentences imposed annually diminishes, courts may find it increasingly difficult to “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” in the tiny minority of cases ending in a sentence of death.\(^{331}\)

### IX. Conclusion

Counsel’s duty to conduct thorough mitigation investigation in death penalty cases must be understood in terms of the evolving standards of the specialized capital defense bar—a bar that has been increasingly successful in avoiding death sentences. The Guidelines are well-established as the best starting point for counsel and courts attempting to understand what these standards are. The commentary to the Guidelines is encyclopedic, providing support from case law, books and treatises, law review articles, defense bar publications, and training materials for all the black letter Guidelines.\(^{332}\) The Supplementary Guidelines, in turn, provide detailed elaboration of the norms specific to

\(^{329}\) See, e.g., Alex Kotlowitz, *In the Face of Death*, N.Y. Times, July 6, 2003, § 6 (Magazine), at 32 (discussing the impact of mitigating evidence in the case of Jeremy Gross, who was convicted of a convenience-store robbery murder that was recorded in its entirety on videotape, and depicting mercy-dispensing jurors as “The Unwitting Abolitionists”).

\(^{330}\) See Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012) (stating that mandatory life without parole sentences for fourteen-year-olds means that they “will receive the same sentence as the vast majority of adults committing similar homicide offenses—but, really . . . a greater sentence than those adults will serve”). In a footnote, the Court added: “Although adults are subject as well to the death penalty in many jurisdictions, very few offenders actually receive that sentence.” Id. at 2468 n.7.


\(^{332}\) See generally ABA GUIDELINES, supra note 1 (providing Guidelines and commentary for defense counsel in capital cases).
this critical component of capital defense representation. Counsel at every stage of capital representation would do well to use the Guidelines for self-assessment and to help courts to understand what effective representation requires. While the Guidelines do not answer every question, they provide the most authoritative framework available for understanding the professional standards relevant to cases where a human life hangs in the balance. No one has suggested that there is any other publication that even begins to offer an alternative framework.

To be sure, courts may also want to hear from experts and to review other authorities specific to the issues in any individual case, particularly issues pertaining to the prevailing norms at a particular point in time. However, the Guidelines are the defining architecture for any measure of effective performance. We hope that this Article has illuminated the singular importance of the Guidelines as a presumptive source of guidance in this critical practice area, the value of utilizing the lens of tort law to envision the quality of representation a competent professional ought to provide, and the evolution of effective capital defense practice in the area of individualized sentencing. We hope it will lead practitioners toward stricter compliance with the norms reflected in the Guidelines and courts toward clear and consistent performance standards in capital cases.

333. See generally SUPPLEMENTARY GUIDELINES, supra note 21 (providing further guidance for capital defense practitioners).
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INTRODUCTION:
THE CONTINUING QUEST FOR HIGH-QUALITY
DEFENSE REPRESENTATION IN CAPITAL CASES

Eric M. Freedman*

The Articles contained in Part Two of the Hofstra Law Review Symposium, marking the tenth anniversary of the publication by the American Bar Association (“ABA”) of the revised version of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines” or “Guidelines”), continue the theme of those in Part One. Much progress has been made in improving the quality of capital defense representation, but much progress remains to be made.

Part Two begins with an Article by Judge Mark W. Bennett of the U.S. District Court for the Northern District of Iowa, Sudden Death: A Federal Trial Judge’s Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, a candid and illuminating account of his experiences in presiding over multi-year trial and post-trial proceedings in federal death penalty prosecutions. Judge Bennett notes the importance of the fact that the Guidelines apply at all stages of the proceedings, while emphasizing

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2. Part One of this Symposium appeared in Volume 41.3 of the Hofstra Law Review. The editors anticipate that Part Three will be published in Volume 43.


4. Id. at 396; see Eric M. Freedman, Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster, 41 HOFRSTA L. REV. 591, 591-92 (2013)
that the most efficient application of resources is to concentrate them on ensuring the quality of trial counsel. Judge Bennett’s experiences show that this goal has not been achieved, but that it is a worthy one. A focus on making all possible efforts to secure a high-performing defense team from the very beginning of the proceedings:

will, in the short-run, increase the cost of death penalty litigation because the trial team will do more. [But] [i]n the long run, greater fidelity to the ABA Guidelines will cause fewer ineffective assistance of counsel claims to be raised—at least, fewer meritorious ones—because this greater fidelity will unquestionably result in significantly improved quality of representation and decreased delays. Thus, the ultimate cost to the taxpayers should be less. Also, finality for the victims’ families and loved ones, and the defendants and their families and loved ones, should be achieved in less time.

The result will be “a win-win for everyone involved in capital litigation: the victims’ families, defendants and their families, the prosecution team and law enforcement, the defense team, the trial and appellate judges, and the taxpayers who fund this enormous expense.”

As the Director of the ABA Death Penalty Representation Project, Robin M. Maher has led the national effort to see the Guidelines implemented by the states. She recounts many of her experiences state-by-state in Improving State Capital Counsel Systems Through Use of the ABA Guidelines. A basic theme of the Guidelines is that the constitutional duty to provide effective defense counsel on a consistent basis rests upon the states, a duty that they can only fulfill by systematically creating institutional structures to deliver high-quality representation. “Even a skilled lawyer making best efforts to defend her client competently is probably engaged in a foredoomed project if

(contrasting “this sound policy” of the Guidelines with the resistance of the Supreme Court to recognize a constitutional right to counsel in capital post-conviction proceedings).

5. Bennett, supra note 3, at 396.
6. See id. at 415-16.
8. Bennett, supra note 3, at 415.
10. See generally id.
11. ABA GUIDELINES, supra note 1, Guideline 2.1, at 939; see id. Guideline 1.1 cmt., at 937-38 (“Attorney error is often the result of systemic problems, not individual deficiency.”); see also Eric M. Freedman, Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines, 31 HOFSTRA L. REV. 1097, 1103 (2003) [hereinafter Freedman, Governments’ Responsibilities] (discussing the “mandate for institution-building” that the Guidelines “forcefully” articulate).
she is not part of a system that provides her with the back-up necessary to perform effectively.”

The state’s duties then are “not only identifying and compensating qualified lawyers, but also equipping the defense team with such fundamental resources as investigative, forensic and related services, and continuing professional education.” Those duties, however, are mere will-o’-the-wisps unless the plan created by the state is “judicially enforceable in full against the jurisdiction.”

This is the background against which Ms. Maher concludes: “We have come a long way since the early days when the Guidelines were dismissed as the defense effort that no state could afford and no capital defendant deserved. But, there is still no counsel system that complies fully with the ABA Guidelines.” For a state to recognize, as an increasing number do, that the Guidelines articulate that the applicable standard of care is “commendable,” but that is only a “flawed” first step unless the state follows through by committing the necessary resources and enforcement mechanisms to ensure that high-quality representation in capital cases is an actual reality at the ground level, day in and day out.

Another basic theme of the Guidelines is that effective capital defense requires a team approach. That approach, like the Guidelines themselves, spans the entire course of the representation “from the moment the client is taken into custody” until his fate is finally determined. These considerations led to the inclusion, in 2003, of a specific Guideline entitled The Duty to Facilitate the Work of Successor Counsel: “In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel.”

Squarely based on pre-existing ethics rules, the “duties contained in this Guideline are of enormous practical significance to the vindication of the client’s legal rights,” in light of

12. Freedman, Governments’ Responsibilities, supra note 11, at 1102.
13. Id. (footnotes omitted).
14. ABA GUIDELINES, supra note 1, Guideline 2.1 cmt., at 941.
15. Maher, supra note 9, at 419-20 (footnote omitted).
16. Id. at 423-24.
17. ABA GUIDELINES, supra note 1, Guideline 4.1, at 952. As noted in the history of guideline 4.1, Guideline 8.1(A) was added to articulate this thought. Id. Guideline 4.1 history of guideline, at 953; see also id. Guideline 4.1 cmt., at 955-57 (discussing the “Team Approach to Capital Defense”); id. Guideline 8.1, at 976-77.
18. See id. Guideline 1.1(B), at 919.
21. ABA GUIDELINES, supra note 1, Guideline 10.13 cmt., at 1075.
the near certainty that, in a capital case, successor counsel will allege that prior counsel performed ineffectively.22

Professor David M. Siegel, whose scholarship formed part of the support for the Guidelines,23 reviews its past and future in The Continuing Duty Then and Now.24 After a historical review of cases running back into the 1800s, in which the duty had been recognized, he turns to the post-2003 efforts of ethics bodies to guide trial lawyers in its discharge.25 In particular, trial counsel should not be cooperating with prosecutors in seeking to rebut claims of ineffective assistance, but should rather be advancing the interests of the client as articulated by successor counsel.26 That means keeping disclosure to the government regarding the representation to the minimum required by the evidentiary rules.27 Hence, as Professor Siegel describes, the ABA, in a 2010 Formal Opinion, concluded that such disclosure should take place only under judicial supervision,28 a conclusion that several state bars have rejected,29 but a number of court cases have accepted.30

No one doubts that the ability of successor counsel to represent the client effectively depends on the degree to which prior counsel abide by their continuing duty of loyalty.31 But decision-making bodies are still not fully educated about the important practical need for effective mechanisms to make sure that prior counsel do so.32

One effort at such education is to be found in Professor Tigran W. Eldred’s Article, 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.33 In support of the intuitively plausible belief that prior counsel is unlikely to be in a position to be an objective judge of the extent of her

23. ABA GUIDELINES, supra note 1, Guideline 10.13 cmt., at 1075 nn.324-27.
25. Id. at 451-58.
26. Id. at 458-62.
27. Id.
29. Siegel, Continuing Duty, supra note 24, at 462-64.
30. Id. at 466.
31. See id. at 460.
32. See id.
continuing duty. Professor Eldred brings to bear the teachings of cognitive psychology. Regardless of prior counsel’s subjective desire to behave ethically, “motivated reasoning can be expected to influence compliance with the duties under Guideline 10.13 and related authority." This means that the dearth of hard evidence about how trial lawyers accused of ineffectiveness are actually behaving is troublesome; the probabilities are that most are behaving badly rather than well.

Professor Eldred puts forward a number of ameliorative proposals. His recommendations:

- explicit acknowledgment by courts of the importance of reading Guideline 10.13 with an unwavering focus on its client-centered purpose;
- encouraging judicial supervision of disclosures made by predecessor counsel in ineffectiveness cases;
- encouraging judges in post-conviction cases to account for motivated reasoning when making credibility assessments of predecessor counsel;
- encouraging successor counsel to learn about strategies that can help reduce implicit bias.

The next Article, by Dr. Kathleen Wayland, who has long employed her training as a clinical psychologist in assisting capital defense teams to integrate mental health themes into mitigation narratives, and Professor Sean O’Brien, an experienced capital litigator who was a leader in creating the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (“Supplementary Guidelines”), also addresses the problem of removing

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34. See Fox, supra note 20, at 1185-86.
35. Eldred, supra note 33, at 492-98.
36. Id. at 478.
37. Id. at 486-87.
38. Id. at 512-16.
39. Id. at 512. With respect to the last point, Guideline 10.7(B)(1) provides: “Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.” ABA GUIDELINES, supra note 1, Guideline 10.7(B)(1), at 1015.
40. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN
cognitive blinders. In *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, they take on the prosecutorial tactic of labeling the client a “psychopath,” a hall-of-mirrors description (not a recognized psychiatric diagnosis) that not only de-humanizes him, but also conveniently finds support in whatever characteristics he may happen to show, from “hot-tempered” to “icyly cold.” That makes it easy for the government to portray the client as the recognizable stock figure at the heart of the master narrative of crimes and criminality that jurors bring with them into the courtroom; “a heinous crime has been committed by an essentially bad or evil person who should pay the ultimate penalty.”

Even if the prosecutors confine their presentation to attempting to establish that the defendant meets the criteria for the (wrongly) recognized diagnosis of antisocial personality disorder (“ASPD”), the results are highly likely to be fatal for the client.

Far too often this is an entirely avoidable miscarriage of justice. As the authors show in detail, even the objective characteristics that the government may rely upon are far more likely to be explicable by “data and context that refutes the diagnosis of ASPD and enables the jury to interpret the defendant’s past behavior in the context of his life circumstances and impairments.” Defense teams acting in accordance with the Guidelines and the Supplementary Guidelines will, in the first instance, conduct a comprehensive investigation of the client’s life. Then, and only then, will they construct a mitigation narrative consistent with, but not dominated by, alternative diagnostic terminology, which more accurately resonates with the realities of the defendant’s life course than the prosecutor’s one-size-fits-all account.

The accumulated experiences of the criminal justice system that underlie the Guidelines and the Supplementary Guidelines have taught many lessons, often painfully. Jie Yang, the Program Manager for...
Criminal Justice Projects of the ABA Rule of Law Initiative China Program, has sought to assist the courageous lawyers in China who want to learn some of these lessons, as she recounts in *The Development of China’s Death Penalty Representation Guidelines: A Learning Model Based on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.*\(^49\) Spurred on by several dramatic cases in which defendants were convicted of murdering victims who later turned up alive, the Criminal Law Committee of the All China Lawyers’ Association sought the assistance of the ABA in developing capital defense representation guidelines.\(^50\) Although political forces prevented this effort from reaching completion,\(^51\) and the structural conditions under which defense lawyers work are daunting to say the least,\(^52\) three provincial lawyers’ associations took up the challenge, and in 2010 published guidelines addressing the appointment and material support of qualified counsel; the duty of defense counsel to collect and present mitigating evidence; counsel’s obligation to present claims of the client’s mistreatment while imprisoned; counsel’s role in reaching an agreed-upon disposition; and the duty to facilitate the work of successor counsel.\(^53\) Although questions of implementation persist and there is much further work to be done, this is quite a solid list of specific provisions.

Yet, Ms. Yang reports that the “most critical lesson that the provincial lawyers’ associations learned from their examination of the development of the ABA Guidelines was the importance of soliciting input from different stakeholders,”\(^54\) including the police, prosecutors, and judges. This suggests that the Guidelines have succeeded in communicating abroad a central message that all actors in the American criminal justice system should continue to heed: the ultimate beneficiary of efforts to improve capital defense representation is the criminal justice system itself.\(^55\)

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50. Id. at 597.

51. Id. at 597-98.

52. See id. at 598-99.

53. Id. at 599-603.

54. Id. at 604.

SUDDEN DEATH:
A FEDERAL TRIAL JUDGE’S REFLECTIONS ON
THE ABA GUIDELINES FOR THE APPOINTMENT
AND PERFORMANCE OF DEFENSE COUNSEL IN
DEATH PENALTY CASES

Mark W. Bennett*

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I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.
– U.S. Supreme Court Justice Ruth Bader Ginsburg

I. INTRODUCTION

On the evening of July 25, 1993, Gregory Nicholson, a federal witness in a methamphetamine conspiracy case against Dustin Honken, Nicholson’s girlfriend of a few weeks, Lori Duncan, and Duncan’s six and ten year-old daughters, Kandi and Amber, were kidnapped from the Duncan family home in a quiet Mason City, Iowa, neighborhood by Honken and his then-girlfriend, Angela Johnson. They were driven in darkness to a farm field, and one at a time, murdered execution-style with gunshots to the back of their heads, and buried in newly dug graves. While Honken was slaying the two adults, Johnson was comforting the two girls by telling them that the gunshots they heard were fireworks. Honken then returned to the vehicle, escorted the two girls into the field, and executed them at point blank range. A little more than three months later, on November 5, 1993, Honken and Johnson lured the last remaining witness, Johnson’s former lover, Terry DeGeus, to a secluded site outside Mason City, “where Honken shot DeGeus several times, then beat him with a baseball bat before he died. DeGeus was buried in another shallow grave a few miles from the burial site of Nicholson and the Duncans.”

Some days are more memorable than others. Members of the “Greatest Generation,” a term coined by Tom Brokaw, will never forget December 7, 1941 (the attack on Pearl Harbor), and members of my generation still vividly recall, fifty years later, where they were and what

3. Johnson, 495 F.3d at 959; Johnson, 403 F. Supp. 2d at 742.
4. Johnson, 495 F.3d at 959; Johnson, 403 F. Supp. 2d at 742.
5. Johnson, 403 F. Supp. 2d at 742. This comes directly from trial testimony in both the Honken and Johnson death penalty trials that I presided over. See id. at 732. Honken was tried in the fall of 2004, and Johnson approximately five and a half months later in the spring of 2005. Id. at 744-45, 748.
6. Id. at 742.
they were doing a little after noon on November 22, 1963 (the assassination of President John F. Kennedy). Other than the birthdays and anniversaries of loved ones, most dates are not memorable. On October 13, 2000, I was sitting in the lounge of a hotel in Des Moines, Iowa, waiting for my best buddy to have a beer. Out of the corner of my eye, I noticed the evening news flash: the bodies of the two Duncan girls, their mother, and Nicholson had been uncovered by state law enforcement officials. A chill instantly ran up my spine. I felt as though I had been hit with a bolt of lightning. I intuitively knew that my life was about to change forever. Little did I realize that, four years later, six U.S. marshals would be living in my home for months, and my daughter would start her ninth grade year at the local public high school under the twenty-four hour protection of those marshals. She could not even go to the bathroom by herself. Nor could I predict, then, that this former ACLU lawyer of seventeen years would order the defendant, Honken, not only chained to the floor of the courtroom with a titanium bolt buried in over a foot of concrete, but also require him, while in the courthouse, to wear a stun vest under his clothing that could be activated remotely by a plain clothes U.S. marshal. Honken’s jury would be anonymous, even to me; they would meet at secret locations, changed every few days, and they would not arrive at the courthouse each morning until shortly after Honken was bolted to the courtroom floor.

In the course of these two death penalty cases and a 28 U.S.C. § 2255 post-conviction proceeding, I published thirty-four death penalty opinions, ten in United States v. Honken and twenty-four in United States v. Johnson. These decisions totaled 1333 pages—often on multiple, cutting-edge pretrial, trial, and post-trial federal death penalty issues.

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8. See id. at 8.
10. I informed the jurors that their anonymity and the secret transportation locations were to ensure that the media did not contact and bother them throughout the lengthy proceedings. The four counsel tables in the courtroom were “custom skirted” so the jurors could not see that Honken was bolted to the floor. Special sound-proofing and light reflection blocking were utilized, at my direction, on the leg irons and bolt so that no noise could be heard and no light reflection could be observed by any spectators or jurors. Years later, I was chatting with a news reporter that had covered every day of the trial, and I asked her if she was aware that Honken had been bolted to the floor or wore a stun-vest. Much to the credit of the U.S. marshals, she answered: “No.”
11. 378 F. Supp. 2d 1010 (N.D. Iowa 2004); see infra note 13.
12. 225 F. Supp. 2d 1022, 1030 (N.D. Iowa 2002), rev’d, 338 F.3d 918 (8th Cir. 2003), rev’d, 352 F.3d 339 (8th Cir. 2004); see infra note 13.
On February 10, 2003, when the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines" or "Guidelines")\textsuperscript{14} were overwhelmingly approved by the ABA House of Delegates, it was of little interest to most of my more than 670 federal trial court judge colleagues. But for my two pending death penalty cases, the ABA Guidelines would not have been on my radar screen, either. At the time of their passage, I had no idea how important the ABA Guidelines would become to me during the two lengthy death penalty trials—Honken’s and Johnson’s trials were severed by agreement owing to insuperable Bruton v. United States\textsuperscript{15} problems.\textsuperscript{16} As important as the ABA Guidelines were to me for these two trials, its importance became even more critical during an eighteen-day § 2255 ineffective assistance of counsel proceeding, after which, in a 276-page opinion, I granted a new penalty phase trial to

that defendant challenged on the ground that they were barred by the statute of limitations for non-capital crimes where no constitutionally effective death penalty was available at the time of the alleged murders, and one count of conspiracy challenged on the grounds that it was untimely and duplicitous); United States v. Johnson, 236 F. Supp. 2d 943 (N.D. Iowa 2002) (ruling on appeal of magistrate judge’s disposition of motion to compel discovery pursuant to stipulated order); Johnson, 225 F. Supp. 2d 1022 (regarding government’s notice of intent to use evidence and defendant’s motion to suppress that evidence, resulting in determination of whether offenses charged in a second indictment were the “same offenses” as offenses charged in a first indictment); United States v. Johnson, 225 F. Supp. 2d 1009 (N.D. Iowa 2002) (ruling on motion to dismiss indictment for failure to allege elements of underlying conspiracy and CCE, and denying motion to dismiss counts of murder while engaging in a conspiracy, but granting dismissal of counts of murder in furtherance of a CCE without prejudice to a superseding indictment satisfying applicable standards); United States v. Johnson, 225 F. Supp. 2d 982 (N.D. Iowa 2002) (deciding appeals of magistrate judge’s rulings denying transfer to a different facility, granting in part and denying in part defendant’s motion for a bill of particulars, and affirming denial of defendant’s motion to transfer pursuant to 18 U.S.C. § 3142(i)); United States v. Johnson, 196 F. Supp. 2d 795, 800 (N.D. Iowa 2002), rev’d, 338 F.3d 918 (8th Cir. 2003) (citing Massiah v. United States, 377 U.S. 201 (1964)) (suppressing incriminating evidence obtained from the defendant by a jailhouse informant pursuant to Massiah); United States v. Johnson, 131 F. Supp. 2d 1088 (N.D. Iowa 2001) (deciding joint motion on attorney representation regarding potential for conflict of interest in defense counsel’s “successive representation” of a witness and the defendant, witness’s waiver of privilege by debriefing, defendant’s waiver of conflict, and prosecutor’s appearance as a witness in a pretrial matter).


15. 391 U.S. 123, 126, 137 (1968) (holding that a defendant’s Confrontation Clause rights under the Sixth Amendment are violated when a non-testifying codefendant’s confession implicating the defendant as a participant in the crime is introduced in a joint trial, even if the jury is instructed to consider the confession only against the defendant). Later cases modified the rule to allow for redaction of the confession and a limiting instruction. See, e.g., Richardson v. Marsh, 481 U.S. 200, 211 (1987).

Johnson.\textsuperscript{17} On October 4, 2013, my colleague, Chief Judge Linda R. Reade, in a 398-page decision, denied relief from Honken’s death sentences on his § 2255 motion.\textsuperscript{18}

The ABA Guidelines represent the Alpha and Omega of guidance in death penalty defense, from the beginning of a capital case, with the appointment of counsel, to the inevitable post-conviction proceeding years later, which ineludibly involves claims of ineffective assistance of counsel.\textsuperscript{19} More importantly, for this Article, the ABA Guidelines represent the good, the bad, and the ugly of what happens when the Guidelines are ignored by trial counsel—and even by a well-meaning trial court judge—in capital litigation. My perspective on the ABA Guidelines is unique because they became effective in the middle of the multi-year pretrial proceedings in \textit{Honken} and \textit{Johnson}.\textsuperscript{20} While both cases involved their respective juries’ independent findings that death was the appropriate verdict, the arc of these cases, and the impact that the ABA Guidelines had on them, was quite different. I chose to write only on the Alpha and Omega set forth above because it is in those two respects that I believe the impact of the ABA Guidelines is greatest for my fellow state and federal trial court colleagues. I firmly believe that, with greater attention to the Alpha—the appointment of competent trial counsel, working together and with their experts as a cohesive team, as the ABA Guidelines mandate—most of the problems of Omega—involving post-conviction claims of ineffective assistance of counsel—can be avoided.\textsuperscript{21}

\textsuperscript{17} \textit{Johnson}, 860 F. Supp. 2d at 680, 920.

\textsuperscript{18} \textit{Honken} v. United States, No. CV10-3074, slip op. at 393-98 (N.D. Iowa Oct. 4, 2013). For the Eighth Circuit Court of Appeals’ decision, which otherwise affirmed Johnson’s convictions and death sentences on direct appeal, see United States v. Johnson, 495 F.3d 951, 980-82 (8th Cir. 2007). Chief Judge Reade vacated the conspiracy murder charges against Honken, because they were multiplicitous of the CCE murder charges, but, she otherwise denied Honken’s § 2255 motion, and denied Honken a certificate of appealability on all issues. \textit{Honken}, No. CV10-3074, slip op. at 393-98.

\textsuperscript{19} \textit{See} ABA GUIDELINES, supra note 14, Guideline 1.1 history of guideline, at 921.


\textsuperscript{21} \textit{See infra} Part II.B.
II. MY EXPERIENCE WITH THE ABA GUIDELINES

A. Important Considerations in Death Penalty Cases

1. Introduction

Currently, there are only fifty-eight defendants on federal death row.\(^{22}\) Obviously, there are more federal capital cases than this.\(^{23}\) Many death eligible defendants plead out.\(^{24}\) While very few death penalty trials result in a not guilty merits phase verdict, many penalty phase verdicts result in a sentence of less than death.\(^{25}\) Indeed, the vast majority of federal district court judges have never had a death penalty case proceed past the Attorney General’s authorization process.\(^{26}\) I am equally confident that the vast majority of district court judges, prior to their appointment, never handled a death penalty case. Thus, there is simply nothing in most of these judges’ prior experiences that adequately prepares them to preside over a federal death penalty case. I had significant experience doing federal criminal defense work prior to becoming a judge, and the Northern District of Iowa’s criminal caseload per judge has averaged in the top ten of the nation’s ninety-four federal districts during my tenure as a federal judge.\(^{27}\) Also, by the time I was...

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23. From 1989 through 2009, approximately 2,975 federal criminal cases were “death eligible.” Russell Stetler & W. Bradley Wendel, The ABA Guidelines and the Norms of Capital Defense Representation, 41 HOFSTRA L. REV. 635, 687 (2013). “By the end of 2009, 262 authorized defendants had been tried, and sixty-eight of those who proceeded to trial were sentenced to death. . . . A scant two percent of the ‘death-eligible’ federal defendants received the death penalty.” Id. at 687-88 (footnotes omitted).
24. See, e.g., id. at 688-92.
25. See, e.g., id. at 689.
26. This authorization process has been described as follows:

   The Department of Justice authorization procedures are set forth in section 9-10.000 of the United States Attorney’s Manual. Promulgated in early 1995, the Department of Justice Death Penalty Guidelines and Procedures are intended to set forth the criteria to be utilized by local United States Attorneys and the DOJ in deciding whether to seek the imposition of the death penalty under federal law. The procedures also outline certain procedural steps to which United States Attorneys and Main Justice are supposed to adhere in considering death penalty authorization requests.

faced with my two death penalty trials, I had presided over many complex, multi-defendant criminal trials, and had sentenced nearly 2000 defendants. However, I still felt grossly ill prepared to manage a federal death penalty case. Starting about a year before Honken’s trial, in order to prepare for the onslaught of new issues I knew that I would have to face, I began reading several law review articles each week, covering a wide array of death penalty topics.

2. The Role of the ABA Guidelines

In Johnson’s § 2255 proceeding, after discussing numerous court decisions involving the proper role of the ABA Guidelines, I held that, “I will consider the ABA Guidelines as guides to whether counsel made ‘objectively reasonable choices.’” However, before discussing the per judge).

28. Johnson v. United States, 860 F. Supp. 2d 663, 744 (N.D. Iowa 2012). My full discussion of the role of the ABA Guidelines in Johnson’s § 2255 proceeding was as follows:

In both her Second Amended § 2255 Motion and her Corrected Post–Hearing Brief, Johnson has repeatedly measured the performance of her trial counsel against the ABA Guidelines For Appointment and Performance of Defense Counsel in Death Penalty Cases. Indeed, in the course of the episodic evidentiary hearing in this case, Johnson’s current habeas counsel went so far as to assert that “[t]here are circuit cases . . . that have said these are binding standards that must be followed.” Johnson’s counsel cited no cases so stating in her Corrected Post–Hearing Brief, however. Instead, she cited cases in which she contends that the “U.S. Supreme Court has observed that the ABA Death Penalty Guidelines establish the ‘prevailing norms of practice’ that serve to measure counsel’s performance under the Sixth Amendment.” The respondent contends that the Supreme Court has clearly rejected Johnson’s assertion that the ABA Guidelines constitute “binding standards.”

Although I observed . . . that my duty of “heightened attention parallels the heightened demands on counsel in a capital case,” that does not necessarily mean that the ABA standards or guidelines for death penalty counsel establish binding standards for the “performance” prong of the Strickland analysis in a death penalty case.

As the Supreme Court recently explained, “Restatements of professional standards . . . can be useful as ‘guides’ to what reasonableness [of counsel’s performance] entails, but only to the extent they describe the professional norms prevailing when the representation took place.” The Court found in Bobby that the Sixth Circuit Court of Appeals had ignored this principle by relying on a version of the ABA Guidelines announced 18 years after the defendant went to trial.

. . . .

. . . The Supreme Court’s decision in Bobby makes clear that reliance on either the 1989 or the 2000 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as “binding” or “inexorable commands” would be to repeat the error of the Sixth Circuit Court of Appeals; the ABA Guidelines are “‘only guides’ to what reasonableness means, not its definition.” The overriding standard remains whether counsel made “‘objectively reasonable choices.’”

Even Johnson’s retrenched position on the relevance of the ABA Guidelines goes too far. Those Guidelines do not necessarily “establish the ‘prevailing norms of practice.’” Rather, the ABA Guidelines must be shown to (1) reflect “prevailing norms of practice,” and (2) reflect “standard practice,” and (3) not be so detailed that they would [a] ‘interfere with the constitutionally protected independence of counsel and
application of the ABA Guidelines to death penalty post-conviction ineffective assistance of counsel claims, I first turn to a discussion of why death is different, the critical importance of the “team approach” to capital litigation, and the all too often overlooked role of the ABA Guidelines on appointment of counsel—one of the most critical facets of any death penalty proceeding.29

3. Death Is Different

In describing death penalty cases, as compared to other types of criminal cases, the U.S. Supreme Court has observed on many occasions, albeit with different phraseology, that: death is different.30

[b] restrict the wide latitude counsel must have in making tactical decisions.”’ Johnson comes nearer the mark when she asserts, “As all of [her] *Strickland* experts testified, and as the trial team itself acknowledged, the prevailing standards of practice governing death penalty litigation are set forth in the [1989 and 2003 ABA Guidelines].” That is, she has pointed to evidence suggesting that the ABA Guidelines do reflect “prevailing norms” and “standard practice.”

Thus, I will consider the ABA Guidelines as guides to whether counsel made “objectively reasonable choices,” subject to my determination of whether specific ABA Guidelines are so detailed that they interfere with the constitutionally protected independence of counsel or restrict counsel’s wide latitude to make tactical decisions. *Id.* at 742-44 (alterations in original) (citations omitted) (quoting Bobby v. Van Hook, 558 U.S. 4, 5-10 (2009), and Smith v. Mullin, 379 F.3d 919, 939 (10th Cir. 2004)) (citing *Strickland* v. Washington, 466 U.S. 668, 687-89 (1984)).

29. See supra Part II.A.

30. Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 & n.1 (2004). Jeffrey Abramson’s article contains a footnote collecting Supreme Court Justices’ views that “the death penalty is ‘qualitatively different’ from all other punishments,” which reads:

Based on my experience, this is true for every aspect of death penalty proceedings. This has been aptly described, in part, by the scholar, Douglas W. Vick:

Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.\(^{31}\)

It is critically important for those judges who do not have experience in death penalty cases to fully appreciate the magnitude of the “death is different” phenomenon in terms of appointing a defense trial team—including an experienced mitigation specialist and an experienced top-flight investigator—and in reviewing the significant number of expert witness requests that the defense trial team will likely ask for.\(^{32}\) The ABA Guidelines are of great assistance in helping trial court judges fully appreciate the critical distinction between death penalty prosecutions and our usual fare of criminal cases. This distinction, specifically as it relates to legal death penalty issues, was recognized by Professor Eric M. Freedman in the introduction to the Summer 2003 Issue of the Hofstra Law Review—wherein the revised ABA Guidelines were published—in which he wrote:

> One element of [the] consensus [about what is required to provide effective death penalty defense representation] is that “the unique characteristics of death penalty law and practice”—including the extreme fluidity of the law and the potentially fatal consequences of erroneous legal predictions—impose a stringent “duty to assert legal claims” even where “their prospects of immediate success on the merits are at best modest.” An effective capital defense lawyer is always testing—and often explicitly challenging—the limits of existing law.\(^{33}\)


\(^{32}\) Stetler & Wendel, supra note 23, at 674-76.

Writing in the same issue of the Hofstra Law Review, Robin M. Maher observed:

As the Guidelines emphasize, that obligation [to provide experienced and well-trained capital defenders] cannot be met by piecemeal efforts aimed at particular cases, but requires sustained institutional commitment. All of us—bar associations, judges, legislators, and lawyers—must work together to bring about badly needed reform of our capital defender systems.

The ABA Guidelines provide a blueprint for that reform.34

These observations by Freedman and Maher are as true today as they were in 2003. In setting aside Johnson’s death penalty verdict, in my § 2255 ineffective assistance of counsel ruling of 2012, I observed that the “death is different” mantra applies with equal force not only to post-conviction proceedings, but to my duty as the post-conviction judge:

Thus, my “review in this [habeas] case is predicated on the awesome responsibility entrusted to the federal judiciary in its habeas jurisdiction.” “[My] duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.” My duty of “heightened attention parallels the heightened demands on counsel in a capital case.”35

It is precisely because “death is different”—as Justice Potter Stewart noted, “it is unique, finally, in its absolute renunciation of all that is

(2003). Perhaps my disagreement is more in how to parse the phrase “frivolous” than with this conclusion: “Counsel in a capital case must, as a matter of professional responsibility, raise every issue at every level of the proceedings that might conceivably persuade even one judge in an appeals court or in the Supreme Court, in direct appeal or . . . collateral attack on a conviction or sentence.” Id. at 1179. This, I agree with. This standard, in my view, excludes most frivolous arguments. I encounter a lot of knowledgeable lawyers, but very few wise ones. In my view, wise lawyers do not raise purely frivolous issues. As the saying goes: Knowledge is recognizing that a tomato is a fruit. Wisdom is not putting it in a fruit salad. Even death penalty defense lawyers can lose their credibility, which is one of their most important assets, by putting too many tomatoes in the fruit salad. In practical terms, if a unanimous U.S. Supreme Court rejected the identical issue two years ago, it is frivolous to raise it now. If the decision was 7-2, one’s unyielding optimism might make the argument non-frivolous.


35. Johnson v. United States, 860 F. Supp. 2d 663, 739 (N.D. Iowa 2012) (alterations in original) (citations omitted) (quoting Stouffer v. Reynolds, 168 F.3d 1155, 1173 (10th Cir. 1999), and Smith v. Mullin, 379 F.3d 919, 939 (10th Cir. 2004)) (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.2(c) (3d ed. 1993) ("Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.")).
embodied in our concept of humanity\(^3\)\(^{36}\)—that the “team approach” to capital litigation mandated by the ABA Guidelines is so critical.

4. The Importance of the “Team Approach” in Capital Cases

I did not fully appreciate the nature and importance of a “team approach” to a capital case at the time that I appointed counsel in Johnson and Honken. Jill Miller, a nationally recognized death penalty mitigation specialist, wrote a decade ago that “[t]he skills and expertise required to effectively represent a capital client are broad and multidisciplinary in nature, thus requiring a team approach.”\(^3\)\(^{37}\) Miller then discussed several advantages of the “team approach”:

Use of the defense team concept in the trial of capital cases ensures that clients facing the death penalty will be provided with representation that includes the combination of skills and expertise required for high quality advocacy. The exchange of views and perspectives of the various members of the team can produce more effective strategy. In addition, utilizing a team approach means that the burden of responsibility for saving the client’s life will be shared. The trial of a capital case can be extraordinarily demanding and stressful. The team becomes a support system for each member.\(^3\)\(^{38}\)

The importance of the “team approach” did not hit home for me until I heard deeply disturbing testimony, some of which came from former legal assistants and investigators for the death penalty trial counsel in Johnson’s § 2255 post-conviction proceeding.\(^3\)\(^{39}\) Because I was unable to appreciate the full impact and necessity of the “team approach” at the time I appointed counsel, I made at least one critical mistake (although probably more than just one). Having appointed a third attorney, I was very concerned about duplication of efforts and having counsel divide up the labor to avoid what I perceived, at the time, to be unnecessary, overlapping, and duplicative work. In hindsight, I now understand that my voicing of this concern may have undermined a “team approach” to Johnson’s representation. On the other hand,


\(^{38}\) Id. at 1123. Miller also points to the Commentary of the ABA Guidelines to support her argument for the “team approach.” Id. (quoting ABA GUIDELINES, supra note 14, Guideline 10.4 cmt., at 1002). The Commentary to Guideline 10.4 states:

The team approach enhances the quality of representation by expanding the knowledge base available to prepare and present the case, increases efficiency by allowing attorneys to delegate many time consuming tasks to skilled assistants and focus on the legal issues in the case, improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.

ABA GUIDELINES, supra note 14, Guideline 10.4 cmt., at 1002 (footnote omitted).

\(^{39}\) See, e.g., Johnson, 860 F. Supp. 2d at 814.
Johnson’s team turned out to be so dysfunctional that, had I encouraged more trial team meetings and conferences, I doubt that it would have made a difference. As Johnson’s § 2255 proceeding unfolded, I was able to appreciate the substantial number of ways trial counsel provided ineffective assistance, and the massive amount of evidence of such ineffective assistance. Unbeknownst to me, the dysfunction of Johnson’s trial team occurred very early in their representation—during critical plea negotiations. A trial team paralegal, the very paralegal that had sixty-four percent of the entire legal team’s contact with Johnson (including contact by experts), became convinced of Johnson’s legal innocence, and, thus, was diametrically opposed to the position of learned counsel and the team mitigation specialist, who believed that it was virtually impossible for Johnson to be found not guilty. This drove a huge and unnecessary wedge between the trial team and their client—a wedge that was not even known to learned counsel at the time.

40. In my lengthy opinion granting Johnson § 2255 relief, I observed the following, regarding the level of dysfunction of the trial team:

The level of dysfunction in the defense team is demonstrated, for example, by a series of exhibits summarizing client contact with Johnson. Exhibit 66 details and totals the hours of in-person client contact by all members of the defense team during Johnson’s incarceration from August 2000, when the attorney identified herein as Lead Counsel appeared to represent her on the original non-capital charges, through December 19, 2005, the day before her sentencing hearing after her conviction on capital charges. It shows the following hours of in-person client contact by the “core” defense team: Lead Counsel, 42 hours; Learned Counsel, 62.9 hours; Co-Counsel, 5.6 hours; Waterloo Counsel, 3.8 hours; a paralegal, 371 hours; the mitigation specialist, 10.2 hours; and the original investigator, 4.6 hours. The gross imbalance between the hours of client contact by the paralegal and the other members of the defense team is obvious. That gross imbalance appears even more glaring from a bar chart . . . and a pie chart . . . which summarize all contacts with Johnson, including telephone contacts that she initiated, as well as in-person contacts, drawn from billing records. The pie chart indicates the following percentages of contact time, as follows: Lead Counsel, 17%; Learned Counsel, 12%; Co-Counsel, 1%; Waterloo Counsel, 1%; mitigation specialist, 3%; original investigator, 2%; and paralegal, 64%. There is no excuse for a paralegal to have three times as much contact with a capital defendant as all of the defendant’s trial attorneys combined, and no excuse for a mitigation specialist and investigator to have so little contact time. There is a relatively small amount of contact that the attorneys, the mitigation specialist, and the original investigator had with Johnson indicates that there was little direct exchange of information between them and Johnson and little opportunity for these key members of Johnson’s defense team to develop the necessary rapport with Johnson to represent her effectively.

41. Johnson, 860 F. Supp. 2d at 782.

42. Id.

43. I observed:

I find it very troubling that trial counsel were unable to present Johnson with a
words, at least two of the three lawyers on the trial team were convinced of Johnson’s guilt, while a paralegal was reinforcing Johnson to assert her innocence. Not only was there a total lack of a “team approach,” as the statistical information about contact time with Johnson reveals, but all three attorneys on the trial team failed the basic command of Guideline 10.5.A: “Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.” The lack of a “team approach” may have been as responsible for the death penalty verdict as any other factor—including the tragic multiple murders that involved the deplorable execution of two young children. As noted in the final sentence of the Commentary to Guideline 9.1, “Funding and Compensation”: “For better or worse, a system for the provision of defense services in capital cases will get what it pays for—or not. Neither Johnson nor the taxpayers received what they should have, where defense costs exceeded $1.5 million, even in a case that cost the taxpayers several multiples of that figure, all told. Failing to pursue the “team approach” mandated by the ABA Guidelines can, and did in Johnson’s case, lead to disastrous results.

unified message that her only realistic course was to accept a plea agreement to life imprisonment; that they did not spend more time with Johnson, and sooner, discussing plea options; that they did not do more, and sooner, to marshal and confront Johnson with evidence suggesting that a plea to a life sentence was the only realistic option; and that they did not do more, and sooner, to enlist the aid of family members and others to convince her to plead guilty to the charges in order to escape the death penalty. As a specific example, Johnson’s trial counsel actually delegated the vast majority of the client contact not to an attorney on the team, or even to the mitigation specialist, but to a paralegal. Worse still, [the paralegal] commiserated with Johnson, believed in her innocence, and reinforced rather than dampened Johnson’s belief that she could be acquitted, a position very much at odds with that of Learned Counsel and the mitigation specialist. Thus, delegation of client contact to a paralegal undermined the capacity of trial counsel and other members of the defense team to present a unified message to Johnson that her best and only realistic hope was to plead guilty in exchange for a sentence to life imprisonment without parole. Being very troubled with these circumstances, however, is short of finding that her trial counsel’s performance in these respects was professionally incompetent.

Id. (citing Harrington v. Richter, 131 S. Ct. 770, 791 (2011)). I went on to hold that trial counsel provided ineffective assistance in other aspects of the plea negotiations, but that Johnson failed to prove prejudice. Id. at 782-91.

44. Id. at 782.
45. See id. at 680 n.3.
46. ABA GUIDELINES, supra note 14, Guideline 10.5(A), at 1005.
47. Id. Guideline 9.1 cmt., at 988; see also Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) (granting habeas relief due to ineffective assistance of counsel where “[t]he state paid defense counsel $11.84 per hour,” and “[u]nfortunately, the justice system got only what it paid for”).
48. The actual plethora of attorney fees and expert witness vouchers are on file with the Clerk of the U.S. District Court for the Northern District of Iowa.
5. The Appointment of Counsel

Let me start with the importance of Guideline 4.1, “The Defense Team and Supporting Services,” and Guideline 5.1, “Qualifications of Defense Counsel.” Normally, judges in our district, and, as I understand it, in most if not all districts, are not involved in any way with the appointment of Criminal Justice Act of 1946 ("CJA") counsel—other than to vet whether a lawyer is competent to be initially placed on the CJA panel. I personally vetted and selected the defense teams for Johnson and Honken. I am not sure that this was a good idea, but our Federal Public Defender’s Office was conflicted out. Upon immediately determining that this case was factually complex, with multiple murders several months apart, and legally complex, because death is different, I appointed three criminal defense lawyers for each defendant.

Iowa abolished the death penalty in 1965. Thus, there were no Iowa attorneys in practice, that I knew of, with death penalty experience. I selected two of the four finest criminal defense lawyers in the state for each defendant’s defense team. All four had been before me on many federal criminal cases. I knew that two of those attorneys had worked together on many other high profile cases, so I put them together on one defendant’s team. I asked each team to do a national search by consulting the death penalty resource counsel in the Federal Public Defender system to find “learned” death penalty counsel who they would be comfortable working with for the third member of each team.
After each team of Iowa lawyers had selected their proposed learned counsel, I personally vetted that lawyer with federal judges in the jurisdiction where the lawyer resided, and with other judges whom the learned counsel had appeared before in capital cases. I thought I had selected two defense “dream teams.” Never in my wildest imagination could I have foreseen that one of these “dream teams” would turn into my worst judicial nightmare years later—a nightmare that unfolded in a § 2255 ineffective assistance of counsel proceeding spanning most of 2011—that included over eighteen days of testimony, four phases of evidence, nearly sixty witnesses, and thousands of pages of exhibits.54

One of the lessons learned is that the “chemistry” of the defense trial team is vital to provide constitutionally effective assistance of counsel. This chemistry problem is magnified when the lawyers on the defense team are separated by significant distances—not only from each other, but also from their client—and are not previously acquainted with one another. Because states that do not have the death penalty are unlikely to have learned counsel within their borders, this is a recurring problem in those federal capital cases brought in jurisdictions with no state death penalty.

Johnson’s defense team was appointed prior to the 2003 adoption of the ABA Guidelines; had they understood the importance of a “team approach,” I believe the lawyers would have worked together far more cohesively.55 Instead, they never developed a unified theory of the defense or a consistent and cohesive mitigation strategy with each other. Their fractured approach seriously affected the conflicting advice and signals that they gave their client about plea negotiations, and seriously undermined the effectiveness of these negotiations with the prosecution because the three lawyers were never on the same page. Instead of working as a team, they worked as they usually do in non-capital cases—as lone wolves. In this sense, the Johnson defense team also seriously ran afoul of ABA Guideline 10.10.1, “Trial Preparation Overall,” which requires counsel to formulate an approach that integrates the guilt phase with the penalty phase, if there is one.56 The Commentary to this Guideline requires that “well before trial, counsel


55. The need for teamwork was not a revelation in 2003. See Miller, supra note 37, at 1121 n.30 (citing SUBCOMM. ON FED. DEATH PENALTY CASES, COMM. ON DEFENDER SERVS., JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION sec. I(B)(4) (1998)); id. at 1123 & n.51 (discussing an interview with Millard Farmer, who coined the term “Team Defense” in capital cases as the post-Furman era began).

56. ABA GUIDELINES, supra note 14, Guideline 10.10.1, at 1047.
formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages.”57 This Guideline further requires that this integrated defense theory approach should be advanced from jury selection through closing arguments, and all phases in between.58

In hindsight, even without obvious warning signs to alert me to the serious lack of a “team approach,” I should have been more vigilant to ensure the proper approach. I had numerous ex parte on the record conversations with the defense team that provided me with opportunities to gently explore whether they were really working as a “team” in the sense promulgated by the ABA Guidelines. My natural reluctance to interfere with the defense function, and my erroneous belief that, because the three lawyers were each outstanding in their own right, they would work together seamlessly, blinded me to the possibility that my hand-selected “dream team” was anything but. Also, it was not until years later, in the § 2255 proceeding, that I began to fully understand the critical need for the “team approach.” I would strongly encourage judges presiding over capital prosecutions not to repeat my mistakes. Looking back, I was naive to think that, merely because I had appointed three excellent criminal defense lawyers, my obligation to ensure competent capital representation was complete. Following the appointment of counsel, I was presented with so many daunting motions and issues that it never dawned on me that the defense’s lack of a “team approach” would ultimately undo years of effort by many—including the outstanding prosecution team and many dedicated law enforcement officers—and waste literally millions of taxpayer dollars.

At bottom, merely appointing the defense team should not end a trial court’s duty to ensure that the defense team is actually functioning consistently with the Sixth Amendment’s command of effective assistance of counsel and the ABA Guidelines.59 Trial court judges in capital cases need to be aware that the sum of the parts of a defense team is not always greater than the whole; indeed, it can be far less—with dire consequences.

## B. Ineffective Assistance of Counsel in § 2255 Proceedings

1. Introduction

At the other end of the arc in capital cases, the Omega, is the inevitable review in post-conviction proceedings, all too often focusing

57. Id. Guideline 10.10.1 cmt., at 1047-48 (footnote omitted).
58. Id. at 1048.
59. See U.S. CONST. amend. VI; ABA GUIDELINES, supra note 14, Guideline 10.1, at 989.
on the disturbing question: was trial counsel constitutionally ineffective in violation of the Sixth Amendment? Of course, because there will be a new post-conviction team that may or may not be the appellate team, some of the same issues that a trial court judge sees in the appointment of counsel for the trial team may arise for that of the post-conviction team—but, probably to a lesser degree in most cases, just not in mine. My experience teaches that trial court judges need to be vigilant when appointing the post-conviction team as well. This is because death penalty post-conviction relief proceedings can be as complex and daunting as the original trial. Indeed, Johnson’s § 2255 proceeding raised enormously complex procedural issues. For example, the § 2255 motion was 176 pages long, and asserted sixty-three grounds for relief. In describing these proceedings, I wrote:

This federal habeas proceeding nearly rivaled the complexity of Johnson’s trial. It involved 18 days of evidence, in four different phases, spanning most of 2011. Fifty-nine witnesses testified and thousands of pages of exhibits were admitted, followed by hundreds of pages of briefing and a full day of oral arguments.

Numerous ineffective assistance of counsel claims were asserted attacking the original trial team for constitutional errors in the pretrial, jury selection, merits, and penalty phases, as well as in the post-trial and appellate phases. The prosecution asserted that twenty-one of the sixty-three claims raised by Johnson were time-barred for a variety of reasons.

For Johnson’s § 2255 team, lawyers were needed who not only knew capital law but were also well versed in habeas litigation. As this combination was also lacking among Iowa lawyers, I relied on the proceeding recommendation of death penalty experts outside of the


62. Id.
63. Id. at 677-79 (listing, in the opinion’s Table of Contents, Johnson’s § 2255 claims).
64. Id. at 697.
state. The résumés of the new lawyers suggested to conduct the § 2255 post-conviction proceeding looked extremely promising. It was clear who “learned counsel” would be, and that he would serve as the leader of the new team. He was very experienced and, on first impression (he flew to Iowa to meet me), charming and dedicated death penalty specialist from Maryland. Unfortunately, however, it emerged over time that the representation provided by this “learned counsel” was appallingly inadequate. Two years later, I would end up removing the § 2255 defense team shortly before the scheduled hearing and file my first-ever formal disciplinary grievance against a lawyer. Johnson, meanwhile, was certainly not receiving the kind of representation envisioned by the Guidelines. Little did I realize, years earlier when I appointed the original defense team, that appointment of counsel issues would literally plague Johnson’s death penalty prosecution for more than a decade.

Out of painful necessity, I appointed a second team for Johnson’s post-conviction § 2255 proceeding. That team, led by an outstanding death penalty specialist, Michael Burt of San Francisco, was truly and finally a judge’s “dream team.” Burt was brilliant, zealous but reasonable, reliable, impeccably honest and candid, and worked exceptionally well with his equally well-qualified, talented, and exceptionally professional opposing counsel, C.J. Williams. Williams, an Assistant U.S. Attorney for the Northern District of Iowa, was also lead counsel for the prosecution in both Johnson’s and Honken’s death penalty trials, appeals, and § 2255 proceedings.

2. The Role of the ABA Guidelines in § 2255 Ineffective Assistance of Counsel Proceedings

In preparation for Johnson’s § 2255 proceeding, and before hearing extensive evidence from nearly sixty witnesses, I undertook the task of reading every reported post-Furman § 2255 and related federal death penalty decision. In doing so, I realized that defense counsel failures in the penalty phase, rather than the guilt phase, were not only far and away the most frequent basis of § 2255 claims, but also created the most difficult issues to resolve in § 2255 capital litigation. The ABA

66. See id.
68. See id. at 916-18.
69. For a more thorough discussion of this mess, see id. at 680 n.3.
70. Id. at 681.
71. Id.
72. Id.
74. “[C]ertain specific duties, such as the duty to investigate [mitigation evidence] . . . [have]
Guidelines, especially Guideline 10.11, “The Defense Case Concerning Penalty,” significantly assisted me in determining whether trial counsel’s alleged failure to investigate and present mitigation evidence of Johnson’s mental health at the time of the five murders rose to the level of ineffective assistance of counsel. Many federal and state courts have relied on Guideline 10.11 in a variety of contexts to evaluate trial counsel’s performances in the penalty phases of capital cases. This is not surprising because the ABA Guidelines are continually regarded as the “single most authoritative summary of the prevailing professional norms in the realm of capital defense practice.” Moreover, the ABA Guidelines have proven especially valuable in “helping courts to assess the investigation and presentation of mitigating evidence in death penalty cases.” This is precisely how I utilized Guideline 10.11, and

become the most heavily scrutinized aspect of defense counsel’s representation.” Blume & Neumann, supra note 60, at 132.

75. ABA GUIDELINES, supra note 14, Guideline 10.11, at 1055-58. This Guideline directs trial counsel to: “investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation”; engage in early discussions with the client about the relationship between the strategy of the guilt phase and the penalty phase; discuss with the defendant the sentencing phase procedures; weigh the consequences of the defendant testifying; consider the evidence, witnesses, and demonstrative exhibits for the penalty phase; consider the potential challenges to the prosecution’s aggravating evidence; consider challenges to the prosecution’s expert witnesses; interview the defendant; and request jury instructions and verdict forms that give effect to all mitigation evidence. See id.

76. Johnson, 860 F. Supp. 2d at 877-98. For an excellent and thorough discussion of the U.S. Supreme Court Justices’ conflicting views on the proper role of the ABA Guidelines in capital litigation, see Stetler & Wendel, supra note 23, at 656-70.


78. Stetler & Wendel, supra note 23, at 635. In the small world of federal capital defense work, Stetler was also a Strickland expert witness for petitioner Johnson in her § 2255 proceeding. Johnson, 860 F. Supp. 2d at 681, 783.

79. Stetler & Wendel, supra note 23, at 635.
how it assisted me in reaching the decision to grant Johnson a new penalty phase re-trial.  

3. Two Examples of ABA Guideline 10.11 in Action

a. Failure to Investigate and Present Evidence of Johnson’s Mental State at the Time of the Five Murders

ABA Guideline 10.11 imposes a general duty that “counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.” More specifically, this Guideline instructs counsel to consider the use of “[e]xpert and lay witnesses along with supporting documentation . . . to provide psychological . . . insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability for the underlying offense(s).”

In Johnson’s § 2255 proceeding, I found that numerous instances of ineffective assistance of counsel had permeated her defense. However, none was more troubling than learned counsel’s decision not to pursue psychological mitigation evidence of Johnson’s state of mind at the time of the five murders. This alleged “strategic decision” was so lacking in the type of sound pretrial investigation contemplated by Guideline 10.11(F) that I stripped the decision of the presumption in favor of counsel’s strategy, a presumption which generally makes strategic choices virtually unchallengeable. Federal Death Penalty Resource Counsel Richard Burr had presented learned counsel with a virtual pretrial mental health mitigation “roadmap” on how to explain Johnson’s participation in the five murders, but learned counsel inexplicably rejected this advice without a proper pretrial investigation. This massive failure of Johnson’s defense team prevented the mitigation defense from achieving the goal expounded by the Commentary to ABA Guideline 10.11: “[I]t is critically important to construct a persuasive narrative in support of the case for life, rather than simply present a catalog of seemingly unrelated mitigation factors.” Ultimately, I held:

81. ABA GUIDELINES, supra note 14, Guideline 10.11(A), at 1055.
82. Id. Guideline 10.11(F)(2), at 1056.
84. See id. at 881-91.
85. See id. at 741-42, 881-91.
86. Id. at 881.
87. ABA GUIDELINES, supra note 14, Guideline 10.11 cmt., at 1061.
The relief I am granting here is not about the case that the jurors heard, or the appropriateness of their verdict based on that evidence (which I affirmed on post-trial motions in a 297–page ruling), but about the case that the jurors did not but should have heard, but for trial counsel’s woefully unconstitutional performance.  

In 2008, the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (“Supplementary Guidelines”) were promulgated by the ABA to “provide comprehensive, up-to-date guidance for all members of the defense team, and [to] provide useful guidance to judges and defense counsel on selecting, funding and working with mitigation specialists.” The Supplementary Guidelines explain in great detail the expected professional norms for penalty phase preparation and representation by the capital defense. For instance, Supplementary Guideline 10.11, “The Defense Case: Requisite Mitigation Functions of the Defense Team,” imposes broad and comprehensive duties on the defense team to locate and interview a host of types of expert and lay witnesses, and to gather extensive documentation to make the case for life.  

88. Johnson, 860 F. Supp. 2d at 919 (footnote omitted).
89. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, in 36 HOFSTRA L. REV. 677, 677-78 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].
90. Id. at 677-78. Maher, the Director of the ABA Death Penalty Representation Project in Washington, D.C., has explained:

The [Supplementary Guidelines] are a natural and complementary extension of the ABA Guidelines. They spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together to uncover and develop evidence that humanizes the client. Most importantly, the Supplementary Guidelines will help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team. This guidance is urgently needed. In my role as Director of the ABA Death Penalty Representation Project, I often receive inquiries from judges and lawyers about what training and experience a mitigation specialist should have before being appointed and what his or her responsibilities in a capital case should be. I also receive calls from mitigation specialists themselves, frustrated because defense counsel does not understand their role and what they need by way of support and direction. The Supplementary Guidelines will provide answers to many of those questions, continuing what the ABA Guidelines began when they first described the unique role and responsibilities of mitigation specialists.

91. See generally SUPPLEMENTARY GUIDELINES, supra note 89.
92. Id. Guideline 10.11, at 689-92.
10.11, as supplemented, provides a ready-made checklist for a comprehensive and thorough mitigation investigation.93

b. The Inadequate Mitigation Jury Instructions

ABA Guideline 10.11(K) specifically addresses defense counsel’s role in preparing, requesting, and objecting to jury instructions in the penalty phase.94 Further, the Commentary to ABA Guideline 10.11(K) requires counsel to “request instructions that will ensure that the jury understands, considers, and gives effect to all relevant mitigating evidence.”95 This did not happen in Johnson’s penalty phase.96 The § 2255 evidence established that the mitigation specialist had presented the trial team with a straightforward list of forty-four mitigating factors, but counsel had “ignored” this list.97 Instead of using this list as a guide for drafting the mitigating factors and placing each in a simple, single instruction for the penalty phase jury instructions, learned counsel submitted mitigation instructions that contained multiple mitigating facts within a single instruction.98 Though I held that this claim was procedurally barred, I felt that it was important to write extensively about it “as a cautionary tale.”99 I noted that, “[t]his is true, not least because the mitigating factors were remarkably poorly drafted, considering how important they are in a capital case, but also because I ignored my own significant misgivings at the time, and submitted . . . trial counsel’s mitigating factors essentially as proposed, a mistake I now deeply regret.”100

In the Johnson § 2255 opinion, as an example of “a deficiently and prejudicially drafted mitigating factor,”101 I used the ninth mitigating factor instruction from Johnson’s penalty phase verdict form:

(9) Angela Johnson was raised in a single-parent household by an emotionally unstable mother who subjected her children to unusual

93. See id.
94. ABA GUIDELINES, supra note 14, Guideline 10.11(K), at 1058. Section K provides:

Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

Id.
95. Id. Guideline 10.11 cmt., at 1069.
97. Id. at 873.
98. See id. at 874-75.
99. Id. at 873.
100. Id.
101. Id. at 874.
fasting practices, long periods of abandonment and physical
detachment, and occasional physical abuse, resulting in Angela
Johnson being far more susceptible to escape through illicit drug use, a
series of unhealthy relationships with men, and chronic feelings of
abandonment and poor self-esteem.\footnote{102}

The problem with this type of mitigation penalty phase instruction is that
it “would have confused jurors as to their ability to consider the potential
mitigating effect of any particular fact, standing alone, or in conjunction
with all of the other facts with which it appeared.”\footnote{103} This instruction,
asserting one mitigating factor, included at least eight facts that the
jurors were asked to consider in a single grouping:

(1) that Johnson was raised in a single-parent household; (2) that her
mother was emotionally unstable; (3) that her mother subjected her to
unusual fasting practices; (4) that she suffered long periods of
abandonment and physical detachment; (5) that she suffered occasional
physical abuse; (6) that she was susceptible to escape through illicit
drug use; (7) that she had a series of unhealthy relationships with
men; and (8) that she had chronic feelings of abandonment and
low self-esteem.\footnote{104}

I held that this instruction “required the jurors to reach the specific
conclusion that the first five of these facts actually caused (that is,
result[ed] in) the remaining three, thereby restricting the jurors’ ability to
give each fact its full mitigating effect.”\footnote{105} I further held:

At a minimum, [the ninth] mitigating factor, as formulated by
Johnson’s trial counsel, would have confused jurors as to their ability
to consider the potential mitigating effect of any particular fact,
standing alone, or in conjunction with all of the other facts with which
it appeared. For example, was a juror required to find all of the first
five factors, rather than just one of them, had all three of the specified
results, rather than any one of them, to find that factor (9) was
mitigating? This problem was not isolated to this specific example, as
nearly all of the other mitigating factors were also multifaceted,
convoluted, and/or required the jurors to find that one or more
preconditions or a series of conditions had specific results.

I also found that the ineffective assistance of counsel in submitting the
compound and confusing mitigation instructions likely caused
Johnson prejudice under the second prong of \textit{Strickland v.}

\footnote{102}{Id.}
\footnote{103}{Id. at 875.}
\footnote{104}{Id.}
\footnote{105}{Id. (internal quotation marks omitted).}
\footnote{106}{Id.}
However, no relief was granted because this claim was procedurally defaulted.  

III. CONCLUSION AND RECOMMENDATIONS

The death of victims in death penalty cases is almost always violent and sudden. In stark contrast, the resulting criminal prosecutions are complex, seemingly endless, and notable for an obsession with process. Greater fidelity to the ABA Guidelines will, in the short run, increase the cost of death penalty litigation because the trial team will do more. However, death penalty litigation is not a sprint, but a marathon—often spanning decades. In the long run, greater fidelity to the ABA Guidelines will cause fewer ineffective assistance of counsel claims to be raised—at least, fewer meritorious ones—because this greater fidelity will unquestionably result in significantly improved quality of representation and decreased delays. Thus, the ultimate cost to the taxpayers should be less. Also, finality for the victims’ families and loved ones, and the defendants and their families and loved ones, should be achieved in less time. In my view, greater fidelity to the ABA Guidelines is a win-win for everyone involved in capital litigation: the victims’ families, defendants and their families, the prosecution team and law enforcement, the defense team, the trial and appellate judges, and the taxpayers who fund these enormous expenses.

Based on my thirteen long years of intimate connection with two federal death penalty cases—from pretrial, to trial, to lengthy appeals—and one complex § 2255 proceeding, I have some recommendations for state and federal judges assigned death penalty cases.

I recommend that every judge assigned a death penalty case be sent, and strongly encouraged to carefully read and review, the ABA Guidelines within seven days of the assignment. This should be accompanied by a short explanation as to why fidelity to the ABA Guidelines increases the quality of representation, reduces the chances of major reversible error, and, in the long run, saves valuable resources and ultimately reduces the costs and delays of capital litigation. I also believe that a careful reading of the ABA Guidelines would assist trial judges in changing their traditional mind-set—that of a single appointed counsel—to the vital importance of the unified team approach that is at...
the essence of the ABA Guidelines, but so foreign to what we judges think about the appointment of counsel.

I recommend that judges or others appointing counsel in death penalty cases require appointed counsel to meet and confer for a lengthy, initial in-person conference before the trial team of lawyers is finalized. At least in federal cases, it is critical that learned counsel be comfortable with the lawyers on the trial team that she will be working with, and vice versa. This would help achieve the “team approach” so strongly and necessarily emphasized by the ABA Guidelines in federal cases, and the same should be true for state court appointments.

I recommend that lawyers appointed in death penalty cases be required to read and discuss the ABA Guidelines with each member of the defense team within ten days of appointment (and be compensated for these efforts), and be required to certify to the assigned judge that they have done so. Privately retained lawyers should also be provided with the ABA Guidelines, and be required to file the same certification.

I recommend that, no later than thirty days after their appointment, defense counsel should be required to file—ex parte and under seal—a Defense Plan for Representation (“Plan”). The Plan must specifically outline how the defense counsel’s team approach—identifying the roles and relationships of the defendant, the investigator, the mitigation specialist, and the other members of the defense team, as required by ABA Guideline 10.4—will be balanced with the need to avoid unwarranted duplication of counsel’s efforts. The presiding judge should then require periodic supplementation of the Plan as needed.

I recommend that trial court judges use ex parte contact on the record with the defense team about counsel fees, retention and payment of expert witness fees, and so forth, to inquire about the functioning of the trial team not only among counsel but also with the mitigation specialist, investigator, and other retained experts. The purpose of these inquiries is to ensure that the trial team is functioning at least at a minimum level—and hopefully at a much higher level—to comply with the Sixth Amendment guarantee of effective assistance of counsel. Of course, the trial judge must ensure that she is not interfering with the defense function.\(^{109}\)

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109. Professor Adam Lamparello has suggested that overcoming the problem of capital defendants being represented by the “worst of the worst,” and dramatically improving the quality of capital representation, “contemplates a more active trial court in ensuring that counsel properly discharges his duty to engage in effective representation and meaningfully advocate on his client’s behalf.” Adam Lamparello, Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials, 62 Me. L. Rev. 97, 102-03 (2010). While the active trial court is “essential” to his proposal, he also suggests “sweeping changes to (1) the manner in which capital defendants are represented; and (2) the method by which their cases are reviewed on appeal.” Id. at 102. His proposal requires defense counsel to certify to the trial judge compliance
Lastly, I recommend that death penalty trial scheduling orders require lead counsel to certify to the trial court, at least thirty days prior to the start of jury selection in the guilt phase, that the defense team has fulfilled its obligation to discover all information in support of a sentence other than death, as required by the Supplementary Guidelines.\footnote{See SUPPLEMENTARY GUIDELINES, supra note 89, Guideline 1.1, at 679; \textit{id.} Guideline 10.11, at 689-92.}

Regardless of one’s personal views of the death penalty, greater fidelity to the ABA Guidelines, and to my modest recommendations, would help assure that the long arc of the moral universe will bend towards justice.\footnote{See \textit{TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS} 1954-63, at 197 (1988) (“[O]ne of [Martin Luther] King’s favorite lines, from the abolitionist preacher Theodore Parker, \[was:] ‘The arc of the moral universe is long, but it bends toward justice.’”).}
IMPROVING STATE CAPITAL COUNSEL SYSTEMS THROUGH USE OF THE ABA GUIDELINES

Robin M. Maher*

I. INTRODUCTION

Since their publication in 2003, the American Bar Association (“ABA”) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines” or “Guidelines”)\(^1\) have been adopted, implemented, and cited by state and federal courts in every active death penalty jurisdiction in the United States. This tenth anniversary provides a welcome opportunity to reflect upon the encouraging progress that has been made and to chart a path for future efforts. We have come a long way since the early days when the Guidelines were dismissed as the defense effort that no state could

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* Robin M. Maher is the Director of the American Bar Association Death Penalty Representation Project and an adjunct professor at The George Washington Law School. This Article reflects her personal views. The author led the effort that resulted in the adoption of the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines" or "Guidelines") in 2003. The author works with judges, legislators, indigent defense organizations, state bar associations, and attorneys in the civil and criminal defense bar to promote further use of the ABA Guidelines in death penalty jurisdictions, and to facilitate other systemic reforms to improve the quality, availability, and performance of capital defense counsel. The author wishes to acknowledge the many contributions of Project staff since 2003, with special thanks to current staff attorneys Becca Eden and Emily Williams for their assistance with this Article and the efforts described in it. The author also thanks Washington and Lee University School of Law Professor David I. Bruck and Washington and Lee law student Elizabeth Pohn (class of 2013) for their help in collecting the examples in footnote 61 (egregious appointments). Any errors in this Article are solely those of the author.

afford and no capital defendant deserved. But, there is still no counsel system that complies fully with the ABA Guidelines. This Article will describe how the Guidelines can become an instrument of reform in death penalty jurisdictions to improve the quality, availability, and performance of capital defense counsel, and how the criminal justice system will benefit from these changes.

II. TEN YEARS OF PROGRESS: 2003–2013

The ABA Guidelines reflect the lessons of forty-one years of capital defense litigation in the modern death penalty era—the strategies and practices that win cases and save lives, and the sobering instruction salvaged from failures and mistakes. Each of the ABA Guidelines in the 2003 publication is validated with references to prior standards, practices, and policies, and further explained with a detailed

2. See Emily Hughes, Mitigating Death, 18 CORNELL J.L. & PUB. POL’Y 337, 349-52 (2009) (discussing the early history of the Guidelines). In 2003, Kent Scheidegger of the Criminal Justice Legal Foundation told the Associated Press that the ABA was pushing extravagant and unnecessary expenses in death penalty cases. Gina Holland, Lawyers Push for Death Penalty Changes, ASSOCIATED PRESS (Feb. 8, 2003, 6:37 PM), http://www.apnewsarchive.com/2003/Lawyers-Push-for-Death-Penalty-Changes/id-2028421c914a4c6f94f5c514706c58?SearchText=L%26apos%3B%20push%20for%20death%20penalty%20changes;Display ("They want to say that if you don’t provide the gold standard in defense, then you can’t have the death penalty." (internal quotation marks omitted)). The Daily Oklahoman also ran an editorial criticizing the Guidelines as “extortion” and lamenting that the “[ABA]’s fixation on the rights of convicted criminals.” Editorial, Dream Team; You Will Fund It Under Group’s Plan, DAILY OKLAHOMAN, Feb. 13, 2003, at 8-A.

3. See infra Parts III–IV.


5. Among these policies are those of the ABA, which does not take any position about the correctness of the death penalty itself but has spent decades studying the administration of the death penalty in the United States and working to improve the fairness and accuracy of capital proceedings. See Hughes, supra note 2, at 349-52. Accordingly, the ABA has policies that reflect its longstanding concerns about the quality and availability of defense counsel in capital cases and other issues. See, e.g., ABA GUIDELINES, supra note 1, intro., at 916; 1989 GUIDELINES, supra note 4, intro.; AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, RECOMMENDATION AND REPORT (1985), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/capital_attorneys_0285.pdf (recommending that two attorneys be appointed as trial counsel to represent defendants facing the death penalty and that the primary attorney have substantial trial experience which includes the trial of serious felony cases); AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES, REPORT NO. 3 (1979), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/capital_counsel_0279.authcheckdam.pdf (recommending that the U.S. Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions in death penalty cases where the defendant cannot afford to hire counsel); AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES, REPORT NO. 6 (1990), available at http://www.americanbar.org/content/dam/aba/uncategorized/reportrecommendations02/107.authcheckdam.pdf (recommending the implementation of
Commentary. There was nothing “new” or invented by the ABA for the 2003 publication. But, there was a need for an authoritative resource that could synthesize these many provisions with the wisdom of experienced capital defenders and apply this understanding to the current requirements of the law. A comprehensive tool was needed, not only to improve the performance of defense counsel, but also for judges and governments to use when making critical decisions about the necessary qualifications for appointment of counsel and the allocation of resources and time for the defense effort. These were the reasons that the ABA initiated the effort to publish the revised Guidelines in 2003.

For the next ten years, a small army of people made the words “ABA Guidelines” their mantra. Members of the capital defender community and many other actors in the criminal justice system

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6. See, e.g., ABA GUIDELINES, supra note 1, Guideline 1.1 cmt., at 922-23.
7. Some courts have erroneously concluded that the ABA Guidelines were not applicable in certain cases because the trials pre-dated the 2003 publication. See, e.g., Bobby v. Van Hook, 558 U.S. 4, 7-8 (2009) (per curiam). This is clearly wrong.
8. See Hughes, supra note 2, at 349-52. Beginning in 2002, the ABA Death Penalty Representation Project, with the co-sponsorship of the Standing Committee on Legal Aid to Indigent Defendants, assembled an advisory committee of experienced capital defenders, academics, and representatives of several ABA Sections, who all met to identify the concepts that were fundamental to effective capital defense. See, e.g., AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES (2002), available at http://www.americanbar.org/content/dam/aba/migrated/sclaid/20110325_aba_resolution107.authcheckdam.pdf. When an initial draft of principles had been prepared, the author spent several months meeting personally with many individuals and groups, including judges and prosecutors, to explain the goals of the Guidelines, answer questions, and request support. Because there was general agreement that the Guidelines were pragmatic and useful, Resolution 107 to adopt the revised ABA Guidelines as the policy of the ABA was co-sponsored by the Standing Committee on Legal Aid to Indigent Defendants, the Criminal Justice Section (whose members include prosecutors, judges, law professors, and defense attorneys), the Section of Litigation, the Senior Lawyers Division, the Section of Individual Rights and Responsibilities, and the Association of the Bar of the City of New York. See id. On February 10, 2003, the five hundred plus member ABA House of Delegates adopted the ABA Guidelines without a single dissenting vote. See ABA GUIDELINES, supra note 1, intro., at 916; IMPLEMENTATION OF THE 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 1 (2012) [hereinafter IMPLEMENTATION OF GUIDELINES], available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/implementation_fact_sheet_01_2012.authcheckdam.pdf.
understood the potential of the Guidelines to become an instrument of reform. They became a feature at every defense-training seminar and were cited by defense counsel in hundreds of motions and pleadings. In addition, the ABA Death Penalty Representation Project made a serious investment of time and energy to educate and train lawyers and judges in death penalty jurisdictions about the utility of the ABA Guidelines. As a result of this deliberate and collective effort, the ABA Guidelines became the recognized and powerful resource that it is today.

Today, more than four hundred state and federal court opinions have cited to or discussed the Guidelines during judicial review of ineffective assistance of counsel (“IAC”) claims in death penalty cases. The U.S. Supreme Court has described the ABA Guidelines as “well-defined norms” that articulate the professional standards for capital defense work. The Court has recognized the Guidelines as “guides to determining what is reasonable [defense counsel performance],” the very touchstone of effectiveness.

The entire criminal justice system benefits from an enhanced understanding of the capital defense effort. One such improvement is that reviewing courts become more adept at identifying Sixth Amendment constitutional violations at trial, perhaps because judges who have a better understanding of what defense counsel must do are better able to identify the failures when they occur. This, of course, is exactly what must happen within a functioning criminal justice system to ensure justice. It is a tragedy when any court concludes that a defendant was sentenced to death without the constitutional assistance of a lawyer.


10. See IMPLEMENTATION OF GUIDELINES, supra note 8, at 2.


The fact that such a finding occurs with appalling frequency in hundreds of cases is evidence enough that reform of our capital counsel systems is urgently needed and long overdue. This is what the ABA Guidelines are about.16

III. IMPLEMENTATION OF THE ABA GUIDELINES IN DEATH PENALTY JURISDICTIONS

Although an important tool, the ABA Guidelines are not magic words. Simply stating that they are the standard of care will not resolve the many longstanding, systemic problems that cripple indigent defense counsel systems in every death penalty jurisdiction.18 The ABA Guidelines are ineffectual without the full commitment of the jurisdiction, including judicial enforcement.19 The commendable first

16. In a study by Columbia University Law Professor James S. Liebman of capital cases from 1973 to 1995, the most common source of error was “egregiously incompetent defense lawyering,” which accounted for thirty-seven percent of all state post-conviction reversals. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 5 (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. A recent study funded by the National Institute of Justice on wrongful convictions identified weak defense counsel as one of the top ten leading causes of wrongful convictions. JON B. GOULD ET AL., PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE, at iii (2013), available at https://ncjrs.gov/pdffiles1/nij/grants/241389.pdf. The study stated that a lack of time, training, and funding among the defense bar contributed greatly to the problem with defense work in erroneous convictions. Id. at 81.


19. See, e.g., ALABAMA REPORT, supra note 18, at xii-xiv; ARIZONA REPORT, supra note 18, at xii-xiv, 140-47; OHIO REPORT, supra note 18, at xvii-xix.
steps discussed below are flawed to the extent that compliance with the Guidelines remains optional and not mandatory because this critical support is lacking.  

A. Adoption Through State Supreme Court Action

Several state supreme courts have recognized the ABA Guidelines as the standard of care for defense representation in death penalty cases. 20 The specific actions differ, yet each state presents an example of systemic reform of the state’s indigent capital defense system in a manner that is consistent with the ABA Guidelines. Developments in several of these states present models that may be applied or adapted in other jurisdictions.

1. Arizona

In 2006, the Arizona Supreme Court adopted an amendment to the Arizona Rules of Criminal Procedure providing that defense counsel in capital cases must “be familiar with and guided by the performance standards” set forth in the ABA Guidelines. 21 The comment to the amendment notes that the ABA Guidelines are “a compendium of best practices for representation in capital cases.” 22 Accordingly, the comment observes that, “in exercising independent professional judgment, counsel should be guided by the performance standards when applicable.” 23

The actions preceding the Arizona Supreme Court’s decision to amend the state Rules of Criminal Procedure illustrate one potential way that state bar association leaders can work to improve the quality of indigent capital defense representation in their states. 24 Specifically, the Arizona Supreme Court considered the proposed amendment in response to a petition that the Arizona State Bar Indigent Defense Task Force

20. See, e.g., ALABAMA REPORT, supra note 18, at xiii-xiv; ARIZONA REPORT, supra note 18, at xii-xiv, 140-47; OHIO REPORT, supra note 18, at xvii-xix; see also ABA GUIDELINES, supra note 1, Guideline 2.1 cmt., at 941 (“Each jurisdiction should take effective measures to formalize the process by which high quality legal representation will be provided in capital cases. This may be done by statute, court order, regulation or otherwise. The critical element is that the plan be judicially enforceable in full against the jurisdiction.”). The drafters of the Guidelines emphasized that “[g]eneral statements of expectations about what lawyers should do will not themselves ensure high quality legal representation.” ABA GUIDELINES, supra note 1, Guideline 1.1 cmt., at 937.

21. See List of Cases Citing to the 1989 ABA Guidelines, supra note 11; List of Cases Citing to the 2003 ABA Guidelines, supra note 11.


23. Id. § 6.8 cmt.

24. Id.

filed with the court. A number of entities submitted comments to the Court in support of the amendment, including the State Bar Association of Arizona. The ABA Death Penalty Representation Project worked closely with a coalition that included members of the State Bar, the Indigent Defense Task Force, and civil pro bono and criminal defense lawyers who handled capital cases.

The adoption of Rule 6.8 in Arizona has lead to other encouraging improvements. Because the Guidelines are the standard of care, they have been a factor influencing decisions about defense funding, staffing, and caseloads. Judicial review is increasingly focused on whether counsel met their obligations under the ABA Guidelines. Significantly, in one recent case, the Presiding Criminal Judge of the Maricopa County Superior Court struck a grossly inadequate state habeas petition filed by a court-appointed attorney. He also removed the attorney from the case, citing his failure to conduct an investigation and otherwise provide representation consistent with the ABA Guidelines. The petitioner was granted a rare second opportunity to pursue state post-conviction relief with new counsel.

Arizona has recently taken additional steps to improve the quality of counsel through use of the ABA Guidelines. In 2012, Maricopa County adopted the Plan for Review of Appointed Defense Counsel (“Plan”) to evaluate and certify attorneys who are eligible for appointments to represent capital defendants at trial and on direct appeal. The Plan requires that counsel wishing to be certified must submit a lengthy application with information about their experience, demonstrate that they possess the qualifications set forth in ABA Guideline 5.1, and offer evidence that they have provided legal


28. See ARIZONA REPORT, supra note 18, at i-ii.


30. Id.

31. Id.

representation in accordance with performance and practice standards found in ABA Guidelines 10.1 through 10.13.\textsuperscript{33}

2. Ohio

In January 2010, the Supreme Court of Ohio adopted amendments to Rule 20 of the Rules of Superintendence for the Courts of Ohio.\textsuperscript{34} The amended rule addresses the appointment and performance of defense counsel for indigent defendants in capital cases, and specifically references the ABA Guidelines as the standard of care for the representation of indigent defendants facing a potential death sentence.\textsuperscript{35}

The adoption of amended Rule 20 followed a multi-year effort that the Supreme Court of Ohio initiated by creating the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (“Ohio Committee”) to study issues relating to the appointment and performance of capital defense counsel.\textsuperscript{36} The Ohio Committee proposed recommendations for amendments to Rule 20, which the Supreme Court of Ohio published for public comments in 2009.\textsuperscript{37}

Importantly, amended Rule 20 focuses on the importance of judicial oversight of the defense function in capital cases.\textsuperscript{38} It requires trial judges to appoint counsel who have been certified as qualified to represent defendants facing a potential death sentence.\textsuperscript{39} Judges must

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at 5.
  \item \textsuperscript{34} \textit{RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO R. 20 to 20.05} (2010).
  \item \textsuperscript{35} \textit{Id.} R. 20(II)(C).
  \item Committee members were to be appointed by the governor and the legislature, be experienced criminal defense lawyers, and serve for four-year terms. George J. Ticoras, \textit{The Ohio Supreme Court’s Move Toward Quality Control of Court-Appointed Counsel for Indigent Defendants Charged with Capital Offense Crimes}, 21 \textit{AKRON L. REV.} 503, app. at 517-19 (1988). The Committee’s primary responsibilities were to provide judges with lists of qualified counsel, develop monitoring and evaluation procedures for retention or deletion of attorneys from the list, and sponsor or co-sponsor specialized training programs. \textit{Id.} app. at 520. \textit{See generally} Margery M. Koosed, \textit{Trying to Get It Right: Ohio, from the Eighties to the Teens}, 43 \textit{HOFSTRA L. REV.} (forthcoming 2015).
  \item \textsuperscript{37} \textit{RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO R. 20 to 20.05} (Proposed Amendments 2009). The ABA Death Penalty Representation Project provided resources and assistance to the Ohio Committee as it prepared the proposed recommendations for amendments to Rule 20. \textit{IMPLEMENTATION GUIDELINES, supra} note 8, at 2-3.
  \item \textsuperscript{38} \textit{See RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO R. 20} (discussing the court’s role with regard to appointment of defense counsel).
  \item \textsuperscript{39} \textit{Id.} R. 20(I)(C). The Ohio Committee certifies that capital defense counsel possess specified qualitative skills, including a “demonstrated commitment to providing high quality legal representation in the defense of capital cases.” \textit{Id.} R. 20.01(A)(1) (emphasis added). Amended Rule 20 defines high quality legal representation by reference to the ABA Guidelines, thereby establishing the ABA Guidelines as the standard of care for capital defense representation in Ohio. \textit{See id.} R. 20(II)(C). Other provisions of amended Rule 20 that are consistent with the ABA Guidelines include: (1) guidelines for approved, required comprehensive training programs for capital defense counsel; (2) a delineation of the specific functions of the Ohio Committee, including
also monitor the performance of appointed capital defense counsel “to ensure that the client is receiving representation that is consistent with the [ABA Guidelines].” Finally, trial judges must provide appointed counsel with experts, investigators, and mitigation specialists necessary for the defense effort.

This emphasis on judicial responsibility is another important reminder that the obligations in the ABA Guidelines are not limited to defense counsel. The ABA Death Penalty Representation Project has made dozens of presentations to judicial conferences and groups about the ABA Guidelines since 2003; however, additional training of these groups and education of individual judges should remain a priority to ensure future progress. Trial judges who hold defense counsel to a standard of care but deny them the necessary resources to meet that standard will inhibit even the most ambitious efforts to improve the quality of defense counsel performance or ensure the fairness of the proceeding. To achieve these goals, jurisdictions must bear the full financial cost and responsibility of seeking death by providing appropriate resources for the defense effort, and trial judges must ensure that counsel have received them.

Courts that review Ohio death penalty cases have repeatedly cited the ABA Guidelines favorably. For example, in Hamblin v. Mitchell, the responsibility to establish continuing legal education standards for capital defense counsel, to monitor the performance of capital defense counsel, to investigate complaints about the performance of capital defense counsel, to review and approve training programs for capital defense counsel, and to “[a]dopt best practices” for capital defense representation; and (3) a requirement that the trial court consider the workload of potential defense counsel before making an appointment in a capital case. See id. R. 20 to 20.05.

40. See, e.g., ABA GUIDELINES, supra note 1, Guideline 4.1, at 952-53 (discussing the composition of the defense team and supporting services).

41. For example, the capital case reference book for judges issued by the National Judicial College does not contain a single reference to the ABA Guidelines. NAT’L JUDICIAL COLL., PRESIDING OVER A CAPITAL CASE: A BENCHBOOK FOR JUDGES (William J. Bruson et al. eds., 2009). In 2012, a trial judge in Ohio, presiding over a capital case, threatened to remove a defense lawyer from the case if he “mention[ed] the words ABA Guidelines one more time,” despite the fact that Ohio Rule 20 required him to ensure that the lawyers were complying with them. Telephone Interview with John Parker, Capital Def. Lawyer (Feb. 16, 2010); see also RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO R. 20 (2010).


the U.S. Court of Appeals for the Sixth Circuit granted penalty phase relief on David Hamblin’s claim of IAC. While analyzing counsel’s performance, the court relied heavily on the ABA Guidelines to explain in detail why the ABA Guidelines codified long-standing professional standards that should be used to evaluate the performance of counsel, noting that, “the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the ‘prevailing professional norms’ in ineffective assistance cases. This principle adds clarity, detail and content to the more generalized and indefinite 20-year-old language of Strickland . . . .” The Hamblin court also rejected the idea that the ABA Guidelines created “new” standards, explaining:

[T]he [ABA] standards merely represent a codification of longstanding, commonsense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984 as “prevailing professional norms” as “guided” by “American Bar Association standards and the like.”

. . . .

. . . We cite the 1989 and 2003 ABA Guidelines simply because they are the clearest exposition of counsel’s duties at the penalty phase of a capital case, duties that were recognized by this court as applicable [at the time of Hamblin’s trial].

3. Nevada

In 2008, the Supreme Court of Nevada issued several orders that altered the procedures for appointing and funding defense counsel and experts in death penalty cases, and established new standards for the qualifications and performance of capital defense counsel. The new procedures are intended to comply with the ABA Guidelines.

The Nevada Supreme Court’s order was the culmination of a process that the court initiated in April 2007, when it created an Indigent
Defense Commission ("Commission"). The Commission conducted a statewide survey of indigent defense services, and submitted a report outlining its findings and recommendations. Following public hearings on the Commission’s report, the court issued the January 2008 order adopting various recommendations from the report.

The court’s order required each judicial district to establish an independent authority that would be responsible for appointing counsel and approving fees for counsel, experts, and investigators in death penalty cases. The establishment of an independent authority to appoint counsel and make funding decisions in death penalty cases is a key provision of the ABA Guidelines. Each appointing authority must develop detailed qualification standards consistent with the guidelines promulgated by the court, monitor the performance of capital defense counsel, compile a list of counsel meeting qualification standards, and ensure funding for the cost of competent legal representation.

Nevada has followed the lead of states like North Carolina with its sensible decision to create an independent appointing authority. While judges appoint counsel in the majority of death penalty jurisdictions, it is clear that establishing an appointing authority that is "independent of the judiciary" is one of the best ways to improve the quality of representation. That is because when judges appoint counsel, the powerful and sometimes corrupting influence of electoral politics can

50. Id.
51. Id.
54. See ABA GUIDELINES, supra note 1, Guideline 2.1, at 939; id. Guideline 3.1, at 944.
56. See infra Part III.B.6; see also ABA GUIDELINES, supra note 1, Guideline 2.1 & cmt., at 939, 942-43.
57. ABA GUIDELINES, supra note 1, Guidelines 3.1, at 944.
58. A 2001 article in The New York Times quoted former presiding judge of the Alabama Court of Criminal Appeals William M. Bowen, Jr. discussing the politics of the death penalty in judicial elections: “Judicial politics has gotten so dirty in this state that your opponent in an election
result in appointments that do not serve the best interests of the defendant. It is also because most judges have little or no experience in criminal defense, let alone as capital defense counsel, and do not fully understand what qualifications and skills counsel should possess before receiving an appointment. As a consequence, judges too often encumber indigent capital defendants with grossly incompetent defense counsel who do not effectively represent their clients.

simply has to say that you’re soft on crime because you haven’t imposed the death penalty enough,” Mr. Brown said. “People run for re-election on that basis, because the popular opinion in the state is, ‘Let’s hang ’em.’”


The only answer [explaining the high number of judicial overrides to impose a death sentence] that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral politics.

*Woodward*, 134 S.C.t. at 408.


60. See, e.g., id. at 619 (discussing the lack of experience of attorneys appointed in Corey Maples’s capital case).

61. See Tabak, *supra* note 17, at 1111. The ABA Guidelines indicate that appointment of defense counsel to capital cases should be made by a “Responsible Agency” that is independent of the judiciary. See ABA GUIDELINES, supra note 1, Guideline 3.1, at 944. The appointment by judges of unskilled and incompetent lawyers to represent capital defendants is a longstanding problem. See Tabak, *supra* note 17, at 1111-14. A few egregious examples are discussed below.

William Morrisette, Virginia. Morrisette v. Warden, 613 S.E.2d 551 (Va. 2005). On remand after the Virginia Supreme Court’s first ever grant of IAC relief in a capital case, the trial judge reappointed the lead trial lawyer who had been found ineffective at trial to conduct the resentencing. Va. Capital Case Clearinghouse, 10-Year Morrisette Saga Ends in Negotiated Life Sentence, WASH. & LEE SCH. L., http://wcl3.org/news/storydetail.asp?id=323 (last visited Feb 16, 2014). The judge refused to reconsider the reappointment even after he was notified of Morrisette’s still-pending petition in federal court alleging IAC with respect to the guilt-or-innocence phase of the trial. E-mail from David I. Bruck, Clinical Professor of Law, Wash. & Lee Univ. School of Law, to author (Feb. 12, 2013, 12:48 PM) (on file with Hofstra Law Review). After being reappointed, the lawyer allowed nearly half the time before a scheduled resentencing trial to elapse without even informing the client that he had been reappointed, or that a resentencing date had been set. Id. The original trial lawyer eventually withdrew just hours before a scheduled hearing on the client’s objection to his reappointment. Id. Even after the lawyer’s withdrawal, the trial judge insisted that he had appointed the best lawyer available. Id. New counsel (including Morrisette’s habeas counsel) eventually obtained a continuance and ultimately negotiated a life disposition without a resentencing trial. 10-Year Morrisette Saga Ends in Negotiated Life Sentence, supra.

Ronald Frye, North Carolina. Frye v. Lee, 235 F.3d 897 (4th Cir. 2000). The trial judge appointed two attorneys, one of whom the judge knew to be an alcoholic. *Ronald Frye Clemency Letter*, ACLU (Aug. 15, 2001), https://www.aclu.org/capital-punishment/ronald-frye-clemency-letter. The judge had previously removed the attorney from another capital case and forced him into rehab. See id. Because of the attorney’s alcoholism, he did virtually no work on the case. Id. Trial counsel did not find significant mitigation evidence of childhood abuse and maltreatment that reasonable investigation would have turned up—including a photograph of Frye taken by law enforcement when he was about eight years old, showing serious abuse by his foster father. Id. The

Lonnie Weeks, Virginia, and Carl Chichester, Virginia. Weeks v. Angelone, 528 U.S. 225 (2000); Chichester v. Taylor, No. 98-15, slip op. (4th Cir. 1999). Weeks and Chichester were separately charged with capital murder for unrelated offenses in Prince William County around the same time. \textit{Weeks, 528 U.S. at 228; Chichester, No. 98-15, slip op. at 4. Each was convicted, and the Supreme Court of Virginia affirmed their convictions on direct appeal within about six weeks of each other. Weeks, 528 U.S. at 231; Chichester, No. 98-15, slip op. at 4. The trial judge in each case then appointed counsel to represent them in state habeas proceedings. Petition for Executive Clemency for Carl Hamilton Chichester at 21 n.1, Chichester v. Taylor, No. 98-15 (4th Cir. Jan. 6, 1999), available at http://deathpenaltyusa.org/usa/images/clemency/chichester_carl1.pdf. Weeks’s trial counsel was appointed as Chichester’s state habeas counsel, and Chichester’s trial counsel was appointed as Weeks’s state habeas counsel. Id. As a result, each lawyer was in the position of having to allege IAC against the other, while simultaneously defending against the other lawyer’s charge of IAC. Id. The state bar held that this situation created a conflict of interest, but that it could be cured if one of the state habeas lawyers withdrew. Id. Weeks’s habeas counsel refused to withdraw but filed Weeks’s petition in the wrong court on the day it was due, thereby defaulting all of Weeks’s habeas claims. Id. Weeks was executed on March 16, 2000. Executions in the U.S. in 2000, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/executions-us-2000 (last visited Feb. 16, 2014). Chichester was executed on April 13, 1999. Executions in the U.S. in 1999, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/executions-us-1999 (last visited Feb. 16, 2014).

Jason Reeves, Louisiana. State v. Reeves, 11 So. 3d 1031 (La. 2009). After original counsel secured a mistrial, the trial judge removed original counsel and appointed the local public defender over the objections of both attorneys. \textit{Id.} at 1035, 1042. Original counsel had represented Reeves for more than twenty-three months at the time of removal, and the public defender objected on the grounds of a crushing existing caseload and the inadequate resources of his office. \textit{Id.} at 1042, 1052. The judge refused original counsel’s offer to continue representation of Reeves pro bono. \textit{See id.} at 1052, 1055. Reeves was convicted upon retrial and is now pursuing post-conviction relief. \textit{Id.} at 1035-36.

Kenneth Neal, North Carolina. State v. Neal, 487 S.E.2d 734 (N.C. 1997). The trial judge knowingly appointed an attorney who had been previously convicted of felony child pornography charges. Bob Burtman, \textit{Criminal Injustice, DEATH PENALTY INFO. CENTER, Oct. 16, 2002, http://www.deathpenaltyinfo.org/node/533. The charges and conviction were widely publicized and known in the community where the defendant was eventually tried. \textit{Id.} The attorney was an assistant district attorney when charged, but was not able to secure a prosecution job after his release from prison. \textit{See Frances Ferris, Common Sense Says . . . That People on Death Row Often Had the State’s Worst Lawyers at Trial, COMMON SENSE FOUND., http://www.prisonpolicy.org/scans/DP$pecialRepon2002.pdf (last visited Feb. 16, 2014). His law license was restored and he was allowed to return to law practice, although he had not yet completed court-ordered probation. \textit{See Burtman, supra. The attorney did not question prospective jurors concerning whether they knew of his own conviction at Neal’s trial, and several who did know became jurors. \textit{Id.} Jurors later admitted that the attorney’s conviction was discussed during deliberations and that they held it against Neal. \textit{Id.} Neal is still pursuing post-conviction relief. See Danielle Battaglia, \textit{Senate Bill Impacts Rockingham Capital Cases, ROCKINGHAM NOW (June 12, 2013, 12:00 PM), http://www.newssadvance.com/rockingham_now/news/eden_reidsville/article_5c5df9d9-d2c0-11e2-9f3a-001a4bc6878.html?mode=jqm_com.}

capital cases, apparently because he had worked as a prosecutor and all of the judges knew him. See Stephen B. Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 ANN. SURV. AM. L. 783, 804-05. The attorney had a reputation for providing poor representation in capital cases. See id. In Kerr’s case, he conducted his mitigation investigation in the hallway outside the courtroom after the jury came back with a guilty verdict. E-mail from David I. Bruck to author, supra. He did not prepare mitigation evidence because he believed the jury would acquit Kerr. Ex parte Kerr, 2009 WL 874005, at *2. The attorney was later found to have provided Kerr with IAC at sentencing, and Kerr was granted a new sentencing hearing. Id. Kerr was offered and accepted a life-saving plea. See id.

Robert Sawyer, Louisiana. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). The trial judge appointed an attorney with less than two years of experience. See id. at 586. A second attorney, who had four years of experience, was appointed as lead counsel days before trial. Id. Sawyer, a person with mental retardation, refused an offer because of a life plea because he previously received a four-year sentence when a murder charge was reduced to manslaughter for a plea deal. See id.; U.S. Execution of Mentally Retarded Condemned: State Legislatures Urged to Act, HUM. RTS. WATCH (Mar. 19, 2001), available at http://www.hrw.org/de/print/news/2001/03/19/us-execution-mentally-retarded-condemned. Trial counsel did not know that Sawyer was mentally retarded and told the jury he was a “sociopath” in closing argument at sentencing. ROBERT PERSKE, ROBERT SAWYER EXECUTED—HIS RETARDATION NEVER CONSIDERED BY THE COURTS 1 (1993) (internal quotation marks omitted). The Fifth Circuit noted that trial counsel:

(1) failed to ask the jurors about their attitudes towards the death penalty during voir dire; (2) objected to the jury’s learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase; (3) failed to object to several inadmissible, inflammatory remarks by the prosecutor; (4) produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as his chief defenses to negate the specific intent required for first degree murder; (5) failed to make a closing argument at the guilt phase of trial; and (6) failed to prepare a competent penalty phase presentation.

Sawyer, 848 F.2d at 588. The court nevertheless denied habeas relief, and Sawyer was executed on March 5, 1993. PERSKE, supra, at 1.

Christa Pike, Tennessee. Pike v. State, No. E2009-00016-CCA-R3-PD (Tenn. Crim. App. Apr. 25, 2011). The trial judge appointed an attorney that had recently been implicated in an overbilling scandal that exposed rampant abuses among the local bar in indigent criminal cases. Id. slip op. at 38, 41, 56. The judge was unwittingly complicit in the scandal as she had signed many of the billing orders at issue. E-mail from David I. Bruck to author, supra. Although the attorney was never prosecuted, the local prosecutor noted his particular case was worthy of prosecution. See Pike, No. E2009-00016-CCA-R3-PD, slip op. at 56. While disciplinary proceedings were pending and there was still a prospect of prosecution, the trial judge appointed the attorney to represent Pike relying on the attorney’s representation that all issues related to the overbilling were resolved. Id. slip op. at 38, 41, 57-58. The attorney had never tried a capital case and had a reputation for mediocrity. Id. slip op. at 38. The attorney did not provide the mitigation specialist’s report to the court of the prosecution before a guilty verdict was returned and then lied about the reason for this when questioned by the court. Id. slip op. at 36. When the mitigation specialist refused his request to corroborate this, he decided not to present the planned mitigation case. See Pike, No. E2009-00016-CCA-R3-PD, slip op. at 44-45. Pike was convicted and sentenced to death. Jamie Satterfield, Killer Christa Gall Pike Asks Fed Court to Block Her Execution: Argues Courts Violated Her Rights, KNOX NEWS (Feb. 13, 2013, 4:00 AM), http://www.knoxnnews.com/news/2013/feb/13/killer-christa-gall-pike-asks-fed-court-to-block. Pike is still pursuing post-conviction relief. Id.

B. Adoption Through State Indigent Defense Commission

In a number of states, legislatively-created, statewide public defender commissions have adopted or established the ABA Guidelines, or a modified version of the ABA Guidelines, as qualification or performance standards for legal representation in death penalty cases.
These commissions often have responsibilities and functions that are consistent with the ABA Guidelines’ recognition of the need for an independent authority to administer the defense function and provide oversight in death penalty cases.

1. Louisiana

In 2009, the Louisiana Public Defender Board (“Louisiana PDB”) adopted Capital Defense Guidelines for Louisiana (“Louisiana Guidelines”), which established qualification and performance standards for capital defense representation in Louisiana that are modeled after the ABA Guidelines. The Louisiana Guidelines were officially promulgated as administrative regulations and became effective on May 20, 2010. In adopting the Louisiana Guidelines, the Louisiana PDB was acting pursuant to the directive contained in the Louisiana Public Defender Act of 2007, which, among other things, required the Louisiana PDB to create “mandatory . . . statewide public defender standards and guidelines that require public defender services to be provided in a manner that is uniformly fair and consistent throughout the state,” including separate standards and guidelines for capital cases.

Prior to adopting the Louisiana Guidelines, the Louisiana PDB presented the Louisiana Guidelines to the Louisiana State Bar Association’s Right to Counsel Committee, and distributed them to all district public defenders, to the Executive Director of the Louisiana District Attorneys Association, and to the state court judge serving as President of the District Judges Association and the Chair of the Capital Crimes Education Committee. These entities and individuals had the opportunity to submit comments about the Louisiana Guidelines. The Louisiana Guidelines explicitly state that they “are intended to adopt and apply the guidelines for capital defense set out by” the ABA Guidelines and that “the ABA guidelines have been adapted and applied to meet the specific needs and legal requirements applicable in Louisiana while seeking to give effect to the intention and spirit of the ABA guidelines.”

63. Id.
64. LA. REV. STAT. ANN. § 15:142 (2005).
67. See id.
The process of implementing a capital counsel certification requirement in Louisiana once again demonstrates why a full jurisdictional commitment is required for any reform to be effective. As required by the Louisiana Guidelines, counsel must now complete specialized training and be certified by the PDB as possessing the necessary skills and qualifications before they can be appointed to a capital case. Some judges, frustrated by this requirement and the unavailability of certified capital counsel, have attempted to force the appointment of counsel who have not been certified. Although this is a problem that is a direct consequence of the high number of capital case filings by prosecutors, it is often the defense bar that is criticized.

2. Oregon

In 2007, the Oregon Public Defense Services Commission (“Oregon PDSC”) adopted the performance standards set forth in ABA Guidelines 10.2 through 10.15.2 as the standards for the performance of defense counsel in death penalty cases, and designated the Oregon Office of Public Defender Services (“Oregon OPDS”) as the “responsible agency” for purposes of appointing defense counsel in death penalty cases. Consistent with the ABA Guidelines, the Oregon OPDS works with the court to assign defense counsel in death penalty cases, recruits and certifies the eligibility of counsel to represent defendants facing a potential death sentence, maintains the roster of certified death penalty defense counsel, and authorizes funds for experts.

69. Id. § 705.

70. See, e.g., State v. Reeves, 11 So. 3d 1031, 1042 & n.13 (La. 2009) (discussing the court’s appointment of an overburdened attorney and the court’s duty to provide qualified counsel to indigent defendants).


and investigators in death penalty cases consistent with relevant provisions of Oregon law.\textsuperscript{73}

The Oregon Supreme Court recently acknowledged the ABA Guidelines in \textit{State v. Langley}.\textsuperscript{74} In that case, the Oregon Supreme Court reversed the trial court’s judgment requiring Langley to proceed without representation of counsel.\textsuperscript{75} In doing so, the Oregon Supreme Court cited the Oregon PDSC’s policy—“Legal Representation Plan for Death Penalty Cases”—as part of the applicable legal principles governing a criminal defendant’s right to counsel.\textsuperscript{76} It noted that the Oregon PDSC’s policy adopted several standards from the ABA Guidelines, including Guideline 10.4, which provides that the responsible agency “should designate lead counsel and one or more associate counsel.”\textsuperscript{77} The adoption of this provision, the court said, “confirm[s] that, in a death penalty case involving an indigent defendant in Oregon, the defense team responsible for furnishing professional assistance to the accused ordinarily includes a lead counsel and a co-counsel.”\textsuperscript{78}

3. Montana

In 2005, the Montana Legislature enacted the Montana Public Defender Act.\textsuperscript{79} This act established a statewide public defender system and created a public defender commission; the public defender commission’s duties include establishing statewide standards for the qualifications, training, and workload of attorneys representing indigent criminal defendants.\textsuperscript{80} With respect to capital cases, the public defender commission promulgated standards requiring counsel to “meet the standards for competency of counsel for indigent persons in death penalty cases adopted by the Montana Supreme Court, and those set forth in the [ABA] Guidelines.”\textsuperscript{81}

\begin{itemize}
  \item \textsuperscript{73} See \textit{Delivery of Defense Services}, supra note 72, at 9-10, 14, 20. The Oregon PDSC’s adoption of the ABA Guidelines and appointment of the Oregon OPDS as the responsible agency occurred after the Oregon PDSC conducted hearings to receive testimony about legal representation in death penalty cases and evaluated the existing capital defense system in Oregon in comparison to the ABA Guidelines. See \textit{id.} at 1, 7-9. The Oregon PDSC also reviewed a report that the Oregon OPDS submitted to it, entitled \textit{Delivery of Public Defense Services in Death Penalty Cases}. See \textit{id.} at 1. The ABA Death Penalty Representation Project was a resource to the Oregon OPDS before and during the Oregon OPDS’s preparation of its report to the Oregon PDSC. See \textit{id.} at 9-10.
  \item \textsuperscript{74} 273 P.3d 901, 909-10 (Or. 2012).
  \item \textsuperscript{75} \textit{Id.} at 904.
  \item \textsuperscript{76} \textit{Id.} at 909 (internal quotation marks omitted).
  \item \textsuperscript{77} \textit{Id.} at 909-10 (internal quotation marks omitted).
  \item \textsuperscript{78} \textit{Id.} at 910.
  \item \textsuperscript{79} MONT. CODE ANN. § 47-1-101 to -216 (2011).
  \item \textsuperscript{80} \textit{Id.}
  \item \textsuperscript{81} \textit{Standards for Counsel Representing Individuals Pursuant to the Mont. Pub. Defender Act} sec. VI(B)(a) (2007).
\end{itemize}
4. Georgia

In 2003, the Georgia General Assembly enacted the Georgia Indigent Defense Act, which created the Georgia Public Defender Standards Council (“Georgia PDSC”). The Georgia PDSC is an independent agency within the executive branch of the state government of Georgia. Pursuant to statute, the Georgia PDSC is “responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation” in criminal proceedings. In 2005, the Georgia PDSC adopted the Georgia Death Penalty Standards, which are nearly identical to the ABA Guidelines.

In addition, the Georgia Supreme Court has relied upon the ABA Guidelines to review defense counsel’s performance. In Hall v. McPherson, the Georgia Supreme Court relied on the ABA Guidelines to vacate Mark McPherson’s death sentence. In that case, the lower court had found that McPherson’s trial counsel was ineffective in its investigation, preparation, and presentation of mitigation evidence. The warden appealed, and argued that the habeas court erred as a matter of law by relying upon the ABA Guidelines in evaluating counsel’s performance.

The Georgia Supreme Court rejected the warden’s argument. Citing case law that recognizes the use of the ABA Guidelines in measuring the reasonableness of trial counsel’s mitigation investigation, the court found that the court below—the habeas court—had conducted an objective review of counsel’s performance. Further, the court found—according to the professional norms outlined in the ABA Guidelines—that the record showed adequate support for the court’s conclusion that McPherson’s counsel was deficient.

82. GA. CODE ANN. § 17-12 (2013).
83. Id. § 17-12-3.
84. Id. § 17-12-1(b).
85. Id. § 17-12-1(c).
86. GA. DEATH PENALTY STANDARDS (2005); see GA. CODE ANN. § 17-10-30 (2007).
87. See IMPLEMENTATION OF GUIDELINES, supra note 8, at 4.
89. 663 S.E.2d 659 (Ga. 2008).
90. Id. at 661.
91. Id. at 664, 668.
92. Id. at 661.
93. Id.
94. Id. at 661 & n.6.
95. Id. at 660.
Unfortunately, Georgia’s efforts to improve its capital counsel system quickly foundered after a high-profile capital case became a lighting rod that resulted in unwarranted criticism by elected officials about the costs of that defense effort. That criticism eventually led to a withdrawal of funding by the legislature, a decision which quickly doomed the effectiveness of the Georgia Indigent Defense Act and the newly created Georgia PDSC.

5. Kentucky

In 2003, the Department of Public Advocacy for the Commonwealth of Kentucky (“DPA”) adopted the performance standards of the ABA Guidelines as the required standard of care for counsel who represent defendants facing a potential death sentence. The DPA not only amended its internal policies and procedures, but also modified the contract used for working with private counsel who represent defendants facing a potential death sentence to require adherence to the performance standards of the ABA Guidelines, which the DPA describes as “a minimum guideline” for death penalty defense representation.

96. See Dennis Brandon Wood, Note, Driving Up the Costs: An Examination of the Brian Nichols Trial and the New Attack on the Death Penalty, 33 J. LEGAL PROF. 173, 183 (2008). In 2005, Brian Nichols shot and killed the judge, a sheriff, and the court reporter in a courtroom. Id. at 173. Although he agreed to accept a sentence of life in prison without the possibility of parole, the state sought the death penalty—filing fifty-four separate charges against him and serving the defense with thousands of pages of documents associated with the prosecution of the case. See id. at 173 n.1; Brenda Goodman, Georgia Murder Case’s Cost Saps Public Defense System, N.Y. TIMES, Mar. 22, 2007, at A16. After a six-week trial, the jury returned a verdict of life without parole. Wood, supra, at 173 n.1; Brian Nichols Found Guilty of Courthouse Shootings: Nichols Could Face Death Sentence, WSB-TV (Nov. 6, 2008, 2:20 PM), http://www.wsbtv.com/news/brian-nichols-found-guilty-of-courthouse-shootings/nFCsy. But, by then, the cost of the trial had reached millions of dollars, with the defense effort costing nearly 1.8 million dollars. Wood, supra, at 174. Although this expense could have been entirely avoided if the state had agreed not to seek death, it was the defense effort that was heavily criticized for the costs of the trial. See id. at 183; Goodman, supra. As a consequence, public funding of the Georgia Indigent Defense Act was cut to $160,000 in 2010, leading to a collapse of the public defender system. Settlement Reached in Georgia’s Indigent Defense Case, PEACH PUNDIT (Dec. 16, 2011, 2:37 PM), http://www.peachpundit.com/2011/12/16/settlement-reached-in-georgias-indigent-defense-case.

97. See US Supreme Court Declines Review of Georgia’s “Serious and Unprecedented Violence to the Right to Counsel,” S. CENTER FOR HUM. RTS. (July 23, 2010), http://www.schrt.org/action/resources/for_immediate_release_right_to_counsel_denied_by_georgia_supreme_court_4_3 (discussing Georgia’s failure to appropriate funds to its public defender system).

98. Ky. Dep’t of Pub. Advocacy, Agreement to Provide Legal Representation in a Capital Prosecution (on file with the ABA Death Penalty Representation Project); see IMPLEMENTATION OF GUIDELINES, supra note 8, at 4.

6. North Carolina

In 2000, the North Carolina General Assembly enacted the Indigent Defense Services Act ("IDS Act"), which created the Office of Indigent Defense Services ("IDS Office") and its governing body, the Commission on Indigent Defense Services ("IDS Commission"). This legislation implemented a model of an effective legal services delivery system with many elements that were later described in the 2003 revision of the ABA Guidelines. Consistent with the Guidelines, the IDS Office serves as the "responsible agency" and oversees the provision of legal representation to indigent defendants facing a potential death sentence in North Carolina. As an appointing authority that is independent of the judiciary, the IDS Office appoints defense counsel in all capital cases; rules upon funding requests for experts, investigators, mitigation specialists, and support services; conducts training programs for death penalty defense attorneys; and supervises compliance with qualification and performance standards for defense counsel that the IDS Commission establishes.

The IDS Commission is responsible for developing standards of practice, training requirements, minimum experience levels, workloads for defense counsel adopted qualification, and performance standards for capital cases that are consistent with the ABA Guidelines.

101. Id. § 7A-498.2.
102. See id. § 7A-498.3.
103. Id. § 7A-498.5.
104. Id. § 7A-498.3.
105. Id. § 7A-498.5. Prior to enacting the IDS Act, the General Assembly created the Indigent Defense Study Commission ("Study Commission") in 1998. See NORTH CAROLINA INDIGENT DEFENSE STUDY COMMISSION: REPORT AND RECOMMENDATIONS 1 (2000), available at http://www.ncids.org/home/id%20study%20commission%20report.pdf. The Study Commission’s purpose was to “study methods for improving the management and accountability of funds being expended to provide counsel to indigent defendants without compromising the quality of legal representation mandated by State and federal law.” Id. at 3 (internal quotation marks omitted). After conducting an extensive study of indigent defense in North Carolina and across the nation, consulting numerous state and national experts and holding a public hearing to gain the perspective of judges, defense attorneys, prosecutors, and the public, the Study Commission prepared a report with recommendations for the General Assembly. Id. at 1. The Study Commission’s report identified several factors that contributed to problems with North Carolina’s indigent defense system, including: (1) the lack of any centralized authority for management and oversight; (2) the absence of any statewide uniform standards for appointment, qualifications, performance, and compensation of counsel; and (3) the lack of independence of criminal defense lawyers. Id. at 6-7. In response to these problems, the Study Commission recommended the creation of the IDS Office and the IDS Commission in order “to improve the efficiency, cost-effectiveness, and accountability of quality indigent defense programs” in North Carolina. Id. at 3. The IDS Act implemented the Study Commission’s recommendations. See N.C. GEN. STAT. § 7A-498 to -498.8.
Following the creation of the IDS Act, the number of capital trials in North Carolina decreased from about sixty per year in 2000, to only about ten to fifteen per year in 2011.\footnote{See Sentencing: No Death Sentences in North Carolina for the First Time Since 1977, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/sentencing-no-death-sentences-north-carolina-first-time-1977 (last visited Feb. 16, 2014).} The decrease in capital trials also resulted in a decrease in the number of new death sentences imposed.\footnote{Id.} The number of death sentences imposed nationally has decreased significantly since the 1990s, but the decrease in North Carolina has outpaced the rest of the nation.\footnote{MARTTHEW ROBINSON, THE DEATH PENALTY IN NORTH CAROLINA: A SUMMARY OF THE DATA AND SCIENTIFIC STUDIES 5 (2011), available at http://gjs.appstate.edu/sites/gjs.appstate.edu/files/ncdeathpenaltyfinal.pdf.} Academics in the state credit the creation of the IDS Office for the decrease, explaining:

By centralizing indigent defense services in a single state-wide operation and by requiring that only lawyers affiliated with IDS could be assigned capital cases, the reform did more than any other single action to revolutionize the practice of capital punishment in the state. It is no mere coincidence that numbers of death sentences have declined so dramatically since the passage of this reform . . . \footnote{Frank R. Baumgartner & Isaac Unah, Univ. of N.C. at Chapel Hill, Paper Presentation at the Annual Meetings of the American Society of Criminology: The Decline of Capital Punishment in North Carolina 7 (Nov. 17-20, 2010) (on file with Hofstra Law Review).}

Observers report a significant improvement in the quality of trial counsel handling capital cases in the decade since the IDS Office was established.\footnote{Telephone Interview with Tye Hunter, Former Dir., N.C. Office of Indigent Def. Servs. (Oct. 14, 2011).} According to former IDS Office Director Tye Hunter, a majority of North Carolina judges now agree that it has been a “great force” in improving the quality of counsel in capital cases.\footnote{Id.}

C. Adoption Through State Bar Association: Texas

No death penalty jurisdiction can match Texas’s record of egregiously incompetent defense counsel appointments.\footnote{See, e.g., T EX. DEFENDER SERV., LETHAL INDIFFERENCE, at ix (2002), available at http://www.fordarlieroutier.org/RelatedLinks/LethalIndifference/front.pdf (stating that Texas has been responsible for more that one-third of executions within the United States since 1976 and more than half of all executions within the United States in 2002); Ross E. Milloy, Judge Frees Texas Inmate Whose Lawyer Slept at Trial, N.Y. TIMES, Mar. 2, 2000, at A20 (discussing the reversal of a conviction caused by counsel being asleep at trial); Lise Olsen, Attorneys Overworked in Harris County Death-Row Cases, HOUS. CHRON., May 25, 2009, at A1 (discussing the heavy caseload of capital defense attorneys in Harris County); Richard A. Oppel Jr., Death Penalty in Texas Case Is Overturned, Citing Lawyer, N.Y. TIMES, Aug. 31, 2000, at A14 (discussing an attorney’s failure to}
executes the largest number of prisoners year after year also has one of the worst capital counsel systems in the country. Any success that could result from the commendable efforts noted below are simply overwhelmed by a system that persistently reappoints ineffective lawyers, denies necessary funding, and ignores flagrant examples of ineffectiveness and injustice.

In 2006, the State Bar of Texas made an attempt to address longstanding concerns by adopting state-specific guidelines for the performance of defense counsel. Specifically, in April 2006, the Board of Directors of the State Bar of Texas adopted the Guidelines and Standards for Texas Capital Counsel (“Texas Guidelines”).

The Texas Guidelines are a Texas-specific version of the ABA Guidelines, with the goal of describing “a state-wide standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any State of Texas jurisdiction.” The State Bar of Texas Standing Committee on Legal Services to the Poor in Criminal Matters (“Texas Standing Committee”) drafted the Texas Guidelines as “a comprehensive tool available to assist attorneys appointed to represent indigent Texans in death-penalty matters.” In 2005, prior to
drafting the Texas Guidelines, the Texas Standing Committee worked with the newly created State Capital Habeas Project to consider ways to improve the quality of representation in capital cases and conducted research to examine the issues surrounding the appointment, qualifications, and performance of defense counsel in death penalty cases. This inquiry informed the Texas Standing Committee’s decision to use the ABA Guidelines as the model for the Texas Guidelines.

D. Adoption by Federal Government

It should be briefly noted that the federal government has also acknowledged the ABA Guidelines as the standard of care. The Commentary to the Defender Services Program Strategic Plan indicates that counsel in federal death penalty cases are expected to comply with the ABA Guidelines. Accordingly, the ABA Guidelines are the subject of frequent training seminars sponsored by the Administrative Office of the U.S. Courts. The obligations promulgated by the ABA Guidelines are also applicable to capital military proceedings. The Joint Explanatory Statement of the Committee of the Conference for the Military Commissions Act of 2009 indicates that, when prescribing regulations to implement the provisions for military commissions, the Secretary of Defense is expected to “give appropriate consideration to

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119. See id.
120. TEX. GUIDELINES, supra note 115, at 967. In a recent amicus brief, the Texas State Bar stated:

The Texas Guidelines are descriptive, articulating as they do the duty to investigate for mitigating evidence that was settled and well-established in 1984, when Strickland was decided. Thus, the Texas Guidelines can properly be applied to representations that occurred after 1984 but before the 2006 date of publication [of the Texas Guidelines].

Brief of the State Bar of Texas as Amicus Curiae in Support of Neither Party at 13, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (No. 11-10189).
121. JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 91 (2010), available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf. Aimed at providing counsel services “consistent with the best practices of the legal profession,” the Defender Services Program Strategic Plan was endorsed by the Defender Services Committee of the United States Judicial Conference.” Id. at 91 n.90.
123. See ABA GUIDELINES, supra note 1, Guideline 1.1 definitional n.2, at 919.
the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003) and other comparable guidelines.”

IV. OVERCOMING IMPEDIMENTS TO ENSURE FUTURE PROGRESS

There is still a great deal of work to be done in the coming years. As has been shown in the discussion above, a jurisdiction’s compliance with the ABA Guidelines will require a financial investment in the defense effort equal to that made in the prosecution effort. Many defense counsel are still routinely denied the resources that they need to be effective. Ensuring a competent and constitutional defense function requires money, and anemic state budgets and the politics of the death penalty will make securing funds difficult. But, using the ABA Guidelines is consistent with efficiency as well as effectiveness. The cost that jurisdictions must pay as a result of wrongful convictions, new sentencing hearings, and retrials that result from ineffective counsel mistakes far exceed the cost of adequately funding the effective counsel system that the Guidelines describe. “Getting it right” in the first place is the best way to avoid the unnecessary financial and tragic human costs that are the result of defense counsel ineffectiveness.

Unfortunately, there are still some judges who resent the intrusion of the ABA Guidelines into the unfettered exercise of judicial discretion. The U.S. Supreme Court Justice Samuel Alito even submitted a separate concurrence in one case to say only that he did not think that the ABA Guidelines “have special relevance.” Some

126. See ABA GUIDELINES, supra note 1, Guideline 9.1, at 981; supra Parts II–III.
127. See Charles W. Hoffman, Abolishing Death Penalty Was Right Choice for State, CHI. SUN-TIMES, Mar. 4, 2012, at 24. When Illinois abolished the death penalty, it was stated:

“Beyond the enormous costs of capital trials and appeals, Illinois taxpayers have also had to pay more than $64 million in damages to men wrongly convicted of murder and sentenced to death, due to the corruption or incompetence of police, prosecutors, defense lawyers and judges, who refused or failed to fairly and honestly apply the law.”

Id.
129. See, e.g., Bobby v. Van Hook, 558 U.S. 4, 13-14 (2009) (per curiam) (Alito, J., concurring). A trial judge at a national judicial death penalty conference interrupted this author’s presentation to announce that he would never acknowledge the ABA Guidelines because he “need[ed] to be re-elected.”
130. Id. It is clear that Justice Alito alone holds this view of the ABA and the Guidelines; otherwise, the majority opinion would have contained his statement or his concurrence would have been joined by other justices. Notwithstanding this fact, Justice Alito’s comment has been misunderstood by some courts to mean that the U.S. Supreme Court now disapproves of the ABA
individual defense lawyers also feel personally threatened by the unprecedented scrutiny of their qualifications and performance. They are probably the very same lawyers who should not handle another capital case. Use of the ABA Guidelines will end the cozy relationships that exist between some judges and the same unskilled, negligent defenders they appoint in case after case. This is not a welcome prospect for those who benefit when standards and expectations for performance are low. But, it is change that must occur if our legal system is to function as it should.

V. Conclusion

Meaningful reform, of course, does not happen quickly. It is a slow and often frustrating process, with more challenges and failures than successes. The ABA Guidelines will be an essential tool for the transformation of our broken death penalty system, but, in the years ahead, we will need everyone’s commitment to retain and build upon the


Even if petitioner had provided the court with reasoned factual support for a contention that the ABA Guidelines were not followed, the court would not be persuaded. As Justice Alito noted in his concurring opinion in Bobby v. Van Hook:

The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. Id. slip op. at 34 n.10 (quoting Van Hook, 558 U.S. at 13-14).

In fact, the court’s opinion did not alter its prior jurisprudence regarding the ABA Guidelines. See, e.g., Showers v. Beard, 635 F.3d 625, 633 (3d Cir. 2011). It merely stated what has already been expressed in other cases: defendants are entitled to representation that meets objective standards of reasonableness given the prevailing professional norms of that time. See, e.g., id. at 633 n.10. The court said:

The Supreme Court case cited by the Commonwealth for the proposition that ABA standards “do not have any special relevance for assessing attorney performance” is inapposite. Appellant’s Br. at 30 (citing Bobby v. Van Hook, --- U.S. ----, 130 S. Ct. 13, 20, 175 L.Ed.2d 255 (2009) (Alito, J., concurring)). In that case, the court of appeals used the wrong ABA standards, those from eighteen years after the defendant’s trial, so the Court merely found that those standards did not speak to the current prevailing norms, not that the then effective standards would not be relevant.

Id.

131. 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, 499-501 (2013) (discussing the lawyer’s emotional response to allegations of IAC). The author has read and has been informed about limited protests made by some members of bar associations which have implemented counsel certification programs, mandatory training requirements, or other qualifications for the appointment of counsel.

132. See id. at 492-98 (discussing the motivated reasoning of self-interested attorneys responding to allegations of IAC allegations).
accomplishments described in this Article. Ten years from now, I hope we will look back at this time and see it as a turning point. We are, I hope, in the “last period of the prehistoric,” and at the beginning of a new era that will bring fundamental and lasting changes to our legal system, and the day when we will finally ensure justice for all.

133. See supra Part II.
134. BARTOLOMEO VANZETTI, THE STORY OF A PROLETARIAN LIFE 22 (1924) (“I am convinced that human history has not yet begun; that we find ourselves in the last period of the prehistoric.”).
THE CONTINUING DUTY THEN AND NOW

David M. Siegel*

I. INTRODUCTION

The recognition in the American Bar Association ("ABA") Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines" or "Guidelines")1 of a continuing duty on the part of defense counsel to safeguard the interests of former clients by facilitating the work of successor counsel was, and is, essential to implementing post-conviction review of the effectiveness of their representation.2 It is very difficult to meaningfully assess a defense lawyer’s representation if one cannot access her files (or if they are incomplete) and her strategic thinking and research ideas, let alone her testimony. The continuing duty’s inclusion in 2003 was “new” insofar as prior practice guidelines and public recognition were concerned (with the exception of one state ethics opinion3 and one undistinguished scholarly article);4 but over a century before, there had been isolated instances of lawyers discharging a continuing duty to former clients by facilitating their post-conviction efforts. The continuing duty’s inclusion in the ABA Guidelines was remarkable, not as a break from existing doctrine, but because it had almost never been articulated as extending, in scope and duration, to affirmative practices during the post-conviction phase.

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2. Id. Guideline 10.13, at 1074.
Part II of this Article reviews these historical antecedents (many of which involved capital cases) in which lawyers acted upon a continuing duty to enable their former clients to advance post-conviction claims, sometimes before any existing jurisprudence supported these claims.5

Operationalizing the continuing duty, however, required more than simply stating its existence. It required that practitioners take the four steps set forth in Guideline 10.13,6 even when doing so could present an apparent ethical dilemma for former counsel: facilitating post-conviction claims alleging their own ineffective assistance.7 The Guideline offered an unqualified assertion concerning actions former counsel should take in detailing her strategic thinking to successor counsel, even when detailing this thinking would be used for the purpose of the former client’s claim of ineffective assistance of counsel (“IAC”): “To do otherwise is professionally unethical.”8 At least one jurisdiction-specific performance guideline promulgated since issuance of the ABA Guidelines reflects this position as well.9 This latent ethical conflict, creating a fundamental practical hurdle for many post-conviction claimants, became patent in 2010 with the Formal Opinion of the ABA’s Standing Committee on Ethics and Professional Responsibility (“ABA

5. See infra Part II.

6. ABA GUIDELINES, supra note 1, Guideline 10.13, at 1074 (setting forth that previous counsel must maintain files that will adequately “inform successor counsel of all significant developments,” provide the files and all information about the representation to successor counsel, “share[e] potential . . . areas of legal and factual research with successor counsel,” and cooperate in successor counsel’s “professionally appropriate legal strategies”).

7. Id. Guideline 10.13 cmt., at 1075 (“Specifically, [prior counsel] must cooperate with the professionally appropriate strategies of successor counsel (Subsection D). And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.”).

8. Id.

9. The Texas State Bar’s Guidelines and Standards for Texas Capital Counsel specifically delineate how counsel should discharge the continuing duty—both as successor counsel and prior counsel. See generally STATE BAR OF TEX., GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, in 69 TEX. BAR J. 966, 966-982 (2006), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/TX_Bar_Associatio n_adopted_version_of_ABA_Guidelines.authcheckdam.pdf. With respect to successor counsel, Guideline 11.1(B) provides: “Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.” Id. Guideline 11.1(B), at 972. With respect to prior counsel, Guideline 12.1(F) provides: “Trial counsel should cooperate with successor direct appeal, habeas and clemency counsel in providing relevant information to successor counsel, including trial counsel’s prior representation files upon the client’s consent, in order to maintain continuity of representation, and to assist future counsel in presentation of issues relevant to subsequent litigation efforts.” Id. Guideline 12.1(F), at 975.
Committee” or “Committee”), addressing how counsel’s continuing duty to her former client should affect her interaction with the prosecutor. The Formal Opinion’s reinforcement of the continuing duty should increase awareness of this duty beyond the more specialized practice of capital post-conviction litigation. The relatively few reported cases to date concerning implementation of this duty and the carrying out of the steps recommended by the ABA Committee suggest it is being formalized in the capital and non-capital contexts. Thus, it is particularly odd that several state ethics bodies have disagreed with the Committee’s recommended steps. Part II of this Article reviews the developing jurisprudence and the treatment of the Formal Opinion in the four ethics bodies that have addressed the matter to date. It is hoped that greater familiarity with the process will lead to a different conclusion concerning the viability of the Formal Opinion.

II. HISTORICAL ANTECEDENTS TO THE CONTINUING DUTY OF COUNSEL

The continuing duty has three principal sources: the duty of loyalty, the duty of competence, and the constitutional guarantee of effective assistance. The duty of loyalty, principally a duty to safeguard client confidences and defend privileged communications against compelled disclosure, is hundreds of years old. The duty of competence is much newer, though perhaps not as new as is typically assumed. It is usually understood as dating, for federal constitutional purposes, back to Powell v. Alabama, but court decisions had found representation inadequate under state constitutions and state statutes for decades before Powell, and had also occasionally cited the Federal Constitution.

That there is a conflict between a lawyer for one party in a criminal case, having represented the other side, even if there is no obvious use of the knowledge gained by the prior representation, was firmly established

11. Kim Alderman & Byron Lichstein, Protect Confidentiality in Ineffective Assistance Claims, Wis. L.J. (Oct. 19, 2010, 11:19 AM), http://www.wislawjournal.com/2010/10/19/protect-confidentiality-in-ineffective-assistance-claims. There is no easy solution to correcting the misconception that an IAC claim serves as an automatic waiver of confidentiality between defendant and trial counsel. The recent ABA Formal Opinion 10-456, along with efforts on the part of post-conviction litigators to make trial counsel and the state aware of defendants’ right to continued confidentiality, despite an IAC claim and until a court orders otherwise, should combat unintentional violations of ethical obligations preceding IAC hearings.
12. See infra Part III.
15. See, e.g., Batchelor v. State, 125 N.E. 773, 776 (Ind. 1920).
long before formal ethics rules existed. Similarly, decisions were rendered invalidating convictions for incompetent representation before the U.S. Supreme Court found a constitutional basis for the right to effective assistance of counsel. A brief review of this history suggests these instances were often capital cases.

A. Duty of Loyalty

The duty of loyalty, which generally forbids a lawyer who has taken confidences from a client from subsequently representing one of adverse interest in the same matter, is quite old. Its earliest American application in a criminal case appears to have been in an 1852 Georgia decision in which a former solicitor general of the state, who had “prefer[red] a bill of indictment,” was thereafter barred from representing the indicted defendant as a matter of public policy, notwithstanding his departure from government service, because he would be seen as having knowledge of the case that would thereby unavoidably be used by the defense. An 1861 Indiana Supreme Court decision overturning a rape conviction addressed the converse side-switching situation of a lawyer who was briefly retained and paid by a defendant and had some communication with him, who thereafter returned his retainer and instead represented the complaining witness and prosecuted the case.

Explicitly noting that it was not addressing any contract issues, the Indiana Supreme Court cited some practice treatises and based its decision on what might be termed fundamental fairness—although the court cited no specific legal principle. In a per curiam opinion, the court explained the consequences of permitting such conduct:

With what confidence could one, arraigned upon a charge of crime, confer with his attorney, or reveal to him his evidence, and thereby prepare for his defense, if that officer is permitted, after thus acquiring such knowledge, to change their relative positions, and instead of standing up as his defender, to stand forth as his accuser. Would he not consider it better to stand mute, dumb, as the sheep before the shearer, rather than disclose the evidence which might thus be turned against

19. See id.
him? He might perhaps, truthfully, believe it more to his interest to return to the practice of a semi-barbarous age, when the prisoner was not heard in his defense by counsel, or witnesses in his behalf, than thus to have the weapons of his defense turned against him, by those in whom, by the acknowledged law and the statute, he had a right to confide.20

The court recognized, in language long predating modern concepts of cognitive bias and behavioral economics,21 that although the defendant averred that his former lawyer had been told the “facts and evidence in his defense,” it was more than a little curious that the lawyer had carefully sworn in response that there was no conflict because he had not thereby learned the “grounds or means of defense.”22 This, the court concluded, was not possible.23

Professor Charles Wolfram, in a seminal modern account of the Former-Client conflicts problem, concludes that, with two important exceptions, the duty of confidentiality essentially demarcates the duty of loyalty to the former client.24 One of those exceptions, the “attack on [one’s] own work,” is the specific instance of the obligation of the continuing duty of counsel.25

B. Duty of Competent Representation

Before the ABA acknowledged that there might be a tension between counsel’s duty to provide competent representation and its continuation after the representation—as an obligation to assist the former client’s successor counsel, even if it meant showing counsel’s own shortcomings—there had to be a duty to provide competent representation in the first place. A 1912 Yale Law Journal comment

20. Id. at 395.
22. Wilson, 16 Ind. at 395 (internal quotation marks omitted).
23. Id. The court noted:
   We cannot see how he could know, in advance of the trial, that the facts and evidence in favor of the defense, if disclosed to him, could not be made available by him, in some one of the phases the defense might assume, either in shaping questions or producing witnesses. If the defendant had not disclosed the facts and evidence in the case, why did not Mr. Flagg so state? He was certainly attempting to place himself in a position that should have called forth the utmost precision, in showing that he had not acquired from the defendant any information which he might use to his detriment.
   Id. at 395-96.
25. Id.
succinctly summarized the state of the law, which will be familiar to anyone who has read Strickland v. Washington,\textsuperscript{26} thusly: “The mere incompetency of an attorney does not ordinarily constitute a ground for a new trial nor justify a reversal. There must be a strong showing both of incompetency and prejudice.”\textsuperscript{27} Although intoxication,\textsuperscript{28} insanity, and general incompetency of counsel would not qualify, capital cases appeared to call, at least in some instances, for relaxation of this rule. “In criminal cases, and especially in cases involving the life of the defendant, the court would probably be justified in adhering to the rule somewhat less strictly.”\textsuperscript{29}

The acknowledged law, from civil cases and generally applied equally in criminal ones, was that a client was held responsible for an attorney’s negligence or incompetence.\textsuperscript{30} These early (often capital) cases recognized, as a basis for invalidating a conviction, the deprivation of a fair trial or the protection of a defendant from “oppression.”\textsuperscript{31} While the reported cases are few, there were early instances of attorneys, outmatched or outgunned by the government, who subsequently averred their own shortcomings.

In an 1893 capital murder case from the New Mexico Territory, for example, a defendant convicted in a highly charged atmosphere, manacled and surrounded by armed men throughout his trial (less than a week after the death), sought a new trial on the basis that he was denied a change of venue and a continuance, even though his trial counsel had sought neither.\textsuperscript{32} Instead, on appeal, his (new) lawyer offered an affidavit from trial counsel explaining that he had feared violence against his client if he had made either motion.\textsuperscript{33} The court noted trial counsel’s intimidation was shown both by his affidavit and “even more clearly” by the record, revealing he made no objections nor offered any argument.\textsuperscript{34}

After the prosecution rested, the defendant “thr[ew] himself upon the

\textsuperscript{26} 466 U.S. 668 (1984).
\textsuperscript{27}  Comment, Technicalities in Criminal Procedure—Reversal for Inadequacy and Inefficiency of Counsel, 21 YALE L.J. 505, 505 (1912).
\textsuperscript{28}  O’Brien v. Commonwealth, 74 S.W. 666, 669 (Ky. 1903) (ruled that the appellate court is powerless to review a decision of the trial court rejecting a claim that counsel was too intoxicated to perform adequately as defendant made no complaint at trial).
\textsuperscript{29}  State v. Benge, 17 N.W. 100, 102 (Iowa 1883).
\textsuperscript{30}  State v. Lewis, 9 Mo. App. 321, 324 (1880), aff’d., 74 Mo. 222 (1881) (“As a general rule, parties are held to a strict responsibility for the acts or omissions of their attorneys.”).
\textsuperscript{31}  Id. at 324-25.
\textsuperscript{32}  Roper v. Territory, 33 P. 1014, 1015 (N.M. 1893). His lawyer had been warned at a citizens’ committee meeting prior to trial that his client would receive a “fair trial,” but that there would be no changes of venue or continuances. Id. at 1016 (internal quotation marks omitted).
\textsuperscript{33}  Id. at 1016.
\textsuperscript{34}  Id.
mercy of the court” and requested an additional lawyer, who was promptly appointed to represent him.  

The New Mexico Supreme Court found he had been denied a fair trial because, though he would have been entitled to a change of venue as an absolute right under the circumstances, he was deprived of it through intimidation of his counsel.

A similar South Carolina lynch mob trial of an African-American defendant convicted and sentenced to death was challenged on the basis of his trial lawyer’s acknowledged mental instability during his case. The lawyer had been “mentally unbalanced” and hospitalized at some point before the trial, and admitted that he had been “unbalanced” during the trial and during the defendant’s subsequent sanity hearing (to determine if the defendant had become insane and so could thereby not be executed). Nevertheless, the lawyer’s admitted mental instability did not appear to have affected the quality of his representation. It did “not appear that he did or left undone anything which would probably have affected the result.” Indeed, he appeared to have done better than the average lawyer.

Long before the Federal Constitution was held to impose a right to effective assistance of counsel, one state court decision, applying a state constitution’s guarantee of assistance of counsel, had so held. The earliest reported American decision invalidating a conviction for ineffectiveness of counsel appears to be an 1882 opinion by the St. Louis Court of Appeals overturning a capital murder conviction and death sentence. The decision is strikingly modern: it examines the

35. Id.
36. Id.
37. State v. Bethune, 75 S.E. 281, 282 (S.C. 1912). This is the appellate court’s description of the trial:

Unusual interest on the part of the public was taken in the trial, and there was considerable feeling of resentment and indignation against the defendant, which was manifested by threats on the part of the friends and relatives of the deceased that, if he were convicted of anything less than murder, he would be lynched. These threats were brought to the attention of the presiding judge, who caused 10 or 12 extra deputies to be sworn in to preserve order and protect the prisoner. During the trial, the courthouse was crowded to standing room. The space within the bar was filled, and some of the audience were allowed to sit on the steps leading to the judge’s bench.

38. Id.
39. Id.
41. State v. Jones, 12 Mo. App. 93, 95-98 (1882). The opinion, by the three-judge panel, reads that one justice concurred in the opinion and a third “concur[red] in the result, but has not seen this
quality of counsel’s representation despite the absence of any legal error in the trial. 42

The court acknowledged the “rigid rule” that in civil cases there is no relief available from a judgment based upon attorney negligence, 43 though it noted a New York civil case in which relief had been granted upon a showing of “gross ignorance, incompetence, or misconduct” of an attorney. 44 The absurdity of applying a rule that forces a defendant to suffer his lawyer’s shortcomings will sound familiar. The court stated:

But must there be absolutely no limit to the operation of this rule, even where a human life is at stake? If an attorney should become insane during the progress of a trial, and should thereupon take such steps as should insure the conviction of an innocent client, would no relief be possible? To say so, would be a libel on the law. In looking over this record, we find, in the performance of the counsel for the defendant, an exhibition of ignorance, stupidity, and silliness that could not be more absurd or fantastical, if it came from an idiot or a lunatic. 45

Basing its decision on the Missouri Constitution’s grant of a right to counsel in criminal cases, the court held “that the prisoner here, in effect, went to his trial and his doom without counsel, such as the law would secure to every person accused of crime.” 46 Not only did the court base its decision on an understanding of the right to counsel as a right to effective assistance of counsel, but it also acknowledged (at least in dicta) a continuing ethical obligation of counsel to one’s former client—even in a post-conviction allegation of deficient performance—by questioning the appropriateness of trial counsel’s post-conviction submissions. More than 120 years before the publication of the ABA Guidelines, a court in a capital case questioned the propriety of a lawyer voluntarily providing a contrary view of the facts from that of his former client. 47

completed opinion.” Id. at 98.
42. Id. at 93-94. The court in State v. Jones held:
   It is not satisfactorily shown to us that any error was committed by the court in the conduct of the trial, but our attention is strongly called to its refusal to sustain a motion for a new trial, based upon the alleged ignorance, imbecility, and incompetency of the defendant’s attorney, and his gross mismanagement of the case.
   Id.
43. Id. at 97; Bowman v. Field, 9Mo. App. 576, 576 (1881).
44. Jones, 12 Mo. App. at 97 (citing Sharp v. Mayor, 31 Barb. 578 (N.Y. Gen. Term 1860)).
45. Id. at 94-95. But see State v. Dreher, 38 S.W. 567, 570-71 (Mo. 1897).
46. Jones, 12 Mo. App. at 98.
47. Id. at 93-95.
The defendant was alleged to have confronted the victim lying in a hammock, without any witnesses, who jumped up and swore he would kill the defendant.\textsuperscript{48} The defendant claimed self-defense, and apparently gave this account to the authorities.\textsuperscript{49} Defendant did not testify at trial, and later claimed that he told his lawyer he wanted to testify in his own defense, but was advised that he was not competent to do so as he was charged with murder.\textsuperscript{50} Defendant averred this in an affidavit, and trial counsel responded with his own affidavit to the effect that he had advised the defendant that, while he had a right to testify in his own defense, his statement to the authorities would be sufficient for the purposes of the defense.\textsuperscript{51}

So far, this would be a familiar dispute between former client and counsel concerning what was said or not said. What is significant is the court’s description of the lawyer’s affidavit in response. The court found defendant’s affidavit persuasive, and specifically questioned the ethical position of counsel in offering an affidavit:

> Considering the existing exigencies, it may be doubted whether the reason given by the attorney for keeping his client off the stand was any more creditable to his professional discrimination than the one stated by the prisoner. But waiving that, and also the seeming impropriety of an attorney’s volunteering an affidavit to prevent his convicted client from getting a new trial, we think that the general aspect of the record so far corroborates the affidavit of the prisoner as to entitle him to the benefit of the doubt.\textsuperscript{52}

This was apparently an astonishing result. Seven years later, considering another death-sentenced defendant’s claim that his attorney too had been so incompetent as to deny him a fair trial, the Missouri Supreme Court declared:

> After a most laborious search we have found but one case in which an appellate court has reversed a sentence or judgment on the ground of the negligence or incompetency of an attorney. That case is State v. Jones. In that case no authority was found upon which to base the ruling, and we cannot find that it has ever been followed in this or any other state. We readily agree with the learned court that decided that case that the record presented a most lamentable example of ignorance and incompetency, and that the trial court should have afforded the remedy by setting aside the verdict and appointing a competent

\textsuperscript{48} Id. at 95-96.
\textsuperscript{49} Id. at 96.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. (emphasis added). \textit{But see} State v. Dreher, 38 S.W. 567, 570 (Mo. 1897).
attorney for the prisoner; but we think that the court of appeals in that case suffered a hard case to make bad law, and ignored the fact that it was a court for the review of errors only, and that it was confined to such errors as appeared on the record proper, and to such exceptions as had been ruled on by the trial court. For the distinguished jurist who wrote that opinion and his associates we have the profoundest respect. We doubt not that, in that individual instance, their judgment wrought justice; but we cannot give it our sanction as a rule of practice or procedure, and it is accordingly disapproved.\textsuperscript{53}

Not only did the Missouri Supreme Court reject the concept that ineffectiveness of counsel that was not due to some conduct of the state could be a basis for relief,\textsuperscript{54} but it explicitly acknowledged the reputational interests of counsel in a post-conviction attack:

We are bound to presume that the court which appointed the counsel to defend the prisoner in this case knew him to be a reputable member of the bar, and that it discovered nothing in this conduct calling for his displacement and the appointment of another in his stead. To sustain this contention would be to condemn the counsel, who gave defendant his services without reward, without according him a hearing in a matter vitally affecting his professional standing, and would be an indirect censure of the court, who was a witness to his conduct throughout the trial. We will not do either.\textsuperscript{55}

Despite the absence of constitutional recognition that representation could be so deficient as to invalidate a conviction, a handful of early—often death penalty—cases held just that. The Illinois Supreme Court held in 1911 that an unemployed coal miner convicted of murdering a railroad construction worker outside Marion, Illinois had received representation so deficient from his two appointed lawyers that he faced “oppression,” in that one lawyer had fewer than two years of experience and the other had practiced only civil law.\textsuperscript{56}

Similarly, in \textit{People v. Nitti},\textsuperscript{57} death sentences for an Italian immigrant convicted of murdering the farmer for whom he worked in (then) rural Cook County and for the farmer’s wife (who allegedly had

\begin{itemize}
\item \textit{Dreher}, 38 S.W. at 570-71 (citation omitted).
\item \textit{Id.} at 570.
\item \textit{Id.} at 571.
\item People v. Blevins, 96 N.E. 214, 215, 217-18 (Ill. 1911).
\item 143 N.E. 448 (Ill. 1924).
\end{itemize}
an improper relationship with the immigrant), were set aside because the Illinois Supreme Court found insufficient evidence. The insufficiency of the evidence, however, was determined in light of the spectacularly poor performance of counsel. "The attorney who represented defendants in the trial court seemed to be unfamiliar with the simplest rules of evidence and incapable of comprehending the rules when suggested to him by the trial court. A few quotations from the record will demonstrate his ignorance and stupidity."59

The deprivation of counsel solely through deficient performance, then still not technically a federal constitutional violation, was implicitly found to be one, as it was also found to be a violation of state statutes providing for provision or appointment of counsel to indigent defendants. The court noted:

A layman of ordinary intelligence would have conducted a much better direct examination of this witness. Both federal and state Constitutions provide that an accused person shall have the right to be represented by counsel when called to answer a criminal charge, and the Legislature has further provided that, if the accused is unable to procure counsel, "the court shall assign him competent counsel, who shall conduct his defense." These provisions are not mere empty formalities.60

These early, often capital, cases found that a state constitution or statute providing for counsel could be violated, by depriving a lawyer of a continuance or time to adequately prepare, which could effectively undermine the functioning of counsel. So, for example, a lawyer appointed as substitute counsel in a capital murder case could not be ordered to begin the trial the day of his appointment, lest the right to counsel be a "barren right."61 While there was no federal constitutional

58. Id. at 449, 452, 457.
59. Id. at 452.
60. Id. at 453.
61. See, e.g., State v. Ferris, 16 La. Ann. 424, 425 (1862). In Ferris, the court explained:

The law in securing to them the assistance of counsel did not intend to extend a barren right; for of what avail would be the privilege of counsel to have free access to the prisoner at all reasonable hours, if on the spur of the moment, without an opportunity of studying the case, the former should be compelled to enter into the investigation of the cause?

The counsel appointed by the court is entitled to a reasonable time for preparation; and this necessitates a postponement of the trial.

Id.; see also State v. Lewis, 9 Mo. App. 321, 322, 325 (1880), aff'd, 74 Mo. 222 (1881) (setting aside the capital murder conviction of an African American defendant, whose trial counsel had "three working-days" to prepare and who did not subpoena his numerous alibi witnesses). The Lewis court found:

When a human life is at stake, every instinct of humanity, every sentiment of justice,
right to the appointment of counsel, let alone a federal constitutional right to effective assistance of counsel, these cases (many with affidavits of trial counsel themselves) demonstrated that lawyers could be sufficiently inadequate to afford—and later were sometimes themselves willing to show—at least a few condemned defendants a new trial.

III. IMPLEMENTING THE CONTINUING DUTY

While the ABA Guidelines have been cited by the U.S. Supreme Court even before the 2003 revisions,62 remarkably few cases have cited Guideline 10.13,63 which sets forth the continuing duty. Eight states or

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62. See Wiggins v. Smith, 539 U.S. 510, 524 (2003). The Court in Wiggins noted: Counsel’s conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as “guides to determining what is reasonable.” The ABA Guidelines provide that investigations into mitigating evidence “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.”


Each counsel representing a capital defendant shall make every effort to ensure that successor counsel is provided with the complete, original file and records consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.13 (2003). The purpose of these rules is to ensure that files are maintained in accordance with the ABA Guidelines and to reduce the delay that
sub-state level jurisdictions have, at least, officially implemented some portion of the Guidelines;64 and some courts65 and several defender organizations have added Guideline 10.13 or its substance to their performance standards.66


District Public Defenders in Louisiana are, as of 2010, charged as part of their duties in establishing a capital representation plan with “ensuring the continuing cooperation of trial counsel and defense team members with appellate and post conviction counsel.” See LA. ADMIN. CODE tit. 22, pt. XV, §§ 905A.1.b. (2011).


Amendments to the Rules of Superintendence for the Courts of Ohio were adopted by the Supreme Court of Ohio on January 12, 2010, and became effective on March 1, 2010, which provide that only attorneys who have been qualified by the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases may be appointed to handle capital cases, and that “[i]n the appointing court shall monitor the performance of all defense counsel to ensure that the client is receiving representation that is consistent with the American Bar Association’s ‘Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases’ and referred to herein as ‘high quality representation.’” OHIO R. CT., SUP. R. 20.03(A) (2011).

The implementation of the continuing duty, however, through specific steps that counsel should follow when they are subject to a post-conviction action claiming IAC, has raised more pointedly the ethical issues surrounding when, how, and to what degree former counsel could or should disclose confidential information concerning the representation. Most importantly, the 2010 Formal Opinion by the ABA Committee distilled the duty into specific “do’s” and “don’ts.” This mechanism, and the ABA Opinion’s treatment by several state ethics opinions, has expanded awareness of the continuing duty beyond the capital context. This is important because recent anecdotal reports suggest that compliance with the continuing duty, at least insofar as it implies limiting informal contacts with the prosecution, may not be the norm. Obvious pressures from the potential loss of future appointments could challenge discharge of the continuing duty. The first Subpart of

Cases,” which “establishes as the standards for performance for all counsel in death penalty cases the standards set forth in Guidelines 10.2 to 10.15.2 of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” OR. OFFICE OF PUB. DEF. SERVS., REPORT TO THE PUBLIC DEFENSE SERVICES COMMISSION 23 (2007); see also STATE BAR OF TEX., GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL 4-10 (2006), supra note 9.

67. See generally ABA Opinion, supra note 10, at 1.


Anecdotal evidence suggests that different defense lawyers react differently to prosecutors’ requests for information. At one end of the spectrum are lawyers who are angered by the claim and eager to beat it back. Attorneys have a reputational interest in having IAC claims defeated. They may also fear future civil claims by the former client.

At the other end of the spectrum are attorneys who police themselves for potential IAC issues. When such lawyers or their supervisons spot such an issue, they withdraw, refer the client to other counsel, and cooperate with the new counsel. If new counsel tells them that the client objects to any voluntary disclosure to prosecutors, they do not disclose until a court requires them to do so.

Between those extremes are understandably concerned lawyers who do not want to jeopardize their licenses, their reputations, or their ability to continue doing defense work but who may not want to assist the prosecution against a former client. Court-appointed lawyers under the Criminal Justice Act may be especially uncomfortable because their livelihoods depend on continued appointments by the court that will be considering the IAC claim.


69. Beyond anecdotal reports, new legislation in Florida to expedite executions embodies such an incentive structure by disqualifying counsel for five years from appointment in capital representation if they have been twice found to have provided ineffective assistance and relief was granted as a result. Section Capital Punishment—Timely Justice Act, 2013 Fla. Sess. Law Serv., ch.
this Part addresses the ABA Opinion, the second addresses opinions by state ethics authorities in response to the ABA Opinion, and the final Subpart addresses developing case law.  

A. American Bar Association Ethics Opinion

In 2012, the ABA Committee formally addressed the conflict between the continuing duty and the waiver of privilege that is universally held to accompany an allegation of ineffective assistance. The ABA Opinion noted that the attorney-client privilege and the obligation of confidentiality both continue beyond the representation, and, while an IAC claim impliedly waives the privilege with respect to allegations concerning lawyer-client communications, it does not end the obligation to maintain confidentiality. While the Committee recognized there could be a limited need for a lawyer to reveal information concerning a former client to defend herself when the former client has alleged ineffective assistance, it set a high bar for such revelations; it requires that the lawyer reasonably believe the disclosures are necessary, that the lawyer take steps to minimize the disclosures, and that the disclosures be made in a court-supervised proceeding.

Both the requirements that disclosures be reasonably necessary and that they be minimized were inherent in Model Rule of Professional Conduct (“Model Rule”) 1.6(b)(5). The requirement of “court-supervised proceedings,” however, was an interpreted application of the Model Rule, implied by the concern that without court supervision, disclosures that were otherwise unnecessary, or more than necessary, might be made. This requirement is entirely appropriate to discharge the continuing duty, given the lawyer’s inherent conflict as both the subject of the IAC allegation and the source of information concerning it. While many opinions begin and end their treatment with the observation that the filing of an IAC claim waives the attorney-client privilege, which to a limited degree it does, as I have argued

2013-216, § 27.045 (West). This statute sets a financial incentive directly countering counsel’s continuing duty, imposes an additional hurdle for successor counsel to obtain the cooperation of prior counsel, and links what may be an unrelated consideration (whether relief was granted) to analysis of counsel’s performance.

70. See infra Part III.A–C.
71. See generally ABA Opinion, supra note 10.
72. Id. at 1-2.
73. Id. at 5.
74. Id. at 3-4; see MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2013).
75. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5); ABA Opinion, supra note 10, at 5.
elsewhere, the ethical obligations are especially significant outside judicial supervision:

However, the evidentiary privilege only matters in a formal proceeding (in which testimony is given); outside formal proceedings disclosures are limited only by ethical rules, so the circumstance under which access to defense counsel occurs is quite significant. Three key issues have emerged: (1) Must disclosures of non-privileged information occur in supervised or non-supervised settings? (2) Are releases of information subject to pre-disclosure judicial review? (3) What control is made over subsequent use of the disclosures, e.g., by protective orders, in later proceedings? 77

While the ABA Opinion did not resolve these issues, it did make their treatment much more explicit, and, at least judging from the state ethics opinions discussed in the next Subpart, more intentional.

B. State Ethics Opinions

To date, four ethics bodies (District of Columbia, North Carolina, Tennessee, and Virginia) have weighed in on the issue addressed in the ABA Opinion. 78 While all four have acknowledged the basis for the ABA Opinion’s concern about unnecessary disclosures, three of the four have nevertheless concluded, without specifically explaining why, that judicial supervision was not required. 79 Virginia’s ethics body, which addressed the matter a month before issuance of the ABA Opinion, foreshadowed its analysis, and specifically rejected efficiency and procedural speed as reasons for permitting out of court disclosures. 80 The Virginia authority recommended that, without facts and circumstances justifying an earlier release of information, former counsel should

77. Siegel, Withhold from the Prosecution, supra note 63, at 20-21.
80. Va. State Bar, Legal Ethics Op. 1859. The Virginia ethics committee commented: Although a pre-litigation disclosure of all relevant information may make it more likely that the claim of ineffective assistance will be disposed of quickly, that fact alone does not make it necessary that the lawyer reveal the information. In the absence of additional facts and circumstances justifying an earlier release of the information, the lawyer can reach the same outcome by disclosing the information under judicial supervision in a formal proceeding, after a full determination of what information should be revealed, and without the danger of revealing more information than would be permitted by Rule 1.6(b)(2).

Id.
disclose information only under judicial supervision in a formal proceeding after full determination of what information should be revealed.\textsuperscript{81} It noted that, while an IAC claim “concerns” lawyer’s representation, it is usually not reasonably necessary to disclose anything in response to a mere filing given the number of petitions that fail on legal and procedural grounds.\textsuperscript{82} This is fully consistent with the ABA Opinion.

The North Carolina State Bar, however, explicitly rejected the ABA Opinion, explaining that Model Rule 1.6(b)(6) did not require that a lawyer’s exercise of discretion, to determine what disclosures were reasonably necessary, be done only in a court-supervised proceeding.\textsuperscript{83} Moreover, the state’s post-conviction statute specifically provided that the filing of an allegation of IAC was deemed a waiver of the privilege for both written and oral communications “to the extent the defendant’s prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness.”\textsuperscript{84} Despite its rejection of the need for judicial supervision of disclosures, the North Carolina opinion cautioned that the Rule (and the post-conviction statute) required former counsel to “respond in a manner that is narrowly tailored to address the specific facts underlying the specific claim”; that counsel “still has a duty to avoid the disclosure of information that is not responsive to the specific claim”; and that the prosecutor “must limit his request to information relevant to the defendant’s specific allegations of ineffective assistance.”\textsuperscript{85}

The District of Columbia Bar Ethics Committee (“D.C. Committee”) also rejected the ABA Opinion’s restriction on disclosures outside court supervision, but it did so based on a distinction between the D.C. Rules and the Model Rules.\textsuperscript{86} D.C. Rule 1.6(e)(3) provides:

A lawyer may use or reveal client confidences or secrets ... to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer’s representation of the client . . . .\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id. (internal quotation marks omitted).
\item \textsuperscript{83} N.C. State Bar, Formal Ethics Op. 16.
\item \textsuperscript{84} Id. (internal quotation marks omitted) (citing N.C. GEN. STAT. § 15A-1415(e) (2011)).
\item \textsuperscript{85} Id.
\item \textsuperscript{86} D.C. Bar Legal Ethics Comm., Op. 364 (2013).
\item \textsuperscript{87} D.C. RULES OF PROF’L CONDUCT R. 1.6(e) (2007).
\end{itemize}
The D.C. Committee noted the distinction in D.C. Rule 1.6(e)(3) between disclosure to establish a defense to formal charges and “to respond to specific allegations,” which the drafters of the rule suggested would extend to public allegations made by the client even if there were no formal charges against the lawyer. 88

The D.C. Committee relied heavily on the distinctions between the wording of Model Rule 1.6 and D.C. Rule 1.6(e)(3):

The permissive disclosure exception in D.C. Rule 1.6(e)(3) differs from its Model Rule counterpart in three respects. D.C. Rule 1.6(e)(3) applies only to “specific” allegations, and only when made “by the client.” By contrast, Model Rule 1.6(b)(5) does not condition disclosure on the allegations being “specific,” and does not require that the “allegations” come from the lawyer’s client. Finally, D.C. Rule 1.6(e)(3), unlike Model Rule 1.6(b)(5), does not require that the disclosure be made in the context of a “proceeding.” 89

The problem with this argument, as applied to IAC claims, is that it ignores the fact that there is a proceeding (if the former client has alleged IAC); and the relevant issue is not whether there must be a proceeding for the disclosure, but whether disclosures permissible under the D.C. Rule 1.6(e)(3) should be made in the proceeding or can be made anywhere. Unless the D.C. Committee thinks that such disclosures pose no risks of compromising any obligations to former clients, it is hard to imagine the disclosures could be equally properly made in a court-supervised proceeding (where the former client may object) or through an editorial of a newspaper. The failure to recognize this difference is particularly odd when the D.C. Committee had nevertheless acknowledged the potential for a lawyer’s own motivation to affect his or her judgment about disclosures: “Further complicating a lawyer’s analysis is the emotional reaction that the lawyer may have upon learning that a former client has accused her of IAC. Feelings of anger and betrayal may impede an objective analysis of these issues.” 90

Most recently, the Board of Professional Responsibility of the Supreme Court of Tennessee (“Tennessee Board”) opined that Tennessee’s Rules of Professional Conduct (“Tennessee Rules”) “permit, but do not require [a lawyer] to make limited voluntary disclosure[s] to the prosecution of information” “outside the in-court

89. Id.
90. Id.
supervised proceeding." Rule 1.6(b)(5) of the Tennessee Rules governing permissive disclosure is identical to ABA Model Rule 1.6(b)(5). The Tennessee Rule governing mandatory disclosure, like the Model Rule, requires disclosure in response to the order of a tribunal. However, it is slightly more protective against disclosure than the Model Rule because it includes the obligations of counsel to "assert on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law," whereas the Model Rule only explains these obligations in a Comment.

Thus, while Tennessee imposes duties on counsel to oppose court-ordered disclosures concerning former clients under in-court supervision, which are more explicit than those under the Model Rules, it is particularly curious that its ethics body nevertheless decided that unsupervised, out-of-court disclosures for some reason require less restriction.

The Tennessee Board recognizes, as did the ABA Committee, that the self-defense exception might be read to extend to situations in which a lawyer has been alleged to have rendered ineffective assistance, but simply notes that "[t]he exception does not require that the disclosures be made in an in-court supervised proceeding or setting nor with the supervision or approval of the court." While this is true, since the Model Rule does not mention court supervision of disclosures either, it is difficult to see why this matters. Indeed, the language of court supervision originally comes from Comment 14 to Model Rule 1.6, which, as noted above, Tennessee has imported into the text of Tennessee Rule 1.6(b)(5).

The Tennessee Board notes in passing the apparent concern about inappropriate motivations for out-of-court disclosures: "Neither

91. Tenn. Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2013-F-156 (2013) ("May a criminal defense lawyer alleged by a former criminal client to have rendered ineffective assistance of counsel voluntarily provide information to the prosecutor defending the claim outside the court supervised setting?").
92. TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2013).
93. Compare id. R. 1.6(c)(2), with MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 13 (2013).
95. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14. Comment 14 to Model Rule 1.6 states:

If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Id.
96. See supra notes 91-93 and accompanying text.
anger nor retaliation toward the former client for having alleged ineffective assistance of counsel justify the former lawyer to disclose such information outside the in-court proceeding. Curiously, it never suggests what would be appropriate justifications for making unsupervised, out-of-court disclosures—since any appropriate “self-defense” by the former counsel can be accomplished through in-court disclosures.

C. Developing Case Law Since the ABA Opinion

While some state ethics bodies have questioned the ABA Opinion’s workability (acknowledging the force of its basic assertion), most cases addressing the issue since the ABA Opinion have largely followed its recommendations. Virtually all the reported cases to date are federal, although many are non-capital. Workability has been raised in some cases by the government, though at least once workability has been raised as a reason that the IAC claims can be addressed without seeking disclosures from former counsel. This Subpart offers a snapshot of how the limits on informal and unsupervised disclosures to the prosecution are being interpreted.

1. To What Extent Are Lawyers Refusing to Make Disclosures Outside Court-Supervised Proceedings?

This is a difficult question to examine systematically because of the range of circumstances in which allegations of IAC might arise (state post-conviction, federal habeas, motions to vacate or set aside, motions for new trial), and counsel’s resistance to disclosures may not reach the level of a formal pleading. For example, if a lawyer simply informs the government that she will not cooperate or make disclosures outside of a court-supervised proceeding, the government may simply seek an evidentiary hearing. There have been reported instances, reflected in

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98. Id.
99. Government’s Opposition to Petition to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody at 10 n.1, United States v. Trigilio, No. 2:08-CR-00292, 2010 WL 1329069 (C.D. Cal. Mar. 31, 2010) (No. 2:08-CR-00292) (responding to defendant’s motion to vacate on grounds of IAC in sentencing by stating that claims can be resolved without disclosures because “procedures required to define the contours of the appropriate waiver and implement it with the required limitations could significantly delay proceedings in this case,” though acknowledging, if the court finds that disclosures are required, that it “find a limited waiver of the attorney-client privilege and permit the government to submit a filing setting forth procedures for implementing the waiver”).
100. See infra Part III.C.1–2.
pleadings and orders, of individual lawyers refusing to make disclosures concerning former clients outside of supervised proceedings.\footnote{101}{See, e.g., United States v. Rankin, No. 5:10CV80253, 2010 WL 5478472, at *1 (W.D. Va. Dec. 30, 2010) (explaining that an evidentiary hearing is required where a former attorney declined to provide an affidavit refuting defendant’s claim that he had asked the attorney to file a direct appeal); see also, e.g., Response of the United States to Attorney’s Motion to Quash at 2, United States v. Mitchell, No. 3:11-CR-286-2, 2012 WL 2049944 (E.D. Va. June 6, 2012) (No. 3:10CR286) (“In several discussions, [former counsel] has refused to provide the United States with information regarding the allegations of ineffective assistance and indicated he would likely not meet with the government before the hearing . . . .”); United States’ Motion to Compel Testimony of Defendant’s Former Attorney at 1, United States v. Tronco-Ramirez, No. 5:10-cr-00028, 2011 WL 3841528 (W.D. Va. Aug. 29, 2011) (No. 10CR00028) (seeking court order because former counsel informed the government he would not disclose prior communications with the former client who sought to withdraw his guilty plea without court order).}

In all of these cases, obviously, the prosecution sought disclosures from former counsel. If these disclosures were sought outside supervised proceedings, under the ABA Opinion, they could be considered misconduct, as attempts to induce another (the former counsel) to violate the Model Rules.\footnote{102}{MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2013).} There is already an ethical restriction on subpoenas of defense lawyers by prosecutors unless the information is not protected by privilege: that is, “essential to the successful completion of an ongoing investigation or prosecution,” and there is “no other feasible alternative to obtain the information.”\footnote{103}{Id. R. 3.8(e)(1)–(3).} Given the importance of ensuring an accurate record of any prospective disclosures, and the ethical restriction on compelled (that is, subpoenaed) disclosures, it would seem prudent that there be at least as great a restriction on efforts to obtain voluntary disclosures from former counsel as there are on efforts to obtain compelled disclosures. Since the court handling the IAC petition must determine the scope of the privilege waiver, even if it is “essential” to the prosecution’s defense against the IAC claim, there is always a feasible alternative to unsupervised disclosures—namely, subpoenaing the former counsel.

A general policy by prosecutors not to seek unsupervised disclosures would be useful in this regard for at least two reasons.\footnote{104}{A former version of Model Rule 3.8 would have required judicial pre-approval of such a subpoena as well, although this was removed in 1990. See Stern v. U.S. Dist. Court for the Dist. of Mass., 214 F.3d 9 (1st Cir. 2000) (citing AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, REPORT 101, at 1 (1995)).} First, it would enable lawyers trying to comply with their ethical obligations to have a clearer path to do so. There are instances of former lawyers seeking to intervene when their former clients filed pro se post-conviction claims of IAC, in an effort to obtain court supervision of

\begin{enumerate}
\item[101] See, e.g., United States v. Rankin, No. 5:10CV80253, 2010 WL 5478472, at *1 (W.D. Va. Dec. 30, 2010) (explaining that an evidentiary hearing is required where a former attorney declined to provide an affidavit refuting defendant’s claim that he had asked the attorney to file a direct appeal); see also, e.g., Response of the United States to Attorney’s Motion to Quash at 2, United States v. Mitchell, No. 3:11-CR-286-2, 2012 WL 2049944 (E.D. Va. June 6, 2012) (No. 3:10CR286) (“In several discussions, [former counsel] has refused to provide the United States with information regarding the allegations of ineffective assistance and indicated he would likely not meet with the government before the hearing . . . .”); United States’ Motion to Compel Testimony of Defendant’s Former Attorney at 1, United States v. Tronco-Ramirez, No. 5:10-cr-00028, 2011 WL 3841528 (W.D. Va. Aug. 29, 2011) (No. 10CR00028) (seeking court order because former counsel informed the government he would not disclose prior communications with the former client who sought to withdraw his guilty plea without court order).
\item[102] MODEL RULES OF PROF’L CONDUCT R. 8.4(a) (2013).
\item[103] Id. R. 3.8(e)(1)–(3).
\item[104] A former version of Model Rule 3.8 would have required judicial pre-approval of such a subpoena as well, although this was removed in 1990. See Stern v. U.S. Dist. Court for the Dist. of Mass., 214 F.3d 9 (1st Cir. 2000) (citing AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, REPORT 101, at 1 (1995)).
\end{enumerate}
Second, it would avoid unfairly disadvantaging petitioners whose former counsel did not adhere to this ethical standard. There have been instances of lawyers rejecting the existence of the continuing duty,

including doing so by refusing to provide former clients’ information.

It has been reported that some lawyers have also begun citing the ABA Opinion as a basis for refusing to simply provide the government a refutation of their former client’s claims when responding to an allegation of ineffective assistance. Discipline has been recommended for at least one lawyer who was found to have pre-emptively disclosed, outside of a court-supervised proceeding, confidential information in response to an IAC allegation. While the matter is on appeal, the disciplinary authority has cited the ABA Opinion to specifically reject the argument that former counsel could justify his conduct as preventing his former client’s perjury, noting that he “no longer had a duty to act to prevent any alleged client perjury. That duty transferred to successor counsel. Instead, [former counsel] owed a continuing duty of

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105. See, e.g., Mitchell v. United States, No. CV10-01683, 2011 WL 338800, at *1-3 (W.D. Wash. Feb. 3, 2011) (ruling that former counsel could not intervene, for the purpose of having the court conduct an in camera hearing with pro se petitioner and former counsel, and that it would not appoint counsel for pro se petitioner). The Mitchell court found privilege waiver and authorized former counsel to “provide evidence of his otherwise privileged conversations with petitioner by way of affidavit, testimony, or in any other form,” but did specifically limit the use of disclosures only to IAC claims in the 28 U.S.C. § 2255 petition or otherwise keep them confidential. Id.

106. See, e.g., Daugherty v. Dingus, No. 5:12-0043, 2013 WL 1694878, at *3-5 (S.D. W. Va. Apr. 18, 2013) (recounting that former counsel explicitly rejected the idea of continuing duty of loyalty, barring subsequent use of material disclosed in future proceedings, and barring further communications between former counsel and state attorney general’s office in the § 2255 proceeding, explaining that “[u]n-supervised communications between the Petitioner’s or Movant’s trial and appellate attorney and the attorney for the State or the United States in Section 2254 and Section 2255 proceedings are prohibited”).


108. United States v. Rankin, No. 5:10CV80253, 2010 WL 5478472, at *2 n.3 (W.D. Va. Dec. 30, 2010) (“According to the government’s motion to dismiss, the defendant’s attorney declined to provide an affidavit rebutting the defendant’s claim that he asked the attorney to file a direct appeal, based on [the ABA Opinion].”).


This ABA Ethics Opinion makes it clear that Thompson went far beyond any reasonable or necessary standards. He did not have to send the letter to the Court. He could have waited and testified at the Machner hearing and then been afforded all the necessary protections of a Court order. Instead, without the client’s knowledge or approval, he bullied ahead and, without justification, totally undermined the appellate defense being mounted on behalf of his former client.

Id.
confidentiality and loyalty to his former client and should not have taken an adverse or antagonistic position against that client.”

2. Is the Continuing Duty Being Interpreted to Prevent Disclosures of Former Counsel Outside Court Supervision?

A few court decisions have rejected the ABA Opinion as unworkable, or have developed a boilerplate order that effectively undermines it by providing that petitioners alleging IAC must waive all claims of privilege without limit, and authorize counsel to disclose confidential information without any opportunity for the client to contest the former counsel’s need to make disclosures. This interpretation of court-supervised testimony, namely a court ordering that it be provided without subsequently supervising it, seems to place all decision-making for the necessity of disclosures on the former counsel who, as the ABA Opinion noted, obviously has a conflict. Court “supervision” should mean more than simply a court ordering former counsel to submit an affidavit that will be immediately disclosed to the prosecution.

While the law, in all jurisdictions to consider the matter, holds that the filing of a post-conviction allegation of IAC is a waiver of the privilege, virtually all also hold that it is a limited waiver. Thus, despite the efforts of some prosecutors, several courts have refused to order privilege waivers by IAC petitioners, and have instead focused on authorizing former counsel to make limited disclosures that are reasonably necessary to address the allegations.

110. Id. at 12 (citation omitted).
111. See, e.g., Dunlap v. United States, No. 4:11-cv-70082-RBH, 2011 WL 269315, at *1 & n.4 (D.S.C. July 12, 2011) (noting that ABA Opinion 10-456 is unpersuasive); Giordano v. United States, No. 3:11cv9, 2011 WL 1831578, at *3 (D. Conn. Mar. 17, 2011) (rejecting ABA Formal Opinion 10-456’s position that the court must directly supervise discussions between government counsel and the attorney accused of ineffectiveness); Government’s Motion for an Order Finding Waiver of Attorney Client Privilege & Motion to Compel Production of Records at 7, United States v. Ugochukwu, No. 1:10CR405, 2012 WL 6730064 (N.D. Ohio Dec. 28, 2012) (No. 653), 2011 WL 7809857 (citing Giordano, 2011 WL 1831578, at *3). The Giordano court held that “[a]s far as this Court is aware, no federal court has ever required that Government counsel’s interview with a prisoner’s former counsel in the context of an ineffective assistance of counsel claim be on-the-record,” and further noted that “[i]t would be highly impractical to require federal district court judges . . . to directly supervise every interaction between the Government and the attorney who allegedly provided ineffective assistance.” Giordano, 2011 WL 1831578, at *3.
112. Douglas v. United States, No. 09 CV9566, 2011 WL 335861, at *3 (S.D.N.Y. Jan. 28, 2011) (“The form authorizes your attorney to disclose confidential communications (1) only in response to a court order and (2) only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by your motion.”).
114. See Belcher v. United States, No. 3:12-cv-04717, 2012 WL 5386564, at *3-4 (S.D. W.
have specifically barred unsupervised communications between the government and former counsel. A few decisions have created sequential disclosure procedures in which former counsel’s proposed disclosures are made before the hearing to successor counsel and the court for review; the court may then consider and rule on any objections before the disclosures are made to the prosecution. Finally, a few courts have imposed restrictions on subsequent use of disclosures, the most detailed and extensive of which seem to have been in capital cases.


117. See, e.g., Lambright v. Ryan, 698 F.3d 808, 813, 817, 820 (9th Cir. 2012). This was the protective order:

IT IS FURTHER ORDERED that all discovery granted to Respondents, including the requests to depose sentencing counsel Brogna, Petitioner’s experts and Petitioner, shall be deemed to be confidential. Any information, documents and materials obtained vis-a-vis the discovery process may be used only by representatives from the Office of the Arizona Attorney General and only for purposes of any proceedings incident to litigating the claims presented in the petition for writ of habeas corpus (and all amendments thereto) pending before this Court. None may be disclosed to any other persons or agencies, including any other law enforcement or prosecutorial personnel or
That successor counsel may seek to restrict disclosures by former counsel is hardly surprising, as successor counsel is ethically obligated to pursue all potentially meritorious claims.\textsuperscript{118} Unless these are professionally inappropriate strategies, former counsel is ethically obligated to cooperate with these strategies.\textsuperscript{119} In fact, all the ethical obligations in this scenario are aligned. Former counsel has a continuing duty to petitioner to avoid disclosures that are not reasonably necessary (as well as a duty to continue to maintain and defend as privileged anything not subject to the limited waiver inherent in the filing of an IAC claim).\textsuperscript{120} Present counsel has an ethical obligation to competently and diligently represent the petitioner (which includes, in advancing the IAC claim, ensuring that information disclosed is not used in any subsequent prosecution). And, while the prosecutor certainly has an obligation to competently and diligently defend against the petition, this cannot include efforts to obtain disclosures through means that require a lawyer to violate her ethical duties. Against these obligations are obvious personal reactions and incentives: no one likes being accused of having done a poor job; people are often more forthcoming in informal, private settings (like a phone call), than they are in formal, public ones (such as testifying in court); and individuals are demonstrably poor judges of their own compliance with rules (such as the continuing duty to avoid disclosures that are not reasonably necessary) when they could benefit (for example, by disputing an accusation about their work, or undermining the effectiveness of such a claim by showing that it would not have affected the outcome) from not complying with the Model Rules.

\textsuperscript{118}ABA GUIDELINES, supra note 1, Guideline 10.8, at 1028-29.
\textsuperscript{119}Id. Guideline 10.13(D), at 1074; see Eldred, supra note 68, at 478-86.
\textsuperscript{120}See Eldred, supra note 68, at 478-86.
IV. CONCLUSION

The continuing duty of counsel to former clients has been recognized by some lawyers, as evidenced by their conduct, well over a century before the ABA Guidelines identified it.\textsuperscript{121} While discharge of the duty can be difficult, professionally and personally, as the ABA Opinion acknowledged, that is hardly a reason for disregarding it.\textsuperscript{122} Compliance with this duty is neither technically difficult nor legally complex. If prosecutors do not seek informal disclosures from former counsel, former counsel are aware that it is unethical to make such disclosures, and present counsel know there are established mechanisms to avoid them and ensure they do not occur, disclosures should not occur. Most lawyers quickly develop an inherent and almost instantaneous reluctance to discuss anything concerning the details of a client’s case with anyone outside carefully delineated contexts. A dissatisfied former client is simply not one of these contexts.

\textsuperscript{121} See supra Part II.
\textsuperscript{122} See supra Part III.A.
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

Tigran W. Eldred*

I. INTRODUCTION

After Wesley Ira Purkey was sentenced to death, he followed the familiar path of filing a claim of ineffective assistance of counsel against his trial lawyer. Initially, the lawyer seemed willing to protect Purkey’s interests, even after this claim against him, stating that he would not provide any information to the prosecution without a court order to do so. In turn, the post-conviction court ordered the lawyer to file an affidavit addressing Purkey’s claims. It is what happened next that is remarkable. Instead of filing a limited affidavit, narrowly tailored to the allegations in the petition for habeas corpus, the lawyer filed an extensive, 117-page affidavit that, according to Purkey, far exceeded the

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1. See Purkey v. United States, No. 06-8001-CV-W, 2010 WL 4386532, at *1 (W.D. Mo. Oct. 28, 2010); David M. Siegel, My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings, 23 J. LEGAL PROF. 85, 90-91 (1999) [hereinafter Siegel, My Reputation or Your Liberty] (“While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims.”).

2. See Purkey, 2010 WL 4386532, at *7 (noting that the attorney produced the affidavit after it was ordered by the court); Letter from Frederick Duchardt to the U.S. Attorney’s Office (Oct. 30, 2007) (on file with Hofstra Law Review).

allegations in dispute. Even more remarkably, twenty-five pages of the affidavit were dedicated to legal analysis, including extensive citation of legal authority arguing why the lawyer’s conduct was not constitutionally defective. By any stretch of the imagination, this argumentative response—described as more akin to an “adversarial briefing” than an affidavit of factual information—did not seek to protect Purkey’s interests. Rather, it was a full throttled defense by Purkey’s trial lawyer of his own conduct.

Purkey v. United States demonstrates the importance of defining with precision the role of predecessor counsel (as the lawyer accused of ineffectiveness is known) in post-conviction proceedings. Often, predecessor counsel will feel defensive about being accused of providing deficient performance, especially in situations where a finding of ineffectiveness will harm the lawyer’s personal interests. As a result, the lawyer may want to assist the prosecution to defend against the allegation, or at least, not help the former client to prove it. Yet, the lawyer who was purportedly ineffective is neither a formal party in the litigation nor merely a witness with critical information in the case. Rather, as the former advocate for the client who is now seeking relief, predecessor counsel owes a set of continuing obligations to the very person who is now challenging the lawyer’s conduct.

Given the gravity and urgency of death penalty litigation, this Article focuses on the continuing duties of predecessor counsel in capital

4. See Purkey, 2010 WL 4386532, at *7-8. The parties disagreed about whether the affidavit was broader than necessary to address Purkey’s claim of ineffectiveness. See id. Ultimately, the court agreed with the prosecution, finding that the 117-page affidavit was appropriate to resolve the allegations against the attorney. See id. at *8. By its own admission, the court reached this conclusion without reviewing every specific detail set forth in the affidavit to determine whether the lawyer exceeded what was appropriate to address and resolve the claims of ineffectiveness. See id. (finding that the court is not required to analyze every response in the attorney’s affidavit if it is “reasonably necessary to answer the allegations”).

5. See Reply to Government’s Response to Movant’s Application for Certificate of Appealability at 15-16, Purkey, 2010 WL 4386532 (No. 06-8001-CV-W) (describing the advocacy positions advanced in the trial attorney’s affidavit); see also Purkey, 2010 WL 4386532, at *8. Neither the prosecution nor the district court contested that the trial counsel’s affidavit included approximately twenty-five pages of legal argument. See generally Purkey, 2010 WL 43846532. However, an independent assessment is not possible because the affidavit itself was filed under seal pursuant to a protective order, making it unavailable for review. See Docket Sheet at 1, Purkey, 2010 WL 4386532 (No. 06-8001-CV-W). The court granted the prosecution’s motion to seal the affidavit. See Purkey v. United States, No. 06-8001-CV-W, slip op. at 15-16 (W.D. Mo. May 19, 2008). This was based on a request that had been initiated by successor counsel. See Telephone Interview with Teresa Norris, Partner, Blume Norris & Franklin-Best, LLC (Mar. 12, 2013) (Mar. 11, 2013).


cases. The starting point is Guideline 10.13 of the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines" or "Guidelines"), promulgated by the American Bar Association ("ABA"), which set forth many of counsel’s central obligations. These include a "continuing duty to safeguard the interests of the [former] client," and the obligation to "cooperate fully with successor counsel." Guideline 10.13 illustrates these obligations with a series of examples—including the duty to maintain proper records during representation, and thereafter, to provide information to successor counsel and to cooperate in appropriate legal strategies during the pendency of post-conviction proceedings. And, while Guideline 10.13 does not specifically address duties relating to confidentiality and privilege, the duty to safeguard the interests of the former client logically includes such obligations. Further guidance comes from ABA Formal Opinion 10-456, applicable in any case where ineffectiveness is alleged, which concludes that lawyers may disclose information "reasonably necessary" for resolution of the ineffectiveness claim, but only during a formal judicial proceeding and only after the judge has determined that such disclosure is appropriate.

The familiar standard for ineffective assistance of counsel, set forth in Strickland v. Washington, reveals why these continuing obligations are so important. Under the Strickland test, a defendant must prove that his former lawyer rendered deficient performance that prejudiced the representation. To satisfy this test, the defendant must overcome the presumption that the challenged conduct "might be considered sound trial strategy." Even with competent successor counsel and the means

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10. Id. The title "successor counsel" denotes the lawyer who represents the defendant in the post-conviction proceedings. See id.
11. Id. Guideline 10.13 cmt., at 1074-75.
14. See id. at 687 (discussing the test for proving a claim of ineffective assistance of counsel). This test pays "a heavy measure of deference" to the strategic choices that were made by counsel. See id. at 691.
15. Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)) (internal quotation
to investigate and pursue an ineffectiveness claim, it is difficult to meet this heavy burden. It becomes all the more difficult to prove ineffectiveness of counsel when predecessor counsel is an obstacle to, rather than an ally in, pursuing the claim.

As a result of the critical nature of these duties, scholars have argued persuasively that lawyers must prioritize them. For example, as my colleague David Siegel has demonstrated, lawyers who face claims of ineffectiveness should place duties owed to former clients above their own interests by zealously guarding the interests of their former clients, even at personal risk to their own reputations. Others have made similar arguments, concluding that, while lawyers may have personal misgivings about the prospect of being found ineffective, they must put those feelings aside to satisfy the obligations owed to their former clients. And, because of the elevated stakes in capital cases, special attention has been paid to the obligations of predecessor counsel set forth in Guideline 10.13.

One area that has not been explored, however, is the extent to which lawyers accused of ineffectiveness are actually meeting these professional duties. In other words, while, as a normative matter, predecessor counsel should comply with the professional obligations set forth in Guideline 10.13 and related authority—even at a personal cost—how often do they so comply? Unfortunately, there is sparse data directly on point, as the informal interactions between lawyers throughout post-conviction proceedings infrequently result in reported decisions. Other sources of authority, such as the opinions of seasoned

marks omitted); see also Cullen v. Pinholster, 131 S. Ct. 1388, 1404 (2011) (quoting Strickland, 466 U.S. at 689).


19. See Lawrence J. Fox, Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant, 31 Hofstra L. Rev. 1181, 1184 & n.23 (2003) [hereinafter Fox, Making the Last Chance Meaningful].
veterans in death penalty litigation, do provide important additional information about existing practices, although without a systemic basis for assessment.

This Article seeks a more complete understanding of attorney compliance with their continuing obligations to former clients in capital post-conviction litigation. To do so, it relies on research into a phenomenon known as “motivated reasoning.” 20 Now a mainstay of academic study and of growing importance in legal scholarship, 21 the central idea is that people do not realize how unconsciously they seek conclusions that favor their own wishes, wants, and desires. 22 By applying this research to the continuing duties lawyers owe to their former clients, the Article concludes that lawyers do not evaluate their obligations objectively. 23 Rather, the motivations that they possess will be a significant factor in how they respond to the allegations.

This Article proceeds in three remaining parts. Part II contextualizes the discussion by reviewing the obligations owed by predecessor counsel to their former clients in death penalty cases, and then assesses anecdotal evidence about whether these obligations are


being satisfied.\textsuperscript{24} Part III turns to motivated reasoning, reviewing the empirical basis for the conclusion that people engage in an unconscious biased reasoning process that favors predetermined goals, and applies the research to the decisions that lawyers make when facing claims of ineffective assistance of counsel.\textsuperscript{25} The ways that motivated reasoning can be expected to influence compliance with the duties under Guideline 10.13 and related authority are also addressed in detail.\textsuperscript{26} Part IV addresses the implications of the analysis, recommending ways to reduce the power of the biased reasoning process.\textsuperscript{27}

II. DUTIES AND PRACTICES OF PREDECESSOR COUNSEL IN DEATH PENALTY LITIGATION

A. The Duties of Predecessor Counsel

This Subpart sketches the contours of the duties owed by lawyers who can anticipate, and then are accused of, ineffective assistance of counsel. Because others have discussed these matters in depth, there is no need to recount every aspect of a lawyer’s duty to a former client who has brought a claim of ineffectiveness.\textsuperscript{28} Instead, this Subpart provides an overview of those duties, highlighting the central obligations and exploring their implications.

The starting point is Guideline 10.13, which details the duties of predecessor counsel in capital cases and sets forth a chronological set of obligations that begin before the original representation ends, and continue through the completion of post-conviction proceedings.\textsuperscript{29} Guideline 10.13 reads:

\begin{quote}
In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

B. providing the client’s files, as well as information regarding all aspects of the representation, to successor counsel;
\end{quote}

\textsuperscript{24} See infra Part II.
\textsuperscript{25} See infra Part III.
\textsuperscript{26} See infra Part III.
\textsuperscript{27} See infra Part IV.
\textsuperscript{28} See supra notes 16-17.
\textsuperscript{29} ABA GUIDELINES, supra note 8, Guideline 10.13, at 1074.
C. sharing potential further areas of legal and factual research with successor counsel; and
D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.\textsuperscript{30}

These duties derive from various sources, most notably the ethical rules of the profession.\textsuperscript{31} To start, the duty of competence requires that a lawyer engage in representation that does not impair the ability of the client to ensure, after the fact, that the representation received was effective.\textsuperscript{32} This obligation, which comes from Rule 1.1 of the Model Rules of Professional Conduct ("Model Rules"),\textsuperscript{33} imposes an obligation on a lawyer during representation to maintain the client's file in a manner that will allow the former client to determine what steps predecessor counsel took, or did not take, during representation.\textsuperscript{34}

In addition, all lawyers owe a duty to safeguard the interests of a client to the extent reasonably practicable at the termination of the attorney-client relationship under Model Rule 1.16.\textsuperscript{35} At the very minimum, this obligation requires surrender of the file to the client at the end of the case.\textsuperscript{36} In addition, coupled with the duty of competence, this places an affirmative duty on predecessor counsel to assist successor counsel in understanding the file's contents, including what is missing,

\textsuperscript{30} Id.
\textsuperscript{31} See Lawrence J. Fox, Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities, 36 HOFSTRA L. REV. 775, 776, 794 (2008); Fox, Making the Last Chance Meaningful, supra note 19, at 1185-91. See generally Siegel, My Reputation or Your Liberty, supra note 1 (discussing the various ethical duties that serve as the basis for obligations of predecessor counsel in death penalty cases).
\textsuperscript{32} See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013); Siegel, My Reputation or Your Liberty, supra note 1, at 102.
\textsuperscript{33} MODEL RULES OF PROF'L CONDUCT (2013).
\textsuperscript{34} As Lawrence Fox has noted:
[T]he capital defense lawyer has an even heightened obligation beyond that in the run of the mill matter, to maintain an orderly file, to permit anyone who follows to know what steps the lawyer considered, what steps the lawyer took, what information was available, what motions were contemplated, what motions were filed, what areas of inquiry and research were suggested, which were pursued and which were rejected, who was interviewed (and who was not), how jury selection was conducted, and every other material step counsel undertook.
Fox, Making the Last Chance Meaningful, supra note 19, at 1189-90; see also Ellen Henak, When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims, 33 AM. J. TRIAL ADVOC. 347, 358-60 (2009) (discussing criminal defense attorney obligations); Siegel, My Reputation or Your Liberty, supra note 1, at 93-99 (discussing criminal defense attorney obligations).
\textsuperscript{35} See MODEL RULES OF PROF'L CONDUCT R. 1.16.
\textsuperscript{36} See id.; Fox, Making the Last Chance Meaningful, supra note 19, at 1189; Siegel, My Reputation or Your Liberty, supra note 1, at 112; Siegel, Three Questions, supra note 17, at 18.
and when necessary, to help organize the file so that its contents can be readily understood by successor counsel.\textsuperscript{37}

The continuing duty of loyalty augments these responsibilities. In particular, fidelity to the interests of a former client requires that predecessor counsel do more than merely be honest and candid in answering questions posed by successor counsel.\textsuperscript{38} It also requires that the lawyer who is accused of ineffectiveness volunteer information that will assist the client’s effort to prove the ineffectiveness claim.\textsuperscript{39}

Finally, predecessor counsel must take steps to protect against unwarranted disclosure of confidential information obtained during representation,\textsuperscript{40} which raises two related questions: first, to what extent does the filing of an ineffectiveness claim waive the attorney-client privilege, such that predecessor counsel can disclose, when compelled to do so, communications with the client; and second, to what extent do the rules of professional ethics permit predecessor counsel to volunteer confidential information obtained during the representation? This latter question concerns the duty to protect all information related to the representation, whatever its source—an obligation that is much broader than the limited disclosure that may be permissible when the attorney-client privilege is waived.\textsuperscript{41} Because Guideline 10.13 imposes upon predecessor counsel the duty, “[i]n accordance with professional norms . . . to safeguard the interests of the client,” it plainly requires that predecessor counsel’s conduct with respect to these two issues comport with the well-established body of doctrine governing them.\textsuperscript{42}

1. The Attorney-Client Privilege

A lawyer who has been accused of ineffectiveness will often be one of the most important witnesses in the formal judicial proceedings to

\textsuperscript{37} See Fox, \textit{Making the Last Chance Meaningful}, supra note 19, at 1189-90.

\textsuperscript{38} Siegel, \textit{My Reputation or Your Liberty}, supra note 1, at 105-08 (discussing the scope of the duty of loyalty to a client).

\textsuperscript{39} See \textit{id}. at 106-07. Of course, successor counsel should do everything reasonable to facilitate this process. In particular, it will often be sound practice for successor counsel to reach out to predecessor counsel prior to any court filing and seek to discuss interactively, as lawyers with duties to a common client, the legal and factual basis, and the phrasing of the forthcoming ineffectiveness claim with a view towards establishing a cooperative relationship. \textit{See id}. Successor counsel should also take the opportunity to remind predecessor counsel specifically of her obligations regarding the continuing duty of client confidentiality. \textit{See id}. at 109-10.

\textsuperscript{40} Fox, \textit{Making the Last Chance Meaningful}, supra note 19, at 1186-87.

\textsuperscript{41} \textit{See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt.3 (2013); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456 (2010) (discussing the lawyer’s disclosure of information when a former client brings an ineffective assistance of counsel claim). The duty to protect former client confidences is specifically set forth in Model Rule 1.9(c). See MODEL RULES OF PROF’L CONDUCT R. 1.9(c); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456.}

\textsuperscript{42} \textit{See ABA GUIDELINES, supra} note 8, Guideline 10.13, at 1074.
resolve the claim. 43 It is therefore critical to determine what information counsel must reveal, for example, when responding to questions on the witness stand, or when filing a court-ordered affidavit. The body of case law that has developed to answer this question favors a limited waiver of the attorney-client privilege, meaning that a lawyer can disclose only information relating to the claims raised in the proceedings. 44 Most courts describe the limited waiver as extending to any information that is “relevant” to addressing the allegations of ineffectiveness, 45 although some limit disclosure to what is “necessary” to resolve the claim. 46 The minority position, which is conceptually weaker, is that the filing of the claim constitutes a full waiver of the privilege. 47

43. See id. Guideline 10.13 cmt., at 1075; Siegel, My Reputation or Your Liberty, supra note 1, at 90-91 (“While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims.”).

44. See Siegel, Withhold from the Prosecution, supra note 12, at 19, 23-24 nn.12-16 (citing cases from the Fifth, Sixth, Eighth, Ninth and Tenth Circuits, as well as state cases and statutes).

45. See, e.g., Johnson v. Alabama, 256 F.3d 1156, 1179 (11th Cir. 2001) (“[A] habeas petitioner alleging that his counsel made unreasonable strategic decisions waives any claim of privilege over the contents of communications with counsel relevant to assessing the reasonableness of those decisions in the circumstances.”) (emphasis added); Alabama v. Lewis, 36 So. 3d 72, 77-78 (Ala. Crim. App. 2008) (noting that, by alleging “ineffective assistance of counsel during the trial and direct appeal of these cases, the defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters relevant to his allegations of ineffective assistance of counsel” (second emphasis added)); Waldrip v. Head, 532 S.E.2d 380, 387 (Ga. 2000) (“We hold that a habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine and the state is entitled only to counsel’s documents and files relevant to the specific allegations of ineffectiveness.”) (emphasis added)); In re Dean, 711 A.2d 257, 258-59 (N.H. 1998) (“We hold that claims of ineffective assistance of counsel, whether brought in a motion for new trial or in a habeas corpus proceeding, constitute a waiver of the attorney-client privilege to the extent relevant to the ineffectiveness claim; the waiver is a limited one.”) (emphasis added)).

46. See, e.g., United States v. Pinson, 584 F.3d 972, 978 (10th Cir. 2009) (“When a habeas petitioner claims ineffective assistance of counsel, he implicitly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim.”) (emphasis added)); Arizona v. Moreno, 625 P.2d 320, 323 (Ariz. 1981) (“The attorney may reveal at least that much of what was previously privileged as is necessary to defend against the charges.”) (emphasis added)).

47. See Siegel, Withhold from the Prosecution, supra note 12, at 19, 24 nn.17-21 (citing cases and state court rules that emphasize that the filing of an ineffective assistance claim constitutes a broad waiver of the privilege). The dangers of a broad waiver rule were set forth forcefully by the Ninth Circuit in Bittaker v. Woodford:

Claims of ineffective assistance of counsel are routinely raised in felony cases, particularly when a sentence of death has been imposed. If the federal courts were to require habeas petitioners to give up the privilege categorically and for all purposes, attorneys representing criminal defendants in state court would have to worry constantly about whether their casefiles and client conversations would someday fall into the hands of the prosecution. In addition, they would have to consider the very real possibility that they might be called to testify against their clients, not merely to defend their own professional conduct, but to help secure a conviction on retrial. A broad waiver rule
Regardless of the precise definition of the waiver, predecessor counsel has an ethical duty to ensure that the former client’s interests are protected. For example, if the lawyer is asked about communications that are outside the scope of the limited waiver in the case, the lawyer must assert privilege in an effort to prevent unwarranted disclosure. In addition, the lawyer must “interpose any other objections if there are nonfrivolous grounds on which to do so.” Further protective action should be pursued, such as requesting that the court determine ex parte and in camera whether any particular communication should be disclosed, and seeking an appropriate protective order limiting disclosure only to those who need it.

2. The Duty of Confidentiality

There is a related question, which often poses the most serious problems: under what circumstances may predecessor counsel disclose information that otherwise would be protected by the ethical duty of confidentiality? This question typically arises when there is an informal request for information by the prosecutor, who may want to see predecessor counsel’s file or meet with predecessor counsel as part of the investigation to prepare for, and respond to, the defendant’s allegations of ineffectiveness. Can predecessor counsel engage in such

would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote.

331 F.3d 715, 722 (9th Cir. 2003); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) (“A client who contends that a lawyer’s assistance was defective waives the privilege with respect to communications relevant to that contention.”); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456 (2010).

48. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 9 (2013).

49. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456. The ABA, in response to a government subpoena or court order to turn over current and former client files, concluded:

[A] lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer’s obligations under Rule 1.6 apply. Only if the lawyer’s efforts are unsuccessful, either in the trial court or in the appellate court . . . and she is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer’s opinion, are privileged, may the lawyer do so.


50. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 19. For examples in which courts have required in camera inspection of proposed disclosure or issued protective orders, see infra notes 56-57 and accompanying text.

51. See MODEL RULES OF PROF’L CONDUCT R. 1.6, 1.9(c).

52. See Siegel, Withhold from the Prosecution, supra note 12, at 23.
informal interactions prior to formal judicial proceedings? Formal Opinion 10-456 is directly on point.

The focus of Formal Opinion 10-456 is on the applicability of the “self-defense” exception to confidentiality under Model Rule 1.6, which permits disclosure of otherwise confidential information that the lawyer determines is reasonably necessary to “respond to allegations in any proceeding concerning the lawyer’s representation of the client.”

Recognizing that a lawyer may seek to justify disclosure under this provision, Formal Opinion 10-456 recognizes that the provision “might be read” to include claims of ineffective assistance of counsel. Even so, Formal Opinion 10-456 concludes that disclosure is permitted only to the extent that the lawyer reasonably believes necessary under the circumstances. In other words, every lawyer will need to carefully scrutinize any potential disclosure to make sure that it is as narrow as possible given the lawyer’s need to respond to the allegations.

More controversially, Formal Opinion 10-456 also concludes that invoking the self-defense exception outside of court-supervised proceedings—such as when the prosecution seeks information from predecessor counsel before there has been a court order to do so—risks unnecessary disclosure of confidential information because there will be no judicial determination as to the propriety of the disclosure. According to Formal Opinion 10-456, the potential harms that can flow from such unwarranted disclosure are prejudice to the defendant in case of a retrial and a chilling effect on future defendants from fully confiding in their lawyers. As a result, this Opinion concludes that it is “highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.”

Critics argue that Formal Opinion 10-456 unnecessarily restricts the ability of predecessor counsel to disclose information to help the prosecution determine whether there is any merit to the ineffectiveness

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53. *Model Rules of Prof’l Conduct* R. 1.6 & cmts. 18–19; ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456. Formal Opinion 10-456 also notes that disclosure would be permissible whenever the former client has provided informed consent, which does not occur merely by the client’s assertion of an ineffectiveness claim. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456.


55. See id.

56. See id. Formal Opinion 10-456 notes that this is functionally analogous to the ways that courts interpret the self-defense exception to the attorney-client privilege. See id.

57. Id.

58. Id.

59. Id.
claim, which might prevent prosecutors from conceding error in some cases, or properly defending claims in others. Critics also claim that restricting disclosure to formal proceedings does not fully account for the many ways that a finding of ineffectiveness might harm predecessor counsel, including possible harm to the reputation of predecessor counsel, increased risk of disciplinary sanction, and malpractice exposure. In a recent ethics opinion, the D.C. Bar Legal Ethics Committee agreed that Formal Opinion 10-456 unnecessarily restricts the circumstances under which disclosure is permissible.

In contrast, supporters of Opinion 10-456 argue that, while there may be some risks to limiting disclosure to judicially supervised proceedings, on the whole, the approach taken by the Opinion 10-456 is consistent with the ethical duties of the profession and the “developing jurisprudence” on how courts approach prosecutorial requests for information in ineffectiveness cases. For example, some courts have required supervision of any contemplated disclosure, including in some instances, requiring that predecessor counsel submit any documents that might be considered appropriate for disclosure to the court for in camera review, while others have issued protective orders limiting the use of any disclosures that occur. In addition, some courts have directly approved

60. See Joy & McMunigal, supra note 12, at 44.
61. Id. For further discussion of these possible harms, see infra Part III.B.1.
62. See D.C. Bar Legal Ethics Comm., Op. 364 (2013), available at http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion364.cfm. While a detailed assessment of Opinion 364 is beyond the scope of this Article, it is worth noting the cribbed and technical basis for its conclusions. For example, Opinion 364 places significant emphasis on the fact that D.C. Rule of Professional Conduct (“DCRPC”) 1.6(e)(3)—which is the analog to the self-defense exception under Model Rule 1.6(b)(5)—permits disclosure that responds only to “specific” allegations of ineffectiveness, whereas Model Rule 1.6(e)(3) has no such limitation. Compare MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013), with D.C. RULES OF PROF’L CONDUCT R. 1.6(e)(3) (2013), and D.C. Bar Legal Ethics Comm., Op. 364. Yet, this is a distinction without a difference. Both the DCRPC and the Model Rules restrict disclosure to that which is “reasonably necessary” to respond to the allegations. D.C. RULES OF PROF’L CONDUCT R. 1.6, MODEL RULES OF PROF’L CONDUCT R. 1.6. It is hard to see how a lawyer who fails to follow this command would be magically transformed into one who did fulfill the command simply because the DCRPC Rule requires the disclosure to respond to “specific allegations,” rather than just “allegations.” See D.C. Bar Legal Ethics Comm., Op. 364. Nor is there persuasive appeal to the fact that DCRPC does not require that disclosure be in response to allegations “in any proceeding,” as required under the Model Rules. See id. The whole point of Formal Opinion 10-456 is that, without judicial supervision, there is too much risk of lawyers disclosing more than is “reasonably necessary” to respond to allegations of ineffectiveness, not that the language of Model Rule 1.6(e)(3) limits disclosure to allegations “in any proceeding.” See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456 (2010). Fundamentally, Opinion 364 sidesteps this central question. See D.C. Bar Legal Ethics Comm., Op. 364; supra notes 50-56 and accompanying text.
63. See Siegel, Withhold from the Prosecution, supra note 12, at 20.
64. Id. at 21-22 (citing cases requiring supervision of contemplated disclosure).
the conclusions of Formal Opinion 10-456, while others have noted this Opinion is not binding on courts when determining the scope of the attorney-client privilege.

Fortunately, in deciding what her obligations are, predecessor counsel in death penalty cases needs not parse these nuances. Guideline 10.13.D specifically requires her to cooperate “with such professionally appropriate legal strategies as may be chosen by successor counsel.” If successor counsel, now representing the client, advocates for the position advanced by Formal Opinion 10-456, predecessor counsel must behave accordingly.

The final duty owed by predecessor counsel is uncontroversial. Like any witness, a lawyer who testifies during a judicial proceeding owes a duty to be truthful. In addition, lawyers also have independent obligations of honesty and truthfulness. As a result, if providing any evidence during the case, a lawyer must be honest—particularly in explaining the choices that the lawyer made during representation.

In sum, predecessor counsel owes to the former client who alleges ineffectiveness a host of duties. Whether there is compliance, however, is another question.


67. ABA GUIDELINES, supra note 8, Guideline 10.13, at 1074.

68. See id. Guideline 10.13 cmt., at 1074 (“All members of the defense team must . . . facilitate the duty of successor counsel . . .”). Successor counsel almost certainly has an obligation to do precisely this, pursuant to Guideline 10.8, “The Duty to Assert Legal Claims.” See id. Guideline 10.8.8 & cmt., at 1028, 1032 (describing counsel’s obligation to litigate all potentially meritorious issues, even if precedent is currently adverse). Hence, predecessor counsel must assume that successor counsel will object to any disclosure beyond the bounds of Formal Opinion 10-456, and must act accordingly. See id.

69. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2013).

70. See id. R. 8.4 (establishing that it is professional misconduct for a lawyer to be dishonest).
B. Assessing Practice: Do Lawyers Comply with Continuing Duties Owed to Former Clients?

Determining whether lawyers who are accused of ineffectiveness satisfy their continuing obligations to former clients is difficult. While a number of recent cases have addressed some of these obligations—particularly those that arise when prosecutors seek discovery from predecessor counsel71—in the vast majority of ineffectiveness cases, the conduct of predecessor counsel is not litigated. As a result, what is known about compliance with the continuing duties is largely anecdotal, coming from the handful of reported decisions on the topic and other sources. In an effort to get a glimpse into these opaque practices, this Subpart reviews what is known about how defense lawyers respond to their duties set forth in Guideline 10.13 and related authority.

The duty of cooperation is the hardest to assess based on case law, as the informal interactions between lawyers during habeas proceedings are seldom reported. In rare instances, however, some mention of these encounters can be found in the filings of a case. For example, in New Jersey v. Loftin,72 where predecessor counsel was found ineffective for allowing the probation department to interview the defendant while capital murder charges were pending, successor counsel reported that predecessor “met with representatives of the . . . Prosecutor’s Office on approximately 6 separate occasions,” yet “declined to speak” with successor counsel, “who he termed ‘[his] adversary.’”73

Is this type of conduct common? Many experts think so. For example, according to the former Chief Public Defender, who was responsible for all death penalty litigation in Georgia:

Commonly, lawyers against whom [allegations of ineffective assistance of counsel] are raised react with disappointment, outrage, and anger. When these feelings subside, the next usual response is to develop a strategy to defend the allegations. Unfortunately, from that point on, many attorneys facing a claim of ineffective assistance tend to distance themselves from the former clients and even to create an adversarial relationship between themselves and their former clients.74

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71. See Siegel, Withhold from the Prosecution, supra note 12, at 20-22 (describing what Siegel calls the “developing jurisprudence” of prosecutors who seek disclosure from predecessor counsel, and citing cases and judicial responses to such inquiries); see also supra notes 51-52 and accompanying text.


73. Id. at 1227, 1229; State v. Loftin, No. 56,186, 2005 WL 6735278, at *8 n.2 (N.J. Sept. 19, 2005).

74. See Mears, supra note 18, at 42.
Another veteran post-conviction lawyer, who has argued multiple cases before the U.S. Supreme Court, concurs, noting: “Some lawyers whose trial work is called into question won’t even pick up the phone,” and refuse to respond to requests or inquiries until a copy of Formal Opinion 10-456 is mailed to them. Other experts agree. Given the depth of knowledge of these commentators, there is little doubt that many defense lawyers accused of ineffectiveness respond defensively.

On the other hand, predecessor counsel has been known to cooperate with successor counsel, at least to the extent of providing factual information needed to support the ineffectiveness claim. For example, during litigation that recently led to a successful claim of ineffective assistance in *Kansas v. Cheatham*, the defendant’s trial lawyer provided a remarkable affidavit in which he conceded a litany of errors, essentially admitting that he had been unprepared for virtually all aspects of death penalty litigation. These errors included: his lack of experience litigating capital murder cases; his failure to consult with or seek assistance from more qualified attorneys; his failure to become aware of the standards for capital litigation as set forth in the Guidelines; his complete failure to investigate for either the guilt or penalty phase; his failure to prepare a mitigation defense; and his agreement to represent the defendant on a contingency fee basis. It is hard to measure how often lawyers provide this type of cooperation; while there have been instances in which lawyers have conceded error in death

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76. See *id.* at 46 (quoting Professor Eric M. Freedman of Maurice A. Deane School of Law at Hofstra University, the Reporter for the ABA Guidelines, who notes that it is the lawyers whose representations are the most egregious, perhaps because of drug or alcohol abuse, who are “the most likely to be defensive”); Joy & McMunigal, supra note 12, at 42 (noting that a “common reaction” to being accused of ineffectiveness is “to be defensive and view the former client as an adversary”).
77. *Id.* at 323.
78. *Id.* at 323.
79. See Affidavit of Dennis Hawver, *Cheatham*, 292 P.3d 318 (No. 95,800).
penalty cases, far more frequently no such concessions are made, which indicates that they are the exception rather than the rule. It is also difficult to make firm assessments regarding the other obligations of cooperation—such as helping successor counsel determine further areas of factual and legal inquiry to pursue, and sharing the strategic thinking, or lack thereof, that preceded decisions made during representation. Certainly, it would be fair to surmise that most lawyers who react defensively to an allegation of ineffectiveness do not turn around and become fully cooperative. Rather, the adversarial posture that often develops between predecessor and successor counsel suggests that little cooperation occurs. But again, little direct evidence is available. After all, lawyers who avoid their professional obligations rarely admit as much publically.

The related question is how frequently predecessor counsel complies with the duty to safeguard the interests of their former clients, for example, by refusing prosecutors’ informal efforts to obtain information about what transpired during the earlier case. Again, there is conflicting information. On the one hand, some have suggested that predecessor counsel rarely volunteer information to the prosecution without a court order to do so, indicating that most lawyers continue to protect confidential information from disclosure, even after a claim of ineffectiveness has been filed. On the other hand, actual practices in

80. See, e.g., Walls v. Bowersox, 151 F.3d 827, 836 (8th Cir. 1998) (noting counsel’s admission of ineffective assistance); Harris v. Dugger, 874 F.3d 756, 761 (11th Cir. 1989) (describing counsel’s admission that he failed to uncover witnesses who could have provided mitigation evidence); Gentry v. Sinclair, 576 F. Supp. 2d 1130, 1153-54 & n.38 (W.D. Wash. 2008), aff’d, 705 F.3d 884 (9th Cir. 2013) (noting predecessor counsel’s concession regarding his failure to challenge the statistical reliability of DNA evidence admitted at trial); Commonwealth v. Carson, 913 A.2d 220, 265 (Pa. 2006) (describing an affidavit by counsel admitting ineffective assistance). In one recent Supreme Court case, predecessor counsel provided a series of declarations that could be interpreted, depending upon the point of view, as concessions or denials of error. See Cullen v. Pinholster, 131 S. Ct. 1388, 1423-24 (2011).

81. See Kyle Graham, Tactical Ineffective Assistance in Capital Trials, 57 AM. U. L. REV. 1645, 1675 n.171, 1684 n.208 (2008) (stating that “attorneys often candidly admit that they rendered ineffective assistance in capital cases,” but noting that there is often no affidavit from trial counsel to provide any explanation, confessional or otherwise, for decisions made during representation).

82. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (“It is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding . . . .”). Formal Opinion 10-456 also notes: “In the generation since Strickland, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings.” Id. Indeed, there are instances in which defense lawyers have refused, at least initially, to provide information to prosecutors. See, e.g., Crusoe v. United States, No. CR05-0071, 2012 WL 877018, at *2 (N.D. Iowa Mar. 15, 2012) (noting that trial counsel refused to cooperate with the prosecution’s discovery requests in an ineffective assistance
some jurisdictions suggest a very different result. For instance, one federal judge recently noted that, in his district—one of the nation’s busiest—the common practice is for lawyers accused of ineffectiveness to voluntarily provide prosecutors with affidavits responding to the allegations, without either the formal consent of the defendant or a court order to do so. In other situations, lawyers have gone so far as to voluntarily disclose their entire case files to the prosecution—again, before any compulsion to do so. Prosecutors have been known to work closely with predecessor counsel; for example, as in Loftin, by helping predecessor counsel prepare for their post-conviction testimony—hardly the type of conduct meant to protect the interests of the former client who has alleged ineffective assistance of counsel. Whether these cases are outliers is, again, hard to determine from available evidence.

83. See Douglas v. United States, No. 09 CV 9566, 2011 WL 335861, at *1 (S.D.N.Y. Jan. 28, 2011). According to Judge Colleen McMahon, this practice arises out of the belief that, because the filing of an ineffective assistance claim constitutes a limited waiver of the attorney-client privilege, “[f]ormal consent” from the former client is “deemed unnecessary,” and a court order requiring disclosure is “guaranteed to issue.” Id. The fallacy of this reasoning is that it erroneously conflates the duty of confidentiality and the attorney-client privilege. To be sure, by bringing the claim for ineffective assistance of counsel, the former client implicitly waives any privilege he may assert to prevent compelled disclosure of pertinent information. But, this says nothing about whether the former client has also consented to the disclosure, prior to a court order, of otherwise confidential information under Model Rule 1.6. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-456.

84. See, e.g., Jones v. United States, No. 4:11CV00702, 2012 WL 4846663, at *2 (E.D. Mo. Feb. 14, 2012) (considering whether the prosecution could review the trial file relinquished by trial defense counsel in preparation for an ineffectiveness hearing); Binney v. State, 683 S.E.2d 478, 479-80 (S.C. 2009) (discussing whether voluntary disclosure of entire case file to the prosecution violated a state statute defining the attorney-client privilege). It is hard to imagine how such blanket disclosure, prior to formal judicial proceedings, comports with the ethical restrictions of Model Rule 1.6, when the “self-defense” exception limits voluntary disclosures to only information that is reasonably necessary for the lawyer to respond to the allegations. See discussion supra Part II.A. To be sure, broad claims of ineffectiveness may require extensive disclosure, but full disclosure of the entire file—which, no doubt, will always contain information unrelated to the substance of ineffectiveness allegations—is difficult to explain.

Delving deeper, determining how predecessor counsel responds once there is a court order requiring disclosure to the prosecution is also difficult. Purkey is one of the few reported decisions where predecessor counsel’s response to a court order for disclosure itself became the subject of additional litigation. More frequently, once a court orders predecessor counsel to provide the prosecution with information relating to the allegations, the record of how predecessor counsel responds becomes silent. Do lawyers continue to safeguard the interests of their former clients by narrowly tailoring their responses to ensure that only information needed to resolve the ineffectiveness claim is disclosed, or do they open the floodgates of their files after a court order and provide the prosecution with whatever is requested, as alleged in Purkey? How frequently does predecessor counsel attempt to limit disclosure in other ways—for example, by asserting as required non-frivolous claims of privilege; seeking an in camera and ex parte review by the court of proposed disclosures; or seeking protective orders to limit unwarranted disclosure? Is the advocacy-style affidavit filed by predecessor counsel in the Purkey case unique, or do other lawyers accused of ineffectiveness respond similarly? Answers to these questions are unknown.

Last, do lawyers in death penalty cases maintain their files in a manner that meets the obligations set forth in Guideline 10.13? Although, again, little is known empirically, here a bit more may be surmised with confidence. Given the pervasive problem of poor-quality representation in death penalty cases, and the burdens of limited resources under which so many lawyers operate, it would hardly be surprising if predecessor counsel’s files were frequently incomplete and inaccurate.

86. See Purkey v. United States, No. 06-8001-CV-W, 2010 WL 4386532, at *1 (W.D. Mo. Oct. 28, 2010); see also State v. Buckner, 527 S.E.2d 307, 310 (N.C. 2000) (finding that predecessor counsel had acted properly when, in response to court ordered disclosure, he agreed to disclose correspondence with the defendant, but refused to speak directly with the prosecutor).
87. See discussion supra Part II.A.2.
88. See supra notes 62-64 and accompanying text.
89. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 41 (2002), available at http://www2.law.columbia.edu/brokensystem2/report.pdf (finding that thirty-nine percent of death sentence reversals in state post-conviction proceedings, and twenty-seven percent of federal reversals, were due to "egregiously incompetent lawyering"). See generally WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006) (describing deeply flawed lawyering provided to many capital defendants); Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835 (1994) (emphasizing the inadequate representation provided to many capital defendants).
90. Fox, Making the Last Chance Meaningful, supra note 19, at 1190-91 (discussing the possibility that “beleaguered counsel, underpaid and understaffed,” would not maintain files “in a
Take, for example, the Supreme Court’s recent decision concerning the quality of the mitigation investigation in Wood v. Allen.\textsuperscript{91} Wood turned on whether the defendant’s three trial lawyers made a “strategic” decision to stop investigating—and to present no evidence at sentencing about—the defendant’s mental health deficiencies after receiving a psychological report regarding his competency to stand trial.\textsuperscript{92} In deciding that there was sufficient evidence to support the state court’s factual determination that the decision was strategic, the Court cited contemporaneous correspondence between the lawyers, which included a statement by the lead lawyer that the psychologist’s report merited no further investigation.\textsuperscript{93} At first blush, this case might suggest that predecessor counsel kept the type of records contemplated by Guideline 10.13. In fact, the opposite is true. None of the correspondence, nor any other contemporaneous documentation in the record, explains why, after reviewing the psychologist’s report, the lead lawyer decided that no further investigation was needed. Was it because there was nothing in the report suggesting any further line of inquiry? Was it because the report was so complete and thorough that no further investigation was reasonably warranted? Or, was it some other reason? These questions are hardly academic; other testimony in the post-conviction proceeding demonstrated that the defendant’s mental health deficiencies placed him at or near the borderline for retardation.\textsuperscript{94} Had there been additional documentation explaining the decisions of the defense team, a much fuller record would have been available to help the Court render its judgment. And, while it is mere conjecture at this point, one can wonder

\begin{itemize}
\item \textsuperscript{91} 558 U.S. 290 (2010).
\item \textsuperscript{92} See id. at 299, 301-03. The Supreme Court sidestepped the primary issue upon which it had granted certiorari—namely, to determine the relationship between two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 relating to federal court review of state court factual findings. Wood, 558 U.S. at 293; see 28 U.S.C. § 2254(d)(2), (e)(1). As a result, the Court limited its inquiry to whether, under § 2254(d)(2), the state court’s finding that predecessor counsel made a strategic decision not to pursue or present evidence of the defendant’s mental deficiencies was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See Wood, 558 U.S. at 299, 301-03.
\item \textsuperscript{93} Wood, 558 U.S. at 301-02. The letters were written by Kenneth Trotter, a young, inexperienced lawyer who was primarily responsible for the sentencing phase and who answered to the other two lawyers: lead counsel, Cary Dozier, and Frank Ralph. See Joint Appendix at 342-45, Wood, 558 U.S. 290 (No. 08-9156). In both letters, Trotter made the same statement: “We have not had an independent psychological evaluation done since [Dozier] said it would not be needed. As you know, in discovery materials [we learned the defendant] had anger control problems and demonstrated antisocial behavior. Based on this information, we should request an independent psychological evaluation [of the defendant].” Id. No such independent psychological evaluation was ever requested or conducted. Id.
\item \textsuperscript{94} See Wood v. Allen, 542 F.3d 1281, 1286 (11th Cir. 2008).
\end{itemize}
whether such records would have furnished the evidence needed to prove that predecessor counsel’s representation was ineffective.95

In sum, the available empirical evidence provides a partial understanding of how lawyers anticipate, and respond to, claims of ineffectiveness in death penalty cases, although, what is known is largely anecdotal and incomplete. While some lawyers appear to be willing and able to comply with their duties to an extent, a defensive response is triggered in many other lawyers upon learning of a former client’s ineffectiveness claim, and such responses can undermine the professional duties owed to these clients. Because anecdotal evidence only goes so far to help assess how lawyers prepare for, and respond to, claims of ineffective assistance of counsel, empirical evidence is needed. The question is whether a more systematic approach to determining lawyer behavior is available.

III. THE POWER OF MOTIVATED REASONING

This Part takes up the task of assessing attorney behavior by focusing on one of the most studied and robust psychological factors that contribute to human reasoning and decision-making: the power of motivation. Often known as “motivated reasoning” or “motivated cognition,” it is now well established that people reason in a way that is biased by their pre-existing wishes, wants, and desires.96

A. Foundations of Motivated Reasoning

A core finding of research into the psychology of decision-making is that motivation powerfully influences judgment and behavior.97 As one set of experts explained:

95. At least two possible legal consequences might have flowed from a fuller explanation of why predecessor counsel decided to end the investigation after receiving the psychologist’s report. First, it may have demonstrated that, as a factual matter, the decision by predecessor counsel was not strategic. Alternatively, it may have demonstrated to the lower courts that, even if strategic, counsel’s decision was not reasonable. See Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000) (noting that the relevant question for Strickland analysis “is not whether counsel’s choices were strategic, but whether they were reasonable”).

96. See Baumeister & Newman, supra note 22, at 3-19; Helzer & Dunning, supra note 22, at 380-81; Kunda, supra note 20, at 480, 489-95.

97. Much has been written about the relationship between cognitive and motivational aspects of reasoning and judgment, including evidence demonstrating the importance of both in the decision-making process. See Ziva Kunda, Social Cognition: Making Sense of People 223-33 (2000); Kunda, supra note 20, at 482, 488; Tom Pyszczynski & Jeff Greenberg, Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model, 20 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 297, 297-98 (1987). The emphasis of this Article is on the motivational components, although other aspects are discussed as appropriate. See supra Part I.
A wealth of social psychological research suggests that in many judgment situations, particularly those that involve people and issues we care about deeply, people . . . often have a preference for reaching one conclusion over another, and these directional motivations serve to tip judgment processes in favor of whatever conclusion is preferred.98

Moreover, motivated cognition occurs through automatic processes, that is, below the level of conscious awareness.99 The result is that people are able to continue comfortably believing the illusion of their own objectivity, unaware of how their wishes and desires are coloring the decisions they make.100 Put succinctly, they are blinded to their own biases.101

The robust empirical basis for motivated reasoning has been well documented.102 Indeed, “[p]sychologists now have file cabinets full of findings on ‘motivated reasoning,’ showing the many tricks people use to reach the conclusions they want to reach.”103 Any casual search for information will produce a vast array of empirical and theoretical studies on motivated reasoning. For instance, studies have demonstrated that people consider information that is consistent with their desires—such

99. See id. at 311 (describing the “affective reactions” that underlie motivated reasoning as “quick, automatic, and ubiquitous”); Pyszczynski & Greenberg, supra note 97, at 302, 311; see also DAN SMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 361 n.100 (2012) (listing sources discussing motivated reasoning).
100. Ditto et al., supra note 98, at 312 (“The crucial aspect of . . . motivated reasoning mechanisms is that their subtlety allows them to operate well within the confines of what people perceive as the dictates of objectivity.”); Kunda, supra note 20, at 483 (describing how people maintain an illusion of objectivity by not being aware that their reasoning process is biased by their goals); Pyszczynski & Greenberg, supra note 97, at 302 (describing the illusion of objectivity).
101. See, e.g., Joyce Ehrlinger et al., Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681 (2005); Emily Pronin, The Introspection Illusion, in 41 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 6-7 (2009); Emily Pronin et al., The Bias Blind Spot: Perceptions of Bias in Self Versus Others, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002); see also MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT 5 (2011) (describing ethical blind spots). For a description of how the illusion of objectivity influences criminal defense lawyers who represent indigent defendants, see Eldred, Prescriptions, supra note 23, at 358 & nn.149-51.
102. Erica Dawson et al., Motivated Reasoning and Performance on the Wason Selection Task, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1379, 1379 (2002) (“There is now a great deal of evidence that people are inclined to draw conclusions that suggest positive outcomes for themselves; provide support for pre-existing opinions; and confirm their status, success, and well-being.”); Paul D. Windschitl et al., Why So Confident? The Influence of Outcome Desirability on Selective Exposure and Likelihood Judgment, 120 ORGANIZATIONAL BEHAV. HUM. DECISION PROCESSES 73, 73-74 (2013).
as, when addressing one’s intelligence or professional competence—more valid than information that is inconsistent with them. Other studies have demonstrated motivated responses in how people assess the performance of preferred presidential officeholders, the sportsmanship of their preferred sporting team, and even the odds of winning a bet.

Take, for example, the long-studied area of motivated political reasoning. While it would hardly be surprising to learn that political zealots can be blinded by partisan ideology, research demonstrates that motivational goals that bias political reasoning are lurking below the surface of consciousness for most people—even those with only moderate political beliefs. Indeed, even when instructed to be accurate, people’s motivations seem to reign, demonstrating “consistent evidence of directional partisan bias” which may make it “impossible to be fair-minded.” In one study, researchers found that political identity influenced views about the propriety of the United States’ intervention in Iraq: Democrats persistently concluded that the absence of weapons of mass destruction was evidence that they never existed, whereas Republicans interpreted the same data as proof that the weapons had been moved, hidden, or destroyed. As is often the case with motivated reasoners, the same information—here, the absence of weapons—was interpreted in a biased manner to help justify pre-existing beliefs and desires about the propriety of the United States’ military campaign.

Other studies have come to similar results.

109. Id. (discussing a study that “presents a compelling case that motivated biases come to the fore in the processing of political arguments even for nonzealots”).
110. See Brian J. Gaines et al., Same Facts, Different Interpretations: Partisan Motivation and Opinion on Iraq, 69 J. POL. 957, 958 (2007). Similarly, in another study, researchers found that the partisanship of participants—who were shown television coverage of the Israeli-Arab conflict—determined the direction of the media bias that the participants perceived. See Robert P. Vallone et al., The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre, 49 J. PERSONALITY & SOC. PSYCHOL. 577, 581 (1985).
111. See Gaines et al., supra note 110, at 958.
112. See Charles S. Taber et al., The Motivated Processing of Political Arguments, 31 POL. BEHAV. 137, 139 (2009) (finding that people engage in various mechanisms of motivated reasoning to denigrate evidence that is inconsistent with their pre-existing political beliefs).
This type of biased assimilation of information is an example of the larger phenomenon that lies at the heart of motivated reasoning. Sometimes called “asymmetrical skepticism,” the central idea is that people subject information that is consistent with preferences to less scrutiny than they do to information that contradicts a preferred outcome. This is particularly true when there is a vested personal interest in the belief. The specific manifestations occur in various ways. For example, considerable evidence indicates that people frame questions in ways that favor their beliefs; search their memory and other sources for favorable information and then truncate their search once it is found; tend to perceive ambiguous information in a manner that is consistent with preferences, and evaluate favorable information less rigorously than unfavorable information. An apt description of the phenomena is that motivated reasoners, when confronted with favorable information, ask the permissive question: “Can I believe this?”—whereas, when confronted with hostile or unfavorable information, they ask a more demanding question that imposes a greater level of scrutiny: “Must I believe this?”


114. See Ask et al., Elasticity in Evaluations, supra note 113, at 290.

115. See Ask & Granhag, supra note 113, at 562, 579 (discussing the subjectivity of witness interpretation of information in criminal investigations).

116. See Helzer & Dunning, supra note 22, at 381 (“One of the most powerful—and subtle—strategies people can use to arrive at desired conclusions is to frame the questions they ask in a biased manner, making confirmation of a desired conclusion more likely than disconfirmation.”); see also Simon, supra note 99, at 37.

117. See Dawson et al., supra note 102, at 1379. In the article Motivated Recruitment of Autobiographical Memories, Rasyid Sanitioso and his colleagues stated:

People attempt to construct a rational justification for the conclusions that they want to draw. To that end, they search through memory for relevant information, but the search is biased in favor of information that is consistent with the desired conclusions. If they succeed in finding a preponderance of such consistent information, they are able to draw the desired conclusion while maintaining an illusion of objectivity.


118. See Ditto et al., supra note 98, at 311.


120. Dawson et al., supra note 102, at 1379; see also Thomas Glovich, How We Know What Isn’t So: The Fallibility of Human Reason in Everyday Life 31-37 (1991); Helzer & Dunning, supra note 22, at 382 (describing studies that support findings of “motivated skepticism”). In one classic study of particular pertinence, researchers found that participants’ pre-existing beliefs about capital punishment determined how they perceived studies on its deterrent effects. See
The power of motivation, however, is not unconstrained. Rather, competing with the desire for a preferred conclusion is the motive for accuracy, which moderates the power of wishful reasoning. Basically, people tend not to bend the rules of reason to achieve implausible conclusions. It is situations of ambiguity where, because there is more room for biased selection and interpretation of information, motivated reasoning can flourish. In contrast, when there is little ambiguity and the conclusion to be reached is clear-cut, the power of motivated reasoning is substantially diminished.

The role of ambiguity is well documented. For example, a large body of research demonstrates what is known as the “above average effect,” in which people persistently rate themselves as above average in a variety of ways, such as driving a car, managerial prowess, productivity, and other desirable traits. The ability to make such self-serving assessments is constrained by the elasticity of the trait. To list just a few examples: athletes asked to rate their capabilities are more likely to exaggerate their abilities regarding ambiguous characteristics—such as mental toughness—than less ambiguous traits, such as running speed; people are more likely to consider themselves environmentalists when asked about general traits that are easily manipulated than when asked about more objective criteria—such as

Charles G. Lord et al., Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2100 (1979). For example, those opposed to capital punishment were more likely to question the methodology of a study that demonstrated its deterrent effect than were those who favored the death penalty. In short, participants were more suspicious of data they did not want to believe. In short, participants were more suspicious of data they did not want to believe. 

121. Kunda, supra note 20, at 481-82.
122. Ditto et al., supra note 98, at 314 (“People only bend data and the laws of logic to the point that normative considerations challenge their view of themselves as fair and objective judges, and motivated reasoning effects are most pronounced in situations where plausibility constraints are loose and ambiguous.”); Kunda, supra note 20, at 491 (“[I]f directional goals do exert an influence on reasoning, this influence is limited by people’s perceptions of reality and plausibility.”). But see Helzer & Dunning, supra note 22, at 385-92 (arguing that the research on plausibility constraints may need to be updated to take into account instances where motivated reasoning occurs despite the implausibility of the conclusion reached).
123. See Linda Babcock & George Loewenstein, Explaining Bargaining Impasse: The Role of Self-Serving Biases, J. ECON. PERSP., Winter 1997, at 109, 111 (citing studies that demonstrate that “self-serving assessments of fairness are likely to occur in morally ambiguous settings”).
124. See Dolly Chugh et al., Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS LAW, MEDICINE, AND PUBLIC POLICY 74, 82 (Don A. Moore et al. eds., 2005).
125. See Babcock & Loewenstein, supra note 123, at 110-11.
126. See id.
whether they recycle, donate to environmental organizations, or use energy-saving light bulbs, all of which can be verified, and college students produce more flattering self-reports the more ambiguous the trait—whether desirable or not. As one noted expert has stated: “one of the royal roads to constructing a pleasant and congenial self-image is the constant exploitation of ambiguity and uncertainty.”

Given the powerful psychological influence of motivated reasoning, it is not surprising that it has permeated considerations about the criminal justice process. For instance, significant attention has focused on how police and others in law enforcement too often narrowly seek to prove that an identified suspect committed a crime, rather than objectively evaluating available evidence. Central to these inquiries are the motivations at play. The pressure to clear cases, the professional pride generated by helping make an arrest, and the prestige that can follow from a successful prosecution are only some of the motivations that can cause asymmetric skepticism of evidence uncovered during a case.

Prosecutors also can experience motivated reasoning as part of the cluster of psychological biases that can produce erroneous judgments. For example, as a number of legal scholars have demonstrated, part of the explanation for prosecutorial misconduct—such as the failure to meet Brady obligations or to properly respond to post-conviction claims

128. Chugh et al., supra note 124, at 82.
129. See David Dunning, Self-Insight: Roadblocks and Detours on the Path to Knowing Thyself 102-03 (2005).
130. Id. at 99; see also Kim, The Banality of Fraud, supra note 21, at 1030 (“[C]omplex and ambiguous contexts... where multiple arguments can be generated are ideal environments for triggering self-serving biases, because they allow subjects to focus on, or weight, differentially, arguments favoring themselves (or their clients or de facto principals) over other parties.”).
132. See Simon, supra note 99, at 25-33 (discussing comprehensive research demonstrating how motivated reasoning can bias the investigation of a criminal case); Ask & Granhag, supra note 113, at 579 (reporting that research demonstrates that investigators engage in asymmetric skepticism when considering evidence regarding an identified suspect); Davis & Leo, supra note 131, at 764-65 (discussing the role that motivated reasoning can play in producing false confessions during the investigation of crime).
133. Simon, supra note 99, at 26-27. Other motivations that can skew the investigatory process include the emotional arousal of police—especially anger and disgust—toward a particular suspect, the affinity of group membership, and the escalation of commitment to the guilt of a suspect who has been identified on preliminary evidence gathered in the case. See id.
134. See id. at 20 (noting that much of the psychological phenomena that influence police and others in law enforcement also affect prosecutors, “who are often involved in one way or another in major investigations, and who are subjected to similar incentives and pressures in the performance of their role”).
of innocence—rests with motivated reasoning. The central argument of these scholars is that, once a person has been accused of a crime, the unconscious need to confirm the accused’s guilt overrides concerns for accuracy.

Finally, defense lawyers are not immune from these psychological forces, especially in circumstances of extreme workload pressure. The result can be a form of what I call “ethical blindness,” which causes defense lawyers who are motivated to dispose of cases quickly to shortchange their professional obligations. Again, these motivations that bias judgment—just as with police and prosecutors—occur below the level of consciousness, meaning they go undetected, leaving their mark without a trace.

B. Predecessor Counsel as Motivated Reasoner

The research on motivated reasoning helps to provide an accurate picture of how lawyers will respond when faced with allegations of ineffective assistance of counsel. Of course, no one motive will exist for all lawyers. Many lawyers will react defensively to a claim of ineffectiveness, believing that the allegation is an unwarranted assault against their competence and good name. Some may view the claim with less hostility, recognizing that accusations of ineffectiveness should be

135. Brady v. Maryland, 373 U.S. 83, 88-90 (1963); see, e.g., Alafair S. Burke, Improvising Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 WM. & MARY L. REV. 1587, 1597-98 (2006) (discussing the influence of motivational factors on selective information processing); Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 WIS. L. REV. 291, 313 (discussing motivational factors). Most of the work on prosecutorial error has focused on the cognitive aspects of judgment bias, particularly with regard to the role of “confirmation bias,” which is the well-documented psychological phenomenon in which people unconsciously seek out information that confirms pre-existing beliefs or opinions. Burke, supra, at 1596. However, the long debate in psychology over differentiating cognitive and motivational aspects of reasoning is well beyond the present purposes, other than to note that the cognitive processes that produce confirmation bias and the goal directed aspects of motivational reasoning tend to work together. See, e.g., Kunda, supra note 20, at 494-95. Indeed, psychologists have found that motivated reasoning will often be responsible for the initial hypothesis that starts the process of confirmatory reasoning. Id. In other words, confirmation bias describes one mechanism by which motivated reasoning occurs. For a discussion that brings together the cognitive and motivational factors in prosecutorial decision-making, see Barbara O’Brien, A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making, 74 MO. L. REV. 999, 1010-15 (2009).

136. See Findley & Scott, supra note 135, at 292-93.

137. See AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 4 (2009); Eldred, Prescriptions, supra note 23, at 337-40; Findley & Scott, supra note 135, at 292.

138. See Eldred, Prescriptions, supra note 23, at 368-74.

expected, especially in death penalty cases. There may even be a few lawyers who, being so committed to their client’s interest, view an allegation of ineffectiveness as a welcome opportunity to prevent or delay the client’s execution. The next Subpart surveys these various motives, and examines how they can be expected to influence decisions lawyers make regarding their professional duties under Guideline 10.13 and other relevant authority.140

1. Lawyers Motivated to Resist Allegations of Ineffectiveness

For defense lawyers who are accused of ineffective assistance of counsel, two motives are likely to take priority. The first concerns the role of emotion. Contrary to common perception, people cannot simply disregard their emotional reactions when making a decision. Rather, it is the experience of emotion that produces an immediate motivated response.141 In other words, motivated reasoning is emotion-based reasoning,142 which occurs automatically, effortlessly, and without awareness.143 And, while the role of emotion continues to be studied in a wide range of disciplines,144 its role as a significant factor in how decisions are made is now firmly established.145

It is also understood that lawyers frequently react defensively to allegations of ineffectiveness.146 They may feel scorned, angry,147 and as

140. See infra Part III.B.1–2.
142. See Drew Westen & Pavel S. Blagov, A Clinical-Empirical Model of Emotion Regulation, in HANDBOOK OF EMOTION REGULATION 373, 382 (2007) (describing how the “emotional influence on judgment and decision making occurs in a phenomenon known as motivated reasoning, whereby people draw emotionally biased conclusions”); see also Ditto et al., supra note 98, at 311 (“[A]s people consider information relevant to a judgment whereby they have a preferred conclusion, they experience positive affect if that information seems to support their preferred conclusion, and negative affect if it seems to challenge their preferred conclusion.”); Westen et al., supra note 141, at 1947 (“Motivated reasoning can be viewed as a form of implicit affect regulation in which the brain converges on solutions that minimize negative and maximize positive affect states.”).
145. See supra notes 134-35 and accompanying text; see also Taber & Lodge, supra note 108, at 756 (arguing that, based on research, “selective biases and polarization . . . are triggered by an initial (and uncontrolled) affective response”).
146. See supra notes 133-37 and accompanying text.
147. See Fox, Making the Last Chance Meaningful, supra note 19, at 1185.
if their pride is wounded. Perhaps they perceive the allegation as an attack on their self-worth, or as an unwarranted attack on their competence, from an ungrateful former client. Whatever the cause, lawyers who experience such negative reactions can be expected to engage in biased selection, recall, and interpretation of information. Coupled with the emotionally charged environment of capital litigation itself, which can be deeply draining and is so often infused with strong passions about the death penalty, the power of these emotional reactions to produce motivated responses can be anticipated to be especially strong.

The power of self-interest is also a significant component of the decision-making process. It should surprise no one that self-interested goals are often consciously pursued. But, the more subtle point here is that self-interest also influences decisions automatically, outside of the conscious awareness of the decision-maker. Indeed, a wealth of psychological data indicates that people engage in biased reasoning to achieve self-interested results. The result is that they fail to perceive the ways in which self-interest corrupts their choices. Lawyers and

148. Siegel, My Reputation or Your Liberty, supra note 1, at 99-100.
149. Chugh et al., supra note 124, at 84-85 (noting that people possess an illusion of their own competence to maintain and protect their self-esteem); see also $MON, supra note 99, at 110 (describing how memory can be influenced by the “ubiquitous need to enhance one’s prestige and sense of self-worth”).
150. Fox, Making the Last Chance Meaningful, supra note 19, at 1185-86 (discussing many reasons why predecessor counsel may feel that the client has contributed to his own predicament).
151. See ABA GUIDELINES, supra note 8, Guideline 1.1 cmt., at 923 (noting the emotional toll of death penalty defense work); Bandes, Repression and Denial, supra note 139, at 342-43 (recounting the case of a defense lawyer who, years after the event, acknowledged that he was so repelled by his client that he intentionally lost the capital case). See generally Bandes, Repellent Crimes, supra note 144 (discussing the emotional environment of capital litigation).
152. See Don A. Moore & George Loewenstein, Self-Interest, Automaticity, and the Psychology of Conflict of Interest, 17 SOC. JUST. RES. 189, 199 (2004) (explaining how self-interest is processed unconsciously, below the level of awareness); see also BAZERMAN & TENBRUNSEL, supra note 101, at 8, 81 (explaining the unconscious processing of self-interest). For a review of the literature and research on the automatic power of self-interest, see Eldred, Prescriptions, supra note 23, at 361-68.
153. See Babcock & Loewenstein, supra note 123, at 111 (“[R]esearch on the self-serving bias has shown that people tend to arrive at judgments of what is fair or right that are biased in the direction of their own self-interests.”); Kim, Naked Self-Interest?, supra note 21, at 137 (describing “the decades of social cognition research showing that we are motivated by our own economic self-interest and that we tend to conflate ‘fairness’ with that which benefits ourselves financially”).
154. Kim, The Banality of Fraud, supra note 21, at 1030 & n.305 (“Because we are imperfect information processors, we first automatically determine our ‘preference for a certain outcome on the basis of self-interest and then justify this preference on the basis of fairness by changing the importance of attributes.”’ (quoting Max H. Bazerman et al., The Impossibility of Auditor Independence, 38 Sloan MGMT. REV. 89, 91 (1997))).
other professionals are not immune; rather, like everyone else, they will often fail to appreciate how self-interest influences their judgment.\textsuperscript{155}

In the present context, lawyers accused of ineffectiveness have a host of self-interested reasons to resist the allegations. Most directly, the determination that a lawyer has been ineffective can be perceived as a blemish to that lawyer’s professional reputation and good name.\textsuperscript{156} Indeed, as Formal Opinion 10-456 notes, it is the possibility of such reputational harm that serves as the rationale for permitting a lawyer to disclose information that would otherwise be protected under the duty of confidentiality.\textsuperscript{157} And, while some have questioned whether such reputational concerns should matter,\textsuperscript{158} reputation is, for many lawyers, the commodity they most cherish.\textsuperscript{159} Other, more concrete, injuries can also flow. In some cases, a lawyer who has been adjudicated ineffective may find it harder to obtain additional court appointments.\textsuperscript{160} And, while criminal defense lawyers typically have little reason to fear professional discipline,\textsuperscript{161} a finding of ineffectiveness can make it more likely—at least in more egregious cases—that the disciplinary process will be initiated.\textsuperscript{162}

\textsuperscript{155}. See Babcock & Loewenstein, supra note 123, at 121 (describing studies of bankruptcy lawyers and judges demonstrating the existence of self-serving biases); Page, supra note 113, at 261-65 (reviewing literature on biased decision-making in various professions). For a discussion of how automatic self-interest can influence the choices made by criminal defense lawyers, see Eldred, Prescriptions, supra note 23, at 368-74; Eldred, Psychology of Conflicts, supra note 23, at 72-77. See generally Max H. Bazerman & Deepak Malhotra, Economics Wins, Psychology Loses, and Society Pays, in Social Psychology and Economics 263 (David De Cremer et al. eds., 2006) (describing research on biased reasoning in various professions, including doctors, lawyers, accountants, and investment bankers).

\textsuperscript{156}. See Eldred, Psychology of Conflicts, supra note 23, at 75 & n.159 (citing sources discussing the effects of an ineffective assistance of counsel claim on the lawyer himself); Joy & McMunigal, supra note 12, at 44 (noting that defense lawyers accused of ineffectiveness have reputational interests at stake).


\textsuperscript{158}. See Newmark, supra note 18, at 731.


\textsuperscript{160}. See, e.g., Burger v. Kemp, 483 U.S. 776, 806 n.11 (1987) (Blackmun, J., dissenting) (describing how the lawyer accused of ineffectiveness based on an alleged conflict of interest was not “fully disinterested,” in that he “ha[d] an interest in disavowing any conflict of interest so that he may receive other court appointments that [could be] a source of clients for the criminal defense work of the partners’ practice”).

\textsuperscript{161}. See Bruce A. Green, Criminal Neglect: Indigent Defense from a Legal Ethics Perspective, 52 Emory L.J. 1169, 1186 (2003); Susan P. Koniak, Through the Looking Glass of Ethics and the Wrongs with Rights We Find There, 9 Geo. J. Legal Ethics 1, 10 (1995).

\textsuperscript{162}. There are at least three reasons for this conclusion. First, because all lawyers have a mandatory reporting requirement under Model Rule 8.3, any violation that raises a substantial question as to the lawyer’s honesty, trustworthiness, and fitness to practice law must be reported to
How will these negative emotions and self-interested motivations influence the choices that lawyers make when responding to claims of ineffectiveness? Recall that one of the primary constraints on motivated reasoning is the competing desire for accuracy, meaning that reasoning towards a desired conclusion flourishes when there is room to maneuver. Determining the power of motivated reasoning for defense lawyers in post-conviction cases, therefore, requires careful scrutiny of the obligations set forth in Guideline 10.13 and other relevant authority.

To begin, Guideline 10.13 is crafted in a manner that limits the likelihood of motivated reasoning being deployed to defeat its core goal of giving primacy to the interests of the client. Some of the duties in Guideline 10.13 simply do not provide much room for motivated reasoning. For example, it would be hard for a defense lawyer to plausibly argue that there is no obligation to turn over the entire case file to successor counsel. As a result, there is little reason to believe that lawyers will attempt to find a rationalization not to do so. Similarly, the categorical obligations to safeguard the best interests of the former client and to cooperate fully with successor counsel make it hard for predecessor counsel to completely ignore these obligations under a belief that there is a plausible reason for such conduct.

At the same time, as with any set of obligations, there is space for interpretation. It is, therefore, in these interstices where motivated reasoning is likely to occur. Recognizing this and the power of motivated reasoning already described, courts applying Guideline 10.13, the appropriate professional authority. MODEL RULES OF PROF’L CONDUCT R. 8.3 (2013). And, while not every finding of ineffectiveness triggers a duty to report, a finding of ineffectiveness based on egregious error arguably does so. See Henak, supra note 34, at 357-58 (discussing Model Rule 8.3’s obligations for findings of ineffective assistance of counsel); see also Ariz. Comm. on Rules of Prof’l Conduct, Op. 98-02 (1998). Second, while judges are often reluctant to report findings of ineffectiveness to disciplinary authorities, the fact that such referrals do occur should be enough to ring a cautionary bell for defense lawyers. See CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 74 (Gerald Uelmen ed., 2008) [hereinafter CCFA FINAL REPORT]; see also Graham, supra note 81, at 1674-75 & n.171 (citing cases showing judicial reluctance to report ineffective assistance of counsel); McMorrow et al., supra note 159, at 1436 & n.50 (citing cases demonstrating the reluctance of judges to report ineffective assistance of counsel). Indeed, at least in one state—California—there is an effort underway to encourage such referrals in appropriate cases. See CCFA FINAL REPORT, supra, at 74-75. Third, there is at least some evidence that disciplinary counsel do not initiate charges against defense lawyers until the record is fully developed through a post-conviction claim of ineffective assistance of counsel. See Donald R. Lundberg, Two Case Studies in the Exercise of Discretion in Lawyer Discipline Systems, 2009 J. PROF. LAW. 107, 108.
and lawyers considering the obligations that it imposes, must keep a steady eye on its client-centered purpose.¹⁶⁷

Take, for example, perhaps the most important duty of predecessor counsel: to provide successor counsel with information regarding all aspects of the representation of the former client, including details about the strategic thinking that took place during the case.¹⁶⁸ This duty is complicated, and certainly requires predecessor counsel to help successor counsel understand which areas of factual and legal inquiry were undertaken, which were not, and the reasons for those decisions or omissions.¹⁶⁹ Yet, there is a degree of flexibility in how to interpret these obligations. Must the lawyer discuss every aspect of decision-making, or only those which predecessor counsel considers significant? What information may predecessor counsel offer freely, even if not sought directly by successor counsel, and which must await a request? Can predecessor counsel assume that much of the file will speak for itself, or must there be an affirmative effort to provide explanations for any ambiguities—and, if so, what is the proper standard for determining what is ambiguous? These and other questions open the doors to motivated answers. Successor counsel might volunteer only a small percentage of available information; or limit the amount of time that is made available to successor counsel for an interview; or fail to return phone calls in a timely manner; or engage in any other number of actions that could burden successor counsel’s efforts to prove the defendant’s claim. None of these actions would be consistent with effective assistance during the course of a representation, and hence, none of them should be tolerated in a situation where successor counsel has “a continuing duty to safeguard the interests of the client.”¹⁷⁰

In addition, most claims for ineffectiveness are litigated long after the defendant was sentenced, requiring predecessor counsel to remember events years after they happened.¹⁷¹ Recall that people tend to remember information in a manner that is favorable to their goals, and then truncate their search upon finding it.¹⁷² Unless there are contemporaneous notes

¹⁶⁹. See id.
¹⁷⁰. Id.
¹⁷¹. See Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 CORNELL L. REV. 679, 695 (2007) (discussing the extensive delay that typically occurs between the sentencing of a defendant and collateral proceedings brought to challenge the effectiveness of counsel).
¹⁷². See SIMON, supra note 99, at 110 (discussing the many psychological factors that influence memory, explaining the various reasons why recall can be biased by directional goals, and noting that memories are “susceptible to motivational influences also because perception itself can
recording decisions that were made—a duty discussed in more detail below—predecessor counsel will need to rely on memory to recall the details of what transpired during the representation of the former client. Motivated to reduce the chance of being found ineffective, lawyers will naturally favor memories that benefit their own interests over those of their former clients.

Once again, Wood serves as an example. As previously noted, the question was whether the three-member trial team made a strategic decision to curtail investigation into the defendant’s mental health deficiencies upon reviewing a psychologist’s report that had been prepared for the defense. At the habeas hearing, which occurred more than six years after the trial, none of the lawyers could recall much regarding the psychologist’s report. For example, the lead lawyer could not recall whether he was present during the defendant’s psychological assessment or whether he ever met with the psychologist. The lawyer primarily responsible for the penalty phase had a hard time even remembering the doctor’s name or what interactions, if any, he had with him. Yet, notwithstanding their expansive lack of recall, both lawyers, as well as the third lawyer who was more tangentially involved, were able to remember that they did, in fact, review the psychologist’s report, which later became the key factual finding to deny the ineffectiveness claim. Was this a process of selective recall, remembering facts that would benefit the lawyers, but not recalling those that would damage their self-interests? It is certainly be shaped by motivation”); supra note 95 and accompanying text. In Dishonest Deed, Clear Conscience: Self-Preservation Through Moral Disengagement and Motivated Forgetting, Lisa Shu and her colleagues state:

Individuals are persistent “revisionist historians” when recalling their pasts. They tend to recall selectively in ways that support their decisions; for instance people engage in “choice supportive memory distortion” for past choices, over-attributing positive features to options chosen and negative features to options not chosen. This memory bias does not exist for experimenter-assigned selections, but does exist when people are led to an incorrect belief about what their previous choice was. These findings point to the role of motivation in recall.


174. Id. at 295-96.
175. Id. at 296.
176. See Joint Appendix, supra note 93, at 343-45.
177. See id.
178. See Wood, 558 U.S. at 301-02.
179. See Kathleen M. Schmitt et al., Why Partisans See Mass Media as Biased, 31 COMM RES. 623, 625 (2004) (defining selective recall as paying more attention to, and therefore remembering more clearly, aspects of content that are hostile to your own beliefs).
possible. After all, had the lawyers denied remembering whether they reviewed the report, it would have been much easier for the habeas court, and any subsequent reviewing court, to conclude that the decision to end the investigation into the defendant’s mental health was the result of neglect or oversight.

The confidentiality obligations of predecessor counsel are also susceptible to motivated responses. One of the core questions in post-conviction litigation, as described in Part II, is whether predecessor counsel can share information with the prosecution prior to any court ordered disclosure. On this point, will the lawyer follow ABA Formal Opinion 10-456 and conclude that the limited self-defense exception to the duty of confidentiality rarely, if ever, justifies such disclosure? Or, will the lawyer decide that informal disclosure to the prosecution is appropriate? Again, motivated reasoning helps to predict the result. Because the ABA Opinion provides only guidance on how ethical questions should be resolved, a lawyer can easily rationalize the self-interested answer by reasoning that, in the absence of binding authority to the contrary, there is no need to follow its conclusions. Even if this choice is not made consciously, the strong automatic power of self-interest can override any concerns the lawyer may have about protecting the interests of the former client, allowing the lawyer to conclude that broad permissive disclosure is acceptable. This is precisely why it is necessary for courts and lawyers to understand clearly that the fundamental tenets of professional ethics embodied in Guideline 10.13 entrust this decision to successor counsel, not predecessor counsel.

Similar concerns will arise when predecessor counsel face decisions about the attorney-client privilege. Again, Guideline 10.13 has anticipated the issue, and provides the appropriate framework for sheltering the client from the predictable exigencies of predecessor counsel’s moment of stress. Guideline 10.13 ties predecessor counsel to the mast of client interests before the sirens of self-interest assault her in the storm of litigation.

In cases where a court finds that the filing of the ineffectiveness claim constitutes a limited waiver of the attorney-client privilege, and

180. This conclusion is buttressed by the remarkable lack of memory all three of the lawyers had regarding the case. Over the course of his questioning, lead counsel responded, “I do not recall,” over seventy-seven times, whereas the lawyer primarily responsible for the penalty phase responded, “I do not recall,” over ninety-one times. See Joint Appendix, supra note 93, at 343-45. The third attorney’s memory was even worse. Id.

181. See supra Part II.A.

182. See supra Part II.A.1.

183. See ABA GUIDELINES, supra note 8, Guideline 10.13, at 1074.

184. See id.
for some reason there is no successor counsel involved, the predecessor lawyer will need to decide which information is, and is not, subject to disclosure. Will the lawyer utilize this discretion to justify broad or limited disclosure? Here, the framing of the question matters. If the lawyer sees the issue solely as a matter of staying within the bounds of the court’s order, then any information that meets the liberal evidentiary standard for relevancy—that is, “any tendency” to be of concern in the habeas proceeding—can be disclosed. In contrast, if the lawyer frames the issue as one of professional duty owed to the former client, and considers ethical obligations in deciding how to respond, then the lawyer would be required to limit the court ordered disclosure as much as possible—by releasing only the information the lawyer believes is necessary to the claim; challenging, if possible, the scope of the court ordered waiver of privilege; seeking a protective order to restrict access to the disclosed information; asking for in camera review of any questionable material; or by asserting other non-frivolous objections.

According to motivated reasoning research, predecessor counsel facing ineffective assistance claims will choose the path that is more likely to lead to counsel’s desired result. For lawyers who want to maximize their chances of being found effective, framing the disclosure as a response to the ineffectiveness allegations—as opposed to a limited response protecting the attorney-client privilege—will make it easier to rationalize a broad disclosure of information.

Perhaps this is what happened in Purkey, the case that started this discussion. There, the court order directing predecessor counsel to file an affidavit was broad, in that it did not limit disclosure to only that

185. Although this situation is inconsistent with the ABA Guidelines, which contemplate continuous representation throughout the life of each capital case, it does in fact occur because states’ systems for the provision of post-conviction counsel in capital cases vary widely in their on-the-ground effectiveness. See Eric M. Freedman, Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster, 41 Hofstra L. Rev. 591, 591-92 (2013).

186. See Fed. R. Evid. 401 (defining as relevant any evidence if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action”); George Fisher, Evidence 23 (3d ed. 2013) (“It would be hard to devise a more lenient standard of probativeness than Rule 401’s ‘any tendency’ standard.”).

187. See discussion supra Part II.A.2.

188. See Helzer & Dunning, supra note 22, at 381-82. For example, people tend to seek out confirming evidence when they ask themselves, “Am I extroverted?” This makes them likely to perceive themselves as gregarious and outgoing. In contrast, people tend to seek out evidence that they are reticent and private when they ask themselves, “Am I shy?” This, in turn, often leads them to believe they are more reserved. Id.; see discussion supra Part III.A.

which was needed to resolve the claim.\textsuperscript{190} The frame used by predecessor counsel to decide how to respond might explain what happened next. Given the power of motivated reasoning, the expansive 117-page affidavit may have resulted from counsel simply asking himself: “What information is responsive to the court order?”—rather than asking a question that focused on the best interests of his former client, such as: “how can I try to limit the disclosure ordered by the court?” Though attempting to peer into the decision-making process of predecessor counsel is largely speculative at this point,\textsuperscript{191} research on motivated reasoning suggests that, even if predecessor counsel did not consciously choose a frame that better aligned with his own interests, a motivated process would have achieved the same result.\textsuperscript{192}

The Purkey case also introduces a slightly different wrinkle. Recall that Purkey’s trial lawyer initially resisted disclosure, but later responded to the court’s order with an affidavit including extensive legal argumentation as to why he was not ineffective.\textsuperscript{193} What explains why a lawyer would seemingly seek to protect the defendant’s interests, at least initially, but then have such a change of heart thereafter? One possible explanation comes from research on what is called “moral self-licensing,” which describes the phenomenon in which past moral deeds make “people more likely to do potentially immoral things without worrying about feeling or appearing immoral.”\textsuperscript{194} Documented in various domains—including demonstrations of prejudice, charitable giving, and consumer purchasing of luxury goods—researchers have demonstrated how prior conduct that is deemed socially worthy can permit future selfish or otherwise immoral behavior.\textsuperscript{195} Two possible explanations have been offered for this phenomenon. The first is that people monitor their own moral credit, similar to a bank account, such that a deposit (acting morally) permits a withdrawal (acting immorally),

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190. Indeed, the trial court arguably issued an order that exceeded even the relevancy standard. \textit{See} Purkey v. United States, No. 01-00308-01-CR-W, 2009 WL 3160774, at *3 (W.D. Mo. Sept. 29, 2009).

191. No independent assessment of the affidavit is possible, as it was filed under seal by court order and is therefore not available for viewing. \textit{See id.} at *7. However, this should not be taken to mean that predecessor counsel took the initiative to protect Purkey’s interests after the court issued its order. Rather, the request for the protective order was initiated by successor counsel, and the formal motion was made by the prosecution. \textit{See id.}

192. \textit{See discussion supra} Part III.A.


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yet leaves the account balanced.\textsuperscript{196} The second is that past acts change the meaning of future ones, such that prior moral acts help convince a person that they are moral, and thus the future conduct (even if immoral in an objective sense) is deemed permissible.\textsuperscript{197} Perhaps this is what can happen when a court orders predecessor counsel to file an affidavit responding to allegations of ineffectiveness: the more the lawyer had attempted to protect the client’s interests before the order, the more room there is to act selfishly after the order.\textsuperscript{198}

Finally, there is the duty to maintain files in a proper manner.\textsuperscript{199} Given the problems of selective recall, the documentation requirement of Guideline 10.13—requiring lawyers in death penalty cases to maintain contemporary records in a manner that will inform successor counsel of significant developments in the case—becomes that much more important.\textsuperscript{200} To be sure, this obligation, if followed, would go a long way to rectifying some of the problems with memory that have been described. But, there are also reasons to be cautious about the accuracy of contemporary records. Research has indicated, for example, that contemporaneous notes taken during interviews of crime victims often omit important details.\textsuperscript{201} Other studies have compared contemporaneous notes of police interviews to later official police reports, finding that the later reports often include information recalled by the interviewer from memory that were not in the contemporaneous notes themselves.\textsuperscript{202} Motivations, such as self-serving biases and pre-existing views about the interview subject, can undermine the accuracy of contemporaneous notes and distort the records that are generated.\textsuperscript{203} While the external

\textsuperscript{196} Id. at 349.

\textsuperscript{197} Id.

\textsuperscript{198} See id. One more time, Guideline 10.13 serves to deter these potential problems. ABA GUIDELINES, supra note 8, Guideline 10.13 & cmt., at 1074-75. As already indicated, predecessor counsel knows that successor counsel (a lawyer who will presumptively be acting competently) will seek to resolve all debatable issues of privilege in the client’s favor, and predecessor counsel will be required to act accordingly. See supra notes 61-62 and accompanying text.

\textsuperscript{199} See ABA GUIDELINES, supra note 8, Guideline 10.13, at 1074.

\textsuperscript{200} See Schmitt et al., supra note 179, at 625.

\textsuperscript{201} See, e.g., Michael E. Lamb et al., Accuracy of Investigators’ Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims, 24 LAW & HUM. BEHAV. 699, 703-04 (2000) (finding that twenty-five percent of the forensically relevant utterances from child abuse victims and more than fifty percent of the utterances by interviewers themselves did not make it into the contemporaneous notes of the interviews); see also SIMON, supra note 99, at 40 (discussing studies about the accuracy of investigatory notes).

\textsuperscript{202} See Amy Hyman Gregory et al., A Comparison of U.S. Police Interviewers’ Notes with Their Subsequent Reports, 8 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 203, 212-14 (2011).

\textsuperscript{203} See Becky Milne & Ray Bull, Interviewing Victims of Crime, Including Children and People with Intellectual Disabilities, in PRACTICAL PSYCHOLOGY FOR FORENSIC INVESTIGATIONS AND PROSECUTIONS 1, 11-12 (Mark R. Kebbell & Graham M. Davies eds., 2006) (describing how
validity of such studies is not known, it would not be surprising to find out that the efforts of predecessor counsel to record earlier events are inaccurate in important details. Indeed, given the powerful ways in which motivation can influence memory, recall, and interpretation of information, it is likely that, in many instances, such records—whether interview notes, correspondence, formal memos to the file, or mere jottings about the case—would be subject to the same errors in judgment that have been described above.  

Because many of the obligations set forth in Guideline 10.13 and the related authority offer predecessor counsel significant discretion in making responsive disclosures after a claim of ineffectiveness has been filed, there is good reason to believe that lawyers with strong motives to resist the claim will engage in asymmetric skepticism in deciding how to respond. The likely result is that predecessor counsel’s choices will be self-serving, advancing the attorney’s own interests rather than those of the former client.

2. Lawyers Motivated to Comply with Professional Duty

What about those lawyers who, from time to time, willingly cooperate with successor counsel, for example, by filing affidavits that concede some form of deficient performance? Are they simply able to overcome their emotions and self-interest to meet their professional duties to their former clients? Perhaps, as some people can overcome their implicit biases through the sheer power of rational deliberation.  

The research on motivated reasoning, however, provides another explanation: these lawyers’ primary motivation is to protect the interests of their former clients. In these instances, Guideline 10.13 and related authority may assist lawyers in achieving legal outcomes that are satisfying to all stakeholders: themselves, their clients, the profession, and the justice system.

To start, some lawyers possess a strong moral antipathy toward the death penalty that outweighs the self-interested concerns that have been discussed. For these lawyers, the conscious desire to prevent the former client’s execution may be the primary motivation, meaning that they

pre-existing views regarding an interviewee can bias the information obtained); see also Saul K. Kassin et al., Police-Induced Confessions: Risk Factors and Recommendations, 34 LAW & HUM. BEHAV. 3, 26 (2010) (arguing in favor of requiring videotaped confessions so that trial judges and juries would have an “objective and accurate record of the process by which a statement was taken—a common source of dispute that results from ordinary forgetting and self-serving distortions in memory”).

204. See Kassin et al., supra note 203, at 25.
205. See Eldred, Psychology of Conflicts, supra note 23, at 70-71.
206. See Fox, Making the Last Chance Meaningful, supra note 19, at 1185.
would be consciously willing to sacrifice their own self-interests for those of their clients. A capital case in which predecessor counsel, who had conceded error in his mitigation investigation, announced his opposition to the death penalty on cross-examination. In such cases, where counsel’s conscious and unconscious motivations can be expected to work together, there will be little danger that her motivated reasoning will undermine the professional obligations owed to the former client.

Other lawyers may conclude that it is in their reputational interest to admit to errors that serve as the basis for the ineffectiveness allegation. As many scholars have noted, informal norms can regulate the behavior of lawyers through imposing reputational costs on members who do not conform to the dominant ethos of the local community in which they practice. Too often, practice norms for criminal defense lawyers discourage the protection of client interests. Yet, there are also communities of practice where the informal norms encourage conduct that benefits clients. One might assume, for example, that lawyers who work for public defender offices—at least those in which there is a strong ethos of client protection—might regard allegations of ineffectiveness as simply part of the job. For these lawyers, the motive

208. 874 F.2d 756 (11th Cir. 1989).
209. See id. at 761 n.4.
210. See Moore & Loevenstein, supra note 152, at 190 (explaining that automatic self-interest and rational or controlled processes of reason often do not clash, but instead work together to produce judgment and behavior).
212. For a detailed discussion, see Brown, supra note 159, at 802, 819-33.
214. See id. (describing multiple reasons why so many criminal defense lawyers provide inadequate representation, but noting that “[s]ome jurisdictions have provided the resources, independence, structure, and supervision that enable capable, caring, and dedicated lawyers to zealously represent their clients”) For a discussion of high-quality defender organizations where caseloads are manageable, see NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 192-228 (2011), available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.
to protect client interests may be dominant, again suggesting that both conscious and unconscious motives would work in the same direction.

Finally, there are lawyers who willingly admit ineffectiveness, but for whom there is not an obvious motive for doing so. Here, one can only speculate what motivates their conduct. Some may genuinely place the interests of their clients above their own, despite the negative consequences that could flow from a finding of ineffectiveness. Others may not care about their professional reputation by the time a claim of ineffectiveness arises. Maybe they have been disbarred for other misconduct and are therefore essentially immune from community censure.\textsuperscript{215} Or, maybe they have such little regard for their public persona that a finding of ineffectiveness could hardly cause reputational harm.\textsuperscript{216}

In sum, the research on motivated reasoning provides a valuable prism through which to understand how lawyers can be expected to respond when accused of ineffective assistance. For lawyers whose primary interest is to resist such allegations, and where there is discretion on how to interpret or respond to the duties owed to former clients, they can be expected to engage in preference-consistent reasoning. It is in these situations that Guideline 10.13 has bite, forestalling what would otherwise likely be reduced compliance with the professional obligation to prioritize client interests.\textsuperscript{217} In contrast, for lawyers whose primary motivation runs in favor of protecting the interests of a former client, the power of unconscious reasoning will pose little danger to compliance with professional obligations, and Guideline 10.13 and related authority can serve to support the attorneys’ laudable goals.

\textsuperscript{215}See, e.g., Cullen v. Pinholster, 131 S. Ct. 1388, 1423 (2011) (noting that defendant’s trial lawyer, who provided successor counsel with a series of declara
tions concerning the case, had been disbarred by that time).

\textsuperscript{216}This may explain the expansive concessions of error by predecessor counsel in Cheatham, where the trial lawyer who was found ineffective had a history of running for various political offices, including governor, while dressed as Thomas Jefferson. Kansas v. Cheatham, 292 P.3d 318, 323-24 (Kan. 2013). The Kansas Supreme Court made special note of these activities in its opinion: [Predecessor counsel] described his political activities . . . as a “hobby” that he engaged in as a “bully pulpit” to express disagreement with certain public policies, such as the Iraq war. Often, [counsel] said, he would attend political events dressed in costume as Thomas Jefferson to reflect his views about the original underpinnings to the United States Constitution. \textit{Id.} In addition, the court noted that “these political and professional activities occupied a significant portion of [counsel’s] time that he wanted [defendant] to acknowledge they would coincide with the defense of the murder charges.” \textit{Id.} at 324.

\textsuperscript{217}See ABA GUIDELINES, supra note 8, Guideline 10.13, at 1074.
IV. THE IMPLICATIONS OF MOTIVATION

Reducing biased judgments of predecessor counsel in ineffectiveness cases will not be easy. For example, research indicates that merely informing people about their implicit biases is of marginal utility in improving decision-making.218 As a result, other strategies are needed. This Part sets forth recommendations that may be more successful—including explicit acknowledgment by courts of the importance of reading Guideline 10.13 with an unwavering focus on its client-centered purpose; encouraging judicial supervision of disclosures made by predecessor counsel in ineffectiveness cases; encouraging judges in post-conviction cases to account for motivated reasoning when making credibility assessments of predecessor counsel; and encouraging successor counsel to learn about strategies that can help reduce implicit bias.219

A. Understanding Guideline 10.13

In large measure, Guideline 10.13 is clearly written, as it forcefully and unambiguously states the two primary obligations of predecessor counsel: “to safeguard the interests [of the former] client,” and to “cooperate fully with successor counsel.”220

As noted earlier, any interstitial interpretations that may need to be made in particular cases should conform to these purposes.221 Thus, for example, hide-and-seek behavior is simply inconsistent with predecessor counsel’s ethical duties under Guideline 10.13.222 Predecessor counsel has an affirmative duty to volunteer all information relevant to the representation, even in the absence of a specific request from successor counsel.223 Similarly, the duty of cooperation includes a timeliness element, meaning that predecessor counsel must respond to requests for information without delay.224

219. See infra Part IV.A–D.
220. ABA GUIDELINES, supra note 8, Guideline 10.13, at 1074.
221. See supra notes 169-74 and accompanying text.
222. ABA GUIDELINES, supra note 8, Guideline 10.13, at 1074.
223. See supra Part II.A.
224. See supra Part II.A.
In addition, for the reasons already discussed, safeguarding the interests of the former client requires both predecessor and successor counsel to act to minimize any compelled disclosure of client information.\textsuperscript{225} This includes reminding predecessor counsel of the duty to assert the attorney-client privilege until disclosure is ordered by the court, and after the court’s order, to take all permissible steps to minimize the scope of disclosure. To minimize disclosure, counsel may seek ex parte and in camera review of any document that plausibly might still be considered privileged, pursue appropriate protective orders, and consider appellate remedies if the court ordered disclosure is broader than necessary to resolve the ineffectiveness claim.\textsuperscript{226}

Further, both successor and predecessor counsel must be vigilant in maintaining the position of Formal Opinion 10-456—that informal disclosure of information from predecessor counsel to the prosecution prior to a court order is not permissible.\textsuperscript{227} Successor counsel should, moreover, remind predecessor counsel that the self-defense exception is permissive, not mandatory, and that any disclosures made under the self-defense exception must be narrowly tailored to protect as much confidential information as possible.\textsuperscript{228}

\textbf{B. Judicial Supervision of Disclosure}

As noted earlier, some courts have been willing to oversee the process of disclosure without much concern for the additional burden it might cause; in some instances, courts have required in camera review of any proposed disclosures by predecessor counsel.\textsuperscript{229} Other courts, however, have been hesitant to oversee the process of disclosure, fearing great burdens given the large number of ineffectiveness cases that are litigated each year.\textsuperscript{230} Which is the right approach?\textsuperscript{231}

The research on motivated reasoning provides two arguments in favor of greater judicial supervision. The first is obvious—by taking the

\begin{itemize}
\item \textsuperscript{225} \textit{See supra} Part II.
\item \textsuperscript{226} \textit{See supra} notes 32, 58 and accompanying text.
\item \textsuperscript{227} \textit{See supra} Part II.A.2.
\item \textsuperscript{228} \textit{See supra} Part II.
\item \textsuperscript{229} \textit{See supra} notes 56-58 and accompanying text.
\item \textsuperscript{230} \textit{See} Siegel, \textit{Withhold from the Prosecution, supra} note 12, at 21-22 (citing cases demonstrating courts’ hesitance to oversee the process of disclosure).
\item \textsuperscript{231} Even before considering how motivated reasoning might mediate this dispute, it seems that—at least in death penalty cases where the ultimate penalty is so grave, and which concern only a small percentage of overall habeas litigation—courts would not be too severely overtaxed by engaging in \textit{a priori} review of proposed disclosures by predecessor counsel. As a result, the objection that supervision will be too burdensome loses most of its force in the death penalty context.
\end{itemize}
decision out of the hands of the biased decision-maker, bias will be lessened.\(^{232}\) In the present context, this means ensuring that it is the court, rather than predecessor counsel, that makes the final disclosure determinations. For example, more courts could follow the procedure used in some cases, in which predecessor counsel submits the trial file to the court, which in turn decides (with the input of successor counsel) the items that should be disclosed to the prosecution.\(^{233}\) If this approach is deemed too burdensome (or otherwise unwise), a modified approach may be available: predecessor counsel would be ordered to prepare a draft affidavit (with attachments) responding to the allegations in the petition, which would be submitted to successor counsel for review prior to disclosure. Successor counsel, in turn, would be permitted to make objections, flagging for the court those aspects of the affidavit that successor counsel believes should not be disclosed. The court would resolve the dispute and decide whether the proposed disclosure was appropriate. Only then would the affidavit be finalized and disclosed to the prosecution. The benefit of this procedure is that court involvement would reduce the power of motivational bias by shifting much of the final decision-making authority to the court.

A second reason for increased judicial scrutiny concerns the power of accountability. Multiple studies demonstrate that the power of biased decision-making is reduced when the decision-maker is aware that his choice will be evaluated by others.\(^{234}\) Where the desires of the audience are not known, decision-makers engage in a form of preemptive self-criticism in which they anticipate and take account of the objections they are likely to face.\(^{235}\) This results in increased accuracy.\(^{236}\) As long as the court itself has not already predetermined the result it wants—for example, by signaling that it will rule that disclosure should be as broad

\(^{232}\) See supra Part III.A.

\(^{233}\) See Siegel, *Withhold from the Prosecution*, supra note 12, at 26 n.55. Notably, there are courts that have ordered even more protection than this recommendation. See, e.g., Jones v. United States, No. 4:11CV00702, 2012 WL 484663, at *2 (E.D. Mo. Feb. 14, 2012) (refusing to require a court ordered affidavit, instead requiring predecessor counsel to testify in court prior to any disclosure, then, prior to cross-examination, ordering an in camera review of any proposed disclosures).


\(^{235}\) See Lerner & Tetlock, supra note 234, at 257.

\(^{236}\) See *SIMON*, supra note 99, at 39 (“Accountability has been found to lead to closer attention to evidence, higher calibration between confidence and accuracy, increased sophistication of thought processes, and lower effects of emotions on unrelated judgments.”); Lerner & Tetlock, supra note 234, at 257.
as possible—lawyers evaluating what information to disclose to prosecutors will be more accurate in their judgments when the lawyer expects to be supervised by the court.

Of course, judicial supervision will not eliminate all bias. There are judges who will doubtlessly resent being asked to assess the propriety of disclosures by predecessor counsel, and as a result, such judges may not adequately exercise this function. In addition, judges are not immune to the same implicit biases of judgment that affect everyone else.\textsuperscript{237} Therefore, judicial supervision is not a miracle cure. That acknowledged, shifting to the court responsibility to review proposed disclosures is preferable to allowing prosecutors to approach predecessor counsel unsupervised, given the powerful biases that can guide counsel to defensively attempt to minimize the chance of being found ineffective, and the dire consequences for defendants who are denied relief.

\textbf{C. Assessing Credibility of Predecessor Counsel Testimony}

The same concerns that encourage judicial supervision of disclosures by predecessor counsel apply to other aspects of post-conviction litigation. Perhaps the place where this is most important is judicial assessment of the credibility of witnesses in post-conviction cases. In all situations where predecessor counsel’s testimony matters, courts should be attuned to the significant possibility that implicit motivation is likely to color what predecessor counsel says. That is, courts should bear in mind these powerful motivations when making credibility determinations and assessing whether a lawyer has provided accurate testimony during post-conviction proceedings. Some courts already judge skeptically the testimony of lawyers who admit to error, with at least a subtle suggestion that biases may be influencing such testimony.\textsuperscript{238} The research on motivated reasoning suggests that, given the reasons for lawyers to resist allegations of ineffectiveness, more concern should be paid to whether lawyers are unintentionally skewing their testimony in their own favor.

\textsuperscript{237} See Bibas, supra note 16, at 2-6 (discussing hindsight bias).

\textsuperscript{238} See, e.g., Walls v. Bowersox, 151 F.3d 827, 836 (8th Cir. 1998) (viewing counsel’s concession with “extreme skepticism”); Gentry v. Sinclair, 576 F. Supp. 2d 1130, 1154 n.38 (W.D. Wash. 2008), aff’d, 705 F.3d 884 (9th Cir. 2013) (explaining that, “given the understandable desire to protect a former client, a concession by trial counsel in a post-conviction proceeding is not conclusive for purposes of the Sixth Amendment”).
D. Educating Successor Counsel

Finally, successor counsel should be educated about strategies that can be effective in reducing implicit bias. One of the most significant strategies is counter-factual thinking, which entails taking positions that are inconsistent with those expected to be produced by the bias.239 For predecessor counsel whose motive is to resist allegations of ineffectiveness, this would mean consciously attempting to take positions that would assist, rather than resist, the allegations of ineffectiveness. Of course, given the motivations that so many lawyers have toward self-preservation, it would be foolish to expect predecessor counsel to take the initiative to learn about and implement such strategies on their own. But successor counsel might be able to employ them as part of the litigation strategy. For example, while talking to predecessor counsel, successor counsel might ask: “Can I ask you to assume for a moment that you are not the lawyer who is the subject of this litigation? If you were bringing this post-conviction claim on behalf of the defendant, what strategies would you think would be most effective?”—or something to that effect. How to employ such efforts to strip the bias from predecessor counsel would have to be considered carefully, but there is no reason why successor counsel—armed with sufficient background in the psychology of implicit bias—should not be able to find ways to help predecessor counsel reduce their own motivated reasoning.240

V. CONCLUSION

Wesley Ira Purkey remains on death row.241 But, more than a decade ago, another defendant, Walter Mickens, was executed for murdering a teenager, even though his trial lawyer had been representing the victim in an unrelated matter at the time of the crime.242 What was


241. See Michael Doyle, Boston Bombing Case May Take Years to Unfold, ANCHORAGE DAILY NEWS, Apr. 26, 2013, http://www.adn.com/2013/04/26/2880713_boston-bombing-case-may-take-years.html (noting that Purkey received a death sentence in 2003 and “has since filed more than a dozen lawsuits and appeals,” one of which—an appeal—remains pending).

242. See Fox, Making the Last Chance Meaningful, supra note 19, at 1181-84. For a more
the critical evidence that doomed Mickens’s claim for ineffective assistance of counsel despite this glaring conflict of interest? According to the record, it was the trial lawyer’s own post-conviction testimony in which counsel stated that his representation of the victim had not influenced the choices he made on behalf of Mickens in any way.\textsuperscript{243} Lawrence Fox, who chaired the ABA’s efforts to adopt the ABA Guidelines, correctly views this bewildering testimony as a glaring example of why Guideline 10.13 is so important: it sets down in detail how lawyers, such as Mickens’s trial attorney, are supposed to respond to allegations of ineffective assistance of counsel.\textsuperscript{244} But at the same time, \textit{Mickens v. Taylor}\textsuperscript{245} is also a cautionary tale about how lawyers, motivated to protect their own self-interests, can rationalize their own misbehavior and thereby undermine the very purposes that the Guidelines are meant to achieve.\textsuperscript{246} Simply put: motivation matters. And, because it does, efforts to reduce its power, such as those recommended here, must matter more.

\textsuperscript{244} Fox, \textit{Making the Last Chance Meaningful}, supra note 19, at 1182-84.  
\textsuperscript{245} 536 U.S. 162 (2002).  
\textsuperscript{246} See Eldred, \textit{Psychology of Conflicts}, supra note 23, at 76 & n.162 (describing how Mickens’s trial lawyer was motivated by economic and reputational interests). See generally ABA GUIDELINES, supra note 8, Guideline 1.1, at 919 (“The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition . . . of a death sentence . . . .”)}
DECONSTRUCTING ANTISOCIAL PERSONALITY DISORDER AND PSYCHOPATHY: A GUIDELINES-BASED APPROACH TO PREJUDICIAL PSYCHIATRIC LABELS

Kathleen Wayland*
Sean D. O'Brien**

I. INTRODUCTION

Randall Dale Adams was on trial for his life for the murder of a Dallas police officer.¹ Under Texas law, the jury can return a sentence of death only if the prosecution proves beyond a reasonable doubt that Adams would be dangerous in the future.² To meet this burden, Doctors John Holbrook and James Grigson³ told the jury that they evaluated Adams, and concluded that he had antisocial personality disorder ("ASPD") and that he was a sociopath—a remorseless killer, devoid of morality, incapable of empathy, and bent on self-gratification.⁴ Grigson

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². TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a)–(b) (West 2006).

³. In more than one hundred trials that ended in death verdicts, Grigson testified that he found the defendant to be an incurable sociopath who was one hundred percent certain to kill again. See RON ROSENBAUM, TRAVELS WITH DR. DEATH AND OTHER UNUSUAL INVESTIGATIONS 206-07 (1991) (analyzing numerous cases Grigson has taken part in). Grigson was sanctioned by the American Psychiatric Association for egregious misconduct in the performance of court-ordered competency evaluations. Mark D. Cunningham & Alan M. Goldstein, Sentencing Determinations in Death Penalty Cases, in 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 407, 413 (Alan M. Goldstein ed., 2003).

⁴. See Adams, 577 S.W.2d at 731.
told the jury that, because of his sociopathic personality, Adams would certainly kill again. The prosecutor told the jury that failing to execute Adams would endanger police officers, “the thin blue line” protecting society from anarchy. The jury returned a verdict of death, and the Texas Court of Criminal Appeals affirmed, finding that the testimony of Grigson and Holbrook was sufficient proof of Adams’s future dangerousness to justify his execution.

The rest of Adams’s story is well known. Only three days before his scheduled capital punishment, the Supreme Court stayed Adams’s execution and granted certiorari. Finding that the Texas requirement that capital jurors swear their verdict will not be “affected” by moral reservations about the death penalty is unconstitutional, the Supreme Court ordered a new sentencing trial. It was subsequently revealed that the police manufactured the testimony of the eyewitness who identified Adams as the shooter. She had previously identified someone other than Adams from the line-up, and was told she had selected the wrong person. Her initial written statement to the police, which had been withheld from the defense, described the shooter as a light-skinned Mexican or black male with a three-inch afro. Adams was a balding Caucasian with a pale complexion. Based on this and other new evidence establishing his innocence, Texas courts set aside Adams’s conviction and released him. The story of his wrongful conviction is told in the documentary, The Thin Blue Line.

Adams was the first of several Texas defendants who were sentenced to death when juries determined that they would kill again, and who were subsequently proven innocent of having ever killed before. These and other cases raise serious concerns about the use of

5. See id.
7. Adams, 577 S.W.2d at 731.
11. Id. at 286.
12. Id.
14. Ex parte Adams, 768 S.W.2d at 294.
15. THE THIN BLUE LINE, supra note 6.
ASPD and related constructs, such as psychopathy, in life-and-death matters. Indeed, diagnostic criteria for personality disorders, including ASPD, have been debated and criticized on many grounds, including lack of validity and reliability. The use of related constructs, such as psychopathy, is also controversial. As shown in Mr. Adams’s case, expert testimony about these conditions has potentially enormous prejudicial consequences.

This Article examines the use of evidence about ASPD in death penalty cases, and how compliance with the American Bar Association (“ABA”) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”) and the Supplementary Guidelines for the Mitigation Function of Capital Defense Teams (“Supplementary Guidelines”) (together “ABA and Supplementary Guidelines”) reduce the risk that such evidence will result in an unfair sentence of death. In Part II, we examine the construct of ASPD and related concepts, how such testimony is presently used in cases involving the death penalty, and data demonstrating the impact of such testimony on capital decision makers. In Part III, we discuss scientific and ethical controversies within the clinical and research community surrounding ASPD and psychopathy, such as issues related to the subjectivity of these constructs, flaws in the reliability and validity of the constructs, and associated assessment methods and instruments. Part IV explains how a thorough psychosocial history, conducted in accordance with prevailing ABA and mental health standards, can avoid or counter opinions of ASPD. We conclude that constructs of ASPD or psychopathy should not be used in capital sentencing proceedings because they are unreliable and prejudicial. Until courts begin excluding such evidence, capital defendants are best protected when their defense teams strictly comply with the ABA and Supplementary Guidelines.


20. See discussion infra Part II.

21. See discussion infra Part III.

22. See discussion infra Part IV.

23. See discussion infra Part V.
II. AN OVERVIEW OF ANTISOCIAL PERSONALITY DISORDER AND PSYCHOPATHY

ASPD is one of ten disorders currently grouped in the personality disorder category.\(^{24}\) According to the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), “[t]he essential feature of [ASPD] is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.”\(^{25}\) Other terms that have historically been used include sociopathy, dissocial personality disorder, and psychopathy. While these terms are often used interchangeably with ASPD in the legal field, they are not identical, and a diagnosis of ASPD is not the same as labeling someone a “psychopath” or “sociopath.”\(^{26}\) Therefore, using these terms as though they are synonymous is incorrect and often causes confusion. “Psychopathy” is not officially recognized in our current diagnostic nomenclature, as defined in the United States by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-5”).\(^{27}\)

As set forth in the DSM-5, specific diagnostic criteria for ASPD are as follows:

A. A pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:

1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest

2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;

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24. Personality disorders are defined as "an enduring pattern of inner experience that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645 (5th ed. 2013) [hereinafter DSM-5]. The DSM-5 supersedes the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (”DSM-IV-TR”), published in 2000. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV-TR]. Despite proposals for significant changes to the existing personality disorder structure, “the categorical listing of personality disorders in the DSM-5 remains virtually unchanged from the previous edition.” Mark Moran, Continuity and Changes Mark New Text of DSM-5, PSYCHIATRIC NEWS 1 (Jan. 18, 2013), http://psychnews.psychiatryonline.org/newsarticle.aspx?articleid=1558423. Thus, the controversies discussed in this Article will persist with the DSM-5.

25. DSM-5, supra note 24, at 659.


27. The DSM-5 text language notes that ASPD has also been referred to as psychopathy. DSM-5, supra note 24, at 659; see also Poythress et al., supra note 26, at 390 (discussing these issues).
(3) Impulsivity or failure to plan ahead
(4) Irritability and aggressiveness, as indicated by repeated physical
defects or assaults
(5) Reckless disregard for safety of self or others
(6) Consistent irresponsibility, as indicated by repeated failure to
sustain consistent work behavior or honor financial obligations
(7) Lack of remorse, as indicated by being indifferent to or
rationalizing having hurt, mistreated, or stolen from another

B. The individual is at least 18 years of age.
C. There is evidence of conduct disorder with onset before age
15 years.
D. The occurrence of antisocial behavior is not exclusively during
the course of schizophrenia or a manic episode.

In addition to the criteria listed above, the DSM-5 describes persons
with ASPD as “lack[ing] empathy and tend[ing] to be callous, cynical,
and contemptuous of the . . . rights . . . of others.” Such persons “may
have an inflated and arrogant self-appraisal . . . and may be excessively
opinionated, self-assured, or cocky. They may display a glib, superficial
charm and can be quite voluble and verbally facile.” None of these
characteristics engender empathy for a capital defendant, and they are
severely prejudicial. Yet, these characteristics are also subjectively
judgmental and sufficiently ambiguous in order to mask manifestations
of severe mental illness, as discussed below in Part IV. To fully
understand the danger of an unreliable diagnosis of ASPD to capital
charged or convicted clients, it is important to know the ways in which
ASPD is used by courts and prosecutors.

Recently, prosecution forensic examiners are using the construct of
psychopathy, which is not a diagnosis in the DSM-5. While the term
psychopathy has had a variety of meanings over the past century, the
concept was narrowed in the first half of the twentieth century to focus
largely on interpersonal traits. The modern concept of psychopathy is
attributed to Hervey Cleckley’s The Mask of Sanity, which was
published in 1941. Canadian psychologist Robert Hare, who attempted

28. DSM-5, supra note 24, at 469-70.
29. Id. at 659.
30. Id. at 660.
31. Id.
32. See discussion infra Part IV.
33. See infra note 35 and accompanying text.
34. HERVEY CLECKLEY, THE MASK OF SANITY (1941). Cleckley’s work has been criticized
for ignoring evidence of severe mental illness among the patients he used to define psychopathy,
Dorothy O. Lewis, Adult Antisocial Behavior, Criminality, and Violence, in KAPLAN & SADOCK’S
COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2258, 2260 (5th ed. 2003) [hereinafter Lewis, Adult
Antisocial Behavior]. Among Cleckley’s white collar criminal case studies, one psychiatrist
to operationalize the work of Cleckley, describes psychopathy as “a specific form of personality disorder with a distinctive pattern of interpersonal, affective, and behavioral symptoms.”

According to Hare, “psychopaths are grandiose, arrogant, callous, superficial and manipulative; affectively, they are short-tempered, unable to form strong emotional bonds with others, and lacking in guilt or anxiety; and behaviorally, they are irresponsible, impulsive, and prone to delinquency and criminality.”

Hare developed the Psychopathy Checklist ("PCL") and the Psychopathy Checklist-Revised ("PCL-R"), which have become widely used in forensic settings. His original objective was to develop an instrument that would operationalize the construct of psychopathy. The PCL-R is a checklist that consists of the following twenty items:

1. Glibness/superficial charm
2. Grandiose sense of self-worth
3. Need for stimulation/proneness to boredom
4. Pathological lying
5. Conning/manipulative
6. Lack of remorse or guilt
7. Shallow affect
8. Callous/lack of empathy
9. Parasitic lifestyle
10. Poor behavioral controls
11. Promiscuous sexual behavior
12. Early behavioral problems
13. Lack of realistic, long-term goals
14. Impulsivity
15. Irresponsibility
16. Failure to accept responsibility for own actions

observed that the “flamboyant ways the massive ill-gotten gains were used,” such as purchasing mink tuxedos and massive art collections, suggest “more serious psychopathology than mere character disorders.” Id. at 2259. Another of Cleckley’s “so-called psychopaths” was so mentally ill that he “had been confined in mental hospitals for almost half his adult life,” and his history of manic episodes included jumping fully clothed into a creek in the middle of winter and running naked through the streets of town. Id. at 2260.

35. Robert D. Hare et al., Psychopathy and Sadistic Personality Disorder, in OXFORD TEXTBOOK OF PSYCHOPATHOLOGY 555, 555 (Theodore Millon et al. eds., 1999).
36. Id. at 555-56.
39. Hare has expressed grave reservations about misuses of his instrument, which has been extended far beyond the goals for which it was designed. See infra notes 210-24 and accompanying text.
17. Many short-term marital relationships
18. Juvenile delinquency
19. Revocation of conditional release
20. Criminal versatility

The Sixth Circuit Court of Appeals recently relied on fifteen of the PCL-R characteristics to justify a federal prisoner’s sentence of death, asserting that the defendant’s behavior “fits the checklist for severe psychopathy in the psychiatric literature.”

Testimony labeling a capital defendant antisocial or psychopathic has one overriding purpose: to obtain and carry out a sentence of death. In the most general sense, such evidence is dehumanizing. A prosecution expert in one capital trial testified that the defendant was a psychopath, and used an analogy to suggest that the defendant was not actually human:

The psychopath, as I say, has the ability to look very normal. However, if you know what you are looking for, it is kind of like seeing a bowl of fruit, and you say to yourself, gosh that bowl of fruit looks wonderful, it looks very good. But when you get close to the bowl of fruit and pick it up you realize that it’s fake fruit. And the psychopath is a lot that way.

The ASPD or psychopathy label invokes the stereotype of “unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human.”

Judicial decisions discussing ASPD and psychopathy almost uniformly reflect reliance on the dehumanizing stereotype. In Guinan v. Armontrout, the court affirmed a death sentence by relying on testimony that Frank Guinan’s antisocial personality made him “aggressive, impulsive, unreliable in maintaining employment,” and resulted in his “getting in trouble with the law again at [an] early age.”

The court summarized the impact of the ASPD diagnosis on Guinan’s sentencing profile:

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40. Hare et al., supra note 35, at 558 tbl.22.1. The core features of the PCL and the PCL-R are taken from Cleckley’s 1950 list of the sixteen characteristics he believed to be typical of the psychopath. Lewis, Adult Antisocial Behavior, supra note 34, at 2260.
42. United States v. Barnette, 211 F.3d 803, 821, 823 (4th Cir. 2000) (quoting the trial testimony of prosecution expert Doctor Scott Duncan).
44. 909 F.2d 1224 (8th Cir. 1990).
45. Id. at 1229, 1234.
In sum, there is simply no evidence in the record or the psychiatric evaluation to suggest that Guinan’s mental problems can be characterized as anything more than personality disorders evidenced by violent and inappropriately aggressive behavior. We suspect that most capital murder defendants are likely to fit this personality profile. Whether evidence of this type would be considered mitigating by a jury is highly doubtful. The psychiatric evaluation portrays Guinan as an individual prone to violent outbursts due to an aggressive personality disorder which is extremely resistant to treatment. This image fits the stereotype of the “typical criminal” which attributes deviant behavior “exclusively to negative traits, malevolent thoughts, and bad moral character.” Craig Haney, a nationally renowned social psychologist with many years of experience in the assessment of persons accused of violent behavior, warns that the fictional stereotype of the psychopathic criminal facilitates the jury’s decision to “assign the offender the mythic role of Monster, a move which justifies harsh treatment and insulates us from moral concerns about the suffering we inflict.” The gratuitous comment in Guinan that most death row inmates are probably antisocial demonstrates the considerable sway that this stereotype holds over capital decision makers, jurors, and judges alike. Thus, if believed, testimony that the defendant has ASPD or is psychopathic diminishes substantially the likelihood that a jury will perceive him or her as a unique, complex human being who is worthy of their mercy. In addition to appealing to this dehumanizing stereotype, prosecutors often use expert testimony that the defendant is antisocial to

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46. Id. at 1230(emphasis added). Resistance to treatment is one of the assumptions about ASPD that is open to debate. See text accompanying infra notes 141-43.


48. Id. (quoting Samuel Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 CORNELL L. REV. 655, 692 (1989)). Other researchers have found substantial evidence that there exist considerable differences in how mental illness is conceptualized by the mental health field and the lay public; and laypersons’ perceptions of such illnesses are particularly important in the legal field, as jurors’ reactions to evidence of mental illness can be stigmatizing and cause the defendant to be perceived as dangerous. See John F. Edens et al., Bold, Smart, Dangerous and Evil: Perceived Correlates of Core Psychopathic Traits Among Jury Panel Members, 7 PERSONALITY & MENTAL HEALTH 143, 143, 150 (2013). In a study to further investigate layperson perceptions of psychopathy, an ethnically diverse sample of 285 community members attending jury duty reviewed a vignette about a capital murder trial and rated perceptions of the defendant’s psychopathic characteristics according to items loosely based on trait labels on the PCL-R. Id. Study results indicated that laypersons associate psychopathy with boldness (social dominance and fearlessness), intelligence, violence potential, and “evil.” Id. The results raise serious questions about the potential for stigmatization of people labeled as psychopaths in forensic settings. Id.

49. Guinan, 909 F.2d at 1230.
accomplish specific strategic purposes. For example, ASPD is commonly used to imply that the defendant is “a dangerous individual, incapable of rehabilitation in the prison system.” \(^{50}\) Further, prosecutors and courts use ASPD to portray a defendant as “‘selfish [and] very impulsive,’ showing ‘little in the line of responsibility’ or concern ‘for the needs or wants of others,’ and ‘hav[ing] little in the line of guilt or remorse.’” \(^{51}\) This is of considerable significance because it is well established that capital sentencing verdicts are heavily influenced by the jurors’ perceptions of the defendant’s remorse. \(^{52}\) Professor Scott Sundby’s analysis of Capital Jury Project \(^{53}\) data shows that “a jury that believes the defendant is truly remorseful is very likely to settle on a life sentence.” \(^{54}\) However, if a jury is convinced that the defendant is antisocial, even his sincere expressions of remorse may be misinterpreted as sociopathic manipulation. \(^{55}\)

Perhaps most troublesome is the attempt by some forensic examiners to equate ASPD with evil. This has been challenged on both scientific and ethical grounds. Doctor Robert Simon, a clinical professor of psychiatry at Georgetown Medical School, warns that “[d]iagnoses such as psychopathology, personality disorder, and conduct disorder may be used by some as more of a moral judgment than a clinical diagnosis.” \(^{56}\) However, Doctor Michael Welner, who frequently testifies

\(^{50}\)  Id.; see also Sutterwhite v. Texas, 486 U.S. 249, 253 (1988) (the prosecution presented expert testimony that defendant had “a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence”); Hammet v. Texas, 448 U.S. 725, 729 (1980) (Marshall, C.J., dissenting) (noting “a customary pattern of conduct” by Texas authorities to present “punishment-stage testimony by the court-appointed psychiatrist that the defendant has an antisocial personality and is likely to commit future violent crimes”); Holsey v. Warden, 694 F.3d 1230, 1252 (11th Cir. 2012) (quoting a prison psychologist’s report that defendant’s “‘Antisocial Personality’ . . . suggests a very high risk for being assaultive and/or otherwise violent”).

\(^{51}\)  Eddings v. Oklahoma, 455 U.S. 104, 126 n.8 (1982) (Burger, C.J., dissenting) (quoting the testimony of the state’s mental health expert). Chief Justice Warren E. Burger was also influenced by the same doctor’s testimony that “91% ‘of your criminal element’ would test as sociopathic or antisocial.” Id.


\(^{54}\)  Sundby, supra note 52, at 1568.

\(^{55}\)  In the Capital Jury Project data analyzed by Professor Sundby, some jurors were certain that the defendant was not remorseful “because they believed any indications of remorse were merely hollow acts for the jury’s benefit.” Id. at 1567.

\(^{56}\)  James L. Knoll, IV, The Recurrence of an Illusion: The Concept of “Evil” in Forensic
on behalf of the prosecution in death penalty cases, claims that evil can be diagnosed and scientifically measured. In defense of his “Depravity Scale,” which purports to measure “evil,” Welner contends that “[d]efining evil is only the latest frontier where psychiatry . . . will bring light out of darkness.” Welner’s approach reinforces deeply entrenched and misinformed cultural stereotypes of violent offenders. Simon counters that “psychiatrists don’t know anything more about [evil] than anyone else,” yet “[o]ur opinions might carry more weight, under the patina or authority of the profession.” “Most psychiatrists assiduously avoid the word evil, contending that its use would precipitate a dangerous slide from clinical to moral judgment that could put people on death row unnecessarily and obscure the understanding of violent criminals.”

In addition to helping the prosecution establish aggravating, dehumanizing themes, presenting evidence about ASPD and psychopathy can undermine the defense mitigation case in multiple ways. First, an opinion that the defendant has ASPD arguably makes it seem reasonable to dismiss statements of the defendant because antisocial persons “can tell a non-truth or they can tell a lie easily, maybe quickly, and they’re not going to feel a lot of hesitation about that, they’re not going to feel any pain of conscience about telling that lie.” Thus, the client’s description of events and life history is often discounted, and both self-reported and observed symptoms of mental illness are often dismissed as the product of malingering.

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58. Id. at 421. Yet another psychiatrist, Doctor Michael Stone of Columbia University, has developed a twenty-two level hierarchy of “evil” behavior. See Adam Liptak, Adding Method to Judging Mayhem, N.Y. TIMES, Apr. 2, 2007, at A14. Stone argues: “[W]e are talking about people who commit breathtaking acts, who do so repeatedly, who know what they’re doing, and are doing it in peacetime . . . . We know who these people are and how they behave [and it’s time to give their behavior] the proper appellation.” Benedict Carey, For the Worst of Us, the Diagnosis May Be ‘Evil,’ N.Y. TIMES, Feb. 8, 2005, at F1 [hereinafter Carey, For the Worst of Us] (internal quotation marks omitted).
59. For in-depth discussions of the superficial and erroneous media portrayals of violence, see CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 38-39 (2005); Craig Haney, Media Criminology and the Death Penalty, 58 DEPAUL L. REV. 689, 725-26 (2009).
60. Carey, For the Worst of Us, supra note 58.
61. Id.
62. Sanborn v. Parker, 629 F.3d 554, 572 (6th Cir. 2010).
63. See, e.g., Worthington v. Roper, 631 F.3d 487, 493 (8th Cir. 2011) (explaining that the state’s expert concluded that, because Worthington was antisocial, he was malingering symptoms of mental illness); see also United States v. Gabrion, 648 F.3d 307, 320 (6th Cir. 2011) (noting that testimony that Marvin Gabrion had ASPD supported a finding that he was malingering and
Second, because most jurisdictions exempt ASPD from the definition of “mental disease or defect,” the diagnosis is used to exclude the possibility of legally cognizable mental impairment. Such examiners give the jury “only superficial and schematic details of the lives of capital defendants, typically only those ‘facts’ that underscore their deviance and that facilitate their dehumanization.” Without question, evidence that the defendant has the characteristics associated with ASPD is significantly harmful to his chances for survival. The overwhelming weight of legal authority views evidence that the defendant has ASPD as inherently aggravating.

Third, ASPD is often used as a counter-narrative to major mental illness evidence presented in mitigation. When the defense presents a

therefore mentally competent to proceed).

64. See ALASKA STAT. § 12.47.010(c) (2012); ARIZ. REV. STAT. ANN. § 13-502(A) (2012); ARK. CODE ANN. § 5-2-312(b) (2012); CAL. PENAL CODE § 25.5 (West 2012); COLO. REV. STAT. ANN. § 16-8-101(2) (West 2012); CONN. GEN. STAT. ANN. § 53a-13(c) (West 2012); DEL. CODE ANN. tit. 11, § 40(c) (West 2012); Fla. STAT. ANN. § 916.106(13) (West 2013); GA. CODE ANN. § 17-7-131(a)(1)-(2)(2013); HAW. REV. STAT. § 704-400(2)(2012); IDAHO CODE ANN. § 18-207(1) (2013); 720 ILL. COMP. STAT. ANN. 5/6-2(b) (West 2013); IND. CODE § 35-41-3-6(b) (West 2013); KAN. STAT. ANN. § 59-2946(f)(1) (West 2012); KY. REV. STAT. ANN. § 504.020(2) (2012); ME. REV. STAT. ANN. tit. 17-A, § 39(2) (West 2012); MD. CODE ANN. CRIM. PROC. § 3-109(b) (2012); MO. ANN. STAT. § 552.010 (West 2012); MONT. CODE ANN. § 46-14-101(2) (2011); N.D. CENT. CODE § 12.1-04.1-01(2) (2012); OR. REV. STAT. ANN. § 161.295(2) (West 2013); S.C. CODE ANN. § 17-24-10 (2012); TENN. CODE ANN. § 39-11-501 (2012); TEX. PENAL CODE ANN. § 8.01 (2012); VT. STAT. ANN. tit. 13, § 4801 (West 2012); WIS. STAT. ANN. § 971.15 (West 2012); COMMONWEALTH v. McHoul, 226 N.E.2d 556, 563 (Mass. 1967) (holding that Massachusetts follows the Model Penal Code test for defects excluding responsibility, which excludes antisocial conduct from the definition of mental disease or defect) (citing MODEL PENAL CODE § 4.01 (1962)); State v. Lorraine, 615 N.E.2d 212, 224 (Ohio 1993) (stating that, under Ohio law, “a behavior or personality disorder does not qualify as a mental disease or defect”).

65. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 309 (1989) (noting that prosecution expert testified that Penry’s impulsiveness and “inability to learn from experience” was due to ASPD rather than mental retardation); Hammet v. Texas, 448 U.S. 725, 728-29 (1980) (presuming that a defendant with ASPD was competent to waive appeals and submit to execution without further mental health inquiry); Sanborn, 629 F.3d at 562 (explaining that Parenmore L. Sanborn’s inability to hold a job, plan for his future, and pay his debts was caused by ASPD, not mental impairment); United States v. Paul, 534 F.3d 832, 844-45 (8th Cir. 2008) (presuming that a defendant with ASPD was competent to waive appeals and submit to execution without further mental health inquiry).


67. Worthington, 631 F.3d at 503.

68. Kokal v. Sec’y, Dep’t of Corr., 623 F.3d 1331, 1349 (11th Cir. 2010); accord Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir. 2010); Reed v. Sec’y, Dep’t of Corr., 593 F.3d 1217, 1248 (11th Cir. 2010); Cummings v. Sec’y, Dep’t of Corr., 588 F.3d 1331, 1368 (11th Cir. 2009); Parker v. Sec’y, Dep’t of Corr., 331 F.3d 764, 788 (11th Cir. 2003); Weeks v. Jones, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994).

69. See, e.g., Fairbank v. Ayes, 650 F.3d 1243, 1250 (9th Cir. 2011) (noting that, in the closing argument, the prosecution highlighted the fact that defendant did not suffer from a mental illness); Reed, 593 F.3d at 1229 (noting on cross-examination that the defendant’s psychological evaluator admitted that ASPD “is what really underlies a sociopath”).
mitigating social history of the effects that living with mental illness had on the client, the prosecution often rebuts this testimony with a diagnosis of ASPD, arguing that the problems presented by the defense as mitigation are in fact character traits or moral weaknesses, not mental illness.70

Because prosecutors easily turn the defense’s ASPD evidence against the defendant,71 no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment. Similarly, it is inherently unreasonable for a post-conviction attorney to claim that trial counsel was ineffective for failing to call a psychologist who diagnosed the defendant as antisocial; the claim is often doomed to failure by the many negative traits associated with ASPD and psychopathy.72 If left unchallenged in a capital case, ASPD and related constructs are quite literally the “kiss of death.” This is particularly true when courts and lawyers view the ASPD label as an immutable fact, rather than a highly questionable opinion.73

Defense teams working in compliance with well-established professional norms avoid the ASPD trap by conducting a thorough investigation that will inevitably establish an alternative and humanizing picture of the client. Experience in death penalty cases demonstrates over and over again that diagnoses of ASPD, psychopathy, or related constructs are inherently unreliable and misleading; these labels are applied when the defense fails to conduct a thorough investigation of the client’s life circumstances, which provides crucial context for behaviors that are superficially labeled “antisocial.” In virtually every case, a thorough investigation conducted according to the ABA and

70. See, e.g., Fairbank, 650 F.3d at 1249-50; Reed, 593 F.3d at 1233-34.
71. See Morton v. Sec’y, Dep’t of Corr., 684 F.3d 1157, 1164, 1167-68 (11th Cir. 2012) (noting that the defense presented evidence that the defendant’s abusive childhood caused him to develop ASPD, and the jury assessed the punishment at death); Fairbank, 650 F.3d at 1250 (noting that the prosecution successfully argued that the defendant’s evidence that he had ASPD and was genetically predisposed to criminal behavior did not constitute a mental disease and failed to humanize the defendant); Looney v. State, 941 So. 2d 1017, 1028-29 (Fla. 2006) (“[A] diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation.”); Leavitt v. Arave, 646 F.3d 605, 623-24 (9th Cir. 2011) (Reinhardt, C.J., dissenting) (”[C]ourts generally treat an individual’s failure to control a personality disorder, or to suppress an anti-social or psychopathic personality, as more blameworthy than an individual’s response to an organic brain disorder.”); Sanborn v. Parker, 629 F.3d 554, 572 (6th Cir. 2011) (referring to the defense expert’s testimony of Sanborn’s ASPD as “perhaps even more damning” than the findings of the state’s expert); Reed, 593 F.3d at 1246 (11th Cir. 2010) (stating that evidence of antisocial personality disorder is “not ‘good’ mitigation”).
72. See, e.g., Parker, 331 F.3d at 788 (holding that it was valid trial strategy not to present damaging psychological evidence that the defendant “was antisocial and a sociopath”); accord Cummings, 588 F.3d at 1364-65.
73. We discuss this distinction at length. See infra Part IV.B–C.
Supplementary Guidelines provide important data and context that refutes the diagnosis of ASPD and enables the jury to interpret the defendant’s past behavior in the context of his life circumstances and impairments. As this Article demonstrates, when an expert concludes that the defendant has ASPD or psychopathy, it is the investigation of the client’s life history, not the defendant, which is shallow and superficial.

III. CONTROVERSIES AND LIMITATIONS OF ASPD AND RELATED CONSTRUCTS

As noted, the labels “antisocial” and “psychopath” derive their unique power over judges and juries from invoking dehumanizing stereotypes masquerading as scientific fact. Yet, invariably those labels are exposed as mere epithets, most often applied by experts who rely only upon rudimentary data from a limited set of sources. Therefore, capital defense counsel have a special duty to become familiar with the issues that are raised by the inflammatory and unreliable nature of such evidence. In order to understand the superior power of

74. Capital defendants are frequently diagnosed with ASPD after a single or limited interview, and without critical life history information. Yet, it is well known that “a single diagnostic interview, regardless of how reliable, does not capture the essence of what is happening to a patient. . . . [A]
curate diagnosis must be part of the ongoing clinical dialogue with the patient.” Robert Freedman et al., The Initial Field Trials of DSM-5: New Blooms and Old Thorns, 170 AM. J. PSYCHIATRY 1, 3-4 (2013); see also Douglas Liebert & David Foster, The Mental Health Evaluation in Capital Cases: Standards of Practice, 164 AM. J. FORENSIC PSYCHIATRY 43, 45-46 (1994). In addition, obstacles to client disclosure of sensitive information are often profoundly more pronounced in forensic interviews than in clinical settings, where clients voluntarily seek assistance and the outcome and goals of interviews are dramatically different. Id. Because the accuracy of a mental health assessment flows directly from extensive, reliable data, the ABA and Supplementary Guidelines require a thorough investigation of the client’s life history, including family history at least three generations back, that follows parallel tracks of client and collateral witness interviews and an exhaustive documentary record. See Scan D. O’Brien, When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Capital Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 693, 724-32 (2008); see also 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, 974-77 (2008); George Woods et al., Neurobehavioral Assessment in Forensic Practice, 35 INT’L J.L. & PSYCHIATRY 432, 438 (2012) (emphasizing that “a comprehensive perspective must be applied to the forensic inquiry at hand”).

75. “Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution’s evidence and experts through effective cross-examination.” ABA GUIDELINES, supra note 18, Guideline 1.1 cmt., at 924. Furthermore, capital defense counsel have a special duty to “raise every legal claim that may ultimately prove to be meritorious.” Id. at 927; see id. Guideline 10.8, at 1028-29. “Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.” Id. Guideline 10.8 cmt., at 1032; see Monroe H. Freedman, The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases, 31 HOFSTRA L. REV. 1167, 1175-79 (2003).
mitigating narratives, capital defense teams must be aware of the contentious debates surrounding the diagnosis of ASPD and the construct of psychopathy.76

ASPD, psychopathy, and personality disorders in general have all been criticized in clinical and research settings on multiple grounds. Some researchers question whether these constructs and instruments to measure them should be precluded in forensic settings, including capital trials.77 The controversies about these diagnoses and labels of deviance have enormous practical (life and death) implications for forensic practice and capital defense teams. In this Part, we will review some of these controversies and the assessment instruments that are currently used to diagnose psychopathy and predict future dangerousness.78 We will first discuss personality disorders and ASPD, addressing both scientific and ethical controversies; then we will do the same with psychopathy and related issues. These unresolved controversies, and the ensuing ethical dilemmas, raise serious questions about the use of these constructs in capital trials because their methodology and lack of reliability are incompatible with the ABA Guidelines and with the Eighth Amendment principle that capital sentencing determinations must “aspire to a heightened standard of reliability.”79

A. Controversies Surrounding Personality Disorders and ASPD

The diagnosis of ASPD has a controversial history in the mental health field, as do most personality disorders, the class of mental disorders in which ASPD is included. Our discussion will focus on scientific and ethical concerns.

76. This also applies to mental health experts working in forensic settings. As noted by John Edens, a leading researcher in forensic psychology, “it seems ethically mandated that those who work in [forensic] settings be familiar with relevant empirical literature.” John F. Edens, Unresolved Controversies Concerning Psychopathy: Implications for Clinical and Forensic Decision Making, 37 Prof. Psychol. Res. & Prac. 59, 59 (2006) [hereinafter Edens, Unresolved Controversies].


78. We are differentiating between the diagnosis of ASPD, which is officially recognized in our current diagnostic nomenclature, and the construct of psychopathy, which is not officially recognized in current diagnostic manuals such as the DSM-5. See generally DSM-5, supra note 24.

1. ASPD: Scientific and Research-Based Controversies

The Diagnostic and Statistical Manual of Mental Disorders, Third Edition (“DSM-III”), published in 1980, represented a significant change in the approach to diagnostic nomenclature in the United States. While the full extent of those changes is beyond the scope of this Article, we note that the DSM-III adopted, for the first time, a five level diagnostic scheme for classifying illnesses and disorders (Axis I through Axis V). Multi-axial assessment was included to better capture various aspects of an individual’s functioning in order to facilitate treatment planning and predict outcomes. The five axial scheme included assessment of mental disorders, consideration of medical conditions that have psychiatric components, assessment of exposures to psychosocial stressors, and evaluation of an individual’s psychological functioning at the current time and during the past year.

The major mental illnesses were placed on Axis I in DSM-III. The personality disorders were placed on Axis II with Mental Retardation and other developmental disorders. The decision to place the personality disorders on a separate axis has been called “pragmatic,” and has had serious implications for how these disorders are viewed by persons in the mental health field. A British sociologist who has written about mental health and social policy issues noted that “the essence of personality disorder is that it is . . . driven by a number of unique aspects, such as the absence of physical and mental symptoms, lack of biochemical basis for treatment, and rejection as a serious mental disorder by many psychiatrists.”

For capital defense teams, this distinction reinforces the importance of conducting a thorough psychosocial history investigation. The absence of historical data establishing physical and mental symptoms


81. Id. at 23.

82. Id. at 11-12, 27.

83. Id. at 23, 26-28.

84. See id. at 15-19 (listing the various disorders listed under Axis I).


86. Id.; see also W. John Livesley et al., Categorical Distinctions in the Study of Personality Disorder: Implications for Classification, 103 J. ABNORMAL PSYCHOL. 6, 12-13 (1994).

87. Nick Manning, DSM-IV and Dangerous and Severe Personality Disorder—An Essay, 63 SOC. SCI. & MED. 1960, 1961 (2006). While the DSM-IV cautions that the coding of personality disorders on Axis II “should not be taken to imply that their pathogenesis or range of appropriate treatment is fundamentally different from . . . disorders coded on Axis I,” clinical and research views have often been contrary to this position. DSM-IV-TR, supra note 24, at 26-28.
can mean the difference between a diagnosis of a personality disorder and an Axis I disorder.\textsuperscript{88}

Placing the personality disorders on Axis II elevated the importance of the personality disorder category\textsuperscript{89} and enlarged their role in the diagnostic process.\textsuperscript{90} However, the differentiation of personality disorders from Axis I disorders has been criticized as “often problematic and perhaps at times even illusory.”\textsuperscript{91} Moreover, it has generated pejorative attitudes towards patients diagnosed with personality disorder, given common assumptions that many of the personality disorder diagnoses are not amenable to treatment.\textsuperscript{92} While this assumption has been challenged,\textsuperscript{93} it is nevertheless a common belief that often works to patients’ and forensic clients’ detriment.\textsuperscript{94}

\textsuperscript{88} See, for example, \textit{Parkus v. Delo}, 33 F.3d 933, 936 (8th Cir. 1994), in which both prosecution and defense mental health experts testified at trial that Parkus was antisocial, and both changed their opinions when confronted with previously unknown historical records more consistent with symptoms of schizophrenia and dementia. Next, compare \textit{Wilson v. Trammell}, 706 F.3d 1286, 1290 (10th Cir. 2013), in which trial and habeas counsel relied primarily on social history interviews with the defendant and his mother, along with the trial psychologist’s computer-scored personality testing. The court found the uncorroborated history unpersuasive, and affirmed Wilson’s death sentence “because the description in the valid MMPI-2 of the Defendant’s profile—a Type C offender in the Megargee typology—explicitly describes the vision of evil evoked by the word psychopath.” \textit{Wilson}, 706 F.3d at 1309.

\textsuperscript{89} See Thomas A. Widiger & Alan J. Frances, \textit{Toward a Dimensional Model for the Personality Disorders}, \textit{in Personality Disorders and the Five-Factor Model of Personality} 23, 24 (Paul T. Costa, Jr. & Thomas A. Widiger eds., 2d ed. 2002); see also Manning \textit{supra} note 87, at 1962.


\textsuperscript{91} Widiger & Shea, \textit{supra} note 85, at 399. Criticisms have been raised about the lack of adequate discussion of the rationale for this distinction—while the various editions of the DSM say little about the reason for the distinction, researchers have suggested the differentiation of Axes I and II may have been based on the presumption that Axis I disorders have biological origins, whereas Axis II disorders have psychosocial origins. See generally, e.g., DSM-III, \textit{supra} note 80. However, there is evidence of the importance of biogenetic and psychosocial components in both Axis I and II disorders. See Richard F. Farmer, \textit{Issues in the Assessment and Conceptualization of Personality Disorders}, \textit{20 Clinical Psychol. Rev.} 823, 829 (2000); Livesley et al., \textit{supra} note 86, at 13.


\textsuperscript{94} Knoll, \textit{supra} note 56, at 113; Rogers & Dion, \textit{supra} note 92, at 27; see also Cunningham
More generally, the literature suggests that many professionals were dissatisfied with the DSM-III’s handling of criteria for the entire category of personality disorders. Challenges to the personality disorder classification scheme adopted with the publication of the DSM-III in 1980 appeared almost immediately after its publication and have continued to the present day, through the publications of the Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised (“DSM-III-R”) in 1987, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (“DSM-IV”) in 1994, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (“DSM-IV-TR”) in 2000, and the DSM-5 in 2013. In spite of contentious debates over a wide range of changes that were proposed for the DSM-5, the personality disorder nomenclature remains virtually unchanged from the DSM-IV-TR, although the multi-axial system has been abandoned.

& Reidy, supra note 17, at 333, 345 (noting that the diagnosis of ASPD “may have a profoundly aggravating effect on sentencing considerations, particularly in creating expectations that no rehabilitation is possible and that future criminal violence is inevitable”).

95. For example, “a survey of 146 psychologists and psychiatrists in 42 countries on their views of DSM-III reported that ‘the personality disorders led the list of psychiatric categories with which respondents were dissatisfied.’” Manning, supra note 87, at 1963-64 (citing Jack D. Maser et al., International Use and Attitudes Towards DSM-III and DSM-III-R: Growing Consensus in Psychiatric Classification, 100 J. ABNORMAL PSYCHOL. 271, 275 (1991)). Also, “[a] majority of respondents (56%) considered personality disorders problematic, well ahead of the next most cited category, mood disorders, (28%).” Manning, supra note 87, at 1964 (citing Michael B. First et al., Personality Disorders and Relational Disorders, in A RESEARCH AGENDA FOR DSM-V 123, 125 (David J. Kupfer et al. eds., 2002)).


One fundamental problem with the classification of personality disorders has been described as the DSM’s “top-down approach,” which is based on the assumption that there are a discrete number of personality types, each of which is qualitatively different in nature.99 A review by the DSM-5 Personality and Personality Disorders Workgroup noted that “no such set of types has been found, even in large, diverse samples, and using sophisticated statistical modeling strategies,” and “human personality varies continuously.”100 These and other concerns fueled efforts for a major reconceptualization of the personality disorders classification in the DSM-5.101 Many critics of the DSM-IV paradigm believe that current personality disorder categories do not do justice to the complexity and continuous nature of personality traits across the human population. As used in the sentencing phase of a capital case, reducing the defendant to a handful of undesirable personality traits runs counter to the Eighth Amendment’s “need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual.”102

Another significant criticism of the personality disorder criteria for the DSM generally is that they “were not empirically based and are not sufficiently specific, so they may apply equally well to other types of mental disorders (e.g. schizophrenia).”103 This lack of specificity means that particular behaviors or symptoms may be seen in many conditions, and often in many people with no illness at all, providing little ability to differentiate or parse illnesses. As noted by the Chair of the DSM-5 Personality and Personality Disorders Work Group, “the DSM-IV-TR criteria were poorly defined, not specific to [personality disorders], and were introduced in the DSM-IV without theoretical or empirical

99. AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 1.
100. Id.
101. See Skodol, Personality Disorders in DSM-5, supra note 97, at 320-24; Skodol et al., Personality Disorder Types Proposed, supra note 97, at 154-55; Skodol et al., Proposed Changes, supra note 97, at 5. The DSM-5 retains the structure of the Personality Disorders classification adopted by the DSM-IV-TR. Skodol, Personality Disorders in DSM-5, supra note 97, at 320-24. This decision occurred after highly contentious debates about how personality disorders should be conceptualized in the DSM-5. Id. Doctor Theodore Millon, a leading personality disorder researcher, has stated, “[i]t’s embarrassing to see where we’re at. We’ve been caught up in digression after digression, and nobody can agree . . . . It’s time to go back to the beginning, to Darwin, and build a logical structure based on universal principles of evolution.” Benedict Carey, Thinking Clearly About Personality Disorders, N.Y. TIMES, Nov. 27, 2012, at D1 [Carey, Thinking Clearly].
103. Skodol et al., Personality Disorder Types Proposed, supra note 97, at 137. This problem is of enormous significance in death penalty litigation where, for strategic and political reasons, prosecutors often seek personality disorder diagnoses and dispute the presence of Axis I diagnoses.
Due to this lack of specificity, the same observed behavior or symptom could be said to be part of the basis for a number of conditions, which opens the door to examiner bias and expectation. A psychiatrist who, for whatever reason, does not establish sufficient rapport with a subject may be pre-disposed to diagnose one condition over another. Similarly, cultural and ethnic biases may exert a greater influence where, as in the case of personality disorders, the criteria and definitions provide little differential guidance.

Additional problems with the current personality disorder diagnostic scheme have been identified. These include extensive co-occurrence among personality disorders, excessive within-diagnosis heterogeneity, lack of synchrony with modern medical approaches to diagnostic thresholds, temporal instability, poor coverage of

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104. Skodol, Personality Disorders in DSM-5, supra note 97, at 318, 333.
107. “Most patients diagnosed with [a personality disorder] meet criteria for more than one,” and in fact, often meet criteria for several, with some researchers arguing that the co-occurrence may be seven or more. Skodol, Personality Disorders in DSM-5, supra note 97, at 321; see Jonathan Shedler & Drew Westen, Dimensions of Personality Pathology: An Alternative to the Five-Factor Model, 161 AM. J. PSYCHIATRY 1743, 1752-53 (2004); Widiger & Frances, supra note 89, at 25-26; see also AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 1. This has raised serious concerns about the validity of the personality disorder classification. The issue of comorbidity is explicitly acknowledged in the DSM-IV-TR and DSM-5. DSM-IV-TR, supra note 24, at 686; DSM-5, supra note 24, at 5. The essence of this problem is that, for clients who are seen by two (or more) clinicians who decide a personality disorder is present, there is little agreement about which personality disorder is correct. This was true of the DSM-IV-TR, and remains a problem as of recently published test-retest reliability results from DSM-5 field trials. Darrel A. Regier et al., DSM-5 Field Trials in the United States and Canada, Part II: Test-Retest Reliability of Selected Categorical Diagnoses, 170 AM. J. PSYCHIATRY 59, 65-67 (2013). See generally AM. PSYCHIATRIC ASS’N, DSM-IV SOURCEBOOK (Thomas A. Widiger et al. eds., 1998) [hereinafter AM. PSYCHIATRIC ASS’N, DSM-IV SOURCEBOOK].
108. For example, there were over 250 ways to meet diagnostic criteria for borderline personality disorder in the DSM-IV-TR, and, as will be discussed below, an exponentially larger set of symptom combinations are possible with ASPD diagnoses. AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 1. This means that people with markedly different symptom patterns can meet criteria for the same diagnosis, even if they share a small number of behaviors in common (or even only one common behavior). See AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 1; Skodol et al., Personality Disorders in DSM-5, supra note 97, at 332; Widiger & Frances, supra note 89, at 26; Skodol et al., Personality Disorder Types Proposed, supra note 97, at 140; Skodol et al., Proposed Changes, supra note 97, at 15.
109. Modern medical approaches embrace measures of severity, for example, multiple stages of cancer or levels of hypertension, whereas the DSM adopts a dichotomous classification system that results in a binary decision as to whether a personality disorder is absent or present. This has
personality psychopathology; arbitrary diagnostic thresholds; lack of clear boundaries between pathological and “normal” personality functioning; and poor convergent validity.

The controversies surrounding the personality disorder classification scheme extend equally to ASPD. According to Doctor Richard Rogers, a nationally recognized forensic psychologist, “[p]rofound ambivalence undergirds most professional discussions of antisocial personality disorder." This diagnosis has “sparked controversy and defied consensus for the last three decades,” and the notion that there is a unitary ASPD diagnosis is merely an illusion. The final DSM-5 ASPD criteria were not tested despite extensive field

been raised as a major concern with the current personality disorder classification, as research suggests that severity may be the most important single predictor in assessing personality pathology, and the DSM does not address this issue in a useful way. See Skodol, Personality Disorders in DSM-5, supra note 97, at 327-28; Skodol et al., Personality Disorder Types Proposed, supra note 97, at 152-53; Skodol et al., Proposed Changes, supra note 97, at 5-6.

11. For example, since personality disorders are defined as pervasive and unremitting (i.e., as fixed), it would be expected that ASPD diagnoses of individuals would remain constant over time. DSM-5, supra note 24, at 645. However, that assumption has been challenged. See, e.g., Cunningham & Reidy, supra note 17, at 335.

111. Considerable evidence shows the “Personality Disorder Not Otherwise Specified” is the most frequently diagnosed personality disorder in clinical practice, and is the most common diagnosis used in research settings. AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 2; Roel Verheul & Thomas A. Widiger, A Meta-Analysis of the Prevalence and Usage of the Personality Disorder Not Otherwise Specified (PDNOS) Diagnosis, 18 J. PERSONALITY DISORDERS 309, 314-15 (2004). This belies the theory underlying the concept of personality disorder—that there is a clearly defined personality to be described, and supports concerns that existing diagnoses are inadequate to capture the complexity of personality. Cf. AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 2.

112. No clinical or empirical justification was provided for the number of criteria deemed necessary to meet diagnostic criteria for the ten personality disorders included in the DSM. Skodol et al., Personality Disorder Types Proposed, supra note 97, at 137, 158; see also Widiger & Frances, supra note 89, at 25-26.

113. The current personality disorder diagnostic scheme has been criticized for inadequately distinguishing between normal and pathological personality functioning, thus leading to additional concerns about the validity of personality disorder diagnoses. See Skodol, Personality Disorders in DSM-5, supra note 98, at 321; Skodol et al., Personality Disorder Types Proposed, supra note 97, at 137-38; Skodol et al., Proposed Changes, supra note 97, at 16; Andrew E. Skodol & Donna S. Bender, The Future of Personality Disorders in DSM-V?, 166 AM. J. PSYCHIATRY 388, 388 (2009).

114. For example, research shows that significant disagreement has resulted in personality disorder assessments when different methods of assessment are used (for example, unstructured versus structured interviews and personality questionnaires). AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 3. This has been identified as one of the most serious problems with the current personality disorder scheme, and relates to the difficulty of translating criteria into assessments that yield similar results. Id. “The importance of these findings cannot be overemphasized. These data mean that the entire personality disorder literature is built upon shifting sands.” Id.

115. Rogers & Dion, supra note 92, at 21.

trials, and thus “political and nonempirical considerations appear to have overridden . . . diagnostic validity.”

ASPD has been criticized on numerous specific grounds, among them the lack of coherence among differing versions of ASPD in various editions of the DSM. There is also what has been called the “innumeracy problem,” that is, the seemingly innumerable possibilities for reaching threshold for a diagnosis of ASPD. The innumeracy problem is even more pronounced with ASPD than with other (personality) disorders. Unlike any other diagnosis in the DSM, this diagnosis requires evidence of symptoms of conduct disorder as a prerequisite for finding ASPD, thus greatly enhancing the number of possible combination of symptoms that could result in an ASPD diagnosis. The diagnostic criteria for ASPD overlap with other disorders, a circumstance which raises doubts about the integrity of the inclusion and exclusion criteria and greatly increases the difficulty of accurate diagnosis and assessment.

ASPD is diagnosed in part on criminal history, which means that a large percentage of inmates have been or could be diagnosed with ASPD. The high prevalence of this diagnosis in inmates renders it of

117. Id. at 236; see also Robert Hare, Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion, PSYCHIATRIC TIMES, Feb. 1, 1996, at 39 [hereinafter Hare, A Case of Diagnostic Confusion].

118. It has been noted that comparison of criteria listed in sequential versions of the DSM often had little in common. Cunningham & Reidy, supra note 17, at 334. These authors questioned whether ASPD diagnosis has sufficient reliability and validity for forensic purposes. Id. Other commenters have countered that these dramatically changing diagnostic standards were not driven by research, and noted that they “begin to doubt seriously the usefulness of ASPD as a unitary diagnosis.” Rogers & Dion, supra note 92, at 24.

119. This is a consequence of the current polythetic classification scheme used in the DSM, in which diagnoses are made by choosing a specified number of required symptoms from a longer list. Many researchers have found it troubling that individuals can be diagnosed with the same disorder, yet have few, if any, features in common. Rogers & Dion, supra note 92, at 24, 26. Innumeracy is arguably most problematic with the diagnosis of ASPD, which requires evidence of “conduct disorder symptoms prior to the age of 15,” and three of seven symptoms of ASPD. Id. Thus, in effect, a diagnosis of ASPD requires consideration of two sets of criteria rather than one, as is the case with respect to other mental disorders. See id.


121. There is also considerable overlap between criteria for ASPD and substance abuse disorders. See Cunningham & Reidy, supra note 17, at 336; Gerstley et al., supra note 120, at 174-75; Widiger & Shea, supra note 85, at 401; see also infra notes 314-19 and accompanying text (discussing the diagnostic similarity of ASPD and substance abuse criteria). This is particularly problematic in the context of capital litigation, as many clients have severe and chronic histories of poly-substance abuse. See infra note 317.

122. For example, estimates of incarcerated male inmates who meet diagnostic criteria for ASPD range from 49–80%. Cunningham & Reidy, supra note 17, at 340. “The diagnosis of ASPD alone then describes little about prison behavior and recidivism outcome except that the individual
little value in fulfilling the Eighth Amendment’s command that the death penalty “must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”123 This illustrates the innumeracy problem: it has been estimated that there are over three million possible symptom variations for the diagnosis of ASPD in the DSM-III-R,124 and 3.2 million symptom combinations for the DSM-IV.125 This further illustrates the lack of precision and clarity in the criteria for ASPD.126

Imprecise criteria and over-inclusion of symptoms are especially troublesome because they greatly heighten the risk of unreliable assessments, and can render diagnoses meaningless. In addition, excessive focus on antisocial behavior without attention to contextual factors such as trauma history, thought or mood disorders, and neuropsychological dysfunction, may lead to failure to identify relevant diagnostic considerations.127 For example, language such as “impulsivity,” “irritability,” or “irresponsibility” can describe symptoms consistent with a range of Axis I disorders, yet they are often labeled antisocial. In the absence of a contextualized understanding of what drove such behaviors, it is difficult (if not impossible) to separate symptoms from subjective judgments.128

Axis II personality disorder diagnoses (including ASPD) are based on strictly defined behavioral criteria, even more so than Axis I diagnoses. For this reason, they have been criticized as too narrow.129 They do not capture the richness and complexity of personality syndromes and deemphasize aspects of mental life and inner experience that are central components of personality syndromes.130 Yet,
the ability to capture this richness and complexity is central to effective capital representation.  

Another problem with the diagnosis of ASPD is the absence of symptom weighting, that is, each criterion receives equal weighting regardless of severity. For example, in the DSM-III-R, “stealing newspapers is equated with a bank heist, and having no fixed address for 30 days is treated the same as having no known address for five years.” Understanding the context in which a crime was committed—for instance, stealing food to help feed a family—is strangely missing from the diagnosis or text language for this and other diagnostic criteria.

Yet another troubling feature of the ASPD diagnosis, only partially addressed in the DSM-IV-TR, is that it “confuses arbitrariness with objectivity” and arguably shows a general insensitivity to social class differences in life experience: “[T]he criterion ‘significant unemployment for six months or more within five years when expected to work and work was available’ appears more arbitrary than objective. For example, successful business consultants, performers, and entertainers may choose not to work over others’ objections and yet remain financially comfortable.”

While the above quotes refer to the DSM-III-R, the DSM-IV-TR also fails to provide sufficient guidance; the diagnostic criteria were updated to “sudden changes of jobs, residences, or relationships” or “repeated failure to sustain consistent work behavior or honor financial obligations,” which would apply to many responsible individuals in the recent economic downturn, or communities in which unemployment and underemployment are chronically high. Similarly, a cognitively impaired person might need assistance caring for a child, maintaining

132. Rogers & Dion, supra note 92, at 26. While the specific references to stealing and having no fixed address were not included in the DSM-IV-TR, there is still no language to guide someone in weighing one example of behavior against another with respect to specific diagnostic criteria. Id.
133. Id.
134. Id.
135. DSM-5, supra note 24, at 659-60. This is especially problematic in cases involving minority defendants, who are more apt to live in communities in which unemployment is chronically high, typically more than double that of white people, due to poor educational and employment opportunities and discrimination in the job market. See Floyd D. Weatherspoon, The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective, 23 Cap. U. L. Rev. 23, 52-54, 57-58 (1994) (discussing social and economic conditions in segregated minority communities that deny economic opportunity); see also Michelle Alexander, The New Jim Crow 228 (rev. ed. 2012) (“As unemployment rates sank to historically low levels in the late 1990s for the general population, jobless rates among noncollege black men in their twenties rose to their highest levels ever, propelled by skyrocketing incarceration rates.”).
consistent work behavior, or honoring financial obligations.\textsuperscript{136} There is still plenty of room for honest disagreement about whether there is evidence for specific symptoms.

To summarize, the personality disorder category generally, and the diagnosis of ASPD specifically, have been the subject of multiple critiques and debate, and these issues are not settled in the mental health field. All of these issues become particularly problematic in the highly adversarial and often emotionally and politically charged context of capital cases, where ASPD and psychopathy become tools in the hands of prosecutors intent on obtaining death verdicts. It has been our experience that in this situation, where the stakes could not be higher, the potential for misdiagnosis is at its peak, as compared to other contexts where mental health assessments and diagnoses occur. All of the debates that surrounded efforts to address these issues in the DSM-5 suggest that these controversies will continue to haunt this contentious category of disorders. Given the high potential for prejudice and mistake, it is especially important that capital defense teams protect clients from unreliable and inflammatory mental health labels.\textsuperscript{137}

2. Ethical Controversies

Ethical concerns have been raised about the personality disorder classification system generally, and, in particular, the diagnosis of ASPD. Doctor Gillian Bendelow, a medical sociologist, noted that, with respect to personality disorders, “the vexed question of the value-laden nature of interpreting symptoms, which are unable to be ‘measured’ in the same manner as high cholesterol or low insulin levels, continues to haunt psychiatric practice and the subsequent provision of evidence-based healthcare.”\textsuperscript{138} This is part of a larger critique and set of concerns about the potential for psychiatry to be an agent of social control that began over a hundred years ago when mental patients were being placed in paupers’ prisons; it continues to the present day when over half of all

\begin{footnotes}
\item[137] The ABA Guidelines state:

[T]he defendant’s psychological and social history and his emotional and mental health are often of vital importance to the jury’s decision at the punishment phase,” counsel must “[e]nter[e] a competent and reliable mental health evaluation consistent with prevailing standards . . . . Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.

ABA GUIDELINES, supra note 18, Guideline 4.1 cmt., at 956 (footnotes omitted).
\item[138] Gillian Bendelow, Ethical Aspects of Personality Disorders, 23 CURRENT OPINION PSYCHIATRY 546, 546 (2010).
\end{footnotes}
people in jails and prisons in the United States have a recent history or active symptoms of mental disorder. In this context, ASPD is often used to achieve non-therapeutic goals: identifying individuals for isolation and punishment instead of treatment.

Another ethical concern is the highly prejudicial nature of the “personality disorder” label. A recent opinion-editorial purporting to describe individuals diagnosed with personality disorders, published in The New York Times, illustrates the oversimplified, dismissive, and prejudicial characterizations of persons with personality disorder diagnoses:

For years they have lived as orphans and outliers, a colony of misfit characters on their own island: the bizarre one and the needy one, the untrusting and the crooked, and grandiose and the cowardly.

Their customs and rituals are as captivating as any tribe’s, and at least as mystifying. Every mental anthropologist who has visited their world seems to walk away with a different story, a new model to explain those strange behaviors.

Besides the stigmatizing stereotype, also ethically troubling is the common assumption that individuals diagnosed with a personality disorder, particularly ASPD, are unchangeable, fixed in their ways, and therefore not amenable to treatment. Personality, in this view, is said to be an immutable character trait that a person is born with and that remains stable throughout life. This assumption has often resulted in stigmatization and denial of treatment options to patients, which is


140. Rogers and Dion, supra note 92, at 27; see also Gainan v. Armontrout, 909 F.2d 1224, 1229 (8th Cir. 1990) (discussing a court-ordered psychiatric evaluation which diagnosed the appellant with ASPD). This issue appears unresolved in the literature. Although it is a common assumption that ASPD is not amenable to treatment, there is evidence that the overall quality of treatment outcome studies is poor and insufficient to allow conclusions to be drawn. See, e.g., Simon Gibbon et al., Psychological Interventions for Antisocial Personality Disorder (Review), in 6 COCHRANE LIBRARY 27 (2010); Najat Khalifa et al., Pharmacologic Interventions for Antisocial Personality Disorder (Review), reprinted in 9 COCHRANE LIBRARY 23 (2010). In addition, there is some evidence for the efficacy of specific treatment modalities for the personality disorders, including ASPD. See, e.g., Mulder & Chanen, supra note 93 at 90; Piper & Joyce, supra note 93, at 324; Luis H. Ripoll et al., Evidence-Based Pharmacotherapy for Personality Disorders, 14 INT’L J. NEUROPSYCHOPHARMACOLOGY 1257, 1259, 1261 (2011); Town et al., supra note 93, at 733. Finally, in contrast to the frequently cited testimony of prosecution experts in capital trials that ASPD is unremittent, it often wanes in symptom intensity with age, particularly in the fourth decade of life. DSM-5, supra note 24, at 661; Cunningham & Reidy, supra note 17, at 335-36.
especially egregious when patients have been misdiagnosed and other more appropriate (possibly more “treatable”) diagnoses have been overlooked. In one study of forensic psychiatric nurses’ approach to treatment in a high security psychiatric hospital in the United Kingdom, patients who were described using lay notions of badness (evil) were “excluded from the usual medical, symptom-centered approach.”

Perhaps ironically, the behaviors that constitute ASPD have been repeatedly demonstrated to recede with aging (decline in aggression and criminality after age forty) but the diagnosis, once the criteria are met, is unaffected by these changes in behavior and the ASPD label persists across time for the individual. This, of course, makes it easier for the prosecutor to argue for the death penalty.

Upon publication of the DSM-III in 1980, the diagnosis of ASPD focused almost exclusively on observable behaviors. This has been described as a “major regressive step” because the “DSM has returned to an accusatory judgment rather than a dispassionate clinical formulation.” A sociologist who has focused on legal and ethical issues in biomedicine and mental health noted: “A diagnosis of ASPD is seldom appropriated willingly by individuals to characterize their subjective distress; rather, it is commonly applied to involuntary patients placed in forensic mental health services. Correspondingly, ASPD plays an important role in debates regarding mental health and criminal policy, and especially their intersections.”

Given the negative implications of ASPD and the contexts in which it is often diagnosed (that is, adversarial forensic proceedings), it is not surprising that the diagnosis itself is often interpreted as a damning judgment of the individual. In the highly politically and emotionally charged death penalty arena, the diagnosis of ASPD is repeatedly used as a tool to inflame jurors and fact finders into imposing sentences of death.

142. Knoll, supra note 56, at 113.
143. Cunningham & Reidy, supra note 17, at 335-36, 344.
144. Rogers & Dion, supra note 92, at 21.
145. Id. at 21-22. An example of how the personality disorders and ASPD result in “accusatory judgments” can be clearly seen in the language used by Benedict Carey in The New York Times. Carey, For the Worst of Us, supra note 58.
B. Controversies Surrounding Psychopathy and Related Assessment Instruments

Interest in the concept of psychopathy—which, we repeat, is not a DSM diagnostic category—has exploded in the past decade, and the literature is vast. It has become the subject of intense debate, and many questions remain unresolved. Accompanying the renewed interest in psychopathy, research into instruments for assessing the risk of violence has “expanded significantly and has included work on many measures in varied populations and settings.” While a number of risk assessment instruments have been developed, the PCL-R is the instrument most often used to assess an individual’s risk of future dangerousness. Although the PCL-R “was not ‘designed to be a risk assessment instrument per se,’” Doctor John F. Edens and his colleagues...

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147. There is also a literature that attempts to identify psychopathic characteristics in youths (deemed “fledgling psychopaths” by one researcher in this area). See Ronald D. Lyman, Early Identification of the Fledgling Psychopath: Locating the Psychopathic Child in the Current Nomenclature, 107 J. ABNORMAL PSYCHOL. 566, 567 (1998). Needless to say, this has generated controversy in the mental health field. See Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 LAW & HUM. BEHAV. 219, 229 (2002). The Supreme Court has noted that, “[f]or most teens, [risk or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled,” and that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Roper v. Simmons, 543 U.S. 551, 570, 573 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014-16 (2003)).

148. For example, a PubMed search performed on March 27, 2013 using “psychopathy” and “psychopathic” as search terms showed that between 1943 and 1973, these terms were used on average sixty-five times per decade; between 1973 and 1993, they were used on average 167 times per decade; between 1993 and 2003, they were used 316 times; and between 2003 and 2013, they were used 1098 times. U.S. Nat’l Library of Med., PUBMED (Mar. 27, 2013), http://www.ncbi.nlm.nih.gov/pubmed (search “PubMed” for “psychopath and psychopathy” for each publication date range listed).


150. Jay P. Singh & Seena Fazel, Forensic Risk Assessment: A Meta-review, 37 CRIM. JUST. & BEHAV. 965, 965 (2010) (“Searching for all previously published literature with the term risk assessment on the PsychINFO search engine in 1999 would have yielded a total of 1,965 citations, whereas the same search in 2009 gave a total of 6,093 records.”).
note that “it has frequently been used to assess the risk of violence and recidivism in civil and forensic settings.”\textsuperscript{153} The PCL-R has been promoted widely as an instrument that predicts re-offending, and, as a result, many in forensic mental health appear to assume a link between the assessment of psychopathy under the PCL-R and future dangerousness. A growing body of research has challenged this assumption.

Statements by proponents as well as critics of psychopathy and the PCL-R illustrate the widely divergent views of researchers in this area. Proponents of the construct of psychopathy and use of the PCL-R claim that psychopathy is “arguably the single most important clinical construct in the criminal justice system,”\textsuperscript{154} that the PCL-R is “unparalleled as a measure for making risk assessments,”\textsuperscript{155} and that the “failure to consider psychopathy when conducting a risk assessment may be unreasonable (from a legal perspective) or unethical (from a professional perspective).”\textsuperscript{156}

On the other hand, critics argue that psychopathy is “an elusive concept with moral overtones”\textsuperscript{157} that “remains a mythical entity,” which “should be discarded”\textsuperscript{158} because “diagnostic groupings . . . seldom have sharp and definite limits[,] . . . [w]orst of all is psychopathic personality.”\textsuperscript{159} Critics also argue that “close inspection of available empirical research does not provide much evidence to suggest that psychopathy is associated with the types of future violence that are at issue in death penalty cases.”\textsuperscript{160} Although proponents of the psychopathy construct, as defined by the PCL-R, strongly advocated for its inclusion

\begin{itemize}
  \item 153. Edens et al., Predictions, supra note 77, at 65; see also Robert D. Hare, Psychopathy: A Clinical and Forensic Overview, 29 PSYCHIATRIC CLINICS N. AM. 709, 710 (2006).
  \item 159. Aubrey Lewis, Psychopathic Personality: A Most Elusive Category, 4 PSYCHOL. MED. 133, 139 (1974).
  \item 160. Edens et al., Predictions, supra note 77, at 66 (citation omitted); see also David Freedman, Premature Reliance on the Psychopathy Checklist-Revised in Violent Risk and Threat Assessment, 1 J. THREAT ASSESSMENT 51, 60-61 (2001) [hereinafter Freedman, Premature Reliance].
\end{itemize}
in DSM-IV, it was rejected following its poor performance in field trials, and has not been recognized as an official diagnosis in any edition of the DSM.\textsuperscript{161}

1. Psychopathy: Scientific and Research-Based Controversies

Despite some overlap between the diagnosis of ASPD and the construct of psychopathy, these terms represent distinct concepts that are frequently (and erroneously) used interchangeably. Traditionally, affective and interpersonal traits (for example, egocentricity, shallow affect, manipulativeness, selfishness, and lack of empathy or remorse) have been considered core elements of the construct of psychopathy, whereas ASPD has focused more on behavioral criteria related to violations of social norms.\textsuperscript{162} Below, we will summarize some of the more noteworthy debates about the construct of psychopathy, and the reliability and validity of risk assessment instruments, such as the PCL-R.\textsuperscript{163}

a. Controversies over the Construct of Psychopathy

A number of intensely debated issues regarding the construct validity of psychopathy remain unresolved. These include the generalizability of psychopathy across gender and ethnic groups, whether variants or subtypes of psychopathy exist, and the nature of the underlying factor structure of the PCL-R.\textsuperscript{164} Edens, a national expert in forensic psychology, summarized common assumptions about psychopathy that are controversial and remain unresolved: “Once a Psychopath, Always a Psychopath”;\textsuperscript{165} “Where the Psychopath Goes, 161. See AM. PSYCHIATRIC ASS’N, RATIONALE, supra note 98, at 1. See generally AM. PSYCHIATRIC ASS’N, DSM-IV SOURCEBOOK, supra note 107.
162. See Edens et al., Psychopathic, supra note 149, at 131; Hare, supra note 117, at 39.
163. “Risk assessment” refers to predictions about the likelihood that a given individual will or will not be dangerous or violent in the future. The PCL-R is of particular consequence to this Article, as it was developed to make determinations about whether or not an individual is a “psychopath,” and has been incorporated into other currently used risk assessment instruments. See Freedman, Premature Reliance, supra note 160, at 52; see also Edens et al., Predictions, supra note 77, at 65.
164. See Edens et al., Psychopathic, supra note 149, at 164, for a discussion of these issues. See Freedman, Premature Reliance, supra note 160, at 56-57, for a discussion about the potential influence of race on PCL-R scores, noting that, while data are sparse, available research suggests there are important differences in the performance of African-Americans and Caucasians on PCL-R scores and that certain PCL-R items appear to be particularly subject to race bias.
165. Edens, Unresolved Controversies, supra note 76, at 60 (noting that, while a lot of literature is based on the belief that psychopathy is an immutable aspect of personality, there is little or no support for this).
Violence Will Surely Follow;”166 “Psychopaths Cannot Be Treated;”167 “Clinical Evaluations of Psychopathy Are Highly Reliable”168 and “Psychopaths Are Qualitatively Different from Other Offenders.”169

According to Edens, these assertions “reflect areas in which [he has] observed clinicians and researchers drawing overly forceful, categorical, or sweeping conclusions about psychopathy in the courtroom, in formal or informal talks, and/or in print.”170 Whether psychopathy represents a “taxon,” that is, a fundamentally distinct class of individuals who differ qualitatively from the rest of society, is an issue critical to capital defense. Because psychopathy plays an increasing role in legal decision-making across the world, this question has broad and significant implications.171 Edens and his colleagues have noted “the increasing role of the highly charged label of psychopath in the legal system, where the PCL-R has been used to find indeterminate commitment, rebut insanity defenses, and bolster support for the death penalty in capital murder trials.”172 In the death penalty context, jurors and fact finders may make life-and-death decisions based on the assumption that “psychopaths” are fundamentally different from the rest of humanity.173

While earlier research supported the view “that there are fundamental, qualitative differences between psychopaths and nonpsychopaths,”174 an increasing body of literature indicates that psychopathy is, in fact, a dimensional, rather than categorical, construct (or taxon).175 In a study specifically examining this question, Edens and

166. Id. While there is evidence to suggest that elevated PCL-R scores may identify violence-prone individuals, the evidence does not support “absolutist assertions . . . that individuals who are psychopathic will necessarily engage in violent conduct in the future.” Id.
167. Id. at 61-62. Although some early outcome studies concluded that psychopathy was untreatable, these studies were methodologically weak; more recent reviews have challenged these findings. See id.
168. Id. at 62. There is evidence of significant disagreement in the scoring of the PCL-R, particularly in highly adversarial legal settings. See discussion infra notes 215-33.
169. Edens, Unresolved Controversies, supra note 76, at 63. In fact, recent research shows that people who are labeled “psychopaths” do not differ from other offenders in kind; the difference is rather in degree. See id.
170. Id. at 59. For additional information regarding misperceptions about psychopathy, see Joanna M. Berg et al., Misconceptions Regarding Psychopathic Personality: Implications for Clinical Practice and Research, 3 NEUROPSYCHIATRY 63, 65 (2013).
171. See, e.g., Bersoff, supra note 77, at 571; Cunningham & Reidy, supra note 17, at 340-41; Edens at al., Predictions, supra note 77, at 64; Edens & Petrila, supra note 149, at 573-74.
172. See Edens et al., Psychopathic, supra note 149, at 132 (citation omitted).
173. Edens & Petrila, supra note 149, at 575, 582.
174. Edens et al., Psychopathic, supra note 149 at 132.
175. See Edens & Petrila, supra note 149, at 583-84; Jean-Pierre Guay et al., A Taxometric Analysis of the Latent Structure of Psychopathy: Evidence for Dimensionality, 116 J. ABNORMAL PSYCHOL. 701, 706-08 (2007); Glenn D. Walters et al., A Taxometric Analysis of the Psychopathy
his colleagues concluded that their results “offer no compelling support for the contention that psychopathy is a taxonic construct and contradict previous reports that psychopathy is underpinned by a latent taxon.”\textsuperscript{176} The implications of this debate are potentially enormous, particularly in the context of capital litigation. Prosecution experts employing a taxonic approach portray a purportedly psychopathic defendant as something other than human. If “psychopathy” is in fact a dimensional construct, the idea that a “psychopath” is in effect non-human is erroneous and enormously prejudicial. If it is dimensional, this suggests that many people in our world have some psychopathic traits.

A related concern is whether the mental health “field is in danger of equating the PCL-R with the theoretical construct of psychopathy,”\textsuperscript{177} and whether the danger is increased by the use of the “PCL-R as a common metric for psychopathy.”\textsuperscript{178} Jennifer L. Skeem and David J. Cooke point out that “a PCL-R score is not psychopathy any more than an intelligence score is intelligence itself.”\textsuperscript{179} To clarify the significance of this issue, it has long been assumed that the construct of psychopathy is primarily defined by the interpersonal-affective domain (for example, egocentricity, shallow affect, manipulativeness, selfishness, or lack of empathy), as captured by Factor 1 of the PCL-R.\textsuperscript{180} The specific characteristics included in Factor 1 have been thought to best capture Cleckley’s original description of psychopathy. However, the research does not support the predictive validity of Factor 1. Instead, Factor 1 adds almost nothing at all to the predictive strength of the PCL-R, and is less predictive of future violence than Factor 2 (testing behavioral factors more related to violation of social norms).\textsuperscript{181} Further, prior

\textsuperscript{176} Edens et al., Psychopathic, supra note 149, at 131; see also Guay et al., supra note 175, at 706-08.
\textsuperscript{178} Id. at 433 (internal quotation marks omitted).
\textsuperscript{179} Id. at 437.
\textsuperscript{180} See id. at 434.
\textsuperscript{181} Kenney et al., supra note 152, at 569, 574, 576-77; see also Edens et al., Impact of Mental Health Evidence, supra note 77, at 619; John F. Edens et al., Inter-Rater Reliability of the PCL-R Total and Factor Scores Among Psychopathic Sex Offenders: Are Personality Features More Prone to Disagreement than Behavioral Features?, 28 BEHAV. SCI. & L. 106, 115 (2010) [hereinafter Edens et al., Inter-Rater Reliability]; Glenn D. Walters, Predicting Institutional
criminal behavior has been found to predict scores on the PCL-R, with Factor 2 being a better predictor of recidivism than total score (which includes both Factor 1 and Factor 2 combined).\textsuperscript{182}\ Given these findings, the use of the PCL-R for assessing violence risk and conceptualizing psychopathy invites “mistaken assumptions that violence risk reflects detachment, predation, and inalterable dangerousness,”\textsuperscript{183} characteristics commonly associated with psychopathy. Arguably, the label “psychopath” should be avoided altogether to circumvent the “emotional baggage” of stigmatization and the perception of untreatability.\textsuperscript{184} This issue takes on added significance in the context of death penalty litigation, where the “psychopath” label is prejudicial. Capital jurors and fact finders may assume that this label establishes a high risk of future violence, even though it, in fact, provides little to no predictive information.\textsuperscript{185}

b. Do Risk Assessment Instruments Deliver What They Promise?

The recent interest in the construct of psychopathy is accompanied by the use of instruments that purport to quantify the risk of future dangerousness. However, there are troubling warnings from a growing number of studies that question the enthusiastic embrace of these risk prediction instruments and their ability to provide reliable and valid

\textsuperscript{182} Marta Wallinius et al., \textit{Facets of Psychopathy Among Mentally Disordered Offenders: Clinical Comorbidity Patterns and Prediction of Violent and Criminal Behavior}, 198 PSYCHIATRY RES. 279, 282 (2012).

\textsuperscript{183} Kennealy et al., \textit{supra} note 152, at 577.

\textsuperscript{184} \textit{Id.} at 570 (citing Paul Gendreau et al., \textit{Is the PCL-R Really the “Unparalleled” Measure of Offender Risk?: A Lesson in Knowledge Cumulation}, 29 CRIM. J. & BEHAV. 397, 413 (2002)). As noted by Canadian forensic psychologists, “[p]sychopathy is commonly equated with untreatability in the professional mind . . . but this widespread belief is perhaps forensic psychology’s most clear-cut example of overzealous acceptance of limited research findings.” Caleb D. Lloyd et al., \textit{Psychopathy, Expert Testimony, and Indeterminate Sentences: Exploring the Relationship Between Psychopathy Checklist-Revised Testimony and Trial Outcome in Canada}, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 323, 326-27 (2010) (citation omitted).

\textsuperscript{185} See infra notes 239-51 and accompanying text.
assessments of an individual’s risk for future violence and recidivism. Concerns about the PCL-R are of particular interest to this Article.\textsuperscript{(186)} Especially important is the problem of false positive rates—frequently at or above fifty percent in nearly a dozen studies—when the PCL-R is used to try to predict violent recidivism.\textsuperscript{(187)} The data suggests that problems associated with risk assessment conclusions gathered from the PCL-R are so serious that inferences drawn from them could damage the integrity of the adjudicative process.\textsuperscript{(188)} Several authors have questioned the wisdom and ethics of the use of instruments like the PCL-R in forensic examinations in death penalty proceedings where the stakes are so high.\textsuperscript{(189)}

Another issue of the utmost significance in capital litigation is that the PCL-R has demonstrated minimal ability to predict future violence in prison,\textsuperscript{(190)} a prediction that is arguably the only outcome measure relevant to death penalty cases, where sentencing options are most often death or life imprisonment, usually without the possibility of parole. In fact, rates of prison violence are low; most capital defendants do not engage in serious violence in prison, and they are no more likely than other high-security inmates to engage in prison violence.\textsuperscript{(191)} Edens

\begin{itemize}
\item[(186)] Identified problems include low base-rates of violence in institutional settings; lack of consistency in the literature about scores used to determine what constitutes a high ("psychopathic") score; failure to define severity of violence; unacceptably high false-positive rates; implausible probability values; differences in criteria used to develop different measures; questions about the best methods to arrive at overall probability estimates; failure to consider context; and predictor overlap. See generally Freedman, \textit{Premature Reliance}, supra note 160; David Freedman, \textit{False Prediction of Future Dangerousness: Error Rates and Psychopathy Checklist-Revised}, 29 J. AM. ACAD. PSYCHIATRY & L. 89 (2001); Vrieze & Grove, supra note 151, at 383-86, 388. More generally, studies into test validity and reliability are often conducted by the designer of the instrument; researchers have found such studies authored by tool designers reported predictive validity findings around two times higher than those reported by independent authors. Jay P. Singh et al., \textit{Authorship Bias in Violence Risk Assessment? A Systematic Review and Meta-Analysis}, PLOS ONE, Sept. 2013, at 1, 4-6, available at http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0072484.
\item[(187)] Freedman, \textit{Premature Reliance}, \textit{supra} note 160, at 92. These data suggest that, for every person who is correctly identified with the PCL-R, many more are misclassified. See \textit{id.} at 54.
\item[(188)] See Bersoff, \textit{supra} note 77, at 571-72; Edens et al., \textit{Predictions}, \textit{supra} note 77, at 77; Edens et al., \textit{Impact of Mental Health Evidence}, \textit{supra} note 77, at 606-07, 617-18; Freedman, \textit{Premature Reliance}, \textit{supra} note 160, at 54.
\end{itemize}
suggests that “it would seem hard to defend the PCL-R in an effort to identify inmates who are likely to be violent given the modest relationships in the literature [between PCL-R scores and prison violence].” As a recent study about the utility of the PCL-R concluded:

a) this checklist is not a reliable tool, b) the conclusions that are linked to these PCL-R scores with regard to the treatability of psychopathy are incorrect, harmful and unethical, c) can easily be misused in legal and forensic psychiatric settings to dispose of problematic psychopaths, and d) the diagnostic category psychopathy should be rejected firmly because some of the items are subjective, vague, judgmental and practically unmeasurable, and the term psychopathy itself seems to be judgmental.

In spite of Hare’s advice that accurate diagnosis involves expert observer (clinical) ratings based on a semi-structured interview and review of case history materials supplemented with behavioral observations whenever possible, determinations of psychopathy can be made without a clinician even meeting the test subject. Edens notes that the PCL-R instrument allows it to be scored without an interview if sufficient high-quality file data are available, but “[h]ow exactly one defines ‘high-quality’ file data is unclear.”

A growing body of literature has employed sophisticated methods, including systematic reviews and meta-analyses, to examine these issues. These studies raise additional concerns about the reliability of assessment instruments (including the PCL-R and other instruments) used to predict future violence. One study reviewed data from seventy-three samples that included over 24,000 participants from thirteen countries, and concluded that, “[w]hen used to predict violent offending, risk assessment instrument tools produced low to moderate positive

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192. Edens, Unresolved Controversies, supra note 76, at 61.
193. Martens, supra note 189, at 449. Edens and colleagues echo similar concerns, especially considering the frequency with which prosecution experts in death penalty cases offer predictions of future violence. Edens et al., Predictions, supra note 77, at 61-63. “[T]here are strong reasons to question the accuracy of predictions of violence risk by prosecution experts in capital murder trials” Id. at 61. “These data clearly call into question the validity of expert testimony asserting that capital defendants are continuing threats to society.” Id. at 63. “There is little reason to believe that risk statements offered by prosecution experts in [capital murder trials] provided much probative information about the likelihood that a capital defendant will go on to harm others in the future.” Id. at 77. “This relative absence of probative value should be considered in the context of the likely prejudicial effects that such expert testimony may have.” Id.
195. Walters et al., supra note 175, at 336.
196. Edens, Misuses, supra note 190, at 1090.
predictive values . . . and higher negative predictive values."\textsuperscript{197} These researchers wrote that “[o]ne implication of these findings is that, even after 30 years of development, the view that violence, sexual, or criminal risk can be predicted in most cases is not evidence based.”\textsuperscript{198} Further implications of this research are “that these tools are not sufficient on their own for the purposes of risk assessment,” and “that risk assessment tools in their current form can only be used to roughly classify individuals at the group level, and not to safely determine criminal prognosis in an individual case.”\textsuperscript{199}

A meta-review of risk assessment instruments “suggests that the view of some experts who have, in the past, argued that the Psychopathy Checklist measures are unparalleled in their ability to predict future offending . . . should now be reconsidered.”\textsuperscript{200} Another systematic review, a meta-analysis of sixty-eight studies involving almost 26,000 participants, concluded that, “[t]o date, no single risk assessment tool has been consistently shown to have superior ability to predict offending.”\textsuperscript{201} Finally, a meta-analysis of nine commonly used risk assessment instruments found that the PCL-R Factor 1 (the factor commonly associated with “psychopathy”) predicted violence no better than chance for men.\textsuperscript{202} In other words, it performed no better than a coin toss. These authors concluded that “there is no appreciable or clinically significant difference in the violence-predictive efficacy of the nine tools . . . . After almost five decades of developing risk prediction tools, the evidence increasingly suggests that the ceiling of predictive efficacy may have been reached with the available technology.”\textsuperscript{203}

In sum, there is a significant body of research that consistently indicates that claims about the value of instruments such as the PCL-R to predict future violence were much too optimistic, and at times were

\begin{itemize}
  \item \textsuperscript{197} Seena Fazel et al., \textit{Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-analysis}, 345 \textit{BRIT. J. MED.} 1, 1 (2012).
  \item \textsuperscript{198} \textit{Id.} at 5.
  \item \textsuperscript{199} \textit{Id.} (emphasis added).
  \item \textsuperscript{200} Singh & Fazel, supra note 150, at 981-82. The meta-review consisted of “systematically searching for and descriptively summarizing all available meta-analyses and systematic reviews” to identify inconsistencies in study findings. \textit{Id.} at 966.
  \item \textsuperscript{201} Jay P. Singh et al., \textit{A Comparative Study of Violence Risk Assessment Tools: A Systematic Review and Meta-regression Analysis of 68 Studies Involving 25,980 Participants}, 31 \textit{CLINICAL PSYCHOL. REV.} 499, 500 (2011). The authors note that “[s]uch uncertainties are important given that risk assessment tools have been increasingly used to influence decisions regarding accessibility of inpatient and outpatient resources, civil commitment or preventative detention, parole and probation, and length of community supervision in many Western countries, including the US.” \textit{Id.}
  \item \textsuperscript{203} \textit{Id.} at 759.
\end{itemize}
based on flawed methodology. While there are clearly prominent advocates as well as critics of the constructs of personality disorders, ASPD and psychopathy in the mental health field, empirical support is lacking for key assumptions on which it depends for admission as relevant scientific evidence, particularly in capital cases.\(^{204}\)

c. Subjectivity and Bias in Forensic Settings

There are increasing concerns about the application of the PCL-R in forensic settings due to the potential for misuse and damage to the integrity of legal proceedings—situations in which the risk of error has severe consequences.\(^{205}\) Hare, the developer of the PCL-R, has raised numerous concerns about its potential for misuse in forensic settings, including issues related to the qualifications and training of evaluators.\(^{206}\) Hare notes that “[t]he PCL-R Manual... outlines recommended qualifications for clinical use of the instrument.”\(^{207}\) Nevertheless, he cautions that, even if the examiner meets minimum qualifications, “there is no guarantee that he or she has the professional experience, competence, and integrity to score the items in a careful, unbiased manner.”\(^{208}\) Hare raised specific concerns about the substitution of “clinical experience” and “informed opinion” in scoring of the PCL-R, which can result in inaccurate scoring of individual items,\(^{209}\) and blatant misuse of the PCL-R, “[t]hrough ignorance or misguided intentions, some unqualified individuals have managed to use the PCL-R in court proceedings.”\(^{210}\)

Further, Hare has raised concerns about conceptual confusion, or conflation of the construct of psychopathy, with the diagnosis of ASPD.\(^{211}\) He noted he had reviewed many forensic reports where clinicians diagnosed clients with ASPD who had not administered the PCL-R, and yet they invoked the PCL-R literature in their testimony.\(^{212}\) “This is a very misleading practice” because “most individuals with

\(^{204}\) See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993) (“Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.”).

\(^{205}\) Martens, supra note 189, at 454.

\(^{206}\) See Robert D. Hare, The Hare PCL-R: Some Issues Concerning Its Use and Misuse, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 99, 107 (1988).

\(^{207}\) See id.

\(^{208}\) Id.

\(^{209}\) Id. at 109.

\(^{210}\) Id.

\(^{211}\) Id. at 108.

\(^{212}\) Id.
antisocial personality disorder are not psychopaths.” Hare pointed out that “literature relating the PCL-R to treatment outcome and to the risk for recidivism and violence may have little or no relevance for an individual with a diagnosis of antisocial personality disorder.”

In addition to the issue of a given clinician’s competence, another important concern raised by Hare involves the potential for inaccurate, biased ratings in applied forensic settings, because of “the assessment biases [the clinician] may have.” Hare considers this a serious matter, “particularly in jurisdictions . . . where it is not uncommon for prosecutors and defense lawyers to seek out and retain ‘the right expert.’” Although Hare asserts that the scoring criteria are “quite explicit,” he has observed that “experts hired by the defense always seem to come up with considerably lower PCL-R ratings than do experts who work for the prosecution.” This is understandably “of considerable concern” to Hare “because a PCL-R rating carries more serious implications for the individual and for the public than do most psychological assessments.”

A growing literature has also raised concerns that the PCL-R is less reliable in field (rather than research) settings, due in part to the potential for evaluator bias in PCL-R rating scores. While studies

213. Id.
214. Id.
215. Id. at 113.
216. Id.
217. Id.
218. Id.
219. Id.
220. Reliability and validity are critical characteristics of any assessment procedure. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 n.9. Reliability refers to the extent to which the same PCL-R scores are obtained for a particular individual, regardless of who administers the instrument; the expectation is that independent evaluators will obtain the same or similar results. Id. Validity refers to the ability of the measuring instrument (for example, the PCL-R) to actually measure the property (for example, psychopathy) it is supposed to measure. See id.; Dave DeMatteo & John F. Edens, The Role and Relevance of the Psychopathy Checklist-Revised in Court: A Case Law Survey of U.S. Courts (1991-2004), 12 PSYCHOL. PUB. POL’Y & L. 214, 214 (2006); Salekin et al., supra note 155, at 204-05.
221. See, e.g., Marcus T. Boccaccini et al., Do Some Evaluators Report Consistently Higher or Lower PCL-R Scores than Others?: Findings from a Statewide Sample of Sexually Violent Predator Evaluations, 14 PSYCHOL. PUB. POL’Y & L. 262, 262 (2008); Edens et al., Inter-Rater Reliability, supra note 181, at 114; Daniel C. Murrie et al., Does Interrater (Dis)agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?, 32 LAW & HUM. BEHAV. 352, 352 (2008) [hereinafter Murrie et al., Interrater]; Daniel C. Murrie et al., Field Validity of the Psychopathy Checklist-Revised in Sex Offender Risk Assessment, 24 PSYCHOL. ASSESSMENT 524, 524 (2012) [hereinafter Murrie et al., Field Validity]. These results raise critical, provocative questions about the use of the PCL-R in extremely high-stakes adversarial legal proceedings such as capital cases. Together, these studies clearly suggest the need for caution and further investigation. See John Edens et al., Taking Psychopathy Measures
show strong interrater agreement for PCL-R scores in well-designed research settings, conditions in real world settings differ significantly.\textsuperscript{222} While “forensic psychologists have traditionally assumed that results from well-designed studies generalize to field settings[,] . . . recent research suggest[s] this assumption may not be safe.”\textsuperscript{223} Taken together, these findings raise serious questions about the reliability of the PCL-R in adversarial legal proceedings.

“[R]ecent field reliability research suggests that some evaluators assign consistently higher PCL-R scores than others . . . .”\textsuperscript{224} Evaluator bias appears to be attributable to at least two independent sources of error.\textsuperscript{225} Several studies suggest that individual differences in evaluators may account for some of the variability in PCL-R scores in forensic proceedings.\textsuperscript{226} In addition, some PCL-R items are clearly more subjective than others.\textsuperscript{227} Although general concerns have been raised about the bias in PCL-R ratings in real-world cases, the inferential personality items (Factor 1), thought to be most central to psychopathy, appear to be particularly susceptible.\textsuperscript{228} Possible explanations include differences in raters’ own subjective thresholds for Factor 1 items (reflecting interpersonal/affective traits) and differences in how

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\textsuperscript{222} Murrie et al., \textit{Interrater, supra note} 221, at 525. \textsuperscript{223} Id. (citing Boccaccini et al., \textit{supra note} 221, at 263). \textsuperscript{224} Boccaccini et al., \textit{supra note} 221, at 276-77; Murrie et al., \textit{Interrater, supra note} 221, at 357-58; Daniel C. Murrie et al., \textit{Rater (Dis)agreement on Risk Assessment Measures in Sexually Violent Predator Proceedings: Evidence of Adversarial Allegiance in Forensic Evaluation?}, 15 \textit{PSYCHOL. PUB POLY} & L. 19, 24 (2009) [hereinafter Murrie et al., \textit{Rater (Dis)agreement}]; see also Edens et al., \textit{Inter-Rater Reliability, supra note} 181, at 116. \textsuperscript{225} Boccaccini et al., \textit{supra note} 221, at 263-64, 276. In this study, researchers found that over thirty percent of the variability in PCL-R scores was attributable to differences among evaluators, regardless of which side of the case they worked on. \textit{Id.} at 276. \textsuperscript{226} Studies have consistently demonstrated that there is more subjectivity and room for disagreement on items related to the interpersonal items of the PCL-R (considered more indicative of traditional notions of psychopathy) than on historical items (traditionally associated with antisocial behavior). See Miller et al., \textit{supra note} 221, at 950; see also Terence W. Campbell, \textit{The Validity of the Psychopathy Checklist-Revised in Adversarial Proceedings}, 6 \textit{J. FORENSIC PSYCHOL. PRAC.} 43, 45-47 (2006); Edens et al., \textit{Inter-Rater Reliability, supra note} 181, at 107; Murrie et al., \textit{Interrater, supra note} 221, at 360. \textsuperscript{227} Edens et al., \textit{Inter-Rater Reliability, supra note} 181, at 109.
evaluators might evoke different levels of Factor 1 traits due to their own interviewing styles.\textsuperscript{229}

A second source of potential PCL-R scoring bias is partisan adversarial allegiance; that is, the tendency for forensic evaluators to reach opinions that support the party who retained them. “For decades, observers have complained – although usually through anecdotes and impressions rather than empirical data – of bias or partisanship by expert witnesses.”\textsuperscript{230} These concerns are validated by recent evidence of systematic differences in PCL-R rating scores, with scores skewed in the direction supporting the party who retained the evaluator.\textsuperscript{231} Similar concerns have been raised by the National Research Council (“NRC”) about the reliability of commonly accepted forensic science techniques,\textsuperscript{232} and this new evidence of bias in the use of the PCL-R raises specific questions about forensic psychology—an area not addressed in the NRC report.\textsuperscript{233}

Evidence of the potential for individual and partisan allegiance bias, and the lack of field reliability of PCL-R application in forensic proceedings, have serious implications for scientifically competent and ethical forensic practice. This raises additional questions about the PCL-R’s evidentiary value in highly adversarial capital litigation proceedings.\textsuperscript{234} Researchers in this area have concluded that, “as the

\textsuperscript{229} Id. at 116. In further support of individual bias, an exploratory study found that raters’ PCL-R scoring tendencies related to their own personality traits. Audrey K. Miller et al., On Individual Differences in Person Perception: Raters’ Personality Traits Relate to Their Psychopathy Checklist-Revised Scoring Tendencies, 18 ASSESSMENT 253, 259 (2011).

\textsuperscript{230} Murrie et al., Rater (Dis)agreement, supra note 225, at 46.

\textsuperscript{231} See Murrie et al., Interrater, supra note 221, at 355; Murrie et al., Rater (Disagreement, supra note 225, at 23. The strongest evidence for partisan adversarial allegiance derives from a recent study that showed a clear pattern of bias in PCL-R scores in an experimental design. Daniel C. Murrie et al., Are Forensic Experts Biased by the Side that Retained Them?, 24 PSYCH. SCI. 1889, 1890-91, 1893, 1895 (2013) [hereinafter Murrie et al., Are Forensic Experts Biased]. This study assessed potential adversarial allegiance and addressed the question of whether forensic experts are biased by the side that retained them. \textit{Id.} The study adds critical and important information to the literature discussed, as the study design involved a random assignment of experts trained in use of two risk assessment instruments (including the PCL-R) to either the defense or the prosecution. \textit{Id.} Partisan adversarial allegiance was found, even in this instance that did not involve real-world settings (e.g., actual retention by the prosecution or defense). \textit{Id.} This study adds further weight to earlier studies based on naturalistic designs, and increases concerns about the objectivity of forensic experts when using instruments such as the PCL-R. See id.


\textsuperscript{233} Murrie et al., Are Forensic Experts Biased, supra note 231, at 1895.

\textsuperscript{234} As an important side note, another potential bias involves the threat to academic freedom in resolving disputes about the PCL-R. This was addressed recently by prominent psychologists Norman Poythress and John Petrila. \textit{See} Norman Poythress & John P Petrila, PCL-R Psychopathy: Threats to Sue, Peer Review, and Potential Implications for Science and Law, \textit{A Commentary}, 9 INT’L J. FORENSIC MENTAL HEALTH 3, 4, 9 (2010). These forensic experts discussed the
amount of variance attributable to evaluators approaches the amount of variance attributable to the offender, any score or opinion from the evaluator becomes less useful and fails to serve the purpose for which evaluators serve in court: to provide nonbiasing assistance to the trier of fact.\textsuperscript{235}

2. Psychopathy: Ethical Controversies

The use of forensic evidence about psychopathy to persuade judges or juries to execute a defendant raises serious ethical concerns. These include the prejudicial nature of the construct itself, the equation of psychopathy with “wickedness” and “evil,” and the implication that psychopathic individuals are subhuman. Consider, for example, Cleckley’s assertions in his influential book on psychopathy:

We are dealing here not with a complete man at all but with something that suggests a subtly constructed reflex machine which can mimic the human personality perfectly. . . . So perfect is this reproduction of a whole and normal man that no one who examines him in a clinical setting can point out in scientific or objective terms why, or how, he is not real. And yet we eventually come to know or feel we know that reality, in the sense of full, healthy experiencing of life, is not here.\textsuperscript{236}

Similar, dehumanizing language was used more recently by Doctor Reid Meloy, who has written extensively about psychopathy:

[T]he psychodynamics of the psychopath bring us closer to what we see as [his] evil . . . . It is phylogenetically a prey-predator dynamic, often viscerally or tactiley felt by the psychiatrist as an acute autonomic fear response in the presence of the patient . . . . the hair standing up on the neck, goosebumps, or the more inexplicable “creepy” or “uneasy” feeling. These are atavistic reactions that may signal real danger and should never be ignored . . . .\textsuperscript{237}

implications of a recent threat of litigation against the authors of an article that questioned the role of criminal behavior in the construct of psychopathy. \textit{Id.} The editor of the scientific journal that accepted the article for publication (following the peer-review process) was also threatened with litigation. \textit{Id.} Poythress and Petrila cautioned that “litigation threats can have chilling effects on academic freedom.” \textit{Id.} Litigation threats, uncommon in the mental health field, have the potential to negatively affect the greatly valued process of peer review as a means of ensuring academic integrity and scientific reliability and validity. \textit{Id.} at 4, 7, 9.

\textsuperscript{235} Boccazini et al., supra note 221, at 277.


\textsuperscript{237} J. Reid Meloy, The Psychology of Wickedness: Psychopathy and Sadism, 27 PSYCHIATRIC ANNALS 630, 631 (1997) (emphasis added) (footnotes omitted). Both of these statements present an alarmingly subjective, dehumanizing portrayal of the “psychopath” as non-human, which has been
The use of such inflammatory language, cloaked as medical science, inevitably stigmatizes capital defendants and prejudices capital jurors and fact finders. Because of the PCL-R’s susceptibility to producing unreliable results in the hands of biased examiners, ethical concerns are growing about its unreliability and misuse of the PCL-R in forensic contexts.

3. Psychopathy Evidence More Prejudicial than Probative

The PCL-R and the construct of psychopathy have only recently been introduced into the sentencing phase of capital murder trials. Such evidence has quickly taken hold in capital litigation to support expert testimony offered by the prosecution that a defendant will be a continuing threat to society if he is not executed. Accumulating evidence suggests that, when juries perceive capital defendants to present a risk of future dangerousness, they are more likely to return a

contradicted by a number of studies indicating that there is no evidence the concept represents a discrete category of individuals. It is noteworthy that Meloy and Cleckley agree that it is difficult to assess clearly whether an individual is a psychopath, except in some “atavistic” or gut-level recognition of this “reality.” See id. The subjective nature of Meloy’s methodology was instrumental in the Colorado homicide conviction of Timothy Lee Masters, who was ultimately proven completely innocent. Miles Moffeit, Release Likely Today as Missteps Surface, DENVER POST, Jan. 22, 2008, http://www.denverpost.com/ci_8039377. Without interviewing Masters, but based on interpretation of violent images depicted in Masters’s artwork and writings, Meloy testified that the “defendant perceived himself as a warrior character without empathy or feeling who engaged, through fictional narratives and pictures, in a variety of killings.” State v. Masters, 33 P.3d 1191, 1196 (Colo. App. 2001). The Colorado Supreme Court found that Meloy’s testimony was crucial to Masters’s conviction. No physical evidence linked him to the crime, and “Dr. Meloy’s testimony provided an explanation for the seemingly inexplicable.” Masters v. State, 58 P.3d 979, 991 (Colo. 2002) (en banc). Without it, “lay jurors would be tremendously disadvantaged in attempting to understand Defendant’s motivation for killing [Peggy] Hettrick.” Id. at 992. Based on exonerating DNA tests, and other evidence developed with the assistance of police detectives who always had reservations about his guilt, Masters was released from prison on the motion of prosecuting attorneys in 2008. Moffeit, supra.

See, e.g., Lloyd et al., supra note 184, at 324. Caleb D. Lloyd and his colleagues state: Concerns have been raised that expert testimony provided in trial courts, especially testimony in regards to psychopathy, may promote unfounded prejudice or inflate weakly supported research findings to bias criminal justice decision makers . . . minimally, professional integrity requires a measure of caution when considering emotionally charged diagnoses in the courts or applying standardized instruments to situations for which these instruments were not originally intended . . . .

Id.


See, e.g., Bersoff, supra note 77, at 571; Cunningham & Reidy, supra note 17, at 333; DeMatteo & Edens, supra note 220, at 215, 218; Edens et al., Impact of Mental Health Evidence, supra note 77, at 616-18; Edens et al., Psychopathy and the Death Penalty, supra note 239, at 436-37, 439; Edens et al., Predictions, supra note 77, at 77.
death sentence. The label “psychopath” has a profound effect on lay persons’ views of capital defendants, because it tends to obscure and overwhelm other relevant mental health evidence. This may explain the increasing use of such evidence by the prosecution.

Given the prejudicial effect of expert testimony that the defendant is a psychopath who may kill again, mental health researchers recognize that it “has arguably become one of the most controversial types of evidence admitted.” Due to the “limited probative value of the PCL-R in capital cases and the prejudicial nature of the effects noted in this study,” Edens and his colleagues “recommend that forensic examiners avoid using it in capital trials.” They also argue for ethical guidelines limiting the use of psychopathy evidence:

Although the courts have typically allowed experts considerable latitude regarding what constitutes admissible evidence in these cases, this by no mean obviates experts’ ethical responsibility to “use assessment instruments whose validity and reliability have been established for use with the members of the population tested” or the need to “take reasonable steps to avoid harming their

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242. See DeMatteo & Edens, supra note 220, at 232; Edens et al., Impact of Mental Health Evidence, supra note 77, at 607; John F. Edens et al., Psychopathic Traits Predict Attitudes Toward a Juvenile Capital Murderer, 21 BEHAV. SCI. & L. 807, 822-24 (2003). As stated by Lloyd and his colleagues:

Pejorative labeling and adverse effects are accomplished through experts’ selective presentation of the concept of psychopathy or exaggeration of its implications. . . . [E]ven when psychopathy is correctly applied, research supports the conclusion that perceptions of dangerousness are heightened beyond an experts’ indicated risk level when a diagnostic label is given. Lloyd et al., supra note 184, at 325.


244. Edens et al., Impact of Mental Health Evidence, supra note 77, at 605 (citing Cunningham & Reidy, supra note 17, at 336-37); Charles P. Ewing, “Dr. Death” and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J.L. & MED. 407, 412-13, 415 (1983); see also Brief for the American Psychological Association & the Missouri Psychological Association as Amicus Curiae Supporting Respondent at 20, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).

245. Edens et al., Impact of Mental Health Evidence, supra note 77, at 603. This study examined the effects of data about psychopathy on layperson attitudes; test subjects reviewed a capital murder case where results of the defendant’s psychological examination were experimentally manipulated. Id.

246. Id.
clients/patients ... and others with whom they work, and to minimize harm where it is foreseeable and unavoidable. Given the minimally probative nature of PCL-R data ... combined with the likelihood that it would have a prejudicial impact, it is difficult to postulate a scenario in which these two ethical standards would not be in jeopardy if it were introduced . . . . "

It is for these reasons that both the American Psychiatric Association and the American Psychological Association have opposed the use of such evidence in in capital cases. 248

In sum, serious ethical questions have been raised about whether the PCL-R provides any probative value in capital sentencing procedures. 249 The PCL-R stigmatizes defendants because of its associated label of “psychopath” and the morally damning judgment implicit in many of PCL-R items. “[I]t seems impossible to reconcile the glaring inaccuracy of the prediction made by prosecution experts . . . with the assertion that death sentences have not been meted out in a capricious manner.” 250 In fact, when laypersons attribute psychopathic traits to capital defendants, this strongly predicts their support for decisions to execute them. 251

4. No Intelligent Design: Conceptual Drift Towards “Evil” and “Wickedness”

An ethical debate of particular relevance to capital litigation is whether the mental health field should weigh in on “wickedness” and “evil,” which are not clinical constructs (for example, neither are they contained anywhere in the DSM, nor are psychiatrists or psychologists trained to assess or identify these moral characterizations). While the introduction of moral and religious overtones into forensic testimony has

247. Id. at 619.
248. Edens & Cox, supra note 241, at 241; see also Brief of Amicus Curiae American Psychological Ass’n in Support of Defendant-Appellant at 9-12, United States v. Fields, No. 04-50393 (5th Cir. Apr. 2, 2007).
249. Edens & Cox, supra note 241, at 242-43; see also Bersoff, supra note 77, at 572 (enumerating six concerns); Cunningham & Goldstein, supra note 3, at 424, 426; Edens, Misuses, supra note 190, at 1085, 1087, 1089 (presenting two case examples); Edens et al., Impact of Mental Health Evidence, supra note 77, at 605-06. The PCL-R also is likely to have a highly prejudicial effect on perceptions of the defendant. Brief for the American Psychological Ass’n & the Missouri Psychological Ass’n as Amicus Curiae Supporting Respondent at 23-24, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).
250. Edens et al., Predictions, supra note 77, at 77. Hare, the developer of the PCL-R, has serious concerns about and has disavowed numerous ways in which his instrument has been misused. See supra text accompanying notes 206-19.
been questioned, "[i]nterest in evil is growing. The psychological and psychiatric literature reflects steadily increasing attention to the concept of evil over the past two decades."252

One prominent advocate of the view that "evil" and similar terms (for example, "depravity") are within the purview of psychiatric assessment is Welner, a psychiatrist who testifies frequently for the government in death penalty cases.253 His position is that "legal relevance demands that evil be defined and standardized" because, "[i]n 39 American states, and in federal jurisdictions, statutes allow for judges and juries to enhance penalties for convicted offenders if they decide the crime committed was 'heinous,' 'atrocious,' 'depraved,' 'wanton,' or otherwise exceptional."254 Welner explains that the purpose of introducing "evil" as a forensic concept in criminal cases is to neutralize evidence of the background and character of the accused, which in his personal opinion has no place in capital decision-making:255

Without standardized direction, jury decisions on whether a crime is deprived are all too often contaminated by details about the "who" of a crime (i.e. a person's checkered background or, alternatively virtuous qualities that render a jury unable to fathom how such a privileged person could so dramatically offend), as opposed to focusing on "what" the defendant actually did.256

Welner contends that, "mingling the 'what' of a crime" with mitigating circumstances "undercuts an unbiased, equal justice,"257 He argues that standardizing depravity (evil) is needed to "insulate [jurors] from emotional manipulation, courtroom theatrics, and the introduction of factors that should not play a role in sentencing,"258 Of course, the factor that Welner seeks to neutralize is the Eighth Amendment's "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual."259

Welner's advocacy of the use of depravity or evil to focus solely on the "what" of the crime, rather than the "who" of the defendant, is particularly misguided in light of the constitutional demand that the

252. Knoll, supra note 56, at 105 ("Medline and PubMed searches using the phrases 'the concept of evil in forensic psychiatry' and 'evil and psychiatry' revealed significantly more relevant publications beginning in the early to mid 1990s than before this period.").
254. Welner, supra note 57, at 417.
255. See generally id.
256. Id. at 417 (emphasized).
257. Id. at 417-18.
258. Id. at 418 (emphasis added).
sentencer consider the uniqueness of each individual in weighing the death penalty, which is reserved only for “a narrow category” of the most culpable offenders who commit the worst of crimes.\(^{260}\) Indeed, the very factors which Welner insists on writing out of the capital sentencing equation—“a person’s checkered background or, alternatively virtuous qualities . . . [or] race, orientation, and socioeconomic factors”\(^{261}\)—are “relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.”\(^ {262}\) The Eighth Amendment condemns any procedure that “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.”\(^ {263}\) Therefore, the Supreme Court requires that a capital sentencer be permitted to consider, “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”\(^ {264}\) Welner’s admission that evidence about psychopathy is intentionally designed to obscure constitutionally mandated mitigating evidence provides a compelling ethical argument for excluding it altogether.

Contrary to Welner, psychiatrist Doctor Robert Simon articulates the view that “evil” is not within the purview of the science of psychiatry:

Forensic psychiatrists are ethically required to adhere to the principles of honesty and striving for objectivity in providing opinions and testimony. Evil, however, is a concept too knotted in ambiguity for the application of these principles. The proper métier of the forensic psychiatrist is psychological and clinical. Psychiatrists are medically trained in the scientific method, not in the diagnosis and treatment of evil. They observe cause and effect in human behavior. When a concept is beyond scientific investigation, it is the province of the philosopher and theologian. Introducing the concept of evil into forensic psychiatry hopelessly complicates an already difficult task.

\(^{261}\) See also Welner, supra note 57, at 417.
The determination that a particular behavior is or is not evil is a judgment that is heavily influenced by context and subjectivity.\(^{265}\)

Simon argues persuasively that “[t]he Gordian knot of evil cannot be untied by forensic psychiatry. It is unreasonable to expect forensic psychiatrists to provide credible testimony about evil.”\(^{266}\) He explains, “[l]ay people are just as qualified to identify these individuals as evil,” and forensic psychiatrists and psychologists have “an important, but limited consulting role when advising the courts about psychological matters. We are not and should not be asked to offer professional opinions about evil. It’s the law’s final moral judgment of guilt upon individuals whom society brands as evildoers.”\(^{267}\)

Opponents of using psychiatry to measure evil point out that it is “an entirely subjective concept created by humans.”\(^{268}\) They argue that “[s]ince evil is a subjective moral concept with inextricable ties to religious thought, it cannot be measured by psychiatric science.”\(^{269}\) Further, “attempts by behavioral science to define evil as though it were an objective and quantifiable concept are inherently flawed.”\(^{270}\) To give “evil” quasi-scientific status in the psychiatric study of human behavior would harm patients and impede advancement in the identification and treatment of mental disorders:

The term evil is very unlikely to escape religious and unscientific biases that reach back over the millennia. Any attempt to study violent or deviant behavior under this rubric will be fraught with bias and moralistic judgments. Embracing the term evil as though it were a legitimate scientific concept will contribute to the stigma of mental illness, diminish the credibility of forensic psychiatry, and corrupt forensic treatment efforts.\(^{271}\)

To conclude otherwise would threaten the neutrality and objectivity that are essential ingredients of ethical and psychiatrically valid forensic mental health evaluations:

\(^{265}\) Robert I. Simon, Should Forensic Psychiatrists Testify About Evil?, 31 J. AM. ACAD. PSYCHIATRY & L. 413, 414 (2003) (footnote omitted). In a private communication with Robert I. Simon, Daniel W. Shuman, Professor of Law at Southern Methodist University, wrote: “As to relevance, no legal standard with which I am familiar turns on depravity – to what is this relevant in the forensic world?” \textit{Id.} at 413.

\(^{266}\) \textit{Id.} at 416.

\(^{267}\) \textit{Id.}

\(^{268}\) \textit{Knoll, supra note 56, at 105.}

\(^{269}\) \textit{Knoll explains that, “evil can never be scientifically defined because it is an illusory moral concept, it does not exist in nature, and its origins and connotations are inextricably linked to religion and mythology.” \textit{Id.} at 114.}

\(^{270}\) \textit{Id.} at 105.

\(^{271}\) \textit{Id.} at 114.
Thus, psychiatry already has a tradition of at least attempting to avoid moralistic bias by focusing on concepts such as violence, aggression, or sexual disorders. Terms with value-laden or pejorative connotations are either limited or avoided. The use of such terms is a tradition that places value on the struggle for neutrality and objectivity. Forensic psychiatrists, as expert witnesses, subscribe to the principle in ethics of striving for objectivity. Forensic clinical psychiatrists, who must follow general ethics guidelines for psychiatry, are instructed to avoid any policy that “excludes, segregates or demeans the dignity” of a patient. When treating offenders, psychiatrists must strike a balance between neutrality and beneficence, regardless of how heinous a crime the patient may have committed.\footnote{272}

Finally, introducing “evil” into capital sentencing under the guise of medical science will only increase concerns about the arbitrary and capricious infliction of the death penalty:

\begin{quote}
[It] is not difficult to imagine a scenario in which the results of a legal adjudication of evil include discrimination against poor or disadvantaged individuals. . . .

There are strong emotional and psychological forces at play during capital trials that are potentially biasing. It is well known that much more than legal fact is communicated in the courtroom, and that this “much more” has a direct and powerful effect on a jury’s punishment decision. For example, it has been found that a defendant’s appearance significantly influences whether jurors impose the death sentence. If jurors are unable to discount the physical appearance of a defendant in their deliberations, what is the likelihood that they will remain objective when a word steeped in religious morality is introduced by “experts” as a scientific construct?\footnote{273}

In sum, evidence that the defendant has ASPD or psychopathy, and that he will therefore be dangerous in the future, fails the most basic tests of scientific knowledge.\footnote{274} The myriad scientific, reliability, and ethical concerns about labeling a person antisocial, psychopathic, and evil cloaked as psychiatric findings should result in this evidence being excluded from the highly-charged adversarial atmosphere of capital trials. Thirty years ago, the Supreme Court rejected a challenge to the

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\item \textit{Id. at 112} (citation omitted) (footnote omitted).
\item \textit{Id. at 110} (footnote omitted).
\item “[S]cientists typically distinguish between ‘validity’ (does the principle support what it purports to show?) and ‘reliability’ (does application of the principle produce consistent results?).” Daubert v. Merril Dow Pharmaceutical, Inc., 509 U.S. 579, 590 n.9 (1993). “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” \textit{Id. at 593}."
\end{itemize}
use of psychiatric testimony in the penalty phase of a death penalty case that the defendant would pose a future danger if not executed.\textsuperscript{275} The Court found that, “[t]he suggestion that no psychiatrist’s testimony may be presented with respect to a defendant’s future dangerousness is somewhat like asking us to disinvent the wheel.”\textsuperscript{276} As Edens and his colleagues suggest, perhaps the time has come to do so.\textsuperscript{277}

IV. LEGAL GUIDELINES AND MENTAL HEALTH ASSESSMENTS:

Avoiding Fatal Mistakes

This Part will discuss the “long recognized... critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel.”\textsuperscript{278} Prevailing standards governing the performance of defense counsel in the post-\textit{Furman}\textsuperscript{279} era of capital punishment require the capital defense team’s active participation and guidance in the assessment of the client’s behavior, background, and mental health.\textsuperscript{280} Performance standards have never contemplated that defense counsel would be a passive observer in processes and decisions that could determine his or her client’s fate. To the contrary, a capital defendant “requires the guiding hand of counsel at every step in the proceedings against him.”\textsuperscript{281} In the context of a potential death sentence, assessment of the client’s mental condition is a critical stage of the proceeding in which the guiding hand of counsel is absolutely essential under the Constitution.\textsuperscript{282} To illustrate our point, we will discuss competent mental health assessments and cases that illustrate the importance of counsel’s involvement to assure that the client does not fall victim to unreliable findings of ASPD and psychopathy.

\begin{thebibliography}{9}
\bibitem{276} \textit{Id.} at 896.
\bibitem{277} Edens et al., \textit{Predictions}, supra note 77, at 76-77.
\bibitem{278} Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985) (quoting United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974)).
\bibitem{279} \textit{Furman} v. Georgia, 408 U.S. 238 (1972).
\bibitem{280} ABA GUIDELINES, supra note 18, Guideline 1.1 cmt., at 926-27.
\bibitem{281} Powell v. Alabama, 287 U.S. 45, 69 (1932).
\bibitem{282} “It is central to [the Sixth Amendment] principle that in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” Estelle v. Smith, 451 U.S. 454, 470 (1981) (quoting United States v. Wade, 388 U.S. 218, 226-27 (1967)).
\end{thebibliography}
A. “Defense Fail”

Justice Ruth Bader Ginsburg observed that “[p]eople who are well represented at trial do not get the death penalty.”

Her observation holds true a dozen years later, as evidenced by many noteworthy examples in recent memory, including Olympic Park Bomber Eric Rudolph, Unabomber Ted Kaczynski, Atlanta courthouse escapee Brian Nichols, accused September 11th co-conspirator Zacharias Moussaoui, Beltway Sniper Lee Boyd Malvo, and Jared Lee Loughner, the shooter of Congresswoman Gabrielle “Gabby” Giffords and others in Tucson, Arizona. These defendants have three things in common: each was convicted of highly publicized capital crimes that had resulted in the deaths of multiple people; each had a tragic history of mental illness that played a key role in persuading jurors, judges, or even prosecutors to reject the death penalty; and each was represented by a team of lawyers, investigators, and mitigation specialists who performed consistently with the ABA Guidelines.

Experience bears testament to Justice William Brennan’s observation that “[t]he evidence is conclusive that death is not the ordinary punishment for any crime.”

Without representation consistent with the ABA and Supplementary Guidelines, the outcome of these cases would be different. Evidence supporting Justice Ginsburg’s observation is easy to find. Columbia Law Professor James Liebman conducted an exhaustive survey of modern death penalty cases and found that more than two-thirds of death sentences are set aside because of prejudicial error, and that the most common error is ineffective assistance of defense counsel. The vast majority of these cases ended in a more favorable disposition for the defendant after remand.

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287. Following appellate or post-conviction rulings finding serious error in capital cases, eighty-two percent of defendants “were found on retrial not to have deserved the death penalty, including [seven percent] . . . who were cleared of the capital offense.” Id. at 1852 (emphasis omitted).
capital clients are at an increased risk of being diagnosed with ASPD or psychopathy if they are represented by trial, appellate, or post-conviction defense teams who fail to comply with the ABA and Supplementary Guidelines. This failure contributes significantly to the arbitrary pattern of death sentences and executions in the United States.

The Supreme Court’s decision in Rompilla v. Beard illustrates how defense counsel’s deficient performance heightens the risk of a death sentence by facilitating an erroneous forensic opinion that the client is antisocial or psychopathic. Instead of retaining a qualified mitigation specialist, trial counsel relied on a staff investigator to help investigate and develop mitigation evidence in addition to performing traditional guilt-or-innocence investigative functions. Consequently, the defense team was understaffed and, contrary to prevailing performance standards, no team member was “qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” Inevitably, as a result of this failure, critical information was misinterpreted or overlooked.

A qualified mitigation specialist would have brought to Ronald Rompilla’s defense team “clinical and information-gathering skills and training that most lawyers simply do not have.” These specialized skills include “the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client’s life history,” and the ability to conduct multiple, culturally competent, “in-person, face-to-face, one-on-one interviews with the client, the client’s

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289. See id.
290. Ronald Rompilla’s three-person defense team consisted of two public defenders and “an investigator in the public defender’s office.” Id. at 398 (Kennedy, J., dissenting). This is inconsistent with the ABA Guidelines, which provide that “[t]he defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.” ABA GUIDELINES, supra note 18, Guideline 4.1(A)(1), at 952 (emphasis added).
291. ABA GUIDELINES, supra note 18, Guideline 4.1(A)(2), at 952; see also id. Guideline 10.4(C)(2)(a), at 1000 (providing that counsel should select a team that includes “at least one mitigation specialist and one fact investigator” (emphasis added)). More recently, the Supplementary Guidelines provided useful context to this requirement:
   At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma.
SUPPLEMENTARY GUIDELINES, supra note 19, Guideline 5.1(E), at 683.
292. See Rompilla, 545 U.S. at 378-80, 382-83.
293. ABA GUIDELINES, supra note 18, Guideline 4.1 cmt., at 959.
294. SUPPLEMENTARY GUIDELINES, supra note 19, Guideline 5.1(B), at 682.
family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death.\textsuperscript{295} As illustrated in further detail below, this is no small undertaking, but it is critically important to fair and reliable decisions by everyone involved in the litigation of a capital case.\textsuperscript{296} Counsel’s decision to proceed to trial without a fully qualified defense team practically guaranteed unreliable results, putting Rompilla at a high risk of being wrongly labeled antisocial or psychopathic.\textsuperscript{297} Nor was this oversight overcome by retaining three mental health examiners to evaluate Rompilla; without the benefit of a thorough life history examination, all three experts concluded that Rompilla had ASPD.\textsuperscript{298}

Rompilla’s trial counsel were found ineffective after a team of post-conviction lawyers, functioning consistently with the ABA and Supplementary Guidelines, uncovered persuasive evidence of developmental disability, possible schizophrenia, fetal alcohol syndrome, and chronic childhood trauma severe enough to cause related disabilities in adulthood; this new picture of Rompilla was so compelling and humanizing that virtually no weight was given to the ASPD diagnoses assessed by the misinformed pretrial examiners.\textsuperscript{299} It is

\textsuperscript{295} Id. Guideline 10.11(C), at 689. The team must also “endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.” Id.

\textsuperscript{296} See O’Brien, supra note 74, at 707, 709-12, for a more in-depth discussion of the prevailing investigation standards described in the ABA Guidelines and commentary.

\textsuperscript{297} See generally Dudley & Leonard, supra note 74. Typical criminal case investigators are ill-suited for mitigation work because they simply lack the necessary skills and abilities. William M. Bowen, Jr., A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases, 36 HOFSTRA L. REV. 805, 817 (2008).

\textsuperscript{298} See Rompilla v. Beard, 545 U.S. 374, 379-80 (2005); see also Bowen, supra note 297, at 817 (observing that, unlike a mitigation specialist, a psychologist will not “drop in on families, or track down and interview witnesses”).

\textsuperscript{299} Rompilla, 545 U.S. at 390-91. The trial team’s limited investigation failed to uncover evidence that:

Rompilla’s parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla’s mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

\textit{Id.} at 391-92.
not difficult to find in virtually every capital punishment jurisdiction in America similar cases in which a thorough post-conviction investigation trumped pretrial diagnoses of ASPD that were based on shallow and superficial social history investigations. Rompilla and similar cases illustrate differential explanations for allegedly antisocial or psychopathic behaviors.

B. Merging Mental Health and Legal Standards—The Role of Counsel

In this Subpart, we discuss counsel’s obligation to participate actively in the investigation of his or her client’s background and mental health. Our starting point is the recognition that counsel is obliged to acquire the specialized knowledge necessary to defend his or her client. In capital cases, mental health problems are so common among defendants that “[i]t must be assumed that the client is emotionally and intellectually impaired.” Just as a lawyer specializing in the defense of drunk drivers must become familiar with the biological processes of intoxication and the design and functional limits of breathalyzer technology, a capital defense attorney must become knowledgeable about mental health. This includes becoming familiar with the mental health standards and procedures for conducting forensic and clinical evaluations.

The starting point for this discussion is that capital litigators understand that graphs or charts produced by psychometric testing do little to humanize the client:

A problem with much expert testimony is that it is so focused on test score numbers and their psychometric properties, or diagnostic criteria and categorization, that the individual being evaluated sometimes gets forgotten. This often results in “expert battles” about cut-offs or comorbidity, diminishing the credibility of all the participants in the courtroom, but more significantly, failing to bring into focus the significant ways in which the symptoms of a person’s mental illness shaped his/her life experiences, altered his/her options,

300. See, e.g., Ferrell v. Hall, 640 F.3d 1199, 1203, 1211-12 (11th Cir. 2011); Cooper v. Sec’y, Dep’t of Corr., 646 F.3d 1328, 1346-47 (11th Cir. 2011); Walbey v. Quarteman, 309 F. App’x 795, 796-97, 803-04 (5th Cir. 2009); see also O’Brien, supra note 74, at 700 n.25 (collecting cases).

301. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

302. ABA GUIDELINES, supra note 18, Guideline 10.5 cmt., at 1007 (quoting Rick Kammen & Lee Norton, Plea Agreements: Working with Capital Defendants, ADVOCATE, Mar. 2000, at 31, 31). More recently, the U.S. Department of Justice reports that over half of the prisoners in the United States suffer some form of mental disease. JAMES & GLAZE, supra note 139, at 1.
choices, and decisions, and brought that person into the courtroom as a subject of testimony. 303

Psychometric testing in general, and the PCL-R in particular, are unreliable substitutes for a thorough life history investigation into the witnesses and documents that uncover the client’s life history and stories that reveal his intrinsic humanity and redeeming qualities that coexist with his mental and emotional impairments. 304

The mental health field provides important, but often overlooked, criteria for the interpretation of data. Counsel must be aware of the difference between objective behavior (facts or symptoms) and subjective interpretations of that behavior (conclusions or diagnoses). The DSM-5 cautions that, before drawing a conclusion from a person’s behavior, many different factors—including his or her social, cultural, and ethnic background—must be taken into account. 305 Competent evaluation requires a thorough patient history, including a family history going back at least three generations. 306 Assessing DSM-5 diagnostic criteria for personality disorders requires evaluation of long-term functioning, 307 and performance standards recognize that it is necessary to conduct multiple interviews over a span of time. 308

303. Woods et al., supra note 74, at 433.
304. Id.; see Dudley & Leonard, supra note 74, at 973, 975; see also Wilson v. Trammell, 706 F.3d 1286, 1290-94 (10th Cir. 2013) (finding that the trial and post-conviction counsel placed primary reliance on whether a pretrial examiner misinterpreted personality test results which arguably established that the client suffered from schizophrenia). Wilson devolved into an argument over what diagnostic label most accurately fit the client, and the courts were not moved to find that he was prejudiced by defense counsel’s performance. Wilson, 706 F.3d at 1288. This contrasts sharply with cases in which trial counsel were similarly deficient, but the post-conviction investigation focused on the client’s life story, not the interpretation of psychometric testing or diagnostic labels. See, e.g., Rompilla v. Beard, 545 U.S. 374, 378 (2005); Wiggins v. Smith, 539 U.S. 510, 514, 535 (2003); Ferrell, 640 F.3d at 1203; Cooper, 646 F.3d at 1342; Walbey, 309 F. App’x at 801.
305. DSM-5, supra note 24, at 662.
307. DSM-5, supra note 24, at 647. Professors of psychiatry train students to “map out the longitudinal course of their patient’s illness; this helps pin down the course and give the student a better understanding of the patient.” NANCY C. ANDREASEN & DONALD W. BLACK, INTRODUCTORY TEXTBOOK OF PSYCHIATRY 291 (3d ed. 2001).
308. See Deana Dorman Logan, Learning to Observe Signs of Mental Impairment, reprinted in MENTAL HEALTH AND EXPERTS MANUAL ch. 19, at 19-1 to 19-6 (8th ed. 2005) (explaining that a subject’s symptoms may not be stable over time, so that multiple interviews are necessary for the defense team to fulfill its duty as the observational caretaker of the client’s condition); see also BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN & SADOCK’S SYNOPSIS OF PSYCHIATRY 6 (9th ed. 2003). Benjamin and Virginia Sadock recommend:

Psychiatric patients may not be able to tolerate a traditional interview format, especially in the acute stages of a disorder. For instance, a patient suffering from increased
or characteristic of the defendant can be attributed to a personality disorder, multiple alternative factors must be considered and ruled out.\textsuperscript{309} Even Cleckley, the influential proponent of the modern construct of psychopathy, argues strongly for differential diagnosis.\textsuperscript{310}

As noted above, by definition the diagnostic criteria for any personality disorder must involve traits and behavior that deviate markedly from the expectations of the client’s culture.\textsuperscript{311} Behavior relied upon to support a personality disorder should not be confused with “the expression of habits, customs, or religious and political values professed by the individual’s culture of origin.”\textsuperscript{312} Therefore, a thorough understanding of the cultural influences in the client’s life is essential to an accurate mental health assessment.\textsuperscript{313}

Environmental and situational factors must also be considered. The DSM-5 cautions that if a constellation of observed behaviors is better accounted for by another mental disorder, is due to the direct physiological effects of a substance (for example, drug, medication, or toxin exposure), or is caused by a general medical condition (for example, head trauma), a personality disorder should not be diagnosed.\textsuperscript{314} A personality disorder diagnosis must also be distinguished from behaviors that emerge in response to situational stressors or more transient mental states, (for example, mood or anxiety agitation or depression may not be able to sit for 30 to 45 minutes of discussion or questioning. In such cases, physicians must be prepared to conduct multiple brief interactions over time, for as long as the patient is able, then stopping and returning when the patient appears able to tolerate more.

SADOCK \& SADOCK, supra, at 6. Mitigation specialist Russell Stetler points out that multiple interviews will be necessary simply because “[i]nvestigating the capital client’s biography is a sensitive, complex, and cyclical process.” Russell Stetler, Capital Cases, CHAMPION, Jan.–Feb. 1999, at 35, 38. Thus, if a person has already been interviewed, and new documents or information suggest a new area of inquiry for that individual, it will be necessary to interview that person again. Norton, supra note 306, at 45.

309. The discussion that follows points to a number of directives in the DSM-5 that certain factors be considered or ruled out prior to assessing a personality disorder diagnosis. See infra text accompanying notes 323–82; see also DSM-5, supra note 24, at 662–63. As noted above, the DSM has been criticized for giving inadequate guidance on the interpretation of symptoms and application of diagnostic criteria. See supra notes 113–37 and accompanying text. Although these problems still persist, the ensuing discussion reveals that the context provided by a thorough life history investigation is essential to the proper interpretation of diagnostic criteria and procedures.

310. See Freedman, Premature Reliance, supra note 160, at 59. In Cleckley’s view, conditions such as “mental deficiency or organic brain damage, schizophrenia, psychosis, cyclothymia or paranoia, manic depression, anxiety disorder, or criminality precluded a finding of psychopathy... [this] has been quietly forgotten by those who claim his tradition as the theoretical framework in which to assess psychopathy.” Id.

311. DSM-5, supra note 24, at 645.

312. Id. at 648.

313. See generally Holdman \& Seeds, supra note 105.

314. DSM-5, supra note 24, at 648, 662.
disorders, substance intoxication\textsuperscript{315} or are associated with acculturation after immigration.\textsuperscript{316} When personality changes emerge and persist after an individual has been exposed to extreme stress, a diagnosis of posttraumatic stress disorder ("PTSD") should be considered.\textsuperscript{517} When an individual has a substance-related disorder, the DSM-5 cautions that it is important not to make a personality disorder diagnosis based solely on behaviors that are consequences of substance intoxication or withdrawal, or that are associated with activities in the service of sustaining a dependency.\textsuperscript{318}

A thorough life history investigation is also important to an accurate mental health assessment and differential diagnosis because behavior does not qualify for a personality disorder (or ASPD) diagnosis if it is "part of a protective survival strategy."\textsuperscript{319} For example, a child at risk of violence in the home may run away, become truant from school, habitually lie, or engage in other behavior to evade severe maltreatment. Children in impoverished environments may steal food simply to have enough to eat. As noted above, the DSM-IV-TR diagnosis of ASPD requires the existence of conduct disorder prior to age eighteen.\textsuperscript{320} In addition, symptoms cannot be attributed to ASPD if the client’s behavior occurred exclusively during the course of schizophrenia or a manic

\textsuperscript{315} Id. at 647.
\textsuperscript{316} Id. at 648.
\textsuperscript{317} Id. at 649.
\textsuperscript{318} Id. The differential diagnosis of alcohol use disorder and personality disorder is clear when considering the DSM-5 text language for the former, which includes:

Social and job performance may also suffer either from the aftereffects of drinking or from actual intoxication at school or on the job; child care or household responsibilities may be neglected; and alcohol absences may occur from school or work. The individual may use alcohol in physically hazardous circumstances (e.g. driving an automobile, swimming, operating machinery while intoxicated). Finally, individuals with an alcohol use disorder may continue to consume alcohol despite knowledge that continued consumption poses significant physical (e.g., blackouts, liver disease), psychological (e.g., depression), social or interpersonal problems (e.g., violent arguments with spouse while intoxicated, child abuse).

\textsuperscript{319} DSM-5, supra note 24, at 662.
\textsuperscript{320} DSM-IV-TR, supra note 24, at 702.
episode. Thus, ASPD cannot be diagnosed if the “enduring pattern” of antisocial behavior occurs only during the course of several other serious Axis I disorders.

With these caveats in mind, we will revisit the seven DSM-IV-TR diagnostic criteria for ASPD, and provide a brief discussion with examples of some of the many alternative explanations that could account for the client’s behavior. Apropos to this discussion is a caution about the danger of “the subjectivity involved in making a diagnosis which may be based purely on subjective guesswork and interpretations in worst-case scenarios,”

1. “Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.”

Prior conviction and arrest records are not uncommon among capital defendants, and many examiners will consider this criterion satisfied based solely on a piece of paper summarizing the client’s criminal history in a most bare-bones manner. This criterion is inherently flawed, represents circular reasoning, and relates to ethical concerns discussed above; that is, inherent in the criterion is an assumption that “failure to conform to social norms” is by definition an example of antisocial behavior. However, there are a host of reasons why clients may fail to conform to social norms and repeatedly perform acts that are grounds for arrest, or are seemingly violations of pro-social expectations for behavior. Civil rights protesters, such as Rosa Parks and Reverend Doctor Martin Luther King, arguably brought themselves within this criterion through repeated acts of civil disobedience, yet no one would seriously contend that these were antisocial acts.

Among the population of homicide defendants, there are equally valid reasons that an arrest record is not indicative of a personality disorder. For example, a client with limited intellectual functioning may not have the capacity to understand or comply with what society defines as pro-social behavior.

Clients with neurodevelopmental disabilities—

321. Id. at 688.
322. See id. at 688-89.
323. Bendelow, supra note 138, at 546.
324. DSM-5, supra note 24, at 659.
325. Id.
326. See id. at 663.
327. “The mentally retarded person might accompany perpetrators or actually commit a crime on impulse or without weighing the consequences of the act; when stopped by the police he might be unable to focus on the alleged crime or appreciate the gravity of his arrest . . . .” James Ellis & Ruth Luckasson, Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 429 (1985).
for example, individuals on the autism spectrum—are often severely impaired in their ability to understand or appreciate social interactions and cues. Traumatized clients may engage in acts that ostensibly fail to conform to social norms, which represent coping attempts to survive perceived or actual threats to life. In general, persons with severe mental illness are simply more likely to be arrested for a multitude of complex reasons that are unrelated to defects in their personalities. By failing to consider and distinguish these and other potential underlying explanations that contextualize reasons for specific behaviors, mental health evaluators may effectively imply intent to violate social norms where no such intent exists.

It would also be inappropriate to find that this diagnostic criterion is satisfied if the client’s arrest records are the product of factors external to the client. Factors related to race, ethnicity, and class may also explain what appears to be “failure to conform to social norms.” For example, we frequently see clients who have records of multiple arrests, and, after a proper mitigation investigation, learn that they have been targeted at young ages by law enforcement in their local jurisdictions and subjected to racial profiling and discriminatory charging practices. Black and Hispanic youths are arrested four times more often than Caucasian youths, and are far more likely to be prosecuted as adults than Caucasian youths who engage in the same conduct. Similarly, adolescent girls are far more likely than boys to be arrested and punished harshly for running away from home, even though they are more likely than boys to be fleeing sexual abuse in the home. It is also possible that the client may be innocent of an offense listed on his criminal record, or a prior

328. See Joseph Jankovic et al., Tourette’s Syndrome and the Law, 18 J. NEUROPSYCHIATR. & CLINICAL NEUROSCIENCE 86, 90 (2006) (noting that individuals with Tourette’s syndrome with behavioral symptoms of comorbid disorders have a significantly higher risk of becoming involved in the criminal justice system).


330. DSM-IV-TR, supra note 24, at 706.

331. “Studies of racial profiling have shown that police do, in fact, exercise their discretion on whom to stop and search in the drug war in a highly discriminatory manner.” ALEXANDER, supra note 135, at 133 (citing DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 59 (The New Press 2002)).


334. See, e.g., Harlow v. Murphy, No. 05-CV-039-B, 2008 U.S. Dist. LEXIS 124288, at *49-
conviction may be otherwise invalid. Thus, the proper application of this diagnostic criterion is impossible without the benefit of a thorough life history investigation of the client and the community in which he lives.

Investigation of the circumstances of each of the client’s arrests is also critically important. Some clients have falsely confessed to crimes for a multitude of reasons, including the desire to protect others (for example, to protect a sibling or other loved one). Others have been subjected to coercive interrogation procedures, to which highly suggestible, gullible, developmentally delayed, traumatized, and youthful clients are very vulnerable. Even more common examples from our decades of experience in capital work are de facto consequences of the pervasive effects of poverty (for example, “stealing” food to stave off hunger, breaking into a building to obtain necessary shelter or clothing, and similar such arrests stemming from the effects of poverty, homelessness, mental illness, or substance-related disorders). We have seen many instances where prosecutors or government experts have labeled defendants “antisocial,” ignoring the fact that they had acted in a protective mode, and “stole” to provide for family members, rather than personal gain or profit.

2. “Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.”

This criterion, if applied without attention to context, constitutes highly subjective language and may give rise to what often amounts to

50 (D. Wyo. Feb. 15, 2008) (finding counsel ineffective for failing to investigate his client’s prior murder conviction and produce evidence that “forensic evidence surrounding the homicide did not point to [the defendant]” and, in fact, implicated two other boys in the homicide).

335. See, e.g., Johnson v. Mississippi, 486 U.S. 578, 590 (1988) (setting aside a death sentence because defendant’s prior conviction, which had been used as an aggravating circumstance, was subsequently reversed).


337. See GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 408-09 (2003) (noting that verbally impaired individuals are more likely to confess to crimes they did not commit in response to modern interrogation methods); see also Roger Kurlan et al., Non-obscene Complex Socially Inappropriate Behavior in Tourette’s Syndrome, 8 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 311, 312 (1996) (providing an example of a patient with Tourette’s syndrome who spontaneously gave a false confession to police who came to his door to investigate a homicide in the neighborhood).

338. See Michael N. Burt, The Importance of Storytelling at all Stages of a Capital Case, 77 UMKC L. REV. 877, 898-900, 909-10 (2009) (describing the life story of capital defendant Alan Quinones—whose parents were so mentally ill and poor that he, as a young man, managed to feed his family by selling drugs—and explaining that his jury unanimously rejected the death penalty).

339. DSM-5, supra note 24, at 659.
speculation about possible motivations for actions. Many mental health symptoms, in the absence of context, may be interpreted as “lying.” Delusions, for example, are fixed false beliefs, but a delusional client’s expression of false beliefs is likely to be interpreted as a lie. Dissociative symptoms prevent a client from recalling information, so the client’s attempt to fill gaps in memory may produce unintentionally false statements of fact. Mood symptoms, such as grandiosity, may distort the client’s perception of self and others. Victims of extreme or chronic trauma, including abuse victims, may make statements that are inconsistent with reality for the purpose of self-protection. As a coping strategy of chronic abuse, victims often learn to “lie” as part of a protective survival strategy. Other factors which may explain a client’s false statements include psychotic symptoms—where a client’s statements represent the fact that they are out of touch with reality—or symptoms of brain dysfunction—such as memory impairments—where clients may confabulate to mask severe impairments.

In addition to the symptoms of mental illness that might explain a client’s perception or expression of facts divergent from reality, other factors may also motivate clients to “lie” in order to protect themselves from the social stigma or shame and embarrassment associated with their condition. In Rompilla, for example, the client told counsel that his childhood was “normal . . . save for quitting school in the ninth grade,” and he repeatedly sent his lawyers on false leads. He also denied that his parents abused him. Yet, post-conviction counsel’s investigation produced a large body of evidence establishing that Rompilla was raised in an impoverished and abusive home, and that he was the victim of extreme neglect and maltreatment.

340. Wayland, supra note 318, at 942 n.83.
341. DSM-IV-TR, supra note 24, at 520.
342. As noted in the DSM-5 description of a manic episode, “[i]nflated self-esteem is typically present, ranging from uncritical self-confidence to marked grandiosity, and may reach delusional proportions.” DSM-5, supra note 24, at 128. “The expansive mood, excessive optimism, grandiosity, and poor judgment often lead to reckless involvement in activities such as spending sprees, giving away possessions, reckless driving, foolish business investments, and sexual promiscuity that is unusual for the individual, even though these activities are likely to have disastrous consequences . . . .” Id. at 129. Without proper context, an examiner might subjectively and mistakenly interpret such behavior as deceitful, and the DSM-5 provides little specific guidance in this regard.
343. See id.
344. Id. at 947.
345. Logan, supra note 308, at 19-4.
346. See id.
349. Rompilla, 545 U.S. at 391-92.
among other things, that Rompilla’s father beat him with “hands, fists, leather straps, belts and sticks,” and “locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled.”\textsuperscript{350} It is not difficult to imagine a number of reasons that Rompilla “lied” to his lawyers, even when telling the truth would have produced life-saving mitigating evidence.\textsuperscript{351} Counsel should be alert to the possibility that a client’s expression of false information is simply an attempt to minimize, normalize, or deny mental illness or a tragically painful history.\textsuperscript{352} Of course, Rompilla’s borderline mental retardation may also explain his failure to provide accurate and correct information about his upbringing.\textsuperscript{353}

3. “Impulsivity or failure to plan ahead.”\textsuperscript{354}

Unless contextualized, a determination that these symptoms are examples of antisocial behavior is often subjective and speculative. Many other possible explanations for these symptoms must be considered and ruled out in order to make an accurate determination. For example, a client with a history of traumatic brain injury or attention deficit hyperactivity disorder (“ADHD”) may not have the ability to plan and will often act impulsively.\textsuperscript{355} Further, “there is abundant evidence that [clients with intellectual disabilities] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.”\textsuperscript{356} A client with PTSD might display hyperarousal responses to traumatic triggers that are immediate and seemingly inexplicable if the context is not understood,\textsuperscript{357} or may be displaying behaviors that reflect a foreshortened sense of future, a symptom frequently seen in highly traumatized individuals.\textsuperscript{358} “Impulsivity and failure to plan ahead” may also be explained by the

\begin{itemize}
\item \textsuperscript{350} \textit{Id.} at 392.
\item \textsuperscript{351} Wayland, \textit{supra} note 318, at 942 n.82.
\item \textsuperscript{352} John H. Blume & Pamela Blume Leonard, \textit{Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases}, CHAMPION, Nov. 2000, at 63, 64.
\item \textsuperscript{353} \textit{See Robert B. Edgerton, The Cloak of Competence: Revised and Updated} 134 (1993).
\item \textsuperscript{354} DSM-5, \textit{supra} note 24, at 659.
\item \textsuperscript{355} Impulsivity is one of the core symptom categories of ADHD, which is categorized as a neurodevelopmental disorder in the DSM-5. DSM-5, \textit{supra} note 24, at 59-60; see also AM. PSYCHIATRIC ASS’N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 2 (2013), available at http://www.psychiatry.org/dsm5.
\item \textsuperscript{356} Atkins v. Virginia, 536 U.S. 304, 318 (2002).
\item \textsuperscript{357} For example, PTSD symptoms may include self-destructive and impulsive behavior, impaired affect modulation, and difficulty completing tasks. DSM-5, \textit{supra} note 24, at 271-72.
\item \textsuperscript{358} A sense of foreshortened future may be expressed in an inability to sustain expectations of a career, marriage, children, or normal life span. \textit{Id.} at 277.
\end{itemize}
hopelessness, despair, and self-destructive behaviors that may be seen in individuals with severe depression. Highly impulsive behavior, which may be interpreted as "failure to plan ahead," is often seen in individuals with bipolar disorder, and only a contextualized understanding can help to make this distinction. An individual with diffuse brain injury, or deficits in frontal or temporal lobe functioning, may also appear to be impulsive and fail to plan for future events. Finally, simply being youthful is associated with impulsive behavior and failure to plan ahead.

4. “Irritability and aggressiveness, as indicated by repeated physical fights or assaults.”

Context is critically important to understanding the origins of what may be called “irritability and aggression.” Such behaviors may reflect the hyperarousal component of traumatic stress responses, and are often classic symptoms of brain dysfunction, particularly frontal and temporal lobe problems, or classic expressions of mood symptoms as seen in depressive, bipolar, and related disorders. Irritability and aggressiveness can also result from exposure to environmental toxins, such as chemicals, lead or other heavy metals. In addition, evidence of

359. Id. at 659. For individuals suffering from a major depressive disorder, “[l]oss of interest of pleasure is nearly always present, at least to some degree.” Id. at 163. This may be expressed as significant withdrawal from many life activities. Id.

360. Id. at 659. A classic symptom of a manic episode, “increase in goal-directed activity,” is often manifested by poor judgment leading to imprudent involvement in activities that may have painful consequences without regard for apparent risks. Id. at 124. Impairment may be severe enough to require intervention to protect an individual from the negative consequences of actions resulting from poor judgment. Id. at 129.

361. “[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” Roper v. Simmons, 543 U.S. 551, 569 (2005).

362. DSM-5, supra note 24, at 659.

363. Id. at 660.

364. This is a core symptom category of PTSD that results in symptoms such as difficulty falling asleep, “exaggerated startle response,” “hypervigilance,” difficulty concentrating, or “irritable behavior and angry outbursts.” Id. at 272.

365. The DSM-5 indicates that many individuals suffering from mood disorders “report or exhibit increased irritability (e.g., persistent anger, a tendency to respond to events with angry outbursts or blaming others, an exaggerated sense of frustration over minor matters).” See id. at 163.

“irritability and aggression” used to diagnosis a client with ASPD is often nothing more than a reflection of the cruel reality of life on the streets for many people living in poverty, in dangerous communities, or in the dangerous environments of the jails and prison in this country.  

Within that cultural context, aggression might be a necessary part of survival, and does not constitute behavior that “deviates markedly from the expectations of the individual’s culture.”

5. “Reckless disregard for safety of self or others.”

Behaviors that appear risky may be better explained by conditions other than ASPD. Such behaviors may reflect the impulsivity seen in clients with attentional problems or deficits in executive functioning. Rash behavior would also be consistent with the dysregulated affect and behavior often seen in people exposed to complex and chronic histories of psychological trauma, or the lack of insight, called “anosognosia,” that is sometimes seen in individuals with psychotic or mood disorders. Youth with ADHD also often have poor insight into their actions and are poor reporters of their condition. What is often labeled as “reckless disregard for safety,” and therefore considered a symptom of ASPD, might also reflect an inability to accurately perceive one’s environment. This can occur in individuals with psychotic disorders, mood disorders, or untreated substance abuse disorders. It also may be a manifestation of the adaptive deficits of an individual with intellectual emotional disturbance; 4) fatigue, lack of vigor, sleep disturbance; 5) impulsive/compulsive behavior; 6) aggression hostility”.

367. See DSM-5, supra note 24, at 59-60.

368. Id. at 645; see, e.g., Harlow v. Murphy, No. 05-CV-039-B, 2008 U.S. Dist. LEXIS 124288, at *47 (D. Wyo. Feb. 15, 2008) (explaining that the successful habeas corpus presentation focused on the culture and environment of a maximum security prison and strongly “supported a defense theme that [defendant] is not a dangerous person, but he was in a dangerous place”).

369. DSM-5, supra note 24, at 659.


372. DSM-5, supra note 24, at 659.

373. For example, extremely impaired judgment, disregard for safety, and engagement in risky behaviors are frequently seen in individuals with mood and/or substance abuse disorders. See id. “Research has shown that more than 90% of suicide completers had a major psychiatric illness and that half were clinically depressed at the time of the act . . . .” ANDREASEN & BLACK, supra note 307, at 555.
or developmental disabilities, or simply the immaturity of a youthful offender. 374 In these cases, understanding the context is critical; yet, so often it is this context which is lost in how a client’s behavior is interpreted by the prosecution, jurors, courts, and—unfortunately, all too often—the defense.

6. “Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.” 375

Once again, the language of this criterion is highly subjective. Without context, it is impossible to make a reliable and valid determination that the criterion of consistent irresponsibility is indicative of antisocial behavior. Consider just a few examples: someone who has the deficits in adaptive behavior seen in individuals with intellectual or developmental disabilities, or who is impaired by mood or psychotic symptoms, or by the consequences of severe trauma exposure, may well have difficulties meeting the tasks of daily life; difficulties functioning in occupational settings; and, consequently, difficulties meeting financial, occupational, or social obligations. 376 Quite frankly, impairments such as these, and many other supposed symptoms of ASPD, are highly consistent with the severe impairments in daily functioning that are often present in individuals with various Axis I mental disorders, particularly when these disorders are undiagnosed or untreated. 377 Individuals suffering from chronic poverty, underemployment, racial discrimination, and lack of socially sanctioned occupational opportunities are also likely to be described by the consistent irresponsibility criterion for reasons that have nothing to do with antisocial behavior.

374. The Supreme Court has established that children are “constitutionally different from adults for purposes of sentencing” because they have a “lack of maturity and underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking.” Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

375. DSM-5, supra note 24, at 659.

376. A person with developmental disabilities, for example, has “significant limitations on an individual’s effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales.” Ellis & Luckasson, supra note 327, at 422 (quoting AM. ASSOC. ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 1983)).

7. “Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.”

A finding that the client lacks remorse is almost always based on an observation that he or she does not display emotion that would be expected in a particular situation, or by a client’s failure to voice his or her remorse for a crime or crimes that have occurred and the impact on the victims of those crimes. Failure to display emotional responses that we are societally conditioned to expect, however, is itself often a hallmark feature of a range of mental disorders and other severely disabling conditions. For example, psychic numbing is a hallmark symptom of PTSD. Flat affect is often seen in severe mental disorders such as mood disorders (for example, major depression) or psychotic disorders (for example, schizophrenia). Absence of emotional expression may be seen in people with severe brain dysfunction, people with neurodevelopmental disabilities—such as autism spectrum disorders—and in people who are inappropriately medicated or overmedicated. Absence of emotional expression may reflect cultural norms, for example, individuals from cultures where emotional stoicism is a reflection of loyalty to one’s culture and family, and is a sign of pride and decency—rather than a lack of remorse. In addition, someone who has faced a lifetime of racism might not be willing to share his or her emotions with authority figures such as representatives

378. Id. at 659.
379. Incongruent emotion is commonly misinterpreted in capital clients; counsel must understand that it is a common symptom of mental impairment. Logan, supra note 308, at 19-5.
381. DSM-5, supra note 24, at 101, 163. For example, “affective flattening” is a common negative symptom of schizophrenia; social withdrawal and lack of interest or pleasure is one of the key manifestations of how a major depressive episode might be expressed. See ANDREASEN & BLACK, supra note 307, at 219-20.
382. DSM-5, supra note 24, at 50, 53. The influence of medications can be so pronounced that the Supreme Court has found that the Due Process Clause is implicated by the involuntary administration of medication to a defendant in a criminal case. See Riggins v. Nevada, 504 U.S. 127, 143 (1992) (Kennedy, J., concurring). “By administering medication, the State may be creating a prejudicial negative demeanor in the defendant -- making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive. . . That such effects may be subtle does not make them any less real or potentially influential.” Id.
383. Cultural differences can interfere with the reliability of medical and mental health assessments of the client. See DSM-IV-TR, supra note 24, at xxxiv. Because culture defines the “spectrum of normal behaviors” as well as thresholds of tolerance for diverse “abnormalities,” “unfamiliarity with the nuances of an individual’s cultural frame of reference may incorrectly judge psychopathology those normal variations in behavior, belief, or experience that are particular to the individual’s culture.” SADOCK & SADOCK, supra note 307, at 168-69; see DSM-IV-TR, supra note 24, at xxxiv.
of law enforcement, or show emotion in a courtroom filled with predominantly majority culture judges, jurors, and spectators. Finally, absence of the expression of remorse may reflect the fact that an individual has been falsely charged or falsely convicted of a crime.

C. Additional Problems with Psychopathy

A similar contextualized analysis is relevant in assessing conclusions that an individual is a psychopath. Such determinations are most often based on the scores from the PCL-R’s twenty-item checklist, which, “unfortunately, often lead to misdiagnosis of bipolar patients” because of “the overlap of symptoms of mania and hypomania with the criteria used by Hare to diagnose psychopathy.” All clinicians recognize that “during manic or hypomanic episodes, many individuals commit antisocial acts, violent and non-violent.”

Three items from the PCL-R commonly attributed to capital defendants are representative of the problem: “[g]libness/superficial charm,” “[p]arasitic lifestyle,” and “[l]ack of realistic, long-term goals.” Willem H. J. Martens notes that Hare does not define “[g]libness/superficial charm” precisely, and asks how it can be “measured in an objective and reliable way”: “How does the investigator know if the charm of a particular patient is superficial enough to be pathological?” Martens points out that these characteristics:

- can contribute substantially to academic, vocational and even social success and status and these features are rather common and widely accepted as necessary tools for surviving in this complicated modern

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384. ABA GUIDELINES, supra note 18, Guideline 10.11(F)(2), at 1055-56 (“Counsel should consider . . . [e]xpert and lay witnesses . . . to provide . . . cultural or other insights into the client’s mental and/or emotional state and life history.”); see also id. Guideline 4.1 cmt., at 957 (noting that “it might well be appropriate for counsel to retain an expert from an out-of-state university familiar with the cultural context by which the defendant was shaped”); id. Guideline 10.5 cmt., at 1007-08 (“There will also often be significant cultural and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.”); id. Guideline 10.7 cmt., at 1026 (“[C]ounsel must learn about the client’s culture.”).


386. Lewis, Adult Antisocial Behavior, supra note 34, at 2260. “Among the manic traits that Hare lists as psychopathic are glibness, superficial charm, grandiosity and exaggerated sense of self-worth, need for stimulation, conniving and manipulative behavior, promiscuous sexual behavior, impulsivity, irresponsibility, poor behavioral controls, early behavioral problems, and lack of realistic long-term goals.” Id.

387. Id.


389. Id. at 457.
world. Why should such socially accepted traits (almost every president in the modern world needs and shows such charm and glibness) be rated as pathological?\(^{390}\)

It is difficult to imagine objective criteria for distinguishing a person who is glib and superficially charming for manipulation purposes from one who is socially fluent and genuinely charming—assuming that there actually is any difference at all. Martens raises similar issues with the “parasitic lifestyle” criterion, explaining:

> Dependence on others . . . might not be a matter of free choice. A parasitic (severely prejudicial term) lifestyle suggests a harmful planning of misuse of other persons. This is not the case in most of the psychopaths we studied. Those who demonstrated a “parasitic lifestyle” are not able to cope with the world, because of their emotional suffering and social-emotional and moral incapacities and they believe that they can only survive in this way. For example, some patients were unable to keep jobs despite their good intentions because of social interaction problems and the consequences of other diagnostic features which are frequently neurobiologically determined.\(^{391}\)

Finally, Martens is critical of the “[l]ack of realistic, long-term goals” criterion.\(^{392}\) He asks, “[w]hat are realistic long-term goals?”\(^{393}\) Martens points out: “In the eyes of normal people many brilliant scientists and artists (until they became famous or recognized) did not have realistic goals.”\(^{394}\) Again, without the context of a complete life history investigation, an examiner might find this criterion met in the case of a client who is exhibiting hallmark features of PTSD, which may often include a foreshortened sense of his or her future stemming from “negative alterations in cognitions and mood associated with the traumatic event(s),”\(^{395}\) including but not limited to:

> Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world (e.g. “I am bad,” “No one can be trusted,” “The world is completely dangerous,” “My whole nervous system is permanently ruined”).

\(^{390}\) Id.

\(^{391}\) Id. at 458 (citations omitted). While this discussion takes as a given that individuals labeled “psychopaths” are indeed so, please see the above discussion contextualizing individual criteria of ASPD for a more thorough discussion of alternative explanations for what is supposedly a “parasitic lifestyle,” including intellectual disabilities, executive dysfunction, post traumatic stress symptoms, and symptoms of severe mood or psychotic disorders. See supra text accompanying notes 323-82.

\(^{392}\) Martens, supra note 189, at 458.

\(^{393}\) Id.

\(^{394}\) Id.

\(^{395}\) DSM-5, supra note 24, at 271.
Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others.

Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame).

Feelings of detachment or estrangement from others.

Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings).

Indeed, given the life circumstances of many capital defendants, and the pervasiveness of mental and emotional disabilities that are common among our clients, it is difficult to imagine long-term life goals that would be realistic.

Just as with the criteria for diagnosing ASPD, in the absence of meaningful context, the PCL-R checklist often amounts to subjective and demeaning value judgments that are prone to mistaken interpretation. This is particularly the case when assessments are not culturally competent and lack critical context derived from a thorough life history investigation. What is the objective distinction between narcissism and grandiosity, and how can it be drawn reliably in the absence of a thorough life history? When is lying “pathological,” and when is it a learned survival strategy? How can a clinician know that a capital defendant lacks remorse, guilt, or empathy, or whether his lack of emotion is better explained by the psychic numbing of PTSD, or flattened affect that accompanies schizophrenia or dementia? Because of the serious consequences of such a mistake in any setting, clinical or forensic, “the psychiatrist given the task of evaluating an offender, especially an offender deemed obnoxious or troublesome, must take care not to write off such an offender as simply psychopathic or antisocial.”

In each individual case, the difference between telling the client’s life story and allowing him or her to fall victim to an unreliable dehumanizing “psychopath” stereotype is simply understanding the difference between objective fact (for example, absence from school) and the subjective interpretation of that fact (for example, truancy, a symptom of conduct disorder). The goal of effective capital representation is to search diligently for the humanizing and mitigating explanation for the client’s behavior and demeanor (for example, the client skipped school to protect his sister from their abusive father). “A careful history regarding mood and behaviors, as well as a detailed

396. Id. at 272.
397. Lewis, Adult Antisocial Behavior, supra note 34, at 2260.
family history, will enable the conscientious psychiatrist to determine to what extent, if any, a mood disorder or some other potentially remediable psychiatric disorder may underlie the antisocial behaviors that brought the individual into conflict with the law. 399 It is for this reason that the standards of capital defense practice, as described in the ABA and Supplementary Guidelines, require the defense team to thoroughly investigate the client’s life story, and to do so with the assistance of a mitigation specialist who is “qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” 400

V. Conclusion

In summary, there are enormous contextual problems that plague mental health evaluations and prosecutorial characterizations of individuals who are capitaly charged and convicted, and who are often inappropriately labeled as antisocial or psychopathic. The motivation for, and recognition of, the need to contextualize is easily lost, in part because capital defendants are overwhelmingly impoverished and disproportionately minorities; and often have multigenerational family histories of racial discrimination and disenfranchisement. 401 The best antidote to the influence of prejudicial psychiatric labels is a compelling mitigating narrative based on a thorough life story investigation which uncovers humanizing conditions and events in the client’s life that demonstrate his human complexity, including the mental, emotional, or developmental impairments which he has struggled to overcome. 402 A thorough and methodical ABA and Supplementary Guidelines-based approach to investigating a client’s life story will protect the client from the dehumanizing inferences that flow from being labeled antisocial.

399. Lewis, Adult Antisocial Behavior, supra note 34, at 2260.
400. ABA GUIDELINES, supra note 18, Guideline 4.1(A)(2), at 952; see also id. Guideline 10.4(C)(2)(b), at 1000.
402. See Haney, The Social Context, supra note 43, at 559 (examining the life histories of capital defendants “leads us to conclusions about the causes of crime and the culpability of capital offenders that are very much at odds with the stereotypes created and nourished by the system of capital punishment that prevails in our society”). For decisions overturning death sentences that had been based in part on diagnoses of ASPD, where post-conviction investigations provided substantial evidence contextualizing and humanizing defendants’ life histories, see, for example, Rompilla v. Beard, 545 U.S. 374, 391-93 (2005); Starkewitz v. Wong, 698 F.3d 1163, 1164-65 (9th Cir. 2012); Blystone v. Horn, 664 F.3d 397, 426-27 (3d Cir. 2011); Cooper v. Sec’y, Dep’t of Corr., 646 F.3d 1328, 1345-47 (11th Cir. 2011); Goodwin v. Johnson, 632 F.3d 301, 319-21, 324, 326 (11th Cir. 2011).
Haney suggests that the system of capital punishment thrives on procedures that dehumanize the defendant, resulting in “jurors’ relative inability to perceive capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors’ own.” Through the inappropriate use of controversial constructs, such as ASPD and psychopathy, prosecutors “demoniz[e] the perpetrators of violence [and] facilitate their extermination at the hands of the state.” Haney explains that this “is why ‘humanizing’ capital clients is so important in penalty trials.”

Put simply, every capital defendant possesses “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.” Justice Sandra Day O’Connor acknowledged that the process of understanding defendants’ disadvantaged backgrounds or their emotional or mental impairments is essential to the constitutionally-required “moral inquiry into the culpability of the defendant.” This Eighth Amendment requirement triggers a Sixth Amendment duty, on the part of defense attorneys, to assist jurors with this inquiry by developing mitigation evidence through a detailed, socio-historical analysis of the capital defendant’s life. Therefore, “[t]he

403. Craig Haney, Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation and the Empathic Divide, 53 DePaul L. Rev. 1557, 1558 (2004) [hereinafter Haney, Condemning the Other].


405. Haney, Condemning the Other, supra note 403, at 1558, 1581. Ninth Circuit Court of Appeals Judge Alex Kozinski recently derided the importance of humanizing capital clients, suggesting that it “may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won’t buy it.” Pinholster v. Ayers, 590 F.3d 651, 692 (9th Cir. 2009) (Kozinski, J., dissenting), rev’d sub nom. Cullen v. Pinholster, 131 S. Ct. 1388 (2011). To support his view that trial counsel’s minimal investigation and pursuit of a “family sympathy defense” was good enough, Judge Kozinski relied on two California cases, State v. Cooper, 809 P.2d 865 (Cal. 1991), and In re Visciotti, 926 P.2d 987 (Cal. 1996), for the proposition that a “family sympathy defense” was consistent with prevailing standards of performance in capital cases. Pinholster, 590 F.3d at 707. Both of those cases ended in death sentences: in Cooper, the jury was expressly not permitted to consider family sympathy evidence. 809 P.2d at 908-90. In In re Visciotti, the trial attorney had never before handled a capital trial, and could point to no case in which a family sympathy defense had succeeded. 926 P.2d at 993. Such anecdotal failures do not evidence a standard of performance. See Russell Oetker & W. Bradley Wendel, The ABA Guidelines and the Norms of Capital Defense Representation, 41 Hofstra L. Rev. 635, 677-79 (2013). Further, scrutiny of the complete record in Pinholster makes our point; based on trial counsel’s superficial and shallow prettrial investigation, the defense psychologist diagnosed him as a psychopath. See 590 F.3d at 659-61. A more thorough life history investigation produced evidence that the defendant was severely beaten by his stepfather as a child, and had epileptic seizures, brain damage, and bipolar disorder. Id.


social history of the defendant has become the primary vehicle with which to correct the misinformed and badly skewed vision of the capital jury.\textsuperscript{409}

The ABA and Supplementary Guidelines establish current and long-established standards of death penalty practice. They provide a necessary road map with which to enhance the fairness and reliability of capital sentencing proceedings in numerous ways that are important to protecting the client from misleading, incomplete, and damaging assessments. The ABA and Supplementary Guidelines help capital defense teams explain to judges and funding authorities why more time and resources are necessary to properly defend the client, particularly when it comes to investigation of the client’s life history. They also specify necessary qualifications of capital defense team members, including the admonition that at least one member of the team be qualified, by training or experience, to identify symptoms and characteristics of mental and emotional impairment. If trial counsel fails to assemble a team with the necessary skills, resources, and time, the ABA and Supplementary Guidelines provide a template for post-conviction counsel to challenge substandard work. It is the authors’ experience that the client’s humanity is established, and the fallacies of the ASPD rubric are exposed, when capital defense teams comply with the ABA and Supplementary Guidelines to conduct a thorough investigation of the client’s life history.

\textsuperscript{409} Haney, \textit{The Social Context}, supra note 43, 559-60.
THE DEVELOPMENT OF CHINA’S DEATH PENALTY REPRESENTATION GUIDELINES: A LEARNING MODEL BASED ON THE ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES

Jie Yang*

I. INTRODUCTION

In 2010, China’s legal advocates, including law professors and defense attorneys, worked together to create a code for lawyers representing defendants in death penalty cases. This code was the first of its kind in China, and was largely based on the American Bar Association (“ABA”) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”). This Article discusses the efforts made in China to create its own defense representation guidelines with the assistance of the ABA Death Penalty Representation Project and the ABA Rule of Law Initiative (“ABA ROLI”).

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2. Since 2004, the ABA ROLI has supported programs in China by working with local partners to increase the capacity to advocate for citizens’ rights. Access to Justice and Human Rights, Am. B. ASS’N, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/china/programs.html (last visited Feb. 16, 2014) [hereinafter Access to Justice]. One substantive area that has been improved is criminal justice, the support of which has focused on strengthening the defense work through identifying and addressing legislative, organizational, and other barriers. See id.
II. BRIEF HISTORY OF THE DEVELOPMENT OF DEATH PENALTY REFORM IN CHINA

The death penalty, once prevalent around the world as the most severe criminal punishment, has been abolished in most countries.\(^3\) China is one of the remaining countries that still actively uses capital punishment, and it will probably retain the death penalty for a considerable period of time.\(^4\)

In recent years, however, the Chinese government has taken significant steps to improve the fairness, transparency, and judicial oversight of death penalty proceedings. Although the exact number of executions in China is a state secret and therefore publicly unavailable, there is evidence that the number of annual executions has fallen.\(^5\) In September 2006, China’s Supreme People’s Court (“SPC”) and China’s Supreme People’s Procuratorate (“SPP”) issued a joint regulation requiring live hearings in the second instance trials of death penalty cases.\(^6\) Previously, appeals were limited to a paper review.\(^7\) In second

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5. Sun Jungong, a spokesperson for the SPC, stated that, “[i]n recent years, among the death penalty cases the SPC reviewed, there have been a number of cases in which the SPC did not approve of the use of the death penalty.” Zuigao Fa: Yiya Zhengce Falu Bu Hezhun de Sixing Anjian Shizhong Zhan Yiding Bili (最高法：死刑案件核准的死刑案件始终占一定比例) [Sup. People’s Ct.: There Have Been a Number of Cases in Which the SPC Did Not Approve of the Use of the Death Penalty], XINHUANET.COM, http://news.xinhuanet.com/politics/2013-02/27/c_114826746.htm (last visited Feb. 16, 2014); see also Zhao Lei (赵蕾), Sixing Jianzhao, Fuguan Laoki, Zhengce Weici, Lushi Kong Dong Sixing Fuhe Zhounian Jihu (死刑减少，法官劳累，政府微词，律师空等死刑复核周年纪录) [Death Penalty Cases Dropped, Judges Exhausted, Government Unsatisfied, Lawyers Kept Waiting in Vain, the Anniversary Report on Judicial Review of Death Penalty], NANEANG ZHOUNOU (南方周末), Dec. 19, 2007, http://www.infzm.com/content/32900. Due to the SPC’s decision in 2007 to review all death penalty cases, the handing down of death penalty decisions has been restricted. Lei, supra. In 2007, the number of executions dropped to its lowest point in a decade; the Deputy Chief Judge in charge of the Criminal Division of an intermediate People’s Court in western China mentioned at a national court conference on death penalty reform that he heard about sixty death penalty cases each year prior to 2007. Id. After 2007, the average was ten cases per year. Id.

instance hearings, the judiciary is required to reconsider both the legal and factual bases of the case. At the hearing, the prosecutor or defense attorney may introduce new evidence or facts that are necessary for the court to effectively review the verdict and death sentence. On January 1, 2007, the SPC declared that it would review all death penalty sentences. Until that date, provincial high courts had conducted the final review of death penalty sentences. With this change, the SPC, as China’s highest court, is ensuring a final level of protection. In February 2010, the SPC issued several opinions on the policy of “justice tempered with mercy” (kuanyan xiangji), which stressed the need to limit the use of the death penalty. These opinions provided guidance on the circumstances in which courts should refrain from applying the death penalty. In July 2010, the SPC, the SPP, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly released rules about how to examine and judge evidence in death penalty cases. These rules set standards for collecting and examining evidence in criminal proceedings, including: standards of proof; burdens of proof; types of evidence; and the admissibility of evidence in death penalty cases. On February 25, 2011, the standing committee of the National People’s Congress officially approved the Eighth Amendment of the Criminal...
Law of the People’s Republic of China (“CLC”). The Amendment further limited the scope of death penalty use. For example, if the defendant standing trial is over seventy-five years old, a court may only give him a death sentence if he committed an especially cruel crime that caused the death of the victim. The new Amendment also reduced the total number of crimes for which the death penalty is a possibility from sixty-eight to fifty-five. Though fifty-five is no small number of crimes that are death penalty eligible, and the number of defendants over seventy-five years old who are charged with the death penalty is few, these new restrictions are important in the context the long-term death penalty reform initiative in China.

These encouraging changes in policy and law offer a significant opportunity to control and limit the number of executions that take place, allowing judges to pay more attention to the evidence when they determine cases, and improving the reliability of judicial decisions in China. Correspondingly, in order to achieve the goal of ensuring fair trials, the legal representation that defense attorneys provide in death penalty cases needs to be strengthened because representation is a vital component of guaranteeing defendants’ rights.


16. “Death penalty shall not apply to a person who has attained the age of 75 at the time of trial, except where the person has caused the death of others by especially cruel means.” CLC Amendment VIII, supra note 14, ¶ 3.


III. PROBLEMS OF CRIMINAL DEFENSE AND LEGAL AID FOR DEATH PENALTY CASES IN CHINA

Under China’s Criminal Procedure Law, a defendant facing a potential death penalty sentence is entitled to legal representation. If he cannot afford to hire a lawyer, the court must appoint one to him. Although courts have been required by law to appoint counsel in death penalty cases since 1996, many problems remain in the practice.

First, defense attorneys face many obstacles protecting their professional rights under the law. For example, defense attorneys have difficulty accessing their clients at the early stages of a case. This challenge is common for defense lawyers in both death penalty cases and other criminal cases. Also, defense attorneys are often unable to access the prosecution’s files and are not allowed to conduct independent investigations, greatly limiting their access to the information a defense attorney needs to prepare for trial. Additionally, in practice, courts are not willing to give a reason for denying a defense attorney’s motion, and rarely permit defense attorneys to call witnesses or expert witnesses to testify at trial. Defense attorneys also have very few opportunities to investigate or introduce mitigation evidence about the background of the client. Another difficulty is that, in death penalty


20. Id. art. 34 ("[I]f there is the possibility that the defendant may be sentenced to death and yet has not hired anyone to be his defender, the People’s Court shall assign a lawyer who is obligated to provide legal aid and to serve as the defense attorney.").


23. See id. at 1013-15.

24. See id. at 1015, 1017-18.


26. See Ran, supra note 22, at 1018-19. In China, the conviction phase is combined with the sentencing phase for all criminal trials, including trials for death penalty cases. Evidence relevant to sentencing is presented and considered simultaneously with evidence related to guilt or innocence. This creates problems for defense attorneys choosing a defense strategy: if the defense argues that a defendant is innocent, the defense attorney may lose the chance to argue leniency at sentencing, should the court hand down a guilty verdict. In practice, most defense attorneys choose the mitigation defense, even when the prosecution’s case is weak, because it is less risky. But, denying the defense the opportunity to prove the defendant’s innocence is a grave miscarriage of justice, especially in death penalty cases. The process lacks transparency and is difficult to challenge. Cf.
review cases, the role of defense lawyers remains unclear; the
procedures that can be used to introduce new evidence or written
arguments to the court are likewise unclear, particularly at the SPC final
review stage.

Second, lawyers representing criminal defendants face tremendous
personal risk, especially in death penalty cases.27 Death penalty cases are
generally politically sensitive and draw significant public attention,
which in turn pressures judges and prosecutors to secure a conviction
and death sentence.28 Article 306 of the CLC imposes criminal penalties
on lawyers who have falsified evidence or led their clients to make false
statements.29 In practice, prosecutors often invoke this provision when a
criminal defendant recants or materially changes a prior confession, or
when witness statements are changed, arguing that the defense attorney
must have persuaded the client or witnesses to submit false statements.30
Therefore, in order to protect themselves, defense attorneys are often
reluctant to conduct their own investigations of the case, and sometimes
will not even discuss the charges when interviewing clients. Article 306
has often been called the proverbial Sword of Damocles hanging above
the head of every criminal defense attorney in China.31 China also lacks
an ethical rule or guideline explaining how lawyers can protect
themselves while still fulfilling their professional responsibilities to
their clients.32

Maher, ABA Rule of Law, supra note 6, at 28.

27. See Maher, ABA Rule of Law, supra note 6, at 29; Ran, supra note 22, at 1036-37.
28. See ROBIN M. MAHER, THE DEATH PENALTY AND REFORM IN THE UNITED STATES 4
[hereinafter MAHER, DEATH PENALTY], available at http://www.americanbar.org/content/dam/aba/
29. See Zhong hua Renmin Gonghe guo Xingfa (中华人民共和国刑法) [Criminal Law of the
available at http://www.21lawyer.cn/english/04c/2.html. Article 306 provides that:

During the course of criminal procedure, any defender, law agent destroys, falsifies
evidence, assist parties concerned in destroying, falsifying evidence, threatening, luring
witnesses to contravene facts, change their testimony or make false testimony is to be
sentenced to not more than three years of fixed-term imprisonment or criminal detention;
when the circumstances are severe, to not less than three years and not more than seven
years of fixed-term imprisonment.

If witnesses, testimonies, or other evidences provided, shown, used by a defender,
law agent are not true but are not falsified purposely, they do not fall into the category of
falsifying evidences.

Id.

30. See Ran, supra note 22, at 1027.
31. See id. at 1012.
32. Cf. Maher, ABA Rule of Law, supra note 6, at 28-29.
Third, unsatisfied legal aid services and case management remain serious problems. As in the United States, most defendants on death row in China are also indigent. China lacks a specialized system like the United States’ public defender system, which is a vital legal resource for indigent criminal defendants. China does have its own legal aid system, which the government began funding in 1996; however, these government-funded legal aid centers are required to handle cases of all types, including civil, criminal, and administrative cases. Therefore, the lawyers working in a legal aid office do not devote their practice to one type of case and frequently lack expertise in criminal matters. Legal aid lawyers are also assigned to cases randomly, without consideration of the expertise they may possess or lack.

Fourth, specialized training and resources in death penalty representation have been rarely provided to legal aid lawyers. Defense counsel in death penalty cases do not receive a greater allocation of resources than those defending other, simpler criminal cases, and such resources are insufficient to cover the greater expenses associated with death penalty cases. Death penalty counsel also lack the benefit of working on a team: lawyers representing death penalty clients operate on their own, without the assistance of experts or investigators. Without coordination and specialized training, legal aid lawyers are unable to effectively use available law and policy considerations.

Finally, in practice, most legal aid lawyers are not assigned to a death penalty case until the trial is scheduled to occur; therefore, defense attorneys commonly have less than a week to prepare for trial.

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35. See Whitfort, supra note 18, at 711.
37. See Legal Aid in China, supra note 36.
38. See id.
39. Id.
40. See id.
41. See discussion infra Part IV.C.
IV. CHINA’S EFFORTS TO DEVELOP DEATH PENALTY REPRESENTATION GUIDELINES AT THE NATIONAL LEVEL

In the past few years, several wrongful convictions in death penalty cases have highlighted the need for reforms. Xianglin She was a defendant from Hubei Province who served eleven years in prison after receiving a death sentence for allegedly murdering his wife, whose body was never found. After his wife reappeared eleven years later, his sentence was overturned and he was released from prison. During the first instance trial, She’s defense attorney voiced his concerns regarding the prosecutor’s evidence and maintained that his client was not guilty. However, the court did not accept the attorney’s argument and rendered a decision of guilt, sentencing the defendant to death.

Zuohai Zhao, a man from Henan Province, was tortured into confessing to a murder he did not commit. The legal counsel assigned to him was inexperienced and unable to provide effective representation. After receiving a death sentence, the defendant served over a decade in prison until he was released when the “victim he killed” returned to his village very much alive. The media coverage of these wrongful convictions revealed the unreliability of coerced confessions, and the cases themselves reinforced the need for effective


44. See id.


46. See id.

47. See Zhao Zuohai: Ming Jiaxiang Shi Yigen Cao (赵作海：命就像是一根草) [Zuohai Zhao: Life Is Just Like a Straw], IFZM.COM (May 13, 2010, 10:04 AM), http://www.ifzm.com/content/44901 [hereinafter Life Is Just Like a Straw].


49. See Life Is Just Like a Straw, supra note 47.

50. China has not adopted a right to silence or a right against self-incrimination. See Interview by Elizabeth M. Lynch with Margaret K. Lewis, Assoc. Professor of Law, Seton Hall Univ. (Sept. 23, 2012), available at http://www.chinalawandpolicy.com/tag/self-incrimination. Confessions have always been sought by investigators as evidence for bringing criminal charges. See Forced Confessions Banned, Again: China ‘Reiterates’ a Widely Ignored Ban on Abuses in Its Jails and Prisons, RADIO FREE ASIA (Dec. 28, 2012), http://www.rfa.org/english/news/china/banned-12282012133531.html. In order to address the issue of illegally obtained evidence, and especially to reduce the use of coercion, evidence obtained through illegal means should be excluded. See Wendy
defense representation to ensure the accuracy and fairness of death penalty proceedings.

Cases like She and Zhao’s prompted the Criminal Law Committee of the All China Lawyers’ Association (“ACLA”) to take a leadership role in improving the quality of defense representation in death penalty cases. In 2005, the ACLA Criminal Law Committee began to work on providing guidance to attorneys representing defendants in death penalty cases. The ABA ROLI China Program was invited to provide technical support, resources, and a comparative perspective. In particular, the ABA’s Death Penalty Representation Project, which led to the creation of the ABA Guidelines, partnered with the ABA ROLI and contributed its institutional and professional expertise to aid in the creation of death penalty guidelines for capital case representation in China.

The ACLA Criminal Law Committee and ABA ROLI co-hosted several workshops in China to discuss the development of representation guidelines for Chinese defense lawyers. Robin M. Maher, the Director of the ABA Death Penalty Representation Project, spoke about how and why the ABA created the 2003 ABA Guidelines. Using what it learned from the ABA, the ACLA Criminal Law Committee created draft representation guidelines that indicated the minimum standards required to provide effective legal representation in death penalty cases and other


51. See Access to Justice, supra note 2.
52. See id.
53. See Maher, ABA Rule of Law, supra note 6, at 28. See generally ABA GUIDELINES, supra note 1 (providing professional guidelines applicable to death penalty cases). In 1989, the ABA issued a set of guidelines for effective defense representation in death penalty cases. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989), available at http://www.ambar.org/1989Guidelines; see Robin M. Maher, ‘The Guiding Hand of Counsel’ and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 1091, 1093 (2003) [hereinafter Maher, Guiding Hand]. In 2003, the ABA published revised and updated guidelines to reflect current law and practice. Maher, Guiding Hand, supra, at 1093; see also AM. BAR ASS’N, DEATH PENALTY REPRESENTATION PROJECT: 2012 YEAR-END REPORT & NEWSLETTER 6 (2012), available at http://www.americanbar.org/content/dam/aba/publications/project_press/DPREP_YearEnd_2012.authcheckdam.pdf (stating that the ABA Guidelines are now widely accepted as the national standard of care in death penalty cases, and “have been cited in more than 250 decisions by state and federal courts, including the U.S. Supreme Court”).
54. See Access to Justice, supra note 2.
55. See Maher, Guiding Hand, supra note 53, at 1093-95.
aspects of representation, including ethical obligations. The ACLA Criminal Law Committee, however, was unable to obtain official approval to publish the guidelines because of increased scrutiny of the ACLA by the Chinese government. As a consequence, the ACLA guidelines still have not been published, but the experience of drafting them and learning from the ABA’s model has led to the other reform efforts discussed below.

V. CHINA’S FIRST PUBLISHED DEATH PENALTY REPRESENTATION GUIDELINES: A SUCCESSFUL PROVINCIAL LEVEL MODEL

In 2008, the ABA ROLI China Program found an opportunity to continue the work of the ACLA Criminal Law Committee when the lawyers’ associations of the Shandong, Guizhou, and Henan Provinces expressed interest in developing provincial-level defense representation guidelines. The ABA ROLI partnered with Professor Ruihua Chen of Peking University Law School (“PKU”) to design a project that would support the efforts of these local lawyers’ associations.

As noted earlier in this Article, implementation of a series of law and policy reforms related to the death penalty occurred from 2006 to 2010. None of the reforms, however, focused on improving the ability of defense attorneys to effectively represent their clients. There are no standards for the minimum qualifications defense attorneys must possess. There are also no issued guidelines on how to provide effective representation in death penalty cases.

The focus of the project was to help the Chinese partners learn from the ways in which the ABA Guidelines gained mainstream acceptance and to better understand the ways in which the ABA Guidelines have been used to provide improved protection for criminal defendants and their legal advocates. The project particularly aimed to provide detailed and comprehensive guidance for defense attorneys—a model that defense counsel could look to for help when representing death penalty defendants.

In the United States, the ABA Guidelines contain detailed instructions concerning the training of defense lawyers who represent

56. See Access to Justice, supra note 2.
57. See Maher, ABA Rule of Law, supra note 6, at 28; infra Part IV.
59. See supra text accompanying notes 4-13.
60. See Maher, ABA Rule of Law, supra note 6, at 28; see also discussion supra Part II.
61. Maher, ABA Rule of Law, supra note 6, at 28.
clients in capital cases, such that these lawyers can obtain and further develop the knowledge and skill essential to providing effective counsel.62 The ABA Guidelines also articulate key issues, such as the expertise that effective defense lawyers must possess; the use of supporting resources; the responsibility of courts; the lawyer’s relationship with the client; the duty to develop and present mitigation evidence; and the obligation to facilitate the work of successor counsel.63 All of these critical issues in the ABA Guidelines have been sufficiently discussed in the process of creating guidelines for Chinese lawyers.

In 2010, the three provincial lawyers’ associations created their own death penalty defense representation guidelines (“Provincial Guidelines”), modeled after the ABA Guidelines.64 Though influenced by the ABA Guidelines, the Provincial Guidelines were tailored to address China-specific issues.65 The Provincial Guidelines have ten chapters with ninety-six articles, many of which address issues defense attorneys encounter when representing defendants in death penalty cases—spanning from the moment the case is received, through appeals and the final court review. Some highlights are discussed below.

A. Qualification of Defense Counsel

Article 3 of the Provincial Guidelines requires the responsible agency to appoint a lawyer who has experience in criminal trials as defense counsel.66 Although this Article does not detail the specific

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62. See ABA GUIDELINES, supra note 1, Guideline 8.1, at 976-77 (providing parameters for “comprehensive training programs,” and suggesting the scope, frequency, and funding of such programs).

63. E.g., id. Guideline 4.1, at 952 (regarding defense counsel’s use of supporting resources); id. Guideline 5.1, at 961-62 (articulating the skills and expertise defense counsel should possess); id. Guideline 10.5, at 1005 (concerning defense counsel’s relationship with clients); id. Guideline 10.7 cmt., at 1021 (explaining defense counsel’s duty to present mitigating evidence at the sentencing phase).


66. The Death Penalty Representation Guidelines issued by the Shandong Provincial Lawyers’ Association, art. 3, states that, “[i]n a capital case, the law firm in charge of representing the client facing the death penalty should appoint a lawyer who has experience in criminal trials as defense counsel.” Shandong Sheng Lushi Xiehui Sixing Anjian Bianhu Zhidao Yijian (山东省律师
experiences or knowledge that the lawyer should process, it is significant in that it states that the responsible agency should consider the lawyer’s experience when appointing counsel in death penalty cases, instead of randomly distributing the cases to defense lawyers who may not even have trial experience.67

B. Defense Lawyer’s Responsibilities to Offer Mitigating Circumstances

Article 36 of the Provincial Guidelines suggests that defense counsel conduct a thorough and detailed investigation into all matters related to sentencing, draft a sentencing recommendation that is favorable to the accused, and use the recommendation as the basis for petitioning the court for a lenient or reduced sentence.68 It also notes the aspects of a case that defense counsel should examine to support requests for lighter sentences, including: the defendant’s family situation and background; educational history; any extenuating circumstances that led to the commission of the crime; the availability of compensation for the victim or the victim’s family; and any fault on the part of the victim.69 Defense counsel should then draft a written recommendation report including relevant evidentiary material and counsel’s assessment.70

These recommendations reflect practices employed in the United States and insights from the ABA Guidelines, which clearly require defense attorneys to collect documents that humanize the client and tell his life story.71 In the United States, it is standard for defense attorneys to introduce mitigating factors, such as the good character of the defendant; his positive relationship with his family; his youth; or the absence of any previous criminal record.72 They may also introduce evidence of abuse or neglect as a child, mental illness, or mental
disability. 73 Additionally, family members, teachers, and friends can testify in support of the defendant. 74 Until now, few defense attorneys in China had ever considered making efforts to present evidence of the client’s humanity; but, as the ABA Guidelines instruct, Chinese lawyers are beginning to understand that it is mitigation evidence that can literally save their clients’ lives.

C. The Defense Team and Supporting Resources

Articles 4 and 5 of the Provincial Guidelines recommend that defense counsel consult with experts when specialized issues are present in the case. 75 The responsible agency is also encouraged to organize group discussions with experienced or senior lawyers to develop strategies for addressing significant or complex legal issues. 76 Because of the limited funding available in China, it is unlikely that a legal aid office could appoint a defense team with two defense attorneys, an investigator, and a mitigation specialist, as prescribed in the ABA Guidelines. 77 The Provincial Guidelines reflect an understanding of the usefulness of a defense team and address the reality of China’s lack of available funding by promoting teamwork and encouraging the addition of more financial resources for death penalty cases. The language in the Provincial Guidelines about assembling a defense team and obtaining additional funding is vague, but it leaves space for defense attorneys and responsible agencies to work toward these ends to the greatest extent possible.

D. Relationship with the Client

Articles 37 and 38 of the Provincial Guidelines focus on the client interview and provides comprehensive guidance regarding a defense attorney’s responsibilities to his client. 78 It is similar to the ABA

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73. See id.
74. MAHER, DEATH PENALTY, supra note 28, at 5.
75. China Provincial Guidelines, supra note 66, arts. 4-5 (permitting defense counsel in capital cases to consult with experts and conduct conferences with experienced attorneys when “death penalty cases . . . involve significant and complicated legal issues”).
76. Id. art. 5.
77. ABA GUIDELINES, supra note 1, Guideline 4.1, at 952.
78. China Provincial Guidelines, supra note 66, art. 37 (requiring defense counsel, during a meeting with client, to obtain client’s consent to the retainer agreement, if the attorney was previously retained by the defendant’s family); id. art. 38 (requiring defense counsel, during a meeting with client, to obtain detailed information from defendant, especially the defendant’s age and whether a female defendant is pregnant).
Guidelines in requiring defense attorneys to engage in “interactive dialogue” with clients on all matters that may impact the case.\(^79\)

As noted earlier, due to the personal risks that defense attorneys face in China, defense attorneys often choose not to discuss the case with or present evidence to their clients during the client interview.\(^80\) This problem drew public attention in February 2010 through the well-publicized case of Zhuang Li.\(^81\) Li was a defense attorney who was sentenced to eighteen months in prison for allegedly encouraging his client to submit false testimony.\(^82\) This case created a national debate on the role and vulnerability of criminal defense attorneys with regard to the client interview.\(^83\) The Li case brought to light the need to develop practice standards that provide guidance to defense lawyers concerning the scope of acceptable behavior when talking to their clients and how to mitigate risk to themselves. The Provincial Guidelines, by clarifying how lawyers should handle the client interview and encouraging lawyers to fulfill their professional responsibilities, are a good start.\(^84\) For example, in situations in which the client claims he was tortured or had other rights violated during an interrogation, the defense lawyer should file a motion or complaint with the court.\(^85\) Because these claims sometimes draw accusations from the prosecution that the defense lawyer has encouraged the client to falsify evidence (the fact at issue in the Li case), defense lawyers need to be particularly careful about how they handle these claims. The Provincial Guidelines therefore also include a requirement that the client make any claims of this nature in writing, and that the client sign the documentation of the claim.\(^86\)

\(^79\) See id. arts. 37–38; ABA GUIDELINES, supra note 1, Guideline 10.5, at 1005.

\(^80\) See supra text accompanying notes 27-32.


\(^84\) See, e.g., China Provincial Guidelines, supra note 66, art. 44 (allowing attorney to plead for the defendant if defendant’s rights have been impinged upon); id. art. 45 (requiring attorney to plead to relevant agency for a change of custody if the defendant’s situation is not suited for the current custody).

\(^85\) See id. art. 44.

\(^86\) See id. art. 91. Article 91 of the Provincial Guidelines states:
E. The Duty to Seek an Agreed upon Decision with the Client

The steps that a defense attorney should take when he disagrees with the client about whether the client should plead guilty were controversial in China. Articles 66 and 67 of the Provincial Guidelines now provide recommendations for this circumstance. These provisions encourage the lawyer to ensure that the client fully understands his options and the consequences of his decision. The lawyer should then attempt to reach an agreement with the client based on the clarified understanding. If the attorney and the client continue to disagree, the defense attorney has the ability to withdraw from the representation of the client.

During the interview with the client, if the accused claims that the authorities have tortured him/her or engaged in other illegal conduct, defense counsel should ask the defendant to record such complaint in written form and submit the written document to the detention center officials, which will then convey the document to the appropriate government organ. If the accused does not have the ability to write, defense counsel should promptly contact the prison officials, convey the accused's complaint, and request that the prison officials process the complaint according to law.

_id._

87. _Id._ arts. 66–67. Article 66 states:

If the defense counsel and accused have agreed to defend the case on the basis of a not-guilty plea, but the accused has pled guilty in open court, defense counsel should petition the court to adjourn the case.

After the case has been adjourned, defense counsel should confer with the accused and reach an agreement on how to defend the case. If an agreement cannot be reached, defense counsel can terminate its retainer agreement with the accused, and petition the court to permit the defense counsel to withdraw from the case.

If the defense counsel has incontrovertible evidence proving the innocence of the accused, he or she should continue to defend the accused, unless the accused proactively decides to terminate defense counsel's representation.

_id._ art. 66. Article 67 states that:

If before trial the defense counsel and accused have reached an agreement on sentencing defense, but the accused has pled not guilty in open court, defense counsel should petition the court to adjourn the case.

After the case has been adjourned, defense counsel should confer with the accused and reach an agreement on how to defend the case. If an agreement cannot be reached, defense counsel can terminate its retainer agreement with the accused, and petition the court to permit the defense counsel to withdraw from the case.

_id._ art. 67.

88. See _id._ arts. 66–67 (requiring defense counsel to confer with defendant if they disagree on the defense strategy).

89. See _id._ (requiring defense counsel to attempt to reach agreement after conferring with defendant).

90. See _id._ (allowing defense counsel to petition the court to withdraw from the case if no agreement can be reached).
F. The Duty to Facilitate the Work of Successor Counsel

Article 82 of the Provincial Guidelines states that, during the SPC death penalty review process, successor counsel can acquire case files from the previous lawyer to handle the case.\(^91\) The previous lawyer and his firm or legal aid agency have the obligation to cooperate and provide support to the lawyers handling the appeal.\(^92\) This provision was based on the ABA Guidelines’ requirement that prior counsel cooperate with successor counsel in order to fulfill their duties to safeguard the interests of the client.\(^93\)

The most critical lesson that the provincial lawyers’ associations learned from their examination of the development of the ABA Guidelines was the importance of soliciting input from different stakeholders in the justice system. During the development of the Provincial Guidelines, the lawyers’ associations made serious efforts to understand the opinions of police, prosecutors, the judiciary, and members of criminal law committees and local lawyers’ associations. This process not only helped the provincial lawyers’ associations gather feedback about their burgeoning guidelines, it also helped them educate the judiciary and other stakeholders about important defense representation issues. In turn, this established political autonomy for criminal defense attorneys and their ability to provide competent, vigorous legal representation because it clarified defense lawyers’ obligations to establish the legal basis of a case and make use of relevant laws regarding death penalty and criminal defense. Notably, the provincial lawyers’ associations took pains to incorporate China’s Criminal Procedure Law, the Law on Lawyers, and official judicial interpretations into the Provincial Guidelines.\(^94\)

VI. Study Tour: Learning How to Implement the Provincial Guidelines

Implementing the Provincial Guidelines in practice is another significant challenge facing the leaders of this reform movement. They must therefore examine how the American legal community has implemented similar practice guidelines and identify the mechanisms employed by individual states to facilitate implementation.

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91. Id. art. 82.
92. Id.
93. ABA GUIDELINES, supra note 1, Guideline 10.13, at 1074.
94. See Chinese Delegation Studies Death Penalty Representation During U.S. Visit, supra note 64.
In order to learn more about these issues, ABA ROLI, with the essential help of the ABA Death Penalty Representation Project, organized a study tour of the United States in summer 2009.\(^{95}\) The Chinese delegation consisted of representatives from the three provincial lawyers’ associations of PKU—which had been dedicated to developing China’s first provincial-level death penalty representation guidelines—and members of the ACLA.\(^{96}\) The delegation traveled to Philadelphia, Pennsylvania\(^{97}\) and Phoenix, Arizona\(^{98}\)—areas that use the death penalty, but also accept and use the ABA Guidelines.\(^{99}\) Ms. Maher accompanied the delegation to explain the process of implementing the ABA Guidelines in these specific jurisdictions.\(^{100}\)

During the visit, the delegation met with defense attorneys, prosecutors, and judges.\(^{101}\) Their discussions highlighted the ways in which various members of the criminal justice system have encouraged the implementation of the ABA Guidelines;\(^{102}\) how such stakeholders were introduced to the ABA Guidelines and what training programs exist; and how each of these groups supported the use of the ABA Guidelines. The critical need of specialized training for attorneys handling death penalty cases was impressed upon the delegation at almost every meeting during the study tour.\(^{103}\) The delegation also discussed the roles that the ABA and state bar associations play in monitoring the performance of defense attorneys in capital cases; how

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95. See id.
96. See id.; Maher, ABA Rule of Law, supra note 6, at 28. Wenchang Tian, Director of the ACLA Criminal Law Committee, has been practicing as a criminal defense lawyer since 1995. Tian Wenchang, KING & CAPITAL, http://www.king-capital.com/templates/en_hhr/index.aspx?nodeid=125&pos=1&page=1&contentid=1319 (last visited Feb. 16, 2014). He is one of the leading criminal defense attorneys in China, and has represented defendants in many important and well-known death penalty cases. See id. He has also been a strong advocate of criminal justice reforms. See id.
100. See id.
101. See id.
102. See id.
103. See Chinese Delegation Studies Death Penalty Representation During U.S. Visit, supra note 64 (discussing the need to develop training programs).
bar associations deal with complaints of ineffective assistance of counsel in death penalty cases; what kinds of training regimes states and other institutions provide to defense attorneys to facilitate quality representation in capital cases; ethical issues in capital cases; the importance of lawyer independence; mechanisms for monitoring and disciplining lawyers; and the interaction of the ABA Guidelines with states' professional ethics rules.\(^\text{104}\)

The delegation was particularly interested in the role of mitigation specialists, which evolved as part of the growing recognition of the importance of gathering and presenting persuasive evidence to mitigate a potential death sentence.\(^\text{105}\) Aside from such meetings, the delegation was also given opportunities to observe court proceedings in death penalty cases and discuss those cases with the practicing defense attorneys.\(^\text{106}\) It was particularly useful for the delegation to hear from the defense attorneys about their strategies for motion practice.\(^\text{107}\)

The study tour provided valuable experience to the delegation, individuals who will go forward as pioneers to promote the Provincial Guidelines and supply recommendations for achieving effective criminal defense in China.

**VII. CONCLUSION**

Prominent law professors and defense attorneys in China have made significant efforts to create and implement the first provincial-level death penalty defense representation guidelines. The creation of the Provincial Guidelines is a great step in establishing a professional standard of care for defense counsel in death penalty cases, and will help to increase the quality of defense representation in China.

It should be noted that the U.S. legal system is very different from the Chinese legal system. The Pattern of Authority Doctrine (职权主义模式) has been deeply affecting Chinese criminal procedures and the Chinese judicial system. The role of lawyers has not been well recognized or respected. For example, in the death penalty review, the

\(^{104}\) See id.

\(^{105}\) See ABA GUIDELINES, supra note 1, Guideline 10.7, at 1020-21 (discussing defense counsel’s obligations concerning mitigation at the sentencing phase).

\(^{106}\) See Chinese Delegation Studies Death Penalty Representation During U.S. Visit, supra note 64; Maher, ABA Rule of Law, supra note 6, at 28-29.

\(^{107}\) China’s Provincial Guidelines encourage defense attorneys to be more proactive in filing motions with the court to support the effectiveness of defense; for example, a motion asking the court to subpoena witnesses for the defense. See China Provincial Guidelines, supra note 66, arts. 63, 65. The observation of actual trials during the study tour allowed the delegation to learn about motion practice in death penalty cases first hand.
newly amended Criminal Procedure Law requires the judge to meet and question the defendant. If the defense attorney so requests, the judge must also listen to counsel’s opinions.108 However, in practice, there are many obstacles for defense lawyers to communicate with judges in the death penalty review process, while judges prefer to do their own investigation by talking to the defendants. Determining whether the defendant is guilty or whether he should be sentenced to death is generally left to the judge, who forms opinions by reviewing both facts and evidence—sometimes gleaned from his own interview with the defendant. Such processes may impede the development of criminal defense attorneys, and lead to a negative assessment of the value of lawyers.

Furthermore, judges and prosecutors have inherently more authority and power than defense attorneys, who therefore are perpetually at a disadvantage despite the existence of lawyers’ associations entirely composed of defense attorney members of the bar. In the United States, the ABA Guidelines are widely recognized—by defense attorneys and other stakeholders in the criminal justice system—as a national standard of care for counsel’s effective representation of clients in death penalty cases. In China, individual lawyers in capital cases are increasingly using the Provincial Guidelines; however, the Provincial Guidelines are not mandatory rules.109 The leading lawyers and professors who are currently working to evolve these guidelines will surely encounter more difficulties implementing and promoting them as the Provincial Guidelines continue to grow.

It is pertinent to note that courts and other important stakeholders in China’s criminal justice system have not yet officially recognized the Provincial Guidelines. This is an important next step in China.

As the ABA Guidelines do in the United States, the Provincial Guidelines can, in China, help judges understand what information they need to decide cases accurately. A stronger and more effective defense effort will in turn help prevent abuses and mistakes by the prosecution and police. Furthermore, skilled and experienced defense lawyers can help prosecutors understand all aspects of the case before the prosecution must decide whether it is necessary to seek the death penalty. More importantly, the Provincial Guidelines provide clear and detailed guidance for defense attorneys to consult when they represent defendants in death penalty cases. The Provincial Guidelines direct

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108. See China Criminal Procedure Law, supra note 19, art. 32.
109. See discussion supra Part V.
where the justice system should be moving towards to allow defense attorneys to fulfill their obligations and do better jobs.

China has recently made progress by listening to the voices of defense attorneys. The SPC has declared that it will consider defense attorneys’ opinions and suggestions on how to prevent wrongful convictions; the SPC has also expressed the importance of, and committed to, protecting the professional rights of defense lawyers.\footnote{Judge Shen Deyong of the SPC stated that China “[s]hould highly pay attention and utilize the role of defense attorney in preventing wrongful conviction cases.” Zuigao Fa: Chuango Fengai Lishi zai Fangfan Yuanjia Cu’an guo’an shanged Zhongyou Zuyong (最高法:充分发挥律师在防范冤假错案上的重要作用), JCRB.COM (Apr. 25, 2013, 5:54 PM), http://news.jcrb.com/jxsw/201304/20130425_1098416.html.} China is aware that its attitude and practices towards death penalty cases must be changed, and that such changes will not happen overnight; but recognition of the important role of defense counsel, and the fortification of a professional legal community, is a promising place to begin.\footnote{Judge Shen, regarding the imperative position of defense counsel, urged China to “realize [that] defense attorneys are one of the most important players in the professional legal community.” Id.} We expect that Chinese lawyers, academics, judges, and other stakeholders will continue to promote acceptance of the Provincial Guidelines at the national level. Future efforts will focus on getting each of the various stakeholders to buy into the Provincial Guidelines, and will seek to provide systematic training programs akin to those promoted by the ABA Guidelines. The ultimate goal is for every defendant facing the possibility of a death sentence to be adequately represented by a competent lawyer at every stage of the criminal proceedings, and to provide each defendant with a fair trial.
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NO EXECUTION IF FOUR JUSTICES OBJECT

Eric M. Freedman*

I. DRIVING A NAIL WITH A SCREWDRIVER IN CAPITAL CASES

Today's Supreme Court defines its role as choosing from the thousands of cases pressed upon it annually those very few that will best serve as vehicles for the resolution of legal issues of general importance.¹

A. Ordinary Cases

The necessary consequence is that some litigants will seek review and fail to attain it for reasons having nothing to do with the merits of their claims (e.g., the Court desires to have the issue percolate for a while in the lower courts or in the public arena),² and will find on reading the ruling in the case of some later party that their position was

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2. A number of such considerations are listed in a lucid inside look at the certiorari consideration process, Stephen M. Shapiro, Certiorari Practice: The Supreme Court’s Shrinking Docket, MAYER BROWN’S APP., http://www.appellate.net/articles/certpractice.asp (last visited Apr. 12, 2015). For a more formal, extended, and current discussion, see STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 4 (10th ed. 2013).
entirely correct. The prior litigants will then believe with good reason that justice was not done in their cases.\(^3\)

The Court ameliorates this inevitable harshness through several mechanisms. When a litigant seeks review by certiorari, a self-imposed “Rule of Four,” dating back to at least 1925, provides that four votes are sufficient to grant the petition.\(^4\) Four votes then suffice to defer action on pending petitions arguably raising the same question.\(^5\) Moreover—and critically—regardless of how a case arrives at the Court, it is subject to a process whose basis is that a judicial body should behave judiciously. The procedures of the Court seek to provide assurance that the ultimate disposition (which ninety-nine percent of the time will be to rebuff the litigant)\(^6\) is reached after the case has been given, or at minimum appears to have been given, as much attention as warranted.

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3. Cf. H. W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 221 (1991) (observing that in interviewing Justices, “[i]t is remarkable how many of my informants used ‘case’ and ‘issue’ interchangeably. . . . [I]t is the issue, not the case[,] that is primary”).


5. See infra notes 26, 44. This process has for some time been sufficiently transparent to allow public comment by interested outsiders, notably John Elwood’s Relist Watch, which appears regularly at SCOTUSBlog.com. See John Elwood, SCOTUSBlog, http://www.scotusblog.com/author/john-elwood (last visited Apr. 12, 2015). The Court began publishing additional details when it revised its website on October 6, 2014.

The Court has explicitly recognized that its power to “hold” cases, like its power to summarily grant certiorari, vacate the judgment below, and remand the case for further consideration, and its power to grant stays pending some future legal development, is a mechanism to “alleviate[] the ‘potential for unequal treatment’ that is inherent in our inability to grant plenary review of all cases raising similar issues.” Lawrence v. Chater, 516 U.S. 163, 166-68 (1996) (quoting United States v. Johnson, 457 U.S. 537, 556 n.16 (1982)).

B. Capital Cases

The necessary consequence of the Court’s institutional limitations has an ineluctably harsher impact in capital cases than in other cases.\footnote{This has been clear since shortly after the resumption of capital punishment in the wake of Gregg v. Georgia, 428 U.S. 153, 187 (1976). During the seven years before Justice Scalia wrote the opinion for a unanimous Court in favor of the petitioner in Hitchcock v. Dugger, 481 U.S. 393, 394, 399 (1987), Florida executed at least thirteen men whose clemency petitions presenting the identical claim had been denied. See 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEEDURE 2075 n. 50 (6th ed. 2011); see also Stringer v. Black, 503 U.S. 222, 237 (1992) (stating that the Fifth Circuit had “made a serious mistake” five years earlier in rejecting the claims of two prisoners whose clemency petitions were denied and who were executed). Between the time of the Court’s ruling in Penry v. Lynaugh (Penry I), 492 U.S. 302, 319-28 (1989), that the Texas capital punishment system unconstitutionally restricted the presentation of mitigating evidence, \textit{see also} Penry v. Johnson (Penry II), 532 U.S. 782, 796-804 (2001) (re-iterating this holding), and its ruling in Tennard v. Dretke, 542 U.S. 274, 283-88 (2004), that the Fifth Circuit had erroneously “invoked its own restrictive gloss on Penry I,” one which “had no foundation in the decisions of this Court,” and was inconsistent with the principles underlying Penry I, an estimated forty prisoners who presented that claim were executed. See Adam Liptak & Ralph Blumenthal, \textit{Death Sentences in Texas Cases Try Supreme Court’s Patience}, N.Y. TIMES, Dec. 5, 2004, at 1.} There may be little the Court can do about this problem.\footnote{“Little,” however, does not mean “nothing.” For example, the Court at one time followed an internal, if unpublishized, practice of discussing every capital case in conference. \textit{See} PERRY, JR., supra note 3, at 92-97. If it still does, the leading treatise on the Court fails to record the fact. \textit{See infra} note 53.}

Once the government—which is also the prisoner’s litigation adversary—has chosen to set an execution date, the ordinary ameliorative mechanisms do not work.\footnote{Both the appearance and the substance of an orderly deliberative process inevitably erode: See also Penry v. Johnson (Penry II), 532 U.S. 782, 796-804 (2001) (re-iterating this holding), and its ruling in Tennard v. Dretke, 542 U.S. 274, 283-88 (2004), that the Fifth Circuit had erroneously “invoked its own restrictive gloss on Penry I,” one which “had[no] foundation in the decisions of this Court,” and was inconsistent with the principles underlying Penry I, an estimated forty prisoners who presented that claim were executed. See Adam Liptak & Ralph Blumenthal, \textit{Death Sentences in Texas Cases Try Supreme Court’s Patience}, N.Y. TIMES, Dec. 5, 2004, at 1.} This is a problem the Court can and should solve. Capital cases under warrant differ from all other
cases. They require institutional treatment reflecting that simple truth. If the Court pretends otherwise, then, as at least three decades of sorry experience show, individuals live or die for reasons that are freakishly arbitrary and clouded in secrecy. That seriously damages the appearance and reality both of equal justice under law and of sound judicial decision-making.

The Justices have long been aware of all this—and have pointed it out to each other publicly and privately, sometimes in forceful language, for decades—as have litigants and commentators. But the Court has been unwilling to address the situation, even as recent legal developments have made the problem worse.

10. For purposes of the following discussion, then, the line of distinction is not between capital cases and all others; it is between capital cases in which the government has set an execution date and all others.

The relevant group is fairly small. Of course, every execution is preceded by the setting of a date. And of course there is ordinarily litigation seeking to stay the execution. But there were only thirty-five executions in 2014, see Facts About the Death Penalty, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last updated Feb. 11, 2015), although there are approximately 3035 inmates on Death Row. See Death Row USA, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/death-row-usa (last visited Apr. 12, 2015). A significant majority of them will eventually attain judicial relief or be otherwise removed from the system by a means other than execution. See Frank R. Baumgartner & Anna W. Dietrich, Most Death Penalty Sentences Are Overturned. Here’s Why That Matters, WASH. POST (Mar. 17, 2015), http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/?tid=hpModule_ba0d4c2a-86a2-11e2-9d71-0f0efad1394.

During 2013, for example, 115 inmates left Death Row, but only thirty-nine did so by execution. See Tracy L. Snell, BUREAU OF JUSTICE STATISTICS, NCJ 248448, CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES 1 figs. 1 & 2 (2014). Thus, depending on the date-setting practice followed by the sentencing jurisdiction, an inmate may well enter and exit Death Row without ever having litigated under warrant. Indeed, as noted infra note 43 (describing the recommendation for an automatic stay by a committee chaired by Justice Powell), there is substantial professional agreement that this is the desirable course of events. For our purposes, non-warrant capital cases do not differ from any other sort of litigation.

When capital litigation occurs under warrant, however, there is a heightened risk of the Court taking actions that are less fully considered than they should be. See supra note 9; infra notes 56, 58. The purpose of providing a special rule for those cases is to reduce that risk.

11. For a summary of this history, see infra Part II.

12. In the past, the issue has most commonly been considered in the context of certiorari review of Circuit dispositions of federal habeas corpus petitions brought in the District Courts. But capital prisoners may quite properly seek relief by commencing other sorts of actions in the lower courts, see ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913, 923-24, 1030-31 (2003) [hereinafter ABA GUIDELINES] (giving examples), or in the Supreme Court, see infra note 75 (discussing original writs of habeas corpus), and they have done so with increasing frequency over the past fifteen years.

Lawsuits under 42 U.S.C. § 1983 (2012) are a common instance. See, e.g., Bradley v. Pryor, 305 F.3d 1287, 1289-90 (11th Cir. 2002) (holding that action seeking DNA samples for testing to establish the innocence of capital prisoner properly brought under § 1983, rather than as habeas corpus petition). In an area that has been the source of a number of recent episodes relevant to this idea, the statute has been used to challenge States’ lethal injection protocols in the wake of
Adhering to the issue-oriented spirit of the Idea format and eschewing any pretense to an exhaustive presentation,13
- Part II summarizes the recent and prior history of the problem.
- Part III proposes a rule that in any capital case, regardless of its procedural posture, the votes of four Justices are sufficient to stay the execution, irrespective of whether those four Justices are ready to vote for plenary review of the case. The stay extends to any other cases held for the first one.
- Part IV urges the Court, in addition to implementing my proposal, to be transparent (a) in the rationale for the disposition of particular cases, and (b) in the formulation and publication of whatever solution it adopts.


the confusingly-written and swiftly-outdated decision in Baze v. Rees, 553 U.S. 35 (2008). See SHAPIRO ET AL., supra note 2, 934-36; Deborah W. Denno, Lethal Injection Chaos Post-Baze, 102 GEO. L.J. 1331, 1346, 1347 & n.93, 1348-54 (2014); Adam Liptak, Moratorium May Be Over, but Hardly the Challenges, N.Y. TIMES, Apr. 17, 2008, at A26. Section 1983 actions are also the appropriate tool for bringing structural attacks on state post-conviction systems, see Skinner v. Switzer, 131 S. Ct. 1289, 1296, 1298-1300 (2011) (decided on merits after grant of stay pending disposition of the petition for writ of certiorari in Skinner v. Switzer, 559 U.S. 1033 (2010)), and Dist. Att’y’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 59-60, 65-67 (2009), and capital inmates use the statute for that purpose as well. See, e.g., Barbour v. Haley, 471 F.3d 1222, 1224, 1232 (11th Cir. 2006) (rejecting § 1983 challenge to Alabama’s failure to provide capital inmates with post-conviction counsel while commenting: “If we lived in a perfect world, which we do not, we would like to see the inmates obtain the relief they seek in this case.”).


These developments increase the probabilities that when the Court considers whether to halt or permit an execution, it does so not just outside the context of a habeas action, but also outside the context of a certiorari petition. See infra Part III.C.
II. WHERE WE ARE AND HOW WE GOT HERE

The set of problems to which this Idea responds is illustrated by the Court’s troubling actions in the case of the late Leon Taylor.

Taylor, a Death Row inmate, was one of a number of plaintiffs in a § 1983 challenge to Missouri’s lethal injection protocol which remained undecided in the Eighth Circuit for some ten months. During that period, the State sought to execute several of the plaintiffs, a divided Court of Appeals denied stays of execution pending its disposition of the appeal, and the inmates were denied Supreme Court stays in summary 5-4 orders.

When this happened in Taylor’s case, he sought to file with the Court a motion for reconsideration of the order denying the stay. The document recounted much of the history described below, asserted that the order “may in practical terms mean a nullification of the Rule of Four,” and called on the Court “to seek the views of all interested parties respecting an amendment of its Rules so it may take the initiative in remedying an anomaly that does it no credit.”

The Clerk refused to file the motion, stating that the Court would not accept motions for reconsideration of denials of stays by the full Court; counsel thereupon sought an order directing the Clerk to file her motion. That relief was denied about an hour later. Taylor was executed that night.

15. See Zink v. Lombardi, 772 F.3d 1151, 1152 (8th Cir. 2014) (Bye, J., joined by Murphy and Kelly, JJ., dissenting) (dissenting from the denial of a stay of execution of Paul Goodwin and citing prior cases).

The Eighth Circuit eventually decided the pending appeal on March 6, 2015, ruling adversely to the inmates. See Zink v. Lombardi, 2015 U.S. App. LEXIS 3550 (8th Cir. Mar. 6, 2015). One of the surviving plaintiffs, Cecil Clayton, then sought a stay of his execution pending the filing and disposition of a certiorari petition; the application was denied on 5-4 vote and he was executed. See Clayton v. Lombardi, 2015 U.S. LEXIS1837 (Mar. 17, 2015); Timothy Williams, Missouri Executes Killer Who Had Brain Injury, N.Y. TIMES, Mar. 18, 2015, at A18.
18. Id. at 6.
19. See Motion for an Order Directing the Clerk to File the Attached Petition for Rehearing and Certification Pursuant to Rule 44.2, Taylor v. Lombardi, 135 S. Ct. 701 (2014) (No. 14A532) (observing that the relevant Court rules, Rule 22 (regarding stay applications) and Rule 44 (regarding motions for reconsideration), contain no language supporting the Clerk’s position).
20. See Taylor, 135 S. Ct. at 701 (reading in its entirety: “Motion to direct the Clerk to file a
This suboptimal judicial performance was not an isolated case. The problems highlighted by *Taylor v. Lombardi* are not new ones. As indicated above, and as counsel tried to call to the Court's attention in her rejected motion, they have bedeviled the Court for at least thirty years. A few selected episodes should suffice to make the point.

On September 1, 1985, a Florida Death Row inmate named Willie J. Darden, who was scheduled to be executed at 7 A.M. on September 4, filed an application for a stay of execution pending the filing and consideration of a petition for certiorari directed to the adverse decision of the Eleventh Circuit on an appeal arising from his first petition for a federal writ of habeas corpus. During the day on September 3 (the Tuesday after Labor Day), four Justices voted to grant the stay.

The four votes would have been enough to grant a petition for certiorari, but . . . [a] stay of execution . . . required a majority, five votes. At 6:05 that evening, the Court informed Darden’s lawyer that there would be no stay of execution. Darden’s lawyer, recognizing that he had the support of four justices, sent a letter requesting that the petition for rehearing of order denying application (14A532) for stay of execution of sentence of death denied.


23. See supra text accompanying note 11.

24. For an account of the Darden episode, see Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* 165-74 (2005), and Revesz & Karlan, supra note 4, at 1074-81. Box 457 of the Harry Blackmun Papers in the Library of Congress contains considerable further documentation that has not yet been fully exploited by scholars. All of the internal Court memorandum cited in the next paragraph of this footnote, and infra notes 43, 45, 55, 56, and 93 are to be found there. Copies of those documents, as well as the memorandum cited infra note 97, are on file with the Hofstra Law Review.

In *Darden*, the Eleventh Circuit denied a motion for an en banc rehearing “on August 27, 1985, and the CA 11 directed that the mandate would issue and the stay would dissolve at 9:00 a.m. on September 3, 1985; the day before the scheduled execution.” Memorandum from Mike [Michael W. Mosman], on Incoming Application for a Stay of Execution, Darden v. Wainwright to Mr. Justice Powell, Supreme Court of the U.S. 2 (Aug. 29, 1985) (on file with the Hofstra Law Review) (annexed to Memorandum from Justice Lewis F. Powell, Jr., Supreme Court of the U.S., on Darden v. Wainwright to the Conference 1 (Aug. 29, 1985) (on file with the Hofstra Law Review)). Justice Powell supplemented this report in a Memorandum to the Conference dated September 3, 1985. Memorandum from Justice Lewis F. Powell, Jr., Supreme Court of the U.S., on Willie Darden v. Wainwright to the Conference 1 (Sept. 3, 1985) (on file with the Hofstra Law Review). He advised his colleagues that on August 30, 1985, the Court of Appeals denied Darden’s application for a stay of its mandate and of his execution pending the filing of a petition for certiorari. *Id.* He further advised them that on “September 1, 1985, Darden filed with this Court an application for a stay of execution pending filing of a petition for certiorari.” *Id.*

Court treat the stay application as a petition for certiorari. The four who had voted for a stay now voted to grant the case. That meant that the Court would, sometime later that fall, be hearing an appeal from a dead man.

At one minute to midnight on September 3, Powell yielded and provided a fifth vote to grant the stay.26

The practice followed in Darden v. Wainwright did not last long,27 and its abandonment proved to be the first step into the current morass. In Hamilton v. Texas in 1990, the Court refused to stay petitioner’s execution despite four votes for certiorari,28 and he was executed without Court review of the merits of his claim.29 In Herrera v. Collins30 just as in Darden, when petitioner found that his stay motion had received four but not five votes, he promptly sought to have the papers treated as a certiorari petition; but the motion was denied over four dissents,31 and when later the same day he filed an actual certiorari petition, the result was an order granting the petition, but adding: “The order of this date denying the application for a stay of execution of sentence of death is to remain in effect.”32 At the last moment, however, the Court was rescued from its own fecklessness when the Texas Court of Criminal Appeals entered a stay33 until the Supreme Court could decide

26. Id.; see Darden v. Wainwright, 473 U.S. 928, 928 (1985); see also Straight v. Wainwright, 476 U.S. 1132, 1132, 1133 & n.2 (1986) (denying stay of execution despite four votes to hold case pending resolution of Darden, while noting “the Court has ordinarily stayed executions when four Members have voted to grant certiorari”); infra note 44 and accompanying text (discussing stays where sufficient number of Justices wish to hold). Meanwhile, inside the Court, the Darden episode set off a lengthy, but ultimately inconclusive, debate among the Justices as to the rule they should adopt to deal with such circumstances. See GREENHOUSE, supra note 24, at 168-72. An earlier account, written without the benefit of the subsequently-released Blackmun Papers, appears in Mark Tushnet, “The King of France With Forty Thousand Men”: Felker v. Turpin and the Supreme Court’s Deliberative Processes, 1996 SUP. CT. REV. 163, 172-79.

27. See SHAPIRO ET AL., supra note 2, at 939 (“[I]t is clear that by the early 1990’s, the Court had moved away from the practice . . . .”).

28. See Hamilton v. Texas, 497 U.S. 1016, 1016-17 (1990) (Brennan, J., dissenting) (“Four Members of this Court have voted to grant certiorari in this case, but, because a stay cannot be entered without five votes, the execution cannot be halted. For the first time in recent memory, a man will be executed after the Court has decided to hear his claim.”).


31. Id.

32. Id.

33. The action is noted at Ex parte Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992) (en banc). This case arose because a lower Texas court entered another execution date for Herrera while his case was still before the Supreme Court. Id. The Texas Court of Criminal Appeals stayed that execution date as well, while pointedly recalling Hamilton and suggesting that the Justices should be solving their own self-created problem, rather than putting a “Texas death row inmate . . . in the position of having to ask the highest court in Texas for criminal matters to delay his date with death until they decide his case.” Id.
the merits, as it eventually did. 34 “This was a lucky last-minute escape for Mr. Herrera, but it is no way to run a judicial system.” 35 Nor was it an isolated instance.

In June of 2007, Christopher Scott Emmett, who was denied a stay by a 5-4 vote 36 was granted one by the Governor of Virginia, who “recognizing that basic fairness demands that capital defendants be given the opportunity to complete the legal appeals process prior to execution, granted petitioner a reprieve to afford us the opportunity to give the petition the careful consideration that it clearly merited.” 37 As a result, he was alive in October, when the Court granted him a stay of execution until the Court of Appeals decided his challenge to Virginia’s lethal injection protocols. 38 Clarence Edward Hill was not so lucky. Hill sought to challenge Florida’s lethal injection protocols, but on September 20, 2006, he was denied a stay of execution by a 5-4 vote 39

39. See Hill v. McDonough, 548 U.S. 940, 941 (2006). In the Eleventh Circuit, Hill had sought an injunction under the All Writs Act against his execution pending the consideration by the Court of Appeals of the District Court’s dismissal of his § 1983 action. Hill v. McDonough, 464 F.3d 1256, 1257-58 (11th Cir. 2006) (per curiam). The Circuit Court did not reach the merits of his challenge, but instead ruled that Hill’s dilatory litigation conduct disqualified him from equitable relief. Id. at 1259. I accordingly suggest that the Justices may have considered themselves to be
and was executed.\textsuperscript{40} He was dead when the Court, without recorded dissent, denied his certiorari petition on October 16, 2006.\textsuperscript{41}

III. THE IDEA AND ITS RATIONALE

I propose that in any capital case, regardless of its procedural posture, an execution will be stayed if four Justices so desire.\textsuperscript{42} This proposal applies irrespective of the route by which the case reaches the Court, and irrespective of whether those four Justices are ready to vote for plenary review of the case.\textsuperscript{43} Executions in capital cases that are reviewed an interlocutory injunctive. See infra note 76. However, Shapiro et al. state that the Court’s ruling came on an "application for a stay of execution pending certiorari," which is equally consistent with the sparse published order. See SHAFT ET AL., supra note 2, at 935.


42. As a corollary, analogous to current practice with respect to the dismissal of certiorari as improvidently granted, the vote of at least one of those four Justices would be required to modify such a stay. See SHAFT ET AL., supra note 2, at 326-29. See generally infra note 97. It is certainly possible that, had my proposal been in effect, some of the cases discussed below would have eventuated in a later order permitting the execution to go forward. But, as in Lovitt and Bower discussed supra note 37, that would have followed a considered review of the issues, rather than a chaotic eleventh-hour scramble.

43. This proposal, designed to best follow the contours of the current litigation landscape, is at once broader than some that have been made previously and less inmate-friendly than others.

On the one hand, it applies to cases other than those reaching the Court by certiorari, and to proceedings other than federal habeas corpus. See supra note 12; infra Part III.C. On the other hand, my proposal requires four affirmative Supreme Court votes for a stay, in contrast to proposals for an automatic stay without individualized judicial action throughout the pendency of federal habeas corpus proceedings, like the one made in 1989 by a committee chaired by retired Justice Powell. See AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, REPORT ON HABEAS CORPUS IN CAPITAL CASES (1989), reprinted in 45 CRIM. L. REP. 3239, 3241 (1989); AM. BAR ASS’N, AMERICAN BAR ASSOCIATION POLICY RECOMMENDATIONS ON DEATH PENALTY HABEAS CORPUS (1990), reprinted in Ira P. Robbins, Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 AM. U. L. REV. 1, 9-12 (1990) (supporting the proposal); Comm. on Civil Rights, Legislative Modification of Federal Habeas Corpus in Capital Cases, 44 REC. ASS’N B. CTY N.Y. 848, 855 (1989) (supporting the proposal); see also Emmett v. Kelly, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg J., respecting denial of certiorari) (“Both the interest in avoiding irreversibility in capital cases, and the interest in the efficient management of our docket, would be served by a routine practice of staying all executions scheduled in advance of the completion of our review of the denial of a capital defendant’s first application for a federal writ of habeas corpus. Such a practice would be faithful to the distinction between first and successive habeas petitions recognized by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 and would accord death row inmates the same, rather than lesser, procedural safeguards as ordinary litigants. It is a practice that JUSTICE GINSBURG and I have followed in the past and one that I hope a majority of the Court will eventually endorse.”); Memorandum from Justice Harry A. Blackmun, Supreme Court of the U.S., on Darden v. Wainwright to the Conference I (Sept. 10, 1985) (on file with the Hofstra Law Review) (“As all of you know, my position with respect to capital cases is that I shall vote to grant a stay pending the...
“held” by as many votes as required under the Court’s internal practice would be stayed automatically.\footnote{There is a long discussion of the Court’s “hold” practice in Revesz & Karlan, supra note 4, at 1109-31, which was written at a time when three votes were sufficient to delay the disposition of a case pending disposition of one already accepted for review. As Professor Tushnet learned from the Marshall Papers, the Court changed its practice in 1991 to require four votes. See Tushnet, supra note 26, at 181. As indicated, supra note 26, the Justices have long disputed whether, even assuming that a stay should issue when four of them have voted to grant certiorari, the rule should extend to cases being held for the first time. See Watson v. Butler, 483 U.S. 1037, 1038-39 (1987) (Brennan & Marshall, JJ., dissenting); Straight v. Wainwright, 476 U.S. 1132, 1133 n.2 (1986) (Powell, J., concurring); Hatch v. Wainwright, 475 U.S. 1074, 1075-76 (1986) (Marshall, J., dissenting); see also Tushnet, supra note 26, at 176-80.}

resolution here of the defendant’s first federal habeas.”; \textit{infra} note 58 (discussing Autry v. Estelle, 464 U.S. 1 (1983)). My trade-offs are, of course, debatable ones, and the justice system would benefit if they were debated openly and thoughtfully. \textit{See infra} Part IV.

44. There is a long discussion of the Court’s “hold” practice in Revesz & Karlan, supra note 4, at 1109-31, which was written at a time when three votes were sufficient to delay the disposition of a case pending disposition of one already accepted for review. As Professor Tushnet learned from the Marshall Papers, the Court changed its practice in 1991 to require four votes. \textit{See Tushnet, supra note 26, at 181.} As indicated, \textit{supra} note 26, the Justices have long disputed whether, even assuming that a stay should issue when four of them have voted to grant certiorari, the rule should extend to cases being held for the first time. \textit{See Watson v. Butler, 483 U.S. 1037, 1038-39 (1987) (Brennan & Marshall, JJ., dissenting); Straight v. Wainwright, 476 U.S. 1132, 1133 n.2 (1986) (Powell, J., concurring); Hatch v. Wainwright, 475 U.S. 1074, 1075-76 (1986) (Marshall, J., dissenting); see also Tushnet, supra note 26, at 176-80.} 

Answering that question affirmatively, the present proposal is that whatever internal rule the Court adopts for “holds,” capital petitioners under warrant should benefit on an equal basis with other litigants from a mechanism which is designed to reduce inequities. \textit{See supra} note 5. This would cover situations such as that presented in \textit{Streetman v. Lynaugh, 484 U.S. 992 (1988)}, where there were four votes for a hold pending the decision that would eventually be rendered in \textit{Franklin v. Lynaugh, 487 U.S. 164 (1988)}, but not five for a stay. The latter was denied on a 4-4 vote, and the petitioner was executed several hours later by “[b]affled prison officials.” \textit{See When a Tie Vote Means Death, N.Y. TIMES} Jan. 18, 1988, \texttt{http://www.nytimes.com/1988/01/18/opinion/when-a-tie-vote-means-death.html} (editorially condemning an “anomaly in the Court’s rules” that denies the benefit of holds to prisoners under warrant). For another such example, see \textit{Rook v. Rice, 478 U.S. 1040, 1043 (1986)} (Brennan, J., dissenting) (stay denied 5-4 despite four votes for hold); \textit{North Carolina Killer Executed After Appeal Fails, N.Y. TIMES} Sept. 20, 1986, \texttt{http://www.nytimes.com/1986/09/20/us/north-carolina-killer-executed-after-appeal-fails.html}.

One justification for a non-majority rule for holds in general is that it is difficult to tell in advance how the ruling in one case yet to be decided will bear on another. As \textit{Streetman and Rook} show, that rationale applies fully in the capital context, where the cases are notoriously procedurally complex. Accordingly, my definition of “hold” extends to other internal Court practices that would ordinarily be available in a non-warrant situation on the vote of a minority of the Justices to assist the deliberative process. \textit{See, e.g., Medellin v. Texas, 554 U.S. 759, 765-66 (2008) (per curiam) (Breyer, J., dissenting) (allowing execution on 5-4 vote notwithstanding the votes of a sufficient number of Justices (four) to call for the views of the Solicitor General).}

The proposal also extends to situations that have not usually been considered as fitting under the “hold” rubric, because they do not involve certiorari petitions, e.g. when multiple litigants in the same underlying lethal injection controversy seek stays. \textit{See infra} Part III.C. After a stay is granted in the first case, my proposal contemplates that the requisite number of Justices may vote to “hold” later such applications. After due consideration, the Court may decide that the salient problem is not the State’s use of Drug X in executions, but rather the use of Drug X without prior disclosure to the prisoner. The Court may then make that clear by denying stays in later-arriving cases raising the first issue, or, if a case raising the first but not the second has benefitted from the hold, by modifying its order as discussed supra note 42. \textit{See infra} notes 70, 94 (explaining how proposal would have worked in recent sets of cases before the Court). Of course, in either situation, the Court should favor all concerned with a few explanatory words, lest it be rightly compared to the oracle at Delphi, who, in the words of Heraclitus of Ephesus, “neither reveals nor conceals, but gives a sign.” \textit{See Daniel W. Graham, Heraclitus, STAN. ENCYCLOPEDIA PHIL.} (Mar. 29, 2011), \texttt{http://plato.stanford.edu/entries.heraclitus; infra text accompanying notes 102-05}. 
A. Cases Arriving by Certiorari Should Be Stayed if Four Justices Vote to Grant Review

In reaction to Darden, at least two Justices proposed that four votes be sufficient for a stay in capital cases in which certiorari had been granted, a proposal that has garnered support from various commentators over the years. The rationale is that the need of the capital litigant under warrant to garner five votes for a stay, although four Justices vote for certiorari, effectively nullifies the Rule of Four.

Thomas Goldstein asserts that this proposal actually represents the current practice. Contrary to its behavior in the 1990s, he says, the Court will now issue a stay where four Justices are ready to grant certiorari, although not where they only wish time for further consideration. There is no recent action of the Court flatly inconsistent

45. Justice Brennan did so in a memorandum to his colleagues dated September 6, 1985, as did Justice Marshall in a memorandum dated September 10, 1985. See Memorandum from Justice Thurgood Marshall, Supreme Court of the U.S., on Darden v. Wainwright to the Conference 2-3 (Sept. 10, 1985); Memorandum from Justice Wm. J. Brennan, Jr., Supreme Court of the U.S., on Darden v. Wainwright to Colleagues 3-4 (Sept. 6, 1985) (on file with the Hofstra Law Review). As indicated above, Justice Blackmun (like Justices Stevens and Ginsburg subsequently) went farther and proposed an automatic stay of execution extending throughout first federal habeas corpus proceedings, even if certiorari had not been granted. See supra note 43.

46. See, e.g., Robbins, supra note 35, at 18-20; see also Edward A. Hartnett, Ties in the Supreme Court of the United States, 44 WM. & MARY L. REV. 643, 673-78 (2002) (proposing an amendment to 28 U.S.C. § 2101(f) providing that “Notwithstanding any other provision of law, a sentence of death shall be stayed in the event the Supreme Court grants a petition for certiorari.”).

47. There is some evidence that Chief Justice Roberts sympathizes with this view. At his confirmation hearing, he was asked about the issue and responded:

It’s an issue that I’m familiar with. I do know it arose. And I thought the common practice, the current practice was that if there are votes to grant cert that the Court would grant the stay, even though that does require the fifth vote . . . . I think that practice makes a lot of sense. I don’t want to commit to pursue a particular practice in an area that I’ll obviously have to look at in the future, but it obviously makes great sense that if you have four to grant and that’s the rule that you will consider an issue if there are four to grant. You don’t want to moot the case by not staying the sentence.


48. See supra notes 28-35 and accompanying text (describing cases of that period); see also Nguyen v. Gibson, 525 U.S. 1050 (1998) (denying stay 5-4; denying motion to permit filing of certiorari petition).

49. Tom Goldstein, Death Penalty Stays, SCOTUSBLOG (Oct. 13, 2007, 12:06 PM), http://www.scotusblog.com/wp/2007/10/more-thoughts-on-death-penalty-stays (stating that the “practice in the later Rehnquist years” was for a Justice to grant “a courtesy fifth vote for a stay of execution when there were four votes to grant certiorari,” and that this practice “remains fully in effect under Chief Justice Roberts”).

This post was a response to Adam Liptak, 4 Votes Get a Man to Court. 4 Votes Let Him Die First, N.Y. TIMES, Oct. 8, 2007, at A13 (discussing the Court’s 5-4 stay denial of August 23, 2007 in Williams v. Allen, 551 U.S. 1183 (2007), a case which raised lethal injection challenges that the Court agreed on September 25, 2007 to review in Baze v. Rees, 551 U.S. 1192, 1192-93 (2007)).
with this hypothesis. But there is no empirical evidence supporting it either. The data is equally consistent with the explanation that the perceived pattern results from ad hoc negotiations by the Justices on a case-by-case basis, and that the timing of the circulation of certiorari petitions is an element of those negotiations.

In the words of the leading treatise:

[Goldstein’s hypothesis] may well be true: there has not been a grant of certiorari coupled with a denial of a stay, nor an order denying a stay and reciting that four Justices would have granted certiorari. On the other hand, no statute or Supreme Court Rule requires such a practice, no judicial opinion states that this is the current internal voting procedure of the Court, votes on certiorari are generally kept confidential, and the experience of the 1980’s reveals that such a practice can break down under pressure.

Simply put, the Court has chosen to reveal neither whether it is governed by a rule nor what the contents of that rule might be.


51. On the assumption that the Clerk of the Court acts at its direction, this explanation might account for the puzzling patterns discussed infra text accompanying notes 65-67 & note 67.

52. Shaprio et al., supra note 2, at 939. In the motion for reconsideration she was not permitted to file, Taylor’s counsel, after noting Goldstein’s hypothesis and the lack of any public information to verify it, argued: “If the Court has indeed adopted some new practice, the public interest would be served by an announcement of it—and a stay in this case should issue while that is formulated in a thoughtful manner.” Motion for Reconsideration of Order Denying Stay of Execution, supra note 17, at 3.
B. Cases Arriving by Certiorari Should Be Stayed if Four Justices Want More Time to Think

More importantly as a substantive matter, even if the rule extrapolated by Goldstein in fact exists, it is unresponsive to most of the problem. The Justices (not to mention the parties and the public) are entitled to at least as thoughtful consideration of certiorari petitions in capital cases as in others, including discussions of the matter with their colleagues. There is no basis as a matter of either justice or sound

53. See Shapiro et al., supra note 2, at 15 (stating that in ordinary course more than eighty-five percent of the petitions listed for a particular conference "are automatically denied review without discussion or vote," because they have not made the list previously circulated by the Chief Justice of those certiorari cases whose prima facie merit makes them "worthy enough to take the time of the Justices…for discussion and voting,"); but "[a]dditional cases are placed on the list if any Justice so requests"). Defending this process as a sound method for the Court "to handle its heavy caseload," Shapiro et al. explain that the cases that do not make the list "receive the attention of each member of the Court," because it is prepared only "after the Justices or their law clerks have had a chance to canvass all the cases scheduled for a given conference." Id.

54. As has been repeatedly documented in empirical studies and acknowledged in a number of published opinions of members of the Court, the claims presented on federal habeas corpus by capital prisoners are overwhelmingly more likely to be meritorious than those of non-capital prisoners. See 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure 27-28 n.27 (6th ed. 2011); see also Shapiro et al., supra note 2, at 931-33. Recent statistics show that capital prisoners' federal habeas corpus petitions succeed approximately 47% of the time, compared to 3.2% for non-capital ones. See Hertz & Liebman, supra; see also Baumgartner & Dietrich, supra note 10.

55. It has sometimes been objected that allowing four votes to suffice for a stay of execution would simply mean that "four Justices out of a total number of nine could frustrate the effectuation of the will of the majority," by voting "to grant certiorari in every death [penalty] case." Memorandum from Justice William H. Rehnquist, Supreme Court of the U.S., on Darden v. Wainwright to the Conference 2 (Sept. 9, 1985) (on file with the Hofstra Law Review).

Quite apart from its implicit disparagement of the Justices' innate professionalism, this objection is unpersuasive. First, under the existing Rule of Four, the hypothetical obstructionists can already behave in this manner in all capital cases except for the relatively few under warrant. Second, the objection has nothing to do with capital punishment. The same tactic could be used by four Justices to force plenary consideration of every case in which a corporation had lost an antitrust case. But, there are many reasons—including collegiality, the likelihood of an adverse outcome on the merits, and the probability of negative public and congressional comment—why the minority would be unlikely to behave in this fashion. Third, the same objection extends beyond the Rule of Four itself to all actions that the Court's practices permit to be taken by a minority. Thus, for example, suppose four Members were resolutely opposed to enforcement of environmental laws. They might routinely call for views of Solicitor General in all environmental cases, thereby blocking enforcement actions for a number of additional months. But the same considerations already listed make it unlikely that this would happen. Fourth, and most importantly, the majority retains ultimate control. Rules by which the Court grants powers to its minority exist only at the sufferance of its majority, and there is every reason to believe that the minority is well aware of this. See Goldstein, supra note 49 ("The four Justices who would grant the stay … would likely hesitate before adopting a regular practice of protectively granting cert."). As has been repeatedly documented in empirical studies and acknowledged in a number of published opinions of members of the Court, the claims presented on federal habeas corpus by capital prisoners are overwhelmingly more likely to be meritorious than those of non-capital prisoners. See 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure 27-28 n.27 (6th ed. 2011); see also Shapiro et al., supra note 2, at 931-33. Recent statistics show that capital prisoners' federal habeas corpus petitions succeed approximately 47% of the time, compared to 3.2% for non-capital ones. See Hertz & Liebman, supra; see also Baumgartner & Dietrich, supra note 10.

Moreover, Justice Rehnquist's concern was in fact rebutted by actual experience soon
judicial administration for requiring them to commit on an accelerated schedule to grant review of a particular case because that is the only way to prevent a possibly wrongful execution. The Justices deserve time to

after he gave voice to it. On February 21, 1986, at a moment when Justice Powell was on the Court and presumably would again have acted as he had in Darden, see supra text accompanying note 26, the Court issued Moore v. Texas, 474 U.S. 1113 (1986), in which a stay was denied on a 5-4 vote with two of the dissenting Justices (Brennan and Marshall) stating that they would grant both the stay application and certiorari petition and the two others (Blackmun and Stevens) declining to vote for certiorari and merely stating that they would grant the application for a stay. A federal district judge stayed the execution shortly before it was to take place, see Around the Nation: Judge Stays Execution of Texas Grocer's Killer, N.Y. Times (Feb. 26, 1986), http://www.nytimes.com/1986/02/26/us/around-the-nation-judge-stays-execution-of-texas-grocer-s-killer.html, and the prisoner eventually succeeded in invalidating his death sentence, see Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999).

56. Indeed, in a blog post subsequent to the one discussed supra note 49, Goldstein recognized this problem. See Goldstein, supra note 9 (agreeing that under the practice he previously described, “[a] difficult dilemma arises when four Justices seek a stay in a late-presented case in order to consider the petition more fully and decide whether to grant review,” because “[Justices] need the opportunity to study and reflect in order to make a decision. When there are four such votes to stay the case, a courtesy fifth vote is not automatically provided, however. The execution can go forward.”).

In a Memorandum, Justice Blackmun wrote:

I shall oppose—indeed, I resent—the necessity of our reviewing a petition for certiorari within 12 hours of its filing here, whether that time limit is occasioned by the state court or by this Court or by a Member of it. . . . In my view, capital cases should be treated with the same consideration, and on the same schedule, as other petitions receive. Justice Harry A. Blackmun, supra note 43, at 2.

When Justice Brennan subsequently presented a formal proposal that the Court adopt an internal rule that four votes be sufficient to stay a capital case arriving on certiorari, one of his rationales was that this would allow adequate time for the Justices to study, and perhaps ultimately deny, the petition. See Tushnet, supra note 26, at 175. In Emmett v. Kelly, 552 U.S. 942 (2007), Justice Stevens explained that his proposal for routine stays of execution to enable the Court’s review of capital habeas cases to be completed on the ordinary schedule was intended to facilitate “ orderly review,” and added that, having had the opportunity due to the Governor’s stay to conduct such a review, “I do not dissent from the Court’s decision to deny certiorari.” Id. at 943. See supra text accompanying notes 36-38 (describing case).

I hope that the primary real-world effect of my proposal would be simply to grant capital cases under warrant the same judicious processing that they would receive if they were not under warrant. See supra note 10; see also infra note 70 (observing that Court seems to have recently adopted procedures for more careful vetting of cases before announcing certiorari grants). At least four Justices—and not necessarily ones opposed to the death penalty—may well appreciate the benefits of a thorough record review. Such Justices might choose to adopt a blanket policy (e.g., voting for stays in all first capital habeas petitions) designed to achieve such benefits, particularly if they knew that their vote would then have added weight respecting any proposal to modify the stay. See supra note 42.

Once they became aware of the Justices’ practices, the States might well modify their sometimes-abusive behavior in date-setting. See ABA GUIDELINES, supra note 12, Commentary to Guideline 10.15.1, at 1081-82; Memorandum from Justice Harry A. Blackmun, supra note 43, at 2 (“If we make clear to the States that this Court will insist upon having sufficient time adequately to review first federal habeas petitions, we shall eliminate the current incentive States possess to set execution dates that force hasty review of often problematic cases.”). Moreover, if the message were sent, lower courts considering stay applications would read it. Cf. Memorandum from Justice Harry
think.\textsuperscript{57} A statement by four of them that they want that time should suffice to postpone a potentially fatal deadline created for the occasion by a party to the litigation.\textsuperscript{58}

Consider, for example, the fate of the late Charles Warner of Oklahoma. Warner was a plaintiff in a lethal injection litigation originating in Oklahoma. His execution date was January 15, 2015.\textsuperscript{59} Along with three other plaintiffs (with execution dates of January 29, February 19, and March 5), he was denied a preliminary injunction by the District Court, a ruling that the Tenth Circuit affirmed on January 12, 2015 in a plenary opinion on the merits.\textsuperscript{60} The following day, January 13, the four plaintiffs filed a petition for certiorari and an application for a stay of execution.\textsuperscript{61} The government responded on the next day, January 14, to both the stay motion and the certiorari petition,\textsuperscript{62} and

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\textsuperscript{57} See Henry M. Hart, Jr., The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 85-94, 100 (1959). It may be worth recalling that much of the substance of this classic article was a critique of the Court’s ruling in favor of the capital habeas corpus petitioner in \textit{Irvin v. Dowd}, 359 U.S. 394 (1959).

\textsuperscript{58} In \textit{Autry v. Estelle}, 464 U.S. 1, 2 (1983), the Court denied a stay pending the filing of a certiorari petition, stating that “[h]ad applicant convinced four members of the court that certiorari would be granted on any of his claims, a stay would issue,” but rejecting the idea of “a rule calling for an automatic stay, regardless of the merits of the claims presented, where the applicant is seeking review of the denial of his first federal habeas corpus petition.” Speaking through Justice Stevens, the four dissenters replied:

The practice adopted by the majority effectively confers upon state authorities the power to dictate the period in which these federal habeas petitioners may seek review in this Court by scheduling an execution prior to the expiration of the period for filing a certiorari petition. Shortening the period allowed for filing a petition on such an ad hoc basis injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error. Procedural shortcuts are always dangerous. Greater—surely not lesser—care should be taken to avoid the risk of error when its consequences are irreversible. \textit{Id.} at 6 (footnote omitted).

\textsuperscript{59} See \textit{Warner v. Gross}, 776 F.3d 721, 724 (10th Cir. 2015).

\textsuperscript{60} \textit{Id.} at 724, 727, 736. The Tenth Circuit’s ruling was a final judgment reviewable by certiorari, and, in ordinary course, the petition would have been due ninety days later. See \textit{Sup. Ct. R. 13.1}.


\textsuperscript{62} \textit{Id.} In ordinary course, the State’s answer to the certiorari petition would have been due on February 13, 2015, thirty days after the petition was docketed. See \textit{Sup. Ct. R. 15.3}. 
plaintiffs filed replies in support of both on January 15, the scheduled execution date. Later that day, the Court summarily denied the stays on a 5-4 vote over a reasoned eight-page dissent by Justice Sotomayor that laid out the substantive legal issues presented by the case and concluded, “I hope that our failure to act today does not portend our unwillingness to consider these questions.”

The Court did not rule upon (and the four dissenters did not explicitly record a position respecting) certiorari. In fact, as subsequently became clear when the docket sheet was published, the Justices did not formally have the certiorari petition before them. Although it had been filed on January 13 along with the stay application, the petition was not distributed to the Court until January 20—five days after Warner’s execution—for consideration at its conference of January 23. On that day, the petition was granted on behalf of the

63. See Search - Supreme Court of the United States, supra note 61. In ordinary course, plaintiffs would have had a minimum of fourteen days to file reply papers in support of the certiorari petition. See SHAPIRO ET AL., supra note 2, at 317.


65. Id. at 824-28. A cold-eyed observer might have speculated that they would not announce a position in favor of certiorari out of concern for a potential adverse outcome on the merits. See SHAPIRO ET AL., supra note 2, at 333. That dynamic is a function of the Rule of Four itself. See supra note 55. In all cases where there are only four Justices in favor of certiorari, they will ultimately need to decide whether to insist that the case be heard on the merits. See, e.g., Brown v. Texas, 522 U.S. 940 (1997). But in all cases except capital ones under warrant the four will first have the benefit of internal communications among the full body. For example, they might learn from an interchange before or during conference that five or more Justices would be prepared to grant review to some other iteration of the question onto a case in some other procedural posture. In capital cases under warrant, assuming that Goldstein’s description of the Court’s stay practice is correct, the petitioner only lives if the four Justices are willing to demand plenary review in the absence of the information that would normally inform their decision. Leaving entirely aside the unfairness to the petitioner, it is very difficult to see how this state of affairs serves the institutional interests of the Court.


The execution of Walter Storey, one of the plaintiffs in the Eighth Circuit lethal injection litigation described supra text accompanying notes 14-16 followed a similarly jarring sequence of events. On February 10, 2015, he filed a pre-judgment certiorari petition and an application for a stay of his execution scheduled for later that day. The stay application was denied on a 5-4 vote, see Storey v. Lombardi, 191 L. Ed. 2d 151 (2015), and he was executed in the early morning hours of February 11. See Jim Salter, Walter Storey Executed for Killing Jill Frey, HUFFINGTON POST, http://www.huffingtonpost.com/2015/02/10/walter-storey-execution_n_6658088.html (last visited Apr. 12, 2015). The certiorari petition was not distributed until February 12, for the conference of February 27, see Search - Supreme Court of the United States, SUPREME CT. U.S., http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-8362.htm (last visited Apr. 12, 2015). It was dismissed as moot by an order dated March 2, 2015. See Storey v. Lombardi, 2015
remaining three plaintiffs. The day before the next one was to be executed, the Court stayed the executions of all three.

The Rule of Four was preserved; the Goldstein hypothesis remained unrefuted. Only fairness, good sense, and sound judicial administration were sacrificed. If a collegial body had been acting as it should, the four votes for a stay would have been sufficient to halt Warner’s execution. The Court could then have considered the certiorari petition judiciously in light of the minority’s views and responded to it in a thoughtful way.

Instead:
- Warner was executed. His identically-situated co-plaintiffs were not, and will receive merits review of their cases.
- The Court was under pressure to act before yet another plaintiff was executed.


This pattern has been followed on at least one other occasion in the past year, in the case of Jeffrey Ferguson, another of the plaintiffs in the same litigation. On March 25, 2014, he filed a pre-judgment certiorari petition and a stay application. The latter was denied that day over four dissents, see Ferguson v. Lombardi, 134 S. Ct. 1582 (2014), and he was executed early the following morning, see Missouri Executes St. Louis-Area Man Who Killed Teen Girl, St. LOUIS POST-DISPATCH, Mar. 26, 2014, at A2. His certiorari petition was not distributed until April 3, for the conference of April 18, see Search - Supreme Court of the United States, SUPREME CT. U.S., http://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-9374.htm (last visited Apr. 12, 2015), and was denied by an order dated April 21, 2014. See Ferguson v. Lombardi, 134 S. Ct. 1927 (2014).

In contrast, the petitions for certiorari before judgment filed by two other of the plaintiffs were, as one would expect, distributed along with their stay applications and denied in a single order. For Paul Goodwin’s case, see Goodwin v. Lombardi, 135 S. Ct. 780, 780 (2014), and Search - Supreme Court of the United States, SUPREME CT. U.S., http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-7406.htm (last visited Apr. 12, 2015), and for Leon Taylor’s case, see Taylor v. Lombardi, 135 S. Ct. 701 (2014), and Search - Supreme Court of the United States, SUPREME CT. U.S., http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-7157.htm (last visited Apr. 12, 2015).

Until the Court vouchsafes—as it should, see infra Part IV—some reliable explanation for the seemingly disparate treatment of identically-situated litigants, prudent capital defense counsel representing an inmate under warrant should as a matter of practice file not just a stay application and a certiorari petition but also a motion to expedite consideration of the latter. See, e.g., Martinez v. United States, 557 U.S. 931 (2009). As a matter of policy, such a motion (which might itself be denied or deferred by five Justices) should not be necessary, and under my proposal it would not be.

88. Assuming that the practice is as described by Goldstein, the remaining plaintiffs would have been executed one by one as long as the Court did not release an order granting certiorari. In the event that it did so at any time before the last one died, all of the survivors would have been granted stays.

In short, the more case the Court—commendably—took in considering the petition, the more plaintiffs would have died. Cf. John Elwood, Relist Watch: What Does the Court’s Relist Streak Mean?, SCOTUSBLOG (Apr. 3, 2014, 11:50 AM), http://www.scotusblog.com/2014/04/relist-watch-what-does-the-courts-relist-streak-mean (suggesting that the Court has adopted the practice of relisting cases at least once following an initial conference vote for certiorari in order to
allow time for careful re-vetting before announcement of the grant).

   My proposal would end this self-inflicted institutional wound. Under it, Warner would have received a stay on January 15, and the other petitioners would have benefited from it automatically. See also infra note 94 (providing similar example of the working of my proposal). A situation that is unavoidably bad, see supra note 7, would at least not be have been made avoidably worse. As Linda Greenhouse observed in commenting on the Court’s “bungled judicial performance” in Warner’s case, the effect of implementing my idea would be to “save the court from itself.” Linda Greenhouse, The Supreme Court’s Death Trap, N.Y. TIMES, Apr. 1, 2015, at A23.

   In the same spirit of pragmatism, my proposal provides that four Justices could grant a stay in a capital case whenever they thought this was the sensible administrative course regardless of procedural subtleties. See infra Part III.C.

   In Romero v. Collins, 504 U.S. 936 (1992), a stay was denied 5-4 on May 19, 1992. Speaking for three of the dissenters (himself and Justices Blackmun and Kennedy), Justice Stevens observed that certiorari petitions in Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc) and two other cases raising the claim advanced by Romero (which had been rejected 7-6 by the Fifth Circuit) were scheduled to be discussed at the Court’s conference of May 29, and continued, “In my opinion it is unseemly not to stay petitioner’s execution until after that time so that his application and petition receive at least the same consideration as will be given to those whose petitions for certiorari are now pending on the Conference list.” Romero, 504 U.S. at 936. Justice O’Connor voted for a stay of execution but did not join this statement. Romero was executed on May 20, see DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/jesus-romero (last visited Apr. 12, 2015). The Court soon afterwards granted the petition in Graham, see Graham v. Collins, 504 U.S. 972 (1992), and went on to decide the case on the merits, see Graham v. Collins, 506 U.S. 461 (1993). Under my proposal, Romero would have been alive at the time. Similarly, my proposal would have led to the grant, rather than the 5-4 denial, of a stay in Bundy v. Dugger, 488 U.S. 1036 (1989), where the petitioner intended to raise on certiorari an issue which the Court had already agreed to review in another case.

   Neither case would be covered by the separate portion of my proposal respecting “holds.” See supra note 44 and accompanying text. In Romero, only three, not four, Justices would have explicitly granted the stay on that basis, see also Daugherty v. Florida, 488 U.S. 936 (1988) (denying stay 5-4; three dissenters would hold petition pending decision in a granted case; one would grant stay for unstated reasons); Jones v. Smith, 475 U.S. 1076 (1986) (denying stay 5-4; two dissenters would hold petition pending decision in a granted case; two would grant stay for unstated reasons), and Bundy presented the obstacle that one cannot “hold” a petition that has not yet been filed.

71. The Justices might reasonably believe that they were acting, or would be criticized as having acted, inconsistently if they granted review to the remaining plaintiff. The late-night ruling on Warner’s stay application thus increased the risk of a lower-quality ruling on the uncirculated certiorari petition.

   Similarly, there has as yet been no certiorari petition filed seeking review of the ruling in Zink v. Lombardi, 2015 U.S. App. LEXIS 3550 (8th Cir. Mar. 6, 2015), in which the Eighth Circuit rejected on the merits the current challenge to Missouri’s lethal injection protocol. Any such certiorari petition will necessarily arrive under a cloud created by the executions of other plaintiffs in the same case over four dissents. See supra text accompanying notes 14-16 & note 16.

   Like the other effects of the Court’s current injudicious handling of cases under warrant, this dynamic is both unfair to the litigants and adverse to the best interests of the Court itself.
Although the Warner case got more publicity than most, there was nothing unusual about it. The Court’s dysfunctional handling of capital cases under warrant regularly produces similarly negative outcomes and will continue to do so for so long as the Court acquiesces in the subversion of its processes by the self-help tactics of certain States. In adopting my proposal to end the systemic problem and place all litigants on an equal footing, the Court would be benefitting not just itself but the public it serves.

C. Cases Arriving by Any Procedural Route Should Be Stayed if Four Justices so Vote

A rule that four votes sufficed to stay an execution upon the grant of certiorari in a capital case under warrant, or upon the filing of a certiorari petition, or even upon the filing of a stay application seeking time for the filing of a certiorari petition would not go far enough. Much litigation involving stays of execution lacks any connection to a certiorari petition. In those instances, the traditional Rule of Four

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Of these prisoners, Shaw was not executed, see Retarded Convict’s Sentence Is Commuted, N.Y. TIMES (June 4, 1993), http://www.nytimes.com/1993/06/04/news/retarded-convict-s-sentence-is-commuted.html, and Stewart was not executed until eight years later, see DEATH PENALTY INFO CENTER, http://www.deathpenaltyinfo.org/roy-allen-stewart (last visited Apr. 12, 2015).


74. For example, in Medellin v. Texas, 554 U.S. 759, 759 (2008) (denying stay 5-4), the stay was sought in connection with motions to the Court to recall and stay its mandate in Medellin v.
does not apply, but its rationale—that the votes of four Justices should be sufficient to cause the Court to take a case seriously—does.

Texas, 552 U.S. 491 (2008) and for an original writ of habeas corpus. As indicated above, see supra note 12, there is every reason to believe that the number of such situations will increase in the coming years.


75. For example, under the 1996 habeas corpus statute, certain Court of Appeals’ decisions may not be reviewed by certiorari; capital litigants must instead petition the Supreme Court for an original writ of habeas corpus. See 28 U.S.C. § 2244 (2012); In re Davis, 557 U.S. 952, 952-54 (2009) (invoking procedure successfully); Felker v. Turpin, 518 U.S. 651, 658-61 (1996); In re Hill, 715 F.3d 284, 301 n.20 (11th Cir. 2013) (noting that although 28 U.S.C. § 2244(b)(3)(E) meant petitioner could not seek certiorari from Circuit’s adverse decision, he could seek Court review by original writ). But the Court: (a) does not follow the Rule of Four with respect to giving plenary consideration to original habeas petitions, see, e.g., In re Stanford, 537 U.S. 968 (2002) (summarily denying original writ in capital case on 5-4 vote), and (b) will only grant stays in such cases on the vote of five Justices. See In re Graham, 530 U.S. 1256 (2000) (summarily denying petition for original writ, and refusing stay over four dissent); In re Wright, 529 U.S. 1001, 1001 (2000) (same); In re Tarver, 528 U.S. 1152, 1152 (2000) (same); In re Davis, 521 U.S. 1142 (1997) (denying stay 5-4, denying original writ without indication of vote count); see also Robbins, supra note 35, at 2, 4-6, 22-24, 30 (criticizing Court for sending petitioner in Tarver on a “bizarre trip through” a “procedural maze” that relied on unpublished rules “cloaked in secrecy’’ to deny relief, and calling upon it to adopt openly a Rule of Four applicable to such cases).

76. See Wainwright, 466 U.S. at 964-66 (Marshall, J., dissenting). In his dissent from the Court’s 5-4 vacatur of the stay of execution entered by the Court of Appeals, Justice Marshall wrote:

After having had less than a day to consider the judgment of the Court of Appeals, this Court now vacates that judgment, thereby opening the way to Adams’s execution. The haste and confusion surrounding this decision is degrading to our role as judges. We have simply not had sufficient time with which to consider responsibly the issues posed by this case. Indeed, the Court is in such a rush to put an end to this litigation that it has denied my motion to defer its action for 24 hours in order for me to write a more elaborate dissent. . . . [T]he Court has utterly failed to attend to this case with the careful deliberation that it deserves and has thus committed an error with respect to process as well as result.

Id. at 965-66.

The Hill case raises similar issues. See supra notes 39-41 and accompanying text. Leaving aside the question of mootness, the two rulings described could be made formally consistent with
One example is the case of the late Jeffrey Landrigan. As plaintiff in a civil action challenging Arizona’s lethal injection procedures, Landrigan had succeeded in the District Court, the Ninth Circuit, and the en banc Ninth Circuit in enjoining his execution until such time as the State provided certain information concerning the drugs it planned to use to execute him. On the State’s late-night application, the Supreme Court vacated the District Court’s restraint by a 5-4 vote, and Landrigan was executed forthwith.

Under my proposal, the Court would, instead, have paused to consider the concerns of the four dissenting Justices. Although the Court’s rapidly-issued order does not elucidate these, they were doubtless based on considerations appropriate to the procedural context, e.g., questions as to the basis on which the Court was exercising jurisdiction, or as to whether the State had engaged in inequitable

both each other and the Rule of Four by hypothesizing that in Hill v. McDonough, 548 U.S. 940, 941 (2006) (denying interlocutory injunction; but cf. supra note 39 (noting statement of Shapiro et al. that the Hill ruling came on “an application for a stay of execution pending certiorari”)), four Justices questioned whether the Eleventh’s equitable holding was consistent with the Court’s recent decision in Hill’s favor in Hill v. McDonough, 547 U.S. 573, 578, 585 (2006), but that in Hill v. McDonough, 549 U.S. 987, 987 (2006) (denying certiorari after Hill’s death), no Justice thought the ruling below was cert-worthy by traditional criteria. That would leave only the question of what difference any of this should make in deciding whether the Court acted prudently in denying a stay in a situation where four Justices believed that the Court of Appeals had given an unduly constricted reading to a prior mandate of the Court.

To answer a question that I hope many fewer readers are likely to ask, Hill does not contradict Goldstein’s hypothesis regardless of its actual procedural posture. If the Justices’ 5-4 stay denial did represent a ruling on a request for an interlocutory injunction, then it fell into group (1) described supra note 50. If the ruling was on an application for a stay pending certiorari, then it fell into group (2).

77. See Landrigan v. Brewer, No. CV-10-02246, 2010 WL 4269559, at *1, *12 (D. Ariz.), aff’d, 625 F.3d 1144, 1145 (9th Cir.), reh’g en banc denied, 625 F.3d 1132, 1132-33 (9th Cir. 2010).

78. See Brewer, 562 U.S. 996 (criticizing plaintiff for having made insufficient showing to justify District Court’s order); John Schwartz, Murderer Executed in Arizona, N.Y. TIMES, Oct. 28, 2010, at A19.

The converse situation, which also would have resulted in a stay under my proposal, arose in Ferguson v. Lombardi, 134 S. Ct. 1582 (2014). There, the District Court had ordered the State to disclose certain information about its lethal injection protocol, the Eighth Circuit vacated the order on a petition for mandamus, see In re Lombardi, 741 F.3d 888 (8th Cir. 2014), and the Supreme Court denied a supervisory stay on a 5-4 vote, see Ferguson, 134 S. Ct. at 1582. As indicated supra note 67, Jeffrey Ferguson was executed on March 26, 2014.

79. The District Court’s opinion, headed “ORDER GRANTING MOTION FOR A TEMPORARY RESTRAINING ORDER,” Brewer, 2010 WL 4269559, at *1, concluded, “IT IS HEREBY ORDERED that Plaintiff’s Motion for a Temporary Restraining Order or a Preliminary Injunction is granted... [and] Defendants are enjoined from carrying out Plaintiff’s sentence of death until further order of the Court.” Id. at *12 (citation omitted). The State took an appeal from this order (which would have been proper in the case of a preliminary injunction, but not of a temporary restraining order, see 28 U.S.C. § 1292(a)(1) (2012)), and the Ninth Circuit explicitly determined to “construe [the] order as one for a preliminary injunction,” Landrigan, 625 F.3d at 1145 n.1, which is plausible enough. The order of the Supreme Court, however, reads:
conduct by withholding information it had been ordered to provide below and then relying on the absence of that information to prevail in the Supreme Court.80

My proposal, similarly, would have resulted in a stay of the execution of Scott Allen Hain. The issue in controversy as his execution approached and his lawyers were seeking clemency from the Governor was whether the applicable federal statute authorized payment to counsel for their efforts. 81 A divided Tenth Circuit panel gave a negative answer, but noted that the Circuits were split on the question. 82 It granted a stay of execution pending a petition for en banc review; the en banc Court of Appeals granted review and declined to vacate the stay. 83 On the government’s last-minute motion, and over the dissent of four Justices, the Supreme Court vacated the stay in an unadorned order, 84 and Hain was executed that night. 85

“[A]pplication to vacate the order by the district court granting a temporary restraining order . . . is granted.” Brewer, 562 U.S. at 996. If, indeed, the District Court’s order were a temporary restraining order, the Court’s jurisdiction to vacate it would have been “a matter which is doubtful at best.” See McGraw-Hill Cos. v. Proctor & Gamble Co., 515 U.S. 1309, 1309-11 (1995) (Stevens, Circuit Justice). 80. See John Schwartz, Murderer Executed in Arizona, N.Y. TIMES (Oct. 27, 2010), http://www.nytimes.com/2010/10/28/us/28execute.html?_r=0&pagewanted=print. This article reported my comment:

The state flatly stonewalled the lower courts by defying orders to produce information, and then was rewarded at the Supreme Court by winning its case on the basis that the defendant had not put forward enough evidence. That is an outcome which turns simple justice upside-down and a victory that the state should be ashamed to have obtained. Id. The District Court had observed: “[A] party cannot refuse to provide discovery necessary to the opposing party’s case and then claim that the opposing party’s claims fail for lack of factual support.” Brewer, 2010 WL 269559, at *10 n.6; see also Editorial, No Justification, N.Y. TIMES, Oct. 29, 2010, at A30 (commenting editorially that the Court “failed, shamefully” in allowing execution “to proceed based on [the] stark misrepresentation” that Landrigan had failed to produce evidence when, in fact, “the state defied four orders from a federal district court to produce it”). 81. See Hain v. Mullin, 324 F.3d 1146, 1147 (10th Cir. 2003). 82. See id. at 1147, 1149. 83. See Hain v. Mullin, 327 F.3d 1177, 1179 (10th Cir. 2003). 84. Mullin v. Hain, 538 U.S. 957, 957 (2003). Because the majority tendered no explanation, there is no actual rationale to discuss, only such hypothetical ones as a student may create. For example, perhaps the majority thought that, regardless of how the underlying issue of compensating the lawyers for clemency efforts was resolved, there would have been no impact on the inmate’s situation because he did, in fact, have counsel at the time. If so, it might be worth pointing out that the extensive efforts needed for professionally competent clemency representation in a capital case, see ABA GUIDELINES, supra note 12, Commentary & Guideline 10.15.2, at 1088-90 (describing duties of clemency counsel), must begin far in advance of the execution date. In any event, although an order accompanied by a rationale would have been better than the one actually issued, see infra text accompanying note 104, the right place for sorting out the competing legal arguments was in the courts before Hain’s execution, not in the law reviews afterwards. 85. See Hain, 327 F.3d at 1179.
Subsequent events suggest that the Court would have done well to take the time for full consideration of the views of its four Members, who were unpersuaded that it had acted prudently. Hain’s attorneys continued to pursue payment, and eventually the en banc Tenth Circuit concluded, in an 8-3 opinion written by the dissenting panel judge, that the federal statute entitled them to it. In due course, the Supreme Court cited this opinion in its 7-2 ruling agreeing with that conclusion.

The problem before the Court in these cases had to do with the wise exercise of its authority in ruling on the applications before it, not with the Rule of Four applicable to certiorari petitions. No constructive purpose would be served—and, indeed, collateral damage to the relevant law might be done—by forcing capital litigants to contort those situations into ones involving certiorari petitions simply in order to benefit from a putative four-votes-for-stay rule originating in a different context ninety years ago. There is no policy justification for a requirement that counsel for the inmate under warrant file a certiorari petition that would not otherwise be supported by professional considerations.

The current murky situation, however, encourages such behavior—further burdening the Court and opening new possibilities for arbitrariness. In Taylor, for example, the inmate’s Court filings included a petition for certiorari before judgment, no doubt because counsel hoped that filing such a petition—notwithstanding its modest

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86. Mindful that the timing of Supreme Court merits consideration of issues of general importance to capital litigation has already resulted in a steep body count among prisoners who were right too soon, see supra note 7, those Justices might well have thought that the Court was unnecessarily risking the creation of another such situation by stepping in to truncate orderly consideration below of an issue that was percolating through the Circuits.

87. See Hain v. Mullin, 436 F.3d 1168, 1171, 1175 (10th Cir. 2006) (en banc).


89. There is an extensive body of law on interlocutory appellate stays and injunctions, one whose rules are designed in general for situations remote from capital litigation. See SHAPIRO ET AL., supra note 2, ch. 17. The soundness of those rules should be considered in connection with the situations they were designed to address, see, e.g., Jill Wieber Lens, Stays Pending Appeal: Why the Merits Should Not Matter, Fla. St. U. L. REV. (forthcoming 2015), available at http://ssrn.com/abstract=2571003, while the special concerns of capital cases under warrant should be dealt with through a rule addressed to that context.

90. In Landrigan’s case, for example, counsel would have had to file a moonshot certiorari petition in a situation where he had been the prevailing party below. See SHAPIRO ET AL., supra note 2, at 88-89, 426. This would be a bizarre requirement indeed to impose on a party opposing his adversary’s motion to vacate an interlocutory restraint entered below.

91. See supra text accompanying notes 14-21 (describing Taylor). The discussion in text also applies to the case of Goodwin, another plaintiff in the same litigation, whose filings a few weeks after Taylor’s included a certiorari petition. See Goodwin v. Lombardi, 135 S. Ct. 780, 780 (2014); supra notes 15-16.
probabilities of success—would improve the chances of obtaining a stay in the event that four Justices favored one.

But there is no sound basis for a rule that would have granted a stay to Taylor while denying one to his late co-plaintiffs, Michael Worthington and Earl Ringo. Both those inmates had sought stays a few months earlier in the same litigation under identical circumstances (i.e., with their appeal of the District Court’s dismissal of the action pending undecided in the Eighth Circuit), and were denied on a 5–4 vote in the Supreme Court. The substantial relief that all three litigants desired was for the Supreme Court to grant a stay of execution while the Circuit considered the appeal. Distinguishing Taylor’s case on the basis that

92. See SHAPIRO ET AL., supra note 2, at 85–86, 287–88. Taylor’s theory in support of acceleration was that the Eighth Circuit, which had made its views on the merits known during prior litigation, had been irresponsibly dilatory in deciding the pending appeal, with the result that plaintiffs were being progressively executed in deference to an anticipated Circuit Court ruling that was unlikely to provide the Supreme Court with any additional illumination. See Petition for Writ of Certiorari for Defendant-Appellant at 30–31, Taylor v. Lombardi, 135 S. Ct. 701 (2014) (No. 14-7157).

93. See supra note 16 and accompanying text (noting prior stay applications arising from the same litigation that had received four votes). If, indeed, that was counsel’s strategy, she may have considered it successful to the extent that the presence of the certiorari petition put her in a position to argue for reconsideration on the basis that the Court’s action was inconsistent with the Rule of Four. See supra notes 20–21 and accompanying text. As indicated above, see text accompanying note 75, the Rule of Four only applies to cases coming to the Court by certiorari. Cf. Memorandum from Justice William H. Rehnquist, supra note 55, at 3 (stating that the Court had determined at the time of Barefoot v. Estelle, 463 U.S. 880 (1983) (discussed infra note 106) that five votes were required to grant certiorari before judgment, and that stay practice should correspond). Whether Justice Rehnquist’s memorandum accurately reports past or current practice, and whether any such considerations entered into the Court’s summary disposition of Taylor’s case, are, of course, questions that went unaddressed by that disposition. This is regrettable. As discussed infra Part IV, there is no good reason why public knowledge respecting basic matters of Court practice in capital cases depends upon the accuracy of speculative deductions based upon arcane data. Whatever the rules are, the Court should announce them.


Under my proposal, four Justices could have determined in May, when the Court granted a stay to one of the plaintiffs in the underlying litigation, Russell Bucklew, that all subsequently-arriving plaintiffs from that case would be similarly treated. See Bucklew v. Lombardi, 134 S. Ct. 2333, 2333 (2014). Or they might have concluded that Bucklew’s situation was unique, and did not warrant such a “hold.” See infra note 95 (describing Bucklew). In that event, Worthington’s execution would have been stayed in consequence of the Court’s 5–4 decision of August 5, Worthington, 135 S. Ct. at 22, and each of the later-arriving cases listed supra note 16 would have benefitted from the automatic stay described supra note 44 and accompanying text. See also supra note 70 (providing a similar example of the workings of my proposal).

95. The Court, had, earlier in the year, granted exactly that relief in the case of another plaintiff in the same litigation, one who claimed that he had a particular medical condition making application of the State’s lethal injection protocol to him particularly risky. See Bucklew, 134 S. Ct. at 2333 (“[T]he [a]pplication for stay of execution of sentence of death . . . [is] treated as an application for stay pending appeal in the . . . Eighth Circuit. [The] [a]pplication [is] granted . . . .”).
counsel for Worthington and Ringo had, quite rationally, not inflicted a tangential piece of paper on the Court would represent formalism gone mad. The three prisoners were identically situated in every respect that mattered.\footnote{96} Having satisfied four Justices that the stay equities were in their favor, all three deserved to have had their executions stayed. Under my proposal, all three would have.

IV. MOVING FORWARD

The first needed step is for the Court to stop permitting executions when four Justices object. It should take that step.

If it did, though, the rest of us might never know it had. At the very least, the information would probably not reach us for many decades.\footnote{97} If the Court adopted my proposal in full tomorrow but made no other change to its existing way of doing business we earthlings would be aware of nothing except the absence of stay denials over four dissents. We would be left to guess whether some change in practice had taken place, and precisely what the contours of the change might have been.

An experienced observer of the Court has recently commented that its

intehal procedures are largely unwritten, developing in common law fashion and documented, if at all, in internal memoranda that become public only when the papers of a retired or deceased Justice are released. The Court’s published rules principally address the ordinary practice of lawyers appearing before the Court; even an internal matter as fundamental as the Rule of Four, specifying that it takes the votes of four Justices to grant certiorari, does not appear in a statute or formal rule of the Court. And the Court has never reduced to writing internal operating procedures, of the sort issued by most of the federal courts of appeals that describe how it handles cases internally or modifies decisions after the fact.\footnote{98}

\footnote{96} See supra note 16 and accompanying text.

\footnote{97} Depending on the arrangements today’s Justices reached when they archived their papers, and depending on the contents of those papers, the data might become known eventually. At that time, of course, it would be describing practices long past. For example, in Memorandum from Justice William J. Brennan, Supreme Court of the U.S., to the Conference (June 25, 1984) (Blackman Papers, Library of Congress, Box 409, Folder 3) (on file with the Hofstra Law Review), the Justice reports the policies that he and Justice Rehnquist have concluded should be followed when five Justices wish to dismiss as improvidently granted a certiorari petition that had been granted with four votes, see supra note 42. The last sentence of the Memorandum reads: “Finally, we think our policy on this issue is a matter best left unpublished and should be treated as an internal rule.” Memorandum from Justice William J. Brennan, supra, at 2.

\footnote{98} Charles Rothfeld, Should the Supreme Court Correct Its Mistakes?, 128 HArV. L. REV. F. 56, 59 (2014); see also Robbins, supra note 35, at 23-25.
A discussion of the extent to which these phenomena may be desirable, or even justifiable, as a general matter is well beyond the scope of this modest idea.

But something is seriously amiss when a Court that is commendably willing to engage in public dialogue about changes to its procedural rules respecting such matters as the font to be used in briefs\(^99\) ignores the repeated efforts of stakeholders to have it formulate openly, or even state clearly, its practice respecting a life-or-death problem\(^100\) — going so far, indeed, as to issue a written order lacking a single syllable of reasoning or authority that denies a capital litigant permission to file a pleading asking it to do so.\(^101\)

There is a difference between what the Court can do, and what it should do. In addition to adopting my proposal about voting rules in stay-of-execution situations, there are some things the Court should do about those cases.

To start with the simplest available improvement, the Justices should be mindful that every few words they vouchsafe regarding grants or denials of stays of execution are valuable. For example, in *Brewer v. Landrigan*,\(^102\) whose substance I have not hesitated to criticize in strong language, full credit should be given to the majority for writing the four sentences of rationale which provided the opportunity for public input.\(^103\) In contrast, the majority in *Hain v. Mullin* impoverished public dialogue by leaving its action unexplained.\(^104\) On the level of the individual Justice, a published explanation of the practices of that Member provides critical data to interested outsiders.\(^105\) These include, among many others: actual and potential individual and institutional litigants and their counsel; scholars; journalists; editorial writers; lower court judges; and support staff throughout the judicial system.

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\(^100\). For that reason, although having Congress write specific rules of judicial procedure is generally a poor idea and is perhaps premature under present circumstances, congressional pressure on the Court to respond to the issue in some public way would not be misplaced. See infra notes 102-08 and accompanying text (suggesting several possibilities).

\(^101\). See supra note 20 (quoting order in full).

\(^102\). 562 U.S. 996 (2010).

\(^103\). See supra note 78. Similarly, only a few words would be needed to clear up the issues raised supra notes 67, 93.

\(^104\). See supra note 84 and accompanying text.

\(^105\). The publication need not necessarily take place within the pages of the U.S. Reports. Justices may communicate with the public in many ways, including writing articles, giving interviews, and appearing on a variety of physical and virtual platforms.
More broadly, the Court should address the problem in a reasoned and public way.

It might grant a stay in a pending case to consider its stay practices, but, for many reasons, that would not be the ideal route to follow. Leaving aside the practical difficulties and the institutional impropriety of a court conducting internal rulemaking in the context of a private lawsuit, to go down that path would be to suggest an adversariality that should be absent from a discussion of how to process cases justly and efficiently. The question is not whether the Court’s rulings are correct but whether they are being given judicious consideration.

The Court should announce that it is reviewing that issue, and invite comment on what it ought to do. The responses could address both the substance of any rule, and the format by which the Court should publicize it.

There are, in short, a number of constructive measures the Court could take in the interests of “remedying an anomaly that does it no credit.” Refusing to acknowledge that a problem exists is not one of them.


107. See Revesz & Karlan, supra note 4, at 1111 (calling for the Court to invoke its rulemaking procedures, rather than consider the issue in the litigated case).

108. Of course, one possibility would be an amendment to the Court’s rules. But there are many others. The Court could cause its views to be expressed in a Clerk’s comment to its rules, in a Clerk’s memorandum of guidance to counsel, or in a press release. Any of these routes would at least result in a statement by the Court of what its practice is—a necessary prelude to any future changes.

INTRODUCTION: THE PAST, PRESENT, AND FUTURE OF EFFECTIVE DEFENSE REPRESENTATION IN CAPITAL CASES

Eric M. Freedman*

The Articles in Part Three of the Hofstra Law Review Symposium marking the tenth anniversary of the publication by the American Bar Association (“ABA”) of a revised version of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“Guidelines”)¹ build on the experience of the past to teach lessons about the present and anticipate progress to be made in the future.

Part Three begins with a contribution by Russell Stetler, a long-time capital defender who serves as the National Mitigation Coordinator for the federal death penalty project, and Aurélie Tabuteau, who is pursuing graduate studies in criminal justice issues. Their Article, The ABA Guidelines: A Historical Perspective,² begins by addressing “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,”³ and represent the wish-list of an unrepresentative group of visionaries rather than articulating—as they say they do—standards that “are not aspirational [but rather] embody the

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³ Id. at 732.
current consensus about what is required to provide effective defense representation in capital cases.\textsuperscript{4}

In fact, the “Guidelines embody not a ‘Cadillac defense,’ but the minimum standards developed by successful capital defenders throughout the modern era.”\textsuperscript{5}

As the authors carefully recount, the Guidelines: (1) were created and revised by a broadly consultative methodology involving a variety of groups and practitioners, including prosecutors, both inside and outside the ABA;\textsuperscript{6} (2) relied upon numerous professional sources, including practice guides for capital defense lawyers, academic articles and treatises, governmental and private studies, and judicial opinions;\textsuperscript{7} and (3) were squarely based on the practices of real-world lawyers with heavy caseloads.\textsuperscript{8}

In establishing the standard of care based on such sources,\textsuperscript{9} the U.S. Supreme Court has simply applied the same methodology to the field of capital representation as would be applied to any other specialized area of knowledge, whether it be medicine or aviation safety.\textsuperscript{10}

Just as in those fields, one expects—indeed one hopes—to see continuing evolution in the applicable standards, as the accumulating experience of the past provides insight to the future. The fact that “[f]uture practitioners may be found ineffective for employing techniques and strategies that would have been state-of-the-art at a prior time”\textsuperscript{11} is a practical embodiment of a bedrock ethical aspiration of the profession: “A lawyer should strive to attain the highest level of skill, to

\begin{thebibliography}{11}
\bibitem{4} ABA Guidelines, supra note 1, Guideline 1.1, at 920.
\bibitem{5} Stetler & Tabuteau, supra note 2, at 743. Of course, a minimally adequate defense in a capital case will be far more expensive than in a non-capital case, but that reflects no more than the uncontroversial fact that “because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.” ABA Guidelines, supra note 1, Guideline 1.1, at 921; see Eric M. Freedman, \textit{Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines}, 31 Hofstra L. Rev. 1097, 1097-1100 (2003) (detailing reasons that “a state’s decision to have a criminal justice system in which death is available as a sanction necessarily entails substantially higher costs than the contrary decision does”).
\bibitem{6} See ABA Guidelines, supra note 1, Guideline 1.1, at 914-16; Stetler & Tabuteau, supra note 2, at 745; see also Eric M. Freedman, \textit{Introduction}, 31 Hofstra L. Rev. 903, 912 (2003) (noting that the 2003 Guidelines “came to the floor of the House of Delegates with the co-sponsorship of a broad spectrum of ABA entities and passed without a single dissenting vote”).
\bibitem{7} See Stetler & Tabuteau, supra note 2, at 745-47.
\bibitem{8} See id. at 744-45; see also id. at 742 & nn.64-69, 743-44, 745 & nn.84-110, 746 nn.112-24.
\bibitem{9} See id. at 746, 747 & nn.134-36.
\bibitem{11} Stetler & Tabuteau, supra note 2, at 749 n.139.
\end{thebibliography}
INTRODUCTION

improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”

The next Article in Part Three, Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels, exemplifies the process at work. The authors are Professor Sean D. O’Brien, an experienced capital litigator, who was a leader in creating the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, and Dr. Kathleen Wayland, who has long employed her training as a clinical psychologist in assisting capital defense teams to integrate mental health themes into mitigation narratives.

In Part Two of this Symposium, O’Brien and Wayland detailed the scientific, logical, and legal flaws in the common prosecutorial tactic of branding the capital client “a psychopath,” irremediably driven by his Antisocial Personality Disorder to a life of evil. In their current contribution, the authors review a series of successful and unsuccessful capital defense representations, and, integrating this empirical evidence with the latest findings from cognitive psychology and the Capital Jury Project, set forth an affirmative approach to countering the government’s use of prejudicial psychiatric labels.

Whenever the mitigation phase of a capital case litigation winds up “focusing on diagnostic labels and psychometric testing,” the defendant is severely—often fatally—disadvantaged, even if his case is “built upon accepted principles of forensic mental health testimony” and his adversary’s is not. Even if the jurors accept the mental health diagnosis proffered by the defense (and they probably will not), the information will, in all likelihood, “not produce an empathetic response.”

16. See generally id.
17. O’Brien & Wayland, supra note 13, at 752.
18. Id.
19. Id. at 753; see id. at 769-70.
The most basic way in which people understand the world is through stories. The successful mitigation presentation in a capital case accordingly narrates the story of the client’s life in a way that will “reveal his innate human qualities, his flaws as well as his strengths, and enable decision makers to see him or her as like themselves.” Mental health assessments are of use not for their independent persuasive force, but for their role in helping communicate the client’s life story to the jury. O’Brien and Wayland continue by noting: “Diagnoses, psychometric test scores and brain scans are not narratives. These tools persuade only when accompanied by compelling stories that reveal the client’s intrinsic humanity.”

What works, in short, is “a thoroughly investigated, truthful narrative of the [client’s] life” that sparks the jurors’ imagination and enables them to see the individual before them as a unique human being with “hopes, dreams, beliefs, and values,” whose trajectory might, under different circumstances, have been theirs.

The final Article in Part Three, Trying to Get It Right—Ohio, from the Eighties to the Teens, by Margery M. Koosed, describes the evolution of capital defense standards from the viewpoint of system-building. The Guidelines “set high performance standards not just for lawyers, but for death penalty jurisdictions,” as well. As a legal matter, it is the government that bears the Constitutional obligation to provide effective assistance of counsel. As a practical matter, that obligation cannot effectively be discharged piecemeal, but requires the creation of institutional structures that “function well in the present and evolve effectively over time.”

20. Id. at 770-71.
21. Id. at 775.
22. Id. at 773-75.
23. Id. at 774.
24. Id. at 753.
25. Id. at 769.
27. See generally id.
28. Freedman, supra note 5, at 1103 (footnote omitted); see ABA GUIDELINES, supra note 1, Commentary to Guideline 1.1, at 924 (“Guidelines 1.1-10.1 contain primarily principles and policies that should guide jurisdictions in creating a system for the delivery of defense services in capital cases, and Guidelines 10.1-10.1.2 contain primarily performance standards defining the duties of counsel handling those cases.”).
29. See Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980). That is why the Guidelines “not only detail the elements of quality representation but mandate the systematic provision of resources to ensure that such representation is achieved in fact.” ABA GUIDELINES, supra note 1, Commentary to Guideline 1.1, at 938 & n.71 (citing Cuyler, 446 U.S. at 344-45).
30. Freedman, supra note 5, at 1103.
In her Article, Koosed, who has played multiple roles in the efforts she describes, recounts the instructive history of one jurisdiction’s ongoing decades-long efforts to create such structures. The fabric of those structures, it turns out, are woven from just the same materials as are used to create a standard of care for the performance of individual lawyers. The Ohio capital defense system is the evolving product of: the lessons learned and taught by state and national practitioners; studies by state and national governmental and private bodies; academic research; court decisions; administrative mandates, and diverse groups and officials motivated to ameliorate particular injustices. Progress has come about through the synergistic efforts of these constituencies, and the way forward depends on bringing additional stakeholders on board.

The Ohio experience, thus, reinforces a basic predicate of the Guidelines: efforts to improve capital defense representation have, as their ultimate beneficiary, the criminal justice system itself—a system in which every person in the country is a stakeholder.

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31. See generally Koosed, supra note 26.
32. See, e.g., id. at 786-89.
33. See, e.g., id. at 790-91, 793-97, 807-14.
34. See, e.g., id. at 790-91, 794.
35. See, e.g., id. at 784-86, 793, 798-00.
36. See, e.g., id. at 791-92, 797, 802-03, 806-07, 814-16.
37. See, e.g., id. at 800, 813.
38. See id. at 822-23.
39. See Eric M. Freedman, Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases, 4 Ohio St. J. CRIM. L. 183, 193 (2006). It has been noted that:

The interest in insuring that the decision of the government to execute a person in the name of its citizens is based upon the most complete factual and legal picture belongs not just to each individual actor in the legal system—including judges and victims as well as defendants and prosecuting and defense attorneys—but to society as a whole.

Id.
THE ABA GUIDELINES: A HISTORICAL PERSPECTIVE

Russell Stetler*
Aurélie Tabuteau**

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,¹ 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”)² 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).


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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*, Justice Alito disparaged the Guidelines as having no “special relevance” to Sixth Amendment performance standards. 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.” Thus, the Guidelines, in the Justice’s opinion, do not merit a “privileged position” in determining the obligations of capital defense counsel. 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.”

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*, 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.” 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.

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).
car terms, something like a Ford Taurus, not a Cadillac. 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.” Justice Kagan continued by stating: “[L]awyers in criminal courts are necessities, not luxuries.” 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, which struck down all then existing death penalty statutes. 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. By 1976, five of the new statutes had reached the Supreme Court. 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. 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

11. Id.
12. Id.
14. Id. at 239-40 (finding the death penalty arbitrary and unconstitutional as applied when jurors have unfettered discretion to impose it).
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. 18

The new statutory frameworks of Georgia, Florida, and Texas, however, survived Supreme Court scrutiny. 19 All three statutes guaranteed that death-sentenced prisoners would have an automatic appeal to their highest state courts. 20 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. 21 In Gregg v. Georgia, 22 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. 23 As Professor Craig Haney has astutely pointed out, “there was

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.
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 109 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.”\textsuperscript{24} 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.”\textsuperscript{25}

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.\textsuperscript{26}

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.\textsuperscript{27} The Court concluded that the Eighth and Fourteenth Amendments require that the


\textsuperscript{25} \textit{Id.} at 836.

\textsuperscript{26} James Jenner, \textit{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. \textit{See, e.g.}, Verlin R. F. Meinz & Mark Schuster, \textit{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”).

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.”

Meanwhile, practitioners in the South were aggressively developing strategies to investigate and present effective mitigating evidence—and embracing multidisciplinary teamwork as early as 1976. 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.

The article also emphasized the importance of investigation, consistent theories in both phases, 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.”

Balske also appreciated

28. Id. at 604.
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.”

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. 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.

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”).


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. 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. 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. 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.” 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.” 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.” These authors also stressed the importance of engaging the services of a mitigation specialist at the


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 322, 323 (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.”

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. He was certified to stand trial as an adult, and pled nolo contendere in the district court. 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.”

Following the rule announced in Lockett v. Ohio, the Supreme Court reversed, holding that capital sentencers may not exclude mitigating evidence from their consideration. 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.

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. He discussed trial

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).
49. Id. at 115-16 (footnotes omitted) (citing Bellotti v. Baird, 443 U.S. 622, 635 (1979)).
counsel’s “duty to investigate the client’s life, history, and emotional and psychological make-up” in death penalty cases. 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.

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. Other Champion articles in this period focused on the other myriad complexities of capital defense representation.

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.


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”).55 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.”56 The Commentary added: “Facts form the basis of effective representation.”57

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 1985.58 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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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.
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. As the Introduction to the 1989 Guidelines explained: “[T]hey enumerate the minimal resources and practices necessary to provide effective assistance of counsel.” 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.”

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.” 73

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. 74

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. 75 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. 76 The more extensive
Commentary that accompanied the 2003 edition, 77 with its 357
footnotes, clearly shows the influence of the effective practice from the

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; ABA, List of
Cases Citing to the 2003 ABA Guidelines, available at http://www.americanbar.org/content/
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. 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.

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. 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. 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). Only seven death sentences were imposed, and all of them were ultimately overturned. The day-to-day practice of the CDO was not an idiosyncratic invention of its management, but rather a

78. See generally id.
79. See generally id.
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).
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, Sandra Babcock, Vivian Berger, John Blume, Stephen Bright, Randall Coyne, Phyllis Cocker, James Ellis, Lyn Entzeroth, Eric M. Freedman, Ruth Friedman, William Geimer, Craig Haney, Jeffrey Kirchmeier, James Liebman, Ruth Luckasson, Andrea Lyon, Michael Mello, Michael Radelet, Clive Stafford-Smith, Carol Steiker, Jordan Steiker, Bryan Stevenson, Scott Sundby, Kim Taylor-Thompson, Welsh White, and Larry Yackle, 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

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.
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.
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.
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.
108. Id. Guideline 1.1, at 930 n.37; id. Guideline 8.1, at 979 n.130.
Champion (published by the National Association of Criminal Defense Lawyers) and Indigent Defense (published by the NLADA). The authors of these articles were also seasoned practitioners, including John Blume, Stephen Bright, James J. Clark, Marshall Dayan, Kevin M. Doyle, Edith Georgi Houlihan, Rick Kammen, Kevin McNally, Edward C. Monahan, Lee Norton, Michael Ogul, Russell Stetter, and Mary Ann Tally. Over a dozen other footnotes referenced the trial manuals of Alabama, California, Florida, Kentucky, and Texas. 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; references to the major death penalty cost studies by the Spangenberg Group and U.S. District Court Judge James R. Spencer’s subcommittee on the cost of the federal death penalty, and, notes identifying significant new

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.
115. Id. Guideline 10.10.2, at 1053 n.263.
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.
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.
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.
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.
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. 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. These sources are precisely the kinds of contemporaneous supporting authorities specified by Justice Stevens in Padilla v. Kentucky, as reflecting prevailing professional norms—in addition to “American Bar Association standards and the like.”

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


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.


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.

be chosen by successor counsel” in post-conviction. 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, 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. It is a tribute

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.


139. Consider, for example, that a great capital defense lawyer of the pre-\textit{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.

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.
I. INTRODUCTION

Psychiatric labels are often used in judicial proceedings involving issues of life, liberty, or access to rehabilitative treatment. The Hofstra Law Review invited us to expand our recent discussion of the use of such labels to invoke prejudicial stereotypes in death penalty cases.¹ Our previous discussion urged courts to reconsider the admissibility of the construct of psychopathy and evidence of certain “personality disorders” because of serious questions and controversies in the mental health field over the reliability and validity of such evidence.² We also suggested that capital defense teams can undermine and rebut that evidence by complying with contemporary standards of performance articulated in the American Bar Association (“ABA”) Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (“Guidelines”) and the Supplementary Guidelines on the Mitigation Function of Capital Defense Teams (“Supplementary Guidelines”).³

². Id. at 528-31, 558-61, 565-66.
Given the length and depth of that discussion, we could only briefly discuss the importance of counter-narrative; the defendant’s life story, based on an extensive longitudinal and developmental investigation of the defendant and his family’s life trajectory, is the most effective tool to counter the dehumanizing effect of prejudicial psychiatric labels. Adherence to tried-and-true standards of practice calling for the presentation of narrative mitigating evidence transcends the proverbial “battle of the experts” over diagnostic labels that fails to humanize the client.

Every homicide prosecution involves a compelling narrative of a violent crime committed by the defendant. Our original article explained how prosecutors’ prejudicial psychiatric labels, such as “Antisocial Personality Disorder” (“ASPD”) and “psychopathy,” are used to advance that narrative by invoking stereotypes that fuel fear and reduce the decision-maker’s natural reluctance to kill another human being.4 Prosecutors use these labels to appeal to jurors’ and judges’ preconceived notions about violent offenders that define them as “Other,” making it easier for them to execute the defendant. In Part II, we explore examples of cases in which the client’s humanity became lost in litigation focusing on diagnostic labels and psychometric testing.5 Although the defense against the death penalty in each of these cases may have been built upon accepted principles of forensic mental health testimony, it was not sufficiently persuasive to withstand the slightest inconsistency or rebuttal. We suggest that such cases place the focus in the wrong place; it is the client’s life story, not diagnostic labels, that reveals his humanity.6

Part III explores human decision-making processes in relation to preexisting cognitive mindsets, which bias the processing and interpretation of information, and can influence behavior.7 Cognitive psychology provides a useful framework for explaining human perceptions, and how implicit or explicit biases can interfere with the


5. See infra text accompanying notes 30-47.

6. See infra text accompanying notes 48-51; Part III.

7. See infra Part III.
objective interpretation of data in ways that affect judgment and behavior. This research underscores the importance of narrative to the decision-maker’s ability to understand and respond to mitigating evidence, especially when such evidence includes psychiatric or cognitive impairments. Capital Jury Project (“CJP”) data has shown that jurors have difficulty assimilating mitigating mental health testimony because they distrust mental health experts as “hired guns,” and because the “antisocial” or “psychopathic” labels invoke the fictitious popular-culture stereotypes of violent criminals. This tendency is exacerbated by the use of psychiatric labels, which are particularly damaging and inherently flawed. As a result, life-or-death decisions can be made based on damaging stereotypes and pervasive cultural myths associated with criminal behavior and prejudicial psychiatric labels.

On the other hand, a defense compliant with prevailing standards enables decision-makers to accommodate new information about the defendant by altering or expanding their schemata to interpret the new information. In Part IV, we examine successful cases in which expert testimony is presented in the context of a humanizing life history narrative, as told by lay people and lay experts who know the client. This enables juries to transcend stereotypes, and to identify with the defendant—to see him in some fundamental way as being like themselves. Jurors who can experience the client’s distress can also empathize with him, and are more likely to respond with mercy. The same information presented as a bare chronology of the defendant’s life or rote recitation of risk factors, devoid of narrative principles such as plot and conflict, does not produce an empathetic response. Experience shows that a thoroughly investigated, truthful narrative of the defendant’s life, told by those who know, love, and understand him, actually works, even in the most aggravated homicide cases.

In Part V, we conclude that the most effective tool to counter these incomplete and misleading stereotypes is to present a compelling, humanizing narrative that extends backwards into the developmental trajectory of the defendant’s life and family. This is why prevailing standards of practice demand a detailed life history investigation.

8. See infra text accompanying notes 65-73, 98-107. The CJP was initiated in 1991 by a consortium of university-based researchers from fourteen states with support from the National Science Foundation. What Is the Capital Jury Project?, SCH. CRIM JUST. ST. UNIV. N.Y. ALBANY, http://www.albany.edu/scj/13189.php (last visited Apr. 12, 2015). The CJP was designed to: (1) systematically describe jurors’ exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors’ exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness. Id. For more information, see id.

9. See infra Part IV.

10. See infra Part V.
conducted by a qualified team applying prevailing standards of practice, as described in the Guidelines and Supplementary Guidelines. Investigating, developing, and presenting the client’s humanizing narrative are indispensable components of contemporary standards of performance for capital defense counsel. These standards provide an effective roadmap that enables the defense team to uncover and tell the stories of the defendant’s life that reveal his innate humanity.

II. LABELS, STEREOTYPES, AND THE “BATTLE OF THE EXPERTS”

“[It] is not clear to us[] that psychiatric terminology affects juries.”
– Chief Judge Frank Easterbrook

“The detrimental impact of the public stigma of people with mental illness cannot be overstated.”
– Melody S. Sadler et al., Stereotypes of Mental Disorders Differ in Competence and Warmth

As discussed in our original article, the prosecution uses labels, such as “ASPD,” “sociopathy,” and “psychopathy,” to appeal to the fictional Hollywood stereotype of the remorseless predator depicted in such movies as Silence of the Lambs or Natural Born Killers. Dr.

11. ABA GUIDELINES, supra note 3, Guideline 10.7, at 1021-26; SUPPLEMENTARY GUIDELINES, supra note 3, Guideline 5.1, at 682-83.
12. See generally ANTHONY G. AMSTERDAM & JEROME S. BRUNER, MINDING THE LAW (2nd prtg. 2002) (explaining how storytelling influences the Supreme Court’s decisions regarding the death penalty); LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (2012) (discussing the importance of framing emotional narratives in advocating for clients); PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2014) (explaining the importance of narratives in good lawyering); Sean D. O’Brien, Death Penalty Stories: Lessons in Life-Saving Narratives, 77 UMKC L. REV. 831 (2009) (finding that the use of narratives can be life-saving in death penalty cases); Alex Kotlowitz, In the Face of Death, N.Y. TIMES, July 6, 2003, at 32 (illustrating an excellent example of a successful, well-constructed, and humanizing capital defense narrative). We have found the research and writing of Professor Craig Haney, a professor trained in both psychology and law, to be especially insightful about the intersection of mental health and crime narratives. See generally Haney, supra note 4; Craig Haney, On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence, 77 UMKC L. REV. 911 (2009) [hereinafter Haney, Prison Violence]; Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 SANTA CLARA L. REV. 547 (1995) [hereinafter Haney, Social Context].
13. 686 F.3d 404, 408 (7th Cir. 2012).
16. NATURAL BORN KILLERS (Warner Brothers Pictures 1994); see Haney, Social Context, supra note 12, at 552; Wayland & O’Brien, supra note 1, at 519, 525.
Craig Haney explains that invoking images of these archetypal villains “justifies harsh treatment and insulates us from moral concerns about the suffering we inflict.” Even though there is no scientific support for such Hollywood stereotypes, they “have become so much a part of the public’s ‘knowledge’ about crime and punishment that, despite their fictional, socially constructed quality, they wield significant power in actual legal decisions.” Uncorrected, the stereotype distorts judicial decision-making in multiple ways. A person upon whom such labels are affixed is deemed dangerous, manipulative, selfish, impulsive, remorseless, adept at malingering mental illness, and beyond treatment or rehabilitation. This image of the defendant only widens the “empathic divide” that exists between many white jurors and African-American defendants.

In the prosecutor’s narrative, the victim of the homicide is the tragic protagonist, our client’s crime is the trouble that upsets the moral balance of the universe, and the jury can, through its verdict, restore the universe to a new state of moral balance. It is virtually always a compelling narrative that portrays the defendant as a one-dimensional predatory creature. Professor Philip N. Meyer explains the concept of the “flat character” in narrative theory: “[W]hat they lack, typically, is psychological complexity or the ability to change.” No evidence is as helpful to the prosecution in this effort as “scientific” proof that the defendant is indeed “flat” by virtue of being without human emotions or conscience, and beyond treatment or redemption.

19. See Wayland & O’Brien, supra note 1, at 527.
21. The prosecution’s crime narrative appeals to a narrative structure as described by Professor Linda H. Edwards:

22. MEYER, supra note 12, at 75-76.
23. See Wayland & O’Brien, supra note 1, at 534 (discussing the fallacy of the position that persons alleged to be “antisocial” are inhuman and cannot respond to treatment).
constructed on such stereotypes is not only false, it is deadly. It renders capital decision-makers unable “to perceive capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors’ own.” Dr. Haney emphasizes the “central role of counter-narratives in modern capital trial practice,” explaining:

Absent such a mitigating counter-narrative, of course, most capital jurors will have only the master crime narrative to fall back on. Its familiar but often too simplistic assumptions about the nature of violent crime will lead many of them to judge the defendant, and even to condemn him to death, without ever coming to terms with who he is or why. Mitigating counter-narratives are designed to counterbalance and correct for this kind of truncated inquiry and decision making.

We agree with Dr. Haney that the defense narrative, constructed upon a thorough life history investigation, is the best antidote to the distorting effect of dehumanizing labels.

Unfortunately, defense lawyers often focus primarily on the battle over diagnostic labels, and give insufficient attention to the client’s humanizing life story. We pointed out in our original article the available science that supports challenges to the admissibility of opinion testimony about the construct of psychopathy and related personality disorders, and we suggested how defense counsel can use the fruits of a comprehensive life history investigation to counter such evidence. Counsel should always contest the admissibility of such evidence, and object to the prosecution’s use of experts who have a demonstrated bias or financial interest in peddling ASPD diagnoses and the construct of psychopathy to well-funded buyers. However, diligent efforts must be made to prevent life-or-death decisions from deteriorating into a “revolving door of experts” battling over which label best fits the client. Labels do not humanize; they appeal to stereotype and create false dichotomies; comorbid conditions are the rule rather than the exception among capital defendants.

24. Haney, supra note 20, at 1558.
26. Id.
27. See Wayland & O’Brien, supra note 1, at 539-42, 568-74.
28. See id. at 554-57.
29. Pinholster v. Ayers, 525 F.3d 742, 770 (9th Cir. 2008).
30. See, e.g., Ronald C. Kessler et al., Posttraumatic Stress Disorder in the National Comorbidity Survey, 52 ARCHIVES GEN. PSYCHIATRY 1048, 1058-59 (1995) (finding that the presence of a second lifetime disorder is significantly elevated among people with lifetime post-traumatic stress disorder (“PTSD”)); see also Kathleen Wayland, The Importance of Recognizing
It is easy to find examples of courts rejecting mitigation presentations that were based solely or mainly on diagnostic labels, because the fight over verbiage failed to foster any understanding of the defendant’s humanity or his crime. In *Pinholster v. Ayers*, even where there was no reason to question the credibility of the mental health experts presented by counsel for Scott Pinholster to rebut a pretrial opinion that he was antisocial, one court concluded “that no newly-minted expert theory to explain his behavior would have made a difference” in the face of Pinholster’s behavior during the crime. Because other experts affixed different diagnostic labels, the court concluded that it “[could not] believe the jury would have given it much weight.” In *Overstreet v. Wilson*, another capital defendant, Michael Overstreet, was delusional and exhibited disorganized behavior and speech before and during his trial. Three different mental health experts agreed that he was mentally impaired, but disagreed as to the diagnosis, and Overstreet was sentenced to death. While an appellate court acknowledged there was “little doubt that on occasions Overstreet would have lacked the ability to evaluate his legal situation rationally,” the argument over diagnostic labels obscured the issue. The court characterized counsel’s argument as “harp[ing] on the theme that an Axis I ‘clinical disorder’ is worse than an Axis II ‘personality disorder’ and assert[ing] that] the difference surely would have affected the jury.” The court disagreed: “[I]t was not clear to the state judici... and is not clear to us, that psychiatric terminology affects juries.” Further, the fight over psychometric testing and diagnostic labels overshadowed other mitigation evidence presented by Overstreet’s lawyers. Dismissing

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32. 525 F.3d 742 (9th Cir. 2008).
33. *Id.* at 770.
34. *Id.* at 773 n.32.
35. 686 F.3d 404 (7th Cir. 2012).
36. *Id.* at 412 (Wood, J., dissenting).
37. *Id.* at 406, 408 (majority opinion).
38. *Id.* at 407.
39. *Id.* at 408. In fact, a few months after the court’s decision, the multi-axial system on which Overstreet’s lawyers relied so heavily was abandoned. This highlights another serious problem with placing the primary focus on shifting diagnostic labels and terminology. While health care providers’ descriptions of symptoms of impairment (hallucinations, delusions, disordered thinking, hypervigilance, pressured speech, etc.) remain consistent over time, diagnostic labels may change from one edition of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) to the next.
40. *Overstreet*, 686 F.3d at 408.
counsel’s argument about the significance of the diagnostic mislabeling as “say-so” and “lawyer talk,” the court concluded that the mental health claim “pale[d] beside” the battle of the experts that the court focused on. The case of Wilson v. Trammel is another good example of failed advocacy over labels. Michael Wilson’s trial expert relied primarily on personality tests, such as the Minnesota Multiphasic Personality Inventory–2 (“MMPI-2”) to diagnose Wilson with a personality disorder. Wilson’s friends described his positive character traits, and the trial expert interpreted psychometric testing to explain “the two Michael Wilsons”—the one who committed a violent homicide, and the one his family knew. The prosecutor used computer-generated personality test interpretations to suggest that Wilson had “the characteristics of a psychopath.” In post-conviction proceedings, Wilson alleged that trial counsel overlooked testing data which indicated the MMPI-2 score was invalid, and that he was, therefore, ineffective as counsel for failing to have Wilson retake the test. The hearing on Wilson’s claim was limited to the testimony of trial counsel and the trial

41. Id. at 409-10.
42. 706 F.3d 1286 (10th Cir. 2013).
44. Wilson, 706 F.3d at 1290-91.
45. Id.
46. Id. at 1292. The computer-generated profile of Wilson’s responses to the Millon Clinical Multiaxial Inventory–III produced ammunition for damaging and misleading cross-examination in which subjective traits, divorced from context necessary to an accurate, humanizing interpretation, were presented as character deficiencies:

Dr. Reynolds conceded that the[Millon Clinical Multiaxial Inventory-III] interpretative report stated that “[t]he guiding principle of [Defendant] is to outwit others, exerting power over them before they can exploit him,” and that Defendant was “easily provoked” and “may express sudden and unanticipated brutality,” . . . . He also acknowledged that Defendant had responded “True” to the following statements on the test questionnaire: “Lately, I have begun to feel like smashing things”; “I often get angry with people who do things slowly”; “I have had to be really rough with some people to keep them in line”; and “I sometimes feel crazy-like or unreal when things start to go badly in my life.”

Id. (citations omitted). Personality testing instruments are loaded with questions that force a defendant to choose answers that will make him vulnerable to such cross-examination by the prosecutor no matter how he responds. See id. at 1290. Personality tests produce “computerized narratives [which] have been criticized as lacking validity, being devoid of social history context, inaccurate and misleading, and often false.” George Woods et al., Neurobehavioral Assessment in Forensic Practice, 35 INT’L J. L. & PSYCHIATRY 432, 435 (2012). Experienced capital defense lawyers do not use personality testing because “[t]hese tests do not help to explain a client’s life or experiences in an effective way, and there is a high risk that statements endorsed in the test will be taken out of context to portray the individual negatively, and that long-standing symptoms can be misjudged to reflect personality traits rather than neurodevelopmental disorders.” Id. at 1293.
mental health expert. The psychologist testified that his testing failed to reveal Wilson’s history of auditory hallucinations, and that with more accurate test results, he would have considered a broader range of diagnoses, including bipolar disorder and schizophrenia; he ultimately settled upon a diagnosis that the court described as “schizophrenic paranoid personality disorder.” The issue of life or death turned on the Tenth Circuit’s lengthy discussion parsing Wilson’s performance on personality testing instruments, and the range of conflicting diagnostic interpretations that were possible. After considering the ways in which each party could spin the test results, the Court of Appeals concluded that the “[d]efendant would have been no better off with the evidence presented at the hearing, and in significant ways would have been worse off.” Such are the fruits of engaging in a battle of the experts; Wilson’s humanity was obscured by generic interpretations of computer-scored personality testing.

In none of these cases did the mental health evidence advance the decision-maker’s ability to view the accused as a unique, complex human being, struggling with the burdens of severe mental and emotional impairments—even though that is a true description of all three defendants. In Pinholster and Overstreet, the record established that the postconviction experts’ findings were supported by far more complete and reliable social history evidence than were the opinions of the trial experts. In Wilson, the postconviction case rested on the trial expert’s re-interpretation of personality testing. On paper, the data favored the findings of the postconviction experts in all three cases. Yet, in none of the cases was the decision-maker moved to spare the defendant’s life. The difference between counsel’s failure in these cases, and the successes discussed in Part III, lies in the inability of diagnostic labels, brain imaging data, or psychological testing instruments to communicate the client’s unique and complex humanity. To be accessible to capital case decision-makers, the client’s mental and cognitive impairments must be revealed in the context of his humanizing life story.

48. Id. at 1294.
49. Id. at 1294-95. This is not a diagnosis found in the DSM.
50. Id. at 1307-10.
51. Id. at 1307.
52. See Overstreet v. Wilson, 686 F.3d 404, 413-17 (7th Cir. 2012) (Wood, J., dissenting); Pinholster v. Ayers, 525 F.3d 742, 778-82 (9th Cir. 2008) (Fisher, J., dissenting); supra text accompanying note 31.
53. See supra text accompanying notes 44-46.
54. See supra text accompanying notes 25-29; infra Part III.
55. See infra Part III. Judge Kozinsky criticized performance standards under which “any trial
III. COGNITIVE PSYCHOLOGY, NARRATIVE, AND LIFE-OR-DEATH DECISIONS

“When men wish to construct or support a theory, how they torture facts into their service!”

— Charles Mackey, Memoirs of Extraordinary Popular Delusions and the Madness of Crowds

Capital defense performance standards emphasize the importance of developing and presenting a narrative of the client’s life history, because it is essential to make the mitigation case accessible to the decision-making process of judges and juries. Cognitive psychologists use the term confirmation bias to explain the complexity of an individual’s opinions and decision-making: when people are confronted with facts that contradict deeply held beliefs, they will find ways to discount the new evidence and cling more strongly to those beliefs.

Moreover, “[c]onfirmation bias . . . connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”

It does not always occur on a conscious level;
confirmation bias “refers usually to unmitigated selectivity in the acquisition and use of evidence.”

However, “[m]otivated confirmation bias has long been believed by philosophers to be an important determinant of thought and behavior.” That such bias exists is well-supported by the evidence:

A great deal of empirical evidence supports the idea that the confirmation bias is extensive and strong and that it appears in many guises. The evidence also supports the view that once one has taken a position on an issue, one’s primary purpose becomes that of defending or justifying that position . . . regardless of whether one’s treatment of evidence was evenhanded before the stand was taken, it can become highly biased afterward.61

In short, people readily accept information that is consistent with their world view, and reject that which is not. George Lakoff cautions that merely marshaling facts to attack an accepted narrative only reinforces the false belief.62 This is true across the political spectrum, and it is equally true in other aspects of human endeavor,63 including decision-making in capital cases by jurors and judges chosen for service.
based on their support for capital punishment. This is the phenomenon at play when defense lawyers attack prejudicial psychiatric labels solely with counter-labels and psychometric testing.

The CJP has identified several ways that implicit bias affects the decision-making of jurors who sit on capital cases. Juror demographics, including race, influence their attitudes toward mercy and their perceptions of whether the defendant is dangerous or remorseful. Factors that operate to define the defendant as “Other” have an aggravating, dehumanizing effect, and the influence of race is particularly pernicious. As we explained in our original article, testimony describing the accused as “antisocial” or “psychopathic” plays into multiple aggravating stereotypes that the accused is remorseless, cunning, manipulative, dangerous, and completely self-centered—maybe even inhuman. We also discussed many of the problems and controversies with ASPD and the construct of psychopathy, and

64. A capital case jury is selected by eliminating people whose views on the death penalty substantially impair their willingness to impose the death penalty. Although the Supreme Court has upheld the procedure, research demonstrating the biasing effect of death qualification of juries is persuasive. See Grigsby v. Mabry, 758 F.2d 226, 232-38 (8th Cir. 1985), rev’d, Lockhart v. McCree, 476 U.S. 162 (1986). The judicial selection process may also filter out candidates who do not support capital punishment. See William M. Bowen, A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases, 36 Hofstra L. Rev. 805, 807 (2008) (“The reality is that the death penalty is so political in Alabama that as a practical matter, if you are against the death penalty, you cannot get elected as a judge or any other public official. Once elected, your rulings must reflect your bias for death.”); Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 776-92 (1995).


66. See id. at 1057 (discussing CJP data reflecting that in cases involving black defendants, African-American male jurors are more likely than their white counterparts “to see the defendant as remorseful, to believe that the defendant’s background had adversely influenced his life, to have lingering doubts about the defendant’s role in the crime, and to believe that the defendant did not pose a future danger if given a life sentence”).

67. Haney, Social Context, supra note 12, at 548-59. Dr. Haney explains that painting a “distorted, exaggerated, and mythologized” picture of the defendant “not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself. If violent crime is the product of monstrous offenders, then our only responsibility is to find and eliminate them.” Id. at 558.

68. Empirical research suggests “that in cases involving a Black defendant and a White victim—cases in which the likelihood of the death penalty is already high—jurors are influenced not simply by the knowledge that the defendant is Black, but also by the extent to which the defendant appears stereotypically Black.” Jennifer L. Eberhardt et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, 17 Psychol. Sci. 383, 385 (2006). See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing the relationship between racially discriminatory law enforcement practices and America’s historically unprecedented incarceration rate).

69. See Wayland & O’Brien, supra note 1, at 524-31.
provided the scientific and research framework for challenging the reliability and admissibility of such evidence based on its subjectivity and unreliability.  

The universal stigma of psychiatric and cognitive disabilities attests to the powerful negative perceptions and stereotypes associated with mental illness. Indeed, prosecutors throw the term “psychopath” into capital trials to activate the archetype that it evokes in the jurors’ imaginations. The use of labels to describe a person on trial for his life invites decision-makers to fill the gaps in information with popular culture stereotypes of violent criminals. When the client is branded “antisocial,” prosecutors are empowered to call the defendant names—monster, animal, psychopath, maniac—and thereby deny the defendant individualized consideration of his human dignity and individuality. In his place, a false and misleading one-dimensional archetypal character is built, whose downfall Hollywood has conditioned us to savor.

Cognitive psychologists tell us that an appeal to the jury’s intellect and reason with carefully researched factual information about mental disease and cognitive disorders may have the opposite effect; it may drive jurors to cling more strongly to their preconceived stereotypes of expert witnesses and violent criminals. The client’s fate then hangs on the proverbial “battle of the experts” that glazes the eyes of most judges and juries. When CJP researchers asked capital jurors if either party called a witness they felt “backfired” or was “hard to believe,” two-thirds of them identified mental health experts, who were perceived to be hired guns for the defense.

This explains CJP data indicating that when the defense relies on expert testimony to carry the core of its mitigation

70.  Id. at 532-66.

71.  In one recent study, researchers asked 203 undergraduate students to review a capital case in which “the results of the defendant’s psychological examination were experimentally manipulated.” John F. Edens et al., The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?, 23 BEHAV. SCI. & L. 603, 603 (2005). Where the expert testified that the defendant was psychopathic, participants were much more likely to support a death sentence (60%) than when he was found to be psychotic (30%) or not mentally disordered (38%). Id. Although “psychotic” defendants fared much better than psychopathic defendants in John F. Edens’ research, mental illness triggers negative associations with lay people. Sadler et al., supra note 14, at 916-17.


73.  See, e.g., Wilson v. Trammell, 706 F.3d 1286, 1290-1304 (10th Cir. 2013) (involving expert battles over psychiatric labels); Overstreet v. Wilson, 686 F.3d 404, 412-13 (7th Cir. 2012) (Wood, J., dissenting). The fact that the client is afflicted with delusional thinking unconnected with reality is far more important than whether the delusions are a product of schizophrenia, bipolar disorder, major depression with psychotic features, or PTSD.

case, juries tend to reject it; only when “the expert takes the role of accompanist and helps harmoniously explain, integrate, and provide context to evidence presented by others, the jury is far more likely to find the expert’s testimony . . . to be trusted.”  

Juror suspicion of mental health experts shows up in the CJP data in multiple ways. Jurors are more likely to be persuaded by “lay experts,” e.g., teachers, healthcare providers, counselors, or social workers, who know the client, and who can testify about his human struggles with internal impairments and life circumstances. A juror’s belief that the defendant loves his family adds to their sense that he is capable of remorse, and also correlates favorably with a vote for life.

All of these findings demonstrate the impact of thorough mitigation investigations and presentations that portray the client as a unique, complex human being—the antithesis of anti-social personality disorder. This is what we meant when we said that when a client is labeled “antisocial,” the investigation, not the client, is shallow and superficial.

Decades of research in social and cognitive psychology, augmented by recent findings from neuroscience, provide a useful framework and vocabulary for analyzing how individuals (including police officers, attorneys, jurors, and judges) may differentially perceive and interpret the information presented to them during criminal justice proceedings and capital trials. The field of cognitive psychology was heavily influenced by Jean Piaget’s seminal work on cognitive development, which focused on critical processes for the development and integration of knowledge. Embedded in Piaget’s theory is the construct of schema, an organized pattern of thought or behavior, a structured cluster of preconceived ideas, a mental framework to organize social information, and assumptions used to interpret and process new information.

75.  Id. at 1144.
77.  See Theodore Eisenberg et al., But Was He Sorry? The Role of Remorse in Capital Sentencing, 83 CORNELL L. REV. 1599, 1621 (1998) (finding a high correlation between jurors’ beliefs that the defendant was sorry for his crime and that he loved his family). It has been noted that “[j]urors perhaps think that defendants who are capable of showing love to their families also have the capacity to experience remorse.” Id. Jurors who perceive the defendant as remorseful are less likely to vote for death. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1559 tbl.4, 1560-61 (1998).
78.  Wayland & O’Brien, supra note 1, at 531 & nn.74-75.
79.  See generally JEAN PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN (Margaret Cook trans., 1952).
80.  See id. at 174-84; see also HERBERT P. Ginsburg & SYLVIA Oppen, Piaget’s Theory of Intellectual Development 19-22 (3d ed. 1988).
The importance of this research in a capital litigation context is that jurors and judges do not enter the courtroom with a neutral frame of reference with respect to the defendant and the violent crime with which he is charged. Each brings his own schema through which the evidence will be interpreted; this schema fills in gaps in data by providing explanations that go beyond the absorbed information. Developing a template for processing information about the world enables us to quickly analyze and respond to new situations. However, a decision-maker’s schema may include faulty notions regarding the cause-and-effect of violent behavior, mental health and cognitive development, the deleterious effects of trauma, or even racial stereotypes that generate erroneous conclusions. Professors Anthony G. Amsterdam and Jerome Bruner explain:

Nobody has the time or mental energy to deal with everything encountered as if it were unique, for the first time. So we use the past to manage the present. We need to be able to say, as William James put it, “here comes a thingumabob again.” Another way to put it is that categorization minimizes surprise, allows us to treat things as if they were the same as what we had encountered before. It ensures that the limited number of slots we have for processing what is going on around us are used to good purpose, not wasted on lavish particularity.

Therefore, our world view is organized into “cognitive ‘shortcuts’ that transform unfamiliar situations into events that are within an individual’s range of experience.” Human beings interpret sensory perceptions in relation to schema, or “interpretive frameworks,” that “constantly ‘filter and affect’ what an individual ‘should be seeing and feeling in a given situation.”

It is the process of filling in gaps in knowledge that leads to trouble for criminal defendants. As Amsterdam and Bruner point out, “[t]he
burden of this new work in the human sciences, to oversimplify a bit, is
that categories are made in the mind and not found in the world,” which
raises questions: “Why do we create our categories as we do, justify
them in what are often very odd ways, and put things into them or not by
what are often dubious procedures? How can categorizing lead us into
trouble and error?”

An incomplete mitigation presentation invites this process, with potentially fatal result; gaps in decision-makers’
knowledge about the client will be filled with images drawn from
categories—stereotypes—that reside in their own schemata.

Research in cognitive psychology and neuroscience provides
insights about how this preexisting interpretive framework shapes
perceptions, conclusions, and behavior in the criminal justice setting,
causing individual police officers, attorneys, jurors, and judges to
perceive and interpret differently the information presented to them.
Within this body of research is the rubric of “implicit social cognition,”
which refers to biases, attitudes, and stereotypes that operate without
intentional control, and at a level below cognitive awareness. Early
research focused on measures of “explicit racial bias,” stereotypes, or
beliefs that are endorsed on a conscious level. As awareness grew
about the role of social desirability and impression management in the
study of explicit racial bias, these measures were increasingly questioned
for their ability to shed light on issues related to racial and other biases.
This led to new methods of studying bias, and gave rise to the study of
implicit social bias. Research indicates that these hidden “implicit”
bias are “robust and pervasive,” and can influence the way we
perceive and behave, even when individuals are committed to being fair
and objective.

86. AMSTERDAM & BRUNER, supra note 12, at 9-10.
87. See, e.g., Helping Courts Address Implicit Bias: Resources for Education, NAT’L CENTER
ST. CTS., http://www.ncsc.org/ibeducation (last visited Apr. 12, 2015); see also CHERYL STAATS,
KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS
REVIEW 2013, at 6, 11-12 (2013) [hereinafter STAATS, IMPLICIT BIAS 2013], available at
http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf. The Kirwan Institute’s 2014 report is
also available online. CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE AND
been studied in numerous ways, including: physiological approaches; priming methods; response
latency measures; and the Implicit Association Test. See STAATS, IMPLICIT BIAS 2013, supra, at 21-
28 (discussing these methods and relevant findings). For example, functional Magnetic Resonance
Imaging has been used to study the amygdala, the part of the brain that reacts to threat and fear, and
which has a “known role in race-related mental processes.” Id. at 22 (citation omitted). Several
studies have shown that Caucasian subjects in general show greater amygdala activation when
exposed to unfamiliar African-American faces as opposed to unfamiliar Caucasian faces. Id.
89. Id. at 7-8.
Race may compound the prejudicial effect of psychiatric labels. Substantial research establishes the existence of implicit bias on the part of police, judges, prosecuting attorneys, defense lawyers, jurors, and physicians. It is difficult to imagine that implicit racial bias does not come into play when the defendant is labeled “antisocial” or “psychopathic.” Our original article discussed substantial research establishing the existence of examiner bias in the interpretation of the Psychopathy Checklist-Revised (“PCL-R”), although race was not a

90. In one study, officers were shown pictures of white and black faces, and with no additional information were asked, “Who looks criminal?” The results established that race played a significant role in officers’ judgments:

When officers were given no information other than a face and when they were explicitly directed to make judgments of criminality, race played a significant role in how those judgments were made. Black faces looked more criminal to police officers; the more Black, the more criminal. These results provide additional evidence that police officers associate Blacks with the specific concept of crime.

Jennifer L. Eberhardt et al., Seeing Black: Race, Crime, and Visual Processing, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 888-89 (2004). Other studies confirm a “shooter/weapons bias,” which “refers to the strong and pervasive implicit association between Blackness . . . and weapons.”

which can mean life or death for innocent Black citizens. STAA TS, IMPLICIT BIAS 2013, supra note 87, at 37-38.

91. STAA TS, IMPLICIT BIAS 2013, supra note 87, at 39 (“Even with an avowed commitment to impartiality, judges, like the rest of the general population, display implicit [racial] biases.”). Judges may have an “illusion of objectivity,” meaning they tend to be overconfident of their ability to avoid racial prejudice in decision-making. Id. at 39-40.

92. Cheryl Staats explains the impact of implicit bias on prosecutors:

Prosecutors are as susceptible to implicit racial biases as anyone else, and the unique nature of their job provides numerous opportunities for those biases to act within criminal justice proceedings . . . . These choices can have tremendous impacts on suspects’ lives, particularly when prosecutors are deciding between trying someone in juvenile court vs. adult court, or determining whether to pursue the death penalty.

....

[P]rosecutorial implicit biases can crop up during aspects of trial strategy, such as jury selection and closing arguments. During closing arguments, in particular, prosecutors may activate implicit biases by referring to the accused in terms that dehumanize them, such as using animal imagery.

Id. at 43-44.

93. Defense attorneys’ implicit bias can adversely affect their performance in a number of areas, including jury selection and the quality of the attorney-client relationship. Id. at 45.

94. Research indicates that jurors tend to show biases against defendants of a different race, and that racial composition of juries has a considerable impact on legal decisions. Id. at 40-42. As racial issues are at the heart of many capital trials, this points to the importance of defense attorneys carefully considering the ramifications of racial issues in multiple aspects of capital litigation.

95. Research into the implicit racial biases of physicians found “implicit and explicit attitudes about race align well with the patterns found in large heterogeneous samples of the general population, as most doctors implicitly preferred Whites to Blacks.” Id. at 47.

96. Researchers suggest that additional studies are needed “to further explore how the construct of psychopathy as assessed by the [Psychopathy Checklist-Revised] fits with different cultural conceptualizations of mental illness and criminality,” as most extant research addresses European populations. Elizabeth A. Sullivan & David S. Kosson, Ethnic & Cultural Variations in Psychopathy, in CHRISTOPHER J. PATRICK, HANDBOOK OF PSYCHOPATHY 439 (2006).
factor addressed in most of those studies. In addition to the issue of examiner bias, experimental evidence supports concerns that jurors are more likely to perceive a black defendant as having “antisocial” or “psychopathic” traits. Given the powerful and pervasive effect of implicit racial bias, the use of prejudicial psychiatric labels to a minority defendant is especially dangerous.

The danger, of course, is that the reliability and fairness of life-or-death decisions are undermined by the preexisting implicit bias inherent in each juror’s schema. Professors Amsterdam and Bruner observe: “[We are always at risk that our categories may lead us astray. Indispensable instruments, they are also inevitable beguilers.”

They have commented on this trait:

[It has spawned] a collective way of thought disposed to all-or-none judgments, to sharp polarization, to defining the Other as simply non-Us, to defining Us as non-Them. It renders us insensitive to middle grounds and the subtle qualities of Others. We Americans find it peculiarly hard to appreciate mitigating circumstances, peculiarly tempting to cast blame rather than find explanation. Put them in jail, one-two-three out, for-us or against-us! This turn of collective thought reflects itself, we suspect, in resistance to affirmative action, in our reluctance to carry the American Creed “too far,” in unwillingness to abolish the death penalty, and above all, in our stumbling efforts to come to terms with our racism—Them and Us.

A significant body of cognitive science confirms this is so:

Most commentators, by far, have seen the confirmation bias as a human failing, a tendency that is at once pervasive and irrational. It is not difficult to make a case for this position. The bias can contribute to

97. See Wayland & O’Brien, supra note 1, at 554-58. Although the issue of racial bias in the context of expert testimony on ASPD and psychopathy has not been well researched, available research suggests there are important differences in the performance of African Americans and Caucasians on the PCL-R, and that certain PCL-R items appear to be particularly subject to race bias. David Freedman, Premature Reliance on the Psychopathy Checklist-Revised in Violence Risk and Threat Assessment, 1. THREAT ASSESSMENT, 2001, at 53, 58-59.

98. For example, in mock jury studies of racial influence on juries, Caucasian jurors have shown a tendency to rate African-American defendants as “more aggressive, less honest and moral, more likely to reoffend, and more likely to have a ‘criminal personality type’ than Caucasian defendants. To the extent that minority defendants also are ‘diagnosed’ as psychopathic by an expert witness, it seems plausible that this bias might be magnified.” John F. Edens et al., Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders Who Represent “a Continuing Threat to Society”?, 29 J. PSYCHIATRY & L. 433, 461 (2001) (citing Samuel R. Sommers & Phoebe C. Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 PSYCHOI. PUB. POL’Y & L. 201, 212-13 (2001)).

99. AMSTERDAM & BRUNER, supra note 12, at 19.

100. Id. at 16.
delusions of many sorts, to the development and survival of superstitions, and to a variety of undesirable states of mind, including paranoia and depression. It can be exploited to great advantage by seers, soothsayers, fortune tellers, and indeed anyone with an inclination to press unsubstantiated claims. One can also imagine it playing a significant role in the perpetuation of animosities and strife between people with conflicting views of the world.  

Testimony which purports to be science-based and labels the client as "antisocial" or "psychopathic" appeals to the fictitious popular culture stereotype of the dangerous psychopath.  

Fighting such evidence with a counter-label, rather than a counter-narrative, is not likely to be successful. Labels appeal to stereotype:  

Once we put a creature, thing, or situation in a category, we will attribute to it the features of that category and fail to see the features of it that don't fit. We will miss the opportunities that might have existed in all the alternative categories we did not use. We will see distinctions where there may be no differences and ignore differences because we fail to see distinctions.  

Thus, psychiatric labels do not communicate the client’s innate uniqueness and complexity, nor do they reveal the things that would enable the jury to see him as like themselves—a human being with hopes, dreams, beliefs, and values, in many ways similar to their own. When applied to a person accused of a violent crime, labels inspire severe punishment, not mercy:  

Historically, the depiction of criminals as defective has always facilitated their mistreatment at the hands of the criminal justice system, and the more “scientifically” the defect could be documented, the greater the mistreatment. Thus, the easier it is to derogate defendants, the easier it is to treat them harshly. Both sides of this dynamic help to explain the American public's fixation with the potential biological and genetic basis of criminality: The belief that criminals are born defective and therefore different facilitates society’s harsh treatment of them.  

101. Nickerson, supra note 57, at 205.  
103. AMSTERDAM & BRUNER, supra note 12, at 49.  
104. Haney, supra note 4, at 1461-62. Dr. Haney explains that "jurors can morally disengage from the defendant by substituting the disorder for the person." Id. at 1464 n.84. Dr. Haney provides that the most "extreme example" of prejudicial labeling occurs when prosecutors encourage jurors to substitute an "antisocial personality" for the personhood of the defendant, robbing him of many human qualities with which jurors might otherwise identify and instead putting in their place a host of diabolical traits that
The structure of a capital trial facilitates the dehumanization of the defendant. In the guilt-or-innocence stage of the trial, a defense restricted to narrowly-defined statutory criteria for insanity or diminished mental capacity “requires extensive reliance on psychiatric opinion and the corresponding use of medical terminology and diagnostic labels. Yet, this kind of labeling can reduce very complicated human beings to disembodied psychiatric categories.”

At best, a battle of the experts over psychiatric labels simply substitutes one stereotype for another—switching the juror’s image of the capital defendant from Hannibal Lector (from Silence of the Lambs), to Norman Bates (from the movie Psycho) is not likely to engender sufficient empathy to motivate her to reject the death penalty. Instead, “the starting point for compassionate justice becomes the recognition of basic human commonality—an opportunity for capital jurors to connect themselves to the experiences, moral dilemmas, and human tragedies faced by the defendant.” This is not accomplished with the charts, graphs, and images developed through psychometric testing and medical imaging; decision-makers respond to narrative in a fundamentally different way. In describing narratives, they tend to “cohere differently, not through the mechanics and chemistry of cause and effect but through the play of human intentions and purposeful acts in the worlds of striving, accomplishment and failure, victory and defeat.”

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106. PSYCHO (Paramount Pictures 1960).

107. Haney, supra note 4, at 1465.

108. AMSTERDAM & BRUNER, supra note 12, at 12. Cognitive scientists explain that “[o]n the one hand, the person incorporates or assimilates features of external reality into his own psychological structures; on the other hand, he modifies or accommodates his psychological structures to meet the pressures of the environment.” Ginsburg & Oppen, supra note 80, at 18. Piaget explained that:

Intelligence is assimilation to the extent that it incorporates all the given data of experience within its framework. . . . Assimilation can never be pure because by incorporating new elements into its earlier schemata the intelligence constantly modifies the latter in order to adjust them to new elements. Conversely, things are never known by themselves, since this work of accommodation is only possible as a function of the inverse process of assimilation.

Piaget, supra note 79, at 6-7. Narrative is the medium by which jurors can respond to mitigation evidence by assimilating the new and different information about a capital defendant into their schemata, and by expanding or altering their schemata to accommodate it.
inundate the jury with logic and scientific facts about mental illness and human behavior, and proper diagnostic procedure and terminology, but without knowing the story of the defendant’s life, decision-makers cannot arrive at an empathetic understanding of him or his crime.

Narratives, or stories, serve as an interpretive framework in which multiple schemata are operating at once. Humans have a “predisposition to organize experience into a narrative form;” in fact, “this predisposition toward narrative is . . . as natural to human comprehension of the world as [an individual’s] visual rendering of what the eye sees . . . .” Consequently, narrative form is “an innate schema for the organization and [understanding of human] experience.” Because humans learn by interacting with their environment, they understand concepts expressed in the form of stories better than they understand abstract principles. Thus, narratives are “central to [an individual’s] ability to make sense out of a series of chronological events.”

Only through exhaustive life history investigation can the stories and storytellers of the client’s life be discovered. Our emphasis on the central importance of narrative in addition to science is consistent with Justice Brennan’s observation regarding the origin of the long-term trend toward moderation in criminal punishment:

[B]eliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.

Capital defense attorneys, wherever possible, rely on lay witnesses, lay experts, and documentary and demonstrative evidence, in addition to expert witnesses, who can tell the jury a truthful narrative of the defendant’s life that explains his mental impairments, disorders, or limitations, as well as his hopes, accomplishments, and failures in the context of his humanity.

110. Id. at 58 (citation omitted).
111. Sheppard, supra note 84, at 261 (citation omitted).
113. WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 105-07 (2006). Capital trial attorney Michael N. Burt explains:
IV. NARRATIVE WORKS

We have discussed examples of mitigation cases that failed when the litigation focused on expert battles over evidence of ASPD, psychopathy, and other psychiatric labels. Our discussion of mitigation counter-narratives is inspired by our fruitless search for cases in which the capital client won a battle of the experts over psychiatric labels without also engaging the client’s life story. The successful mitigation cases that we found focused on symptoms and life history more than on diagnoses and testing. They did not invariably ignore the controversy over diagnosis, but the story, not the label, took center stage. Thorough life history investigations enabled defense teams to discover and tell stories about conditions and events that frustrated the client’s attempts to make it in life, and moved the decision-makers away from death.

Although we caution that focusing on diagnostic labels may simply conjure up its own stereotype in the jurors’ minds, expert witnesses may indeed be an important part of the client’s life narrative. Mental health experts can help the defense team and the jury understand the client’s symptoms and impairments, and interpret the testimony of lay people describing events that reveal the client’s limitations. They can also help the jury understand how symptoms and impairments are manifested at different developmental stages, and the impact of these symptoms and impairments on a client’s perceptions, behavior, and functioning. If presented in the context of a complete and accurate narrative, even prior crimes or acts of violence can help a decision-maker understand the client’s state of mind at the time of the homicide. For example, in

The “record” at the trial level is primarily based upon the thorough life history investigation that the capital defense team is constitutionally obligated to undertake. An exhaustive social history investigation undertaken by a skilled mitigation specialist is premised on the well-grounded assumptions that “no meaningful account of criminal behavior can begin without extensive social historical knowledge about the life of the perpetrator” and that “because people’s actions are influenced in large part by their past experiences, counter-normative behaviors (like crime) must be partly rooted in counter-normative social historical experiences.”


114. See supra notes 26-51 and accompanying text.

115. See Mark E. Olive, Narrative Works, 77 UMKC L. REV. 989, 994-1003, 1006-16 (2009) (discussing the successful post-conviction mitigation narratives presented in Gray v. Branker, 529 F.3d 220 (4th Cir. 2008), Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008), and Walbey v. Quarterman, 309 F. App’x 795 (5th Cir. 2009)). All three cases are good examples of developing a persuasive counter-narrative in mitigation; in Walbey, the counter narrative trumped the trial expert’s testimony that his behavior was consistent with ASPD. Walbey, 309 F. App’x at 800-06.
Rompilla v. Beard,\textsuperscript{116} records found in the file of Ronald Rompilla’s prior rape conviction pointed to school and social service records that became a springboard for a robust mitigation narrative.\textsuperscript{117} In Atkins v. Virginia,\textsuperscript{118} the underlying facts of Darryl Atkins’ six prior ill-conceived and poorly-executed criminal episodes that produced twenty-one felony convictions underscored his intellectual disability.\textsuperscript{119} Atkins’ prior crimes were an effective lens through which to view his struggles with his intellectual disability. More often than not, “double-edged” mitigation will provide critical clues to developing accurate and reliable social histories and contextualizing the defendant’s behaviors.\textsuperscript{120} Capital defense teams do not automatically shy away from double-edged mitigation evidence when exploring and telling the client’s life story with the nuance and context that is core to an effective and truthful narrative.\textsuperscript{121}

The role of narrative is so important to moving a decision-maker toward life that experienced capital defense lawyers do not even select mental health experts until they have conducted enough investigation to know the client’s life story, and what experts will be helpful in communicating it to the jury:

Only after the social history data have been meticulously digested and the multiple risk factors in the client’s biography have been identified will counsel be in a position to determine what kinds of culturally

\textsuperscript{116} 545 U.S. 374 (2005).
\textsuperscript{117} Id. at 389-93.
\textsuperscript{118} 536 U.S. 304 (2002).
\textsuperscript{119} See Brief for Petitioner at 12 n.20, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452).
\textsuperscript{120} The Supreme Court’s analysis in Porter v. McCollum, 558 U.S. 30 (2009) illustrates this point. The prosecution’s case portrayed George Porter, Jr. as a violent drunk who murdered his girlfriend and her new boyfriend after she attempted to end her tumultuous and abusive relationship with Porter. See id. at 31-33. The Florida Supreme Court had concluded that Porter’s military record would have opened the door to adverse evidence that he went absent without leave and drank heavily. Id. at 43-44. The Supreme Court rejected this conclusion as objectively unreasonable: [T]he relevance of Porter’s extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea. Id. Further, the Court reasoned, “[i]t is unreasonable to discount to irrelevance the evidence of Porter’s abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter’s behavior in his relationship with Williams.” Id. at 43.
\textsuperscript{121} White, supra note 113, at 85 (“[E]xperienced capital defense attorneys invariably conclude that mitigating evidence must be presented, even if there is some chance that the jury may view it as double-edged.”). Capital defense attorneys are trained to “always present mitigating evidence that will explain the defendant’s background and history to the jury, thereby enabling the jury to gain an understanding of the defendant as a person.” Id.
competent experts are appropriate to the needs of the case, what role the experts will play, and what referral questions will be asked of the experts.\textsuperscript{122}

Rather than asking experts to diagnose a client and opine whether his condition triggers statutory defenses or mitigating circumstances, experienced defense lawyers frame referral questions in the language that will help tell the client’s mitigating life story. They will want the expert to help explain how the client’s mental impairments “explain or contribute to [his behavior] . . . , especially as it relates to the crime,” or whether the client “suffer[s] from mental health difficulties that the decision-maker might find mitigating even though they did not directly lead to the defendant’s criminal behavior.”\textsuperscript{123} Other possible referral questions include the course of the defendant’s mental difficulties, how his multiple impairments interact with one another to influence his behavior or impair his functioning, whether he was treated prior to the crime, or whether he would respond to treatment in a prison setting.\textsuperscript{124} In formulating referral questions, counsel should be mindful that much more important than diagnosis are the social, psychological, developmental, familial, cultural, religious, and environmental factors that played a role in shaping the client’s development and functioning. Such questions are much more likely to generate thorough, thoughtful exploration of the client’s life, and will inevitably produce humanizing narratives that demonstrate the client’s strengths and frailties. Diagnoses, psychometric test scores, and brain scans are not narratives. These tools persuade only when accompanied by compelling stories that reveal the client’s intrinsic humanity.

What do we mean by narrative, and how does it work in a capital case? In the legal arena, narrative is “factual and truthful storytelling, meticulously built upon a record.”\textsuperscript{125} More succinctly, narrative is “[c]hronology with meaning.”\textsuperscript{126} More importantly, it is a way of communicating information in a form that is accessible to decision-makers. Unlike facts offered to refute the prosecutor’s case for death, “[n]arratives do not contradict theories but cut across them; the two are


\textsuperscript{123} Richard G. Dudley, Jr. & Pamela Blume Leonard, \textit{Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment}, 36 Hofstra L. Rev. 963, 985 (2008).

\textsuperscript{124} Id.

\textsuperscript{125} Philip N. Meyer, \textit{Are the Characters in a Death Penalty Brief Like the Characters in a Movie?}, 32 Vt. L. Rev. 877, 877-78 (2008).

Although we may speak about a capital defense team’s “theory of mitigation,” what we really mean is, “[w]hat is your mitigation story?” This is why experts, such as Dr. Haney, consistently talk about the mitigation “counter narrative” as the key to bringing the decision-maker to an empathetic understanding of the defendant. Stories of the client’s life reveal his innate human qualities, his flaws as well as his strengths, and enable decision-makers to see him as like themselves.

_Rompilla_ is perhaps the best-known story of a mitigation counter-narrative overcoming the antisocial stereotype that was created by trial counsel’s shallow investigation. Rompilla was convicted of killing tavern owner James Scanlon at his bar, the Cozy Corner Cafe, by stabbing him repeatedly and setting him on fire. Rompilla stole Scanlon’s wallet and between $500 and $1000 from the bar. At approximately 6:30 a.m., later that morning, Scanlon’s son found his father’s body lying behind the bar in a pool of blood. The circumstantial evidence against Rompilla was strong: his own statement and witnesses placed him in the Cozy Corner Cafe the evening before the murder, and he was seen making repeated trips to the bathroom, which was the burglar’s point of entry. Blood on Rompilla’s sneaker matched Scanlon’s blood type, and the sneaker’s tread matched bloody footprints at the scene of the murder. Scanlon’s wallet was found in the bushes a few feet from the hotel room Rompilla rented the night of the murder, and Rompilla’s fingerprint was recovered from one of the knives used to stab Scanlon to death. In the penalty phase of trial, the jury found statutory aggravating circumstances that Rompilla killed Scanlon “while in the perpetration of a felony,” that “[t]he offense was committed by means of torture,” and that [Rompilla] had a significant history of felony convictions involving the use or threat of violence to the person. The last aggravator was supported by Rompilla’s two

127.  _AMSTERDAM & BRUNER, supra_ note 12, at 12.


130.  _Id._ at 377. This description of Rompilla’s crime is condensed from the Pennsylvania Supreme Court’s opinion affirming the conviction on direct appeal. _Commonwealth v. Rompilla_, 653 A.2d 626, 628-29, 634 (Pa. 1995), _aff’d in part, rev’d in part sub nom._ Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004).

131.  _Rompilla_, 63 A.2d at 629.

132.  _Id._

133.  _Id._

134.  _Id._

135.  _Id._ at 629-30.

136.  _Id._ at 634 n.13.
prior convictions, one for rape and the other for a burglary, during which he threatened the victim with a knife.\textsuperscript{137} Rompilla was sentenced to death.\textsuperscript{138}

Rompilla’s trial counsel presented a defense that U.S. District Judge Ronald L. Buckwalter described as “unreasonably brief and lacking in real substance considering the nature of the proceedings.”\textsuperscript{139} Trial counsel’s investigation was limited to interviews with the client, his ex-wife, sister-in-law, and three of his five siblings—a very narrow sampling of sources.\textsuperscript{140} The family told counsel “that they didn’t really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody,” and Rompilla himself said that his childhood and schooling had been “normal.”\textsuperscript{141} Judge Buckwalter summarized the penalty phase presentation:

Petitioner’s counsel called five witnesses on his behalf at that hearing: Darlene Rompilla, his sister-in-law; Nicholas Rompilla, Junior, an older brother; Robert Rompilla, a younger brother; Sandy Whitby, a sister; and Aaron Rompilla, a son who was 14 at that time. . . . Not one witness discussed [Rompilla’s] traumatic childhood, his alcoholism, mental retardation, cognitive impairment or organic brain disorder. What they did say were, “He was a good family member”; “We never had a problem”; I don’t think my brother did it”; “Have mercy on him”; “I was close to him, he loved my family, he just didn’t have a chance”; “They didn’t give him no rehabilitation”; “Why can’t he get help like all the rest of the people get help”; “I love him very much” (crying); “I’ve never seen the bad side of my brother, never”; “He just loves us like we love him.”\textsuperscript{142}

Although the jury did not hear from mental health experts, defense counsel consulted two psychiatrists and a psychologist who evaluated Rompilla.\textsuperscript{143} Based on their testing and the history described in the preceding paragraphs, “the experts found nothing helpful to Rompilla’s

\textsuperscript{137} Id. at 633-34.
\textsuperscript{138} Id. at 628, 634.
\textsuperscript{141} Rompilla v. Beard, 545 U.S. 374, 381-82 (2005).
\textsuperscript{142} Rompilla, 2000 U.S. Dist. LEXIS 9620, at *11-12, aff’d in part, rev’d in part, Rompilla, 355 F.3d 233.
case and diagnosed him as a sociopath."\textsuperscript{144} The Pennsylvania Supreme Court concluded that because of this diagnosis, “counsel had a reasonable basis for proceeding as they did.”\textsuperscript{145} Thus, trial counsel’s inaction enabled Rompilla’s family to dupe the jury into believing that they had given Rompilla a “normal” upbringing, and therefore the fault for Rompilla’s criminal behavior lay exclusively with him. The diagnosis of ASPD fit that false picture perfectly, so trial counsel were justified to abandon pursuit of mitigating evidence of Rompilla’s mental health impairments, or so it seemed.

A thorough postconviction investigation proved the trial experts wrong: Rompilla’s family had betrayed him. Trial counsel themselves became significant players in Rompilla’s tragic life story when they failed in their duty to investigate his defense. Postconviction counsel gathered extensive life history documents, including a mental evaluation conducted in connection with Rompilla’s rape prosecution, a copy of which was in the court file stored in the same courthouse in which Rompilla was tried for murder—all trial counsel needed to do was walk across the hall and ask for it.\textsuperscript{146} Rompilla’s sisters, Randi Rompilla and Barbara Harris, lived in town and attended the trial, but were never interviewed.\textsuperscript{147} The necessity to investigate further was so obvious that the court concluded that competent counsel “could not reasonably have ignored mitigation evidence or red flags” pointing to the need to investigate further.\textsuperscript{148}

The new data “destroyed the benign conception of Rompilla’s upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts.”\textsuperscript{149} The court summarized a portion of the new evidence of Rompilla’s childhood:

Rompilla’s parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla’s mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he

\textsuperscript{144} Id.
\textsuperscript{145} Id. at 789-90.
\textsuperscript{147} Id. at 280.
\textsuperscript{148} Id. at 391.
\textsuperscript{149} Id. at 391.
was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.  

Easily obtained school, medical, juvenile, and prison records established that before Rompilla dropped out of school, his mother was reported “missing from home frequently” for weeks at a time, and was “frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times.” School records showed Rompilla’s IQ was in the intellectually disabled range. At age sixteen, Rompilla quit school and began a series of juvenile incarcerations for assaultive behavior “related to over-indulgence in alcoholic beverages.” The juvenile incarceration files contained reports “pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.” A reasonable investigation enabled mental health experts to credibly explain that Rompilla’s mother’s alcoholism during her pregnancy with him resulted in organic brain damage; his impulsive behavior and cognitive deficits were consistent with fetal alcohol syndrome.

The new narrative based on a thorough investigation worked; Rompilla’s sentence of death was vacated, and on remand, the Allentown prosecuting attorney waived the death penalty, commuting Rompilla’s sentence to life. While the courts mention, in passing, a variety of psychiatric and cognitive disabilities from which Rompilla may suffer, including schizophrenia, mental retardation, and fetal alcohol syndrome, his claim for relief did not depend upon staking out a

150. Id. at 391-92 (quoting Rompilla, 355 F.3d at 279).
151. Id. at 393.
152. Id.
153. Id. at 390-91.
154. Id. at 391.
155. Id. at 391-92 (quoting Rompilla, 355 F.3d at 282).
position based on a diagnostic label. Unlike the decisions in Pinholster, Overstreet, and Williams v. Allen, Rompilla’s lawyers and experts did not square off over labels. Postconviction counsel understood that “not antisocial” is not a theory of mitigation. Mental health expert assessments played a supporting role in Rompilla’s life story; it was the powerful narrative of his tragic childhood, his trial counsel’s inept representation, and his sisters’ love that saved him from execution.

Rompilla fits a pattern that we found among successful cases involving mental and cognitive impairments; the client’s humanizing life story takes center stage, and mental health experts play a supporting role. In Parkus v. Delo, Steven Parkus’ life-long pattern of running away, truancy, and institutionalization prompted pretrial diagnoses of ASPD by both state and defense examiners, but those experts repudiated their findings upon learning that, at age four, Parkus had been placed in foster care with an uncle who was a sadistic pedophile. In Stankewitz v. Wong, although the prosecution mustered substantial aggravating evidence showing that Douglas Stankewitz “had a violent, antisocial personality,” it was overcome by the story of Stankewitz’s tragic childhood. Richard Cooper’s own defense lawyer presented evidence that he had ASPD, which in the view of the trial court “merely buttressed the state’s contention that an aspect of Cooper’s character was that he was really

157. Indeed, comorbidity is so common among capital defendants that, in many cases, multiple conditions could be diagnosed. This is particularly true with respect to trauma. Wayland, supra note 30, at 941 (explaining that “the vast majority of people who meet diagnostic criteria for PTSD also meet diagnostic criteria for one or more additional psychiatric disorders”).

158. 542 F.3d 1326 (11th Cir. 2008).

159. 33 F.3d 933 (8th Cir. 1994).

160. Id. at 935-36, 939-40. Parkus was eventually removed from death row pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), the only circumstance in which a diagnostic label matters because it results in a categorical exclusion from capital punishment. See In re Parkus, 219 S.W.3d 250, 252-56 (Mo. 2007) (en banc).

161. 698 F.3d 1163 (9th Cir. 2012).

162. Id. at 1173. The court was moved by evidence that “Stankewitz was born into a poverty-stricken home described by police and probation reports as dirty, covered in cockroaches and fleas, and without electricity or running water,” and that “[t]here was often not enough food for Stankewitz and his nine siblings.” Id. at 1168. Stankewitz’s mother was an alcoholic since childhood, severely intellectually impaired, and “she would regularly drink three to four six packs of beer or two fifths of a gallon of whiskey in a night, including while she was pregnant with Stankewitz.” Id. Mrs. Stankewitz was beaten severely by Stankewitz’s father, Robert, while she was pregnant, and both parents beat Stankewitz and his siblings regularly and severely with electrical cords, and belts, and threatened them with a gun. Id. The court easily concluded that Stankewitz’s impulsive behavior was attributable to “significant emotional damage [that] followed from his troubled childhood.” Id. at 1169.

163. 646 F.3d 1328 (11th Cir. 2011).
without remorse.”164 A thorough life history investigation told a story that was so different that a reasonable jury would not have sentenced him to die.165 We found many other examples of successful defense cases in which a thorough life history investigation produced a compelling and truthful mitigation counter-narrative against which claims of ASPD faded into insignificance.166

V. CONCLUSION

Our research led us to conclude in our original article that the “enormous contextual problems that plague mental health evaluations” that inappropriately label defendants as “antisocial” or “psychopathic” contribute to a “misinformed and badly skewed vision” of capital decision-makers.167 We, again, urged adherence to the standards of performance articulated in the Guidelines and Supplementary Guidelines, “including the admonition that at least one member of the team be qualified, by training or experience, to identify symptoms and characteristics of mental and emotional impairment.”168 Experienced capital defense attorneys understand that “it is critically important to

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164. Id. at 1340-41.
165. See id. at 1355-56. A thorough life history investigation produced documents, evidence, and testimony establishing that since he was barely out of diapers, Cooper received daily beatings from his father, who beat, punched, and kicked Cooper and his siblings and “pick[ed] [them] up off [their] feet and slam[med] [them] against the wall.” Id. at 1342. Cooper’s father used “boards, switches, belts, and horse whips, leaving welts up and down their bodies and bruises from being grabbed and hit so hard.” Id. at 1343. In spite of the beatings, Cooper loved his father, and “was always wanting to kill himself because he thought he was the one causing the problems.” Id. Cooper’s father also withheld food as punishment, and Cooper and his brother “would go out to the barn and eat dog food and drink horse’s milk from their nursing mare.” Id. at 1344. A psychologist testified in Cooper’s post conviction hearing; without harping on a particular diagnosis, he explained to the court the damage that Cooper suffered as a result of “[p]sychological abuse and an extreme deprivation of security and love.” Id. at 1345. The court’s extensive discussion of Cooper’s life story, along with its relatively brief description of the expert’s harmonious findings that emphasized impairment and symptoms over testing and diagnosis, demonstrates that Cooper’s tragic life story transcended diagnostics and psychometrics.

166. See, e.g., Blystone v. Horn, 664 F.3d 397, 427 (3rd Cir. 2011) (finding that “the result of his sentencing hearing would have been different, had counsel conducted an adequate investigation of mitigating circumstances”); Goodwin v. Johnson, 632 F.3d 301, 328 (6th Cir. 2011) (holding that there was “little trouble finding a reasonable probability that at least one juror would have voted against death had defense counsel attempted to humanize Goodwin by presenting evidence of the hardships and disadvantages he faced growing up”); Correll v. Ryan, 539 F.3d 938, 954 (9th Cir. 2008) (finding that “the evidence of [Michael Correll’s] ‘excruciating’ history could have provided an alternative—and much more sympathetic—context for the horrific observations and conclusions that were before the judge in the presentence report”).

168. Id. at 588.
construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors.”

We also advised, as we do here:

The best antidote to the influence of prejudicial psychiatric labels is a compelling mitigating narrative based on a thorough life history investigation which uncovers humanizing conditions and events in the client’s life that demonstrate his human complexity, including the mental, emotional, or developmental impairments which he has struggled to overcome.

Psychometric testing and diagnostic labels are incapable of capturing the complexity and uniqueness of our clients; only through a narrative life history presentation can we communicate his or her innate humanity:

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.

Narrative is critical; “a plea for mercy in conclusory terms such as ‘he is a good person, friendly, nice, polite, hard-working, decent, compassionate,’ et cetera has not proven to be particularly helpful” in persuading a judge or jury to spare a defendant’s life. For decades, capital defense attorneys have understood that “[i]t is always best to have the family and friends testify anecdotally about incidents in the defendant’s life;” we have long known that client stories are crucial in litigation. The Supreme Court itself has found that defense lawyers performed deficiently for failing to develop a “powerful mitigating narrative.” Nowhere is this more important than in death penalty cases

169. ABA GUIDELINES, supra note 3, Guideline 10.11, at 1061.
171. Lacey Fosburgh, The Nelson Case: A Model for a New Approach to Capital Trials, in CALIFORNIA DEATH PENALTY MANUAL N-6, N-7 (Supp. 1982). Lacey Fosburgh’s article explains the necessity of working with a mitigation specialist, a member of the defense team who “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.” Id.
174. Edwards, supra note 21, at 883-84.
in which the prosecution relies on the highly questionable construct of psychopathy and flawed diagnoses of ASPD.\textsuperscript{176}

We are grateful to have this opportunity to supplement those conclusions with our discussion of what the field of cognitive psychology adds to our understanding of why a narrative account of the client’s life story is an essential ingredient to the mitigation case. Each capital case decider comes to the case with preconceived notions of persons who commit violent crimes and what should be done with them, and charts, graphs, scans, or psychiatric jargon are not likely to reach them. Even though cognitive psychology informs us that these “categories are made in the mind and not found in the world,”\textsuperscript{177} logic and data alone are incapable of modifying the world-view of death-qualified jurors and judges. Only the truthful and detailed narrative of the client’s life story can provide the essential context that enables decision-makers to respond empathetically to the client, and extend mercy even for the most terrible crime. As Dr. Haney urges, “the now well-established use of these more valid, nuanced, psychologically-sophisticated mitigating counter-narratives in capital cases must continue.”\textsuperscript{178}


\textsuperscript{177} \textit{Amsterdam & Bruner, supra} note 12, at 9.

\textsuperscript{178} \textit{Haney, Prison Violence, supra} note 12, at 945.
TRYING TO GET IT RIGHT—OHIO, FROM THE EIGHTIES TO THE TEENS

Margery M. Koosed*

I. INTRODUCTION**

Ohio has a long capital punishment history1 and is presently an active death penalty state, having executed fifty-three men in the modern, post-1976 era.2 In 2010, Ohio was second only to Texas in the numbers of persons executed.3 Though the Ohio Supreme Court has scheduled monthly executions into 2016,4 its death penalty system is undergoing increased scrutiny.5 After the state and national bar

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3. Id.


organizations completed studies of Ohio’s system, finding multiple deficiencies in 1997 and 2007, the Ohio Supreme Court created a task force that released its final report and recommendations. This Article will focus on Ohio’s experience in attempting to achieve justice by enhancing defense services, anticipating and adopting national standards for appointment and performance of counsel, and its rather mixed results thus far.

II. THE 1970S: DEFINING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND CHARTING THE OHIO DEATH PENALTY STATUTES

In the wake of the 1972 Furman v. Georgia decision, many states (including Ohio) reinstated the death penalty. At the time, approximately nineteen states and two federal circuits were still using the “farce and mockery of justice” standard to assess whether the Sixth Amendment right to counsel was denied. Reversal was only required if the counsel’s representation was so grossly incompetent, as the D.C. Circuit Court of Appeals described it, that the proceedings were rendered a “farce and mockery of justice.” The D.C. Circuit later moved to a “reasonably competent assistance” standard. In 1973, Judge Bazelon of the D.C. Circuit incorporated into the reasonably competent assistance standard the duties and obligations imposed upon defense counsel by the American Bar Association (“ABA”) Standards for the Defense Function. Providing greater specificity was both desirable and necessary to give substance to the right to counsel.

At the time, Ohio had no consistent theory for ineffectiveness. Then, in 1976, the Ohio Supreme Court chose a test between the two

7. See infra Part II.
8. See infra Part III.
12. See, e.g., United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949) (“A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.”).
competing models: the federal and state constitutions would be satisfied if the defendant “had a fair trial and substantial justice was done,” and “courts may find assistance in” professional standards such as the ABA Standards for Criminal Justice when assessing the claim.

Ohio’s death penalty was reinstated just a few years earlier, in 1974. The Ohio Legislature crafted a quasi-mandatory death-sentencing scheme that required the death sentence be imposed unless one of three very narrow mitigating circumstances was demonstrated. The U.S. Supreme Court agreed to review this statute, and in one of its most significant capital litigation rulings, the 1978 *Lockett v. Ohio* decision, the Court found the Ohio legislation violated the Eighth and Fourteenth Amendments, as it failed to allow consideration of all relevant mitigating circumstances before death could be imposed.

It took Ohio three more years—until 1981—to reenact death penalty sentencing procedures. As renowned capital defense attorney Millard Farmer commented at the first Ohio death penalty training conference in November 1981, the new state legislation was very nearly a “clean rope,” a statute that would survive constitutional scrutiny and included several defense-favorable features. But, thirty years ago, not all was well in Ohio, nor anywhere else around the country, and change was needed.

17. *Id.*
18. See *Capital Punishment in Ohio*, supra note 11.
20. 438 U.S. 586 (1978). Sandra Lockett was nineteen years old when the crime was committed, and was not the principal offender. See *id.* at 590–91, 594, 597, 608, 615. She assertedly lacked the requisite intent to kill, and had no significant prior criminal convictions. *Id.* at 597. The *Lockett* Court considered all of these factors relevant mitigating circumstances. *Id.* Following the Court’s decision to strike down the Ohio statute, the Ohio governor commuted the death sentences imposed on Lockett and another ninety-six persons on death row. See OHIO DEP’T REHAB. & CORR., *Escaping Death 1* (2007) [hereinafter ESCAPING DEATH], available at http://www.dispatch.com/content/downloads/2007/03/28/escaping_death.pdf; Capital Punishment in *Ohio*, supra note 11. Lockett was eventually released on parole and resides in her hometown of Akron, Ohio. See ESCAPING DEATH, supra. She is a regular guest speaker in my Capital Punishment Litigation class, and movingly describes the importance of having effective and caring defense counsel in these cases.
22. See, e.g., *Ohio Rev. Code Ann.* § 2929.03.
23. See, e.g., *id.* § 2929.04 (discussing the constitutionality of the statute, as well as the mitigating factors available for defendants).
III. THE DEVELOPMENT OF NATIONAL STANDARDS

A. 1981 to 1983: The National Legal Aid and Defender Association Steps Up

The National Legal Aid and Defender Association ("NLADA") recognized that things had to change, and started working in the late 1970s. Then, just one month after Ohio reenacted the death penalty, from November 6-8, 1981, the NLADA and the Southern Coalition on Jails and Prisons, headed by Joe Ingle, conducted a Conference on the Death Penalty in Atlanta, Georgia. Richard Wilson, then Director of the Defender Division of the NLADA, presented an “Outline of Standards for Representation in Capital Cases” (“Outline”). This may very well have been the first effort at crafting what would become the NLADA and ABA Standards we honor today.

Wilson’s four-page Outline addressed five topics. The first, “Systems Criteria” (whether capital counsel would be retained, or if indigent, whether private appointed counsel, public defender, or a mixed system would handle the cases), listed specific areas with a potential impact on indigent defense representation, pairing each area with then-existing NLADA Recommendations and ABA Standards for the Defense Function.

The second topic addressed “Experiential Criteria” to be improved by legislation, bar, or education. Wilson’s Outline related that three states then had statutory experience requirements for representation in capital cases: Alabama required no less than five years of active practice of criminal law; Louisiana merely required a lawyer be admitted to the bar for at least five years, and noted that an attorney with less experience

27. Id. at 1-4.
28. Id. at 1-2. These included: system structure; eligibility for counsel; assignment of cases; waiver of counsel; conflict of interest; independence; early representation; continuity of representation; client complaint; and public defender office structure. Id. at 2.
29. Id.
30. Id. at 3.
could be assigned as assistant counsel; and, South Carolina provided for up to two counsel, one of which shall have a minimum of five years of practice before the bar. Wilson urged that “[s]pecific experiential criteria in death penalty cases” should include: “[s]pecific number of years in practice;” “[s]pecification of criminal practice;” and “[s]pecified number of trials before jury/bench.” None of the then-present statutes met these requirements.

“Training Criteria” was the next topic, suggesting law school substantive and clinical courses, Continuing Legal Education (“CLE”) programs, and in-house training programs in public defender systems. Monitoring, supervision, and evaluation of retained counsel should be regularly conducted, but was present nowhere. The use of bar disciplinary proceedings and appellate review based on ineffective representation, as well as lawsuits, were mentioned. Finally, Wilson recommended that specific training criteria in capital cases should include at least: “[s]pecifics of motion practice;” “[j]ury selection—challenge to the entire array and Witherspoon issues;” “[s]entencing issues—evidentiary rules and the problems of bifurcated sentencing;” and “[a]ppeals and collateral attack representation.”

The next outline topic was “Resources Criteria,” including: “[f]ees [([l]evel—compared with prosecution and retained counsel[,] [a]vailability . . . [a]vailability of support services]”; “[s]tatutory limits;” and “[a]vailability of support services” (which it was noted “varies radically by jurisdiction”).

The last topic addressed in the Outline was “Substantive Representational Criteria,” noting this was the “[m]ost difficult area because of [the] highly subjective judgments involved.” But, Wilson urged that each of the major areas “must be done to provide effective assistance of counsel in death penalty cases.” The major areas identified were: “[c]ontact and interaction with the defendant;” “[i]nvestigation of the case;” “[m]otion practice;” and “[t]rial of the case.” Each was sketched out briefly.

32. LA. CODE CRIM. PROC. ANN. art. 512 (1966); WILSON, supra note 26, at 3.
34. WILSON, supra note 26, at 3.
35. Id.
36. Id.
37. Id.
38. Id. at 3-4.
39. Id. at 4.
40. Id.
41. Id.
42. Id.
The NLADA carried the baton further in September 1983. The 1983 NLADA Conference ("Conference") included a lengthy program entitled: “Public Defender Offices and Statewide Coordination of Death Penalty Defense.” Ohio’s then-fledgling efforts to improve capital representation were clearly a central part of the Conference. Randall M. Dana, then Ohio Public Defender (“OPD”), introduced the program and addressed the ominous risks and urgent attention needed. He wrote in the several-hundred-page conference manual’s Introduction: “Death penalty litigation in and of itself could destroy the American system of providing indigent defense . . . unless steps are taken to either abolish capital punishment or to develop systems that can handle the tremendous amount of work that these cases require.”

At the time of the Conference, when over 1200 people were on death row in the United States, Dana related:

In the past, many organizations such as the [National Association for the Advancement of Colored People] Legal Defense Fund, the Southern Poverty Law Clinic, and Team Defense, have not only provided assistance in this area but have also been fighting a “rear guard” action around the United States, filing last minute appeals to ensure that as few people are executed as possible.

However, the vast numbers on death row could not be sustained by this prior practice. What was needed, Dana urged, was to “organize a statewide system that will be properly funded and have the resources necessary to handle these very expensive and difficult cases.”

Sessions and materials at the Conference focused on several critical remedial measures. Kevin McNally, then at the Kentucky Department of Public Advocacy, urged establishing tracking systems to ensure that each capital defendant was effectively represented, work he continues...
today with federal Criminal Justice Act attorneys. Convening and possibly requiring specialized training programs in the defense of capital cases was addressed by Thomas Smith, of the New Jersey State Public Defender Office, and Michael Millman, then of the California State Public Advocacy Office, who later established, and became Executive Director of, the California Appellate Project that produces monthly updates on capital litigation decisions around the country.

I spoke to training as well, wearing several hats at the time. In addition to my law school teaching, I was then a Governor’s appointee to the OPD Commission (“Commission”). The Commission administered the system of indigent defense in Ohio, assuring that each county had an acceptable system of appointed counsel representation, and it also approved the reimbursement of state funds to counties for indigent defense representation. I was also serving as Coordinator of the Ohio Criminal Defense Lawyers’ Ohio Death Penalty Task Force, which was organized to assure effective representation in capital cases and produce training and motions manuals, of which I was a contributing co-editor. So, training concerns came naturally to me.

Other topics at the Conference included engaging nationwide organizations and lobbying for legislation. Such topics were discussed by OPD Dana, OPD Death Penalty Unit Director David Stebbins, and me. All of the topics identified at the Conference retain importance today.

B. 1983 to 1984: Ohio Takes Up the Mantle

Efforts to coordinate death penalty representation statewide were already underway in Ohio in 1983, and came to some fruition over the next year. Wearing several hats, my professional work was focusing on developing practices to better assure that appointed counsel provided
effective representation in capital cases. In 1983, I received a faculty research grant from the University of Akron to study appointed counsel practices in capital cases around the country. I was also made Chair of the State Public Defender Commission’s newly formed Committee on Capital Defense Counsel Qualifications (“Qualifications Committee”). That Qualifications Committee position and the research grant allowed me to begin gauging the progress toward such better systems of representation in capital cases. I prepared a survey questionnaire that was distributed at the NLADA, National Association for the Advancement of Colored People Legal Defense Fund, and ABA meetings that year. In late 1983, with survey responses from defense attorneys in nineteen states (half of the then-death penalty states), the picture was forming.

This 1983 snapshot survey of capital defense representation systems showed that public defender offices were doing more of the trial and appeal cases than were private counsel, but private counsel were doing more of the federal habeas corpus work. An equal number of states had two counsel appointed to each capital trial level case as had states with one counsel appointed. In four states, the Public Defender controlled appointments, and one state required appointment of the State Public Defender. In four states, there were local rules or practices imposing an experiential standard before appointment could occur. One respondent referenced the South Carolina statutory requirement that two attorneys be appointed, that one of the two have at least five years of experience as a licensed attorney and three years of experience in the actual trial of felony cases, and that one of the two attorneys be a public defender. I had no responses from the other two states with statutory requirements. It appeared four states had made attempts to establish qualifications, but did not succeed. When asked whether the responders favored the idea of qualifications, the great majority responded affirmatively, many strongly. When asked what type of qualifications were appropriate, litigation “[e]xperience” was by far the most frequent.

58. Margery M. Koosed, supra note 53.
59. Stebbins & Koosed, supra note 57.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
66. See Stebbins & Koosed, supra note 57.
67. Id. Indiana, Kentucky, Missouri, and Washington were the states that tried and failed. Id.
68. Id.
response, followed by a “[w]illingness to spend time and money,” and, at nearly the same frequency, “[s]pecialized death penalty training.”

The survey responses and ideas generated by the NLADA Conference and their personnel in Washington, D.C. working on this issue—Wilson and Mary Broderick—bore fruit in Ohio. In early 1984, my Qualifications Committee proposed a regulation that was soon adopted by the Commission, and added to the statewide Ohio Administrative Code on November 16, 1984.

That Ohio Administrative Code Regulation 120-1-10 (“Regulation”) made Ohio the first state to require that both capital trial level appointed counsel be experienced litigators, and that specialized training be incorporated in the defense of capital cases as a means of compensating for somewhat less experience in both trial and appellate level appointments. It did this through the power of the purse.

At this time, the State of Ohio reimbursed counties for half of the defense costs in all criminal cases. The Regulation would cut off this flow of funds in capital cases if the county did not comply with these qualifications when appointing counsel. The Regulation required appointment of no fewer than two attorneys at the trial level, and recommended no fewer than two at the appellate level.

Lead counsel at the trial level was required to have at least three years of litigation experience and either: have previously served as lead counsel in at least one capital trial; or as co-counsel in two death penalty trials; or have been a co-counsel, and have prior experience as either (1) lead counsel in an aggravated murder or murder case, or (2) in ten felony jury or civil jury trials; or prior experience (1) as lead counsel in the trial of at least three aggravated murder or murder jury trials, or (2) as lead

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69. Id. As further survey questionnaires were received over the next year and a half, respondents identified “capability/willingness to investigate,” “to file motions and preserve the record,” “demonstrable litigation skills,” and “appellate experience” (it appears that there is an awareness of the issues and need to preserve the record). See id.


72. Id. (outlining “[q]ualifications for assigned/appointed counsel and public defenders in cases in [which] reimbursement for defense costs is sought by a county from the Ohio public defender”).

73. Id. § 120-1-11; OHIO Cnty. Comm’rs, HANDBOOK: CH. 103: INDIGENT DEFENSE 1 (2010) [hereinafter INDIGENT DEFENSE]. That percentage decreased over the next few decades, and presently, Ohio’s eighty-eight counties carry most of the burden of indigent defense funding. See INDIGENT DEFENSE, supra, at 2, 8.

74. OHIO ADMIN. CODE § 120-1-10(A)–(C).

75. OHIO SUP. R. 20 (II)(A)–(B).
counsel in one aggravated murder or murder jury trials, at least three first degree felony trials within the past three years, and have specialized training in the defense of capital cases.\textsuperscript{76} Appointment as trial level co-counsel had similar requirements, but a lesser number or lesser level of jury trial experience, or was allowed simply where the lawyer had specialized training in the trial of cases in which the death penalty may be imposed.\textsuperscript{77}

If these criteria were not met, a county might still attain reimbursement from the state if the trial judge, in consultation with the State Public Defender, was convinced the attorney would provide competent representation.\textsuperscript{78} A number of factors were identified as relevant to this, including: CLE training and experience; the amount of time necessary for preparation of the defense; the time available to the attorney to attain that knowledge; and skill reasonably necessary for defense of the case.\textsuperscript{79}

For appointment on appeal, the Regulation required that the counsel have adequate criminal appeal, post-conviction, or habeas corpus experience commensurate with the appellate responsibilities of a capital case, have three years of litigation experience, and either (1) prior experience as counsel in the appeal of a death sentence case, or (2) prior experience in the appeal of at least three felony convictions within the past three years and have specialized training in the trial or appeal of capital cases.\textsuperscript{80} A similar provision was made to seek reimbursement upon consultation with the State Public Defender in the event these criteria were not met.\textsuperscript{81} Counsel interested in such appellate appointments were encouraged to submit their information regarding their ability to meet these qualification criteria to the State Public Defender so that it might notify the relevant courts.\textsuperscript{82} All appointments were to be distributed as widely as possible among the members of the bar meeting Ohio’s trial or appellate level qualifications.\textsuperscript{83}

The Ohio Legislature was also asked, in 1984, to weigh in on qualifying counsel for these cases, through even further financial

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\textsuperscript{76} \textit{Ohio Admin. Code} § 120-1-10(A)(b).

\textsuperscript{77} \textit{Ohio Sup. R.} 20.01(C).

\textsuperscript{78} \textit{See} \textit{Ohio Admin. Code} § 120-1-10(C)-(D); \textit{see, e.g.}, \textit{Ohio Admin. Code} § 120-1-13 (2009); George J. Ticoras, \textit{Comment, The Ohio Supreme Court’s Move Toward Quality Control of Court-Appointed Counsel for Indigent Defendants Charged with Capital Crimes}, 21 \textit{Akron L. Rev.} 503, 511 (1988).

\textsuperscript{79} \textit{See} Ticoras, \textit{supra} note 78, at 508, 509 & nn.74 & 78.

\textsuperscript{80} \textit{Ohio Sup. R.} 20.01(D).

\textsuperscript{81} \textit{Ohio Admin. Code} § 120-1-10(C).

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Ohio Admin. Code} § 120-1-10(B).
incentives to the county—a full reimbursement of indigent defense if the county appointed counsel who was certified by the State Public Defender through training programs or other procedures to be eligible for appointment in capital cases. This proposal did not pass.

C. 1984: The United States Supreme Court Finally Steps In—Strickland v. Washington

In 1984, the Strickland v. Washington decision addressed defining the right to effective assistance of counsel, and the proof required to find a violation occurred and to obtain relief—counsel’s performance was to be assessed by examining what reasonably competent counsel under prevailing professional norms would do. Under this test, professional standards like the ABA Standards for the Defense Function are used as guides to determine what is reasonable, and the Court listed “certain basic duties” that essentially repeated responsibilities found in those ABA Standards. It was evident that professional standards would assume a heightened role in assuring justice.

D. 1984 to 1985: The ABA Weighs In

Throughout its history, the ABA has worked to assure the American people a fair and accurate criminal justice system that accords due process and delivers justice to society and to those who are accused. In large part, the ABA has done that by developing standards addressing each component of the criminal justice system, from investigation of crime to appeal of conviction and petitions for clemency.

84. E-mail from David Stebbins, Former Director, Death Penalty Unit of the Pub. Defender’s Office, to Margery M. Kossed, Professor of Law, Univ. of Akron School of Law (Mar. 18, 2015) (on file with the Hofstra Law Review).
85. Id.
87. Id. at 687-89.
88. Id. at 688.
89. Id.
90. See 1 A.M. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 4-1.1 (2d ed. Supp. 1980). To obtain relief, however, a defendant had to prove not only that counsel did not perform as reasonably competent counsel would, but also that there was a reasonable probability of a different outcome in the case had counsel properly performed. Strickland, 466 U.S. at 694.
91. See generally 1 A.M. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, supra note 90.
92. See id. §§ 4-7.7 to 8.2.
The ABA began writing standards for appointment of capital trial counsel and standards of performance at this time. In February 1984, the ABA Defense Function Committee ("ABA Committee") crafted proposed "Minimum Guidelines for the Conduct of Counsel in Felony and Capital Cases," and proposed "Minimum Qualifications for the Appointment of Counsel in Capital Cases." The ABA Committee urged special guidelines for the conduct and the appointment of counsel because "the death penalty is being sought more frequently than in previous years, and more lawyers lacking in capital defense experience are being assigned and are undertaking these cases."94

The first version of what would later become the "Standards for Performance of Counsel" was but five duties. Drawing heavily upon Professor Gary Goodpaster's then-recent article, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,95 the "ABA Committee recommended Guidelines for the Conduct of Counsel in Death Penalty Cases," and simply added material to the third duty (appearing in brackets below).96 Its recommended guidelines governing the duties of trial counsel were:

A capital defendant’s trial counsel should:
1. Conduct thorough crime and life-history investigations in preparation for both the guilt and penalty phases of the trial;
2. Fully inform the client of all available defenses and the potential penalty phase consequences of each defense, and obtain the client’s assent to both the guilt and penalty phase case to be presented;
3. Attempt to rehabilitate members of the venire who seem to be unequivocally opposed to imposition of the death penalty [, and to exclude members of the venire who unequivocally favor the imposition of the death penalty];
4. Integrate the guilt phase defense theory and strategy with the projected affirmative case for life at the penalty phase;
5. At the penalty phase of the trial, present all reasonably available mitigating evidence helpful to the defendant.97

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94. Id. at 3.
96. Minimum Guidelines, supra note 93, at 3-4.
97. Id.
With regard to “Minimum Qualification Necessary for Appointment of Counsel in Death Penalty Cases,” the ABA Committee proposed as ABA policy: “1. Counsel appointed to represent the defendant should have a minimum of five (5) years of active felony trial experience;”98 Moreover, “2. The Court should appoint a second counsel to assist the appointed lead counsel.”99

Between February 3, 1984, and July 19, 1984, the ABA Committee revised its February proposals, dropping altogether the list of duties and revising the minimum qualifications.100 The question “what happened in the interim to bring this about?” is simply answered: the U.S. Supreme Court’s decision in Strickland.101 The ABA Committee’s Report of July 19, 1984 (“Report”), explained, after acknowledging Professor Goodpaster’s list of duties, that though “[a] list of specific duties has a certain merit in providing more concrete guidance than existing general standards,” the Strickland Court “made it clear that rigid and inflexible rules for counsel’s conduct are not appropriate.”102 The Report acknowledged that “[w]hile it rejected a listing of duties, the Court did not turn its back on ‘guidelines’ which are advisory or act as a checklist or reminder of possible actions to be taken by defense counsel, if believed to be appropriate to a particular case.”103 The Report later added: “Trial tactics involved in a case is not one of those elements that can be adequately defined by a list of duties.”104 Given that the Court created the test for “ineffectiveness of counsel,” and seemingly rejected a listing of duties just a few months before, it is perhaps understandable that the ABA Committee would back away from its proposed listing of duties.105 But, how many instances of ineffective assistance may have been averted had these basic duties been proposed and adopted as “guidelines” then, eighteen years earlier?

98. Id. at 4.
99. Id.
100. Compare Memorandum from Michael L. Bender, Chair of the Def. Function Comm., on Minimum Qualifications of Appointed Private Counsel in Death Penalty Cases to Officers, Council Members, and Other Meeting Attendees 2-4 (July 19, 1984) (on file with the Hofstra Law Review) [hereinafter Minimum Qualifications] (stating that the Supreme Court “rejected a listing of duties,” and rejected the quantifying of trial counsels’ qualifications by number of years of experience), with Minimum Guidelines, supra note 93, at 1-2 (explaining the minimum duties in a felony case, and requiring that counsel have a minimum of five years of active felony trial experience).
102. Minimum Qualifications, supra note 100, at 2.
103. Id.
104. Id. at 3.
105. See Strickland, 466 U.S. at 682-83, 688-91; Minimum Qualifications, supra note 100, at 2.
As noted, the ABA Committee also revised its proposal on “Minimum Qualification Necessary for Appointment of Counsel in Death Penalty Cases” before sending it on to the Criminal Justice Section. The revised proposal rejected “any numerical gauge by which a desired level of trial experience is measured,” while, at the same time, upping the nature of counsel’s experience, and mandated, rather than suggested, that two attorneys be appointed.106 The Report provided that the ABA recommends:

When attorneys are appointed to represent defendants in death penalty cases:
1. The appointed attorneys shall have substantial trial experience involving the defense of serious and complex criminal cases; and
2. Two attorneys shall be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel, and the other shall be assistant defense counsel.107

The Report suggested that the “broad terms of ‘substantial trial experience’ . . . is best left to the discretion of the appointing authority,” and though imprecise, “it brings to the issue of ‘effective assistance’ a degree of specific qualifications that has previously been lacking.”108 “At a minimum, it will exclude the neophyte . . . .”109 The many reasons to require that two attorneys be appointed include: the unique nature of these cases; the need for added perspectives; a sounding board; emotional support; and enhancing the lead attorney’s ability to meet their responsibilities to their other clients.110 The Report stated that these were only minimal guidelines, and encouraged authorities to build upon them; they were not a panacea to the existing problem of ineffective assistance—monitoring by the courts on an individual basis would need to be continued.111

The Criminal Justice Section revised the ABA Committee’s proposal slightly, by changing the words “and complex criminal” to “felony,” as it found “complex” was too “hard to define.”112 Thus, the final form, as proposed to the House of Delegates, reads:

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106. Minimum Qualifications, supra note 100, at 4.
107. Id. at 1.
108. Id. at 4.
109. Id.
110. Id. at 4-5.
111. See id. at 2.
1. The appointed attorneys shall have substantial trial experience involving the defense of serious felony cases; and

2. Two attorneys shall be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel, and the other shall be assistant defense counsel.\(^\text{113}\)

This proposal required that both counsel have substantial trial experience, however, a further revision occurred before the House of Delegates unanimously adopted the Criminal Justice Section’s proposed minimum qualification at its February 18-19, 1985, mid-year meeting.\(^\text{114}\) The proposal suggested that only lead counsel be experienced. In its final form, as unanimously approved, the qualifications provision read:

[When attorneys are appointed to represent defendants in the trial of death penalty cases:
1. Two attorneys be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel and shall meet the criteria of paragraph 2. The other shall be assistant defense counsel; and
2. The primary attorney shall have substantial trial experience which includes the trials of serious felony cases.\(^\text{115}\)


The Regulation was a carrot—it provided a financial incentive to appoint qualified counsel, but was not mandatory. It took a stick—the financial penalty of having to retry a case due to ineffective assistance—to mandate that counsel be qualified to undertake these cases.\(^\text{116}\) The Ohio Common Pleas Superintendence Rule 65 (“Rule 65”)\(^\text{117}\) arose


\(^\text{114}\) See ABA Criminal Justice Section Wins Approval for Two Resolutions, 36 CRIM. L. REP. 2427, 2427 (1985).

\(^\text{115}\) Id. (internal quotation marks omitted).

\(^\text{116}\) See Ticoras, supra note 78, at 510-11, 516-17.

\(^\text{117}\) OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, supra note 78, app. at 514-16. Amendments have been made over the years, many of which are discussed below. See id. Additionally, in 1997, the Rule was renumbered to Rule 20, and, in 2010, it was broken down into six portions, beginning with Rule 20 and ending with Rule 20.05. See OHIO SUP. R. 20.00-05. The present Superintendence Rules can be accessed at http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf. As further discussed in the Addendum, in February 2015, Rule 20 was replaced by the Rules for Appointment of Counsel in Capital Cases, which can be accessed at http://www.supremecourt.ohio.gov/LegalResources/Rules/
because a Justice of the Ohio Supreme Court, the Ohio State Bar Association ("OSBA"), and the OPD were all strongly committed to the task of doing it right the first time.\(^\text{118}\)

Rule 65 derived from the first reversal on grounds of ineffective assistance of counsel in a case prosecuted under the new 1981 Ohio death penalty law.\(^\text{119}\) Gary Johnson was convicted and sentenced to death in October 1983, a year before Strickland was decided, and at a point when Ohio was using a test of whether the defendant had "a fair trial and substantial justice was done."\(^\text{120}\) This test melded the "farce and mockery" test with an added suggestion that the trial courts may find assistance in professional standards, including the ABA Standards for Criminal Justice, in assessing retained or appointed counsel's performance.\(^\text{121}\) The Ohio Supreme Court reversed Johnson's case on June 18, 1986.\(^\text{122}\) Justice Brown wrote the majority opinion, reversing both the conviction and death sentence on grounds of ineffective assistance of counsel and improperly denying a continuance in violation of the Due Process Clause.\(^\text{123}\) The facts of the case are, in some respects, the textbook example of ineffectiveness, at least at the penalty phase.

Upon the jury returning a guilty verdict on all charges—with the aggravating circumstances making the case death-eligible\(^\text{124}\)—defense counsel asked for a ten-minute recess to explain the penalty phase of the case to the defendant in order "to consider what action we would like for him to take," openly admitting that "he had not even discussed with his client the penalty phase aspect of the case."\(^\text{125}\) Counsel was given a ten-minute recess, and the judge then set the sentencing hearing for nine in the morning the very next day.\(^\text{126}\) Defense counsel presented only the unsworn statement of appellant; no mitigating evidence of any kind was

\(^\text{118}\). See Ticoras, supra note 78, at 504, 508-09.
\(^\text{119}\). See State v. Johnson, 494 N.E.2d 1061, 1063 (Ohio 1986); Ticoras, supra note 78, at 506-07.
\(^\text{120}\). See Johnson, 494 N.E.2d at 1062; see, e.g., State v. Hester, 341 N.E.2d 304, 310 (Ohio 1976).
\(^\text{121}\). Hester, 341 N.E.2d at 308-10.
\(^\text{122}\). Johnson, 494 N.E.2d at 1061, 1063.
\(^\text{123}\). Id. at 1062-63, 1067. For further analysis of the decision, see Ticoras, supra note 78, at 506-09. For Rule 65 and its Commentary, see id. app. at 514-23.
\(^\text{124}\). Johnson, 494 N.E.2d at 1068. Ohio provides that the aggravating circumstances are proven at the trial phase, unlike many other states. OHIO REV. CODE ANN. § 2929.04(B) (West 2006). The penalty phase is then devoted to mitigating factors, and, if necessary, a prosecutor's rebuttal of them. Id. § 2929.04(C). Ultimately, the aggravating factors proven at the trial phase are then weighed against these mitigating factors, and death may be imposed if aggravating factors outweigh mitigating factors beyond a reasonable doubt. Id. § 2929.03(B).
\(^\text{125}\). Johnson, 494 N.E.2d at 1062-63.
offered. The State called two witnesses and introduced several exhibits, and the jury found the earlier proved aggravating circumstances (specifications) outweighed the mitigating evidence. Johnson was sentenced to death following the jury’s recommendation.

The majority opinion wrote that counsel “had not even discussed with his client the penalty phase aspect of the case,” and had a duty “to investigate his client’s background for mitigating factors,” describing this as “an indispensable component of the constitutional requirement [for] . . . effective representation.” The court also found no strategic or tactical decision-making to support counsel’s failure to present over eight relevant mitigating factors at the penalty phase. Trial counsel was also ineffective for failing to object to the consideration of an invalid non-statutory aggravating factor. In addition, the trial judge’s failure to grant a one-week continuance to investigate facts relating to the trial phase violated the defendant’s due process rights, requiring reversal of the conviction.

Chief Justice Celebrezze concurred in the reversal, as there was no evidence counsel did any penalty phase investigation: “counsel was entirely unprepared for, and indeed misunderstood, the nature of the penalty phase of this trial,” and failed to object to the invalid aggravating circumstance. He also found that the trial judge violated the defendant’s right to due process by denying the one-week continuance at the outset of the trial phase.

Associate Justice Wright concurred in part with the majority on denial of due process by denial of the continuance, but agreed with dissenting Justice Douglas that reversal on grounds of ineffectiveness was error.

Justices Douglas and Holmes dissented, finding no prejudice in counsel’s representation or in the denial of the continuance that warranted reversal. But, as important as this decision was for shaping

127. Id.
128. Id. at 1062.
129. Id.
130. Id. at 1063.
131. Id. at 1064.
132. Id. at 1064, 1065 & n.5
133. Id. at 1065-66.
134. Id. at 1066-68.
135. Id. at 1069-70 (Celebrezze, C.J., concurring).
136. Id. at 1070.
137. Id.
138. Id. at 1070-72 (Wright, J., concurring in part).
139. Id. at 1072-80 (Douglas, J., dissenting).
Ohio law and providing a new trial for Gary Johnson, perhaps the most important facet is the action that dissenting Justice Douglas took the day the Court released its decision.

Justice Douglas took the Johnson decision to the next level, writing to the OSBA and the OPD: “[I]t is time for us to set some standards of training for counsel who are handling [death penalty] cases and provide a procedure for the training and for the selecting of lawyers who will be assisting persons charged with crimes wherein the death penalty is involved.”

His reasons were two-fold: “[T]he most important being . . . that defendants so charged should have the most able of attorneys, properly trained in this specialty, to represent them as they stand trial for their very life.” This was immediately followed by the second factor: “Of course, the cost factor is not insignificant when we consider the enormous cost to each county to bring each of these capital cases to trial—and then have to proceed all over again because counsel was actually or allegedly ineffective.” Thus, just as the financial prospect of getting full reimbursement from the state served as an encouragement for the counties to adopt the OPD qualifications, the prospect of incurring the cost of retrying a capital case ultimately led to mandatory standards.

The OSBA and OPD met and determined to create a special Subcommittee of the OSBA Criminal Justice Committee (“Subcommittee”) to consider and propose qualifications for appointment, training procedures, and standards of performance. This Subcommittee included a law professor (the Author), prosecutors, defense lawyers, public defenders, general practitioners, and an NLADA


141. See Letter from Justice Andrew Douglas to Duke W. Thomas, then-President of the Ohio State Bar Ass’n, Leslie W. Jacobs, President-Elect of the Ohio State Bar Ass’n, and Randall M. Dana, State Pub. Defender (June 18, 1986) (on file with the Hofstra Law Review).

142. Id.

143. Id.

144. Id.

145. OHIO ADMIN. CODE § 120-1-10(A) (1984).

146. Judge Everett Burton, Report of the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases 1 (1990); see also Ticoras, supra note 78, at 504. Its formal title was the “Subcommittee on the Appointment of Counsel for Indigents in Capital Cases.” Ticoras, supra note 78, at 504.

147. Burton, supra note 146, at 1.
liaison. The Subcommittee’s proposal was formally adopted by the Criminal Justice Committee and, later, by the OSBA Executive Committee. Its report and proposal was then forwarded to Justice Douglas, who in turn forwarded it to the Ohio Supreme Court Chief Justice Moyer and the Associate Justices, with the request that the Court consider adopting the proposals as a court rule. The proposal was published for comment and officially approved by the court, becoming effective on October 14, 1987.

In a press release on October 15, 1987, Chief Justice Moyer stated: “Ohio is the first state in the nation to adopt a mandatory rule establishing standards for the appointment of counsel for indigents in death penalty cases. This demonstrates the [Ohio Supreme Court’s] commitment to maintaining and enhancing the skills of lawyers who represent indigent clients in capital cases.”

Rule 65 made mandatory what was, in most respects, the criteria earlier specified in the Regulation. Differences between them included mandates in Rule 65: for two counsel appointed for the appeal (as opposed to a recommendation); that lead trial counsel have specialized training in the defense of persons accused of capital crimes; that “[a]t least one of the appointed counsel must maintain a law office in the State of Ohio and have experience in Ohio criminal trial practice;” and that “[a]t least one of the appointed [appellate] counsel must maintain a law office in Ohio.” Finally, the earlier provision that provided for appointments of counsel without such criteria being met, upon consultation of the judge with the OPD, became one that spoke of

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148. Id. at 6-7. Its liaison was Mary Broderick, the director of the Defender Division. See Mary Broderick, DEATH PENALTY FOCUS, http://deathpenalty.org/article.php?id=162 (last visited Apr. 12, 2015). The Defender Division was actively seeking further input from the Subcommittee and the author, as well as others, to craft more detailed qualifications and standards of performance. See, e.g., History of NLADA, NAT’L LEGAL AID & DEFENDER ASS’N, http://www.nlada.org/About/About_HistoryNLADA (last visited Apr. 12, 2015). That these national and Ohio efforts were contemporaneous was mutually advantageous.

149. BURTON, supra note 146, at 2.

150. Id.

151. Id.; Ticoras, supra note 78, app. at 514.


154. OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, supra note 78, app. at 516. In George Ticoras’s law review comment, the Committee Comments, while complete, are reprinted somewhat out of order and within parts of the Rule itself.

155. Ticoras, supra note 78, app at 514.

156. Id.

157. Id. app. at 516.
“exceptional circumstances” based on similar criteria, but with a decision to allow appointment being made by a majority of the newly formed Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (“Committee on the Appointment of Counsel”). Part II of Rule 65 establishes and describes the Committee on the Appointment of Counsel. Part III of Rule 65 sets out the procedure for appointing counsel, and the necessity for adequate support services. The latter expressly references support services as required by “professional standards.”

The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator(s), social worker(s), mental health professional(s), or other forensic experts and other support services reasonably necessary for counsel to prepare and present an adequate defense at every stage of the proceedings—before, during and after trial—including, but not limited to... preparation for the sentencing phase of the trial.

Rule 65 was adopted with fairly extensive Committee Comments that provide very helpful and necessary insights, including highly appropriate disclaimer language regarding the ability of minimum qualifications to eliminate ineffectiveness:

The fact that an attorney meets the minimum qualifications... cannot be the sole criterion in assessing the effectiveness of such counsel in a particular case. When a claim of ineffective assistance of counsel is raised, even the actions of those attorneys appearing to possess the necessary skill and knowledge must be judged by the usual standards. Compliance with this Rule cannot, nor is it expected to, eliminate the occasional validity of such claims.

Indeed, there is no presumption of ineffective assistance if retained counsel representing the defendant would not have met the qualifications
under Rule 65.\textsuperscript{163} Appointing judges are expressly cautioned to consider workload of prospective lawyers when appointing.\textsuperscript{164}

The Commentary also reiterates “the proposition adopted by other national standards on defense services that quality representation cannot be rendered by assigned counsel unless the lawyers have available for their use adequate supporting services,” including expert witnesses, personnel skilled in social work to provide assistance at sentencing, and trained investigators,\textsuperscript{165} concluding:

It is critical, therefore, for courts to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for the trial and sentencing phases, and to procure the necessary expert witnesses and documentary evidence.

Resources available to appointed defense counsel should be equivalent to yet independent of, those available to the prosecution.\textsuperscript{166}

All in all, the 1987 version of Rule 65 was state-of-the-art rulemaking\textsuperscript{167} to help assure qualified counsel could provide their clients with effective assistance.\textsuperscript{168}

Like everything else, however, the devil is in the details, or in the implementation, and in the adequacy of resources. Since 1987, Ohio has had continuing problems with ineffectiveness, inadequate support services, and prosecutorial misconduct, leading to multiple reversals of convictions and death sentences.\textsuperscript{169} More Ohio death sentences are reversed for ineffective assistance of counsel than any other ground for relief.\textsuperscript{170}


\textsuperscript{164} OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, supra note 78, app. at 518.

\textsuperscript{165} Ticoras, supra note 78, app. at 519.

\textsuperscript{166} Id.

\textsuperscript{167} See BURTON, supra note 146, at 2. A March 20, 1990 Spangenberg Group “Report on Standards in Capital Cases and Compensation in Capital Cases at Trial” found only four other states with such standards (California, Georgia, Oregon, and Washington), but noted that there was “a beginning trend in this regard.” Id. app. E.

\textsuperscript{168} OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, supra note 78, app. at 518; see Norman Lefstein, Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation, 29 IND. L. REV. 495, 504 (1996).


As of this Symposium, twenty-five Ohio death row inmates have been granted relief in the Ohio or federal courts on grounds of ineffective assistance of counsel, most on penalty phase ineffectiveness. To put this in perspective, approximately 279 death row defendants have had their cases reviewed thus far in the Ohio Supreme Court on direct appeal, so of these, twenty-five, or nearly nine percent, have already been found to have received ineffective assistance.

Ohio's continuing difficulties in providing what the Constitution requires have prompted additional reform measures, some merely proposed, and others enacted.

“Ineffective assistance cases accounted for 54 percent of all appeals won by death row inmates in the 6th Circuit (which includes Ohio, Kentucky, Tennessee and Michigan).” Id. (“It’s a big, big problem” said Judge Gilbert Merritt, a semi-retired senior judge on the 6th Circuit court. The lawyers don’t have the wherewithal to put on a first-class defense.” (internal quotations omitted)). The Cincinnati Enquirer’s 2007 study found fifteen Ohio death inmates had won relief on ineffective assistance grounds.

The number has risen to twenty-five since then. See infra note 171.

171. See the following federal Sixth Circuit and/or Ohio Supreme Court cases finding ineffective assistance and reversing a penalty phase, or a conviction (latter designated by a *). Note, a few of these were cases finding that ineffective assistance on appeal (noted as “IAAC” in this list) had prejudiced the review of a particular phase of the trial. See Foust v. Houk, 655 F.3d 524, 533-38, 546 (6th Cir. 2011); Goff v. Bagley, 601 F.3d 445, 462-72, 482 (6th Cir. 2010) (IAAC); Woodward v. Mitchell, 410 F. App’x 869, 873-81 (6th Cir. 2010); Johnson v. Mitchell, 585 F.3d 923, 937-46 (6th Cir. 2009); Johnson v. Bagley, 544 F.3d 592, 600-06 (6th Cir. 2008)*; Mason v. Mitchell, 543 F.3d 766, 773-85 (6th Cir. 2008); Jells v. Mitchell, 538 F.3d 478, 489-501, 508-11, 513 (6th Cir. 2008); Hyland v. Mitchell, 492 F.3d 680, 691-96, 720 (6th Cir. 2007); Morales v. Mitchell, 507 F.3d 916, 929-39, 942 (6th Cir. 2007)*; Dickerson v. Bagley, 453 F.3d 690, 693-700 (6th Cir. 2006); Franklin v. Anderson, 434 F.3d 412, 417-31 (6th Cir. 2006)(IAAC); Poindexter v. Mitchell, 454 F.3d 564, 570-81, 587 (6th Cir. 2006); Williams v. Anderson, 460 F.3d 789, 797-805, 817 (6th Cir. 2006); Richey v. Mitchell, 395 F.3d 660, 682-88 (6th Cir. 2005)*; Frazier v. Huffman, 343 F.3d 780, 793-800, 802 (6th Cir. 2003); Hamblin v. Mitchell, 354 F.3d 482, 485-94, 496 (6th Cir. 2003); Coleman v. Mitchell, 268 F.3d 417, 444-54 (6th Cir. 2001); Greer v. Mitchell, 264 F.3d 663, 673-81, 691-92 (6th Cir. 2001) (IAAC); Combs v. Coyle, 205 F.3d 269, 277-91, 293 (6th Cir. 2000); Mapes v. Coyle, 171 F.3d 408, 425-29 (6th Cir. 1999) (IAAC); Glenn v. Tate, 71 F.3d 1204, 1206-11 (6th Cir. 1995); Stallings v. Bagley, 561 F. Supp. 2d 821, 860-79, 888 (N.D. Ohio 2008); Goodwin v. Johnson, No. 1-99CV2963, 2006 WL 753111, at *7-15, 19 (N.D. Ohio Mar. 26, 2006); Lawson v. Mansfield, 197 F. Supp. 2d 1072, 1095, 1100 (S.D. Ohio 2002); State v. Zuranski, 513 N.E.2d 753, 753 (Ohio 1987)(citing State v. Penix, 513 N.E.2d 744, 746-48 (Ohio 1987)). This listing does not include the handful of cases where the Ohio District Courts of Appeal may have reversed a conviction or death sentence on grounds of ineffective assistance before 1998, when the law was changed to remove the court of appeals review. Following reversal, some of these defendants were resentenced to death; many others received life sentences, either by operation of law (until 1998, no legislation existed to conduct a new sentencing hearing before a new jury, see Penix, 513 N.E.2d at 747, and later amended Ohio REV. CODE ANN. § 2929.06 (West 2006)) or upon a retrial, or by plea negotiations.

172. See cases cited supra note 171. Of course, cases thus far reviewed by the Ohio Supreme Court on direct appeal move into further state post-conviction and federal habeas corpus review where ineffectiveness claims are made and assessed, so this number can be expected to grow.
1. National Legal Aid and Defender Association and ABA Standards

NLADA liaison Broderick was very helpful throughout the crafting of Rule 65. A few months after Ohio adopted its Rule 65, the NLADA published its Standards for the Appointment and Performance of Counsel in Death Penalty Cases (“Standard(s)”)\(^{173}\) taking in the same general concepts for qualifying counsel as the Ohio Rule 65, but notably requiring specialized training within the past year for both counsel, and five years and three years of active trial criminal defense work of lead and co-counsel respectively.\(^{174}\) Further, the Legal Representation Plan Standard 3.1 called for an independent committee, like the Committee on the Appointment of Counsel, to actually be making the appointments, rather than having judges select from a list as was done in Ohio.\(^ {175}\) The NLADA also established a much more detailed and thorough set of performance standards, setting out the duties of counsel at all phases of capital litigation, from pre-trial to clemency.\(^ {176}\)

Ultimately, these Standards formed the basis (with only the slightest variations) for the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (“1989 ABA Guidelines”)\(^ {177}\) (the small variations were adopted by the NLADA at its 1988 NLADA Annual Meeting, so the two documents are the same). The 1989 ABA Guidelines were subsequently revised and expanded upon in the 2003 ABA Guidelines for the Appointment and

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\(^{173}\) See STANDARDS AND COMMENTARY, supra note 25, at 20-21. They were adopted by the NLADA Board of Directors on December 1, 1987, and were later amended on November 16, 1988. See Ticoras, supra note 78, at 504 n.16. Rule 65 was cited in the Commentary to Guideline 11.2 as an example of standards that are “intended for use in determining eligibility but not as the sole basis for examining claims of ineffective assistance of counsel.” AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter 1989 ABA GUIDELINES]; see also STANDARDS AND COMMENTARY, supra note 25, at 54.

\(^{174}\) STANDARDS AND COMMENTARY, supra note 25, at 16-17.

\(^{175}\) NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES § 3.1 (1988) [hereinafter STANDARDS FOR THE APPOINTMENT OF COUNSEL].

\(^{176}\) Id. §§ 11.1–9.5.

\(^{177}\) Compare STANDARDS FOR THE APPOINTMENT OF COUNSEL, supra note 175, with 1989 ABA GUIDELINES, supra note 173.
Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines") we observe today. 178

Both the ABA and the NLADA personnel worked vigorously to have states set qualifications for appointments and standards of performance. They lobbied bar associations, the media, legislatures, and courts with amici briefs and by meetings with judicial committees. Arguments often focused, as they did in Ohio, on the cost savings that would accrue from having fewer constitutional flaws in trials, and thus, less expenditure in the appellate and post-conviction processes and fewer retrials. 179 Further, "[c]ertain cases will be screened out at the beginning of the process that aren't really capital cases," as skilled lawyers will quickly see the weaknesses in the prosecution's cases and obtain a lesser charge or a plea. 180

This seemed to be borne out in Ohio: while capital indictments remained in the same range for the period 1987-1989, the percentage of indictments resolved by pleas to lesser charges rose from 8.8% in 1987, to 12.9% in 1988, to 13.5% in 1989. 181 In the same period, the trials resulting in sentences less than death actually dropped, from 10.2% to 8.1%, indicating that the cases taken to trial were more death-worthy. 182 Further, the number of death sentences imposed (and appeals necessitated) fell from twenty-three in fiscal year 1985-1986 into the teens in the period 1986-1989, when qualifications and training came into the system, and fell to eight in the 1989-1990 period, saving resources. 183 Likewise, the death-sentenced cases should "move more expeditiously through the appeals court if competent counsel are


180. Id.


provided at the trial stage as the issues are more likely to have been identified and developed in the trial court, and such efficiencies are even more clear if qualifications for appellate and post-conviction representation are included, as they were in the 1989 ABA Guidelines and the NLADA Standards.

2. Ohio Rule 65 Revisions

Ohio continued to tinker with its qualifications system, bringing it into greater synchronization with the ABA and NLADA practices. In January 1991, Rule 65 was amended to require that all co-counsel and appellate counsel have specialized training in the defense of capital cases. A part of the Rule 65, titled “Monitoring of Counsel; Removal,” provides that an appointing court should monitor the performance of assigned counsel, and

[i]f there is compelling evidence that an attorney has ignored basic responsibilities of an effective lawyer, which results in prejudice to the client’s case, the court shall report such action to the Committee, which shall accord the attorney an opportunity to be heard, and may use its authority to remove the attorney from the list of qualified counsel.

The “basic responsibilities of an effective lawyer” were not specifically defined, and this provision was rarely, if ever, used.

In July 1992, the Committee on the Appointment of Counsel reported that though Ohio’s steps were worthy of praise, the need for further improvements was evident. “[U]neven and inadequate rates of compensation for appointed counsel and uneven funding for expert witnesses and investigation from county to county” warranted the warning that “the future of high quality representation in capital cases is dependent on the Supreme Court and the entire justice system seeking creative solutions to these difficult problems just as the Court and bar did in 1987 when Rule 65 was enacted.”

186. OHIO C.P. SUP. R. 65 (1991), in SECOND REPORT, supra note 183, at 2, 8; see ABA Criminal Justice Section Wins Approval for Two Resolutions, supra note 114, at 2427.
187. SECOND REPORT, supra note 183, at 7, 21; see also OHIO SUP. R. 20.03 (1997).
188. See SECOND REPORT, supra note 183, at 8.
190. Report Praises Counsel Rule, supra note 189, at 12; see also SECOND REPORT, supra note 183, at 13.
The same problems are highlighted in the following decades. On July 1, 1995, Rule 65 was further amended to provide that it did not permit the engagement of one privately retained attorney and the appointment of a second attorney pursuant to Rule 65.\textsuperscript{191} A new provision in Part III provided specific guidance on “Workload of [A]ppointed [C]ounsel”\textsuperscript{192} consistent with the ABA and NLADA Standards.\textsuperscript{193} A further provision, Part VI, entitled “Programs for Specialized Training,” set out the topics to be covered in training seminars for trial and appellate level appointments, tweaking somewhat the topics earlier identified in regulations of the Committee on the Appointment of Counsel.\textsuperscript{194}

At the same time, the Rules of Superintendence for Courts of Appeals were amended to provide Rule 6 “Appointment of Counsel for Indigent Defendants in Capital Cases” workload limitations.\textsuperscript{195} In 1997, Rule 65 was renumbered to Rule 20, and Court of Appeals Superintendence Rule 6 was renumbered to Rule 21.\textsuperscript{196} Therefore, researchers since that point should be looking to the Common Pleas Rules of Superintendence 20.\textsuperscript{197}

3. The 1997 Ohio State Bar Association Study of the Ohio Death Penalty

In the mid-1990s, the OSBA Criminal Justice Committee (of which I was a member) undertook a study of Ohio’s death penalty system, producing a report entitled “Ohio’s Death Penalty Processes Fail to Guarantee Reliable, Consistent and Fair Capital Sentences. No Executions Should Take Place Until These Processes are Corrected” (“OSBA Report”).\textsuperscript{198} The OSBA Report and its recommendations for reform were adopted by the OSBA governing Board of Governors and Council of Delegates on November 8, 1997, and were published with an

\begin{footnotesize}
\begin{enumerate}
\item Rule 65 I (C) (1995).
\item Rule 65 IV (B).
\item Rule 65 VI; ABA GUIDELINES, supra note 178, Guideline 6.1, at 965; STANDARDS AND COMMENTARY, supra note 25, at 22.
\item See SECOND REPORT, supra note 183, at 8.
\item OHIO APP. SUP. R. 6 (1995).
\item OHIO SUP. R. 20.00–05 (1997); see also supra note 117.
\item Eventually, in 2010, this was renumbered from 20 with portions I through IV; instead, these appeared as Rules 20 through 20.05. Id.; see supra note 117. The Rules were replaced in February 2015. See Addendum, infra Part A.1–3.
\end{enumerate}
\end{footnotesize}
updating commentary in the *Ohio State Law Journal* in 2002. The OSBA Report found major problems in Ohio’s death penalty system: “Ohio’s capital sentencing system is unreliable. There are systemic failures of justice in both the guilt and penalty determinations. . . . It suffers from nearly every defect noted by the American Bar Association in its call for a national moratorium on the death penalty and more.”

The systemic defects identified included: underfunding of indigent capital defense; disparate charging decisions and inadequate narrowing of the class of eligible offenders; politics; racial bias; inadequate guidance to sentencing jurors; inadequate opportunities to defend against the state’s charges; reviewing judges’ usurpation of the jury’s role in sentencing; unequal appellate review practices; state post-conviction remedies that are unavailable and/or inadequate; and stays of execution that are not reasonably or predictably available to capital defendants.

The OSBA Report did not call for a moratorium as the ABA had done that year, but instead urged the state “to require individual case review and systemic change in Ohio’s death penalty charging and sentencing scheme on the theory that the close scrutiny of each case would prevent any unjust execution and that systemic improvements would protect future cases from the same errors or unfairness.” At the time of the 2002 article reprinting the OSBA Report, three persons had been executed, and “[t]hat call [to suspend executions], had not been heeded. This is not to say that nothing had changed in the intervening years—small changes have been wrought—some for good, some for ill.”

Underfunding of defense services remained a critical problem and, in some respects, had grown worse. In the OSBA Report, the OSBA found most counties paid under $25,000 for two attorneys at the capital trial level, ten counties paid $10,000 or less, and some paid as little as $25 an hour. The OSBA Report admonished: “Even in the most impoverished areas of the state, private counsel command a higher rate of pay for even the simplest legal work.” It was noted that in October 1994, Ohio Governor George Voinovich was charged with a
misdemeanor for ordering his plane to leave the ground while President Bill Clinton’s plane, Air Force One, was preparing for takeoff:

While it seemed there was little to dispute, Attorney General Betty Montgomery set aside $20,000 for Governor Voinovich’s misdemeanor defense. In some counties this is more than a capital defendant is given for his entire case. In the best of circumstances, a capital defendant in Ohio is lucky to get twice that amount to defend a vastly more complicated felony charge and prepare mitigation.207

The OSBA Report recommended that $95 be the hourly rate, which matched the median hourly rate for attorneys with three years of experience, and that the budget for each capital case (for attorney’s fees and experts) be $75,000 at trial and $40,000 on appeal.208

In 2002, S. Adele Shank wrote:

[Though] the Ohio Public Defender Commission revised its reimbursement schedules for appointed counsel in capital cases to allow a maximum hourly rate of $50 for out-of-court time and $60 for in-court time, with a total maximum fee for each of two attorneys of $25,000 or a total of $50,000…. [m]any counties do not authorize payment of fees at these rates but continue to set lower hourly rates for appointed counsel. Fees currently range from $35 to $60 per hour. At the same time, the median hourly rates for attorneys with three years of experience have increased to $110 per hour. The prosecution continues to have vastly superior resources and access to resources throughout the litigation process.209

G. 2004 to 2007: The ABA Assesses Ohio’s Death Penalty System

In 1997, as noted above, the ABA had concluded that death penalty systems across this country were failing to deliver justice.210 Although the ABA took no position on the death penalty itself, on February 3, 1997, the ABA had called for all death penalty jurisdictions across the country to impose a temporary halt on actual executions until they could review their systems in detail to assure that they delivered fair and accurate justice, according each defendant due process under

207. Id. at 381 (footnotes omitted).
208. Id. at 381-82.
209. Id. at 382 (footnotes omitted).
210. See supra Part III.F.3.
the law.\textsuperscript{211} Ohio had asked for the same several months later, but little had been done.\textsuperscript{212}

To assist the states and federal government in conducting those reviews, the ABA Section of Individual Rights and Responsibilities developed protocols setting benchmarks for criminal justice systems that administer the death penalty fairly and accurately.\textsuperscript{213} The ABA subsequently launched its state Death Penalty Assessment Project, and Ohio was the seventh of eight states evaluated under that Death Penalty Assessment Project (“Ohio Assessment”).\textsuperscript{214}

The ABA’s Ohio Assessment was conducted by a balanced team of legal experts, each of whom were from the Ohio legal community.\textsuperscript{215} Though the Ohio Prosecuting Attorneys Association would later discount the ABA Assessment Team’s (“Assessment Team”) 2007 Report (“2007 Report”) for not having any sitting prosecutors on it, in fact, the director of the Ohio Attorney General’s Office death penalty unit was repeatedly invited to join the Assessment Team and did not do so.\textsuperscript{216} Furthermore, the Assessment Team already contained two former prosecutors who had actively sought the death penalty (Jones in state

\begin{itemize}
\item \textsuperscript{211} ABA DEATH PENALTY MORATORIUM RESOLUTION: RECOMMENDATION NO. 107, at 1 (1997).
\item \textsuperscript{212} See Shank, supra note 198, at 384-87, 389-92, 394-95, 397-99, 402-03.
\item \textsuperscript{215} Id. at 3-6. The chair was Associate Dean and Professor Phyllis Crocker of the Cleveland-Marshall College of Law. Id. at 3. The Team included: Congresswoman Stephanie Tubbs Jones, Member of the United States House of Representatives and former elected Cuyahoga County prosecutor; Judge Craig Wright, a judge on the Ohio Court of Claims and a former Justice of the Ohio Supreme Court; Senator Shirley Smith, Member of the Ohio State Senate; Judge Michael Merz, Chief Magistrate Judge in the U.S. District Court for the Southern District of Ohio; Geoffrey Mearns, Dean and Professor of Law at Cleveland-Marshall College of Law and former Assistant U.S. Attorney for the Eastern District of North Carolina and the Eastern District of New York; Mark Godsey, Professor of Law at the University of Cincinnati College of Law and Director of the Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project, and former Assistant U.S. Attorney for the Southern District of New York; Adele Shank and David Stebbins, both lawyers in private practice and former defenders in the OPD Office; and the Author of this Article, Professor Margery Koosed of the University of Akron School of Law. Id. at 3-6.
court, Mearns in federal court), and other former prosecutors who had actively prosecuted lesser crimes (Shank in state court, Godsey in federal court). In the end, the Prosecuting Attorneys Association simply did not wish to confront or even talk about the merits of the 2007 Report, nor the reforms it recommended.

The Assessment Team conducted a two and a half year study. The Assessment Team and the ABA released its 2007 Report on September 24, 2007. It found: of ninety-three ABA protocols, Ohio fully complied with only four; the state partially met thirty-seven of the standards; it totally failed to comply with twenty-eight protocols; and because of limited access to information, the team was not able to assess Ohio’s compliance with twenty-three of the protocols. The Assessment Team concluded this was not a system that delivered the justice citizens of Ohio expected.

At its September 24, 2007 news conference, the Assessment Team announced fourteen specific recommendations to help Ohio achieve the justice that the victims of crime, their families and friends, and all of Ohio’s people, deserve. On a broader level, the ABA itself joined the Assessment Team in encouraging the Ohio authorities to take two steps: (1) conduct a review into the many areas the Assessment Team could not address, as well as the problems already identified in this study; and (2) temporarily suspend executions until the problems raised in the 2007 Report could be addressed, and there is greater reason to have confidence that justice is being served. The Assessment Team urged that regardless of one’s view as to the morality of the death penalty, it is

218. Id. at 3-5.
220. Id. *See generally Evaluating Fairness*, supra note 214.
221. As the Executive Summary states: “All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities’ 2001 publication, Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States (the Protocols).” *Evaluating Fairness*, supra note 214, at 1; see *Death Without Justice*, supra note 213.
224. See id. at v-vii.
beyond question that if Ohio is to have a death penalty, it should be accurate, fair, and provide due process to all capital defendants and death row inmates. Unfortunately, the Assessment Team found this was not the case.

In its review, the Assessment Team found a number of problems in the state’s death penalty system, all of which undermined the fairness and accuracy of the system. Some of the problems specific to the ABA Standards we are here to commemorate were: inadequate procedures to protect innocent defendants; inadequate access to experts and investigators; inadequate legal representation; and inadequate appellate review of claims of error. The number and significance of these problems, along with others, led the Assessment Team to call for a temporary suspension of executions until these problems were addressed. The Assessment Team urged that the Ohio Supreme Court or Ohio Legislature to create a task force to further study and make recommendations, especially with respect to those matters the Assessment Team had found itself without sufficient access to data to evaluate fully.

Executions were not suspended, a task force was not created, and for a while it seemed as though the Prosecuting Attorneys Association’s contention that the 2007 Report should be ignored because no sitting prosecutors sat on it might carry the day. But, fortunately, calmer
heads prevailed and some aspects of the Assessment Team’s recommendations began to get attention; indeed, some measures were passed by the legislature.

The Assessment Team’s 2007 Report had called for several reforms designed to assure the innocent were not convicted and sentenced to death. In response, a state-of-the-art Innocence Protection Act was passed with the support of the former Ohio Attorney General, Republican James Petro, and the Ohio Innocence Project. The same ABA-identified concern yielded significant discovery reforms, as defense counsel and prosecutors sat down to hammer out proposed revisions to the Ohio Criminal Rule 16. So, though not explicitly crafted to respond to the 2007 Report as such, some needed reforms were being made.

Those concerns and recommendations of the Assessment Team most relevant to this Symposium were:

**Inadequate Access to Experts and Investigators** (see Chapter 6) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants in Ohio are denied these necessary resources.

**Inadequate Qualification Standards for Defense Counsel** (see Chapter 6 and 8) – Although the State of Ohio provides indigent defendants of a task force including prosecutors); see also Phyllis Crocker, *O’Connor’s Firsts*, 48 AKRON L. REV. 79, 81-83 (2015).

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233. EVALUATING FAIRNESS, supra note 214, at v-vii.
236. See OHIO REV. CODE ANN. CRIM. R. 16 (West 2014).
237. EVALUATING FAIRNESS, supra note 214, at iv.
with counsel at trial, on direct appeal, and in state post-conviction proceedings, the State falls short of the requirements set out in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases for trial and appellate attorneys. In fact, while the State of Ohio requires counsel to be certified to represent indigent death row inmates in post-conviction proceedings, it does not set forth any requirements that are specific to post-conviction representation or any other related proceedings.\footnote{238}

Insufficient Compensation for Defense Counsel Representing Indigent Capital Defendants and Death-Row Inmates (see Chapters 6 and 8) – In at least some instances, attorneys handling capital cases and appeals are not fully compensated at a rate and for all of the necessary services commensurate with the provision of high quality legal representation. The Office of the Ohio Public Defender sets the statewide maximum hourly rate and case fee cap, but each county is authorized to and does set its own reimbursement amounts and requirements. These limits have the potential to dissuade the most experienced and qualified attorneys from taking capital cases and may preclude those attorneys who do take these cases from having the funds necessary to present a vigorous defense.\footnote{239}

The now-Rule 20 Committee on the Appointment of Counsel undertook to create amendments to that Rule that would satisfy the second of the above Assessment Team’s critiques. It made significant progress in 2010.\footnote{240}

\section*{H. 2010 Amendments to Rule 20}

A series of 2010 amendments (“2010 amendments”) to Rule 20 “adopt[ed] increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal . . . consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,” as the Assessment Team recommended.\footnote{241}

The most significant change to Rule 20 was, in essence, the adoption of the ABA Guidelines as the governing standard of care in capital defense representation.\footnote{242} Rule 20.01(A)(1) required that every attorney has “[d]emonstrated commitment to providing high quality

\footnote{238} Id.
\footnote{239} Id.
\footnote{240} See infra Part III.H.
\footnote{241} EVALUATING FAIRNESS, supra note 214, at vi; see OHIO SUP. R. 20.01, 20.03; ABA GUIDELINES, supra note 178, Guideline 5.1, at 961-62, 970-71.
\footnote{242} See EVALUATING FAIRNESS, supra note 214, at vi (recommending that Ohio adopt rules consistent with the ABA Guidelines); compare OHIO SUP. R. 20.02(G)(6), with ABA GUIDELINES, supra note 178, Guideline 5.1, at 961-62, 970-71.
legal representation in the defense of capital cases.”\textsuperscript{243} \textit{Rule 20.02(G)(11)} provided that the Committee on the Appointment of Counsel will “[a]dopt best practices for representation of indigent defendants in capital cases and disseminate those best practices appropriately,”\textsuperscript{244} similar to ABA Guideline 10.1. Training programs would include discussion of these “best practices,” so that all counsel undertaking capital case representation in Ohio will know what providing high quality representation in capital cases entails and requires.\textsuperscript{245}

Members of the Assessment Team urged the Rule 20 Committee on the Appointment of Counsel and the Ohio Supreme Court to expressly adopt the standards of performance found in ABA Guideline 10.1 as the “best practices” that will be disseminated to all Ohio counsel.\textsuperscript{246} I wrote to the Ohio Supreme Court in support of the then-proposed amendments:

To assure that this improvement is as full as possible, I greatly urge the Rule 20 Committee to adopt the ABA’s Standards for Performance of Counsel found in ABA Guideline 10.1 when the Committee designs the “best practices” that Ohio attorneys will be trained to use. These ABA Standards of Performance found in Guideline 10.1 are routinely referred to by the Sixth Circuit, the United States Supreme Court, as well as other courts as the ‘prevailing professional norm’ in capital case representation. They should become our ‘[‘best practices’. They should inform Ohio’s capital litigation process, and become part of an Ohio counsel’s duties and responsibilities when undertaking representation if we are to avoid the dual dangers that motivated members of the Court to initially adopt Rule 65 [i.e. the danger that the truly guilty individual is not captured and prosecuted in a timely fashion because an unreliable proceeding convicted an innocent, allowing a dangerous individual to possibly continue to commit crimes, and/or that a costly retrial is necessary to assure a properly charged defendant received a fair and reliable determination of guilt/innocence and of appropriate punishment].\textsuperscript{247}

Ultimately, the Ohio Supreme Court did so, in a manner of speaking, by making the ABA Guidelines a judge’s guiding

\textsuperscript{243} \textit{Ohio Sup. R. 20.01(A)(1).}
\textsuperscript{244} \textit{Id. 20.02(G)(11).}
\textsuperscript{245} \textit{Id. 20.01(A)(1).}
\textsuperscript{246} Individual members of the Assessment Team writing to the Court included this Author and the Chair of the Assessment Team, Professor Phyllis Crocker.
\textsuperscript{247} Letter from Margery Koosed, Professor, Univ. of Akron Sch. of Law, on Support of Amendment to Rule 20, Rules of Superintendence to Tammy White, Office of Att’y Servs., Supreme Court of Ohio (Mar. 16, 2009) (on file with the Hofstra Law Review).
principle when monitoring counsel appointed to these cases under newly revised Rule 20.03:

RULE 20.03. Monitoring of Counsel; Removal.

(A) Duty of court
The appointing court shall monitor the performance of all defense counsel to ensure that the client is receiving representation that is consistent with the American Bar Association’s “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases” and referred to herein as “high quality representation.”

Though judges seldom make use of this monitoring practice, this provision does provide defense counsel with the argument that they have an obligation to provide representation as required by the ABA Guidelines or risk removal, and this should help to educate the court to what more is needed in defending a capital case, whether it is time, resources, access, or experts. The 2010 amendments also adopted the increased monitoring procedures that the Assessment Team recommended for the Committee on the Appointment of Counsel itself. Rule 20.02(G) Powers and Duties of the Committee, sections (6) and (7) gave new authority to the Rule 20 Committee on the Appointment of Counsel to monitor the performance of attorneys, and investigate and maintain records concerning complaints about the performance of attorneys and take appropriate corrective action. Extending monitoring responsibilities to the Committee on the Appointment of Counsel allows them another opportunity for a “teachable moment” with attorneys and judges. The Court also adopted a removal process consistent with the ABA Guidelines and other provisions that also enhanced the likelihood of improved representation of capital defendants.

248. OHIO SUP. R. 20.03(A) (emphasis added); see ABA GUIDELINES, supra note 178, Guideline 7.1, at 970.
249. OHIO SUP. R. 20.03(A); EVALUATING FAIRNESS, supra note 214, at 208.
250. OHIO SUP. R. 20.02(G)(6)–(7). The former provision was identical to a provision found in ABA Guideline 3.1(E)(5), Designation of a Responsible Agency. ABA GUIDELINES, supra note 178, Guideline 3.1, at 946. The latter essentially repeated ABA Guideline 3.1(E)(8). Id.
251. Rule 20.03, entitled Monitoring of Counsel; Removal, established a procedure consistent with ABA Guideline 7.1 Monitoring and Removal for investigation of complaints regarding defense representation and provided for an appropriate remedy of removal from the list of qualified attorneys, while providing adequate notice and an opportunity to be heard to the counsel involved, should removal be ordered, it included a limited opportunity for reinstatement in the event of exceptional circumstances. OHIO SUP. R. 20.03(B); ABA GUIDELINES, supra note 178, Guideline 7.1, at 970–71.
252. Rule 20.01, entitled Qualifications Required for Appointment as Counsel for Indigent Defendants in Capital Cases, section (A) adopted in full the knowledge and skills requirements found in ABA Guideline 5.1(B)(1)–(2), Qualifications for Appointed Counsel. OHIO SUP. R.
I. 2011 to 2014: The Ohio Supreme Court/Ohio State Bar Association Joint Task Force to Review the Administration of Ohio’s Death Penalty

From September 2007 to September 2011, as noted above, some improvements in innocence protection, discovery, and appointment of counsel were made that responded to the 2007 Report.253 Innocence protection legislation and discovery rule reforms were the product of present and former prosecutors sitting down with defense counsel and defender organizations informally to hammer out reforms.254 When it came to discussing the ABA’s suggested revisions specific to the death penalty system, however, these same present and former prosecutors were unwilling to meet. Multiple entreaties to do so were made by myself, as chair of the Subcommittee, and by the chair of the Criminal Justice Committee, the OSBA Legislative Director, the OSBA President, and others, to no avail. The OSBA believed it was critical that it review and respond to the Assessment Team’s 2007 Report, but felt it would not be practical or appropriate to go forward without prosecution representatives.255 After over three years of fruitless entreaties, the OSBA took the matter to the Ohio Supreme Court.256

The newly elected Chief Justice O’Connor, a former county prosecutor and Lieutenant Governor overseeing the State Department of

20.01(A); ABA GUIDELINES, supra note 178, Guideline 5.1, at 961. Section (B) of Rule 20.01 also adopted a requirement that lead counsel have prior experience as lead or co-counsel “for the defense” that is consistent with the Commentary to ABA Guideline 5.1. OHIO S.C. 20.01(A); ABA GUIDELINES, supra note 178, Guideline 5.1, at 964. That Commentary relates that a person who has not had experience in the defense of capital cases, such as a law professor or former prosecutor, may have adequate knowledge to well-represent a capitaly charged person, but advises that the appointing authority must be satisfied that the client will be provided with the high degree of legal representation by the team as a whole before making such an appointment. ABA GUIDELINES, supra note 178, Guideline 5.1, at 964.

Given that “[l]ead counsel bears overall responsibility for the performance of the defense team and shall allocate, direct, and supervise the [team’s] work” under the amendment found in Rule 20(III)(D), therequirement that lead counsel have prior experience as a defense counsel in capital cases was quite appropriate. OHIO S.C. 20(III)(D). That amendment to Rule 20(III)(D) regarding “Support Services,” also consistent with ABA Guideline 4.1, The Defense Team and Supporting Services, should help assure the provision of necessary investigative and other support services. See id.; ABA GUIDELINES, supra note 178, Guideline 4.1, at 952. An amendment to Rule 20.04’s provision Programs for Specialized Training specified the subject areas that will be covered in CLE training programs in the defense of capital cases that is identical to that found in ABA Guideline 8.1. OHIO S.C. 20.04(A)(1); ABA GUIDELINES, supra note 178, Guideline 8.1, at 976-77.

253. See supra Part III.G.H.
255. Judiciary Address, supra note 232 (discussing the Joint Task Force to Review the Administration of Ohio’s Death Penalty being formed by the Supreme Court of Ohio and the Ohio Bar Association, which will be comprised of a number of individuals, including prosecutors).
256. See id.
Public Safety, told them that she too had concerns, and that the 2007 Report had “got me to thinking.”

Chief Justice O’Connor may well have been thinking, too, of the views expressed by the senior judge on the Court, Paul E. Pfeifer. Justice Pfeifer helped write Ohio’s 1981 death penalty legislation while a state senator, but had evolved from enacting that law to becoming a justice in 1994, who, by 1999, was “wondering if [the first execution under the death penalty law] is a step that we really want to take.” In 2011, Justice Pfeifer wrote an “opinion piece” urging that it was time to end capital punishment in Ohio, and so testified before the Ohio Legislature.

Chief Justice O’Connor agreed that a review and response to the 2007 Report was overdue, and determined to create a joint task force, comprised of all the appropriate stakeholders, including prosecutors.

In September 2011, Chief Justice O’Connor announced the appointment of a Joint Task Force to Review the Administration of Ohio’s Death Penalty (“Joint Task Force”). The Joint Task Force’s purpose was to review the 2007 American Bar Association report titled “Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report” and offer an analysis of its findings; assess whether the death penalty in Ohio is administered in the most fair and judicious manner possible; and determine if the administrative and procedural mechanisms for the administration of the death penalty in Ohio are in proper form or in need of adjustment.

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259. Frolik, supra note 257. In January 2011, Justice Pfeifer urged newly-elected Governor John Kasich “to empty death row.” Andrew Welsh-Huggins, Ohio Justice Rejects Death Penalty Law He Wrote, AKRON LEGAL NEWS, Feb. 21, 2012, at 1; Paul E. Pfeifer, Retire Ohio’s Death Penalty: Paul E. Pfeifer, CLEVELAND.COM (Jan. 26, 2011, 4:00 AM), http://www.cleveland.com/opinion/index.ssf/2011/01/retire_ohios_death_penalty_pau.html. Justice Pfeifer also testified before the Ohio Legislature in December 2011 in favor of a bill to abolish the death penalty: “I have concluded that the death sentence makes no sense to me at this point when you can have life without the possibility of parole . . . . I don’t see what society gains from that.” Welsh-Huggins, supra. Though he has upheld death sentences, he has dissented on some cases, urging that the sentence “should be reserved for those committing what the state views as the most heinous of murders.” Id. Though two county prosecutors have moved to recuse him from hearing death cases, Chief Justice O’Connor had said she was “comfortable Pfeifer is following the law and not showing bias.” Id.


261. Id.

262. Joint Task Force to Review the Administration of Ohio’s Death Penalty, supra note 6.
The Joint Task Force was expressly barred from undertaking the questions of whether Ohio should abolish the death penalty or how executions should be carried out.\footnote{263}{Judiciary Address, supra note 232.}

The Joint Task Force’s composition was balanced. Chaired by retired Court of Appeals Judge Brogan and Vice-Chaired by Common Pleas Judge McIntosh, there were six other judges,\footnote{264}{See id. Two judges were from Cuyahoga County (Cleveland), one from Lucas (Toledo), and two from rural counties (Belmont and Champaign).} four legislators, four prosecutors, including the State Attorney General’s representative,\footnote{265}{The other three were from Hamilton County (Cincinnati), Cuyahoga County (Cleveland), and Trumbull County (Warren).} three defense counsel, including the State Public Defender,\footnote{266}{A fourth individual, veteran civil litigator Samuel Porter of Porter, Wright law firm in Columbus, was Chair of the OPD Commission, and attended until his untimely death in May 2013. He was not replaced despite several requests to do so.} two law professors,\footnote{267}{One of the professors, Phyllis Crocker of Cleveland Marshall Law School, was Chair of the Assessment Team. The other, Douglas Berman of Ohio State University Law School, writes a federal sentencing blog and textbook. The Author of this Article served as an informal resource person at the request of the Chair Judge Brogan, and was occasionally called upon to offer historical information or other assistance.} one Sheriff, and one representative of the Department of Rehabilitation and Corrections.

Prosecutorial participation was uneven. One prosecutor regularly attended, but another came to only a few of the dozen-plus meetings of the Joint Task Force, and never attended the meetings of the Defense Services Committee of which he is a member,\footnote{268}{He sometimes simply sat in a room down the hall and read while the Defense Services Subcommittee met.} nor participated in the Defense Services Committee’s conference calls. At one point, the same prosecutor proffered his view that the Joint Task Force was simply there to abolish the death penalty and offered to join in such a motion, to which a few members chuckled and seconded the motion. Both the Chief Justice and the Chair were dismayed by this prosecutor’s frequent absences, and it is possible this impaired the ability of the Joint Task Force to receive input and/or occasionally reach a greater consensus on matters before it.\footnote{269}{The Prosecutorial Issues Subcommittee submitted a number of proposals that would make it easier to obtain death sentences, and very few passed. See Alan Johnson, ‘With These Rules, You Couldn’t Execute Timothy McVeigh,’ Argues Task-Force Dissent, COLUMBUS DISPATCH (Apr. 11, 2014, 5:25 AM), http://www.dispatch.com/content/stories/local/2014/04/10/death-penalty-task-force.html. After this, there seemed to be a drop in attendance.} So, while the Chief Justice’s intervention in the earlier impasse and creation of the Joint Task Force is to be
highly commended,\textsuperscript{270} it did not fully solve the problem of prosecutorial unwillingness or ambivalence about participating.\textsuperscript{271}

The Joint Task Force met from early 2012 to spring 2014, and issued its Final Report and Recommendations in April 2014.\textsuperscript{272}

Amongst its work, the Joint Task Force undertook the responsibility to respond to the Assessment Team’s three concerns relating to counsel and support services. Early on, the Joint Task Force unanimously approved a measure that the Ohio Supreme Court should take the lead to adopt a uniform process for the selection of indigent counsel in capital cases, including the establishment of a uniform fee and expense schedule, so that appointed counsel would be paid equally throughout the state, regardless of the county in which the crime occurred.\textsuperscript{273} Another unanimous measure urged enacting legislation to

\textsuperscript{270} Crocker, supra note 232, at 80–90.

\textsuperscript{271} Indeed, at the final meeting of the Joint Task Force on April 10, 2014, another prosecutor conveyed that some prosecutors agreed to join the Joint Task Force only when they were promised a minority or dissenting report would be possible, and one was filed. \textit{Id.} at 87 n.41.

The county prosecutors in attendance were most adamant in their opposition to a proposed recommendation that would call for county prosecutors to submit intended capital charges to a review and approval process in the Attorney General’s Office. The Joint Task Force ultimately approved the measure as a means of reducing geographical disparity in the application of Ohio’s death penalty. See, e.g., Robert Higgs, \textit{Task Force Suggests Panel to Screen Death Penalty Cases Review of Decisions by Prosecutors Would Aim to End Disparities}, CLEVELAND PLAIN DEALER, June 15, 2013, at A1. On the other hand, a month later, the newly-elected Cuyahoga County (Cleveland) Prosecutor decided to conduct a pre-execution review of an earlier imposed county death sentence, and advised the Ohio Parole Board that his office supported clemency for inmate Billy Slagle because it was unlikely the case would result in a death sentence today. Associated Press, \textit{Prosecutor: Condemned Ohio Man Should Be Spared}, TOLEDO BLADE (July 4, 2013), http://www.toledoblade.com/State/2013/07/03/Prosecutor-Condemed-Ohio-man-should-be-spared.html. The Ohio Parole Board was divided but denied clemency, as did the Governor. Vicki Adams Werneke, \textit{Loss of Hope, NAT’L COALITION TO ABOLISH DEATH PENALTY BLOG} (Aug. 6, 2013), http://www.ncadp.org/blogentry/loss-of-hope. However, the prosecutor’s office then contacted defense counsel with the news that their file apparently revealed that a plea to life had been offered and never conveyed to the client pre-trial, and that the prosecutor’s office would be willing to support a stay of execution on this basis; tragically, Slagle committed suicide in his cell before his lawyers could advise him of this development. \textit{Id.}


\textsuperscript{273} Ohio’s eighty-eight counties continue to have very diverse and inadequate fee schedules; little improvement has occurred since 2002. When the Joint Task Force began meeting in 2012, Cuyahoga County (Cleveland) paid a maximum $25,000 for two attorneys ($12,500 for each counsel) in capital trials, and just $5000 in capital appeals. CUYAHOGA COUNTY COMMON PLEAS COURT LOCAL RULES R. 33 (2014), available at http://cp.cuyahogacounty.us/internet/Rules/33.pdf. Such fee caps are inconsistent with ABA Guideline 9.1(B)(1) which states: “Flat fees, caps on compensation and lump-sum contracts are improper in death penalty cases.” ABA GUIDELINES, \textit{supra} note 178, Guideline 9.1, at 981. A proposal to increase the fee cap to $60,000 between two lawyers, with an hourly rate of $60 in court and $50 out of court for trials, and to $15,000 for two lawyers for appeals with a rate of $95 an hour was passed in 2014. CUYAHOGA COUNTY COMMON
fund a Capital Litigation Fund to pay all fees and expenses of the prosecutor and defense at all levels of capital litigation.\(^\text{274}\)

The Joint Task Force also unanimously approved a measure urging that the best-qualified counsel be appointed, leaving open whether the present process of appointment by the judiciary would be continued.\(^\text{275}\) A divided vote urged that the present judicial appointment be continued, a position at odds with the ABA Guidelines expectation of an independent appointing body.\(^\text{276}\)

To gather needed information and insight, the Joint Task Force invited Robin Maher, Director of the ABA Death Penalty Representation Project (“Project”), to appear before it. Maher delivered a most helpful summary of the ABA Guidelines at an April 2013 meeting.\(^\text{277}\) She discussed the acceptance of the ABA Guidelines in the courts,\(^\text{278}\) in

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\(^\text{274}\) **Final Report, supra** note 272, at 8.

\(^\text{275}\) \textit{Id.} at 22.

\(^\text{276}\) \textit{Id.} at 21. \textit{But see ABA Guidelines, supra} note 178, Guideline 3.1, at 944.


\(^\text{278}\) She highlighted the Sixth Circuit decision in an Ohio case, \textit{Hamblin v. Mitchell}, using the ABA Guidelines as the gauge of performance under prevailing professional norms. 354 F.3d 482, 487-88 (6th Cir. 2004).
Ohio’s Rule 20, and the Project’s ongoing efforts at adoption among the states and internationally, including in Chinese provinces.\(^ {279}\) In the months after her visit, further discussion ensued regarding how to ensure quality representation, adequate monitoring of counsel, adequate and prompt review of judicial decision-making regarding investigative and expert services, and reduce costly retrials. Maher’s presentation and these discussions led to a shift in perspective within the Joint Task Force.

After her presentation and this discussion, the Joint Task Force approved 13-3 the appointment of a statewide defender office to handle all indigent capital cases at all levels (except instances when conflict counsel was needed).\(^ {280}\)

In August 2013, the Joint Task Force voted 12-2 that the ABA Guidelines for Appointment and Standards of Performance should be adopted in Ohio.\(^ {281}\) The two negative votes came from prosecutors who made clear they supported the ABA Guidelines, but were concerned about how the measures would be enforced.\(^ {282}\) The Joint Task Force also adopted the ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (“Supplementary Guidelines”) by a 13-4 vote, with the understanding that this was not meant to alter the standard adopted in \textit{Strickland}.\(^ {283}\) Other recommendations provide additional, and perhaps alternative, means of enhancing defense services in Ohio.\(^ {284}\) Costs and


\(^ {280}\) Final Report, supra note 272, at 9.

\(^ {281}\) Id. at 7.


\(^ {283}\) Final Report, supra note 272, at 8. A Judicial Role Subcommittee recommendation was also passed 16-0 that provided if the ABA Guidelines and Supplementary Guidelines were adopted, it would be necessary to determine whether these are merely guides or to be applied as standards to be monitored and enforced by the trial court; in either event, the trial court shall take appropriate steps on the record to monitor and/or enforce a checklist of guidelines, and how to do so shall be addressed by the Supreme Court of Ohio and the Ohio Judicial College in the Capital Crimes Seminar. Id.

\(^ {284}\) In addition to recommending the adoption of the 2003 ABA Guidelines, and the Supplementary Guidelines, the Joint Task Force has responded to the Assessment Team’s concern regarding “Inadequate Qualification Standards for Defense Counsel” by recommending Ohio do the following (many of which fall within the umbrella of the ABA Guidelines, but were earlier specific recommendations): expand and enhance training requirements to all participating legal counsel (appointed and retained) and to all Ohio judges at all levels, which could be waived in exceptional circumstances with the consent of the Ohio Supreme Court if their qualifications otherwise exceed
resources entered into many of the discussions of the Joint Task Force, as could be expected. 285

IV. CONCLUSION

The Joint Task Force’s recommendation that Ohio adopt, in full, the ABA Guidelines is a near culmination of years of cooperative interaction between the ABA, and earlier, the NLADA, and those bodies and individuals concerned with improving Ohio’s justice system. 286 This could not have been done without the concerted and committed efforts of those in each of these constituencies over the decades. Though waxing and waning at times, the courts, bar associations, and many concerned individuals kept their eyes on the prize.

The lessons of experience in Ohio suggest that two equally powerful motivators for change are at work here: saving resources by avoiding costly retrials, and avoiding conviction of the innocent and/or execution of the undeserving. It remains to be seen whether the measures recommended to the Joint Task Force will come to fruition. The voices of present and former judges, legislators, and of our former attorney general will likely be the most powerful in this endeavor. But, other stakeholders need to be brought into the fold, as well. I hope for the best—if not abolition, some needed improvements in a still rather broken system.

285. Though the Joint Task Force did not discuss whether death sentencing systems were more costly than life imprisonment without parole and should be discontinued because of cost, as this was deemed to be beyond the scope of the Joint Task Force, such discussion has occurred outside of the Joint Task Force. See, e.g., Lynd, supra note 229, at 40-41.

286. See supra Part III.
ADDENDUM: OHIO DEVELOPMENTS—MAY 2014 TO MARCH 2015

Since I spoke at the Symposium in October 2013 and drafted this Article in April 2014, Ohio has made progress in some areas, but also inexplicably regressed in others.

A.I. RELEASE OF THE TASK FORCE REPORT AND OF INNOCENT INMATES

The Joint Task Force released its Final Report on May 21, 2014. Chief Justice O’Connor thanked the Joint Task Force for its work, and commented that “no one can disagree that as long as Ohio does have a death penalty we should have the fairest and most reliable system possible.” The Chief Justice’s concern for the reliability of Ohio’s death penalty system was apt, considering that five men sentenced to death since 1977 had been exonerated at the time of her statement, and two more were added in the months that followed, one of whom served more time behind bars—thirty-nine years—than any other exoneree.

The Chief Justice’s words, “I will study this report very closely, and I know that the governor and the members of the General Assembly will also,” were welcome.

288. Id.
289. Rachel Dissell, Who Are Ohio’s Exonerated? 42 Have Been Freed After Wrongful Convictions in the Past 25 Years, CLEVELAND PLAIN DEALER, Nov. 22, 2014, at A7 (displaying a chart referencing National Registry of Exonerations data showing five death sentenced inmates, and over thirty non-capitally sentenced inmates, have been exonerated since 1977). Ricky Jackson and Wiley Bridgeman, both sentenced to death, have now been added to the National Registry list. Id.; see Wiley Bridgeman, NAT’L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4554 (last visited Apr. 12, 2015).
290. John Caniglia, Freedom ‘Finally! Finally!’ Exonerated Friends Leave Prison After More Than 39 Years Behind Bars, CLEVELAND PLAIN DEALER, Nov. 22, 2014, at A1 (relating release of co-defendants Ricky Jackson and Wiley Bridgeman); see also John Caniglia, Inmate of 39 Years to Go Free After Witness Recants, CLEVELAND PLAIN DEALER, Nov. 19, 2014, at A1 (noting that, the witness, a twelve-year-old boy, had wished to help the police though he had seen nothing, police fed him information, and when he wished to recant, police told him they would put his parents on trial for perjury, so he had waited decades to tell the authorities); James F. McCarthy, Man Held 39 Years Is Granted $1 Million, CLEVELAND PLAIN DEALER, Mar. 20, 2015, at A1. More funds will be awarded to Ricky Jackson as the case proceeds under Ohio’s wrongful conviction compensation law. McCarthy, supra.
291. Davey, supra note 287. OSBA President Jonathan Hollingsworth also thanked the Joint Task Force, asserting “there is much work still to be done,” and that the OSBA would be “convening some of our committees and others with expertise in the area of criminal justice for that review” of the Report. Id.
A.II. PROGRESS IN THE OHIO LEGISLATURE

The Ohio Legislature was the first to step in to make positive changes, enacting some Joint Task Force recommendations. At the close of the 130th General Assembly, within a very disturbing bill guarding the identity of those providing drugs to be used in Ohio executions and amidst a delay in executions until 2016, three Joint Task Force recommendations were adopted. Henceforth, written instructions will be provided before oral instructions are delivered, and will be available to the capital jury during deliberations; and, post-conviction counsel will have twice the amount of time to prepare and file their petitions for post-conviction relief.

Most pertinent to this Article was the legislature giving the Ohio Supreme Court authority to set uniform fees to be paid to counsel in capital cases: amounts of “compensation and expenses,” by case or on an hourly basis, that the boards of county commissioners must approve and pay. Hopefully, the fees and expenses set by the Ohio Supreme Court

292. The bill can be accessed at http://archives.legislature.state.oh.us/bills.cfm?ID=130_HB_663_EN. The secrecy provisions were urged by the Ohio Attorney General, as four executions in Ohio have brought litigation over questions of cruelty, repeated changes in the drugs used and/or execution protocols, and questions which led to federal court orders, and then to Governor John Kasich’s granting reprieves, creating a current delay in executions until 2016. See Robert Hines, Ohio Alters Lethal Injection Protocol, Delaying Execution, CLEVELAND Plain DEALER, Jan. 9, 2015, at A3; Andrew Welsh-Huggins, 11 Ohio Executions – Including Ronald Phillips – Rescheduled Over Next Two Years, (Sept. 5, 2014), http://www.ohio.com/news/break-news/11-ohio-executions-including-akron-s-ronald-phillips-rescheduled-over-next-2-years-1.520185. A listing of the stayed executions and the new execution dates set beginning January 21, 2016 can be found at http://www.deathpenaltyinfo.org/upcoming-executions#2016. The secrecy law was challenged in federal court, and has been upheld at the district court level, but is on appeal as of this writing. Jeremy Petzer, Ohio Death Row Inmates Appeal Lawsuit Challenging New Execution Secrecy Law, CLEVELAND Plain DEALER (Mar. 16, 2015), http://www.cleveland.com/open/index.ssf/2015/03/ohio_death_row_inmates_appeal.html. It is hoped that this delay in executions will help to focus attention on the Joint Task Force’s recommendations.


294. Id. (amending Revised Code sections 120.33 and 2945.51, addressing Recommendation number 53, appearing in the Joint Task Force Report). This will greatly assist post-conviction counsel as considerable factual investigation is necessary, and the previous six-month period created a risk that issues outside the record, which could not have been raised at trial or on appeal, such as the failure to disclose exculpatory evidence or ineffective assistance of counsel, may not be fully investigated and properly raised.

in conjunction with the Commission will not only equalize, but significantly raise the compensation provided to Ohio counsel, their experts, and investigators.\textsuperscript{296} The recurring underfunding of the system must be turned around.

Several legislators are currently working to prepare four bills attending to another fourteen of the fifty-six recommendations; one state Senator describing these as “the serious objections” to the present capital litigation system.\textsuperscript{297} These include recommendations foreclosing execution of the severely mentally disabled (Recommendation 8), foreclosing convictions based solely on uncorroborated jailhouse snitch testimony (Recommendation 18), establishing a statewide death penalty fund in the OPD Office (Recommendations 13-15 in some respects), and certification of crime labs and coroner’s offices (Recommendations 2-4 in some respects).\textsuperscript{298}

To enhance the likelihood of legislative and judicial action adopting the Joint Task Force’s recommendations, public education about the recommendations is ongoing through advocacy groups,\textsuperscript{299} talks presented by Joint Task Force members, and news articles.\textsuperscript{300}

Discussions indicated they expected the State Public Defender Commission, which provides reimbursement to the counties under Title 120, would be involved in this process, and this is expected. Two bills—H.B. 186 and S.B. 139—that would have the Commission set statewide schedules of hourly rates and per case rates, and ordered state reimbursement to the counties of 100% of the costs in non-capital cases and of 50% of the costs in capital cases (as opposed to the 40% reimbursement in both now actually provided), failed in in the 130th General Assembly, but may well be re-considered.

\textsuperscript{296} The great need to equalize and raise counsel fees was earlier identified in the Reports of the Rule 65 Committee on Appointment of Counsel, see supra note 190, the OSBA, see supra notes 202-09, and the ABA, see supra note 229.

\textsuperscript{297} Alan Johnson & Mike Wagner, Questions Raised About the Death Penalty in Ohio, COLUMBUS DISPATCH (Mar. 8, 2015), http://www.dispatch.com/content/stories/local/2015/03/08/death-or-life.html (quoting Joint Task Force member and Republican Senator Bill Seitz).

\textsuperscript{298} See id. See generally FINAL REPORT, supra note 272.

\textsuperscript{299} A summary of the Recommendations and links to the Joint Task Force Report appear at the website of the Ohioans to Stop Executions (“OTSE”) group, which can be accessed at http://www.otse.org/the-death-penalty-in-ohio/task-force-recommendations.

\textsuperscript{300} The OTSE website also contains several videos of talks given by Joint Task Force Members, such as Common Pleas Court Judges Michael Donnelly and John Russo, see, e.g., Recommendations from the Joint Task Force on the Death Penalty, OHIOANS TO STOP EXECUTIONS (Feb. 13, 2015), http://www.otse.org/event/recommendations-joint-task-force-death-penalty, and Chair retired Court of Appeals Judge James Brogan, see, e.g., Voice of Experience: Springfield, OHIOANS TO STOP EXECUTIONS (Oct. 2, 2014), http://www.otse.org/event/2343. State Public Defender and Task Force member Tim Young participated in a panel discussion with Terry Collins, a former director of the Ohio Department of Rehabilitation and Corrections, who oversaw the execution of thirty-three Ohio inmates and now opposes the death penalty. Gary Huffenberger, Fairness of Death Penalty Challenged, Panelists Urge Changes to Way Capital Punishment Is Applied, WILMINGTON NEWS J. (Oct. 2, 2014), http://www.wnewsj.com/news/home_top-news/150029478/Fairness-of-death-penalty-challenged. Witnesses before the Joint Task Force have also made presentations to church groups, and/or written opinion pieces. See, e.g., Petro & Petro,
A.III. The Court Inexplicably Regresses in Part

The Ohio Supreme Court, meanwhile, has adopted a new version of Rule 20 (formerly Rule 65), making some good, but other fairly significant and disappointing changes, without public comment or much notice to the public of these adverse changes. One change, in particular, diminishes Ohio’s regard for the ABA Guidelines we honored in 2013.

While the Joint Task Force undertook its study, the Rule 20 Committee had been working for several years on proposed changes to Rule 20, and the Ohio Supreme Court published these for public comment on June 9, 2014, with the notice that these were not related to the recent Rule 20 recommendations contained in the final report issued by the Joint Task Force.301 The proposals made by the Rule 20 Committee would: add or change differing look-back periods on lead counsel and co-counsel qualifications arising from defense experience in jury trials; take away a lead counsel qualification that permitted appointment based on experience in ten or more criminal or civil jury trials, at least three of which were felony jury trials; reestablish the Rule 20 Committee as the Commission on Appointment of Counsel in Capital Cases and repeal Superintendence Rule 20’s provisions; and relocate these into a new separate set of Rules for Appointment of Counsel in Capital Cases.302 It was expected these would be adopted with little, if any, opposition.

But in the months that followed after the thirty-day public comment period, the court undertook additional changes, declining to put these changes out for public comment when requested to do so by the Rule 20 Committee,303 and simply adopted the Rules for Appointment of Counsel in Capital Cases304 (“2015 Rules”) with several disturbing

supra note 235. See generally Johnson and Wagner, supra note 297. Public Defender Tim Young responded to the change in lethal injection drugs and the new secrecy law, stating: “Ohio needs to take a comprehensive look at its death penalty system and execution process. . . . Rather than continuing to patch and trying to hide a flawed, decades-old system, it's time for Ohio to carefully examine the costs, benefits, structure and practices of capital punishment.” Hines, supra note 292.

301. Staff Report, Supreme Court Seeks Public Comment on Amendments to Appoint Capital Case Counsel for Indigent Defendants, Ct. NEWS OHIO (June 9, 2014), http://www.courtnewsohio.gov/happening/2014/ruleAmendCapitalCase_060914.asp#.VSlo5y6YG5J. For the proposed Rules, see id.

302. Staff Report, supra note 301. Other changes were that two appointments previously made by the Ohio Supreme Court to the Committee now become an appointment of a judge by the Ohio Common Pleas Judges Association, and of a criminal defense lawyer by the Ohio Metropolitan Bar Association Consortium.

303. Interview with Joann Sahl, Chair, Rule 20 Comm. (Mar. 2015).

changes that were not clearly acknowledged in the Ohio Supreme Court’s press release/staff report of February 2, 2015.\footnote{305}

Not all of the Ohio Supreme Court’s in-house changes were disturbing. One change of a better nature was to allow a capital defendant who became indigent after having retained counsel to request appointment of a co-counsel who would meet the 2015 Rules’ requirements.\footnote{306} Previous Rule 65 and Rule 20 had precluded appointing a second counsel if a defendant had already retained counsel, leaving those few who did retain counsel short a lawyer.\footnote{307}

The first concerning change was to remove the requirement that lead counsel have previous experience as defense counsel in at least one prior capital case. The Rule 20 Committee had not proposed this change; as of 2010, Rule 20.01(B)(4) had required that lead counsel have experience as lead counsel “for the defense in the jury trial of at least one capital case,” or experience as co-counsel “for the defense in the jury trial of at least two capital cases.”\footnote{308} The 2015 Rules eliminate the requirement that this prior experience be as defense counsel, and just requires “experience as trial [lead or co-] counsel.”\footnote{309} While this may be consistent with the ABA Guidelines, which allot for the possible appointment of a lawyer whose previous experience was as a prosecutor,\footnote{310} this is a surprising change for Ohio. Though specialized training in the defense of capital cases in the past two years is required before appointment,\footnote{311} and training programs cannot be accredited if they are offered to full-time prosecuting attorneys,\footnote{312} the Commission is still authorized to certify an attorney who does not meet the training requirement where exceptional circumstances are present.\footnote{313} One would hope the Commission would be sensitive to the perceptions of a capitally charged defendant and the public, and not approve a prosecutor who is switching sides without specialized training in the defense of capital cases.

\footnote{305.} Staff Report, Supreme Court Adopts Amendments to Appoint Capital Case Counsel for Indigent Defendants, CT. NEWS OHIO (Feb. 2, 2015), http://courtnewsohio.gov/happening/2015/capCaseCounsel_020215.asp#.VSBKFrHD9Qs.
\footnote{306.} APPT. COUN. R. 5.04 (replacing Rule 20 I (C), which had been restated in the initial version of proposed 5.04 released for comment).
\footnote{307.} Rule 65 I (C) (1995); see supra note 191 (discussing Rule 20).
\footnote{308.} Rule 20.01(B)(4) (effective March 1, 2010) (emphasis added).
\footnote{309.} APPT. COUN. R. 3.02 (B)(2).
\footnote{310.} ABA GUIDELINES, supra note 178, Commentary to Guideline 5.1, at 964; see also discussion supra note 252.
\footnote{311.} APPT. COUN. R. 4.01.
\footnote{312.} Id. 4.02(C).
\footnote{313.} Id. 3.05.
A second apparent change to the qualifications for counsel is quite unsettling from the perspective of Ohio past practice—that the prior experience of lead counsel in capital cases, or of co-counsel in aggravated murder or murder cases, no longer needs to be in jury trials. 314 From the outset of Rule 65, if one was applying for lead counsel certification, one had to have either experience as lead counsel in the jury trial of at least one capital case, or alternatively, have experience as co-counsel in the trial of at least two capital cases. 315 In 2010, Rule 20 was amended to require that lead counsel must have prior capital jury trial experience in both settings: as lead counsel in one, or as co-counsel in two. 316 The 2015 Rules remove this requirement of prior capital jury trial experience altogether. 317 They likewise remove the requirement created in 2010 that if one was seeking co-counsel certification on the basis of prior experience in an aggravated murder or murder trial, this needed to be in a jury trial. 318 So now, it is quite possible that two attorneys will represent a capital defendant, neither of whom has any prior experience whatsoever in the unique responsibilities of Witherspooning/death-qualifying a jury or presenting mitigating evidence and arguing to a jury in a sentencing phase. 319 This seems to be a step backward; a capital defendant’s life should not be so risked. 320

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314. See id. 3.02(B)(2), 3.03(B)(2)(a).
315. Rule 65 I (A)(2); Rule 20 II (A)(d).
316. Rule 20.01(B)(4) (effective 2010).
317. APPT. COUN. R. 3.02(B)(2).
318. Rule 20.01(C)(4)(a).
319. These are unique to capital jury trials, skills distinguishable from the general qualifications related in APPT. COUN. R. 3.01(B)(9)–(10). Witherspooning and reverse-Witherspooning are critical tools in voir dire to identify those prospective jurors who are substantially impaired in their ability to follow the law to consider recommending either a death sentence or life sentence in the penalty phase. See Morgan v. Illinois, 504 U.S. 719, 728–36 (1992); Witt v. Wainwright, 470 U.S. 1039, 1039 (1985).
320. It may be possible to argue that jury trials are still required, as APPT. COUN. R. 1.06 defines “trial,” for purposes of the qualification provisions, as meaning “a case that has concluded with a judgment of acquittal . . . or submission to a jury for decision and verdict.” APPT. COUN. R. 1.06 (emphasis added). That would be a welcome conclusion, but as the qualification provisions at various other times refer to “in the jury trial of” or “jury trials,” see id. 3.02(B)(3), 3.03(B)(2), that interpretation will likely be opposed.

It should be noted that one other change in the new rules that was not an in-house Ohio Supreme Court change is that experience in civil jury trials or litigation is no longer considered relevant. Compare APPT. COUN. R. 3.02 (making it clear that experience is no longer considered relevant), and id. 3.03 (making it clear that experience is no longer considered relevant), with Rule 20.01(B) (requiring experience), and Rule 20.01(C) (requiring experience). Though the Commentary to ABA Guideline 5.1 alludes to the possible usefulness of civil trial experience, ABA GUIDELINES, supra note 178, Commentary to Guideline 5.1, at 964, the Rule 20 Committee had recommended this change, based on its experience in Ohio.
Finally, the change most directly pertinent to this Symposium is the Ohio Supreme Court’s decision to lessen the significance of counsel’s compliance with the ABA Guidelines. Previous Rule 20.03 provided: “The appointing court shall monitor the performance of all defense counsel to ensure that the client is receiving representation that is consistent with the ABA’s ‘Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases’ and referred to herein as ‘high quality representation.’”

That provision mandating compliance or consistency with the ABA Guidelines is replaced by the following rather discretionary standard in the 2015 Rule: “A court that has appointed an attorney . . . shall monitor the performance of the attorney to ensure the defendant is receiving high quality representation. In determining ‘high quality representation,’ the court may consider the ABA’s ‘Guidelines for the Appointment and Performance of Defense Counsel.’”

It is true that the general qualifications for appointment still require that counsel have a “demonstrated commitment to providing high quality representation,” and that the general statement of qualifications for appointment is identical to that found in the ABA Guidelines. It is also true that the Commission on Appointment of Counsel in Capital Cases (“Commission on Appointment of Counsel”) is given the authority to “promulgate best practices for the representation of indigent defendants in capital cases and disseminate those best practices appropriately,” and that it is anticipated that the Commission on Appointment of Counsel will take steps to adopt the ABA Guidelines for performance, which counsel will receive specialized training on. It is also true that the ABA Guidelines are still looked to by the courts in evaluating effective representation. But still, relieving Ohio courts from ascribing to, or even giving great weight to, the ABA Guidelines when evaluating the performance of counsel, is a step backward.

As the OPD recently stated in a conversation, and I fully agree: “It is disappointing that Ohio, which has so long been lauded for first establishing qualifications for capital counsel, would be instead the first to step backwards.” Notwithstanding Chief Justice Moyer’s proud pronouncement that the crafting of 1987’s Rule 65 “demonstrates the

321. Rule 20.03(A).
322. APPT. COUN. R. 6.01.
323. Id. 3.01(B)(2).
324. Id. 2.02.
325. Id. 4.02(A)(13).
326. See supra note 278. Russell Stetler and others at this Symposium have also commented on “Defining a National Standard: Assisting the Judiciary and Ensuring Justice.”
[Ohio] Supreme Court’s commitment to maintaining and enhancing the skills of lawyers, the crafting of the 2015 Rules moves away from maintaining and enhancing skills, and lessens that commitment.

Had these *sua sponte* changes been put forth for public comments, as requested, no doubt many others would have shared this view with the Ohio Supreme Court, and perhaps, these changes would not have been promulgated. But, the Ohio Supreme Court did not seek input beyond informal discussions, and these discussions apparently failed to convince them to maintain Ohio’s standing and commitment.

There are reasons to hope that the adverse changes brought about in the 2015 Rules will be short-lived. First, and interestingly, no mention of these changes expressly appears in the Ohio Supreme Court’s pronouncement of the new 2015 Rules, while other changes are quite explicitly described. Second, and most importantly, the Court’s pronouncement contained this clear disclaimer: “The rule amendments adopted represent the culmination of several years worth of work and are not related to the recent Rule 20 recommendations contained in the final report issued by the Joint Task Force to Review the Administration of Ohio’s Death Penalty.”

The Joint Task Force Report, of course, recommends outright adoption of the ABA Guidelines. Chief Justice O’Connor has pledged to “study the report very closely,” and we should expect the Associate Justices to do likewise.

So, while Ohio has taken some recent steps backward, one hopes these will soon be overcome by a giant step forward, adopting in full the ABA Guidelines.

327. *See supra* note 152.
328. *See Staff Report, supra* note 305.
329. *Id.*
330. *See supra* notes 281-83.
331. *See supra* note 291.