NOT JUST WISHFUL THINKING:
THE AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES

The right to assistance of counsel is not only a right guaranteed under the Sixth Amendment, but is basic to the adversarial system of criminal justice, and is therefore part of the "due process" guaranteed by the Fourteenth Amendment. Faretta v. California 422 U.S. 806, 817 (1975). In Strickland v. Washington, 466 U.S. 668 (1984), a Florida case, the Supreme Court set forth the test for determining, under the Sixth Amendment, the standard for allegations of ineffectiveness. In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient, and that, due to that deficient performance, the defendant was prejudiced. Id., at 687. "Generally, prejudice is established by a finding that, but for the ineffective assistance of counsel, a reasonable probability exists that the outcome of the proceeding would have been different, or that as a result of the ineffective assistance, the proceeding was rendered fundamentally unfair." State v. Lewis, supra, 838 So.2d 1102, 1112 (Fla. 2002).

In capital cases, not only are the Sixth and Fourteenth Amendments implicated, but the Eighth Amendment and its prohibition against cruel and unusual punishment apply to penalty phase issues. See, e.g., Roper v. Simmons, 543 U.S. 551 (2005) (juvenile death penalty violates the Eighth Amendment ban on cruel and unusual punishment; Atkins v. Virginia, 536 U.S. 304 (2002) (execution of mentally retarded violates the Eighth Amendment); Lockett v. Ohio, 438 U.S. 586 (1978) (Eighth Amendment requires sentencer not to be precluded from considering any aspect of offense or defendant's character as mitigating factor). Effective assistance in a capital case requires a thorough investigation of the defendant's entire background and life history, and "the obligation to investigate and prepare for the penalty portion of a capital case cannot by overstated…." State v. Lewis, supra, 838 So.2d at 1113.

The American Bar Association (A.B.A.) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "Guidelines"or "A.B.A. Guidelines") have been embraced by the Supreme Court as "well defined norms," and are "standards to which [the court] long [has] referred as guides to determining what is reasonable." Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citations and internal quotation omitted). The Guidelines are intended to ensure the provision of "high quality legal representation" in capital cases, and apply from the moment the client is taken into custody for a homicide which could result in a possible sentence of death. Guideline 1.1.

The Guidelines cover a wide range of areas regarding the appointment and performance of counsel and the defense team, as well as funding, the duty of investigation, the duty to assert legal claims, to maintain communication with the client, to seek an agreed upon disposition, to facilitate the work of successor counsel, and to present mitigating evidence. They provide for a "responsible agency" apart from the judiciary and the Bar to adequately monitor and remove attorneys who fail to provide "high quality representation," and require attorneys involved in capital defense to limit their workloads so as to accomplish this important goal.

The Guidelines "provide that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravators that may be introduced by the prosecutor." Wiggins, supra, 539 U.S. at 524. (Citations and internal quotation omitted). This, according to the Court, includes at a minimum "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id.

In addition to Wiggins, supra, the Supreme Court reiterated the importance of the Guidelines in several other cases, including Rompilla v. Beard, 545 U.S. 374, 389, n.7 ("The A.B.A. Guidelines relating to death penalty defense are … explicit: Counsel must … investigate prior convictions … that could be used as aggravating circumstances or otherwise come into evidence"), Florida v. Nixon, 543 U.S. 175, 191-192, n.6 ("If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights," citing Guideline 10.9.2 Commentary (rev. ed. 2003), and Williams v. Taylor, 529 U.S. 362, 396 (2000) ("Whether or not these omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background") (citing A.B.A. Standards, 1980).

The Florida courts have also cited the Guidelines in determining whether counsel's conduct is reasonable in the context of capital litigation. In Henry v. State, 937 So.2d 563 (Fla. 2006), the supreme court stated that "[c]ertainly, both Wiggins and the A.B.A. Guidelines for Appointment and Performance of Counsel in Death Penalty Cases section 10.11 (rev. ed. 2003) on counsel's duties mandate mitigation investigation, even if the client objects." Id., at 573.

In Peterka v. State, 890 So.2d 219 (Fla. 2004) the court again quoted Wiggins and cited the A.B.A. Guidelines for the proposition that counsel should make efforts to discover any available mitigating evidence and evidence that rebuts the aggravating factors listed in Florida Statute 921.141(5). Id., at 236.

In Armstrong v. State, 862 So.2d 705 (2003), Justices Anstead and Pariente noted in concurrence that "the A.B.A. Guidelines that the Supreme Court concluded should have guided counsel's investigation in Wiggins should have provided similar guidance to Armstrong's counsel." Id., at 723. The Guidelines, said the learned Justices, "underscore not only the importance of defense counsel's investigation into mitigating factors, but also the understanding that often strategy shifts between the penalty and guilt phases of a capital trial." Id. Although preparation for both phases is essential, the justices noted that "the penalty phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." Id., citing Guidelines 11.8.1 (1989). The opinion, after noting that the Wiggins court "relied heavily on the A.B.A. standards for … determining what is reasonable," Id., at 722, concluded by stating that "[our] hope is that judges and lawyers will heed the message of Wiggins." Id., at 725. (Internal quotations and citations omitted).

In Kilgore v. State, 933 So.2d 1192 (2nd D.C.A. 2006), the court noted that the United States Supreme Court has "time and again [cited to] the standards for capital defense work articulated by the American Bar Association as guides." Id., at 1196. Thus, even though the Guidelines

have not been *formally* adopted in Florida, Id., the Wiggins, case "now stands for the proposition that the A.B.A. standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the prevailing professional norms…." Hamblin v. Mitchell, 354 F.3rd 482, 486 (6th Cir. 2003). These standards represent "a codification of long standing common sense principles of representation understood by diligent competent counsel in death penalty cases. The A.B.A. standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of long standing norms referred to in Strickland in 1984 as 'prevailing professional norms'." Hamblin, supra, 354 F.3rd at 487.

Given the evolution of death penalty jurisprudence in the last several years, and the codification of standards requiring "high quality legal representation", it is no longer sufficient for counsel, for example, to simply put the defendant's mother on the witness stand in the penalty phase of a capital trial and let her cry in front of the jury. Defense counsel must seek and receive expert assistance, must consider presenting psychiatric, neuropsychological, intelligence, and brain scan testing, and must investigate all aspects of the client's background, character, and record. Although a mitigation specialist is no doubt an essential member of the defense team, the ultimate responsibility, pursuant to caselaw and the Guidelines, rests with defense counsel. If counsel is to provide the required level of high quality representation, the courts must give him or her the resources, assets, and funding to accomplish this important goal. The matter of life and death deserves no less, and the law of the land requires it.

In sum, the Guidelines are not just wishful thinking. Indeed, in light of the scrutiny which capital cases receive, they are wise practice for judges to help implement, and capital defense lawyers to follow. The Guidelines may be found at 31 Hofstra Law Review (Summer 2003), or on the American Bar Association website, www.abanet.org.

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