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# The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-conviction Proceedings

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# THE REVISED ABA GUIDELINES AND THE DUTIES OF LAWYERS AND JUDGES IN CAPITAL POST-CONVICTION PROCEEDINGS\*

Eric M. Freedman\*\*

## I. INTRODUCTION

On February 10, 2003, the American Bar Association approved the revised edition of its *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.<sup>1</sup> Their purpose is to articulate the “national standard of practice for the defense of capital cases”;<sup>2</sup> they “are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense

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1. See ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed., ABA 2003) (adopted Feb. 10, 2003), reprinted in 31 Hofstra L. Rev. 913 (2003) [hereinafter *Guidelines*]. The black-letter *Guidelines*, which represent the official position of the ABA, are accompanied by a lengthy and heavily documented Commentary [hereinafter *Commentary*], which, though unofficial, “serves as a useful explanation of the black-letter guidelines.” *Id.* at 914. Both documents represent a distillation of the combined experiences of many individuals actively at work in different aspects of the field, see *id.* at 914-16 (Acknowledgments and Introduction). The issue of the Hofstra Law Review in which the *Guidelines* and *Commentary* are reprinted also contains individual commentaries by various outside authors, some of which are referred to later in this article.

2. *Guidelines*, *supra* n. 1, at 919 (Guideline 1.1.A).

representation in capital cases.”<sup>3</sup> Because the ABA does not oppose the death penalty but does believe in justice,<sup>4</sup> it sets as its bedrock criterion the principle that “any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with these Guidelines.”<sup>5</sup>

Significantly for the special concerns of this issue of the *Journal*, the *Guidelines*

apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including . . . post-conviction review,<sup>6</sup> clemency proceedings, and any connected litigation.<sup>7</sup>

As detailed in the three Parts of this Article that follow, a review of the revised *Guidelines* with a special focus on their implications for capital post-conviction proceedings reveals that:

3. *Commentary*, *supra* n. 1, at 920. *See Wiggins v. Smith*, 123 S. Ct. 2527, 2536-37 (2003) (relying on non-compliance with the prevailing norms of practice reflected in first edition of *Guidelines* to support holding of ineffective assistance of counsel).

4. Except for opposing execution of persons who are mentally retarded or were under 18 at the time of their crimes, the ABA “takes no position on the death penalty”; it simply calls upon all jurisdictions wishing to retain capital punishment to comply with a series of policies—including the *Guidelines*—intended to insure due process and minimize the risk of execution of the innocent. *See* <http://www.abanet.org/moratorium/resolution.html> (containing both ABA resolution of Feb. 3, 1997, which embodies this position, and links to relevant policies) (accessed Sept. 29, 2003; copy on file with Journal of Appellate Practice and Process).

5. *Commentary*, *supra* n. 1, at 938.

6. As explained in Definitional Note 5 to *Guideline* 1.1, *see Guidelines*, *supra* n. 1, at 920, the term “post-conviction review” is not limited to state and federal proceedings in the nature of habeas corpus. Rather,

[t]he term “post-conviction” is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari, (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 2255, but including all applications of similar purport, e.g., for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, e.g., applications for original writs of habeas corpus, applications for certificates of probable cause), and all applications for interlocutory relief (e.g. stay of execution, appointment of counsel) in connection with any of the foregoing, and (d) all requests, in any form, for pardons, reprieves, commutations, or similar relief made to executive officials, and also applications to administrative or judicial bodies in connection with such requests.

*Id.*

7. *Guidelines*, *supra* n. 1, at 919 (*Guideline* 1.1.B).

1. There is a right to the effective assistance of counsel beyond direct appeal. The conventional wisdom, that the federal Constitution guarantees no such right and therefore none exists, is flawed on multiple levels. It is a perilous foundation on which to ground any legal conclusion, and an unacceptable one on which to build a just system for adjudicating capital cases.

2. The defense bar will need to expand its traditional concept of what constitutes a lawyering task, and recognize that lead counsel in a properly conducted death penalty case is the captain of a defense team of lawyers and non-lawyers deployed to pursue the best interests of the client.<sup>8</sup> For example, a lawyer who fails to conduct a broad-ranging investigation of both the guilt and penalty phases—taking responsibility for duties traditionally relegated to forensic experts or social workers or, more commonly, not performed at all—is ineffective.<sup>9</sup> Similarly, an effective capital post-conviction lawyer does not just litigate—although he or she most certainly does litigate, and to a greater degree than traditionally recognized<sup>10</sup>—but also pursues with vigor the possibility of an agreed-upon disposition of the case,<sup>11</sup> seeking that goal through a variety of means.<sup>12</sup>

3. Judges<sup>13</sup> will need to recognize the foregoing in compensating counsel and other members of the defense team.

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8. See *Guidelines*, *supra* n. 1, at 952 (*Guideline* 4.1), 999 (*Guideline* 10.4); *Commentary*, *supra* n. 1, at 955-58 (detailing “The Team Approach to Capital Defense”); see also *infra* at 337-41.

9. See *infra* at 335-37.

10. See *Commentary*, *supra* n. 1, at 923-24 (discussed *infra* at 343).

11. See *Guidelines*, *supra* n. 1, at 1035 (*Guideline* 10.9.1: “Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.”); see also 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 (2003).

12. The *Guidelines* mandate that counsel pursue discussions not only with the prosecutor and the client (notwithstanding the reluctance of either to engage in them, see *Guidelines*, *supra* n. 1, at 1038 (*Guideline* 10.9.1.E)), but also with appropriate members of the client’s family and representatives of the victim, and that counsel not only act in person but also engage appropriate intermediaries. See *Commentary*, *supra* n. 1, at 1008-09, 1042, 1046.

13. This comment is addressed to judges in the expectation that, for the medium term, they will continue in most jurisdictions to have principal responsibility for the appointment and compensation of defense counsel. The revised *Guidelines*, however, call upon death penalty jurisdictions to create agencies to perform these functions that are “independent of the judiciary,” *Guidelines*, *supra* n. 1, at 944 (*Guideline* 3.1.B). This aspect of the

Realistically, this will involve a significant increase in the amount of resources currently provided.<sup>14</sup> That is the ineluctable consequence of a simple fact: “The death penalty is expensive.”<sup>15</sup> But only by paying its costs can we have confidence in the appropriateness of executions that will ultimately be carried out in the name of all of us. Money paid for effective post-conviction representation in capital cases is not a windfall bestowed upon defense lawyers but rather an investment in the system of justice.<sup>16</sup>

## II. EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL: A LEGAL RIGHT THAT IMPROVES THE JUSTICE SYSTEM

In applying a uniform standard of competence to capital defense lawyers from the moment of arrest through final action on executive clemency, the *Guidelines* recognize current legal and practical realities.

Although, to be sure, as a matter of formal doctrine there is presently no federal constitutional right to the assistance of counsel to pursue collateral attacks on state capital convictions, the case on which that proposition rests is shaky at best,<sup>17</sup> and

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*Guidelines* is the subject of Ronald Tabak's commentary in the special issue of the Hofstra Law Review in which the *Guidelines* and *Commentary* appear. See Ronald J. Tabak, *Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 Hofstra L. Rev. 1105 (2003).

14. The *Commentary* reiterates existing ABA policy that “[a]s a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and the prosecution.” *Commentary*, *supra* n. 1, at 985. It then goes on to note that, in fact, “[s]tudies indicate that funding for prosecution is, on the average, three times greater than funding that is provided for defense services at both the state and federal levels.” *Id.* at n. 135.

15. Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments' Responsibilities Under the Revised ABA Capital Representation Guidelines*, 31 Hofstra L. Rev. 1097, 1097 (2003).

16. See *Commentary*, *supra* n. 1, at 987 (noting that inadequate representation in state post-conviction proceedings may preclude inmates' ability to gain federal review of their claims: “It is such inmates—and the justice system—rather than lawyers (who can always move to more lucrative fields) that are victimized when jurisdictions fail to fulfill their financial responsibilities.”); see also *infra* at 345.

17. In *Murray v. Giarattano*, 492 U.S. 1 (1989), a four-one-four lineup of the Court did reject the claim of the petitioner before it to a constitutional right to the appointment of counsel to pursue his state post-conviction remedies, but the controlling opinion of Justice Kennedy suggested that such a right might exist in certain factual circumstances. See *Murray*, 492 U.S. at 14-15 (emphasizing that concurrence is based “[o]n the facts and

unlikely to survive the vigorous attacks that will surely be leveled at it in the years to come.<sup>18</sup> In light of the accumulated experience of the intervening years reflected in the *Guidelines*,<sup>19</sup> the Justices' recent expressed concerns about the quality of defense representation in capital cases,<sup>20</sup> and the renewed vigor with which the Court has scrutinized the performance of counsel,<sup>21</sup> there is a good chance that within the next few years this precedent will be radically narrowed if not overruled outright. Even if the federal constitutional proposition endures, its practical effect will predictably be undermined by a series of developments in state and federal law that render it irrelevant.<sup>22</sup>

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record of this case," in which "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief").

There are states today where a prisoner could make the showing that Justice Kennedy described. For example, since Alabama has no system at all for insuring that Death Row inmates receive post-conviction representation, Thomas D. Archer was without counsel for more than two years after his direct appeal and came within a day of execution before an emergency rescue by the federal courts. *See Arthur v. Haley*, 248 F.3d 1302 (11th Cir. 2001); *Agency Claims Death Row Inmates Without Lawyers a Growing Problem*, Times Free Press (Chattanooga, Tenn.) B8 (March 26, 2001). *See also* Leonard Post, *On Their Own: In Alabama, Some Inmates Don't Have Lawyers as They Near the Last Bid for Life*, 26 Natl. L. J. 1 (Dec. 1, 2003).

The *Commentary*, *supra* n. 1, at 1081 n. 333, aptly describes *Arthur* as "an instance of legal Russian roulette," and encourages counsel "to be aggressive in challenging such irresponsible behavior by the states as a federal constitutional violation."

18. *See Commentary*, *supra* n. 1, at 933 n. 47 (advising counsel to "continue to test the boundaries of *Murray*"). The Court could plausibly re-visit the case from the viewpoints, among others, of the Sixth Amendment (right to counsel), Eighth Amendment (distinguishing capital proceedings from others), or Fourteenth Amendment (due process right to counsel before adverse state action; access to the courts), *see* Christopher Flood, *Closing the Circle: Case v. Nebraska and the Future of Habeas Reform*, 27 N.Y.U. Rev. L. & Soc. Change 633, 658-660 (2001-02) (explicating argument on due process theory).

19. *See Commentary*, *supra* n. 1, at 932 n. 47 (documenting states' poor performance in providing post-conviction counsel and collecting scholarly commentary critical of that performance); *see also* Freedman, *supra* n. 15, at 1100 n. 11 (listing federal cases since 1996 finding inadequacies in state systems for providing capital post-conviction counsel).

20. *See Commentary*, *supra* n. 1, at 928-29.

21. *See infra* at 332-33.

22. The ABA's campaign for adoption of the revised *Guidelines*, announced at Hofstra Law School on October 24, 2003, *see* Leigh Jones, *ABA Launches Effort to Improve Capital Case Defense*, N.Y.L.J. 1 (Oct. 27, 2003), is likely to have an impact in some jurisdictions.

Some states may infer a right to effective post-conviction representation in capital cases from state constitutions, *see e.g. Jackson v. State*, 732 So. 2d 187 (Miss. 1999), or state statutes providing for the appointment of such counsel, *see Commentary*, *supra* n. 1,

More generally, courts can be expected to develop law in response to facts,<sup>23</sup> and, as the following discussion indicates, the factual case for a right to the effective assistance of post-conviction counsel in capital cases is overwhelming.

Simply put: "Quality representation in both state and federal court is essential if erroneous convictions and sentences are to be corrected."<sup>24</sup> The *Commentary* documents this proposition at some length,<sup>25</sup> but the bottom line is straightforward. The most comprehensive available data show that of every hundred death sentences imposed, sixty-eight percent do not survive post-conviction review; forty-seven percent are reversed at the state level (roughly forty-one percent on direct appeal and six percent on state collateral attack), and a further twenty-one percent on federal habeas corpus.<sup>26</sup>

These statistics, moreover, come from a system which has hardly been loath to allow procedural considerations to foreclose

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at 941 n. 74 (listing cases). And even if they do not, the existence of such statutes may support federal entitlements. *See e.g. Ake v. Okla.*, 470 U.S. 68, 78 n. 4 (1985) (collecting state statutes making expert psychiatric assistance available to indigent defendants as support for holding that due process requires provision of such assistance); *see also* Celestine Richards McConville, *The Right to the Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31 (arguing that once jurisdiction creates statutory right to post-conviction counsel, Constitution requires it to provide effective counsel).

Federal law provides for the appointment of qualified counsel in habeas corpus proceedings challenging state capital convictions, *see* 21 U.S.C. § 848(q) (1988), and defendants may be able to challenge deficient attorney performance as a statutory violation. *See Cooney v. Bradshaw*, 216 F.R.D. 408 (N.D. Ohio 2003) (granting stay of execution on claim of ineffective assistance by prior counsel appointed under § 848), *motion to vacate stay denied*, No. 03-4001 (6th Cir. July 24, 2003), *motion to vacate stay denied*, No. 03-5472 (U.S. July 24, 2003).

23. *See e.g. Henderson v. Sargent*, 926 F.2d 706, 711, 712 (8th Cir. 1991) (granting writ where trial counsel's performance at guilt phase was ineffective because it lacked "an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories," and state post-conviction counsel was ineffective for failing to perform full analysis of "trial testimony and the police record" and conducting "interviews with the persons who testified at trial or had firsthand knowledge of the events surrounding the murder"); *People v. Johnson*, 609 N.E.2d 304, 311-12 (Ill. 1993) (holding state post-conviction counsel ineffective for failing to interview witnesses that client claimed trial attorneys should have called).

24. *Commentary*, *supra* n. 1, at 932.

25. *See id.* at 932-36.

26. *See Commentary*, *supra* n. 1, at 932 n. 46 (citing James S. Liebman, Jeffrey A. Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, pt. I, app. A, at 5-6 (2000)).

review of the merits,<sup>27</sup> which has until recently been willing to uphold as effective a level of performance that most people would consider appalling malpractice if displayed by the lawyer they had engaged to assist them in the purchase of a new home,<sup>28</sup> and which—not unconnectedly—has seen a frightening number of cases in which the system has acknowledged coming to the brink of executing an innocent person.<sup>29</sup>

The implications are twofold:

- Jurisdictions must create mechanisms to provide effective assistance of counsel throughout the pendency of a capital case,<sup>30</sup> and
- Judges must recognize the right to such assistance both in reviewing attacks on the performance of counsel at prior stages of the proceeding, and in providing funding for post-conviction counsel appearing before them.<sup>31</sup> To do otherwise will not only render convictions vulnerable to

27. See *Commentary*, *supra* n. 1, at 936 n. 57 (quoting description of habeas doctrine by Linda Greenhouse of The New York Times: “so complex as to be almost theological”). See also Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in *America’s Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 553, 567 (James R. Acker, Robert M. Bohm & Charles S. Lanier, eds., 2d ed., Carolina Academic Press 2003) (describing “the creation of a legalistic maze of restrictions on the availability of the habeas corpus remedy”).

28. See *Commentary*, *supra* n. 1, at 928-29, 928 n. 29, 930, 930 n. 37 (documenting current profound and pervasive set of problems with the quality of defense representation in death penalty cases at trial level, and showing that under the extremely deferential 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”); *id.* at 933 n. 47 (documenting ineffective performance by counsel at state post-conviction level). The most recent developments are discussed *infra* at 332-33.

29. See *Innocence and the Death Penalty* (Death Penalty Info. Ctr. 1997-2003) (including information about cases of 111 people who have, since 1973, “been released from death row with evidence of their innocence”) (available at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6>) (accessed Oct. 27, 2003; copy on file with Journal of Appellate Practice and Process).

30. The obligation of each death penalty jurisdiction to create structures within which counsel are able to perform effectively is the subject of my commentary in the special issue of the Hofstra Law Review. See Freedman, *supra* n. 15. The focus of the present Article, in contrast, is on the obligations of lawyers and judges in the context of individual post-conviction litigations. For while “[n]either the problem of ineffective representation nor the solution to it ultimately lies at the level of the individual case . . . it is at that level that the problems become visible and the solutions must be implemented.” *Id.* at 1102-03.

31. See *infra* at 341-45.



subsequent reversal, but—far more importantly—undermine the justice and reliability, real and perceived, of case outcomes. The premise of the *Guidelines* since their inception has been that

[a]ll actors in the system share an interest in the effective performance of [capital post-conviction] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.<sup>32</sup>

### III. EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL: THE STANDARD OF PRACTICE

Among the judges who must depend on the quality of counsel's work in death penalty cases are the Justices of the Supreme Court of the United States. This may or may not be related to a new willingness on the part of that Court to give teeth, in the capital context at least, to a constitutional standard for the effective performance of counsel that has hitherto been universally denounced as flaccid.<sup>33</sup>

In *Williams v. Taylor*,<sup>34</sup> counsel at the penalty phase of a capital trial were held ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison.<sup>35</sup> Their performance, the Court held, violated the obligation of

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32. This quotation, which I have described as encapsulating "the philosophy that has animated the [*Guidelines*] project since its inception in the 1980s," Eric M. Freedman, *Introduction*, 31 Hofstra L. Rev. 903, 912 (2003), is from a report released by the Association of the Bar of the City of New York in 1989. See Comm. on Civ. Rights, Assn. of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 Rec. of the Assn. of the Bar of the City of N.Y. 848, 854 (1989) (footnote omitted) [hereinafter *Legislative Modification*].

33. The governing case is *Strickland v. Wash.*, 466 U.S. 668 (1984). From the date on which it was decided until the year 2000, when the *Williams* case, discussed in the next paragraph of text, was decided, the Court had never found any attorney ineffective under *Strickland*. For criticisms of *Strickland*, and in particular of its insufficiency to insure representation that conforms to "the special standard of practice applicable to capital cases," *Commentary*, *supra* n. 1, at 991, see *id.* at 930-31, and at 991 n. 155.

34. 529 U.S. 362 (2000).

35. *Williams*, 529 U.S. at 395-96.

counsel in a capital case “to conduct a thorough investigation of the defendant’s background.”<sup>36</sup>

Then came *Wiggins v. Smith*.<sup>37</sup> In what seems to have been a deliberate effort to reinforce the message of *Williams*,<sup>38</sup> the Court by a vote of seven to two “took a major step toward dealing with the pervasive and persistent problem of inadequate representation for indigent capital murder defendants.”<sup>39</sup> Trial counsel in *Wiggins* were held ineffective because, although they did uncover some mitigation evidence, their investigation was inadequate; it “fell short of the standards for capital defense work articulated by the American Bar Association—standards to which we long have referred as ‘guides to determining what is reasonable.’”<sup>40</sup> Counsel “acquired only a rudimentary knowledge of [the client’s] history from a narrow set of sources,” notwithstanding the “well-defined norms”—embodied in the 1989 edition of the *Guidelines*—calling for an investigation, inter alia, into “medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.”<sup>41</sup>

While the case has a variety of ramifications,<sup>42</sup> the key point for present purposes is that Mr. Wiggins’s right to the

36. *Id.* (citing *ABA Standards for Criminal Justice* 4-4.1, cmt. at 4-55 (2d ed. 1980)).

37. 123 S. Ct. 2527 (2003).

38. See Marcia Coyle, *New Standards in Death Cases; High Court Rules on Effective Counsel*, 25 Natl. L.J. P1, P1 (July 14, 2003) (“The promise of *Williams*—to put teeth into the *Strickland* standards—has not been fulfilled, according to some scholars and litigators. But *Wiggins*, they added, will not be so easily ignored by lower courts.”). This view finds support in the fact that Justice O’Connor wrote both *Strickland* and *Wiggins*, reinforcing the point that the former will have to be read in light of the latter. See also *Commentary*, *supra* n. 1, at 929 (quoting Justice O’Connor’s concerns, expressed in a 2001 speech, that the system “may well be allowing some innocent defendants to be executed” and suggesting that “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used”).

39. Coyle, *supra* n. 38, at 1.

40. *Wiggins*, 123 S. Ct. at 2536-37 (quoting *Strickland*).

41. *Wiggins*, 123 S. Ct. at 2537 (quoting *Guideline* 11.8.6 of the 1989 edition) (emphasis omitted). For the extensively annotated discussion of these topics in the revised edition, see *Commentary*, *supra* n. 1, at 1018-26.

42. A notable aspect of the decision is its treatment of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). The *Wiggins* Court—again reinforcing what it had done in *Williams*—held that the rulings of the state courts rejecting the claim of ineffective assistance represented an unreasonable application of *Strickland* that rested upon “an unreasonable determination of the facts in light of the evidence presented in the state court

effective performance of trial counsel was only vindicated by the work of post-conviction counsel, who complied with their obligations under the *Guidelines* and did what trial counsel ought to have done.<sup>43</sup>

Although this is precisely why the obligations of the *Guidelines* (including, but not limited to, the “obligation to conduct thorough and independent investigations relating to issues of both guilt and penalty”)<sup>44</sup> apply “to all stages” of every capital case,<sup>45</sup> the practical effect is that post-conviction counsel face a truly daunting task:

The post-conviction handling of capital cases is a legal specialty requiring mastery of an intricate body of fast-changing substantive and procedural law. . . . Furthermore, taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one’s personal responsibility for the outcome.<sup>46</sup>

Moreover, the lawyer is dealing with a uniquely challenging client population:

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult. They may have mental illnesses or personality disorders that

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proceedings.” See *Wiggins*, 123 S. Ct. at 2534-35, 2538-39. These rulings, predicates under 28 U.S.C. § 2254 (d) to the grant of relief, should encourage federal habeas corpus courts to follow the example set in *Wiggins* by the United States District Court for the District of Maryland and to engage in a more intensive review than many of them have recently felt at liberty to perform. Thus, for instance, in *Frazier v. Huffman*, 343 F.3d 780, 797-99 (6th Cir. 2003), the Court of Appeals, relying on *Williams* and *Wiggins*, reversed the District Court and granted habeas relief on the basis of trial counsel’s failure to present mitigating evidence of brain damage. The Sixth Circuit “conclude[d] that the state court’s determination that Frazier’s trial counsel had performed in a competent manner during the penalty phase was not simply erroneous, but unreasonable.” *Id.* at 797.

43. See *infra* at 341-45.

44. *Guidelines*, *supra* n. 1, at 1015 (*Guideline* 10.7.A).

45. *Id.* at 919 (*Guideline* 1.1.B).

46. *Legislative Modification*, *supra* n. 32, at 854 (footnote omitted); see also *Commentary*, *supra* n. 1, at 923.

make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that “[i]t must be assumed that the client is emotionally and intellectually impaired.”<sup>47</sup>

These special characteristics of the Death Row population exacerbate the “significant cultural and/or language barriers between the client and his lawyers”<sup>48</sup> that are likely to exist in criminal defense work generally. Yet,

[o]vercoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information, the lawyer must understand the client and his life history. To communicate effectively on the client’s behalf in negotiating a plea, . . . arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant.<sup>49</sup>

The response of the *Guidelines* to this multiplicity of difficulties is to launch a comprehensive attack on them—requiring counsel both to pursue a multi-front strategy on behalf of the client and to deploy a multi-disciplinary team to execute it.

### *A. Pursuing a Multi-Front Strategy*

Victory in a capital case may take many forms and occur for many reasons. The client might be exonerated because new evidence emerges or old evidence proves unreliable.<sup>50</sup> He may

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47. *Commentary, supra* n. 1, at 1007 (quoting Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, in 22 *The Advocate* (Mar. 2000) (available at <http://www.dpa.state.ky.us/library/advocate/mar00/plea.html>) (accessed Sept. 30, 2003; copy on file with Journal of Appellate Practice and Process)).

48. *Commentary, supra* n. 1, at 1007.

49. *Commentary, supra* n. 1, at 1009 (footnotes omitted).

50. *See Commentary, supra* n. 1, at 1018 (detailing counsel’s duty “to take seriously the possibility of the client’s innocence,” notwithstanding an apparently overwhelming case of guilt, “to scrutinize carefully the quality of the state’s case, and to investigate and re-investigate all possible defenses”).

gain a lesser sentence as a result of a favorable legal ruling or because new developments cause the prosecutor to agree.<sup>51</sup> The Governor might grant clemency.<sup>52</sup> None of these events are likely to be the result of spontaneous generation. They will happen because counsel took action to make them happen. During the years consumed in a typical capital case, it will often be the duty of counsel to pursue more than one of these possibilities simultaneously,<sup>53</sup> cultivating seeds whose germination may be distant.

Counsel must discharge this duty with a self-conscious awareness of the unique context in which capital representation occurs. In spending time to build a relationship with someone in a position to influence a key actor<sup>54</sup>—and, most certainly, in spending a good deal of time with the client himself—a lawyer is doing work that is every bit as “legal” as filing an application for a writ of prohibition.<sup>55</sup> The *Guidelines* stress the importance of this work during the post-conviction phase:

[P]ost-conviction counsel, from direct appeal through clemency, must not only consult with the client but also monitor the client’s personal condition for potential legal

51. See *Commentary*, *supra* n. 1, at 1040 (“As in other sorts of protracted litigation, circumstances change over time (e.g., through replacement of a prosecutor, death of a prosecution witness, alteration in viewpoint of a key family member of the client or the victim, favorable developments in the law or the litigation, reconsideration by the client) and as they do new possibilities arise.”); see also *id.* at 1040 n. 243 (describing many instances of negotiated settlements following extended litigation).

52. See *Commentary*, *supra* n. 1, at 1088-90 (describing duties of clemency counsel).

53. See e.g. *Guidelines*, *supra* n. 1, at 1038 (*Guideline* 10.9.1.G); *Commentary*, *supra* n. 1, at 1043 (explicating this *Guideline*: “If the possibility of a negotiated disposition is rejected by either the prosecution or the client when a settlement appears to counsel to be in the client’s best interest, counsel should continue efforts at persuasion while also continuing to litigate the case vigorously.”)

54. Examples might include members of “the client’s family or others on whom the client relies for support and advice,” *Commentary*, *supra* n. 1, at 1008, or a cleric who might reach out to the victim’s family, see *Commentary*, *supra* n. 1, at 1042.

55. See *Guidelines*, *supra* n. 1, at 1005 (*Guideline* 10.5: “Relationship With the Client”); see also *Commentary*, *supra* n. 1, at 1008 (describing importance of ongoing personal contact; by establishing “a relationship of trust with the client” counsel can obtain all the facts relevant to “appeal, post-conviction review, or clemency” and “ensure that the client will listen to counsel’s advice” on key strategic matters). See also *id.* at 1009 n. 182 (Because a lawyer “can . . . frequently earn a client’s trust by assisting him with problems he encounters in prison, or otherwise demonstrating concern for his well being and a willingness to advocate for him . . . [,] such advocacy is an appropriate part of the role of defense counsel in a capital case.”).

consequences. For example, actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness . . . , and changes in the client's mental state (e.g., as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed.<sup>56</sup> In any event, . . . maintaining an ongoing relationship with the client minimizes the possibility that he will engage in counter-productive behavior (e.g., attempt to drop appeals, act out before a judge, confess to the media). Thus, the failure to maintain such a relationship is professionally irresponsible.<sup>57</sup>

In short, to pursue a multi-level strategy in a capital case, counsel must be intensely engaged not just in the nuances of the facts and the law but also in the human environment within which they will interact to achieve a just outcome for the client.

### *B. Deploying a Multi-Disciplinary Team*

As a great deal of unhappy experience shows,<sup>58</sup> expecting one, or even several, lawyers to have the skills needed to perform well all the tasks that are required to deliver high-quality defense representation to a capital defendant is unrealistic.<sup>59</sup> Rather,

the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines. 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, . . . improves the relationship with the client and his family by providing

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56. The *Commentary* notes in this regard that "the case establishing the proposition that insane persons cannot be executed," *Ford v. Wainwright*, 477 U.S. 399 (1966), "was heavily based on notes on the client's mental status that counsel had kept over a period of months," *Commentary*, *supra* n. 1, at 1083.

57. *Id.* at 1010-11 (footnotes omitted).

58. *See id.* at 928-29.

59. *See Freedman, supra* n. 15, at 1102 ("Even a skilled lawyer making best efforts to defend her client competently is probably engaged in a foredoomed project if she is not part of a system that provides her with the back-up necessary to perform effectively.").

more avenues of communication,<sup>60</sup> and provides more support to individual team members.

The *Guidelines* accordingly provide that, at every stage of the case, the client must be represented by a defense team consisting of:

- one lead counsel and one or more associate counsel;
- at least one investigator;
- at least one mitigation specialist;
- at least one person (who may be one of the foregoing) “qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments”;<sup>61</sup> and
- “any other members needed to provide high quality legal representation.”<sup>62</sup>

As the *Commentary*—relying upon professional standards, empirical experience, and many decided cases regarding ineffective assistance of counsel—demonstrates at some length, these requirements represent the standard of practice. Indeed, as the following sections summarize, the mandates of the *Guidelines* flow logically from the tasks that defense counsel are expected to perform.

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60. *Commentary*, *supra* n. 1, at 1002 (footnotes omitted).

61. *Guidelines*, *supra* n. 1, at 1000 (*Guideline* 10.4: “The Defense Team”).

62. *Id.*; see also Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 Hofstra L. Rev. 1143 (2003); Jill Miller, *The Defense Team in Capital Cases*, 31 Hofstra L. Rev. 1117 (2003). The *Guidelines* contemplate that the need for appropriate expertise on the defense team may require the provision of legal, as well as non-legal, resources beyond the minimum requirements: “Most cases will require at least some contributions by additional lawyers—for example, a specialist to assist with motions practice and record preservation, or an attorney who is particularly knowledgeable about an area of scientific evidence.” *Commentary*, *supra* n. 1, at 1004 (footnote omitted).

### 1. *The Investigator*<sup>63</sup>

The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings. Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation. Counsel lacks the special expertise required to accomplish the high-quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness.

### 2. *The Mitigation Specialist*

A mitigation specialist is also an indispensable member of the defense team. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. As in *Wiggins*,<sup>64</sup> the mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social-history information to experts to enable them to conduct competent and

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63. This sub-section (1), and sub-section (2), which follows, are both drawn from the *Commentary*, *supra* n. 1, at 958-60.

64. *See infra* at 344.



reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation. The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.

### *3. The Mental-Impairment Expert*

Manifestly, some team member must be “qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.”<sup>65</sup> Counsel’s own observation of the client, his family members, and other witnesses, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation<sup>66</sup>) that could be vitally important.

### *4. The Additional Experts and Specialists*

Beyond the core requirements, each case will have unique needs. The provision of effective representation may require counsel to work with forensic scientists,<sup>67</sup> translators, medical and mental-health specialists of various kinds,<sup>68</sup> or anthropologists.<sup>69</sup> Counsel bears the heavy responsibility of

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65. *Guidelines*, *supra* n. 1, at 952 (*Guideline* 4.1.A.2).

66. As noted in *Commentary*, *supra* n. 1, at 1009 n. 183, mental retardation is a condition of critical legal significance, *see Atkins v. Va.*, 536 U.S. 304, 321 (2002) (holding that Constitution prohibits execution of mentally retarded individuals), but one which the client “may conceal with great skill.”

67. *See Commentary*, *supra* n. 1, at 955 (listing as examples “pathologists, serologists, microanalysts, DNA analysts, ballistics specialists”).

68. *See e.g. Caro v. Calderon*, 165 F.3d 1223, 1226-27 (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).

69. *See Mak v. Blodgett*, 970 F.2d 614, 616-18, 617 n. 5 (9th Cir. 1992) (positive testimony from defendant’s family, combined with expert testimony about difficulty of adolescent immigrants from Hong Kong assimilating to North America, would have humanized client and could have resulted in a life sentence for defendant convicted of

determining what expertise the case needs, obtaining it, and turning the results into persuasive presentations to all relevant decisionmakers.

#### IV. ACHIEVING EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL ON THE GROUND

The ultimate beneficiary of effective post-conviction lawyering by capital defense counsel is the justice system itself. But the effective performance that “vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed,”<sup>70</sup> costs money. “For better or worse, a system for the provision of defense services in capital cases will get what it pays for.”<sup>71</sup>

Since at the moment it is judges who control the flow of funding to defense counsel in most of the states where the crisis in post-conviction capital representation is most acute, it is judges who are the most urgent audience for this message.

Defense teams facing the challenges of post-conviction representation described in Part III above simply cannot do their jobs without the resources that will enable them to (a) find compelling facts, (b) pursue promising legal theories, and (c) engage in persuasive advocacy.

##### 1. Finding Compelling Facts

By definition, a lawyer cannot know what an investigation will turn up until the investigation is done—that is precisely why one investigates. Not every aspect of the prior proceedings will turn out to be unreliable, but the odds are good that some aspects will. Yet what those are cannot be predicted.<sup>72</sup> It is for this reason that the *Guidelines* require counsel at every stage to:

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thirteen murders). See also Lynn Thompson, *Life Without Parole in Massacre: Mak Sentenced Again for 13 Wah Mee Deaths in 1983*, Seattle Times B1 (May 21, 2002) (reporting that defendant was sentenced to thirteen life terms after prosecution decided not to appeal judge's order that death penalty was unavailable).

70. *Legislative Modification*, *supra* n. 32, at 854.

71. *Commentary*, *supra* n. 1, at 988.

72. See e.g. Gwen Filosa, *N.O. Man Cleared in '84 Murder*, Times-Picayune 1 (May 9, 2003) (describing case of John Thompson, who was deterred from taking the stand at his

- “conduct thorough and independent investigations relating to issues of both guilt and penalty”;<sup>73</sup>
- “conduct a full examination of the defense provided to the client at all prior phases of the case”;<sup>74</sup> and
- “satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.”<sup>75</sup>

If post-conviction review is to achieve its goal of insuring reliable results, judges must support counsel financially in performing this work. For example, it makes no sense for a federal judge to limit the investigations of habeas counsel to issues exhausted in state court or treated on the merits there. One of counsel’s primary duties is to uncover issues that have not been previously presented; if counsel does, then—depending on the facts—it may well be the case that the resulting claims may be heard on the merits.<sup>76</sup> Similarly, an otherwise preclusive procedural bar will not bar a federal habeas court from reaching the merits where “a constitutional violation has probably

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murder trial by a prior conviction for armed robbery, which, a defense investigator discovered weeks before the execution date, had been tainted by government suppression of an exculpatory blood test; when retried on the murder charge, Thompson, who had always maintained his innocence, was acquitted).

73. *Guidelines*, *supra* n. 1, at 1015 (Guideline 10.7.A).

74. *Id.* (Guideline 10.7.B.1).

75. *Id.* (Guideline 10.7.B.2).

76. See e.g. *Dobbs v. Zant*, 506 U.S. 357 (1993) (*per curiam*) (granting certiorari and holding previously unasserted claim not precluded because petitioner properly relied on state’s representation that critical transcript did not exist); *Graves v. Cockrell*, 343 F.3d 465, 476 (5th Cir. 2003) (holding that District Court erred in finding petitioner’s claim under *Brady v. Md.*, 373 U.S. 83 (1963), to be procedurally barred, notwithstanding the fact that state courts had rejected it on the basis that it was not raised until his third application for postconviction relief). To take another example, the AEDPA states that a federal court should ordinarily not hold an evidentiary hearing “if the applicant has failed to develop the factual basis of a claim in State court proceedings.” 28 U.S.C. § 2254(e)(2). But the statutory bar does not apply “unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” *Williams v. Taylor*, 529 U.S. 420, 432 (2000). Moreover, even if the statute does apply, the court may still hold a hearing “if efforts to discover the facts would have been in vain, see § 2254(e)(2)(A)(ii), and there is a convincing claim of innocence, see § 2254(e)(2)(B).” 529 U.S. at 435; see also 529 U.S. at 440 (holding that, because state post-conviction counsel had been sufficiently diligent, petitioner was entitled to present new material to the federal court). All of these elements, of course, turn on issues of fact that post-conviction counsel must investigate.

resulted in the conviction of one who is actually innocent”<sup>77</sup>—a fact-sensitive issue indeed, and one only likely to be resolved after extraordinary efforts by counsel.<sup>78</sup>

## 2. Pursuing Promising Legal Theories

Just as counsel must lay the factual groundwork for meritorious claims, so must they lay the legal groundwork. For example, in *Johnson v. Mississippi*<sup>79</sup> the petitioner’s death sentence was set aside because it had been predicated on an invalid conviction in New York. But that result occurred only after his counsel had successfully brought an action to vacate the New York conviction.<sup>80</sup> Under the *Guidelines*, it was counsel’s duty to bring the New York action as an aspect of the Mississippi representation,<sup>81</sup> and they were entitled to be compensated for doing so.

## 3. Engaging in Persuasive Advocacy

Once the facts have been obtained and the legal theories formulated, they have to be presented in a forceful way that

77. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). For an example of a petitioner successfully relying upon this rule, see *Schlup v. Delo*, 513 U.S. 298 (1995).

78. Thus, for example, before hiring an expert to do DNA testing, counsel may have to bring an action to obtain DNA samples to test. See e.g. *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002) (cited in *Commentary*, *supra* n. 1, at 1031 n. 231). Generalizing from this example, the cited footnote of *Commentary* continues by admonishing

defense attorneys to be aggressive in pursuing the implication of the Court’s assumption in *Herrera v. Collins*, 506 U.S. 390, 417 (1993), “that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim.” See *House v. Bell*, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 2575 (2003) (relying upon this passage and opinion of Justice O’Connor in *Schlup v. Delo*, 513 U.S. 298 (1995), in certifying to state courts issue of whether procedural vehicle existed to present to them evidence of innocence first uncovered during federal habeas proceedings).

*Commentary*, *supra* n. 1, at 1031 n. 231.

79. 486 U.S. 578 (1988) (discussed in *Commentary*, *supra* n. 1, at 924 n. 7).

80. See *People v. Johnson*, 506 N.E.2d 1177 (N.Y. 1987) (per curiam).

81. See *Commentary*, *supra* n. 1, at 927 n. 22 (noting that the ruling in *Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394 (2001), “may well require counsel,” as part of their “obligation to prevent the prosecution from using unconstitutionally obtained prior convictions in support of a death sentence,” to bring “collateral challenges to such prior convictions in the jurisdictions or districts where those convictions were obtained”).

causes the decisionmaker to form a new picture of the case.<sup>82</sup> Thus, for example, in *Wiggins*, a key element in persuading the Supreme Court that trial counsel had performed inadequately at the mitigation phase was the presentation on state post-conviction of “an elaborate social history report” by an expert social worker.<sup>83</sup> The “detailed” and “graphic” evidence in this report—buttressed by “state social services, medical, and school records, as well as interviews with petitioner and numerous family members”—“chronicled petitioner’s bleak life history” and powerfully demonstrated the case that trial counsel had failed to make.<sup>84</sup> Under the *Guidelines*, that social worker—surely a most valuable member of the defense team—was entitled to remuneration for his efforts.<sup>85</sup>

With a Supreme Court opinion in hand to sharpen hindsight, coming to this conclusion is easy. But at the time during the post-conviction process when resource decisions need to be made, neither the post-conviction counsel seeking funding nor the judges passing on the requests can know what course a litigation will ultimately take. Counsel’s work on the many factual, legal and relational tasks for which they are responsible needs to lay the groundwork for a variety of possible courses of action.<sup>86</sup> For the effective advocacy mandated by the *Guidelines*

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82. See *Commentary*, *supra* n. 1, at 1085 (“Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system.”).

83. See *Wiggins*, 123 S. Ct. at 2532-33.

84. *Id.*

85. See *Guidelines*, *supra* n. 1, at 981 (*Guideline* 9.1.C: “Non-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.”) Of course, this entitlement would be not a whit diminished if the purpose of the presentation had not been to persuade the post-conviction court to grant legal relief, but rather the prosecutor to accept a plea. See *supra* at 335.

86. See *id.* This is particularly so in light of the especially strong duty of capital counsel to pursue legal claims, even ones whose “prospects of immediate success on the merits are at best modest,” *Commentary*, *supra* n. 1, at 1033-34; see also Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 Hofstra L. Rev. 1167 (2003).

That duty is based on decades of experience with the vagaries of death-penalty law, see e.g. *Commentary*, *supra* n. 1, at 928 n. 28 (pointing out that within a single week in the

to become a reality, judges must recognize this need and support counsel financially in exploring a range of strategies.<sup>87</sup>

#### 4. *Investing in Justice*

Will all this cost money? Yes. But the 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,”<sup>88</sup> and one of those costs is the cost of providing defendants at “all stages of every case in which the jurisdiction may be entitled to seek the death penalty” with high-quality legal representation.<sup>89</sup> If governments do not pay that cost in money, defendants will pay it in injustice.<sup>90</sup> Reflecting the norms of the legal community, the *Guidelines* deem that alternative unacceptable.

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spring of 2002 the Supreme Court rendered two major decisions favorable to capital defendants (*Atkins v. Va.*, 536 U.S. 503, 304 (2002) (barring execution of the mentally retarded) and *Ring v. Ariz.*, 536 U.S. 584 (2002) (expanding requirements for jury findings in capital cases)), both of which squarely overruled contrary precedent; in the interests of clients, counsel should have been asserting “these claims at every stage in the proceedings, notwithstanding that they were then plainly at odds with the governing law.”). See *Commentary*, *supra* n. 1, at 1032:

Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case. . . . [C]ounsel also has a duty . . . to preserve issues calling for a change in existing precedent; the client’s life may well depend on how zealously counsel discharges this duty. Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.

*Id.* (footnotes omitted).

Indeed, recognizing that “[a]n effective capital defense lawyer is always testing—and often explicitly challenging—the limits of existing law,” the *Commentary* “specifically identifies many areas in which it would be remiss for counsel to accept uncritically the contours of existing doctrine.” Freedman, *supra* n. 32, at 904, 904 n. 11 (listing examples).

87. See *Commentary*, *supra* n. 1, at 957 (In providing resources, jurisdictions should bear in mind “counsel’s need to explore the potential of a variety of possible theories.”).

88. Freedman, *supra* n. 15, at 1097-98.

89. *Guidelines*, *supra* n. 1, at 919 (*Guideline* 1.1.B).

90. It is for this reason that the *Guidelines* mandate that “counsel at all stages . . . demand on behalf of the client all resources necessary to provide high quality legal representation [and if] such resources are denied . . . make an adequate record to preserve the issue for further review,” *Guidelines*, *supra* n. 1, at 1001 (*Guideline* 10.4.D).

## V. CONCLUSION

Post-conviction review in capital cases is a critical “safeguard against injustice.”<sup>91</sup> It can only function as such if defense lawyers, supported by judges, provide high-quality legal representation. The *Guidelines* are a roadmap for both groups to follow in achieving that goal.



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91. *Commentary, supra* n. 1, at 931.