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## 'THE GUIDING HAND OF COUNSEL' AND THE ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES

*Robin M. Maher\**

More than seventy years ago, the United States Supreme Court found itself reviewing what was then the most sensational criminal case in recent years.<sup>1</sup> Nine poor, young African Americans were facing death sentences after being convicted of raping two white women in Alabama.<sup>2</sup> The question was simple: were the defendants entitled to effective assistance of counsel in a death penalty trial as part of their constitutional right to due process?<sup>3</sup>

On November 7, 1932, Mr. Justice George Sutherland announced the Court's decision. He first famously declared that defendants in capital cases have the right to the "guiding hand of counsel at every step in the proceedings against [them]."<sup>4</sup> Poor defendants had the right to have counsel appointed if necessary.<sup>5</sup> While the Court was still years away from acknowledging that the right to counsel was essential in all felony cases, the words of this conservative justice marked a significant

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1. The "Scottsboro Boys" ranged in age from 13 to 20 and were nearly lynched before their trial could begin:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were . . . put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

*Powell v. Alabama*, 287 U.S. 45, 57-58 (1932); see also DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH*, 5-6 (special ed., The Notable Trials Library 2000) (giving age range of Scottsboro boys as 13-20).

2. See *Powell*, 287 U.S. at 49-50.

3. See *id.* at 52.

4. *Id.* at 69.

5. See *id.* at 72.

moment in criminal legal jurisprudence and foreshadowed the Court's 1963 landmark opinion in *Gideon v. Wainwright*.<sup>6</sup>

Equally important, however, was how the Court reached its decision. It found that the trial court's failure to make an effective appointment of counsel<sup>7</sup> was a clear *denial of due process*, with all its attendant implications of fairness and justice: "[T]he right [to counsel] is of such character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"<sup>8</sup> On that November day, the Court concluded for the first time that effective legal assistance in the preparation and defense of a capital case was an essential component of due process and a fair trial.

Observers that day might have reasonably expected that legal representation for capital defendants would change forever. They would be disappointed to know how many problems remain.

Seventy-one years later, the United States Supreme Court once again found itself hearing oral arguments regarding the death sentence of another indigent African American defendant, Kevin Wiggins.<sup>9</sup> Mr. Wiggins, very much like the Scottsboro Boys, was poor, vulnerable, and accused of a heinous crime against a white victim.<sup>10</sup> Like the lawyers in the Scottsboro case, Mr. Wiggins's lawyers failed to adequately investigate the facts or prepare the case for trial.<sup>11</sup> They waived critical rights of the defendant at trial.<sup>12</sup> Like the Scottsboro lawyers, they failed

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6. 372 U.S. 335 (1963).

7. On the morning of trial, the trial court appointed an intoxicated real estate lawyer and a "doddering, extremely unreliable, senile" lawyer of almost seventy years old to serve as defense counsel for the defendants. CARTER, *supra* note 1, at 18. They replaced "all seven members of the Scottsboro bar" who had been summarily appointed at arraignment. *Id.* at 17. The lawyers conducted no investigation and met with their clients for a mere thirty minutes before the trial began. *See id.* at 23. They managed very little by way of defense and waived closing arguments. *See id.* at 31-35.

8. *Powell*, 287 U.S. at 67.

9. *See Wiggins v. Smith*, 123 S. Ct. 2527, 2532 (2003) (indigency); MD. COALITION AGAINST STATE EXECUTIONS, MARYLAND'S DEATH ROW, at [http://www.mdcase.org/death\\_penalty/deathrow.htm](http://www.mdcase.org/death_penalty/deathrow.htm) (last visited Aug. 28, 2003) (race).

10. *See Wiggins*, 123 S. Ct. at 2533 (noting that Wiggins is "borderline retard[ed]"); MD. COALITION AGAINST STATE EXECUTIONS, *supra* note 9 (victim's race).

11. *See Wiggins*, 123 S. Ct. at 2536-38.

12. The Scottsboro lawyers waived closing arguments and presented almost no defense during trial. *See CARTER*, *supra* note 1, at 31-35. Mr. Wiggins's lawyers waived his right to a trial by jury and presented almost no evidence in the guilt phase and no mitigation evidence during sentencing. *See Wiggins*, 123 U.S. at 2532, 2536-38, *direct appeal at* 597 A.2d 1359, *district court habeas proceedings at* 164 F. Supp. 2d 538.

to discover critical evidence for the defense.<sup>13</sup> I can only imagine that Mr. Justice Sutherland would be surprised at the poor quality of legal representation that Mr. Wiggins received. Our society has seen incredible technological advances and achievements in the past seventy years. Unfortunately, our capital defense systems have not shared in that progress.

The ABA has long been concerned with the provision of effective counsel for all criminal defendants, especially for those facing the death penalty.<sup>14</sup> In 1989, the ABA first published its Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which detailed the kind of competent, effective legal representation that all capital defendants were entitled to receive. Earlier this year, after a two-year effort drawing upon the expertise of a broad group of distinguished and experienced judges, lawyers, and academics, the ABA House of Delegates overwhelmingly approved revisions to those Guidelines to update and expand upon the obligations of death penalty jurisdictions to ensure due process of law and justice.<sup>15</sup>

“These Guidelines are not aspirational.”<sup>16</sup> They articulate a national standard of care and the minimum that should be required in the defense of capital cases.<sup>17</sup> Sadly, however, we know that all too often, the kind of zealous, effective legal representation the Guidelines describe does not occur.<sup>18</sup>

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13. The Scottsboro lawyers were appointed immediately before trial and never discovered any facts at all. *See Powell*, 287 U.S. at 53-56. Mr. Wiggins’s lawyers failed to uncover evidence of sexual abuse and torture he had been subject to as a child as well as other powerful mitigating evidence. *See Wiggins*, 123 S. Ct. at 2533, 2536-38.

14. *See generally, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION (3d ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992).

15. In February 2003 the ABA House of Delegates passed the following resolution adopting the Guidelines:

*Resolved*, That the American Bar Association adopts the black letter ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003; and

*Further Resolved*, That the American Bar Association recommends adoption by death penalty jurisdictions of the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003

<http://www.abanet.org/leadership/recommendations03/107.pdf> (last visited Aug. 28, 2003) (text of resolution submitted to House of Delegates); ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Introduction (rev. ed. 2003) [hereinafter GUIDELINES] (noting passage of resolution on Feb. 10, 2003).

16. GUIDELINES, *supra* note 15, at Guideline 1.1, History of Guideline.

17. *See id.* at Guideline 1.1, text accompanying note 73.

18. *See id.* at Guideline 1.1, text accompanying note 29-32, 46.

Nearly every week I hear of another death row prisoner whose conviction or sentence has been set aside because of serious constitutional errors at trial, or actual innocence. It forces me to wonder what would have happened to these men and women had they not had the good fortune to have competent legal representation on appeal. What will happen to the men and women on death rows around the country represented by appointed counsel without the knowledge, skill, or experience to satisfy the Guidelines, lawyers who are merely required to have “a law license and a pulse?”<sup>19</sup> The risk—the very likelihood—that we have or will execute an innocent person because we have failed to provide them with competent and effective legal counsel at trial or post-conviction is deeply troubling.

Mr. Wiggins, fortunately, will not be among the wrongfully executed. A law firm agreed to take his appeal pro bono and for the first time Mr. Wiggins received the assistance of a competent legal advocate.<sup>20</sup> At the Supreme Court, his new lawyers argued that Mr. Wiggins’s Sixth Amendment rights had been violated because of the poor performance and mistakes his lawyers made at trial.<sup>21</sup> The Court turned to the ABA Guidelines to help assess the performance of Mr. Wiggins’s trial counsel and found that their conduct had fallen well short of these professional norms.<sup>22</sup> The Guidelines, the Court said, “are guides to determining what is reasonable” in the defense of a capital case.<sup>23</sup> Mr. Wiggins will receive another sentencing hearing and a first chance at justice.

But what about the next young man or woman facing a death sentence who needs legal assistance? We cannot recruit enough volunteer lawyers to represent all those who need them, nor should we rely on inexperienced but well-meaning civil lawyers as a substitute for the experienced and well-trained capital defenders that governments have an obligation to provide.

As the Guidelines emphasize, that obligation cannot be met by piecemeal efforts aimed at particular cases, but requires sustained

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19. *Ex parte Graves*, 70 S.W.3d 103, 118 (Tex. Crim. App. 2002) (Price, J., dissenting)

20. See Elizabeth Amon, *Jenner & Block: Death Penalty Pros*, NAT’L L.J., Jan. 6, 2003, at A8. Since the mid-1980s the ABA Death Penalty Representation Project has recruited, trained, and supported volunteer lawyers, most of whom are civil lawyers, to represent death row inmates who do not have counsel. The profession can rightly take pride in this effort.

21. See, e.g., *supra* notes 11-12 and accompanying text. Similarly, the International Labor Defense recruited a prominent criminal lawyer as pro bono counsel to the Scottsboro Boys after the U.S. Supreme Court remanded the case for new trial. See CARTER, *supra* note 1, at 182.

22. See *Wiggins*, 123 S. Ct. at 2536-37.

23. *Id.*

institutional commitment.<sup>24</sup> 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. To improve the quality and availability of counsel, we must require independent appointing authorities to set performance standards and qualifications for counsel, require training of recruited and appointed lawyers, and investigate all complaints regarding the performance of capital defense counsel.<sup>25</sup> Every capital defense lawyer must possess the requisite knowledge and skills necessary to handle the demanding aspects of a capital case.<sup>26</sup> The team of experts that the lawyer assembles should be multi-disciplinary and capable of handling the complex and highly specialized issues that death penalty cases present.<sup>27</sup> But that is only the beginning. Even the best of lawyers needs resources if she is to provide effective representation. We need to adequately fund capital defender offices in parity with the prosecutorial effort<sup>28</sup> and limit the caseloads of capital defenders so that they can provide high quality legal representation to each and every defendant they represent.<sup>29</sup>

These are just a few of the reforms that must occur, and no one believes that it will be easy to realize them. It will require an investment of time and money and care, from all of us. But the effort is both worthy and long overdue. For in calling upon every death penalty jurisdiction to adopt the revised Guidelines, the ABA is doing no more than seeking implementation of a “‘fundamental principle[.]’ of liberty and justice” that Justice Sutherland recognized more than seventy years ago.<sup>30</sup> Jurisdictions that choose to have the death penalty must accept the concomitant obligation to implement meaningful safeguards intended to insure due process and minimize the risk of execution of the innocent.<sup>31</sup>

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24. See generally Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments' Responsibilities Under the New ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097 (2003).

25. See GUIDELINES, *supra* note 15, at Guideline 3.1(E).

26. See *id.* at Guidelines 5.1, 10.1.

27. See *id.* at Guidelines 4.1, 10.4.

28. See *id.* at Guideline 9.1. Currently capital prosecution is generally funded at approximately three times the level of capital defense. See *id.* at note 135.

29. See generally *id.* at Guideline 6.1, commentary.

30. *Powell v. Alabama*, 287 U.S. 45, 67 (1932).

31. See ABA Recommendation No. 107, approved Feb. 3., 1997, available at <http://www.abanet.org/moratorium/resolution.html> (ABA resolution explicating this position).

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