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THE ABA GUIDELINES AND THE NORMS OF CAPITAL DEFENSE REPRESENTATION

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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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1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES].

2. See *List of Cases Citing 1989 ABA Guidelines*, ABA, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989list.authcheckdam.pdf (last updated Aug. 6, 2012); *List of Cases Citing 2003 ABA Guidelines*, ABA, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003list.authcheckdam.pdf (last updated Jan. 8, 2013).

3. “[I]magining, collecting, and presenting what is generically called ‘mitigation’ evidence,” viz. any evidence tending “to humanize the client in the eyes of those who will decide his fate,” is “arguably the central [] duty of counsel in a capital case,” one which “pervades the responsibilities of defense counsel from the moment of detention on potentially capital charges to the instant of execution.” Eric M. Freedman, *Re-stating the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 664 (2008).

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,

4. 529 U.S. 362 (2000).

5. 539 U.S. 510 (2003).

6. 545 U.S. 374 (2005).

7. 558 U.S. 30 (2009) (per curiam).

8. 130 S. Ct. 3259 (2010) (per curiam).

9. *Williams*, 529 U.S. at 395.

10. *Id.* at 395-96.

11. *Wiggins*, 539 U.S. at 523-24.

however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources."¹² In *Rompilla*, tried in 1988, counsel were found deficient "even when a capital defendant's family members and the defendant himself ha[d] suggested that no mitigating evidence [wa]s available,"¹³ and despite consulting three mental health experts.¹⁴ 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."¹⁵ 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.'"¹⁶ Among the mitigation evidence that Porter's counsel failed to present was "brain damage that could manifest in impulsive, violent behavior."¹⁷ In *Sears*, the Court found trial counsel ineffective in the 1993 trial even though they had presented seven witnesses in the penalty proceedings.¹⁸ 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 . . ."¹⁹ Post-conviction evidence emphasized significant frontal lobe brain damage causing deficiencies in cognitive functioning and reasoning.²⁰

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

12. *Id.* at 524.

13. *Rompilla*, 545 U.S. at 377.

14. *Id.* at 379.

15. *Porter*, 558 U.S. at 40.

16. *Id.* at 452 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

17. *Id.* at 36.

18. *Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010) (per curiam).

19. *Id.* at 3266.

20. *Id.* at 3261.

of legal representation.”²¹ The standard of care for cardiac surgeons is, of course, not set by just any physician with a medical degree and a license to practice. Treatment guidelines for medical specialties are based on a combination of scientific evidence and collaboration between the professionals who have devoted their careers to the area of practice—for example, peer review by the cardiac surgeons themselves.²² Similarly, the standard of care in capital defense

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.

Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1193 (2003) (footnote omitted).

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.

Opinion 9.10 – Peer Review, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion910.page#> (last updated June 1994); see *Opinion 9.14 – Quality*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion914.page> (last visited July 18, 2013) (discussing the need to monitor care “through personal case review and critical self-reflection, peer review, and . . . other quality improvement tools”); see also Denise Grady, *Study Criticizes Care in Cancer of the Ovaries*, N.Y. TIMES, Mar. 12, 2013, at A1. According to the newspaper report, a new study reported at a meeting of the Society of Gynecologic Oncology, found that most women with ovarian cancer receive “inadequate care” because they are “treated by doctors and hospitals that see

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.²³

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.²⁴ 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.²⁵

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.*

23. See Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 250 (1991) (highlighting this point).

24. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 242 (2000); see also Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 170, 172 (2000).

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*²⁶ 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.”²⁷ 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]nitiating in 1991 by a consortium of university-based researchers with support from the National Science Foundation.”²⁸ 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.²⁹ Some fifty articles based on the CJP data have been published, along with books and doctoral dissertations, completed and in progress.³⁰ The interviews elicit both predetermined response options to structured questions and narrative accounts in jurors’ own words in

26. 466 U.S. 668 (1984).

27. *Past Deans of the Faculty of Medicine*, HARV. MED. SCH., <http://hms.harvard.edu/about-hms/facts-figures/past-deans-faculty-medicine> (last visited July 18, 2013).

28. *What Is the Capital Jury Project?*, UNIV. AT ALB.: SCH. CRIM. JUST., <http://www.albany.edu/scj/13189.php> (last visited July 18, 2013) (providing a detailed description of the work of the CJP); see also William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1077 (1995).

29. *What Is the Capital Jury Project?*, *supra* note 28.

30. *Publications*, UNIV. AT ALB.: SCH. CRIM. JUST., <http://www.albany.edu/scj/13189.php> (last visited July 18, 2013) (listing many such publications); see also SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY*, at xiii-xiv (2005).

response to open-ended questions.³¹ 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,³² in the most effective manner,³³ 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.³⁴ In addition to the CJP's body of work, capital defense

31. *What Is the Capital Jury Project?*, *supra* note 28.

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 Jurors 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").

33. See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123, 1180-81 (1997) (finding jurors did not like defense expert witnesses' testimony unless supported by contemporaneous information from lay witnesses, and also finding that defense experts accounted for two-thirds of the witnesses jurors thought backfired).

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.³⁵ 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.³⁶

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.”³⁷ 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,³⁸ 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).

35. See CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (2005). His influential articles include: Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557 (2004); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008) [hereinafter Haney, *Evolving Standards*]; Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689 (2009); Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911 (2009); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447 (1997).

36. See MICHAEL RADELET, *FLORIDA DEATH CASES WHERE NON-STATUTORY MITIGATORS WERE FOUND: A CHRONOLOGICAL LIST, BY DATE OF SENTENCE* (last updated Aug. 9, 2012) (on file with *Hofstra Law Review*). The list of non-statutory mitigating factors ran to 241 pages when last updated on August 9, 2012. *Id.*

37. Haney, *Evolving Standards*, *supra* note 35, at 855-56.

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,³⁹ advances in psychopharmacology and neurochemistry,⁴⁰ 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).⁴¹ In addition, two wars have tragically heightened our awareness of the consequences of trauma and traumatic brain injury.⁴² Capital defense practitioners have been obliged to keep current with all of these complex scientific developments.⁴³

Many of the post-*Furman v. Georgia*⁴⁴ 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.⁴⁵ Not surprisingly, expert testimony in capital

39. See IRVING GOTTESMAN & STEVEN O. MOLDIN, *SCHIZOPHRENIA AND GENETIC RISKS: A GUIDE TO GENETIC COUNSELING* 1 (1998); Deborah W. Denno, *Courts' Increasing Consideration of Behavioral Genetics Evidence in Criminal Cases: Results of a Longitudinal Study*, 2011 MICH. ST. L. REV. 967, 1010-11; Steven I. Friedland, *The Criminal Law Implications of the Human Genome Project: Reimagining a Genetically Oriented Criminal Justice System*, 86 KY. L.J. 303, 335 (1998); Erick L. Messias et al., *Epidemiology of Schizophrenia: Review of Findings and Myths*, 30 PSYCHIATRIC CLINICS OF N. AM. 323, 333 (2007).

40. See AM. SOC'Y FOR NEUROCHEMISTRY, *BASIC NEUROCHEMISTRY: MOLECULAR, CELLULAR AND MEDICAL ASPECTS* 665-67 (George J. Siegel et al. eds., 6th ed. 1999).

41. See NESSA CAREY, *THE EPIGENETICS REVOLUTION: HOW MODERN BIOLOGY IS REWRITING OUR UNDERSTANDING OF GENETICS, DISEASE, AND INHERITANCE* 6-9, 42-45 (2012); Robert Sanger, *Close Test Scores and Epigenetics in Atkins Cases*, FORUM, Apr. 2012, at 27, 28 (2012).

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 xix (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); IND. CODE ANN. § 35-50-2-9.c (West 2012); KY.

sentencing proceedings began as soon as the new statutes were enacted in the 1970s.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.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 understand, human behavior?”⁴⁸ Forensic social workers wrote that their “psychosocial expertise” had proven useful in enhancing capital defense in the early 1980s.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

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-2000(f) (2011); NEB. REV. STAT. ANN. § 29-2523(2) (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); OHIO 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).

46. *See* George E. Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing*, 1 INT'L J. L. & PSYCHIATRY 283, 283 (1978).

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).

48. Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must Be Different, Too*, CHAMPION, Mar. 1984, at 8, 13.

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.”⁵⁰ Other articles focused on representing capital clients with disabling mental impairments.⁵¹

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.⁵² By 2005, the Bureau of Justice Statistics found that *more than half* of all prison and jail inmates had mental health problems.⁵³ 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 clients⁵⁴ and self-destructive behaviors often reflect underlying mental disorders.⁵⁵

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).⁵⁶ Three years later, the Court also prohibited the execution of people whose crimes were committed before they had reached eighteen

50. David C. Stebbins & Scott P. Kenney, *Zen and the Art of Mitigation Presentation, or, The Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, CHAMPION, Aug. 1986, at 14, 16-18.

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); E. 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).

53. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> (estimating 705,600 prisoners with mental health problems in state prisons, 79,800 in federal prisons, and 479,900 in local jails).

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).

56. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

years of age.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.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.⁵⁹

II. 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."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).⁶¹ She also noted that the State of Florida had appointed "an experienced criminal lawyer."⁶² Mr. Washington, however, did not follow counsel's advice.⁶³

57. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

58. See Brief for Am. Med. Ass'n et al. as Amici Curiae Supporting Respondent at 5, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), available at <http://www.ama-assn.org/ama1/pub/upload/mm395/roper-v-simmons.pdf>.

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").

60. *Strickland v. Washington*, 466 U.S. 668, 671 (1984).

61. *Id.* at 671-72.

62. *Id.* at 672.

He confessed to the murders, waived his right to a jury trial, and pleaded guilty to all charges, including three counts of capital murder.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.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.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.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.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."⁶⁹ The trial judge nonetheless found that all three murders were especially heinous, atrocious, and cruel; were committed

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 672-73.

68. *Id.* at 673 (citations omitted).

69. *Id.* at 673-74.

in the course of at least one other violent felony; involved pecuniary gain; and were committed to avoid arrest and hinder law enforcement.⁷⁰ 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.”⁷¹ The judge found that the aggravating circumstances clearly far outweighed the mitigation⁷² and imposed three death sentences for the murders and prison terms for the other crimes.⁷³

Mr. Washington raised claims of ineffective assistance of counsel in state collateral proceedings but was denied relief without an evidentiary hearing.⁷⁴ The Florida Supreme Court affirmed the denial of relief.⁷⁵ The claims were then litigated in the United States District Court for the Southern District of Florida.⁷⁶ Habeas corpus counsel offered proof in the form of affidavits and reports.⁷⁷ Both trial counsel and the trial judge testified at an evidentiary hearing.⁷⁸ The District Court faulted trial counsel for “errors in judgment” for failing to investigate non-statutory mitigation but found no prejudice.⁷⁹ On appeal, the case ultimately went en banc to the newly formed Court of Appeals for the Eleventh Circuit.⁸⁰ 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.”⁸¹ Superintendent Charles E. Strickland petitioned for a writ of certiorari.⁸² 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.”⁸³

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.”⁸⁴ Furthermore, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”⁸⁵ 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.”⁸⁶ 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.”⁸⁷

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.”⁸⁸ The reviewing court “must consider the totality of the evidence before the judge or jury.”⁸⁹ 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.”⁹⁰

Mr. Washington lost on both prongs—“a double failure.”⁹¹ 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.”⁹²

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

DEP’T CORR., <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (last visited July 18, 2013).

93. *Strickland*, 466 U.S. at 707-08 (Marshall, J., dissenting) (citation omitted).

94. See GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 334-46 (2012) (describing Marshall’s handling of a capital rape case in Florida in the early 1950s as director-counsel of the NAACP Legal Defense Fund); see also JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 14-25 (1994) (describing the history of the NAACP Legal Defense Fund, including its capital punishment cases in the pre-*Furman* era).

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).

101. (1837) 132 Eng. Rep. 490 (C.P.).

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").

104. *Vaughan*, 132 Eng. Rep. at 490.

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.¹⁰⁶ 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 standard¹⁰⁷

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*¹⁰⁸ as precedent in *Strickland* was foreboding.¹⁰⁹ In *Michel*, the Court addressed two cases in which three young African American men had been sentenced to death for aggravated rape.¹¹⁰ Each prisoner had challenged the composition of the grand jury that indicted him, alleging systematic exclusion of people of color.¹¹¹ 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.¹¹² 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.¹¹³ 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

107. OLIVER W. HOLMES, JR., *THE COMMON LAW* 108 (Neill H. Alford, Jr. et al. eds., 1982) (1881).

108. 350 U.S. 91 (1955).

109. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

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 strategy¹¹⁴

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.¹¹⁷

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

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.

119. 475 U.S. 157 (1986).

client not to testify falsely.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.¹²¹ In both *Nix* and *Strickland*, the Court considered authoritative statements *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,”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

A. *The Guidelines as Evidence of the Standard of Effective Representation*

In 2000, sixteen years after *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 *Williams v. Taylor*, Justice John Paul Stevens used the same ABA Standards for Criminal Justice (“The Defense Function”)¹²³ that Justice O’Connor had cited in *Strickland* in support of the view that it was objectively unreasonable not to have conducted a thorough mitigation investigation:

[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

120. *Id.* at 177 (Brennan, J., concurring).

121. *Id.* at 177-78 (Blackmun, J., concurring).

122. *Strickland*, 466 U.S. at 689.

123. *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

did not fulfill their obligation to conduct a thorough investigation of the defendant's background.¹²⁴

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."¹²⁵ 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."¹²⁶

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.'"¹²⁷ 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.).

125. Brian Bakst, *O'Connor Says There are 'Serious Questions' About Fairness of the Death Penalty*, LUBBOCK AVALANCHE-J. (July 3, 2001), http://lubbockonline.com/stories/070301/upd_075-4394.shtml.

126. *Id.*

127. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing *Strickland*, 466 U.S. at 688, and *Williams*, 529 U.S. at 396).

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”).¹²⁸

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.”¹ ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.).¹²⁹

The footnote quoted the third edition of the Standards published in 1993.¹³⁰

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.

129. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (footnote omitted) (quoting ABA, STANDARDS FOR CRIMINAL JUSTICE, Guideline 4–4.1 (2d ed. 1982 Supp.)).

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.”¹³¹

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.”¹³² Moreover, the majority had overturned a decision by the Third Circuit Court of Appeals that had been written by then Judge Samuel Alito,¹³³ 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.¹³⁴ 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.¹³⁵ 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.”¹³⁶ 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*, 355 U.S. at 400.

135. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.3, at 184-85 (5th ed. 1998).

136. *Id.*

which potential victims are willing to pay, because the latter are customers.”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.”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 *Burdine v. Johnson*,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.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

137. *Id.*

138. RICHARD A. EPSTEIN, TORTS § 6.2, at 140-41 (1999).

139. 262 F.3d 336, 338 (5th Cir. 2001) (en banc); see also Henry Weinstein, *Inmate in Sleeping-Lawyer Case Pleads Guilty*, L.A. TIMES, (June 20, 2003), <http://articles.latimes.com/2003/jun/20/nation/na-sleep20>.

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, *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, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1102-03 (2003).

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/fal/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 over a 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.

143. See Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, L. & SOC'Y REV., June 1967, at 15, 28-31.

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.”¹⁴⁵ 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.¹⁴⁶ 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.”¹⁴⁷ 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.”¹⁴⁸ 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).

146. Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 9-10 (1992) [hereinafter Epstein, *The T.J. Hooper*].

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).

150. Epstein, *The T.J. Hooper*, *supra* note 146, at 9-12.

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.¹⁵⁴ 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.¹⁵⁵ The *New Yorker* writer Atul Gawande has discussed the importance of checklists in aviation and medicine.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ Another common problem arises when lawyers try to handle too many cases.¹⁶⁰ 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").

156. ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* 32-47 (2009).

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.

158. DAVID BRUCK, *THE ABA GUIDELINES BOILED DOWN* 1-4 (2010), available at http://www.sites.melcooper.com/acdla/death/leboeuf/leboeuf_aba_guidelines_boiled_down_1.pdf.

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

161. See Epstein, *The T.J. Hooper*, *supra* note 146, at 24.

162. See *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam).

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.

165. 558 U.S. 4 (2009) (per curiam).

166. *Id.* at 8.

extent they describe the professional norms prevailing when the representation took place.”¹⁶⁷ 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.”¹⁶⁸ 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”¹⁶⁹ 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.¹⁷⁰ 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 meriting a “privileged position” in determining the obligations of a capital defense attorney.¹⁷¹

167. *Id.* at 7.

168. *Id.* at 8. Of course, five years earlier, the Court had cited the 2003 Guidelines when denying relief in *Florida v. Nixon*, assessing trial performance in 1985. *Florida v. Nixon*, 543 U.S. 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 “requir[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”).

170. *Bobby*, 558 U.S. at 13-14 (Alito, J., concurring).

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. REV. 693, 697-702 (2008).

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."¹⁷² There is nothing inappropriate about using ethics rules promulgated by the profession as a source of guidance in evaluating the conduct of lawyers.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ 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

172. MODEL RULES OF PROFESSIONAL CONDUCT, Scope ¶ [20] (2003).

173. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6, at 52 (1986).

174. See RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 20:7, at 1353-54 (2009).

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

181. *Id.* at 1482 (alteration in original) (citations omitted) (quoting *Bobby v. Van Hook*, 130 S. Ct. 13, 16–17 (2009) (per curiam), and *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

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."¹⁸⁵ The commentary to this Standard noted concisely, "Facts form the basis of effective representation."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."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.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."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.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

185. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 118, Standard 4-4.1 (emphasis added).

186. *Id.* Standard 4-4.1 cmt.

187. *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.").

188. *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

189. Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 357-58 (1979).

190. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323-24 (1983).

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 . . .”).

193. LACEY FOSBURGH, *CLOSING TIME: THE TRUE STORY OF THE “GOODBAR” MURDER* (1977).

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.¹⁹⁴

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.”¹⁹⁵ 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 1987.¹⁹⁶ 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.”¹⁹⁷ A mitigation consultant from New Jersey appeared on the magazine’s cover the following year.¹⁹⁸ She had co-authored an article in *The Champion* in 1986 discussing how forensic social workers could enhance capital defense.¹⁹⁹ 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.”²⁰⁰

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,

194. Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, *Forum*, Sept.–Oct. 1982, at 31, 32 (emphasis added); see also Michael G. Millman, *Interview: Millard Farmer*, *FORUM*, Nov.–Dec. 1984, at 31, 31–33; Team Defense Project, *Team Defense in Capital Cases*, *FORUM*, May–June 1978, at 24, 24.

195. SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE U.S., *FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION* sec. I(B)(7) (1998) [hereinafter *RECOMMENDATIONS CONCERNING DEFENSE REPRESENTATION*], available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/federal_judicial_conference_recommendations.authcheckdam.pdf (commonly known as “the Spencer Report”).

196. Anne E. Fragasso, *Interview: Casey Cohen*, *FORUM*, Jan.–Feb. 1987, at 22, 26.

197. *Id.*

198. Leslie H. Abramson, *Interview: Cessie Alfonso*, *FORUM*, Mar.–Apr. 1988, at 24, 26.

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.”²⁰¹ 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.”²⁰²

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.²⁰³

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

201. RECOMMENDATIONS CONCERNING DEFENSE REPRESENTATION, *supra* note 195, at sec. I(B)(7).

202. *Id.*; see also Jonathan P. Tones, *Damned if You Do, Damned if You Don’t: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM J. CRIM. L. 359, 364 (1997) (“[L]aw school prepares one to be an advocate, not an investigator.”).

203. Affidavit of Russell Stetler at 14, *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012) (No. 12–99001) (citations omitted).

the presence of mental or psychological disorders or impairments²⁰⁴ in order to conduct a thorough and independent investigation relating to penalty.²⁰⁵ 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."²⁰⁶ The 1989 Guidelines also advised counsel to retain experts for investigation and "presentation of mitigation."²⁰⁷

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."²⁰⁸ Following her speech, Justice Ginsburg added that "People who are well represented at trial do not get the death penalty."²⁰⁹ 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-*Furman* Court, only Justice Marshall brought the personal experience of representing capitally charged clients at trial and in post-conviction proceedings.²¹⁰ 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

204. ABA GUIDELINES, *supra* note 1, Guideline 10.4, at 999-1000.

205. *Id.* Guideline 10.7, at 1015.

206. 1989 ABA GUIDELINES, *supra* note 128, Guideline 11.4.1(C).

207. *Id.* Guideline 11.4.1(D)(7).

208. Ruth Bader Ginsburg, Supreme Court Justice, address to the University of the District of Columbia, David A. Clarke School of Law, Joseph L. Rauh Lecture: In Pursuit of the Public Good: Lawyers Who Care (Apr. 9, 2001), available at http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_04-09-01a.html.

209. *Justice Backs Death Penalty Freeze*, CBS NEWS (Feb. 11, 2009, 9:27 AM), http://www.cbsnews.com/2100-508_162-284850.html.

210. See KING, *supra* note 94, at 338-42.

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:

[I]f 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

211. Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 819 n.* (2008).

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.²¹⁷ Chief Judge Kozinski, in turn, cited two cases, both of which also ended in death sentences.²¹⁸ 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.²¹⁹ 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.²²⁰

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."²²¹ The jury was expressly *not* permitted to consider the impact his execution would have on his family members.²²² The other case, involving John Louis Visciotti, was tried in Orange County, California and did involve the "family sympathy" strategy.²²³ However, Mr. Visciotti's counsel had never tried a capital case to a jury before or handled a penalty phase.²²⁴ He did not investigate Mr. Visciotti's family: *because they were paying his bill.*²²⁵ 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.'"²²⁶ 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

217. *Id.* (citing *Pinholster v. Ayers*, 590 F.3d 651, 707 (9th Cir. 2009) (Kozinski, C.J., dissenting)).

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)).

219. *In re Visciotti*, 926 P.2d at 993; *Cooper*, 809 P.2d at 880.

220. *In re Visciotti*, 926 P.2d at 993.

221. *Cooper*, 809 P.2d at 880.

222. *Id.* at 908.

223. *In re Visciotti*, 926 P.2d at 993.

224. *Id.*

225. *Id.* at 990, 993-94.

226. *Id.* at 993.

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.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:

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.²²⁸

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.²²⁹ They tend to rely on unconscious, intuitive shortcuts (known as heuristics), which most of the time work fairly well.²³⁰ Heuristics allow us to make fast, effortless decisions, thereby conserving cognitive resources for tasks that demand effortful reflection.²³¹ Unfortunately, heuristics also lead to certain predictable errors. Consider, for example, the availability heuristic.²³² If asked to estimate the likelihood of a hurricane or an act of

227. *Id.*

228. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011).

229. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 112-13 (2011).

230. See *id.* at 97-99.

231. See *id.*

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.²³³ The reason is that certain events are highly “available” to our intuitive processing system, meaning that it is easy to call examples to mind.²³⁴ 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.²³⁵

Related to the availability heuristic is the problem of confirmation bias.²³⁶ 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.²³⁷ This is the case even though, logically speaking, disconfirming evidence provides much more reliable information regarding the reliability of a belief.²³⁸ 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.²³⁹ Participants who had previously identified themselves as supporters of the death penalty judged evidence against its deterrent effect to be unpersuasive.²⁴⁰ What is more, they were able to concoct a seemingly logical explanation based on methodological flaws they perceived in the studies.²⁴¹ 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.²⁴² People do not

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*, 37 J. 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.²⁴³

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.²⁴⁴ 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.

243. 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. *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. *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, *supra* note 229, at 116-17 (internal quotation marks omitted).

244. *See supra* notes 212-17 and accompanying text.

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.²⁴⁵ 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,”²⁴⁶ 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 trials²⁴⁷

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.”²⁴⁸

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.

245. 1989 ABA GUIDELINES, *supra* note 128, Guideline 5.1.

246. *Id.* Guideline 5.1(A)(ii).

247. *Id.* Guideline 5.1(A)(iii).

248. 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, 1871 n.209 (1994).

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

249. Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES, May 18, 2010, at A13.

250. *Id.*

251. *Id.* (internal quotation marks omitted).

252. *Id.*

253. *Osborne v. Shillinger*, 861 F.2d 612, 614 (10th Cir. 1988); *Eaton v. State*, 2008 WY 97, ¶ 1, 192 P.3d 36, 49 (Wyo. 2008); *Harlow v. Murphy*, No. 05-CV-39-B (D. Wyo. Feb. 15, 2008); *Olsen v. State*, 2003 WY 46, ¶ 1, 67 P.3d 536, 546 (Wyo. 2003); *Engberg v. Meyer*, 802 P.2d 70, 73 (Wyo. 1991); *Hopkinson v. State*, 664 P.2d 43, 47 (Wyo. 1983).

254. *See Engberg*, 820 P.2d at 118; *Hopkinson*, 664 P.2d at 78; Reply Brief of the Appellant at 3 n.1, *Eaton v. State*, 192 P.2d 36 (Wyo. 2008) (No. 04-180); Michael L. Rehberg, Court Filed Expert Resume at 39, *Freeman v. Busch*, 199 F. Supp. 2d 907 (2002) (No. Civ.1-99-CV-10063).

255. *See generally* Testimony of Wyatt Skaggs in Transcript of Evidentiary Hearing vol. I, *Wyoming v. Eaton*, 2008 WY 97, 192 P.3d 36 (Wyo. 2008) (Nos. 04-180, 06-255) (discussing counsels representation of death-penalty defendants and their sentences).

256. 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.”²⁵⁷ 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.²⁵⁸

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.²⁵⁹ 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.²⁶⁰

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

257. Marc Bookman, Op-Ed., *No Danger of Excess Justice*, PHILA. INQUIRER, Apr. 5, 2012, at A23. An e-mail from Mr. Bookman to Russell Stetler on November 12, 2012 disclosed that one of the lawyers in the case already had two other clients on death row. E-mail from Marc Bookman, Exec. Dir., Atlantic Ctr. for Capital Representation, to author Russell Stetler (Nov. 12, 2012, 4:57 PM) (on file with author and *Hofstra Law Review*).

258. Bookman, *supra* note 257, at A23.

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 capital-charged defendants received effective representation.²⁶¹ Prosecutors were required to notify the CDO whenever anyone was arrested for first-degree murder.²⁶² Such defendants were then eligible for capital 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.²⁶³

New York’s post-*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.²⁶⁴ While the statute was operational, 877 defendants were charged with potential death-eligible offenses, entitling them to capital qualified counsel.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ Many of those cases were still resolved by negotiated disposition, including two that were resolved after conviction

261. 1995 N.Y. Laws 16-17.

262. *Id.* at 17-18.

263. *Id.* at 16-19; *see also* N.Y. JUD. LAW § 35-b (McKinney 2002).

264. *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, *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.

265. 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 *Hofstra Law Review*).

266. N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2004).

267. E-mail from Kevin M. Doyle to Russell Stetler, *supra* note 265.

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

268. The two cases that were resolved after first-degree murder convictions in the trial court were in Kings County. *People v. Page*, 785 N.Y.S.2d 113 (N.Y. App. Div. 2004) (affirming judgment of the Supreme Court, Kings County); *People v. Bonton*, No. 4152/98, 1999 WL 33313135 at *1 (N.Y. Sup. Ct. Apr. 6, 2006), *aff'd* 775 N.Y.S.2d 901 (N.Y. App. Div. 2004) (affirming defendant's conviction and subsequent waiver of right to appeal in exchange for life imprisonment). The Jermaine Page plea was reported by Joseph P. Fried, *Brooklyn Killer Takes Deal for Life in Prison*, N.Y. TIMES, Oct. 29, 1988, at B8. Jerry Bonton's plea was reported by Mike Claffey, *Killer Chooses Life Over Death in Plea Agreement*, N.Y. DAILY NEWS, Apr. 12, 2000, at 3.

269. Six death sentences were overturned by the New York Court of Appeals. *See People v. Taylor*, 878 N.E.2d 969, 984 (N.Y. 2007); *People v. Shulman*, 843 N.E.2d 125, 140 (N.Y. 2005); *People v. Mateo*, 811 N.E.2d 1053, 1083 (N.Y. 2004); *LaValle*, 817 N.E.2d at 368; *People v. Cahill*, 809 N.E.2d 561, 594 (N.Y. 2003); *People v. Harris*, 779 N.E.2d 705, 728-29 (N.Y. 2002). The case of the remaining death-sentenced prisoner, Nicholson McCoy, was resolved following the *LaValle* decision. *See* Robert Gearty & Bill Hutchinson, *Sentenced to Life, Killer Yawns*, DAILY NEWS, Sept. 10, 2004, at 7; William Glaberson, *Across New York, a Death Penalty Stuck in Limbo*, N.Y. TIMES, Aug. 21, 2004, at A1.

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. *Id.*

274. RECOMMENDATIONS CONCERNING DEFENSE REPRESENTATION, *supra* note 195.

recommendations were adopted by the Judicial Conference of the United States on September 15, 1998.²⁷⁵ An update released in September 2010 provided data on federal capital defendants during the period from 1989 to 2009.²⁷⁶ 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.²⁷⁷

The update identified 2975 “death-eligible” federal capital defendants from 1989 through 2009,²⁷⁸ and found that the Attorney General authorized 463 of those cases to proceed capitally.²⁷⁹ By the end of 2009, 262 authorized defendants had been tried, and sixty-eight of those who proceeded to trial were sentenced to death.²⁸⁰ Thus, three-quarters of the defendants in authorized cases avoided the death penalty at trial. Others avoided the death penalty through plea bargains.²⁸¹ A

275. 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 1 (2010), *available at* <http://www.deathpenaltyinfo.org/documents/FederalDPCost2010.pdf>.

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.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 2007.²⁸³ 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.²⁸⁴ Of the 138 capitally charged cases, forty-six defendants were permitted to plead guilty to a noncapital offense.²⁸⁵ Sixty-six of the remaining ninety-two were convicted of a capital felony and twenty-six were acquitted of capital felony charges.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.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.

282. *Id.* at 5 fig.1, 10.

283. John J. Donohue III, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation From 4686 Murders to One Execution 1* (2011), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john_donohue.

284. *Id.*

285. *Id.*

286. *Id.*

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 2004,²⁸⁸ including 1315 cases eligible for the death penalty.²⁸⁹ Prosecutors sought the death penalty in roughly one-fourth of these cases (344).²⁹⁰ 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).²⁹¹ 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.”²⁹² 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.”²⁹³

The South Carolina Commission on Indigent Defense opened a Capital Trial Division in September 2008.²⁹⁴ 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

288. Bill Rankin et al., *A Matter of Life or Death: Death Still Arbitrary*, ATLANTA J. CONST., Sept. 23, 2007, at A1.

289. *Id.*

290. *Id.*

291. *See id.*

292. N.C. OFFICE OF INDIGENT DEF. SERVS., FY07 CAPITAL TRIAL CASE STUDY, at II (2008), available at <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf>.

293. *Id.* at I-II. For the first time since the death penalty was reinstated in 1977, there were no new death sentences in North Carolina in 2012. Anne Blythe, *No One Sentenced to Death in North Carolina this Year*, NEWS OBSERVER, Nov. 9, 2012, <http://www.newsobserver.com/2012/11/09/2473276/no-one-sentenced-to-death-in-north.html>

294. E-mail from Natasha J. Holliday, Capital Trial Div., S.C. Comm’n on Indigent Def., to author Russell Stetler (Oct. 16, 2012, 10:33 AM) (on file with author and *Hofstra Law Review*).

judge (death sentences in about sixteen percent of authorized cases).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.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.”²⁹⁷ They found similar results in Richland County: 117 cases prosecuted capitally out of 152 potentially eligible cases—again with a single death sentence.²⁹⁸ The researchers also found that the State sought death sentences in 226 cases statewide from 1995 to 2007.²⁹⁹ 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.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.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.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

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

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*].

297. *Id.* at 499 & n.87.

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*).

299. Blume et al., *When Lightning Strikes Back*, *supra* note 296, at 531.

300. *Id.*; E-mail from Emily C. Paavola to Russell Stetler, *supra* note 298.

301. Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 J. CRIM. L. & CRIMINOLOGY 483, 494-95 (1988).

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.”³⁰³

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).³⁰⁴

The late Professor David C. Baldus and his colleagues analyzed the 185 prosecutions of death-eligible offenders in Nebraska from 1973 to 1999.³⁰⁵ They found that death was waived by the State in over half of the cases (96 of 185).³⁰⁶ 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).³⁰⁷

A study of death sentencing from 1980 through 1999 in Colorado identified 110 defendants against whom the death penalty was sought.³⁰⁸ 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).³⁰⁹

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.³¹⁰ Nine cases were dismissed before trial; almost half (47.8 percent) were resolved with a plea bargain that precluded a death

303. *Death Penalty Facts*, IND. PUB. DEFENDER COUNCIL 4-5, <http://www.in.gov/ipdc/general/indianadpfactsheet.pdf> (last updated Apr. 1, 2013).

304. MO. DEP'T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2006, at 47 (rev. ed. 2007) (“Capital Punishment: Awaiting Execution, Executions, and Sentences for Murder 1st Degree FY1990-FY2006”).

305. David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486, 545 fig.1 (2002).

306. *Id.*

307. *Id.*

308. Stephanie Hindson et al., *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 COLO. L. REV. 549, 572 (2006).

309. *Id.* at 573.

310. Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255, 266 (2008).

sentence; 46.9 percent went to trial.³¹¹ 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).³¹²

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.³¹³

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.³¹⁴

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.³¹⁵

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

311. *Id.*

312. *Id.*

313. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS 1, 18-20 (2004).

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)).

315. Catherine M. Grosso et al., *The Impact of Civilian Aggravating Factors on the Military Death Penalty (1984-2005): Another Chapter in the Resistance of the Armed Forces to the Civilianization of Military Justice*, 43 U. MICH. J.L. REFORM 569, 570 (2010). Most of the military death sentences have been overturned. As of January 1, 2013, there were only five prisoners on the military death row. NAACP LEGAL DEF. & EDUC. FUND, CRIMINAL JUSTICE PROJECT, DEATH ROW USA: WINTER 2013, at 62, available at http://www.naacpldf.org/files/publications/DRUSA_Winter_2013.pdf.

state capital cases for the period 1973 to 1995.³¹⁶ They found that the overall rate of prejudicial error was sixty-eight percent.³¹⁷ 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.³¹⁸ In fact, “7 percent were found to be innocent of the capital crime.”³¹⁹

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 2000.³²⁰ 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.³²¹ On August 13, 2007, the Lehigh County, Pennsylvania District Attorney’s Office stipulated to a life sentence for Ronald Rompilla.³²² On July 21, 2010, the Brevard-Seminole, Florida State Attorney’s Office announced that it would allow George Porter, Jr., to be resentenced to life because of his age (seventy-eight), stating “if we were to seek and obtain [the death penalty], it would never be executed.”³²³

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-

316. James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (Colom. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 15, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712.

317. *Id.* at 68.

318. *Id.* at ii.

319. *Id.* (emphasis omitted).

320. See Frank Green, *Death Penalty Cases Scrutinized: More Hearings Are Being Ordered in Virginia*, RICHMOND TIMES-DISPATCH, Apr. 9, 2001, at A1.

321. See *12 Year Battle for Kevin Wiggins Comes to an End*, JENNER & BLOCK LLP (Oct. 15, 2004), <http://jenner.com/library/news/7810>.

322. See *Death Row Inmate Gets New Life Term*, USA TODAY (Aug. 13, 2007, 11:06 PM), http://www.usatoday.com/news/topstories/2007-08-13-477084247_x.htm.

323. Kaustuv Basu, *Aging Killer May Get Reprieve from Death Row*, FLA. TODAY (July 21, 2010, 10:47 AM), <http://www.floridatoday.com/article/20100721/NEWS01/7210344/Aging-killer-may-get-reprieve-from-death-row>.

called "Beltway Sniper";³²⁴ Zacarias Moussaoui, the alleged twentieth hijacker of the September 11th attacks;³²⁵ Terry Nichols, tried twice (in federal and then state court) for the Oklahoma City bombing;³²⁶ 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).³²⁷ 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.³²⁸ While concerns about wrongful

324. *Sniper Malvo Sentenced to Life Without Parole*, CNN (May 5, 2004, 7:22 PM), <http://www.cnn.com/2004/LAW/03/10/sniper.malvo/>.

325. See Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, WASH. POST, May 4, 2006, at A1.

326. See Tim Talley, *Religion Credited in Nichols Jury's Choice*, WASH. POST, June 13, 2004, at A12; see also Tony Clark, *Nichols Gets Life for Oklahoma Bombing*, CNN (June 4, 1998, 8:39 PM), <http://www.cnn.com/US/9806/04/nichols.update.pm/index.html>.

327. See *Expensive Death Penalty Prosecution of Infamous Murderer Results in Life-Without-Parole Sentence in Georgia*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/expensive-death-penalty-prosecution-infamous-murderer-results-life-without-parole-sentence-georgia> (last visited July 18, 2013); see generally Brian Rankin, *The Nichols Case: Failure to Win Death Penalty Resonates*, ATLANTA J. CONST., Dec. 14, 2008 (discussing the death penalty in the wake of the Nichols case); Steve Visser & J. Scott Trubey, *Nichols Gets Life Without Parole*, ATLANTA J. CONST., Dec. 13, 2008 (reporting on the sentence imposed on Nichols).

328. See *United States v. Bass*, 460 F.3d 830, 833 (6th Cir. 2006) (imposing life sentence on defendant for four drug-related murders); *United States v. Beckford*, No. 97-4924, 211 F.3d 1266, at *4 (4th Cir. 2000) (per curiam) (Westlaw) (imposing life sentence on defendant for six drug-related murders); *United States v. Johnson*, 219 F.3d 349, 351 (4th Cir. 2000) (imposing life sentence on defendant for five drug-related murders); *United States v. Pitera*, 5 F.3d 624, 625 (2d Cir. 1993) (imposing life sentence on defendant for seven drug-related murders in which the victims were tortured and their bodies dismembered); *United States v. Williams*, No. 00 Cr. 1008, 2011 WL 3296101, at *1 (S.D.N.Y. July 28, 2011) (imposing life sentence on defendant for execution-style triple murder); *United States v. Kehoe*, No. 4:97-CR-00243-(1), 2008 WL 4079316, at *2 (E.D. Ark. Aug. 28, 2008) (imposing life sentence on defendant for murdering two adults and a small child); *United States v. Moore*, No. 00-157-2, 2005 WL 6797098, at *1 (D.D.C. Mar. 9, 2005) (imposing life sentence on defendant for thirty-one drug related murders); *United States v. Edelin*, 134 F. Supp. 2d 59, 63 (D.D.C. 2004) (imposing life sentence on defendant for fourteen drug-related murders); Carol D. Leonnig, *2 Top Bosses of 'Murder Inc.' Get Life Terms*, WASH. POST, Mar. 10, 2005, at B1; Carol D. Leonnig, *D.C. Gang Leader Blames System for Crime*, WASH. POST, Dec. 18, 2004, at B4; see also *United States v. Gilbert*, 92 F. Supp. 2d 1, 2-3 (D. Mass Mar. 26, 2001) (imposing life sentence on a Virginia nurse who murdered four patients and attempted to murder three others); *United States v. Al-'Owhali*, 691 F. Supp. 2d 441, 441 (S.D.N.Y. 2010) (imposing life sentence on defendant for involvement in the terrorist bombing at American embassies that killed 224 people); Phil Hirschorn, *Four Embassy Bombers Get Life*, CNN (Oct. 21, 2001), <http://www.edition.cnn.com/2001/LAW/10/19/embassy.bombings>; see, e.g., U.S. DEP'T OF JUSTICE, CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS' MANAGEMENT OF INMATE TELEPHONE PRIVILEGES, (1999), available at <http://www.justice.gov/oig/special/9908/callsp51.htm> (reporting on the case of Anthony Jones, who was sentenced for life for six drug-related murders);

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

cf. *United States v. Alexis Candelario Santana*, Crim. No. 09-427, 2013 WL 101615, at *2 (D.P.R. Jan. 8, 2013) (imposing life sentence on defendant for “La Tombola Massacre” in which eight people were killed; defendant previously convicted of killing or ordering others to kill thirteen others he viewed as threats or disloyal); *No Death Penalty for P.R. Mass Killer*, UPI (Mar. 25, 2013, 8:04 PM), http://www.upi.com/Top_News/World-News/2013/03/25/No-death-penalty-for-PR-mass-killer/UPI-14261364256284/.

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.

331. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

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.³³³ 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).