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Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

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

*Mark W. Bennett**

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

– U.S. Supreme Court Justice Ruth Bader Ginsburg¹

I. INTRODUCTION

On the evening of July 25, 1993, Gregory Nicholson, a federal witness in a methamphetamine conspiracy case against Dustin Honken, Nicholson's girlfriend of a few weeks, Lori Duncan, and Duncan's six and ten year-old daughters, Kandi and Amber, were kidnapped from the Duncan family home in a quiet Mason City, Iowa, neighborhood by Honken and his then-girlfriend, Angela Johnson.² They were driven in darkness to a farm field, and one at a time, murdered execution-style with gunshots to the back of their heads, and buried in newly dug graves.³ While Honken was slaying the two adults, Johnson was comforting the two girls by telling them that the gunshots they heard were fireworks.⁴ Honken then returned to the vehicle, escorted the two girls into the field, and executed them at point blank range.⁵ A little more than three months later, on November 5, 1993, Honken and Johnson lured the last remaining witness, Johnson's former lover, Terry DeGeus, to a secluded site outside Mason City, "where Honken shot DeGeus several times, then beat him with a baseball bat before he died. DeGeus was buried in another shallow grave a few miles from the burial site of Nicholson and the Duncans."⁶

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

1. Associate Justice Ruth Bader Ginsburg, U.S. Supreme Court, Joseph L. Rauh Lecture at the University of the District of Columbia, David A. Clarke School of Law: 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; see also Bell v. Cone, 535 U.S. 685, 718 n.17 (2002) (Stevens, J., dissenting); DePew v. Anderson, 311 F.3d 742, 750 n.1 (6th Cir. 2002); Mayfield v. Woodford, 270 F.3d 915, 942 n.1 (9th Cir. 2001) (Hawkins, J., concurring in part and dissenting in part); Hyde v. State, 950 So. 2d 344, 360 (Ala. Crim. App. 2006).

2. United States v. Johnson, 495 F.3d 951, 958 (8th Cir. 2007); United States v. Johnson, 403 F. Supp. 2d 721, 742 (N.D. Iowa 2005).

3. Johnson, 495 F.3d at 959; Johnson, 403 F. Supp. 2d at 742.

4. Johnson, 495 F.3d at 959; Johnson, 403 F. Supp. 2d at 742.

5. Johnson, 403 F. Supp. 2d at 742. This comes directly from trial testimony in both the Honken and Johnson death penalty trials that I presided over. See *id.* at 732. Honken was tried in the fall of 2004, and Johnson approximately five and a half months later in the spring of 2005. *Id.* at 744-45, 748.

6. *Id.* at 742.

7. TOM BROKAW, THE GREATEST GENERATION 11 (1998).

they were doing a little after noon on November 22, 1963 (the assassination of President John F. Kennedy).⁸ Other than the birthdays and anniversaries of loved ones, most dates are not memorable. On October 13, 2000, I was sitting in the lounge of a hotel in Des Moines, Iowa, waiting for my best buddy to have a beer. Out of the corner of my eye, I noticed the evening news flash: the bodies of the two Duncan girls, their mother, and Nicholson had been uncovered by state law enforcement officials. A chill instantly ran up my spine. I felt as though I had been hit with a bolt of lightning. I intuitively knew that my life was about to change forever. Little did I realize that, four years later, six U.S. marshals would be living in my home for months, and my daughter would start her ninth grade year at the local public high school under the twenty-four hour protection of those marshals. She could not even go to the bathroom by herself. Nor could I predict, then, that this former ACLU lawyer of seventeen years would order the defendant, Honken, not only chained to the floor of the courtroom with a titanium bolt buried in over a foot of concrete, but also require him, while in the courthouse, to wear a stun vest under his clothing that could be activated remotely by a plain clothes U.S. marshal.⁹ Honken's jury would be anonymous, even to me; they would meet at secret locations, changed every few days, and they would not arrive at the courthouse each morning until shortly after Honken was bolted to the courtroom floor.¹⁰

In the course of these two death penalty cases and a 28 U.S.C. § 2255 post-conviction proceeding, I published thirty-four death penalty opinions, ten in *United States v. Honken*¹¹ and twenty-four in *United States v. Johnson*.¹² These decisions totaled 1333 pages—often on multiple, cutting-edge pretrial, trial, and post-trial federal death penalty issues.¹³

8. See *id.* at 8.

9. *United States v. Honken*, 378 F. Supp. 2d 1010, 1039 (N.D. Iowa 2004) (ruling on the government's motion to have defendant Honken wear shackles at trial, be bolted to the floor of the courtroom, and wear a remotely activated stun vest).

10. I informed the jurors that their anonymity and the secret transportation locations were to ensure that the media did not contact and bother them throughout the lengthy proceedings. The four counsel tables in the courtroom were "custom skirted" so the jurors could not see that Honken was bolted to the floor. Special sound-proofing and light reflection blocking were utilized, at my direction, on the leg irons and bolt so that no noise could be heard and no light reflection could be observed by any spectators or jurors. Years later, I was chatting with a news reporter that had covered every day of the trial, and I asked her if she was aware that Honken had been bolted to the floor or wore a stun-vest. Much to the credit of the U.S. marshals, she answered: "No."

11. 378 F. Supp. 2d 1010 (N.D. Iowa 2004); see *infra* note 13.

12. 225 F. Supp. 2d 1022, 1030 (N.D. Iowa 2002), *rev'd*, 338 F.3d 918 (8th Cir. 2003), *rev'd*, 352 F.3d 339 (8th Cir. 2004); see *infra* note 13.

13. See generally *United States v. Johnson*, No. CR01-3046, 2013 WL 1149763 (N.D. Iowa Mar. 19, 2013) (denying, on "penalty retrial," defendant's motion to prohibit trial owing to unconstitutional jury selection procedures); *United States v. Johnson*, 915 F. Supp. 2d 958 (N.D.

Iowa 2013) (granting, on “penalty retrial,” defendant’s motion to dismiss “non-statutory aggravating factors” concerning “perjury” and “distribution of methamphetamine after 1997,” but otherwise denying her challenges to aggravating factors, and denying prosecution’s motion to reconsider that ruling); *United States v. Johnson*, 900 F. Supp. 2d 949 (N.D. Iowa 2012) (ruling on defendant’s challenges to a capital sentencing rehearing and the second superseding indictment); *Johnson v. United States*, 860 F. Supp. 2d 663 (N.D. Iowa 2012) (granting defendant’s § 2255 motion to the extent that certain aspects of ineffective assistance of trial counsel in the original “penalty phase” required a “penalty retrial”); *United States v. Honken*, 477 F. Supp. 2d 1004 (N.D. Iowa 2007) (analyzing the procedure provided by Rule 10(c) of the Federal Rules of Appellate Procedure for reconstruction of the record when a transcript or other recording is unavailable); *United States v. Johnson*, 403 F. Supp. 2d 721 (N.D. Iowa 2005) (denying defendant’s request for post-trial relief); *United States v. Honken*, 381 F. Supp. 2d 936 (N.D. Iowa 2005) (denying defendant’s motion for judgment of acquittal or new trial); *United States v. Johnson*, 378 F. Supp. 2d 1051 (N.D. Iowa 2005) (ruling on defendant’s motion to exclude hearsay testimony during the penalty phase on Confrontation Clause, Due Process Clause, and statutory grounds); *United States v. Johnson*, 378 F. Supp. 2d 1049 (N.D. Iowa 2005) (denying defendant’s renewed motion to strike death penalty where government was no longer asserting guilt as a “principal”); *United States v. Johnson*, 377 F. Supp. 2d 689 (N.D. Iowa 2005) (granting in part and denying in part defendant’s motion to exclude evidence and argument that she acted as a “principal” in the alleged killings); *United States v. Johnson*, 377 F. Supp. 2d 686 (N.D. Iowa 2005) (denying defendant’s motion to dismiss alleging failure to charge offenses owing to omission of “substantive connection” between killings and drug conspiracy or continuing criminal enterprise (“CCE”)); *United States v. Johnson*, 366 F. Supp. 2d 822 (N.D. Iowa 2005) (ruling, at pretrial, on the proper degree of case-specific questioning, if any, that is permissible in the course of life- or death-qualifying prospective jurors); *United States v. Johnson*, 383 F. Supp. 2d 1145 (N.D. Iowa 2005) (regarding intention of defendant, who had given notice of intent to rely on mental condition evidence in the penalty phase, to assert her Fifth Amendment right against self-incrimination to questions about her involvement in the charged murders during mental examinations by government mental health experts); *United States v. Johnson*, 379 F. Supp. 2d 1005 (N.D. Iowa 2005) (denying defendant’s motion to exclude evidence of identification of remains where defendant has stipulated to identity of remains); *United States v. Johnson*, 378 F. Supp. 2d 1041 (N.D. Iowa 2005) (ordering return to defendant of privileged documents obtained by law enforcement officers); *United States v. Johnson*, 362 F. Supp. 2d 1043 (N.D. Iowa 2005) (ruling on second round of pretrial motions); *United States v. Johnson*, 354 F. Supp. 2d 939 (N.D. Iowa 2005) (ruling on first round of pretrial motions); *United States v. Honken*, 378 F. Supp. 2d 1040 (N.D. Iowa 2004) (ruling on defendant’s request for a “residual doubt” instruction in the penalty phase); *Honken*, 378 F. Supp. 2d 1010 (ruling on the government’s motion to have the defendant wear shackles at trial); *United States v. Honken*, 378 F. Supp. 2d 970 (N.D. Iowa 2004) (ruling on the parties’ second round of pretrial motions regarding admissibility of evidence); *United States v. Honken*, 378 F. Supp. 2d 928 (N.D. Iowa 2004) (ruling on parties’ pretrial motions regarding admissibility of evidence); *United States v. Honken*, 378 F. Supp. 2d 925 (N.D. Iowa 2004) (denying motion to reconsider order for anonymous jury and determining degree of “anonymity”); *United States v. Honken*, 378 F. Supp. 2d 880 (N.D. Iowa 2004) (ordering an anonymous jury and determining degree of “anonymity”); *United States v. Honken*, 438 F. Supp. 2d 983 (N.D. Iowa 2004) (closing hearing on government’s motion for anonymous jury); *United States v. Honken*, 271 F. Supp. 2d 1097 (N.D. Iowa 2003) (denying defendant’s motion to dismiss on double-jeopardy grounds); *United States v. Johnson*, 270 F. Supp. 2d 1060 (N.D. Iowa 2003) (denying defendant’s motion to reconsider denial of motion to dismiss on statute of limitations grounds); *United States v. Johnson*, 239 F. Supp. 2d 924 (N.D. Iowa 2003) (citing *Ring v. Arizona*, 536 U.S. 584 (2002), *Harris v. United States*, 536 U.S. 545 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999)) (denying defendant’s challenge to constitutionality of death penalty provisions of 21 U.S.C. § 848 in the wake of the Supreme Court’s decisions in *Ring*, *Harris*, *Apprendi*, and *Jones*); *United States v. Johnson*, 239 F. Supp. 2d 897 (N.D. Iowa 2002) (denying defendant’s motion to dismiss five counts of murdering witnesses

On February 10, 2003, when the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines” or “Guidelines”)¹⁴ were overwhelmingly approved by the ABA House of Delegates, it was of little interest to most of my more than 670 federal trial court judge colleagues. But for my two pending death penalty cases, the ABA Guidelines would not have been on my radar screen, either. At the time of their passage, I had no idea how important the ABA Guidelines would become to me during the two lengthy death penalty trials—Honken’s and Johnson’s trials were severed by agreement owing to insuperable *Bruton v. United States*¹⁵ problems.¹⁶ As important as the ABA Guidelines were to me for these two trials, its importance became even more critical during an eighteen-day § 2255 ineffective assistance of counsel proceeding, after which, in a 276-page opinion, I granted a new penalty phase trial to

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

14. 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], available at <http://www.ambar.org/2003Guidelines>.

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

16. Both Honken and Johnson received the death penalty from separate juries in separate trials. *Honken*, 381 F. Supp. 2d at 947-48; *Johnson*, 403 F. Supp. 2d at 736. I affirmed both convictions in lengthy post-trial rulings—albeit Johnson’s with great reluctance. *Honken*, 381 F. Supp. 2d at 1057; *Johnson*, 403 F. Supp. 2d at 897.

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

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

17. *Johnson*, 860 F. Supp. 2d at 680, 920.

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

19. See ABA GUIDELINES, *supra* note 14, Guideline 1.1 history of guideline, at 921.

20. See, e.g., *United States v. Honken*, 378 F. Supp. 2d 880, 924 (N.D. Iowa 2004); *United States v. Johnson*, 196 F. Supp. 2d 795, 800 (N.D. Iowa 2002).

21. See *infra* Part II.B.

II. MY EXPERIENCE WITH THE ABA GUIDELINES

A. Important Considerations in Death Penalty Cases

1. Introduction

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

22. See *Iowa: The Fact Sheet*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Dec. 12, 2013).

23. From 1989 through 2009, approximately 2975 federal criminal cases were "death eligible." Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 687 (2013). "By the end of 2009, 262 authorized defendants had been tried, and sixty-eight of those who proceeded to trial were sentenced to death. . . . A scant two percent of the 'death-eligible' federal defendants received the death penalty." *Id.* at 687-88 (footnotes omitted).

24. See, e.g., *id.* at 688-92.

25. See, e.g., *id.* at 689.

26. This authorization process has been described as follows:

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

Department of Justice Authorization Procedures, FED. DEATH PENALTY RESOURCE COUNS., http://www.capdefnet.org/fdprc/links.aspx?menu_id=78&id=2278 (last visited Feb. 16, 2014); see Memorandum from Eric H. Holder, Jr., Att'y Gen., to All Federal Prosecutors on Changes to Death Penalty Protocol (July 27, 2011), available at www.deathpenaltyinfo.org/documents/FedDPRules2011.pdf.

27. See *Federal Court Management Statistics 2010: District Courts*, U.S. COURTS, <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2010Sep.pl> (last visited Feb. 16, 2014) (showing that, between 2005 and 2010, the Northern District of Iowa ranked ninth in criminal cases

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

2. The Role of the ABA Guidelines

In Johnson's § 2255 proceeding, after discussing numerous court decisions involving the proper role of the ABA Guidelines, I held that, "I will consider the ABA Guidelines as *guides* to whether counsel made 'objectively reasonable choices.'"²⁸ However, before discussing the

per judge).

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

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

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

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

. . . .
 . . . The Supreme Court's decision in *Bobby* makes clear that reliance on either the 1989 or the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as "binding" or "inexorable commands" would be to repeat the error of the Sixth Circuit Court of Appeals; the ABA Guidelines are "'only guides' to what reasonableness means, not its definition." The overriding standard remains whether counsel made "'objectively reasonable choices.'"

Even Johnson's retrenched position on the relevance of the ABA Guidelines goes too far. Those Guidelines do not necessarily "establish the 'prevailing norms of practice.'" Rather, the ABA Guidelines must be shown to [1] *reflect* "prevailing norms of practice," and [2] *reflect* "standard practice," and [3] "not be so detailed that they would [a] 'interfere with the constitutionally protected independence of counsel and

application of the ABA Guidelines to death penalty post-conviction ineffective assistance of counsel claims, I first turn to a discussion of why death is different, the critical importance of the “team approach” to capital litigation, and the all too often overlooked role of the ABA Guidelines on appointment of counsel—one of the most critical facets of any death penalty proceeding.²⁹

3. Death Is Different

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

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

Thus, I will consider the ABA Guidelines as *guides* to whether counsel made “objectively reasonable choices,” subject to my determination of whether specific ABA Guidelines are so detailed that they interfere with the constitutionally protected independence of counsel or restrict counsel’s wide latitude to make tactical decisions.

Id. at 742-44 (alterations in original) (citations omitted) (quoting *Bobby v. Van Hook*, 558 U.S. 4, 5-10 (2009), and *Smith v. Mullin*, 379 F.3d 919, 939 (10th Cir. 2004)) (citing *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984)).

29. See *supra* Part II.A.

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

See, e.g., *Furman v. Georgia*, 408 U.S. 238, 286-89 (1972) (Brennan, J., concurring) (“[d]eath is a unique punishment”; “[d]eath . . . is in a class by itself”); *id.* at 306 (Stewart, J., concurring) (“penalty of death differs from all other forms of criminal punishment, not in degree but in kind”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“penalty of death is different in kind from any other punishment” and emphasizing its “uniqueness”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“penalty of death is qualitatively different from a sentence of imprisonment, however long”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“qualitatively different”); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing Court’s prior recognition of the “qualitative difference of the death penalty”); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (“death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards”); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing “previously unquestioned principle” that unique safeguards necessary because death penalty is “qualitatively different”); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (“hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death”); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (majority opinion holding it cruel and unusual to punish retarded persons with death is “pinnacle of . . . death-is-different jurisprudence”); *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (“no doubt that [d]eath is different”) (citation omitted); *id.* at 614 (Breyer, J.,

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

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

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

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

concurring in the judgment) (“Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”).

Id.

31. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995) (footnotes omitted).

32. Stetler & Wendel, *supra* note 23, at 674-76.

33. Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 903-04 (2003) (footnotes omitted). However, I strongly disagree with Professor Monroe H. Freedman’s notion that capital defenders have an obligation to raise “frivolous” issues. See Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1177-78

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

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

The ABA Guidelines provide a blueprint for that reform.³⁴

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

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

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

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

34. Robin M. Maher, 'The Guiding Hand of Counsel' and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 *HOFSTRA L. REV.* 1091, 1094-95 (2003) (footnote omitted).

35. *Johnson v. United States*, 860 F. Supp. 2d 663, 739 (N.D. Iowa 2012) (alterations in original) (citations omitted) (quoting *Stouffer v. Reynolds*, 168 F.3d 1155, 1173 (10th Cir. 1999), and *Smith v. Mullin*, 379 F.3d 919, 939 (10th Cir. 2004)) (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.2(c) (3d ed. 1993) ("Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.")).

embodied in our concept of humanity”³⁶—that the “team approach” to capital litigation mandated by the ABA Guidelines is so critical.

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

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

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

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

36. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

37. Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1121 (2003).

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

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

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

39. *See, e.g., Johnson*, 860 F. Supp. 2d at 814.

Johnson's team turned out to be so dysfunctional that, had I encouraged more trial team meetings and conferences, I doubt that it would have made a difference.⁴⁰ As Johnson's § 2255 proceeding unfolded, I was able to appreciate the substantial number of ways trial counsel provided ineffective assistance, and the massive amount of evidence of such ineffective assistance. Unbeknownst to me, the dysfunction of Johnson's trial team occurred very early in their representation—during critical plea negotiations.⁴¹ A trial team paralegal, the very paralegal that had sixty-four percent of the entire legal team's contact with Johnson (including contact by experts), became convinced of Johnson's legal innocence, and, thus, was diametrically opposed to the position of learned counsel and the team mitigation specialist, who believed that it was virtually impossible for Johnson to be found not guilty.⁴² This drove a huge and unnecessary wedge between the trial team and their client—a wedge that was not even known to learned counsel at the time.⁴³ In other

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

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

Id. at 680 n.3 (citation omitted). I note that the ABA Guidelines require that "[c]ounsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case." ABA GUIDELINES, *supra* note 14, Guideline 10.5(C), at 1005.

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

42. *Id.*

43. I observed:

I find it very troubling that trial counsel were unable to present Johnson with a

words, at least two of the three lawyers on the trial team were convinced of Johnson's guilt, while a paralegal was reinforcing Johnson to assert her innocence.⁴⁴ Not only was there a total lack of a "team approach," as the statistical information about contact time with Johnson reveals,⁴⁵ but all three attorneys on the trial team failed the basic command of Guideline 10.5.A: "Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client."⁴⁶ The lack of a "team approach" may have been as responsible for the death penalty verdict as any other factor—including the tragic multiple murders that involved the deplorable execution of two young children. As noted in the final sentence of the Commentary to Guideline 9.1, "Funding and Compensation": "For better or worse, a system for the provision of defense services in capital cases will get what it pays for"⁴⁷—or not. Neither Johnson nor the taxpayers received what they should have, where defense costs exceeded \$1.5 million, even in a case that cost the taxpayers several multiples of that figure, all told.⁴⁸ Failing to pursue the "team approach" mandated by the ABA Guidelines can, and did in Johnson's case, lead to disastrous results.

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

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

44. *Id.* at 782.

45. *See id.* at 680 n.3.

46. ABA GUIDELINES, *supra* note 14, Guideline 10.5(A), at 1005.

47. *Id.* Guideline 9.1 cmt., at 988; *see also* *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992) (granting habeas relief due to ineffective assistance of counsel where "[t]he state paid defense counsel \$11.84 per hour," and "[u]nfortunately, the justice system got only what it paid for").

48. The actual plethora of attorney fees and expert witness vouchers are on file with the Clerk of the U.S. District Court for the Northern District of Iowa.

5. The Appointment of Counsel

Let me start with the importance of Guideline 4.1, “The Defense Team and Supporting Services,” and Guideline 5.1, “Qualifications of Defense Counsel.”⁴⁹ Normally, judges in our district, and, as I understand it, in most if not all districts, are not involved in any way with the appointment of Criminal Justice Act of 1946 (“CJA”)⁵⁰ counsel—other than to vet whether a lawyer is competent to be initially placed on the CJA panel. I personally vetted and selected the defense teams for Johnson and Honken. I am not sure that this was a good idea, but our Federal Public Defender’s Office was conflicted out. Upon immediately determining that this case was factually complex, with multiple murders several months apart, and legally complex, because death is different, I appointed three criminal defense lawyers for each defendant.⁵¹ Iowa abolished the death penalty in 1965.⁵² Thus, there were no Iowa attorneys in practice, that I knew of, with death penalty experience. I selected two of the four finest criminal defense lawyers in the state for each defendant’s defense team. All four had been before me on many federal criminal cases. I knew that two of those attorneys had worked together on many other high profile cases, so I put them together on one defendant’s team. I asked each team to do a national search by consulting the death penalty resource counsel in the Federal Public Defender system to find “learned” death penalty counsel who they would be comfortable working with for the third member of each team.⁵³

49. ABA GUIDELINES, *supra* note 14, Guideline 4.1, at 952; *id.* Guideline 5.1, at 961. These Guidelines were not yet promulgated at the time I appointed counsel in both *Johnson* and *Honken*. *See id.* intro., at 916 (stating that the revised ABA Guidelines were adopted in 2003).

50. 18 U.S.C. § 3600A (2006). CJA counsel refers to counsel appointed pursuant to the Criminal Justice Act of 1964, which provides for the appointment and payment of counsel for indigent criminal defendants in federal court. *Id.*

51. *See Johnson v. United States*, 860 F. Supp. 2d 663, 687 (N.D. Iowa 2012).

52. Iowa carried out forty-five executions between 1834 and 1965. *See Iowa*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state_by_state (last visited Feb. 16, 2014). Victor Harry Feguer, a convicted murderer, was the last federal inmate executed in the United States before the moratorium on the death penalty following *Furman v. Georgia*, 408 U.S. 238 (1972), and the last person put to death in the state of Iowa. *See Carey Goldberg, Federal Executions Have Been Rare but May Increase*, N.Y. TIMES, May 6, 2001, at 26. On March 15, 1963, Feguer requested a single unpitted olive for his last meal hoping to grow an olive tree above his burial site. *See id.*

53. 18 U.S.C. § 3005 (2006). Concerning counsel and witnesses in capital cases, it is required that the trial court judge appoint at least two defense counsel, “of whom at least 1 shall be learned in the law applicable to capital cases.” *See id.* In addition to the learned counsel requirement of § 3005, the minimum experience standards for counsel appointed in federal capital cases are contained in § 3599. *Id.* § 3599(a)–(d). Additional procedures for appointment of counsel and qualification requirements are further detailed in § 620 of the Guide to Judiciary Policies. 7 GUIDE TO JUDICIARY POLICY § 620 (2013). At the time of the capital cases against Honken and Johnson, however, 21 U.S.C. § 848, under which they were charged, included provisions for appointment of counsel and expert witnesses in capital “conspiracy murder” and “CCE murder” cases comparable to the

After each team of Iowa lawyers had selected their proposed learned counsel, I personally vetted that lawyer with federal judges in the jurisdiction where the lawyer resided, and with other judges whom the learned counsel had appeared before in capital cases. I thought I had selected two defense “dream teams.” Never in my wildest imagination could I have foreseen that one of these “dream teams” would turn into my worst judicial nightmare years later—a nightmare that unfolded in a § 2255 ineffective assistance of counsel proceeding spanning most of 2011—that included over eighteen days of testimony, four phases of evidence, nearly sixty witnesses, and thousands of pages of exhibits.⁵⁴

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

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

provisions currently found in 18 U.S.C. § 3005. Compare 21 U.S.C. § 848(q) (2000), with 18 U.S.C. § 3005.

54. *Johnson*, 860 F. Supp. 2d at 689-92.

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

56. ABA GUIDELINES, *supra* note 14, Guideline 10.10.1, at 1047.

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

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

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

B. Ineffective Assistance of Counsel in § 2255 Proceedings

1. Introduction

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

57. *Id.* Guideline 10.10.1 cmt., at 1047-48 (footnote omitted).

58. *Id.* at 1048.

59. *See* U.S. CONST. amend. VI; ABA GUIDELINES, *supra* note 14, Guideline 10.1, at 989.

on the disturbing question: was trial counsel constitutionally ineffective in violation of the Sixth Amendment?⁶⁰ Of course, because there will be a new post-conviction team that may or may not be the appellate team, some of the same issues that a trial court judge sees in the appointment of counsel for the trial team may arise for that of the post-conviction team—but, probably to a lesser degree in most cases, just not in mine. My experience teaches that trial court judges need to be vigilant when appointing the post-conviction team as well. This is because death penalty post-conviction relief proceedings can be as complex and daunting as the original trial. Indeed, Johnson’s § 2255 proceeding raised enormously complex procedural issues. For example, the § 2255 motion was 176 pages long, and asserted sixty-three grounds for relief.⁶¹ In describing these proceedings, I wrote:

This federal *habeas* proceeding nearly rivaled the complexity of Johnson’s trial. It involved 18 days of evidence, in four different phases, spanning most of 2011. Fifty-nine witnesses testified and thousands of pages of exhibits were admitted, followed by hundreds of pages of briefing and a full day of oral arguments.⁶²

Numerous ineffective assistance of counsel claims were asserted attacking the original trial team for constitutional errors in the pretrial, jury selection, merits, and penalty phases, as well as in the post-trial and appellate phases.⁶³ The prosecution asserted that twenty-one of the sixty-three claims raised by Johnson were time-barred for a variety of reasons.⁶⁴

For Johnson’s § 2255 team, lawyers were needed who not only knew capital law but were also well versed in habeas litigation.⁶⁵ As this combination was also lacking among Iowa lawyers, I relied on the proceeding recommendation of death penalty experts outside of the

60. The U.S. Supreme Court first held that indigent defendants, at least in capital cases, had a right to effective assistance of counsel in *Powell v. Alabama*, 287 U.S. 45, 71 (1932). *Powell* relied on the Due Process Clause because the Sixth Amendment right to counsel had not yet been incorporated. John H. Blume & Stacey D. Neumann, “It’s Like *Deja Vu* All Over Again”: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 130 (2007). The Court then gravitated to the Sixth Amendment analysis. See, e.g., *United States v. Wade*, 388 U.S. 218, 227-28 (1967). For a detailed explanation of the evolution of the right to the effective assistance of counsel and a discussion of the evolving “tests” for establishing a claim of ineffective assistance of counsel, see Blume & Neumann, *supra*, at 130-41.

61. *Johnson v. United States*, 860 F. Supp. 2d 663, 680 (N.D. Iowa 2012).

62. *Id.*

63. *Id.* at 677-79 (listing, in the opinion’s Table of Contents, Johnson’s § 2255 claims).

64. *Id.* at 697.

65. See *2255 Project Offers Help*, U.S. COURTS, http://www.uscourts.gov/news/TheThirdBranch/08-06-01/2255_Project_Offers_Help.aspx (last visited Feb. 16, 2014).

state.⁶⁶ The résumés of the new lawyers suggested to conduct the § 2255 post-conviction proceeding looked extremely promising. It was clear who “learned counsel” would be, and that he would serve as the leader of the new team. He was very experienced and, on first impression (he flew to Iowa to meet me), charming and dedicated death penalty specialist from Maryland. Unfortunately, however, it emerged over time that the representation provided by this “learned counsel” was appallingly inadequate. Two years later, I would end up removing the § 2255 defense team shortly before the scheduled hearing and file my first-ever formal disciplinary grievance against a lawyer.⁶⁷ Johnson, meanwhile, was certainly not receiving the kind of representation envisioned by the Guidelines.⁶⁸ Little did I realize, years earlier when I appointed the original defense team, that appointment of counsel issues would literally plague Johnson’s death penalty prosecution for more than a decade!⁶⁹

Out of painful necessity, I appointed a second team for Johnson’s post-conviction § 2255 proceeding.⁷⁰ That team, led by an outstanding death penalty specialist, Michael Burt of San Francisco, was truly and finally a judge’s “dream team.”⁷¹ Burt was brilliant, zealous but reasonable, reliable, impeccably honest and candid, and worked exceptionally well with his equally well-qualified, talented, and exceptionally professional opposing counsel, C.J. Williams. Williams, an Assistant U.S. Attorney for the Northern District of Iowa, was also lead counsel for the prosecution in both Johnson’s and Honken’s death penalty trials, appeals, and § 2255 proceedings.⁷²

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

In preparation for Johnson’s § 2255 proceeding, and before hearing extensive evidence from nearly sixty witnesses, I undertook the task of reading every reported post-*Furman*⁷³ § 2255 and related federal death penalty decision. In doing so, I realized that defense counsel failures in the penalty phase, rather than the guilt phase, were not only far and away the most frequent basis of § 2255 claims, but also created the most difficult issues to resolve in § 2255 capital litigation.⁷⁴ The ABA

66. *See id.*

67. *Johnson*, 860 F. Supp. 2d at 681.

68. *See id.* at 916-18.

69. For a more thorough discussion of this mess, see *id.* at 680 n.3.

70. *Id.* at 681.

71. *Id.*

72. *Id.*

73. *Furman v. Georgia*, 408 U.S. 238 (1972).

74. “[C]ertain specific duties, such as the duty to investigate [mitigation evidence] . . . [have]

Guidelines, especially Guideline 10.11, “The Defense Case Concerning Penalty,”⁷⁵ significantly assisted me in determining whether trial counsel’s alleged failure to investigate and present mitigation evidence of Johnson’s mental health at the time of the five murders rose to the level of ineffective assistance of counsel.⁷⁶ Many federal and state courts have relied on Guideline 10.11 in a variety of contexts to evaluate trial counsel’s performances in the penalty phases of capital cases.⁷⁷ This is not surprising because the ABA Guidelines are continually regarded as the “single most authoritative summary of the prevailing professional norms in the realm of capital defense practice.”⁷⁸ Moreover, the ABA Guidelines have proven especially valuable in “helping courts to assess the investigation and presentation of mitigating evidence in death penalty cases.”⁷⁹ This is precisely how I utilized Guideline 10.11, and

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

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

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

77. *See, e.g., Johnson v. Bagley*, 544 F.3d 592, 599 (6th Cir. 2008) (citing ABA GUIDELINES, *supra* note 14, Guideline 10.11(F), at 1055-56) (noting that “counsel should consider [Guideline 10.11’s requirements] in deciding what witnesses and evidence to introduce at the penalty phase of a capital case”); *Canaan v. McBride*, 395 F.3d 376, 384-85 (7th Cir. 2005) (relying on Guideline 10.11 in finding that defendant’s “counsel fell short of professional norms when they failed to consult with him regarding his testifying at the penalty phase”); *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004) (relying, in part, on Guideline 10.11 in holding that “[i]t was patently unreasonable for [the attorney] to omit [mental health] evidence from his case for mitigation”); *Bolin v. Baker*, No. 3:07-CV-00481, 2012 WL 2138160, at *2 (D. Nev. June 13, 2012) (noting that many of the ABA Guidelines—including Guideline 10.11—“have been employed by the U.S. Supreme Court as the standard for determining the level of reasonable performance for counsel in a capital case”); *United States v. Karake*, 370 F. Supp. 2d 275, 278-79 (D.D.C. 2005) (citing Guideline 10.11 as one of many “guideposts” for measuring whether a capital defendant’s counsel was effective); *State v. Hausner*, 280 P.3d 604, 630 (Ariz. 2012) (en banc) (noting that, under Arizona’s criminal rules, Guideline 10.11 functions as a guideline, but not a requirement); *Hall v. McPherson*, 663 S.E.2d 659, 668 (Ga. 2008) (holding that “[t]rial counsel’s investigation also was not reasonable in light of [Guideline 10.11(A)] set forth by the American Bar Association”); *Henry v. State*, 937 So. 2d 563, 573 (Fla. 2006) (noting that Guideline 10.11 “mandate[s] mitigation investigation and preparation, even if the client objects”).

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

79. Stetler & Wendel, *supra* note 23, at 635.

how it assisted me in reaching the decision to grant Johnson a new penalty phase re-trial.⁸⁰

3. Two Examples of ABA Guideline 10.11 in Action

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

ABA Guideline 10.11 imposes a general duty that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation."⁸¹ More specifically, this Guideline instructs counsel to consider the use of "[e]xpert and lay witnesses along with supporting documentation . . . to provide psychological . . . insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)."⁸²

In Johnson's § 2255 proceeding, I found that numerous instances of ineffective assistance of counsel had permeated her defense.⁸³ However, none was more troubling than learned counsel's decision not to pursue psychological mitigation evidence of Johnson's state of mind at the time of the five murders.⁸⁴ This alleged "strategic decision" was so lacking in the type of sound pretrial investigation contemplated by Guideline 10.11(F) that I stripped the decision of the presumption in favor of counsel's strategy, a presumption which generally makes strategic choices virtually unchallengeable.⁸⁵ Federal Death Penalty Resource Counsel Richard Burr had presented learned counsel with a virtual pretrial mental health mitigation "roadmap" on how to explain Johnson's participation in the five murders, but learned counsel inexplicably rejected this advice without a proper pretrial investigation.⁸⁶ This massive failure of Johnson's defense team prevented the mitigation defense from achieving the goal expounded by the Commentary to ABA Guideline 10.11: "[I]t is critically important to construct a persuasive narrative in support of the case for life, rather than simply present a catalog of seemingly unrelated mitigation factors."⁸⁷ Ultimately, I held:

80. *Johnson*, 860 F. Supp. 2d at 877-94.

81. ABA GUIDELINES, *supra* note 14, Guideline 10.11(A), at 1055.

82. *Id.* Guideline 10.11(F)(2), at 1056.

83. *Johnson*, 860 F. Supp. 2d 663, 919.

84. *See id.* at 881-91.

85. *See id.* at 741-42, 881-91.

86. *Id.* at 881.

87. ABA GUIDELINES, *supra* note 14, Guideline 10.11 cmt., at 1061.

[T]he relief I am granting here *is not about the case that the jurors heard*, or the appropriateness of their verdict based on that evidence (which I affirmed on post-trial motions in a 297–page ruling), *but about the case that the jurors did not but should have heard*, but for trial counsel’s woefully unconstitutional performance.⁸⁸

In 2008, the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (“Supplementary Guidelines”)⁸⁹ were promulgated by the ABA to “provide comprehensive, up-to-date guidance for all members of the defense team, and [to] provide useful guidance to judges and defense counsel on selecting, funding and working with mitigation specialists.”⁹⁰ The Supplementary Guidelines explain in great detail the expected professional norms for penalty phase preparation and representation by the capital defense.⁹¹ For instance, Supplementary Guideline 10.11, “The Defense Case: Requisite Mitigation Functions of the Defense Team,” imposes broad and comprehensive duties on the defense team to locate and interview a host of types of expert and lay witnesses, and to gather extensive documentation to make the case for life.⁹² ABA Guideline

88. *Johnson*, 860 F. Supp. 2d at 919 (footnote omitted).

89. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, in 36 HOFSTRA L. REV. 677, 677-78 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

90. *Id.* at 677-78. Maher, the Director of the ABA Death Penalty Representation Project in Washington, D.C., has explained:

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

Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 770-71 (2008) (footnotes omitted). Sean D. O’Brien, Associate Professor at the University of Missouri-Kansas City School of Law, who directed the project that surveyed experienced death penalty practitioners, then drafted the Supplementary Guidelines, has explained the methodology and the years of work that went into promulgating the Supplementary Guidelines. *See generally* Sean D. O’Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693 (2008).

91. *See generally* SUPPLEMENTARY GUIDELINES, *supra* note 89.

92. *Id.* Guideline 10.11, at 689-92.

10.11, as supplemented, provides a ready-made checklist for a comprehensive and thorough mitigation investigation.⁹³

b. The Inadequate Mitigation Jury Instructions

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

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

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

93. *See id.*

94. ABA GUIDELINES, *supra* note 14, Guideline 10.11(K), at 1058. Section K provides: Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

Id.

95. *Id.* Guideline 10.11 cmt., at 1069.

96. *Johnson v. United States*, 860 F. Supp. 2d 663, 873-76 (N.D. Iowa 2012).

97. *Id.* at 873.

98. *See id.* at 874-75.

99. *Id.* at 873.

100. *Id.*

101. *Id.* at 874.

fasting practices, long periods of abandonment and physical detachment, and occasional physical abuse, resulting in Angela Johnson being far more susceptible to escape through illicit drug use, a series of unhealthy relationships with men, and chronic feelings of abandonment and poor self-esteem.¹⁰²

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

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

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

At a minimum, [the ninth] mitigating factor, as formulated by Johnson’s trial counsel, would have confused jurors as to their ability to consider the potential mitigating effect of any particular fact, standing alone, or in conjunction with all of the other facts with which it appeared. For example, was a juror required to find all of the first five factors, rather than just one of them, had all three of the specified results, rather than any one of them, to find that factor (9) was mitigating? This problem was not isolated to this specific example, as nearly all of the other mitigating factors were also multifaceted, convoluted, and/or required the jurors to find that one or more preconditions or a series of conditions had specific results.¹⁰⁶

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

102. *Id.*

103. *Id.* at 875.

104. *Id.*

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

106. *Id.*

Washington.¹⁰⁷ However, no relief was granted because this claim was procedurally defaulted.¹⁰⁸

III. CONCLUSION AND RECOMMENDATIONS

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

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

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

107. 466 U.S. 668 (1984); *Johnson*, 860 F. Supp. 2d at 874, 876 (citing *Strickland*, 466 U.S. at 687). “Where, as here, the mitigating factors, as formulated, precluded jurors from giving meaningful consideration and effect to all mitigating evidence, there is a reasonable probability that, had the jurors been presented with coherent and effective mitigating factors, they would have reached a different mitigation phase verdict.” *Johnson*, 860 F. Supp. 2d at 874, 876.

108. See *Johnson*, 860 F. Supp. 2d at 876.

the essence of the ABA Guidelines, but so foreign to what we judges think about the appointment of counsel.

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

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

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

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

109. Professor Adam Lamparello has suggested that overcoming the problem of capital defendants being represented by the “worst of the worst,” and dramatically improving the quality of capital representation, “contemplates a more active trial court in ensuring that counsel properly discharges his duty to engage in effective representation and meaningfully advocate on his client’s behalf.” Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 102-03 (2010). While the active trial court is “essential” to his proposal, he also suggests “sweeping changes to (1) the manner in which capital defendants are represented; and (2) the method by which their cases are reviewed on appeal.” *Id.* at 102. His proposal requires defense counsel to certify to the trial judge compliance

Lastly, I recommend that death penalty trial scheduling orders require lead counsel to certify to the trial court, at least thirty days prior to the start of jury selection in the guilt phase, that the defense team has fulfilled its obligation to discover all information in support of a sentence other than death, as required by the Supplementary Guidelines.¹¹⁰

Regardless of one's personal views of the death penalty, greater fidelity to the ABA Guidelines, and to my modest recommendations, would help assure that the long arc of the moral universe will bend towards justice.¹¹¹

with detailed requirements, as established by a Death Penalty Representation Commission created in each state. *Id.* at 140-48. Such requirements would regulate the investigation and trial stages for effective assistance of counsel. *Id.* There is some merit to his certification notions—I could envision a trial court judge requiring the defense team to certify they have complied with the existing ABA Guidelines. On the other hand, the remainder of his proposal is both unrealistically fanciful (the creation of state commissions), and, in terms of his proposal for a more active trial court, creates far more problems than it purports to solve. He proposes that trial courts review the status of counsel's pretrial investigation, and, when not satisfied, order further investigation. *Id.* at 147. Lamparello also proposes that "the trial court shall also have an active role with respect to trial counsel's preparation and presentation to the jury of the various mitigating evidence that has been compiled." *Id.* at 148. This suggestion for unprecedented trial court involvement in the defense preparation and presentation of mitigation evidence raises a host of constitutional and prudential concerns totally ignored by Lamparello. For this professor, the "guiding hand of counsel" now becomes the "guiding hand of counsel [and the trial court]" on behalf of the defendant, both in the pretrial and trial phases. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

110. See SUPPLEMENTARY GUIDELINES, *supra* note 89, Guideline 1.1, at 679; *id.* Guideline 10.11, at 689-92.

111. See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 197 (1988) ("[O]ne of [Martin Luther] King's favorite lines, from the abolitionist preacher Theodore Parker, [was:] 'The arc of the moral universe is long, but it bends toward justice.'").
