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## TRYING TO GET IT RIGHT—OHIO, FROM THE EIGHTIES TO THE TEENS

*Margery M. Koosed\**

### I. INTRODUCTION\*\*

Ohio has a long capital punishment history<sup>1</sup> and is presently an active death penalty state, having executed fifty-three men in the modern, post-1976 era.<sup>2</sup> In 2010, Ohio was second only to Texas in the numbers of persons executed.<sup>3</sup> Though the Ohio Supreme Court has scheduled monthly executions into 2016,<sup>4</sup> its death penalty system is undergoing increased scrutiny.<sup>5</sup> After the state and national bar

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\*\* This Article was submitted in April 2014 and discusses events in Ohio through the release of the Ohio Supreme Court and the Ohio State Bar Association Final Report and Recommendations of the Joint Task Force to Review the Administration of Ohio's Death Penalty in April 2014. An Addendum to this Article relates relevant events from May 2014 to March 2015.

1. See *Capital Punishment in Ohio*, OHIO DEPARTMENT REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/public/capital.htm> (last visited Apr. 12, 2015). Ohio has legally executed 491 persons. See *Death Penalty Cases in Ohio*, HIST. DEATH PENALTY, [http://www.insideprison.com/death\\_penalty\\_cases\\_by\\_state.asp?stateID=39](http://www.insideprison.com/death_penalty_cases_by_state.asp?stateID=39) (last visited Apr. 12, 2015); *Ohio Executions – 1897 to 1904*, OHIO DEPARTMENT REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/web/executed/executed01.htm> (last visited Apr. 12, 2015). An informal moratorium was in effect from 1963 to 1999. *Ohio Executions – 1897 to 1904, supra*.

2. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Apr. 12, 2015). Ohio ranks eighth among the states in number of executions since 1976. *Id*.

3. *Id*.

4. *Upcoming Executions*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/upcoming-executions> (last visited Apr. 12, 2015).

5. Patrik Jonsson, *Ohio Delays All 2015 Executions, Amid Scrutiny of Lethal Injection Drugs*, CHRISTIAN SCI. MONITOR (Jan. 31, 2015), <http://www.csmonitor.com/USA/Justice/2015/0131/Ohio-delays-all-2015-executions-amid-scrutiny-of-lethal-injection-drugs>.

organizations completed studies of Ohio's system, finding multiple deficiencies in 1997 and 2007, the Ohio Supreme Court created a task force that released its final report and recommendations.<sup>6</sup> This Article will focus on Ohio's experience in attempting to achieve justice by enhancing defense services,<sup>7</sup> anticipating and adopting national standards for appointment and performance of counsel,<sup>8</sup> and its rather mixed results thus far.<sup>9</sup>

## II. THE 1970S: DEFINING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND CHARTING THE OHIO DEATH PENALTY STATUTES

In the wake of the 1972 *Furman v. Georgia*<sup>10</sup> decision, many states (including Ohio) reinstated the death penalty.<sup>11</sup> At the time, approximately nineteen states and two federal circuits were still using the "farce and mockery of justice" standard to assess whether the Sixth Amendment right to counsel was denied.<sup>12</sup> Reversal was only required if the counsel's representation was so grossly incompetent, as the D.C. Circuit Court of Appeals described it, that the proceedings were rendered a "farce and mockery of justice."<sup>13</sup> The D.C. Circuit later moved to a "reasonably competent assistance" standard.<sup>14</sup> In 1973, Judge Bazelon of the D.C. Circuit incorporated into the reasonably competent assistance standard the duties and obligations imposed upon defense counsel by the American Bar Association ("ABA") Standards for the Defense Function.<sup>15</sup> Providing greater specificity was both desirable and necessary to give substance to the right to counsel.

At the time, Ohio had no consistent theory for ineffectiveness. Then, in 1976, the Ohio Supreme Court chose a test between the two

6. OHIO STATE BAR ASS'N, JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY: FINAL REPORT & RECOMMENDATIONS 1-22 (2014), available at <http://www.sc.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>.

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part III.E.1.

10. 408 U.S. 238 (1972).

11. *Part I: History of the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/part-i-history-death-penalty> (last visited Apr. 12, 2015); see *Capital Punishment in Ohio*, OHIO DEPARTMENT REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/public/capital.htm> (last visited Apr. 12, 2015).

12. See, e.g., *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949) ("A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.").

13. *Diggs v. Welch*, 148 F.2d 667, 668-69 (D.C. Cir. 1945).

14. *United States v. DeCoster*, 487 F.2d 1197, 1202-03 (D.C. Cir. 1973).

15. *Id.* at 1203 & nn.22-25. The en banc court later retreated from this approach in *United States v. DeCoster*, 624 F.2d 196, 246-50 (1976). See also David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 12-14, 30-31 (1973).

competing models: the federal and state constitutions would be satisfied if the defendant “had a fair trial and substantial justice was done,”<sup>16</sup> and “courts may find assistance in” professional standards such as the ABA Standards for Criminal Justice when assessing the claim.<sup>17</sup>

Ohio’s death penalty was reinstated just a few years earlier, in 1974.<sup>18</sup> The Ohio Legislature crafted a quasi-mandatory death-sentencing scheme that required the death sentence be imposed unless one of three very narrow mitigating circumstances was demonstrated.<sup>19</sup> The U.S. Supreme Court agreed to review this statute, and in one of its most significant capital litigation rulings, the 1978 *Lockett v. Ohio*<sup>20</sup> decision, the Court found the Ohio legislation violated the Eighth and Fourteenth Amendments, as it failed to allow consideration of all relevant mitigating circumstances before death could be imposed.<sup>21</sup>

It took Ohio three more years—until 1981—to reenact death penalty sentencing procedures.<sup>22</sup> As renowned capital defense attorney Millard Farmer commented at the first Ohio death penalty training conference in November 1981, the new state legislation was very nearly a “clean rope,” a statute that would survive constitutional scrutiny and included several defense-favorable features.<sup>23</sup> But, thirty years ago, not all was well in Ohio, nor anyplace else around the country, and change was needed.

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16. *State v. Hester*, 341 N.E.2d 304, 310 (Ohio 1976).

17. *Id.*

18. *See Capital Punishment in Ohio*, *supra* note 11.

19. OHIO REV. CODE ANN. §§ 2929.03–.04 (West 2006 & Supp. 2014).

20. 438 U.S. 586 (1978). Sandra Lockett was nineteen years old when the crime was committed, and was not the principal offender. *See id.* at 590-91, 594, 597, 608, 615. She assertedly lacked the requisite intent to kill, and had no significant prior criminal convictions. *Id.* at 597. The *Lockett* Court considered all of these factors relevant mitigating circumstances. *Id.* Following the Court’s decision to strike down the Ohio statute, the Ohio governor commuted the death sentences imposed on Lockett and another ninety-six persons on death row. *See* OHIO DEP’T REHAB. & CORR., ESCAPING DEATH 1 (2007) [hereinafter ESCAPING DEATH], available at [http://www.dispatch.com/content/downloads/2007/03/28/escaping\\_death.pdf](http://www.dispatch.com/content/downloads/2007/03/28/escaping_death.pdf); *Capital Punishment in Ohio*, *supra* note 11. Lockett was eventually released on parole and resides in her hometown of Akron, Ohio. *See* ESCAPING DEATH, *supra*. She is a regular guest speaker in my Capital Punishment Litigation class, and movingly describes the importance of having effective and caring defense counsel in these cases.

21. *Lockett*, 438 U.S. at 608.

22. *See, e.g.*, OHIO REV. CODE ANN. § 2929.03.

23. *See, e.g., id.* § 2929.04 (discussing the constitutionality of the statute, as well as the mitigating factors available for defendants).

### III. THE DEVELOPMENT OF NATIONAL STANDARDS<sup>24</sup>

#### A. 1981 to 1983: *The National Legal Aid and Defender Association Steps Up*

The National Legal Aid and Defender Association (“NLADA”) recognized that things had to change, and started working in the late 1970s.<sup>25</sup> Then, just one month after Ohio reenacted the death penalty, from November 6-8, 1981, the NLADA and the Southern Coalition on Jails and Prisons, headed by Joe Ingle, conducted a Conference on the Death Penalty in Atlanta, Georgia.<sup>26</sup> Richard Wilson, then Director of the Defender Division of the NLADA, presented an “Outline of Standards for Representation in Capital Cases” (“Outline”).<sup>27</sup> This may very well have been the first effort at crafting what would become the NLADA and ABA Standards we honor today.

Wilson’s four-page Outline addressed five topics. The first, “Systems Criteria” (whether capital counsel would be retained, or if indigent, whether private appointed counsel, public defender, or a mixed system would handle the cases), listed specific areas with a potential impact on indigent defense representation,<sup>28</sup> pairing each area with then-existing NLADA Recommendations and ABA Standards for the Defense Function.<sup>29</sup>

The second topic addressed “Experiential Criteria” to be improved by legislation, bar, or education.<sup>30</sup> Wilson’s Outline related that three states then had statutory experience requirements for representation in capital cases: Alabama required no less than five years of active practice of criminal law;<sup>31</sup> Louisiana merely required a lawyer be admitted to the bar for at least five years, and noted that an attorney with less experience

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24. See *Capital and Public Defender Standards Library*, A.B.A., [http://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/guidelines.html](http://www.americanbar.org/groups/committees/death_penalty_representation/resources/guidelines.html) (last visited Apr. 12, 2015) (citing national standards, past and present).

25. NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 1 (1976), *reprinted in* INDIGENT DEFENSE STANDARDS: A COMPILATION OF NATIONAL STANDARDS & COMMENTARY (1999) [hereinafter STANDARDS AND COMMENTARY].

26. RICHARD J. WILSON, OUTLINE OF STANDARDS FOR REPRESENTATION IN CAPITAL CASES 1 (1981).

27. *Id.* at 1-4.

28. *Id.* at 1-2. These included: system structure; eligibility for counsel; assignment of cases; waiver of counsel; conflict of interest; independence; early representation; continuity of representation; client complaint; and public defender office structure. *Id.* at 2.

29. *Id.*

30. *Id.* at 3.

31. ALA. CODE § 13A-5-54 (2006); WILSON, *supra* note 26, at 3.

could be assigned as assistant counsel;<sup>32</sup> and, South Carolina provided for up to two counsel, one of which shall have a minimum of five years of practice before the bar.<sup>33</sup> Wilson urged that “[s]pecific experiential criteria in death penalty cases” should include: “[s]pecific number of years in practice;” “[s]pecification of criminal practice;” and “[s]pecified number of trials before jury/bench.”<sup>34</sup> None of the then-present statutes met these requirements.

“Training Criteria” was the next topic, suggesting law school substantive and clinical courses, Continuing Legal Education (“CLE”) programs, and in-house training programs in public defender systems.<sup>35</sup> Monitoring, supervision, and evaluation of retained counsel should be regularly conducted, but was present nowhere.<sup>36</sup> The use of bar disciplinary proceedings and appellate review based on ineffective representation, as well as lawsuits, were mentioned.<sup>37</sup> Finally, Wilson recommended that specific training criteria in capital cases should include at least: “[s]pecifics of motion practice;” “[j]ury selection—challenge to the entire array and Witherspoon issues;” “[s]entencing issues—evidentiary rules and the problems of bifurcated sentencing;” and “[a]ppeals and collateral attack representation.”<sup>38</sup>

The next outline topic was “Resources Criteria,” including: “[f]ees [(l)level—compared with prosecution and retained counsel[,] [a]vailability . . . [and] [s]cope[]];” “[s]tatutory limits;” and “[a]vailability of support services” (which it was noted “varies radically by jurisdiction”).<sup>39</sup>

The last topic addressed in the Outline was “Substantive Representational Criteria,” noting this was the “[m]ost difficult area because of [the] highly subjective judgments involved.”<sup>40</sup> But, Wilson urged that each of the major areas “must be done to provide effective assistance of counsel in death penalty cases.”<sup>41</sup> The major areas identified were: “[c]ontact and interaction with the defendant;” “[i]nvestigation of the case;” “[m]otion practice;” and “[t]rial of the case.”<sup>42</sup> Each was sketched out briefly.<sup>43</sup>

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32. LA. CODE CRIM. PROC. ANN. art. 512 (1966); WILSON, *supra* note 26, at 3.

33. S.C. CODE ANN. § 17-23-70 (1977); WILSON, *supra* note 26, at 3.

34. WILSON, *supra* note 26, at 3.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 3-4.

39. *Id.* at 4.

40. *Id.*

41. *Id.*

42. *Id.*

The NLADA carried the baton further in September 1983. The 1983 NLADA Conference (“Conference”) included a lengthy program entitled: “Public Defender Offices and Statewide Coordination of Death Penalty Defense.”<sup>44</sup> Ohio’s then-fledgling efforts to improve capital representation were clearly a central part of the Conference. Randall M. Dana, then Ohio Public Defender (“OPD”), introduced the program and addressed the ominous risks and urgent attention needed.<sup>45</sup> He wrote in the several-hundred-page conference manual’s Introduction: “Death penalty litigation in and of itself could destroy the American system of providing indigent defense . . . unless steps are taken to either abolish capital punishment or to develop systems that can handle the tremendous amount of work that these cases require.”<sup>46</sup>

At the time of the Conference, when over 1200 people were on death row in the United States, Dana related:<sup>47</sup>

In the past, many organizations such as the [National Association for the Advancement of Colored People] Legal Defense Fund, the Southern Poverty Law Clinic, and Team Defense, have not only provided assistance in this area but have also been fighting a “rear guard” action around the United States, filing last minute appeals to ensure that as few people are executed as possible.<sup>48</sup>

However, the vast numbers on death row could not be sustained by this prior practice.<sup>49</sup> What was needed, Dana urged, was to “organize a statewide system that will be properly funded and have the resources necessary to handle these very expensive and difficult cases.”<sup>50</sup>

Sessions and materials at the Conference focused on several critical remedial measures. Kevin McNally, then at the Kentucky Department of Public Advocacy, urged establishing tracking systems to ensure that each capital defendant was effectively represented, work he continues

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43. *Id.* Mentioned under “Contact and interaction with the defendant” were: initial contact and initial interview; obtaining bail; frequency of later contact; and contact at critical decision points. *Id.* Noted under “Investigation of the case” were: factual; discovery; exploration of psychiatric issues; exploration of polygraphic evidence of witnesses and the defendant; prompt receipt of prior transcripts of court proceedings; and exploration of alternatives. *Id.* Listed within “Trial of the case” were: personalization and humanization of the defendant; *voir dire*; and opening/closing statement. *Id.*

44. Randall M. Dana et al., *Public Defender Offices and Statewide Coordination of Death Penalty Defense* (Sept. 19, 1983).

45. *Id.* at I-1 to -2.

46. *Id.*

47. *Id.* at I-1.

48. *Id.*

49. *See id.*

50. *Id.*

today with federal Criminal Justice Act attorneys.<sup>51</sup> Convening and possibly requiring specialized training programs in the defense of capital cases was addressed by Thomas Smith, of the New Jersey State Public Defender Office, and Michael Millman, then of the California State Public Advocacy Office, who later established, and became Executive Director of, the California Appellate Project that produces monthly updates on capital litigation decisions around the country.<sup>52</sup>

I spoke to training as well, wearing several hats at the time. In addition to my law school teaching, I was then a Governor's appointee to the OPD Commission ("Commission").<sup>53</sup> The Commission administered the system of indigent defense in Ohio, assuring that each county had an acceptable system of appointed counsel representation, and it also approved the reimbursement of state funds to counties for indigent defense representation.<sup>54</sup> I was also serving as Coordinator of the Ohio Criminal Defense Lawyers' Ohio Death Penalty Task Force, which was organized to assure effective representation in capital cases and produce training and motions manuals, of which I was a contributing co-editor.<sup>55</sup> So, training concerns came naturally to me.

Other topics at the Conference included engaging nationwide organizations and lobbying for legislation. Such topics were discussed by OPD Dana, OPD Death Penalty Unit Director David Stebbins, and me.<sup>56</sup> All of the topics identified at the Conference retain importance today.

### B. 1983 to 1984: Ohio Takes Up the Mantle

Efforts to coordinate death penalty representation statewide were already underway in Ohio in 1983, and came to some fruition over the next year.<sup>57</sup> Wearing several hats, my professional work was focusing on developing practices to better assure that appointed counsel provided

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51. See generally *id.* Kevin McNally now serves as Director of the Federal Death Penalty Resource Counsel Project. *Contact Us*, FED. DEATH PENALTY RESOURCE COUNS., <https://www.capdefnet.org/fdprc/contactus.aspx> (last visited Apr. 12, 2015).

52. Dana et al., *supra* note 44, at III-5-6; see also *Contact CAPSF*, CAL. APP. PROJECT, <http://www.capsf.org/Contact.asp> (last visited Apr. 12, 2015); *History*, ST. N.J. OFF. PUB. DEFENDER, <http://www.state.nj.us/defender/history> (last visited Apr. 12, 2015).

53. Margery M. Koosed, UNIV. AKRON, <http://www.uakron.edu/law/faculty/profile.dot?identity=692083> (last visited Apr. 12, 2015).

54. OHIO REV. CODE ANN. §§ 120.01-.03 (West 2002).

55. *Koosed*, *supra* note 53.

56. Dana et al., *supra* note 44, at VII-8.

57. See generally OHIO REV. CODE ANN. §§ 120.01-.03; David C. Stebbins & Margery M. Koosed, Summary of Responses to OPD Office Questionnaire Regarding Manner of Appointment Defense Counsel for Indigent Capital Defendants (July-Oct. 1983) (on file with the *Hofstra Law Review*).



effective representation in capital cases. In 1983, I received a faculty research grant from the University of Akron to study appointed counsel practices in capital cases around the country. I was also made Chair of the State Public Defender Commission's newly formed Committee on Capital Defense Counsel Qualifications ("Qualifications Committee").<sup>58</sup> That Qualifications Committee position and the research grant allowed me to begin gauging the progress toward such better systems of representation in capital cases. I prepared a survey questionnaire that was distributed at the NLADA, National Association for the Advancement of Colored People Legal Defense Fund, and ABA meetings that year.<sup>59</sup> In late 1983, with survey responses from defense attorneys in nineteen states (half of the then-death penalty states), the picture was forming.<sup>60</sup>

This 1983 snapshot survey of capital defense representation systems showed that public defender offices were doing more of the trial and appeal cases than were private counsel, but private counsel were doing more of the federal habeas corpus work.<sup>61</sup> An equal number of states had two counsel appointed to each capital trial level case as had states with one counsel appointed.<sup>62</sup> In four states, the Public Defender controlled appointments, and one state required appointment of the State Public Defender.<sup>63</sup> In four states, there were local rules or practices imposing an experiential standard before appointment could occur.<sup>64</sup> One respondent referenced the South Carolina statutory requirement that two attorneys be appointed, that one of the two have at least five years of experience as a licensed attorney and three years of experience in the actual trial of felony cases, and that one of the two attorneys be a public defender.<sup>65</sup> I had no responses from the other two states with statutory requirements.<sup>66</sup> It appeared four states had made attempts to establish qualifications, but did not succeed.<sup>67</sup> When asked whether the responders favored the idea of qualifications, the great majority responded affirmatively, many strongly.<sup>68</sup> When asked what type of qualifications were appropriate, litigation "[e]xperience" was by far the most frequent

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58. *Margery M. Koosed, supra* note 53.

59. *Stebbins & Koosed, supra* note 57.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* S.C. CODE ANN. § 16-3-26(B)(1) (2003).

66. *See* *Stebbins & Koosed, supra* note 57.

67. *Id.* Indiana, Kentucky, Missouri, and Washington were the states that tried and failed. *Id.*

68. *Id.*

response, followed by a “[w]illingness to spend time and money,” and, at nearly the same frequency, “[s]pecialized death penalty training.”<sup>69</sup>

The survey responses and ideas generated by the NLADA Conference and their personnel in Washington, D.C. working on this issue—Wilson and Mary Broderick—bore fruit in Ohio. In early 1984, my Qualifications Committee proposed a regulation that was soon adopted by the Commission, and added to the statewide Ohio Administrative Code on November 16, 1984.<sup>70</sup>

That Ohio Administrative Code Regulation 120-1-10 (“Regulation”)<sup>71</sup> made Ohio the first state to require that both capital trial level appointed counsel be experienced litigators, and that specialized training be incorporated in the defense of capital cases as a means of compensating for somewhat less experience in both trial and appellate level appointments.<sup>72</sup> It did this through the power of the purse.

At this time, the State of Ohio reimbursed counties for half of the defense costs in all criminal cases.<sup>73</sup> The Regulation would cut off this flow of funds in capital cases if the county did not comply with these qualifications when appointing counsel.<sup>74</sup> The Regulation required appointment of no fewer than two attorneys at the trial level, and recommended no fewer than two at the appellate level.<sup>75</sup>

Lead counsel at the trial level was required to have at least three years of litigation experience and either: have previously served as lead counsel in at least one capital trial; or as co-counsel in two death penalty trials; or have been a co-counsel, and have prior experience as either (1) lead counsel in an aggravated murder or murder case, or (2) in ten felony jury or civil jury trials; or prior experience (1) as lead counsel in the trial of at least three aggravated murder or murder jury trials, or (2) as lead

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69. *Id.* As further survey questionnaires were received over the next year and a half, respondents identified “capability/willingness to investigate,” “to file motions and preserve the record,” “demonstrable litigation skills,” and “appellate experience” (it appears that there is an awareness of the issues and need to preserve the record). *See id.*

70. *See* RICHARD J. WILSON, INDIGENT DEFENSE RESOURCES (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325\\_aba\\_indigentdefenseresourcesbibliog.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325_aba_indigentdefenseresourcesbibliog.authcheckdam.pdf); *see also* OHIO PUB. DEFENDER COMM’N, 1980 ANNUAL REPORT 3 (1980).

71. OHIO ADMIN. CODE § 120-1-10 (1984).

72. *Id.* (outlining “[q]ualifications for assigned/appointed counsel and public defenders in cases in [which] reimbursement for defense costs is sought by a county from the Ohio public defender”).

73. *Id.* § 120-1-11; OHIO CNTY. COMM’RS, HANDBOOK: CH. 103: INDIGENT DEFENSE 1 (2010) [hereinafter INDIGENT DEFENSE]. That percentage decreased over the next few decades, and presently, Ohio’s eighty-eight counties carry most of the burden of indigent defense funding. *See* INDIGENT DEFENSE, *supra*, at 2, 8.

74. OHIO ADMIN. CODE § 120-1-10(A)–(C).

75. OHIO SUP. R. 20 (II)(A)–(B).

counsel in one aggravated murder or murder jury trials, at least three first degree felony trials within the past three years, and have specialized training in the defense of capital cases.<sup>76</sup> Appointment as trial level co-counsel had similar requirements, but a lesser number or lesser level of jury trial experience, or was allowed simply where the lawyer had specialized training in the trial of cases in which the death penalty may be imposed.<sup>77</sup>

If these criteria were not met, a county might still attain reimbursement from the state if the trial judge, in consultation with the State Public Defender, was convinced the attorney would provide competent representation.<sup>78</sup> A number of factors were identified as relevant to this, including: CLE training and experience; the amount of time necessary for preparation of the defense; the time available to the attorney to attain that knowledge; and skill reasonably necessary for defense of the case.<sup>79</sup>

For appointment on appeal, the Regulation required that the counsel have adequate criminal appeal, post-conviction, or habeas corpus experience commensurate with the appellate responsibilities of a capital case, have three years of litigation experience, and either (1) prior experience as counsel in the appeal of a death sentence case, or (2) prior experience in the appeal of at least three felony convictions within the past three years and have specialized training in the trial or appeal of capital cases.<sup>80</sup> A similar provision was made to seek reimbursement upon consultation with the State Public Defender in the event these criteria were not met.<sup>81</sup> Counsel interested in such appellate appointments were encouraged to submit their information regarding their ability to meet these qualification criteria to the State Public Defender so that it might notify the relevant courts.<sup>82</sup> All appointments were to be distributed as widely as possible among the members of the bar meeting Ohio's trial or appellate level qualifications.<sup>83</sup>

The Ohio Legislature was also asked, in 1984, to weigh in on qualifying counsel for these cases, through even further financial

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76. OHIO ADMIN. CODE § 120-1-10(A)(b).

77. OHIO SUP. R. 20.01(C).

78. See OHIO ADMIN. CODE § 120-1-10(C)-(D); see, e.g., OHIO ADMIN. CODE § 120-1-13 (2009); George J. Titoras, Comment, *The Ohio Supreme Court's Move Toward Quality Control of Court-Appointed Counsel for Indigent Defendants Charged with Capital Crimes*, 21 AKRON L. REV. 503, 511 (1988).

79. See Titoras, *supra* note 78, at 508, 509 & nn.74 & 78.

80. OHIO SUP. R. 20.01(D).

81. OHIO ADMIN. CODE § 120-1-10(C).

82. *Id.*

83. OHIO ADMIN. CODE § 120-1-10(B).

incentives to the county—a full reimbursement of indigent defense if the county appointed counsel who was certified by the State Public Defender through training programs or other procedures to be eligible for appointment in capital cases.<sup>84</sup> This proposal did not pass.<sup>85</sup>

C. 1984: *The United States Supreme Court Finally Steps In—*  
Strickland v. Washington

In 1984, the *Strickland v. Washington*<sup>86</sup> decision addressed defining the right to effective assistance of counsel, and the proof required to find a violation occurred and to obtain relief—counsel’s performance was to be assessed by examining what reasonably competent counsel under prevailing professional norms would do.<sup>87</sup> Under this test, professional standards like the ABA Standards for the Defense Function are used as guides to determine what is reasonable,<sup>88</sup> and the Court listed “certain basic duties”<sup>89</sup> that essentially repeated responsibilities found in those ABA Standards.<sup>90</sup> It was evident that professional standards would assume a heightened role in assuring justice.

D. 1984 to 1985: *The ABA Weighs In*

Throughout its history, the ABA has worked to assure the American people a fair and accurate criminal justice system that accords due process and delivers justice to society and to those who are accused.<sup>91</sup> In large part, the ABA has done that by developing standards addressing each component of the criminal justice system, from investigation of crime to appeal of conviction and petitions for clemency.<sup>92</sup>

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84. E-mail from David Stebbins, Former Director, Death Penalty Unit of the Pub. Defender’s Office, to Margery M. Koosed, Professor of Law, Univ. of Akron School of Law (Mar. 18, 2015) (on file with the *Hofstra Law Review*).

85. *Id.*

86. 466 U.S. 668 (1984).

87. *Id.* at 687-89.

88. *Id.* at 688.

89. *Id.*

90. See 1 AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 4-1.1 (2d ed. Supp. 1980). To obtain relief, however, a defendant had to prove not only that counsel did not perform as reasonably competent counsel would, but also that there was a reasonable probability of a different outcome in the case had counsel properly performed. *Strickland*, 466 U.S. at 694.

91. See generally 1 AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, *supra* note 90.

92. See *id.* §§ 4-7.7 to 8.2.

The ABA began writing standards for appointment of capital trial counsel and standards of performance at this time. In February 1984, the ABA Defense Function Committee (“ABA Committee”) crafted proposed “Minimum Guidelines for the Conduct of Counsel in Felony and Capital Cases,” and proposed “Minimum Qualifications for the Appointment of Counsel in Capital Cases.”<sup>93</sup> The ABA Committee urged special guidelines for the conduct and the appointment of counsel because “the death penalty is being sought more frequently than in previous years, and more lawyers lacking in capital defense experience are being assigned and are undertaking these cases.”<sup>94</sup>

The first version of what would later become the “Standards for Performance of Counsel” was but five duties. Drawing heavily upon Professor Gary Goodpaster’s then-recent article, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*,<sup>95</sup> the “ABA Committee recommended Guidelines for the Conduct of Counsel in Death Penalty Cases,” and simply added material to the third duty (appearing in brackets below).<sup>96</sup> Its recommended guidelines governing the duties of trial counsel were:

A capital defendant’s trial counsel should:

1. Conduct thorough crime and life-history investigations in preparation for both the guilt and penalty phases of the trial;
2. Fully inform the client of all available defenses and the potential penalty phase consequences of each defense, and obtain the client’s assent to both the guilt and penalty phase case to be presented;
3. Attempt to rehabilitate members of the venire who seem to be unequivocally opposed to imposition of the death penalty [, and to exclude members of the venire who unequivocally favor the imposition of the death penalty];
4. Integrate the guilt phase defense theory and strategy with the projected affirmative case for life at the penalty phase;
5. At the penalty phase of the trial, present all reasonably available mitigating evidence helpful to the defendant.<sup>97</sup>

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93. Memorandum from Michael L. Bender, Chair of the Def. Function Comm., on Minimum Guidelines for the Conduct of Counsel in Felony Cases and Capital Cases, and Minimum Qualifications for the Appointment of Counsel in Capital Cases to Officers, Council Members, and Other Meeting Attendees 1-4 (Feb. 3, 1984) (on file with the *Hofstra Law Review*) [hereinafter Minimum Guidelines].

94. *Id.* at 3.

95. 58 N.Y.U. L. REV. 299 (1983).

96. Minimum Guidelines, *supra* note 93, at 3-4.

97. *Id.*

With regard to “Minimum Qualification Necessary for Appointment of Counsel in Death Penalty Cases,” the ABA Committee proposed as ABA policy: “1. Counsel appointed to represent the defendant should have a minimum of five (5) years of active felony trial experience;”<sup>98</sup> Moreover, “2. The Court should appoint a second counsel to assist the appointed lead counsel.”<sup>99</sup>

Between February 3, 1984, and July 19, 1984, the ABA Committee revised its February proposals, dropping altogether the list of duties and revising the minimum qualifications.<sup>100</sup> The question “what happened in the interim to bring this about?” is simply answered: the U.S. Supreme Court’s decision in *Strickland*.<sup>101</sup> The ABA Committee’s Report of July 19, 1984 (“Report”), explained, after acknowledging Professor Goodpaster’s list of duties, that though “[a] list of specific duties has a certain merit in providing more concrete guidance than existing general standards,” the *Strickland* Court “made it clear that rigid and inflexible rules for counsel’s conduct are not appropriate.”<sup>102</sup> The Report acknowledged that “[w]hile it rejected a listing of duties, the Court did not turn its back on ‘guidelines’ which are advisory or act as a checklist or reminder of possible actions to be taken by defense counsel, if believed to be appropriate to a particular case.”<sup>103</sup> The Report later added: “Trial tactics involved in a case is not one of those elements that can be adequately defined by a list of duties.”<sup>104</sup> Given that the Court created the test for “ineffectiveness of counsel,” and seemingly rejected a listing of duties just a few months before, it is perhaps understandable that the ABA Committee would back away from its proposed listing of duties.<sup>105</sup> But, how many instances of ineffective assistance may have been averted had these basic duties been proposed and adopted as “guidelines” then, eighteen years earlier?

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98. *Id.* at 4.

99. *Id.*

100. Compare Memorandum from Michael L. Bender, Chair of the Def. Function Comm., on Minimum Qualifications of Appointed Private Counsel in Death Penalty Cases to Officers, Council Members, and Other Meeting Attendees 2-4 (July 19, 1984) (on file with the *Hofstra Law Review*) [hereinafter Minimum Qualifications] (stating that the Supreme Court “rejected a listing of duties,” and rejected the quantifying of trial counsels’ qualifications by number of years of experience), with Minimum Guidelines, *supra* note 93, at 1-2 (explaining the minimum duties in a felony case, and requiring that counsel have a minimum of five years of active felony trial experience).

101. See *Strickland v. Washington*, 466 U.S. 668, 688-91 (1984).

102. Minimum Qualifications, *supra* note 100, at 2.

103. *Id.*

104. *Id.* at 3.

105. See *Strickland*, 466 U.S. at 682-83, 688-91; Minimum Qualifications, *supra* note 100, at 2.

As noted, the ABA Committee also revised its proposal on “Minimum Qualification Necessary for Appointment of Counsel in Death Penalty Cases” before sending it on to the Criminal Justice Section. The revised proposal rejected “any numerical gauge by which a desired level of trial experience is measured,” while, at the same time, upping the nature of counsel’s experience, and mandated, rather than suggested, that two attorneys be appointed.<sup>106</sup> The Report provided that the ABA recommends:

[W]hen attorneys are appointed to represent defendants in death penalty cases:

1. The appointed attorneys shall have substantial trial experience involving the defense of serious and complex criminal cases; and
2. Two attorneys shall be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel, and the other shall be assistant defense counsel.<sup>107</sup>

The Report suggested that the “broad terms of ‘substantial trial experience’ . . . is best left to the discretion of the appointing authority,” and though imprecise, “it brings to the issue of ‘effective assistance’ a degree of specific qualifications that has previously been lacking.”<sup>108</sup> “At a minimum, it will exclude the neophyte . . . .”<sup>109</sup> The many reasons to require that two attorneys be appointed include: the unique nature of these cases; the need for added perspectives; a sounding board; emotional support; and enhancing the lead attorney’s ability to meet their responsibilities to their other clients.<sup>110</sup> The Report stated that these were only minimal guidelines, and encouraged authorities to build upon them; they were not a panacea to the existing problem of ineffective assistance—monitoring by the courts on an individual basis would need to be continued.<sup>111</sup>

The Criminal Justice Section revised the ABA Committee’s proposal slightly, by changing the words “and complex criminal” to “felony,” as it found “complex” was too “hard to define.”<sup>112</sup> Thus, the final form, as proposed to the House of Delegates, reads:

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106. Minimum Qualifications, *supra* note 100, at 4.

107. *Id.* at 1.

108. *Id.* at 4.

109. *Id.*

110. *Id.* at 4-5.

111. *See id.* at 2.

112. Memorandum from Thomas C. Smith, Assoc. Dir., ABA, on Minutes of August 4-5, 1984 Council Meeting to Officers, Council Members, Advisors to the Section Chairperson, Liaison Representatives, Former Section Chairpersons, Other Meeting Attendees 9-10 (Aug. 20, 1984) (on file with the *Hofstra Law Review*).

1. The appointed attorneys shall have substantial trial experience involving the defense of serious felony cases; and
2. Two attorneys shall be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel, and the other shall be assistant defense counsel.<sup>113</sup>

This proposal required that both counsel have substantial trial experience, however, a further revision occurred before the House of Delegates unanimously adopted the Criminal Justice Section's proposed minimum qualification at its February 18-19, 1985, mid-year meeting.<sup>114</sup> The proposal suggested that only lead counsel be experienced. In its final form, as unanimously approved, the qualifications provision read:

[W]hen attorneys are appointed to represent defendants in the trial of death penalty cases:

1. Two attorneys be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel and shall meet the criteria of paragraph 2. The other shall be assistant defense counsel; and
2. The primary attorney shall have substantial trial experience which includes the trials of serious felony cases.<sup>115</sup>

#### *E. 1986 to 1987: Ohio Common Pleas Superintendence Rule 65 Mandates Adopted*

The Regulation was a carrot—it provided a financial incentive to appoint qualified counsel, but was not mandatory. It took a stick—the financial penalty of having to retry a case due to ineffective assistance—to mandate that counsel be qualified to undertake these cases.<sup>116</sup> The Ohio Common Pleas Superintendence Rule 65 (“Rule 65”)<sup>117</sup> arose

113. PAUL T. SMITH, AM. BAR ASS'N, REPORT OF THE SECTION OF CRIMINAL JUSTICE: RECOMMENDATION 500 (1985), available at [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/capital\\_attorneys\\_0285.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/capital_attorneys_0285.authcheckdam.pdf).

114. See *ABA Criminal Justice Section Wins Approval for Two Resolutions*, 36 CRIM. L. REP. 2427, 2427 (1985).

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

116. See Tidoras, *supra* note 78, at 510-11, 516-17.

117. OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Tidoras, *supra* note 78, app. at 514-16. Amendments have been made over the years, many of which are discussed below. See *id.* Additionally, in 1997, the Rule was renumbered to Rule 20, and, in 2010, it was broken down into six portions, beginning with Rule 20 and ending with Rule 20.05. See OHIO SUP. R. 20.00-.05. The present Superintendence Rules can be accessed at <http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf>. As further discussed in the Addendum, in February 2015, Rule 20 was replaced by the Rules for Appointment of Counsel in Capital Cases, which can be accessed at <http://www.supremecourt.ohio.gov/LegalResources/Rules/>



because a Justice of the Ohio Supreme Court, the Ohio State Bar Association (“OSBA”), and the OPD were all strongly committed to the task of doing it right the first time.<sup>118</sup>

Rule 65 derived from the first reversal on grounds of ineffective assistance of counsel in a case prosecuted under the new 1981 Ohio death penalty law.<sup>119</sup> Gary Johnson was convicted and sentenced to death in October 1983, a year before *Strickland* was decided, and at a point when Ohio was using a test of whether the defendant had “a fair trial and substantial justice was done.”<sup>120</sup> This test melded the “farce and mockery” test with an added suggestion that the trial courts may find assistance in professional standards, including the ABA Standards for Criminal Justice, in assessing retained or appointed counsel’s performance.<sup>121</sup> The Ohio Supreme Court reversed Johnson’s case on June 18, 1986.<sup>122</sup> Justice Brown wrote the majority opinion, reversing both the conviction and death sentence on grounds of ineffective assistance of counsel and improperly denying a continuance in violation of the Due Process Clause.<sup>123</sup> The facts of the case are, in some respects, the textbook example of ineffectiveness, at least at the penalty phase.

Upon the jury returning a guilty verdict on all charges—with the aggravating circumstances making the case death-eligible<sup>124</sup>—defense counsel asked for a ten-minute recess to explain the penalty phase of the case to the defendant in order “to consider what action we would like for him to take,” openly admitting that “he had not even discussed with his client the penalty phase aspect of the case.”<sup>125</sup> Counsel was given a ten-minute recess, and the judge then set the sentencing hearing for nine in the morning the very next day.<sup>126</sup> Defense counsel presented only the unsworn statement of appellant; no mitigating evidence of any kind was

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capitalCases/capitalCases.pdf.

118. See Ticoras, *supra* note 78, at 504, 508-09.

119. See *State v. Johnson*, 494 N.E.2d 1061, 1063 (Ohio 1986); Ticoras, *supra* note 78, at 506-07.

120. See *Johnson*, 494 N.E.2d at 1062; see, e.g., *State v. Hester*, 341 N.E.2d 304, 310 (Ohio 1976).

121. *Hester*, 341 N.E.2d at 308-10.

122. *Johnson*, 494 N.E.2d at 1061, 1063.

123. *Id.* at 1062-63, 1067. For further analysis of the decision, see Ticoras, *supra* note 78, at 506-09. For Rule 65 and its Commentary, see *id.* app. at 514-23.

124. *Johnson*, 494 N.E.2d at 1068. Ohio provides that the aggravating circumstances are proven at the trial phase, unlike many other states. OHIO REV. CODE ANN. § 2929.04(B) (West 2006). The penalty phase is then devoted to mitigating factors, and, if necessary, a prosecutor’s rebuttal of them. *Id.* § 2929.04(C). Ultimately, the aggravating factors proven at the trial phase are then weighed against these mitigating factors, and death may be imposed if aggravating factors outweigh mitigating factors beyond a reasonable doubt. *Id.* § 2929.03(B).

125. *Johnson*, 494 N.E.2d at 1062-63.

126. *Id.*

offered.<sup>127</sup> The State called two witnesses and introduced several exhibits, and the jury found the earlier proved aggravating circumstances (specifications) outweighed the mitigating evidence.<sup>128</sup> Johnson was sentenced to death following the jury's recommendation.<sup>129</sup>

The majority opinion wrote that counsel "had not even discussed with his client the penalty phase aspect of the case,"<sup>130</sup> and had a duty "to investigate his client's background for mitigating factors," describing this as "an indispensable component of the constitutional requirement [for] . . . effective representation."<sup>131</sup> The court also found no strategic or tactical decision-making to support counsel's failure to present over eight relevant mitigating factors at the penalty phase.<sup>132</sup> Trial counsel was also ineffective for failing to object to the consideration of an invalid non-statutory aggravating factor.<sup>133</sup> In addition, the trial judge's failure to grant a one-week continuance to investigate facts relating to the trial phase violated the defendant's due process rights, requiring reversal of the conviction.<sup>134</sup>

Chief Justice Celebrezze concurred in the reversal, as there was no evidence counsel did any penalty phase investigation: "counsel was entirely unprepared for, and indeed misunderstood, the nature of the penalty phase of this trial,"<sup>135</sup> and failed to object to the invalid aggravating circumstance.<sup>136</sup> He also found that the trial judge violated the defendant's right to due process by denying the one-week continuance at the outset of the trial phase.<sup>137</sup>

Associate Justice Wright concurred in part with the majority on denial of due process by denial of the continuance, but agreed with dissenting Justice Douglas that reversal on grounds of ineffectiveness was error.<sup>138</sup>

Justices Douglas and Holmes dissented, finding no prejudice in counsel's representation or in the denial of the continuance that warranted reversal.<sup>139</sup> But, as important as this decision was for shaping

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127. *Id.*

128. *Id.* at 1062.

129. *Id.*

130. *Id.* at 1063.

131. *Id.* at 1064.

132. *Id.* at 1064, 1065 & n.5

133. *Id.* at 1065-66.

134. *Id.* at 1066-68.

135. *Id.* at 1069-70 (Celebrezze, C.J., concurring).

136. *Id.* at 1070.

137. *Id.*

138. *Id.* at 1070-72 (Wright, J., concurring in part).

139. *Id.* at 1072-80 (Douglas, J., dissenting).

Ohio law and providing a new trial for Gary Johnson,<sup>140</sup> perhaps the most important facet is the action that dissenting Justice Douglas took the day the Court released its decision.<sup>141</sup>

Justice Douglas took the *Johnson* decision to the next level, writing to the OSBA and the OPD: “[I]t is time for us to set some standards of training for counsel who are handling [death penalty] cases and provide a procedure for the training and for the selecting of lawyers who will be assisting persons charged with crimes wherein the death penalty is involved.”<sup>142</sup> His reasons were two-fold: “[T]he most important being . . . that defendants so charged should have the most able of attorneys, properly trained in this specialty, to represent them as they stand trial for their very life.”<sup>143</sup> This was immediately followed by the second factor: “Of course, the cost factor is not insignificant when we consider the enormous cost to each county to bring each of these capital cases to trial—and then have to proceed all over again because counsel was actually or allegedly ineffective.”<sup>144</sup> Thus, just as the financial prospect of getting full reimbursement from the state served as an encouragement for the counties to adopt the OPD qualifications, the prospect of incurring the cost of retrying a capital case ultimately led to mandatory standards.<sup>145</sup>

The OSBA and OPD met and determined to create a special Subcommittee of the OSBA Criminal Justice Committee (“Subcommittee”)<sup>146</sup> to consider and propose qualifications for appointment, training procedures, and standards of performance.<sup>147</sup> This Subcommittee included a law professor (the Author), prosecutors, defense lawyers, public defenders, general practitioners, and an NLADA

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140. *Id.* at 1068 (majority opinion). Gary Johnson was convicted and resentenced to death on remand to the trial court. *State v. Johnson*, 545 N.E.2d 636, 646 (Ohio 1989). His death sentence was ultimately reversed, again on the grounds of ineffective assistance of counsel at the penalty phase. *Johnson v. Mitchell*, 585 F.3d 923, 946 (6th Cir. 2009). He is no longer on death row. *See Ohio Department of Rehabilitation and Correction Death Row Inmates*, OHIO DEPARTMENT REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/public/deathrow.htm> (last updated Dec. 31, 2014).

141. *See* Letter from Justice Andrew Douglas to Duke W. Thomas, then-President of the Ohio State Bar Ass’n, Leslie W. Jacobs, President-Elect of the Ohio State Bar Ass’n, and Randall M. Dana, State Pub. Defender (June 18, 1986) (on file with the *Hofstra Law Review*).

142. *Id.*

143. *Id.*

144. *Id.*

145. OHIO ADMIN. CODE § 120-1-10(A) (1984).

146. JUDGE EVERETT BURTON, REPORT OF THE COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES 1 (1990); *see also* Ticoras, *supra* note 78, at 504. Its formal title was the “Subcommittee on the Appointment of Counsel for Indigents in Capital Cases.” Ticoras, *supra* note 78, at 504.

147. BURTON, *supra* note 146, at 1.

liaison.<sup>148</sup> The Subcommittee's proposal was formally adopted by the Criminal Justice Committee and, later, by the OSBA Executive Committee.<sup>149</sup> Its report and proposal was then forwarded to Justice Douglas, who in turn forwarded it to the Ohio Supreme Court Chief Justice Moyer and the Associate Justices, with the request that the Court consider adopting the proposals as a court rule.<sup>150</sup> The proposal was published for comment and officially approved by the court, becoming effective on October 14, 1987.<sup>151</sup>

In a press release on October 15, 1987, Chief Justice Moyer stated: "Ohio is the first state in the nation to adopt a mandatory rule establishing standards for the appointment of counsel for indigents in death penalty cases. This demonstrates the [Ohio] Supreme Court's commitment to maintaining and enhancing the skills of lawyers who represent indigent clients in capital cases."<sup>152</sup>

Rule 65 made mandatory what was, in most respects, the criteria earlier specified in the Regulation.<sup>153</sup> Differences between them included mandates in Rule 65: for two counsel appointed for the appeal (as opposed to a recommendation);<sup>154</sup> that lead trial counsel have specialized training in the defense of persons accused of capital crimes;<sup>155</sup> that "[a]t least one of the appointed counsel must maintain a law office in the State of Ohio and have experience in Ohio criminal trial practice;"<sup>156</sup> and that "[a]t least one of the appointed [appellate] counsel must maintain a law office in Ohio."<sup>157</sup> Finally, the earlier provision that provided for appointments of counsel without such criteria being met, upon consultation of the judge with the OPD, became one that spoke of

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148. *Id.* at 6-7. Its liaison was Mary Broderick, the director of the Defender Division. See *Mary Broderick*, DEATH PENALTY FOCUS, <http://deathpenalty.org/article.php?id=162> (last visited Apr. 12, 2015). The Defender Division was actively seeking further input from the Subcommittee and the author, as well as others, to craft more detailed qualifications and standards of performance. See, e.g., *History of NLADA*, NAT'L LEGAL AID & DEFENDER ASS'N, [http://www.nlada.org/About/About\\_HistoryNLADA](http://www.nlada.org/About/About_HistoryNLADA) (last visited Apr. 12, 2015). That these national and Ohio efforts were contemporaneous was mutually advantageous.

149. BURTON, *supra* note 146, at 2.

150. *Id.*

151. *Id.*; Ticoras, *supra* note 78, app. at 514.

152. Press Release, The Supreme Court of Ohio, Supreme Court Establishes Standards of Training and Experience for Lawyers (Oct. 15, 1987) (on file with the *Hofstra Law Review*).

153. Compare OHIO ADMIN. CODE § 120-1-10 (1984), with OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, *supra* note 78, app. at 514-16.

154. OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, *supra* note 78, app. at 516. In George Ticoras's law review comment, the Committee Comments, while complete, are reprinted somewhat out of order and within parts of the Rule itself.

155. Ticoras, *supra* note 78, app. at 514.

156. *Id.*

157. *Id.* app. at 516.

“exceptional circumstances” based on similar criteria, but with a decision to allow appointment being made by a majority of the newly formed Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (“Committee on the Appointment of Counsel”).<sup>158</sup> Part II of Rule 65 establishes and describes the Committee on the Appointment of Counsel.<sup>159</sup> Part III of Rule 65 sets out the procedure for appointing counsel, and the necessity for adequate support services.<sup>160</sup> The latter expressly references support services as required by “professional standards:”

The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator(s), social worker(s), mental health professional(s), or other forensic experts and other support services reasonably necessary for counsel to prepare and present an adequate defense at every stage of the proceedings—before, during and after trial—including, but not limited to . . . preparation for the sentencing phase of the trial.<sup>161</sup>

Rule 65 was adopted with fairly extensive Committee Comments that provide very helpful and necessary insights, including highly appropriate disclaimer language regarding the ability of minimum qualifications to eliminate ineffectiveness:

The fact that an attorney meets the minimum qualifications . . . cannot be the sole criterion in assessing the effectiveness of such counsel in a particular case. When a claim of ineffective assistance of counsel is raised, even the actions of those attorneys appearing to possess the necessary skill and knowledge must be judged by the usual standards. Compliance with this Rule cannot, nor is it expected to, eliminate the occasional validity of such claims.<sup>162</sup>

Indeed, there is no presumption of ineffective assistance if retained counsel representing the defendant would not have met the qualifications

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158. *Id.* at 511, app. at 515.

159. *Id.* at 511-12. Committee members were to be appointed by the Ohio Supreme Court, the OSBA, and the Public Defender Commission, be experienced criminal defense lawyers, and serve for five-year terms. *See id.* app. at 517, 519. The Committee on the Appointment of Counsel’s primary responsibilities were to provide judges with lists of qualified counsel and develop monitoring and evaluation procedures for retention or deletion of attorneys from the list, and to sponsor or co-sponsor specialized training programs. *Id.* app. at 520.

160. *Id.* at 512-13.

161. *Id.* app. at 523.

162. *Id.* app. at 517.

under Rule 65.<sup>163</sup> Appointing judges are expressly cautioned to consider workload of prospective lawyers when appointing.<sup>164</sup>

The Commentary also reiterates “the proposition adopted by other national standards on defense services that quality representation cannot be rendered by assigned counsel unless the lawyers have available for their use adequate supporting services,” including expert witnesses, personnel skilled in social work to provide assistance at sentencing, and trained investigators,<sup>165</sup> concluding:

It is critical, therefore, for courts to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for the trial and sentencing phases, and to procure the necessary expert witnesses and documentary evidence.

Resources available to appointed defense counsel should be equivalent to yet independent of, those available to the prosecution.<sup>166</sup>

All in all, the 1987 version of Rule 65 was state-of-the-art rulemaking<sup>167</sup> to help assure qualified counsel could provide their clients with effective assistance.<sup>168</sup>

Like everything else, however, the devil is in the details, or in the implementation, and in the adequacy of resources. Since 1987, Ohio has had continuing problems with ineffectiveness, inadequate support services, and prosecutorial misconduct, leading to multiple reversals of convictions and death sentences.<sup>169</sup> More Ohio death sentences are reversed for ineffective assistance of counsel than any other ground for relief.<sup>170</sup>

163. See *State v. Keith*, 684 N.E.2d 47, 65-66 (1997).

164. OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, *supra* note 78, app. at 518.

165. Ticoras, *supra* note 78, app. at 519.

166. *Id.*

167. See BURTON, *supra* note 146, at 2. A March 20, 1990 Spangenberg Group “Report on Standards in Capital Cases and Compensation in Capital Cases at Trial” found only four other states with such standards (California, Georgia, Oregon, and Washington), but noted that there was “a beginning trend in this regard.” *Id.* app. E.

168. OHIO C.P. SUP. R. 65 (amended 1987), reprinted in Ticoras, *supra* note 78, app. at 518; see Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495, 504 (1996).

169. See, e.g., M. Bettman, *Merit Decision: Counsel Prejudicially Ineffective in Mitigation Phase in Death Penalty Case: State v. Herring*, LEGALLY SPEAKING OHIO (Dec. 8, 2014), <http://www.legallyspeakingohio.com/2014/12/merit-decision-counsel-prejudicially-ineffective-in-mitigation-phase-in-death-penalty-case-state-v-herring> (discussing a grant of post-conviction relief on the grounds of ineffective assistance of counsel); *OH: Prosecutor's Misconduct Was "Flagrant" and "Severe" Says Sixth Circuit*, OPEN FILE (Jan. 26, 2015), <http://www.prosecutorialaccountability.com/oh-prosecutors-misconduct-was-flagrant-and-severe-says-sixth-circuit> (discussing a 1992 Ohio murder conviction being vacated because of prosecutorial misconduct).

170. See, e.g., Dan Horn, *Fatal Mistakes*, CINCINNATI ENQUIRER, Apr. 16, 2007, at A1.

As of this Symposium, twenty-five Ohio death row inmates have been granted relief in the Ohio or federal courts on grounds of ineffective assistance of counsel, most on penalty phase ineffectiveness.<sup>171</sup> To put this in perspective, approximately 279 death row defendants have had their cases reviewed thus far in the Ohio Supreme Court on direct appeal, so of these, twenty-five, or nearly nine percent, have already been found to have received ineffective assistance.<sup>172</sup>

Ohio's continuing difficulties in providing what the Constitution requires have prompted additional reform measures, some merely proposed, and others enacted.

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"Ineffective assistance cases accounted for 54 percent of all appeals won by death row inmates in the 6th Circuit (which includes Ohio, Kentucky, Tennessee and Michigan)." *Id.* ("It's a big, big problem" said Judge Gilbert Merritt, a semiretired senior judge on the 6th Circuit court. . . . The lawyers don't have the wherewithal to put on a first-class defense." (internal quotations omitted)). The Cincinnati Enquirer's 2007 study found fifteen Ohio death inmates had won relief on ineffective assistance of counsel grounds. *Id.* The number has risen to twenty-five since then. *See infra* note 171.

171. See the following federal Sixth Circuit and/or Ohio Supreme Court cases finding ineffective assistance and reversing a penalty phase, or a conviction (latter designated by a \*). Note, a few of these were cases finding that ineffective assistance on appeal (noted as "IAAC" in this list) had prejudiced the review of a particular phase of the trial. *See Foust v. Houk*, 655 F.3d 524, 533-38, 546 (6th Cir. 2011); *Goff v. Bagley*, 601 F.3d 445, 462-72, 482 (6th Cir. 2010) (IAAC); *Woodard v. Mitchell*, 410 F. App'x 869, 873-81 (6th Cir. 2010); *Johnson v. Mitchell*, 585 F.3d 923, 937-46 (6th Cir. 2009); *Johnson v. Bagley*, 544 F.3d 592, 600-06 (6th Cir. 2008)\*; *Mason v. Mitchell*, 543 F.3d 766, 773-85 (6th Cir. 2008); *Jells v. Mitchell*, 538 F.3d 478, 489-501, 508-11, 513 (6th Cir. 2008); *Haliym v. Mitchell*, 492 F.3d 680, 691-96, 720 (6th Cir. 2007); *Morales v. Mitchell*, 507 F.3d 916, 929-39, 942 (6th Cir. 2007)\*; *Dickerson v. Bagley*, 453 F.3d 690, 693-700 (6th Cir. 2006); *Franklin v. Anderson*, 434 F.3d 412, 417-31 (6th Cir. 2006) (IAAC); *Poindexter v. Mitchell*, 454 F.3d 564, 570-81, 587 (6th Cir. 2006); *Williams v. Anderson*, 460 F.3d 789, 797-805, 817 (6th Cir. 2006); *Richey v. Mitchell*, 395 F.3d 660, 682-88 (6th Cir. 2005)\*; *Frazier v. Huffman*, 343 F.3d 780, 793-800, 802 (6th Cir. 2003); *Hamblin v. Mitchell*, 354 F.3d 482, 485-94, 496 (6th Cir. 2003); *Coleman v. Mitchell*, 268 F.3d 417, 444-54 (6th Cir. 2001); *Greer v. Mitchell*, 264 F.3d 663, 673-81, 691-92 (6th Cir. 2001) (IAAC); *Combs v. Coyle*, 205 F.3d 269, 277-91, 293 (6th Cir. 2000); *Mapes v. Coyle*, 171 F.3d 408, 425-29 (6th Cir. 1999) (IAAC); *Glenn v. Tate*, 71 F.3d 1204, 1206-11 (6th Cir. 1995); *Stallings v. Bagley*, 561 F. Supp. 2d 821, 860-79, 888 (N.D. Ohio 2008); *Goodwin v. Johnson*, No. 1:99CV2963, 2006 WL 753111, at \*7-15, 19 (N.D. Ohio Mar. 26, 2006); *Lawson v. Mansfield*, 197 F. Supp. 2d 1072, 1095, 1100 (S.D. Ohio 2002); *State v. Zuranski*, 513 N.E.2d 753, 753 (Ohio 1987) (citing *State v. Penix*, 513 N.E.2d 744, 746-48 (Ohio 1987)). This listing does not include the handful of cases where the Ohio District Courts of Appeal may have reversed a conviction or death sentence on grounds of ineffective assistance before 1998, when the law was changed to remove the court of appeals review. Following reversal, some of these defendants were resentenced to death; many others received life sentences, either by operation of law (until 1998, no legislation existed to conduct a new sentencing hearing before a new jury, *see Penix*, 513 N.E.2d at 747, and later amended OHIO REV. CODE ANN. § 2929.06 (West 2006)) or upon a retrial, or by plea negotiations.

172. *See* cases cited *supra* note 171. Of course, cases thus far reviewed by the Ohio Supreme Court on direct appeal move into further state post-conviction and federal habeas corpus review where ineffectiveness claims are made and assessed, so this number can be expected to grow.

*F. 1987 to 2003: The National Legal Aid and Defender Association  
and ABA Standards, and Ohio Rule Amendments  
and State Bar Association Study*

1. National Legal Aid and Defender Association and  
ABA Standards

NLADA liaison Broderick was very helpful throughout the crafting of Rule 65. A few months after Ohio adopted its Rule 65, the NLADA published its Standards for the Appointment and Performance of Counsel in Death Penalty Cases (“Standard(s)”) <sup>173</sup> taking in the same general concepts for qualifying counsel as the Ohio Rule 65, but notably requiring specialized training within the past year for both counsel, and five years and three years of active trial criminal defense work of lead and co-counsel respectively. <sup>174</sup> Further, the Legal Representation Plan Standard 3.1 called for an independent committee, like the Committee on the Appointment of Counsel, to actually be making the appointments, rather than having judges select from a list as was done in Ohio. <sup>175</sup> The NLADA also established a much more detailed and thorough set of performance standards, setting out the duties of counsel at all phases of capital litigation, from pre-trial to clemency. <sup>176</sup>

Ultimately, these Standards formed the basis (with only the slightest variations) for the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (“1989 ABA Guidelines”) <sup>177</sup> (the small variations were adopted by the NLADA at its 1988 NLADA Annual Meeting, so the two documents are the same). The 1989 ABA Guidelines were subsequently revised and expanded upon in the 2003 ABA Guidelines for the Appointment and

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173. See STANDARDS AND COMMENTARY, *supra* note 25, at 20-21. They were adopted by the NLADA Board of Directors on December 1, 1987, and were later amended on November 16, 1988. See Titoras, *supra* note 78, at 504 n.16. Rule 65 was cited in the Commentary to Guideline 11.2 as an example of standards that are “intended for use in determining eligibility but not as the sole basis for examining claims of ineffective assistance of counsel.” AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter 1989 ABA GUIDELINES]; see also STANDARDS AND COMMENTARY, *supra* note 25, at 54.

174. STANDARDS AND COMMENTARY, *supra* note 25, at 16-17.

175. NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES § 3.1 (1988) [hereinafter STANDARDS FOR THE APPOINTMENT OF COUNSEL].

176. *Id.* §§ 11.1–9.5.

177. Compare STANDARDS FOR THE APPOINTMENT OF COUNSEL, *supra* note 175, with 1989 ABA GUIDELINES, *supra* note 173.



Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”) we observe today.<sup>178</sup>

Both the ABA and the NLADA personnel worked vigorously to have states set qualifications for appointments and standards of performance. They lobbied bar associations, the media, legislatures, and courts with amici briefs and by meetings with judicial committees. Arguments often focused, as they did in Ohio, on the cost savings that would accrue from having fewer constitutional flaws in trials, and thus, less expenditure in the appellate and post-conviction processes and fewer retrials.<sup>179</sup> Further, “[c]ertain cases will be screened out at the beginning of the process that aren’t really capital cases,” as skilled lawyers will quickly see the weaknesses in the prosecution’s cases and obtain a lesser charge or a plea.<sup>180</sup>

This seemed to be borne out in Ohio: while capital indictments remained in the same range for the period 1987-1989, the percentage of indictments resolved by pleas to lesser charges rose from 8.8% in 1987, to 12.9% in 1988, to 13.5% in 1989.<sup>181</sup> In the same period, the trials resulting in sentences less than death actually dropped, from 10.2% to 8.1%, indicating that the cases taken to trial were more death-worthy.<sup>182</sup> Further, the number of death sentences imposed (and appeals necessitated) fell from twenty-three in fiscal year 1985-1986 into the teens in the period 1986-1989, when qualifications and training came into the system, and fell to eight in the 1989-1990 period, saving resources.<sup>183</sup> Likewise, the death-sentenced cases should “move more expeditiously through the appeals court if competent counsel are

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178. AMERICAN BAR ASSOCIATION 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>.

179. Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, 12 NAT'L L.J. 30, 41 (1990).

180. *Id.*

181. OHIO PUB. DEFENDER COMM'N, 1987 ANNUAL REPORT 30 (1987) [hereinafter 1987 ANNUAL REPORT]; OHIO PUB. DEFENDER COMM'N, 1988 ANNUAL REPORT 23 (1988) [hereinafter 1988 ANNUAL REPORT]; OHIO PUB. DEFENDER COMM'N, 1989 ANNUAL REPORT 18 (1989) [hereinafter 1989 ANNUAL REPORT].

182. 1987 ANNUAL REPORT, *supra* note 181, at 30; 1988 ANNUAL REPORT, *supra* note 181, at 23; 1989 ANNUAL REPORT, *supra* note 181, at 18.

183. OHIO PUB. DEFENDER COMM'N, 1990 ANNUAL REPORT 10 (1990); *see also* 1988 ANNUAL REPORT, *supra* note 181, at 23. The 1993 Second Report of the Committee on the Appointment of Counsel related that though death sentences had risen slightly, to ten in the 1990-1992 fiscal year, and to fourteen the year after, “[t]hese figures, in spite of increasing capital indictments, suggest to some an improvement in the level of representation . . .” JUDGE EVERETT BURTON, SECOND REPORT OF THE COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES 11 (1993) [hereinafter SECOND REPORT], available at <https://www.ncjrs.gov/pdffiles1/Digitization/143731NCJRS.pdf>.

provided at the trial stage” as the issues are more likely to have been identified and developed in the trial court,<sup>184</sup> and such efficiencies are even more clear if qualifications for appellate and post-conviction representation are included, as they were in the 1989 ABA Guidelines and the NLADA Standards.<sup>185</sup>

## 2. Ohio Rule 65 Revisions

Ohio continued to tinker with its qualifications system, bringing it into greater synchronization with the ABA and NLADA practices. In January 1991, Rule 65 was amended to require that all co-counsel and appellate counsel have specialized training in the defense of capital cases.<sup>186</sup> A part of the Rule 65, titled “Monitoring of Counsel; Removal,” provides that an appointing court should monitor the performance of assigned counsel, and

[i]f there is compelling evidence that an attorney has ignored basic responsibilities of an effective lawyer, which results in prejudice to the client’s case, the court shall report such action to the Committee, which shall accord the attorney an opportunity to be heard, and may use its authority to remove the attorney from the list of qualified counsel.<sup>187</sup>

The “basic responsibilities of an effective lawyer” were not specifically defined, and this provision was rarely, if ever, used.<sup>188</sup>

In July 1992, the Committee on the Appointment of Counsel reported that though Ohio’s steps were worthy of praise, the need for further improvements was evident.<sup>189</sup> “[U]neven and inadequate rates of compensation for appointed counsel and uneven funding for expert witnesses and investigation from county to county” warranted the warning that “the future of high quality representation in capital cases is dependent on the Supreme Court and the entire justice system seeking creative solutions to these difficult problems just as the Court and bar did in 1987 when Rule 65 was enacted.”<sup>190</sup>

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184. Marcia Coyle, *High Noon for Congressional Habeas Reform*, 12 NAT’L L.J. 1, 5 (1990).

185. ABA GUIDELINES, *supra* note 178, Guideline 10.14, at 1076-80; STANDARDS AND COMMENTARY, *supra* note 25, at 19-20.

186. OHIO C.P. SUP. R. 65 (1991), in SECOND REPORT, *supra* note 183, at 2, 8; see *ABA Criminal Justice Section Wins Approval for Two Resolutions*, *supra* note 114, at 2427.

187. SECOND REPORT, *supra* note 183, at 7, 21; see also OHIO SUP. R. 20.03 (1997).

188. See SECOND REPORT, *supra* note 183, at 8.

189. SECOND REPORT, *supra* note 183; Nat’l Legal Aid & Defender Ass’n, *Report Praises Counsel Rule, Calls for More Improvement*, CAPITAL REP., May-June 1993, at 12, 12 [hereinafter *Report Praises Counsel Rule*].

190. *Report Praises Counsel Rule*, *supra* note 189, at 12; see also SECOND REPORT, *supra* note 183, at 13.

The same problems are highlighted in the following decades. On July 1, 1995, Rule 65 was further amended to provide that it did not permit the engagement of one privately retained attorney and the appointment of a second attorney pursuant to Rule 65.<sup>191</sup> A new provision in Part III provided specific guidance on “Workload of [A]ppointed [C]ounsel”<sup>192</sup> consistent with the ABA and NLADA Standards.<sup>193</sup> A further provision, Part VI, entitled “Programs for Specialized Training,” set out the topics to be covered in training seminars for trial and appellate level appointments, tweaking somewhat the topics earlier identified in regulations of the Committee on the Appointment of Counsel.<sup>194</sup>

At the same time, the Rules of Superintendence for Courts of Appeals were amended to provide Rule 6 “Appointment of Counsel for Indigent Defendants in Capital Cases” workload limitations.<sup>195</sup> In 1997, Rule 65 was renumbered to Rule 20, and Court of Appeals Superintendence Rule 6 was renumbered to Rule 21.<sup>196</sup> Therefore, researchers since that point should be looking to the Common Pleas Rules of Superintendence 20.<sup>197</sup>

### 3. The 1997 Ohio State Bar Association Study of the Ohio Death Penalty

In the mid-1990s, the OSBA Criminal Justice Committee (of which I was a member) undertook a study of Ohio’s death penalty system, producing a report entitled “Ohio’s Death Penalty Processes Fail to Guarantee Reliable, Consistent and Fair Capital Sentences. No Executions Should Take Place Until These Processes are Corrected” (“OSBA Report”).<sup>198</sup> The OSBA Report and its recommendations for reform were adopted by the OSBA governing Board of Governors and Council of Delegates on November 8, 1997, and were published with an

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191. Rule 65 I(C) (1995).

192. Rule 65 IV (B).

193. Rule 65 VI; ABA GUIDELINES, *supra* note 178, Guideline 6.1, at 965; STANDARDS AND COMMENTARY, *supra* note 25, at 22.

194. See SECOND REPORT, *supra* note 183, at 8.

195. OHIO APP. SUP. R. 6 (1995).

196. OHIO SUP. R. 20.00-.05 (1997); see also *supra* note 117.

197. Eventually, in 2010, this was renumbered from 20 with portions I through IV; instead, these appeared as Rules 20 through 20.05. *Id.*; see *supra* note 117. The Rules were replaced in February 2015. See Addendum, *infra* Part A.1-3.

198. See generally S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk—A Report on Reforms in Ohio’s Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L.J. 371 (2002) (discussing the entire 1997 OSBA Report).

updating commentary in the *Ohio State Law Journal* in 2002.<sup>199</sup> The OSBA Report found major problems in Ohio's death penalty system: "Ohio's capital sentencing system is unreliable. There are systemic failures of justice in both the guilt and penalty determinations. . . . It suffers from nearly every defect noted by the American Bar Association in its call for a national moratorium on the death penalty and more."<sup>200</sup>

The systemic defects identified included: underfunding of indigent capital defense; disparate charging decisions and inadequate narrowing of the class of eligible offenders; politics; racial bias; inadequate guidance to sentencing jurors; inadequate opportunities to defend against the state's charges; reviewing judges' usurpation of the jury's role in sentencing; unequal appellate review practices; state post-conviction remedies that are unavailable and/or inadequate; and stays of execution that are not reasonably or predictably available to capital defendants.<sup>201</sup>

The OSBA Report did not call for a moratorium as the ABA had done that year, but instead urged the state "to require individual case review and systemic change in Ohio's death penalty charging and sentencing scheme on the theory that the close scrutiny of each case would prevent any unjust execution and that systemic improvements would protect future cases from the same errors or unfairness."<sup>202</sup> At the time of the 2002 article reprinting the OSBA Report, three persons had been executed, and "[t]hat call [to suspend executions], had not been heeded. This is not to say that nothing had changed in the intervening years—small changes have been wrought—some for good, some for ill."<sup>203</sup>

Underfunding of defense services remained a critical problem and, in some respects, had grown worse.<sup>204</sup> In the OSBA Report, the OSBA found most counties paid under \$25,000 for two attorneys at the capital trial level, ten counties paid \$10,000 or less, and some paid as little as \$25 an hour.<sup>205</sup> The OSBA Report admonished: "Even in the most impoverished areas of the state, private counsel command a higher rate of pay for even the simplest legal work."<sup>206</sup> It was noted that in October 1994, Ohio Governor George Voinovich was charged with a

199. *Id.* at 372 n.2. I was a member of the OSBA Criminal Justice Committee, and assisted in drafting portions of this OSBA Report. *Id.*

200. *Id.* at 373 (referencing the February 1997 ABA Committee Report with Recommendations, which called for a national moratorium on the death penalty).

201. *See id.* at 379-402, 404-12.

202. *Id.* at 371-72.

203. *Id.* at 372.

204. *Id.* at 379-82.

205. *Id.* at 379.

206. *Id.* at 379-80.

misdemeanor for ordering his plane to leave the ground while President Bill Clinton's plane, Air Force One, was preparing for takeoff:

While it seemed there was little to dispute, Attorney General Betty Montgomery set aside \$20,000 for Governor Voinovich's misdemeanor defense. In some counties this is more than a capital defendant is given for his entire case. In the best of circumstances, a capital defendant in Ohio is lucky to get twice that amount to defend a vastly more complicated felony charge *and* prepare mitigation.<sup>207</sup>

The OSBA Report recommended that \$95 be the hourly rate, which matched the median hourly rate for attorneys with three years of experience, and that the budget for each capital case (for attorney's fees and experts) be \$75,000 at trial and \$40,000 on appeal.<sup>208</sup>

In 2002, S. Adele Shank wrote:

[Though] the Ohio Public Defender Commission revised its reimbursement schedules for appointed counsel in capital cases to allow a maximum hourly rate of \$50 for out-of-court time and \$60 for in-court time, with a total maximum fee for each of two attorneys of \$25,000 or a total of \$50,000. . . . [m]any counties do not authorize payment of fees at these rates but continue to set lower hourly rates for appointed counsel. Fees currently range from \$35 to \$60 per hour. At the same time, the median hourly rates for attorneys with three years of experience have increased to \$110 per hour. The prosecution continues to have vastly superior resources and access to resources throughout the litigation process.<sup>209</sup>

#### G. 2004 to 2007: *The ABA Assesses Ohio's Death Penalty System*

In 1997, as noted above, the ABA had concluded that death penalty systems across this country were failing to deliver justice.<sup>210</sup> Although the ABA took no position on the death penalty itself, on February 3, 1997, the ABA had called for all death penalty jurisdictions across the country to impose a temporary halt on actual executions until they could review their systems in detail to assure that they delivered fair and accurate justice, according each defendant due process under

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207. *Id.* at 381 (footnotes omitted).

208. *Id.* at 381-82.

209. *Id.* at 382 (footnotes omitted).

210. *See supra* Part III.F.3.

the law.<sup>211</sup> Ohio had asked for the same several months later, but little had been done.<sup>212</sup>

To assist the states and federal government in conducting those reviews, the ABA Section of Individual Rights and Responsibilities developed protocols setting benchmarks for criminal justice systems that administer the death penalty fairly and accurately.<sup>213</sup> The ABA subsequently launched its state Death Penalty Assessment Project, and Ohio was the seventh of eight states evaluated under that Death Penalty Assessment Project (“Ohio Assessment”).<sup>214</sup>

The ABA’s Ohio Assessment was conducted by a balanced team of legal experts, each of whom were from the Ohio legal community.<sup>215</sup> Though the Ohio Prosecuting Attorneys Association would later discount the ABA Assessment Team’s (“Assessment Team”) 2007 Report (“2007 Report”) for not having any sitting prosecutors on it, in fact, the director of the Ohio Attorney General’s Office death penalty unit was repeatedly invited to join the Assessment Team and did not do so.<sup>216</sup> Furthermore, the Assessment Team already contained two former prosecutors who had actively sought the death penalty (Jones in state

211. ABA DEATH PENALTY MORATORIUM RESOLUTION: RECOMMENDATION NO. 107, at 1 (1997).

212. See Shank, *supra* note 198, at 384-87, 389-92, 394-95, 397-99, 402-03.

213. *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 2001 A.B.A. SEC. INDIVIDUAL RTS. & RESP. REP. [hereinafter *Death Without Justice*], available at <http://www.americanbar.org/content/dam/aba/migrated/irr/finaljune28.authcheckdam.pdf>.

214. AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT 1-2 (2007) [hereinafter EVALUATING FAIRNESS], available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/ohio/finalreport.authcheckdam.pdf>.

215. *Id.* at 3-6. The chair was Associate Dean and Professor Phyllis Crocker of the Cleveland-Marshall College of Law. *Id.* at 3. The Team included: Congresswoman Stephanie Tubbs Jones, Member of the United States House of Representatives and former elected Cuyahoga County prosecutor; Judge Craig Wright, a judge on the Ohio Court of Claims and a former Justice of the Ohio Supreme Court; Senator Shirley Smith, Member of the Ohio State Senate; Judge Michael Merz, Chief Magistrate Judge in the U.S. District Court for the Southern District of Ohio; Geoffrey Mearns, Dean and Professor of Law at Cleveland-Marshall College of Law and former Assistant U.S. Attorney for the Eastern District of North Carolina and the Eastern District of New York; Mark Godsey, Professor of Law at the University of Cincinnati College of Law and Director of the Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project, and former Assistant U.S. Attorney for the Southern District of New York; Adele Shank and David Stebbins, both lawyers in private practice and former defenders in the OPD Office; and the Author of this Article, Professor Margery Koosed of the University of Akron School of Law. *Id.* at 3-6.

216. *Perspective: Death Penalty Report’s Results Are Disputed*, TIMES-GAZETTE (Oct. 2, 2007, 4:02 AM), <http://www.times-gazette.com/opinion/2007/10/02/perspective-death-penalty-report-s-results-are-disputed>; Rick Halperin, [Deathpenalty] *Death Penalty News—GA., Ohio, Idaho, N.C.*, WASHLAW.EDU (Oct. 2, 2007, 10:25 PM), <http://lists.washlaw.edu/pipermail/deathpenalty/2007-October/007065.html>.

court, Mearns in federal court),<sup>217</sup> and other former prosecutors who had actively prosecuted lesser crimes (Shank in state court, Godsey in federal court).<sup>218</sup> In the end, the Prosecuting Attorneys Association simply did not wish to confront or even talk about the merits of the 2007 Report, nor the reforms it recommended.

The Assessment Team conducted a two and a half year study.<sup>219</sup> The Assessment Team and the ABA released its 2007 Report on September 24, 2007.<sup>220</sup> It found: of ninety-three ABA protocols,<sup>221</sup> Ohio fully complied with only four; the state partially met thirty-seven of the standards; it totally failed to comply with twenty-eight protocols; and because of limited access to information, the team was not able to assess Ohio's compliance with twenty-three of the protocols.<sup>222</sup> The Assessment Team concluded this was not a system that delivered the justice citizens of Ohio expected.<sup>223</sup>

At its September 24, 2007 news conference, the Assessment Team announced fourteen specific recommendations to help Ohio achieve the justice that the victims of crime, their families and friends, and *all* of Ohio's people, deserve.<sup>224</sup> On a broader level, the ABA itself joined the Assessment Team in encouraging the Ohio authorities to take two steps: (1) conduct a review into the many areas the Assessment Team could not address, as well as the problems already identified in this study; and (2) temporarily suspend executions until the problems raised in the 2007 Report could be addressed, and there is greater reason to have confidence that justice is being served.<sup>225</sup> The Assessment Team urged that regardless of one's view as to the morality of the death penalty, it is

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217. EVALUATING FAIRNESS, *supra* note 214, at 4-5.

218. *Id.* at 3-5.

219. Jeff Coryell, *ABA Death Penalty Assessment Team Calls for Suspension of Executions in Ohio*, CLEVELAND.COM (Sept. 24, 2007, 10:58 AM), [http://blog.cleveland.com/wideopen/2007/09/aba\\_death\\_penalty\\_assessment\\_t.html](http://blog.cleveland.com/wideopen/2007/09/aba_death_penalty_assessment_t.html).

220. *Id.* See generally EVALUATING FAIRNESS, *supra* note 214.

221. As the Executive Summary states: "All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols)." EVALUATING FAIRNESS, *supra* note 214, at 1; see *Death Without Justice*, *supra* note 213.

222. *Ohio Death Penalty 'Flawed,' Bar Association Says in Calling for Moratorium*, GONGWER OHIO (Sept. 24, 2007), <http://www.gongwer-oh.com/programming/login.cfm?link=http://www.gongwer-oh.com/programming/mygongwer.cfm?&CFID=10854051&CFTOKEN=801ac1fde851928e-F0A4CAD0-2590-49FC>. See generally EVALUATING FAIRNESS, *supra* note 214.

223. EVALUATING FAIRNESS, *supra* note 214, at iii.

224. See *id.* at v-vii.

225. *Ohio Death Penalty 'Flawed,' Bar Association Says in Calling for Moratorium*, *supra* note 222.

beyond question that if Ohio is to have a death penalty, it should be accurate, fair, and provide due process to all capital defendants and death row inmates.<sup>226</sup> Unfortunately, the Assessment Team found this was not the case.<sup>227</sup>

In its review, the Assessment Team found a number of problems in the state's death penalty system, all of which undermined the fairness and accuracy of the system.<sup>228</sup> Some of the problems specific to the ABA Standards we are here to commemorate were: inadequate procedures to protect innocent defendants; inadequate access to experts and investigators; inadequate legal representation; and inadequate appellate review of claims of error.<sup>229</sup> The number and significance of these problems, along with others, led the Assessment Team to call for a temporary suspension of executions until these problems were addressed.<sup>230</sup> The Assessment Team urged that the Ohio Supreme Court or Ohio Legislature to create a task force to further study and make recommendations, especially with respect to those matters the Assessment Team had found itself without sufficient access to data to evaluate fully.<sup>231</sup>

Executions were not suspended, a task force was not created, and for a while it seemed as though the Prosecuting Attorneys Association's contention that the 2007 Report should be ignored because no sitting prosecutors sat on it might carry the day.<sup>232</sup> But, fortunately, calmer

226. EVALUATING FAIRNESS, *supra* note 214, at iii.

227. *Id.* at iii, vii.

228. *Id.* at vii.

229. *Id.* at iv. Other problem areas were: a lack of meaningful proportionality review of death sentences; virtually nonexistent discovery provisions in state post-conviction; racial and geographic disparities in Ohio's capital sentencing; and death sentences imposed or carried out on people with severe mental disabilities. *Id.* at iv-v.

With regard to racial and geographic disparities, the ABA studied homicides in Ohio between 1981 and 2000, in order to determine whether racial and geographic factors correlate with the decision to sentence defendants to death. *Id.* at 357. The ABA found that:

(1) those who kill Whites are 3.8 times more likely to receive a death sentence than those who kill Blacks [in Ohio;] and (2) the chances of a death sentence in Hamilton County are 2.7 times higher than in the rest of the state, 3.7 times higher than in Cuyahoga County, and 6.2 times higher than in Franklin County.

*Id.* For a further discussion of the ABA Task Force's work and recommendations, and race concerns in particular, see generally Alice Lynd, *Unfair and Can't Be Fixed: The Machinery of Death in Ohio*, 44 U. TOL. L. REV. 1 (2012).

230. EVALUATING FAIRNESS, *supra* note 214, at vii. Judges Merz and Mearns abstained from voting on the temporary suspension. *Id.* at vii n.6.

231. *Ohio Death Penalty 'Flawed,' Bar Association Says in Calling for Moratorium*, *supra* note 222.

232. See Maureen O'Connor, Chief Justice, Supreme Court of Ohio, First State of the Judiciary Address (Sept. 8, 2011) [hereinafter *Judiciary Address*], available at [http://www.supremecourt.ohio.gov/PIO/Speeches/2011/SOJ\\_090811.asp](http://www.supremecourt.ohio.gov/PIO/Speeches/2011/SOJ_090811.asp) (announcing the creation



heads prevailed and some aspects of the Assessment Team's recommendations began to get attention; indeed, some measures were passed by the legislature.

The Assessment Team's 2007 Report had called for several reforms designed to assure the innocent were not convicted and sentenced to death.<sup>233</sup> In response, a state-of-the-art Innocence Protection Act<sup>234</sup> was passed with the support of the former Ohio Attorney General, Republican James Petro, and the Ohio Innocence Project.<sup>235</sup> The same ABA-identified concern yielded significant discovery reforms, as defense counsel and prosecutors sat down to hammer out proposed revisions to the Ohio Criminal Rule 16.<sup>236</sup> So, though not explicitly crafted to respond to the 2007 Report as such, some needed reforms were being made.

Those concerns and recommendations of the Assessment Team most relevant to this Symposium were:

*Inadequate Access to Experts and Investigators* (see Chapter 6) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants in Ohio are denied these necessary resources.<sup>237</sup>

*Inadequate Qualification Standards for Defense Counsel* (see Chapter 6 and 8) – Although the State of Ohio provides indigent defendants

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of a task force including prosecutors); see also Phyllis Crocker, *O'Connor's Firsts*, 48 AKRON L. REV. 79, 81-83 (2015).

233. EVALUATING FAIRNESS, *supra* note 214, at v-vii.

234. Sub. S. B. No. 77, 128th Gen. Assemb. (Ohio 2010). Its reforms included practices respecting preservation of evidence, eyewitness identification procedures, and videotaping of interrogations.

235. See Editorial, *Call the Roll: Lawmakers Should Pass Long-Delayed Criminal-Justice Bill*, COLUMBUS DISPATCH (Mar. 9, 2010, 6:18 AM), <http://www.dispatch.com/content/stories/editorials/2010/03/09/call-the-roll.html>. The bill made significant changes in: preservation and testing of evidence; criteria for post-conviction DNA testing; eyewitness identification procedures; and the recording of interrogations. See *id.* Former Ohio Attorney General Petro became the first attorney general in the country to work with an Innocence Project to free an inmate. T.C. Brown, *Jim Petro's Crusade*, COLUMBUS MONTHLY (Oct. 2010), <http://www.columbusmonthly.com/content/stories/2010/10/jim-petro039s-crusade.html>. He continued working with the Project when he left office and returned to private practice. See *id.* He and his wife, Nancy Petro, authored the excellent volume *False Justice: Eight Myths that Convict the Innocent*, and other shorter pieces. See, e.g., Jim Petro & Nancy Petro, *Jim Petro: Ohio Shouldn't Risk Executing Innocent*, CINCINNATI.COM (Sept. 19, 2014, 5:00 PM), <http://www.cincinnati.com/story/opinion/contributors/2014/09/19/jim-petro-ohio-risk-executing-innocent/15892555>. Nancy is a regular contributor to the *Wrongful Convictions Blog*, and the two continue to intensively work to improve the reliability of our justice system in Ohio, the nation, and internationally. E.g., Nancy Petro, *\$9.2 Million Awarded in Wrongful Conviction that Underscores FBI Forensic Problems*, WRONGFUL CONVICTIONS BLOG (Feb. 28, 2015), <http://wrongfulconvictionsblog.org/2015/02/28/9-2-million-awarded-in-wrongful-conviction-revealed-in-fbi-lab-review/#more-19605>.

236. See OHIO REV. CODE ANN. CRIM. R. 16 (West 2014).

237. EVALUATING FAIRNESS, *supra* note 214, at iv.

with counsel at trial, on direct appeal, and in state post-conviction proceedings, the State falls short of the requirements set out in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* for trial and appellate attorneys. In fact, while the State of Ohio requires counsel to be certified to represent indigent death row inmates in post-conviction proceedings, it does not set forth any requirements that are specific to post-conviction representation or any other related proceedings.<sup>238</sup>

*Insufficient Compensation for Defense Counsel Representing Indigent Capital Defendants and Death-Row Inmates* (see Chapters 6 and 8) – In at least some instances, attorneys handling capital cases and appeals are not fully compensated at a rate and for all of the necessary services commensurate with the provision of high quality legal representation. The Office of the Ohio Public Defender sets the statewide maximum hourly rate and case fee cap, but each county is authorized to and does set its own reimbursement amounts and requirements. These limits have the potential to dissuade the most experienced and qualified attorneys from taking capital cases and may preclude those attorneys who do take these cases from having the funds necessary to present a vigorous defense.<sup>239</sup>

The now-Rule 20 Committee on the Appointment of Counsel undertook to create amendments to that Rule that would satisfy the second of the above Assessment Team’s critiques. It made significant progress in 2010.<sup>240</sup>

#### H. 2010 Amendments to Rule 20

A series of 2010 amendments (“2010 amendments”) to Rule 20 “adopt[ed] increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal . . . consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*,” as the Assessment Team recommended.<sup>241</sup>

The most significant change to Rule 20 was, in essence, the adoption of the ABA Guidelines as the governing standard of care in capital defense representation.<sup>242</sup> Rule 20.01(A)(1) required that every attorney has “[d]emonstrated commitment to providing high quality

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238. *Id.*

239. *Id.*

240. *See infra* Part III.H.

241. EVALUATING FAIRNESS, *supra* note 214, at vi; *see* OHIO SUP. R. 20.01, 20.03; ABA GUIDELINES, *supra* note 178, Guideline 5.1, at 961-62, 970-71.

242. *See* EVALUATING FAIRNESS, *supra* note 214, at vi (recommending that Ohio adopt rules consistent with the ABA Guidelines); *compare* OHIO SUP. R. 20.02(G)(6), *with* ABA GUIDELINES, *supra* note 178, Guideline 5.1, at 961-62, 970-71.

legal representation in the defense of capital cases.”<sup>243</sup> Rule 20.02(G)(11) provided that the Committee on the Appointment of Counsel will “[a]dopt best practices for representation of indigent defendants in capital cases and disseminate those best practices appropriately,”<sup>244</sup> similar to ABA Guideline 10.1. Training programs would include discussion of these “best practices,” so that all counsel undertaking capital case representation in Ohio will know what providing high quality representation in capital cases entails and requires.<sup>245</sup>

Members of the Assessment Team urged the Rule 20 Committee on the Appointment of Counsel and the Ohio Supreme Court to expressly adopt the standards of performance found in ABA Guideline 10.1 as the “best practices” that will be disseminated to all Ohio counsel.<sup>246</sup> I wrote to the Ohio Supreme Court in support of the then-proposed amendments:

To assure that this improvement is as full as possible, I greatly urge the Rule 20 Committee to adopt the ABA’s Standards for Performance of Counsel found in ABA Guideline 10.1 when the Committee designs the “best practices” that Ohio attorneys will be trained to use. These ABA Standards of Performance found in Guideline 10.1 are routinely referred to by the Sixth Circuit, the United States Supreme Court, as well as other courts as the ‘prevailing professional norm’ in capital case representation. They should become our [‘]best practices’. They should inform Ohio’s capital litigation process, and become part of an Ohio counsel’s duties and responsibilities when undertaking representation if we are to avoid the dual dangers that motivated members of the Court to initially adopt Rule 65 [i.e. the danger that the truly guilty individual is not captured and prosecuted in a timely fashion because an unreliable proceeding convicted an innocent, allowing a dangerous individual to possibly continue to commit crimes, and/or that a costly retrial is necessary to assure a properly charged defendant received a fair and reliable determination of guilt/innocence and of appropriate punishment].<sup>247</sup>

Ultimately, the Ohio Supreme Court did so, in a manner of speaking, by making the ABA Guidelines a judge’s guiding

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243. OHIO SUP. R. 20.01(A)(1).

244. *Id.* 20.02(G)(11).

245. *Id.* 20.01(A)(1).

246. Individual members of the Assessment Team writing to the Court included this Author and the Chair of the Assessment Team, Professor Phyllis Crocker.

247. Letter from Margery Koosed, Professor, Univ. of Akron Sch. of Law, on Support of Amendment to Rule 20, Rules of Superintendence to Tammy White, Office of Att’y Servs., Supreme Court of Ohio (Mar. 16, 2009) (on file with the *Hofstra Law Review*).

principle when monitoring counsel appointed to these cases under newly revised Rule 20.03:

**RULE 20.03. Monitoring of Counsel; Removal.**

**(A) Duty of court**

*The appointing court shall monitor the performance of all defense counsel to ensure that the client is receiving representation that is consistent with the American Bar Association's "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" and referred to herein as "high quality representation."*<sup>248</sup>

Though judges seldom make use of this monitoring practice, this provision does provide defense counsel with the argument that they have an obligation to provide representation as required by the ABA Guidelines or risk removal, and this should help to educate the court to what more is needed in defending a capital case, whether it is time, resources, access, or experts. The 2010 amendments also adopted the increased monitoring procedures that the Assessment Team recommended for the Committee on the Appointment of Counsel itself.<sup>249</sup> Rule 20.02(G) Powers and Duties of the Committee, sections (6) and (7) gave new authority to the Rule 20 Committee on the Appointment of Counsel to monitor the performance of attorneys, and investigate and maintain records concerning complaints about the performance of attorneys and take appropriate corrective action.<sup>250</sup> Extending monitoring responsibilities to the Committee on the Appointment of Counsel allows them another opportunity for a "teachable moment" with attorneys and judges. The Court also adopted a removal process consistent with the ABA Guidelines<sup>251</sup> and other provisions that also enhanced the likelihood of improved representation of capital defendants.<sup>252</sup>

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248. OHIO SUP. R. 20.03(A) (emphasis added); see ABA GUIDELINES, *supra* note 178, Guideline 7.1, at 970.

249. OHIO SUP. R. 20.03(A); EVALUATING FAIRNESS, *supra* note 214, at 208.

250. OHIO SUP. R. 20.02(G)(6)–(7). The former provision was identical to a provision found in ABA Guideline 3.1(E)(5), Designation of a Responsible Agency. ABA GUIDELINES, *supra* note 178, Guideline 3.1, at 946. The latter essentially repeated ABA Guideline 3.1(E)(8). *Id.*

251. Rule 20.03, entitled Monitoring of Counsel; Removal, established a procedure consistent with ABA Guideline 7.1 Monitoring and Removal for investigation of complaints regarding defense representation and provided for an appropriate remedy of removal from the list of qualified attorneys, while providing adequate notice and an opportunity to be heard to the counsel involved; should removal be ordered, it included a limited opportunity for reinstatement in the event of exceptional circumstances. OHIO SUP. R. 20.03(B); ABA GUIDELINES, *supra* note 178, Guideline 7.1, at 970-71.

252. Rule 20.01, entitled Qualifications Required for Appointment as Counsel for Indigent Defendants in Capital Cases, section (A) adopted in full the knowledge and skills requirements found in ABA Guideline 5.1(B)(1)–(2), Qualifications for Appointed Counsel. OHIO SUP. R.

*I. 2011 to 2014: The Ohio Supreme Court/Ohio State Bar Association Joint Task Force to Review the Administration of Ohio's Death Penalty*

From September 2007 to September 2011, as noted above, some improvements in innocence protection, discovery, and appointment of counsel were made that responded to the 2007 Report.<sup>253</sup> Innocence protection legislation and discovery rule reforms were the product of present and former prosecutors sitting down with defense counsel and defender organizations informally to hammer out reforms.<sup>254</sup>

When it came to discussing the ABA's suggested revisions specific to the death penalty system, however, these same present and former prosecutors were unwilling to meet. Multiple entreaties to do so were made by myself, as chair of the Subcommittee, and by the chair of the Criminal Justice Committee, the OSBA Legislative Director, the OSBA President, and others, to no avail. The OSBA believed it was critical that it review and respond to the Assessment Team's 2007 Report, but felt it would not be practical or appropriate to go forward without prosecution representatives.<sup>255</sup> After over three years of fruitless entreaties, the OSBA took the matter to the Ohio Supreme Court.<sup>256</sup>

The newly elected Chief Justice O'Connor, a former county prosecutor and Lieutenant Governor overseeing the State Department of

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20.01(A); ABA GUIDELINES, *supra* note 178, Guideline 5.1, at 961. Section (B) of Rule 20.01 also adopted a requirement that lead counsel have prior experience as lead or co-counsel "for the defense" that is consistent with the Commentary to ABA Guideline 5.1. OHIO SUP. R. 20.01(A); ABA GUIDELINES, *supra* note 178, Guideline 5.1, at 964. That Commentary relates that a person who has not had experience in the defense of capital cases, such as a law professor or former prosecutor, may have adequate knowledge to well-represent a capitally charged person, but advises that the appointing authority must be satisfied that the client will be provided with the high degree of legal representation by the team as a whole before making such an appointment. ABA GUIDELINES, *supra* note 178, Guideline 5.1, at 964.

Given that "[l]ead counsel bears overall responsibility for the performance of the defense team and shall allocate, direct, and supervise the [team's] work" under the amendment found in Rule 20(III)(D), the requirement that lead counsel have prior experience as a defense counsel in capital cases was quite appropriate. OHIO SUP. R. 20(III)(D). That amendment to Rule 20(III)(D) regarding "Support Services," also consistent with ABA Guideline 4.1, The Defense Team and Supporting Services, should help assure the provision of necessary investigative and other support services. *See id.*; ABA GUIDELINES, *supra* note 178, Guideline 4.1, at 952. An amendment to Rule 20.04's provision Programs for Specialized Training specified the subject areas that will be covered in CLE training programs in the defense of capital cases that is identical to that found in ABA Guideline 8.1. OHIO SUP. R. 20.04(A)(1); ABA GUIDELINES, *supra* note 178, Guideline 8.1, at 976-77.

253. *See supra* Part III.G-H.

254. OHIO REV. CODE ANN. CRIM. R. 16, staff note (West 2014).

255. Judiciary Address, *supra* note 232 (discussing the Joint Task Force to Review the Administration of Ohio's Death Penalty being formed by the Supreme Court of Ohio and the Ohio Bar Association, which will be comprised of a number of individuals, including prosecutors).

256. *See id.*

Public Safety, told them that she too had concerns, and that the 2007 Report had “got me to thinking.”<sup>257</sup>

Chief Justice O’Connor may well have been thinking, too, of the views expressed by the senior judge on the Court, Paul E. Pfeifer. Justice Pfeifer helped write Ohio’s 1981 death penalty legislation while a state senator, but had evolved from enacting that law to becoming a justice in 1994, who, by 1999, was “wondering if [the first execution under the death penalty law] is a step that we really want to take.”<sup>258</sup> In 2011, Justice Pfeifer wrote an “opinion piece” urging that it was time to end capital punishment in Ohio, and so testified before the Ohio Legislature.<sup>259</sup>

Chief Justice O’Connor agreed that a review and response to the 2007 Report was overdue, and determined to create a joint task force, comprised of all the appropriate stakeholders, including prosecutors.<sup>260</sup> In September 2011, Chief Justice O’Connor announced the appointment of a Joint Task Force to Review the Administration of Ohio’s Death Penalty (“Joint Task Force”).<sup>261</sup> The Joint Task Force’s purpose was

to review the 2007 American Bar Association report titled “Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report” and offer an analysis of its findings; assess whether the death penalty in Ohio is administered in the most fair and judicious manner possible; and determine if the administrative and procedural mechanisms for the administration of the death penalty in Ohio are in proper form or in need of adjustment.<sup>262</sup>

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257. Joe Frolik, *Seeking Fairness on Death Row*, CLEVELAND PLAIN DEALER, Sept. 27, 2011, at A7.

258. Press Release, Paul E. Pfeifer, Justice, Ohio Supreme Court, Of Justice and Executions (Feb. 10, 1999) (on file with the *Hofstra Law Review*).

259. Frolik, *supra* note 257. In January 2011, Justice Pfeifer urged newly-elected Governor John Kasich “to empty death row.” Andrew Welsh-Huggins, *Ohio Justice Rejects Death Penalty Law He Wrote*, AKRON LEGAL NEWS, Feb. 21, 2012, at 1; Paul E. Pfeifer, *Retire Ohio’s Death Penalty: Paul E. Pfeifer*, CLEVELAND.COM (Jan. 26, 2011, 4:00 AM), [http://www.cleveland.com/opinion/index.ssf/2011/01/retire\\_ohios\\_death\\_penalty\\_pau.html](http://www.cleveland.com/opinion/index.ssf/2011/01/retire_ohios_death_penalty_pau.html). Justice Pfeifer also testified before the Ohio Legislature in December 2011 in favor of a bill to abolish the death penalty: “I have concluded that the death sentence makes no sense to me at this point when you can have life without the possibility of parole . . . I don’t see what society gains from that.” Welsh-Huggins, *supra*. Though he has upheld death sentences, he has dissented on some cases, urging that the sentence “should be ‘reserved for those committing what the state views as the most heinous of murders.’” *Id.* Though two county prosecutors have moved to recuse him from hearing death cases, Chief Justice O’Connor had said she was “comfortable Pfeifer is following the law and not showing bias.” *Id.*

260. Judiciary Address, *supra* note 232.

261. *Id.*

262. *Joint Task Force to Review the Administration of Ohio’s Death Penalty*, *supra* note 6.

The Joint Task Force was expressly barred from undertaking the questions of whether Ohio should abolish the death penalty or how executions should be carried out.<sup>263</sup>

The Joint Task Force's composition was balanced. Chaired by retired Court of Appeals Judge Brogan and Vice-Chaired by Common Pleas Judge McIntosh, there were six other judges,<sup>264</sup> four legislators, four prosecutors, including the State Attorney General's representative,<sup>265</sup> three defense counsel, including the State Public Defender,<sup>266</sup> two law professors,<sup>267</sup> one Sheriff, and one representative of the Department of Rehabilitation and Corrections.

Prosecutorial participation was uneven. One prosecutor regularly attended, but another came to only a few of the dozen-plus meetings of the Joint Task Force, and never attended the meetings of the Defense Services Committee of which he is a member,<sup>268</sup> nor participated in the Defense Services Committee's conference calls. At one point, the same prosecutor proffered his view that the Joint Task Force was simply there to abolish the death penalty and offered to join in such a motion, to which a few members chuckled and seconded the motion. Both the Chief Justice and the Chair were dismayed by this prosecutor's frequent absences, and it is possible this impaired the ability of the Joint Task Force to receive input and/or occasionally reach a greater consensus on matters before it.<sup>269</sup> So, while the Chief Justice's intervention in the earlier impasse and creation of the Joint Task Force is to be

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263. Judiciary Address, *supra* note 232.

264. *See id.* Two judges were from Cuyahoga County (Cleveland), one from Lucas (Toledo), and two from rural counties (Belmont and Champaign).

265. The other three were from Hamilton County (Cincinnati), Cuyahoga County (Cleveland), and Trumbull County (Warren).

266. A fourth individual, veteran civil litigator Samuel Porter of Porter, Wright law firm in Columbus, was Chair of the OPD Commission, and attended until his untimely death in May 2013. He was not replaced despite several requests to do so.

267. One of the professors, Phyllis Crocker of Cleveland Marshall Law School, was Chair of the Assessment Team. The other, Douglas Berman of Ohio State University Law School, writes a federal sentencing blog and textbook. The Author of this Article served as an informal resource person at the request of the Chair Judge Brogan, and was occasionally called upon to offer historical information or other assistance.

268. He sometimes simply sat in a room down the hall and read while the Defense Services Subcommittee met.

269. The Prosecutorial Issues Subcommittee submitted a number of proposals that would make it easier to obtain death sentences, and very few passed. *See* Alan Johnson, 'With These Rules, You Couldn't Execute Timothy McVeigh,' *Argues Task-Force Dissent*, COLUMBUS DISPATCH (Apr. 11, 2014, 5:25 AM), <http://www.dispatch.com/content/stories/local/2014/04/10/death-penalty-task-force.html>. After this, there seemed to be a drop in attendance.

highly commended,<sup>270</sup> it did not fully solve the problem of prosecutorial unwillingness or ambivalence about participating.<sup>271</sup>

The Joint Task Force met from early 2012 to spring 2014, and issued its Final Report and Recommendations in April 2014.<sup>272</sup>

Amongst its work, the Joint Task Force undertook the responsibility to respond to the Assessment Team's three concerns relating to counsel and support services. Early on, the Joint Task Force unanimously approved a measure that the Ohio Supreme Court should take the lead to adopt a uniform process for the selection of indigent counsel in capital cases, including the establishment of a uniform fee and expense schedule, so that appointed counsel would be paid equally throughout the state, regardless of the county in which the crime occurred.<sup>273</sup> Another unanimous measure urged enacting legislation to

270. Crocker, *supra* note 232, at 80-90.

271. Indeed, at the final meeting of the Joint Task Force on April 10, 2014, another prosecutor conveyed that some prosecutors agreed to join the Joint Task Force only when they were promised a minority or dissenting report would be possible, and one was filed. *Id.* at 87 n.41.

The county prosecutors in attendance were most adamant in their opposition to a proposed recommendation that would call for county prosecutors to submit intended capital charges to a review and approval process in the Attorney General's Office. The Joint Task Force ultimately approved the measure as a means of reducing geographical disparity in the application of Ohio's death penalty. *See, e.g.,* Robert Higgs, *Task Force Suggests Panel to Screen Death Penalty Cases Review of Decisions by Prosecutors Would Aim to End Disparities*, CLEVELAND PLAIN DEALER, June 15, 2013, at A1. On the other hand, a month later, the newly-elected Cuyahoga County (Cleveland) Prosecutor decided to conduct a pre-execution review of an earlier imposed county death sentence, and advised the Ohio Parole Board that his office supported clemency for inmate Billy Slagle because it was unlikely the case would result in a death sentence today. Associated Press, *Prosecutor: Condemned Ohio Man Should Be Spared*, TOLEDO BLADE (July 4, 2013), <http://www.toledoblade.com/State/2013/07/03/Prosecutor-Condemned-Ohio-man-should-be-spared.html>. The Ohio Parole Board was divided but denied clemency, as did the Governor. Vicki Adams Werneke, *Loss of Hope*, NAT'L COALITION TO ABOLISH DEATH PENALTY BLOG (Aug. 6, 2013), <http://www.ncadp.org/blog/entry/loss-of-hope>. However, the prosecutor's office then contacted defense counsel with the news that their file apparently revealed that a plea to life had been offered and never conveyed to the client pre-trial, and that the prosecutor's office would be willing to support a stay of execution on this basis; tragically, Slagle committed suicide in his cell before his lawyers could advise him of this development. *Id.*

272. *See generally* JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY: FINAL REPORT & RECOMMENDATIONS (2014) [hereinafter FINAL REPORT], available at <http://www.supremecourtofohio.gov/Boards/deathPenalty/resources/finalReport.pdf>.

273. Ohio's eighty-eight counties continue to have very diverse and inadequate fee schedules; little improvement has occurred since 2002. When the Joint Task Force began meeting in 2012, Cuyahoga County (Cleveland) paid a maximum \$25,000 for two attorneys (\$12,500 for each counsel) in capital trials, and just \$5000 in capital appeals. CUYAHOGA COUNTY COMMON PLEAS COURT LOCAL RULES R. 33 (2014), available at <http://cp.cuyahogacounty.us/internet/Rules/33.pdf>. Such fee caps are inconsistent with ABA Guideline 9.1(B)(1) which states: "Flat fees, caps on compensation and lump-sum contracts are improper in death penalty cases." ABA GUIDELINES, *supra* note 178, Guideline 9.1, at 981. A proposal to increase the fee cap to \$60,000 between two lawyers, with an hourly rate of \$60 in court and \$50 out of court for trials, and to \$15,000 for two lawyers for appeals with a rate of \$95 an hour was passed in 2014. CUYAHOGA COUNTY COMMON



fund a Capital Litigation Fund to pay all fees and expenses of the prosecutor and defense at all levels of capital litigation.<sup>274</sup>

The Joint Task Force also unanimously approved a measure urging that the best-qualified counsel be appointed, leaving open whether the present process of appointment by the judiciary would be continued.<sup>275</sup> A divided vote urged that the present judicial appointment be continued, a position at odds with the ABA Guidelines expectation of an independent appointing body.<sup>276</sup>

To gather needed information and insight, the Joint Task Force invited Robin Maher, Director of the ABA Death Penalty Representation Project (“Project”), to appear before it. Maher delivered a most helpful summary of the ABA Guidelines at an April 2013 meeting.<sup>277</sup> She discussed the acceptance of the ABA Guidelines in the courts,<sup>278</sup> in

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PLEAS COURT LOCAL RULES R. 33. But, even these fees are insufficient. As Professor Crocker, Professor Michael Benza at Case Western Reserve University School of Law, and this Author wrote to the Cuyahoga County Commissioner collecting comments on this proposal: “The federal government pays private capital counsel \$178 per hour without a cap.” Motion to Remand to Eighth Circuit Court of Appeals at 9, *Ohio v. Sowell*, No. 2012-0153 (Ohio May 11, 2012). The previous federal government amount of \$125 per hour was “universally recognized as a below-market rate for criminal defense lawyers.” See *United States v. Konrad*, 730 F.3d 343, 351 (3d Cir. 2013). The present hourly rate and cap do not provide a level of compensation that will allow lawyers to expend the necessary time and resources to the defense of the case without suffering financial losses. See, e.g., *id.* Even more disturbing, the present fee schedules pay only \$170 for handling a post-conviction proceeding that included an evidentiary hearing. CUYAHOGA COUNTY COMMON PLEAS COURT LOCAL RULES R. 33. Though the OPD Office generally litigates capital post-conviction cases, when conflicts arise, they must be handled by a qualified private bar appointed counsel. See FINAL REPORT, *supra* note 272, at 9. A maximum fee of \$170 is insulting and amounts to a taking of services. It utterly ignores the (hundreds to thousands of hours of) time and expense required to properly represent a defendant in post-conviction, let alone the fixed costs of operating a law practice including rent, support staff, online legal research, and other electronic services costs. In addition, in light of its recent decisions, a very real possibility exists that the U.S. Supreme Court will soon find a constitutional right to effective assistance of post-conviction counsel. See *Trevino v. Thaler*, 133 S. Ct. 1911, 1915 (2013) (applying *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)) to a Texas capital case); *Martinez*, 132 S. Ct. at 1315 (recognizing denial of effective assistance of post-conviction counsel in non-capital cases could excuse a procedural default and allow a federal court to reach the merits of a constitutional claim). This makes the delivery of high-quality representation in post-conviction proceedings all the more important if we are to avoid expensive and time-consuming remands and reversals. As a matter of equity or constitutional mandate, post-conviction counsel should be fairly paid for the substantial and necessary work that they do. See *Shank*, *supra* note 198, at 379.

274. FINAL REPORT, *supra* note 272, at 8.

275. *Id.* at 22.

276. *Id.* at 21. *But see* ABA GUIDELINES, *supra* note 178, Guideline 3.1, at 944.

277. *Project News & Highlights*, A.B.A. DEATH PENALTY REPRESENTATION PROJECT, [http://www.americanbar.org/publications/project\\_press/2013/year-end/2013-project-news.html](http://www.americanbar.org/publications/project_press/2013/year-end/2013-project-news.html) (last visited Apr. 12, 2015).

278. She highlighted the Sixth Circuit decision in an Ohio case, *Hamblin v. Mitchell*, using the ABA Guidelines as the gauge of performance under prevailing professional norms. 354 F.3d 482, 487-88 (6th Cir. 2004).

Ohio's Rule 20, and the Project's ongoing efforts at adoption among the states and internationally, including in Chinese provinces.<sup>279</sup> In the months after her visit, further discussion ensued regarding how to ensure quality representation, adequate monitoring of counsel, adequate and prompt review of judicial decision-making regarding investigative and expert services, and reduce costly retrials. Maher's presentation and these discussions led to a shift in perspective within the Joint Task Force.

After her presentation and this discussion, the Joint Task Force approved 13-3 the appointment of a statewide defender office to handle all indigent capital cases at all levels (except instances when conflict counsel was needed).<sup>280</sup>

In August 2013, the Joint Task Force voted 12-2 that the ABA Guidelines for Appointment and Standards of Performance should be adopted in Ohio.<sup>281</sup> The two negative votes came from prosecutors who made clear they supported the ABA Guidelines, but were concerned about how the measures would be enforced.<sup>282</sup> The Joint Task Force also adopted the ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("Supplementary Guidelines") by a 13-4 vote, with the understanding that this was not meant to alter the standard adopted in *Strickland*.<sup>283</sup> Other recommendations provide additional, and perhaps alternative, means of enhancing defense services in Ohio.<sup>284</sup> Costs and

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279. Robin M. Maher, Director, Am. Bar Ass'n Death Penalty Representation Project, Presentation on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Apr. 18, 2013), available at [supremecourtsohio.gov/Boards/deathPenalty/minutes/2013/041813.pdf](http://supremecourtsohio.gov/Boards/deathPenalty/minutes/2013/041813.pdf).

280. FINAL REPORT, *supra* note 272, at 9.

281. *Id.* at 7.

282. See JOE DETERS ET AL., DISSENTING REPORT FROM MEMBERS OF THE JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY 35-37 (2014), available at <http://www.sc.ohio.gov/Boards/deathPenalty/resources/dissentingReport.pdf>.

283. FINAL REPORT, *supra* note 272, at 8. A Judicial Role Subcommittee recommendation was also passed 16-0 that provided if the ABA Guidelines and Supplementary Guidelines were adopted, it would be necessary to determine whether these are merely guides or to be applied as standards to be monitored and enforced by the trial court; in either event, the trial court shall take appropriate steps on the record to monitor and/or enforce a checklist of guidelines, and how to do so shall be addressed by the Supreme Court of Ohio and the Ohio Judicial College in the Capital Crimes Seminar. *Id.*

284. In addition to recommending the adoption of the 2003 ABA Guidelines, and the Supplementary Guidelines, the Joint Task Force has responded to the Assessment Team's concern regarding "Inadequate Qualification Standards for Defense Counsel" by recommending Ohio do the following (many of which fall within the umbrella of the ABA Guidelines, but were earlier specific recommendations): expand and enhance training requirements to all participating legal counsel (appointed and retained) and to all Ohio judges at all levels, which could be waived in exceptional circumstances with the consent of the Ohio Supreme Court if their qualifications otherwise exceed

resources entered into many of the discussions of the Joint Task Force, as could be expected.<sup>285</sup>

#### IV. CONCLUSION

The Joint Task Force's recommendation that Ohio adopt, in full, the ABA Guidelines is a near culmination of years of cooperative interaction between the ABA, and earlier, the NLADA, and those bodies and individuals concerned with improving Ohio's justice system.<sup>286</sup> This could not have been done without the concerted and committed efforts of those in each of these constituencies over the decades. Though waxing and waning at times, the courts, bar associations, and many concerned individuals kept their eyes on the prize.

The lessons of experience in Ohio suggest that two equally powerful motivators for change are at work here: saving resources by avoiding costly retrials, and avoiding conviction of the innocent and/or execution of the undeserving. It remains to be seen whether the measures recommended to the Joint Task Force will come to fruition. The voices of present and former judges, legislators, and of our former attorney general will likely be the most powerful in this endeavor. But, other stakeholders need to be brought into the fold, as well. I hope for the best—if not abolition, some needed improvements in a still rather broken system.

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the standards required by Rule 65; and amend Rule 20 to: increase (double) CLE hours for defense counsel, and require within this a minimum two hours CLE each on forensics, mental health, and mitigation every two years; monitor appointed counsel on a monthly basis; investigate and maintain records concerning whether counsel seeking (re-)certification have been found ineffective and take appropriate corrective action; adopt qualifications for post-conviction counsel that include three years of civil or criminal or criminal appellate experience (unless employed by an institutional office where there is supervision by qualified counsel); and specialized training as set out above. *Id.* at 12, 21, 45, 47, 49.

285. Though the Joint Task Force did not discuss whether death sentencing systems were more costly than life imprisonment without parole and should be discontinued because of cost, as this was deemed to be beyond the scope of the Joint Task Force, such discussion has occurred outside of the Joint Task Force. *See, e.g.,* Lynd, *supra* note 229, at 40-41.

286. *See supra* Part III.

## ADDENDUM: OHIO DEVELOPMENTS—MAY 2014 TO MARCH 2015

Since I spoke at the Symposium in October 2013 and drafted this Article in April 2014, Ohio has made progress in some areas, but also inexplicably regressed in others.

### A.I. RELEASE OF THE TASK FORCE REPORT AND OF INNOCENT INMATES

The Joint Task Force released its Final Report on May 21, 2014.<sup>287</sup> Chief Justice O'Connor thanked the Joint Task Force for its work, and commented that “no one can disagree that as long as Ohio does have a death penalty we should have the fairest and most reliable system possible.”<sup>288</sup> The Chief Justice’s concern for the reliability of Ohio’s death penalty system was apt, considering that five men sentenced to death since 1977 had been exonerated at the time of her statement,<sup>289</sup> and two more were added in the months that followed, one of whom served more time behind bars—thirty-nine years—than any other exoneree.<sup>290</sup>

The Chief Justice’s words, “I will study this report very closely, and I know that the governor and the members of the General Assembly will also,”<sup>291</sup> were welcome.

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287. Chris Davey, *Death Penalty Task Force Releases Final Report*, CT. NEWS OHIO (May 21, 2014), [http://www.courtnewsOhio.gov/happening/2014/deathPenaltyTFReport\\_052114.asp#.VQti8dLF91](http://www.courtnewsOhio.gov/happening/2014/deathPenaltyTFReport_052114.asp#.VQti8dLF91).

288. *Id.*

289. Rachel Dissell, *Who Are Ohio's Exonerated? 42 Have Been Freed After Wrongful Convictions in the Past 25 Years*, CLEVELAND PLAIN DEALER, Nov. 22, 2014, at A7 (displaying a chart referencing National Registry of Exonerations data showing five death sentenced inmates, and over thirty non-capitally sentenced inmates, have been exonerated since 1977). Ricky Jackson and Wiley Bridgeman, both sentenced to death, have now been added to the National Registry list. *Id.*; see *Wiley Bridgeman*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4554> (last visited Apr. 12, 2015).

290. John Caniglia, *Freedom 'Finally! Finally!' Exonerated Friends Leave Prison After More Than 39 Years Behind Bars*, CLEVELAND PLAIN DEALER, Nov. 22, 2014, at A1 (relating release of co-defendants Ricky Jackson and Wiley Bridgeman); see also John Caniglia, *Inmate of 39 Years to Go Free After Witness Recants*, CLEVELAND PLAIN DEALER, Nov. 19, 2014, at A1 (noting that, the witness, a twelve-year-old boy, had wished to help the police though he had seen nothing, police fed him information, and when he wished to recant, police told him they would put his parents on trial for perjury, so he had waited decades to tell the authorities); James F. McCarthy, *Man Held 39 Years Is Granted \$1 Million*, CLEVELAND PLAIN DEALER, Mar. 20, 2015, at A1. More funds will be awarded to Ricky Jackson as the case proceeds under Ohio’s wrongful conviction compensation law. McCarthy, *supra*.

291. Davey, *supra* note 287. OSBA President Jonathan Hollingsworth also thanked the Joint Task Force, asserting “there is much work still to be done,” and that the OSBA would be “convening some of our committees and others with expertise in the area of criminal justice for that review” of the Report. *Id.*

## A.II. PROGRESS IN THE OHIO LEGISLATURE

The Ohio Legislature was the first to step in to make positive changes, enacting some Joint Task Force recommendations. At the close of the 130th General Assembly, within a very disturbing bill guarding the identity of those providing drugs to be used in Ohio executions and amidst a delay in executions until 2016,<sup>292</sup> three Joint Task Force recommendations were adopted. Henceforth, written instructions will be provided before oral instructions are delivered, and will be available to the capital jury during deliberations,<sup>293</sup> and, post-conviction counsel will have twice the amount of time to prepare and file their petitions for post-conviction relief.<sup>294</sup>

Most pertinent to this Article was the legislature giving the Ohio Supreme Court authority to set uniform fees to be paid to counsel in capital cases: amounts of “compensation and expenses,” by case or on an hourly basis, that the boards of county commissioners must approve and pay.<sup>295</sup> Hopefully, the fees and expenses set by the Ohio Supreme Court

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292. The bill can be accessed at [http://archives.legislature.state.oh.us/bills.cfm?ID=130\\_HB\\_663\\_EN](http://archives.legislature.state.oh.us/bills.cfm?ID=130_HB_663_EN). The secrecy provisions were urged by the Ohio Attorney General, as four executions in Ohio have brought litigation over questions of cruelty, repeated changes in the drugs used and/or execution protocols, and questions which led to federal court orders, and then to Governor John Kasich’s granting reprieves, creating a current delay on executions until 2016. See Robert Hines, *Ohio Alters Lethal Injection Protocol, Delaying Execution*, CLEVELAND PLAIN DEALER, Jan. 9, 2015, at A3; Andrew Welsh-Huggins, *11 Ohio Executions – Including Ronald Phillips – Rescheduled Over Next Two Years*, (Sept. 5, 2014), <http://www.ohio.com/news/break-news/11-ohio-executions-including-akron-ronald-phillips-rescheduled-over-next-2-years-1.520185>. A listing of the stayed executions and the new execution dates set beginning January 21, 2016 can be found at <http://www.deathpenaltyinfo.org/upcoming-executions#2016>. The secrecy law was challenged in federal court, and has been upheld at the district court level, but is on appeal as of this writing. Jeremy Petzer, *Ohio Death Row Inmates Appeal Lawsuit Challenging New Execution Secrecy Law*, CLEVELAND PLAIN DEALER (Mar. 16, 2015), [http://www.cleveland.com/open/index.ssf/2015/03/ohio\\_death-row\\_inmates\\_appeal.html](http://www.cleveland.com/open/index.ssf/2015/03/ohio_death-row_inmates_appeal.html). It is hoped that this delay in executions will help to focus attention on the Joint Task Force’s recommendations.

293. H.B. 663, 130th Gen. Assemb., 1st Reg. Sess. (Ohio 2014) (amending Revised Code 2945.10, adding section (E)(1), addressing Joint Task Force Recommendation number 46, appearing in the Joint Task Force Report).

294. *Id.* (amending Revised Code 2953.21(A)(2), and allowing 365 days, thus enacting Recommendation number 24, appearing in the Joint Task Force Report).

This will greatly assist post-conviction counsel as considerable factual investigation is necessary, and the previous six-month period created a risk that issues outside the record, which could not have been raised at trial or on appeal, such as the failure to disclose exculpatory evidence or ineffective assistance of counsel, may not be fully investigated and properly raised.

295. *Id.* (amending Revised Codes sections 120.33 and 2945.51, addressing Recommendation number 53, appearing in the Joint Task Force Report). The Recommendation actually said: “The Supreme Court should take the lead to adopt a uniform process for the selection of indigent counsel in capital cases, including the establishment of a uniform fee and expense schedule . . . .” RECOMMENDATIONS OF THE JOINT DEATH PENALTY TASK FORCE, *available at* <http://www.ohiojudges.org/Document.aspx?DocGuid=43443c40-7c64-4c48-8907-e801f3d0896d>.

in conjunction with the Commission will not only equalize, but significantly raise the compensation provided to Ohio counsel, their experts, and investigators.<sup>296</sup> The recurring underfunding of the system must be turned around.

Several legislators are currently working to prepare four bills attending to another fourteen of the fifty-six recommendations; one state Senator describing these as “the serious objections” to the present capital litigation system.<sup>297</sup> These include recommendations foreclosing execution of the severely mentally disabled (Recommendation 8), foreclosing convictions based solely on uncorroborated jailhouse snitch testimony (Recommendation 18), establishing a statewide death penalty fund in the OPD Office (Recommendations 13-15 in some respects), and certification of crime labs and coroner’s offices (Recommendations 2-4 in some respects).<sup>298</sup>

To enhance the likelihood of legislative and judicial action adopting the Joint Task Force’s recommendations, public education about the recommendations is ongoing through advocacy groups,<sup>299</sup> talks presented by Joint Task Force members, and news articles.<sup>300</sup>

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Discussions indicated they expected the State Public Defender Commission, which provides reimbursement to the counties under Title 120, would be involved in this process, and this is expected. Two bills—H.B. 186 and S.B. 139—that would have the Commission set statewide schedules of hourly rates and per case rates, and ordered state reimbursement to the counties of 100% of the costs in non-capital cases and of 50% of the costs in capital cases (as opposed to the 40% reimbursement in both now actually provided), failed in in the 130th General Assembly, but may well be re-considered.

296. The great need to equalize and raise counsel fees was earlier identified in the Reports of the Rule 65 Committee on Appointment of Counsel, *see supra* note 190, the OSBA, *see supra* notes 202-09, and the ABA, *see supra* note 229.

297. Alan Johnson & Mike Wagner, *Questions Raised About the Death Penalty in Ohio*, COLUMBUS DISPATCH (Mar. 8, 2015), <http://www.dispatch.com/content/stories/local/2015/03/08/death-or-life.html> (quoting Joint Task Force member and Republican Senator Bill Seitz).

298. *See id.* *See generally* FINAL REPORT, *supra* note 272.

299. A summary of the Recommendations and links to the Joint Task Force Report appear at the website of the Ohioans to Stop Executions (“OTSE”) group, which can be accessed at <http://www.otse.org/the-death-penalty-in-ohio/task-force-recommendations>.

300. The OTSE website also contains several videos of talks given by Joint Task Force Members, such as Common Pleas Court Judges Michael Donnelly and John Russo, *see, e.g., Recommendations from the Joint Task Force on the Death Penalty*, OHIOANS TO STOP EXECUTIONS (Feb. 13, 2015), <http://www.otse.org/event/recommendations-joint-task-force-death-penalty>, and Chair retired Court of Appeals Judge James Brogan, *see, e.g., Voice of Experience: Springfield*, OHIOANS TO STOP EXECUTIONS (Oct. 2, 2014), <http://www.otse.org/event/2343-2>. State Public Defender and Task Force member Tim Young participated in a panel discussion with Terry Collins, a former director of the Ohio Department of Rehabilitation and Corrections, who oversaw the execution of thirty-three Ohio inmates and now opposes the death penalty. Gary Hufferberger, *Fairness of Death Penalty Challenged, Panelists Urge Changes to Way Capital Punishment Is Applied*, WILMINGTON NEWS J. (Oct. 2, 2014), [http://www.wnewsj.com/news/home\\_top-news/150029478/Fairness-of-death-penalty-challenged](http://www.wnewsj.com/news/home_top-news/150029478/Fairness-of-death-penalty-challenged). Witnesses before the Joint Task Force have also made presentations to church groups, and/or written opinion pieces. *See, e.g.,* Petro & Petro,

## A.III. THE COURT INEXPLICABLY REGRESSES IN PART

The Ohio Supreme Court, meanwhile, has adopted a new version of Rule 20 (formerly Rule 65), making some good, but other fairly significant and disappointing changes, without public comment or much notice to the public of these adverse changes. One change, in particular, diminishes Ohio's regard for the ABA Guidelines we honored in 2013.

While the Joint Task Force undertook its study, the Rule 20 Committee had been working for several years on proposed changes to Rule 20, and the Ohio Supreme Court published these for public comment on June 9, 2014, with the notice that these were not related to the recent Rule 20 recommendations contained in the final report issued by the Joint Task Force.<sup>301</sup> The proposals made by the Rule 20 Committee would: add or change differing look-back periods on lead counsel and co-counsel qualifications arising from defense experience in jury trials; take away a lead counsel qualification that permitted appointment based on experience in ten or more criminal or civil jury trials, at least three of which were felony jury trials; reestablish the Rule 20 Committee as the Commission on Appointment of Counsel in Capital Cases and repeal Superintendence Rule 20's provisions; and relocate these into a new separate set of Rules for Appointment of Counsel in Capital Cases.<sup>302</sup> It was expected these would be adopted with little, if any, opposition.

But in the months that followed after the thirty-day public comment period, the court undertook additional changes, declining to put these changes out for public comment when requested to do so by the Rule 20 Committee,<sup>303</sup> and simply adopted the Rules for Appointment of Counsel in Capital Cases<sup>304</sup> ("2015 Rules") with several disturbing

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*supra* note 235. See generally Johnson and Wagner, *supra* note 297. Public Defender Tim Young responded to the change in lethal injection drugs and the new secrecy law, stating: "Ohio needs to take a comprehensive look at its death penalty system and execution process. . . . Rather than continuing to patch and trying to hide a flawed, decades-old system, it's time for Ohio to carefully examine the costs, benefits, structure and practices of capital punishment." Hines, *supra* note 292.

301. Staff Report, *Supreme Court Seeks Public Comment on Amendments to Appoint Capital Case Counsel for Indigent Defendants*, CT. NEWS OHIO (June 9, 2014), [http://www.courtnewsOhio.gov/happening/2014/ruleAmendCapitalCase\\_060914.asp#.VSl05y6YG5J](http://www.courtnewsOhio.gov/happening/2014/ruleAmendCapitalCase_060914.asp#.VSl05y6YG5J). For the proposed Rules, see *id.*

302. Staff Report, *supra* note 301. Other changes were that two appointments previously made by the Ohio Supreme Court to the Committee now become an appointment of a judge by the Ohio Common Pleas Judges Association, and of a criminal defense lawyer by the Ohio Metropolitan Bar Association Consortium.

303. Interview with Joann Sahl, Chair, Rule 20 Comm. (Mar. 2015).

304. RULES FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES (effective date February 1, 2015), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/capitalCases/capitalCases.pdf>.

changes that were not clearly acknowledged in the Ohio Supreme Court's press release/staff report of February 2, 2015.<sup>305</sup>

Not all of the Ohio Supreme Court's in-house changes were disturbing. One change of a better nature was to allow a capital defendant who became indigent after having retained counsel to request appointment of a co-counsel who would meet the 2015 Rules' requirements.<sup>306</sup> Previous Rule 65 and Rule 20 had precluded appointing a second counsel if a defendant had already retained counsel, leaving those few who did retain counsel short a lawyer.<sup>307</sup>

The first concerning change was to remove the requirement that lead counsel have previous experience as *defense* counsel in at least one prior capital case. The Rule 20 Committee had not proposed this change; as of 2010, Rule 20.01(B)(4) had required that lead counsel have experience as lead counsel "*for the defense* in the jury trial of at least one capital case," or experience as co-counsel "*for the defense* in the jury trial of at least two capital cases."<sup>308</sup> The 2015 Rules eliminate the requirement that this prior experience be as defense counsel, and just requires "experience as trial [lead or co-] counsel."<sup>309</sup> While this may be consistent with the ABA Guidelines, which allot for the possible appointment of a lawyer whose previous experience was as a prosecutor,<sup>310</sup> this is a surprising change for Ohio. Though specialized training in the defense of capital cases in the past two years is required before appointment,<sup>311</sup> and training programs cannot be accredited if they are offered to full-time prosecuting attorneys,<sup>312</sup> the Commission is still authorized to certify an attorney who does not meet the training requirement where exceptional circumstances are present.<sup>313</sup> One would hope the Commission would be sensitive to the perceptions of a capitally charged defendant and the public, and not approve a prosecutor who is switching sides without specialized training in the *defense* of capital cases.

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305. Staff Report, *Supreme Court Adopts Amendments to Appoint Capital Case Counsel for Indigent Defendants*, CT. NEWS OHIO (Feb. 2, 2015), [http://courtnewsohio.gov/happening/2015/capCaseCounsel\\_020215.asp#.VSBKFrHD9Qs](http://courtnewsohio.gov/happening/2015/capCaseCounsel_020215.asp#.VSBKFrHD9Qs).

306. APPT. COUN. R. 5.04 (replacing Rule 20 I (C), which had been restated in the initial version of proposed 5.04 released for comment).

307. Rule 65 I (C) (1995); *see supra* note 191 (discussing Rule 20).

308. Rule 20.01(B)(4) (effective March 1, 2010) (emphasis added).

309. APPT. COUN. R. 3.02 (B)(2).

310. ABA GUIDELINES, *supra* note 178, Commentary to Guideline 5.1, at 964; *see also* discussion *supra* note 252.

311. APPT. COUN. R. 4.01.

312. *Id.* 4.02(C).

313. *Id.* 3.05.



A second apparent change to the qualifications for counsel is quite unsettling from the perspective of Ohio past practice—that the prior experience of lead counsel in capital cases, or of co-counsel in aggravated murder or murder cases, no longer needs to be in *jury* trials.<sup>314</sup> From the outset of Rule 65, if one was applying for lead counsel certification, one had to have either experience as lead counsel in the *jury* trial of at least one capital case, or alternatively, have experience as co-counsel in the trial of at least two capital cases.<sup>315</sup> In 2010, Rule 20 was amended to require that lead counsel must have prior capital jury trial experience in both settings: as lead counsel in one, or as co-counsel in two.<sup>316</sup> The 2015 Rules remove this requirement of prior capital jury trial experience altogether.<sup>317</sup> They likewise remove the requirement created in 2010 that if one was seeking co-counsel certification on the basis of prior experience in an aggravated murder or murder trial, this needed to be in a jury trial.<sup>318</sup> So now, it is quite possible that two attorneys will represent a capital defendant, neither of whom has any prior experience whatsoever in the unique responsibilities of Witherspooning/death-qualifying a jury or presenting mitigating evidence and arguing to a jury in a sentencing phase.<sup>319</sup> This seems to be a step backward; a capital defendant's life should not be so risked.<sup>320</sup>

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314. *See id.* 3.02 (B)(2), 3.03 (B)(2)(a).

315. Rule 65 I (A)(2); Rule 20 II (A)(d).

316. Rule 20.01(B)(4) (effective 2010).

317. APPT. COUN. R. 3.02(B)(2).

318. Rule 20.01(C)(4)(a).

319. These are unique to capital jury trials, skills distinguishable from the general qualifications related in APPT. COUN. R. 3.01(B)(9)–(10). Witherspooning and reverse-Witherspooning are critical tools in *voir dire* to identify those prospective jurors who are substantially impaired in their ability to follow the law to consider recommending either a death sentence or a life sentence in the penalty phase. *See Morgan v. Illinois*, 504 U.S. 719, 728-36 (1992); *Witt v. Wainwright*, 470 U.S. 1039, 1039 (1985).

320. It may be possible to argue that jury trials are still required, as APPT. COUN. R. 1.06 defines “trial,” for purposes of the qualification provisions, as meaning “a case that has concluded with a judgment of acquittal . . . or submission to a jury for decision and verdict.” APPT. COUN. R. 1.06 (emphasis added). That would be a welcome conclusion, but as the qualification provisions at various other times refer to “in the jury trial of” or “jury trials,” *see id.* 3.02(B)(3), 3.03(B)(2), that interpretation will likely be opposed.

It should be noted that one other change in the new rules that was not an in-house Ohio Supreme Court change is that experience in *civil* jury trials or litigation is no longer considered relevant. *Compare* APPT. COUN. R. 3.02 (making it clear that experience is no longer considered relevant), *and id.* 3.03 (making it clear that experience is no longer considered relevant), *with* Rule 20.01(B) (requiring experience), *and* Rule 20.01(C) (requiring experience). Though the Commentary to ABA Guideline 5.1 alludes to the possible usefulness of civil trial experience, ABA GUIDELINES, *supra* note 178, Commentary to Guideline 5.1, at 964, the Rule 20 Committee had recommended this change, based on its experience in Ohio.

Finally, the change most directly pertinent to this Symposium is the Ohio Supreme Court's decision to lessen the significance of counsel's compliance with the ABA Guidelines. Previous Rule 20.03 provided: "The appointing court shall monitor the performance of all defense counsel to ensure that the client is receiving representation that is consistent with the ABA's 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' and referred to herein as 'high quality representation.'"<sup>321</sup>

That provision mandating compliance or consistency with the ABA Guidelines is replaced by the following rather discretionary standard in the 2015 Rule: "A court that has appointed an attorney . . . shall monitor the performance of the attorney to ensure the defendant is receiving high quality representation. In determining 'high quality representation,' the court may consider the ABA's 'Guidelines for the Appointment and Performance of Defense Counsel.'"<sup>322</sup>

It is true that the general qualifications for appointment still require that counsel have a "demonstrated commitment to providing high quality representation,"<sup>323</sup> and that the general statement of qualifications for appointment is identical to that found in the ABA Guidelines. It is also true that the Commission on Appointment of Counsel in Capital Cases ("Commission on Appointment of Counsel") is given the authority to "promulgate best practices for the representation of indigent defendants in capital cases and disseminate those best practices appropriately,"<sup>324</sup> and that it is anticipated that the Commission on Appointment of Counsel will take steps to adopt the ABA Guidelines for performance, which counsel will receive specialized training on.<sup>325</sup> It is also true that the ABA Guidelines are still looked to by the courts in evaluating effective representation.<sup>326</sup> But still, relieving Ohio courts from ascribing to, or even giving great weight to, the ABA Guidelines when evaluating the performance of counsel, is a step backward.

As the OPD recently stated in a conversation, and I fully agree: "It is disappointing that Ohio, which has so long been lauded for first establishing qualifications for capital counsel, would be instead the first to step backwards." Notwithstanding Chief Justice Moyer's proud pronouncement that the crafting of 1987's Rule 65 "demonstrates the

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321. Rule 20.03(A).

322. APPT. COUN. R. 6.01.

323. *Id.* 3.01(B)(2).

324. *Id.* 2.02.

325. *Id.* 4.02(A)(13).

326. See *supra* note 278. Russell Stetler and others at this Symposium have also commented on "Defining a National Standard: Assisting the Judiciary and Ensuring Justice."

[Ohio] Supreme Court's commitment to maintaining and enhancing the skills of lawyers,"<sup>327</sup> the crafting of the 2015 Rules moves away from maintaining and enhancing skills, and lessens that commitment.

Had these *sua sponte* changes been put forth for public comments, as requested, no doubt many others would have shared this view with the Ohio Supreme Court, and perhaps, these changes would not have been promulgated. But, the Ohio Supreme Court did not seek input beyond informal discussions, and these discussions apparently failed to convince them to maintain Ohio's standing and commitment.

There are reasons to hope that the adverse changes brought about in the 2015 Rules will be short-lived. First, and interestingly, no mention of these changes expressly appears in the Ohio Supreme Court's pronouncement of the new 2015 Rules, while other changes are quite explicitly described.<sup>328</sup> Second, and most importantly, the Court's pronouncement contained this clear disclaimer: "The rule amendments adopted represent the culmination of several years worth of work and are not related to the recent Rule 20 recommendations contained in the final report issued by the Joint Task Force to Review the Administration of Ohio's Death Penalty."<sup>329</sup>

The Joint Task Force Report, of course, recommends outright adoption of the ABA Guidelines.<sup>330</sup> Chief Justice O'Connor has pledged to "study the report very closely,"<sup>331</sup> and we should expect the Associate Justices to do likewise.

So, while Ohio has taken some recent steps backward, one hopes these will soon be overcome by a giant step forward, adopting in full the ABA Guidelines.

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327. See *supra* note 152.

328. See Staff Report, *supra* note 305.

329. *Id.*

330. See *supra* notes 281-83.

331. See *supra* note 291.