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Emily Olson-Gault

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RECLAIMING *VAN HOOK*: USING THE ABA'S *GUIDELINES* AND RESOURCES TO ESTABLISH PREVAILING PROFESSIONAL NORMS

Emily Olson-Gault*

I. INTRODUCTION

The *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“*ABA Guidelines*” or “*Guidelines*”) have been widely recognized as setting forth the standard of care for defense counsel in capital cases.¹ The 2003 *Guidelines*² and their 1989 counterpart³ have been cited favorably by courts in more than 350 reported opinions, adopted in substantive part by at least ten capital jurisdictions⁴ and numerous defender offices and bar associations, and

* Emily Olson-Gault is Director and Chief Counsel of the American Bar Association Death Penalty Representation Project. The views expressed in this Article are her own.

1. For discussion of the broad acceptance and importance of the Guidelines, see, for example, Russell Stetler & Aurelie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731 (2015); Robin M. Maher, *Improving State Capital Counsel Systems Through Use of the ABA Guidelines*, 42 HOFSTRA L. REV. 419, 420-23 (2013); Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 635-36 (2013).

2. Am. Bar Ass’n, *ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA Guidelines*]. This edition is also available at <https://ambar.org/2003guidelines>. Unless otherwise specified, use of “the Guidelines” in this Article is a reference to the 1989 and 2003 versions of the Guidelines collectively rather than a specific reference to either version.

3. AM. BAR ASS’N GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 1989), <https://ambar.org/1989guidelines>.

4. Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Montana, Nevada, New Hampshire, and Oklahoma all have rules and/or statutes for capital defense counsel appointment and performance that mirror or directly reference the ABA Guidelines. See ABA Death Penalty Representation Project, *Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, AM. BAR ASS’N, https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/ImplementationFactSheetJul2018.pdf (last updated July 2018); see also Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized*

are an integral part of virtually all capital defender training programs.⁵ They have become a critical tool for appellate and post-conviction counsel attempting to meet the first prong of the *Strickland* standard⁶ by establishing that prior counsel's performance was constitutionally deficient because it fell below prevailing professional norms.⁷

Despite this broad and multi-faceted acceptance, the *Guidelines* have long faced resistance from certain judges and law makers. This minority view has found support for its position in a 2009 opinion of the U.S. Supreme Court, *Bobby v. Van Hook*, that admonished the Sixth Circuit for its particular use of the 2003 *Guidelines*.⁸ Lower courts have interpreted the high court's language to have a variety of different implications—ranging from reaffirming the importance of the *Guidelines* to rejecting them in their entirety.⁹ These varied reactions have left many capital defense practitioners wary of using the *Guidelines* and consequently adopting an approach that unnecessarily limits the available arguments in support of claims of ineffective assistance of counsel.¹⁰ This Article will discuss ways that capital defense practitioners can stop reacting to *Van Hook* and the *Guidelines'* detractors in a way that could limit or undermine their claims, and instead be proactive about supporting the *Guidelines* through embracing the Court's language in *Van Hook* and educating the courts about the underlying basis for the norms embodied in the *Guidelines*. The Article will begin with a discussion about the *Van Hook* decision and the response from the lower courts;¹¹ it will then describe a number of resources created by the ABA related to the *Guidelines*;¹² and it will conclude by analyzing the claims at issue in *Van Hook* using the ABA resources as an example of how those tools can be put to use.¹³

Sentencing in Capital Cases, 46 HOFSTRA L. REV. 1161 (2018) (discussing acceptance of the Guidelines by the Federal Defender Services Committee as the governing standards for lawyers with capital cases in federal court).

5. Maher, *supra* note 1, at 422.

6. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

7. *Id.* at 687-88 (citations omitted).

8. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009).

9. *See infra* Part II.B.

10. *See infra* Part II.B.

11. *See infra* Part III.A.

12. *See infra* Part III.C.

13. *See infra* Part IV.

II. *BOBBY V. VAN HOOK*: THE OPINION THAT CHANGED NOTHING (OR EVERYTHING) ABOUT THE *GUIDELINES*

In 1985, Robert Van Hook was convicted of capital murder and sentenced to death in Ohio.¹⁴ Mr. Van Hook confessed to the murder and waived his right to a jury trial, pleading not guilty by reason of insanity.¹⁵ A three-judge panel rejected this defense and sentenced him to death after finding that the mitigating evidence did not outweigh the aggravating circumstance that the offense was committed in the course of a robbery.¹⁶ Mr. Van Hook's defense counsel did not begin preparing their mitigation case until after the guilt phase of trial concluded, leaving time for only a " cursory," "last-minute" mitigation investigation that was "never finished."¹⁷ His counsel failed to uncover and present to the jury evidence of significant childhood trauma.¹⁸ More than two decades later, the U.S. Court of Appeals for the Sixth Circuit reversed a district court's denial of a writ of habeas corpus, finding that relief was warranted because Mr. Van Hook's counsel's performance was constitutionally deficient.¹⁹ The court held that counsel's failure to conduct a full mitigation investigation fell below "an objective standard of reasonableness".²⁰

As a measure of reasonable performance, and as it had done before in numerous other cases, the court looked to the 2003 *ABA Guidelines*. It noted that the *Guidelines* instruct that "[t]he mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase offenses, decisions about the need for expert evaluations, motions practice, and plea negotiations" and that "preparing for the mitigation phase of trial 'requires extensive and generally unparalleled investigation into personal and family history,' as well as school, medical and psychological records."²¹ Because Mr. Van Hook's trial counsel conducted an abbreviated, incomplete mitigation investigation that did not uncover significant available mitigating evidence, the court found that counsel's performance was

14. *Van Hook v. Anderson*, 560 F.3d 523, 525 (6th Cir. 2009).

15. *Id.*

16. *Id.* at 529-30.

17. *Id.* at 528.

18. *Id.* ("Significantly, trial counsel's investigation failed to reveal that Van Hook's parents repeatedly beat him, that he had witnessed his father attempt to kill his mother several times, and that his mother was committed to a psychiatric hospital when he was between four and five years old." (citations omitted)).

19. *Id.* at 530.

20. *Strickland*, 466 U.S. at 687.

21. *Anderson*, 560 F.3d at 527-28 (first quoting *ABA Guidelines*, *supra* note 2 at 1023 (Guideline 10.7, Commentary); then quoting *id.* at 1022 (same)).

constitutionally deficient and that he was entitled to relief from his death sentence.²²

A. *Van Hook at the U.S. Supreme Court*

The State filed a petition for a writ of certiorari, and without hearing argument, the U.S. Supreme Court granted certiorari, reversed the decision of the Sixth Circuit, and issued a per curiam opinion remanding the case for further proceedings.²³ In a concurring opinion, Justice Alito wrote separately to state his view that the *Guidelines*, and American Bar Association standards generally, “in no way . . . have special relevance” in the analysis of a claim of ineffective assistance of counsel.²⁴

The Court’s per curiam opinion identified two primary errors committed by the Sixth Circuit. The first error was treating the *Guidelines* as “inexorable commands with which all capital defense counsel ‘must fully comply.’”²⁵ The second error was applying the 2003 *Guidelines* to performance that occurred in 1985 without further consideration of the applicability of such standards.²⁶

1. Mandatory Use of the *Guidelines*

Prior to the Court’s decision in *Van Hook*, several decisions of the Sixth Circuit had effectively found the *Guidelines* to be mandatory requirements for capital defense counsel. The Sixth Circuit reviewed the development of its jurisprudence in *Dickerson v. Bagley*, decided three years before *Van Hook*.²⁷

The Court has relied on 1989 and 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases for the required norms and duties of counsel. Our Court has also made it clear that this means that counsel for defendants in capital cases must fully comply with these professional norms. In *Hamblin* we said that in order to satisfy the requirements of the effective assistance of counsel requirement of the Sixth Amendment, ABA Guidelines establish the relevant criteria:

22. *Anderson*, 560 F.3d at 528.

23. *Bobby v. Van Hook*, 558 U.S. 4, 4-5 (2009). In the proceedings that followed the Court’s decision, the Sixth Circuit denied the remaining ineffectiveness claims on procedural grounds. *Van Hook v. Bobby*, 661 F.3d 264 (2011). Mr. Van Hook was subsequently executed on July 18, 2018.

24. *Id.* at 13-14 (Alito, J., concurring).

25. *Id.* at 8 (quoting *Anderson*, 560 F.3d at 526).

26. *Id.*

27. *Dickerson v. Bagley*, 453 F.3d 690, 692-93 (6th Cir. 2006).

New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances²⁸

In *Van Hook*, the Supreme Court explicitly rejected the approach announced by the Sixth Circuit in *Dickerson*, reiterating its prior holdings that "'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition."²⁹ A footnote to this admonition further warned that the Court's opinion "should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation" and that the Court expressed "no views on whether the 2003 Guidelines" reflect the "prevailing norms of practice."³⁰

2. Application of the *Guidelines* to Performance Predating their Publication

The Court held in *Van Hook* that the Sixth Circuit further erred by applying the standards found in the 2003 *Guidelines* to counsel performance that occurred in 1985, without considering whether the 2003 *Guidelines* reflect the prevailing professional norms in 1985.³¹ The Court wrote that "[j]udging counsel's conduct in the 1980s on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial—was error."³² Citing to *Strickland v. Washington* and its reliance on the ABA Criminal Justice Standards, the Court instructed that "[r]estatements of professional standards, we have recognized, can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place."³³

28. *Dickerson*, 453 F.3d at 693-94 (first citing *Rompilla v. Beard*, 545 U.S. 374, 384 n.7 (2005) (relying on 2003 ABA Guidelines as "later, and current, ABA Guidelines relating to death penalty defense") and *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (incorporating the 1989 Guidelines as stating the required professional obligation to conduct a complete mitigation investigation); then citing *Hamblin v. Mitchell*, 354 F.3d 482, 485-88 (6th Cir. 2003) (briefly outlining the historical development of the requirement of effective assistance of counsel in capital cases); and then quoting *Hamblin*, 354 F.3d at 487).

29. *Van Hook*, 558 U.S. at 8 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

30. *Id.* at 8 n.1. As discussed in Part II, the Court had previously expressed this very opinion, in the very same cases cited elsewhere in the *Van Hook* opinion. See *infra* Part II.

31. *Id.* at 8.

32. *Id.*

33. *Id.* at 7 (citing *Strickland*, 466 U.S. at 688); see *Strickland*, 466 U.S. at 688 ("Prevailing

The Court then looked at the “ABA standards in effect in 1985,” which it found to be the 1980³⁴ ABA Standards for Criminal Justice.³⁵ It characterized those standards as “describ[ing] defense counsel’s duty to investigate both the merits and mitigating circumstances in general terms.”³⁶ These standards, the Court found, are “[q]uite different” from the 2003 *Guidelines*, which “expanded what had been (in the 1980 Standards) a broad outline of defense counsel’s duties in all criminal cases into detailed prescriptions for legal representation of capital defendants.”³⁷ They discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin.”³⁸ Using the 1979/1980 Criminal Justice Standards as a guide to reasonable counsel performance, the Court found that Mr. Van Hook’s counsel’s mitigation investigation was reasonable and reversed the grant of penalty-phase relief.³⁹

norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable, but they are only guides.”) (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION Standard 4–1.1 to 4–8.6 (AM. BAR. ASS’N 1980, 2d ed.)).

34. The *Van Hook* opinion incorrectly refers to these standards as being published in 1980. *Van Hook*, 558 U.S. at 7. This particular set of standards was approved by the ABA House of Delegates on February 12, 1979. A supplement was published in September 1982. In total to date, the ABA Criminal Justice Section has published four editions of its Standards for the Defense Function (publication years of 1971, 1979, 1993, and 2015). Prior editions are available to registered users of the National Capital Standards Database, www.capstandards.org. The most recent edition is publicly available from the ABA Criminal Justice Section, along with the current editions of Criminal Justice Standards addressing twenty-four additional subject areas, on the Section’s website at https://www.americanbar.org/groups/criminal_justice/standards.html.

35. *Van Hook*, 558 U.S. at 7.

36. *Id.*

37. Importantly, the Criminal Justice Standards were *not* a direct precursor to the 1989 and 2003 *Guidelines*. The 1979 “Criminal Justice Standards – Defense Function” make no reference to death penalty or capital defense work. Subsequent editions of the Criminal Justice Standards for the Defense Function refer to capital cases only by reference to the *Guidelines*, acknowledging that capital counsel have heightened duties as compared to other defense counsel. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION Standard 4–1.2 (AM. BAR. ASS’N 2015, 4th ed.) (“Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA *Guidelines* for the Appointment and Performance of Counsel in Death Penalty Cases.”). While it is true that these may have been the most relevant standards that had been adopted by the ABA as official Association policy at the time of Mr. Van Hook’s trial, they were not the most relevant standards generally, nor were they standards intended to govern capital representation. See Stetler & Tabuteau, *supra* note 1, at 738–43 (discussing the development of the 1989 *Guidelines*). For discussion about resources that can help establish the appropriate standard of care, see *infra* Part III.

38. *Van Hook*, 558 U.S. at 8 (citing *ABA Guidelines*, *supra* note 2 at 1016–27).

39. *Id.* at 11–13. The 1979 ABA Criminal Justice Standards contain only a generalized instruction to “conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.” ABA CRIMINAL JUSTICE STANDARDS, THE DEFENSE FUNCTION Standard 4–4.1 (1979).

3. Justice Alito's Concurrence

Justice Alito wrote separately from the rest of the Court, issuing a single-paragraph concurring opinion:

I join the Court's *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.⁴⁰

No other members of the Court joined Justice Alito's opinion, which notably lacks any attempt to reconcile its position with the series of Supreme Court opinions—let alone the hundreds of opinions from state and federal courts below—using ABA Standards and Guidelines to assess counsel's performance.⁴¹

B. Lower Court Reactions to Van Hook

The reaction to the *Van Hook* decision in the lower courts has been decidedly mixed. Some courts have taken the opinion at face value as a restatement of the *Strickland* standard with a reminder to judge counsel's performance against the norms as they existed at the time of the challenged performance;⁴² some have used it to draw bright-line rules that prohibit use of the *Guidelines* to judge counsel performance that occurred before the date they were adopted by the ABA;⁴³ and some have used it to disregard the *Guidelines* entirely in their analysis of ineffective assistance of counsel claims.⁴⁴

Falling in this first category are courts such as the Shelby County, Alabama Circuit Court. In *State v. Gamble*, that court analyzed whether

40. *Id.* at 13-14 (Alito, J., concurring) (citing *ABA Guidelines*, *supra* note 2).

41. *Id.*

42. *See infra* note 47.

43. *See infra* note 48.

44. *See infra* note 50.

the *Guidelines* could apply to counsel performance that predated their publication.⁴⁵ Although the Circuit Court relied primarily on the 1989 version of the *Guidelines* to find counsel's 1997 performance deficient, it also noted that courts have appropriately relied on standards that were published after the date of the challenged performance.

This Court recognizes that federal courts of appeals have analyzed counsel's performance in a case, including cases prior to the publication of the 1989 ABA Guidelines for counsel in capital cases, by citing both the 1989 and 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. They do so under the theory that the 1989 and 2003 ABA Guidelines are "not aspirational in the sense that they represent norms newly discovered after *Strickland*" but are instead simply "the clearest exposition of counsel's duties at the penalty phase of a capital case." These duties are rooted in *Strickland* as well as longstanding, common-sense principles of representation understood by competent counsel in death-penalty cases.⁴⁶

This same reasoning has been used by several other courts in post-*Van Hook* cases.⁴⁷

Other courts have taken a very different approach, drawing a bright-line rule at the date of the *Guidelines*' adoption. For example, in *Duty v. Workman*, the U.S. Court of Appeals for the 10th Circuit refused to apply the 2003 *Guidelines* because they were "approved on February 10, 2003, over three months after the challenged representation."⁴⁸ As

45. *State v. Gamble*, 63 So. 3d 707 (Ala. Crim. App. 2010). Citations are to the appellate court's opinion. The Circuit Court's language regarding the Guidelines in its unreported opinion was quoted by the Alabama Court of Criminal Appeals when it considered the case on appeal and affirmed the lower court's grant of relief.

46. *Id.* at 716-17 (first citing *Dickerson v. Bagley*, 453 F.3d 690 (6th Cir. 2006) and *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003); then quoting *Hamblin*, 354 F.3d at 487, 488).

47. *See, e.g., Morris v. Beard*, No. 01-3070, 2012 WL 4757868, at *10 (E.D. Pa. Oct. 5, 2012) (although the 1989 ABA Guidelines were adopted more than five years after the petitioner was sentenced to death, "the 1989 guidelines simply reflected prevailing norms in the profession that had already existed" and consequently were "effective standards by which to judge the reasonableness of counsel's conduct in this case."); *United States v. Sampson*, 820 F. Supp. 2d 202, 219-20 (D. Mass. 2011) (relying primarily on the 2003 Guidelines for counsel performance that started in 2001); *Frye v. Warden*, No. 2:99-cv-0628 KJM CKD, 2015 WL 300755, at *19 (Cal. Jan. 22, 2015) (using 1989 Guidelines when evaluating counsel performance in 1987 and 1988).

48. *Duty v. Workman*, 366 Fed. Appx. 863, 871 n.6 (10th Cir. 2010); *see also West v. Ryan*, 608 F.3d 477, 486 n.9 (9th Cir. 2010) ("Under *Van Hook*, the 1989 guidelines are inapplicable to the present case since they did not come into effect until after West's trial [in 1988]."); *Overstreet v. Superintendent*, No. 3:08-CV-226 PS, 2011 WL 836800, at *10 (N.D. Ind. Mar. 4, 2011), *aff'd sub nom. Overstreet v. Wilson*, 686 F.3d 404 (7th Cir. 2012) (rejecting use of the 2003 Guidelines to evaluate performance at a 2000 trial: "[T]he Supreme Court has held that the 2003 ABA Guidelines are not applicable to trials, like this one, that occurred prior to their issuance.").

discussed in greater detail in Part III, there is virtually no rational basis for drawing such an arbitrary line, and even the U.S. Supreme Court itself has used the *ABA Guidelines* to assess counsel performance when the publication post-dated that of the challenged performance.⁴⁹

Finally, some courts have used *Van Hook* to dismiss the relevance of the *Guidelines* entirely. These courts tend to rely heavily on Justice Alito's concurring opinion to justify their position. For example, in *Coleman v. Thaler*, the U.S. District Court for the Northern District of Texas wrote that "[e]ven if petitioner had provided the court with reasoned factual support for a contention that the ABA Guidelines were not followed, the court would not be persuaded [to find counsel ineffective]."⁵⁰ The court supported its complete disregard of the *Guidelines* by quoting the majority of the text of Justice Alito's concurring opinion in *Van Hook*.⁵¹

The broad spectrum of treatment of the *Guidelines* in the wake of *Van Hook* has caused many practitioners to be wary of reliance on the *Guidelines*, particularly where the publication date of the *Guidelines* post-dates the challenged performance, and they frequently use terminology that further entrenches the inaccurate notion that the *Guidelines* cannot be applied to counsel performance prior to their publication.⁵² This approach often results in counsel needlessly abandoning a critical tool that could be used to make the case that their client did not receive effective counsel.⁵³ Rather than setting aside the *Guidelines* out of fear of *Van Hook*, practitioners need to remind the courts that the *Guidelines* are still the single most authoritative statement of norms governing the defense of capital cases⁵⁴ and look to *Van Hook* as a roadmap for making the case for the *Guidelines* to the courts.

49. See *Rompilla v. Beard*, 545 U.S. 374, 387 n.6 (2005) (using the language of 1989 and 2003 ABA Guidelines along with the 1982 Supplement to the ABA Criminal Justice Standards to assess counsel's performance at a 1988 trial); *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (using 2003 Guidelines to evaluate counsel's performance at 1985 trial); see also Stetler & Wendell, *supra* note 1, at 655, n.188 (discussing *Strickland v. Washington*, 466 U.S. 668 (1984) and its use of ABA standards published two years prior to the challenged performance).

50. *Coleman v. Thaler*, No. 4:11-CV-542-A, 2012 WL 171549, at *16 n.10 (N.D. Tex. Jan. 20, 2012); see also *In re Reno*, 283 P.3d 1181, 1213 (Cal. 2012), as modified on denial of reh'g (Oct. 31, 2012) ("[T]he ABA Guidelines require much more of counsel than is required by state and federal law governing ineffective assistance of counsel."); *State v. Craig*, No. 24580, 2010 WL 1052203, at *3-4 (Ohio Ct. App. Mar. 24, 2010) (finding that in *Van Hook*, "[t]he Supreme Court rejected holding counsel to the standards announced by the American Bar Association.").

51. *Coleman*, 2012 WL 171549, at *16 n.10.

52. See *supra* notes 7-8 and accompanying text.

53. See *infra* Part III.A.

54. *Accord* Stetler & Wendell, *supra* note 1, at 635 ("The ABA Guidelines . . . continue to stand as the single most authoritative summary of the prevailing professional norms in the realm of capital defense practice.").

III. REINFORCING THE *GUIDELINES* AND RECLAIMING *VAN HOOK*

One thing—and perhaps the only thing—that is clear from the disjointed body of law that has developed since *Van Hook* is that capital defense practitioners must put in the effort to defend the *Guidelines* in tandem with their use.⁵⁵ To accomplish this task, defense counsel should do exactly as instructed by the Court in *Van Hook* and “paus[e] to consider whether [the *Guidelines*] reflect[] the prevailing professional practice at the time of the trial.”⁵⁶ This can be a daunting task, particularly when the challenged performance occurred decades earlier.

In addition, because of the ways that lower courts have attempted to extend the holding of *Van Hook* far beyond its plain language—including those that treat Justice Alito’s concurrence as a binding statement of the law—it is important to include support for the *Guidelines* even in cases that post-date their publication. The ABA has numerous resources available to help practitioners make the legal and factual arguments necessary to support the *Guidelines*. What follows are brief introductions to the two primary legal arguments that may need to be made in support of the *Guidelines*,⁵⁷ followed by a discussion of the ABA resources that are available to provide the support for these arguments.⁵⁸

A. *The ABA Guidelines Remain Guides to Reasonable Counsel Performance*

Some lower courts have put a great deal of emphasis on the word “only” in the *Van Hook* opinion, i.e., the *Guidelines* are guides but “only guides.”⁵⁹ This modest limiting principle has been construed by some courts to mean that the *Guidelines* have no relevance at all.⁶⁰ When talking to courts about the *Guidelines*, particularly those that have already taken a position similar to that in Justice Alito’s *Van Hook*

55. While this Article recommends that defense counsel proactively support the *Guidelines*, it is important to remember and remind the courts that the Supreme Court has previously placed that burden elsewhere. See *Rompilla*, 545 U.S. at 387 & n.6 (“We long have referred to these ABA Standards as guides to determining what is reasonable, and the Commonwealth has come up with no reason to think the quoted standard impertinent here.” (internal quotes and citations omitted)); see also *Stetler & Wendell*, *supra* note 1, at 660 (“From the analogous perspective of tort law and theory, one can see that Justice Kennedy is setting up a false dichotomy. Standards need not be either merely a ‘useful point of reference’ or a binding statute. Instead, there should be a rebuttable presumption that compliance with authoritative professional standards is required.”).

56. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009).

57. See *infra* Parts II.A, II.B.

58. See *infra* Part II.C.

59. *Van Hook*, 558 U.S. at 8; see *supra* Part II.A.

60. See, e.g., *supra* note 50 and accompanying text.

concurrence, it may be helpful to include a reminder that this language in *Van Hook* is not new and did not alter prior Supreme Court jurisprudence. The phrase is taken directly from *Strickland*, where the Court wrote in 1985—prior even to the publication of the original *ABA Guidelines*—that ABA standards are “guides to determining what is reasonable, but they are only guides.”⁶¹ This same sentence from *Strickland* has been cited as supporting precedent every time the Supreme Court has relied upon the *Guidelines* to assess counsel performance. For example, in *Wiggins*, the Court explicitly rejected any notion that it had created new law by referring to ABA standards in a prior case, *Williams v. Taylor*,⁶² and then supported that statement with a citation to the same language from *Strickland* that was used in *Van Hook*.⁶³ Two years after announcing *Wiggins*, the Court relied on the same language from *Strickland* to support its use of the *Guidelines* in *Rompilla v. Beard*.⁶⁴ This series of favorable references between and among the line of cases using ABA standards to assess ineffective assistance of counsel, which is continued in *Van Hook*, does not suggest in any way that the Court has intended to alter its jurisprudence.

Certainly, some ambiguity is inserted into the Court’s jurisprudence by a footnote in the *Van Hook* opinion, where the Court declared that it “express[ed] no views” on whether the *Guidelines* can be used to evaluate counsel performance that post-dates the publication of the *Guidelines*.⁶⁵ Several aspects of the *Van Hook* opinion are in conflict with this assertion, including a supporting citation to the language and analysis in *Wiggins*.⁶⁶ Perhaps even more telling is the Court’s use of ABA standards (albeit different ABA standards) to conduct its own analysis of counsel’s performance at Mr. Van Hook’s trial.⁶⁷ So while

61. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

62. *Wiggins v. Smith*, 539 U.S. 510, 522 (“Contrary to the dissent’s contention, we therefore made no new law in resolving Williams’ ineffectiveness claim. In highlighting counsel’s duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same ‘clearly established’ precedent of *Strickland* we apply today.” (citations omitted)).

63. *Id.* (“Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.” (quoting *Strickland*, 466 U.S. at 688-89)).

64. *Rompilla v. Beard*, 545 U.S. 374, 387 (quoting *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688)).

65. *Bobby v. Van Hook*, 558 U.S. 4, 8 n.1 (2009).

66. *Id.* at 8-9 (citing to *Wiggins*, 539 U.S. at 524 (“Counsel’s conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as ‘guides to determining what is reasonable.’”)).

67. *Id.* at 11 (“The ABA Standards prevailing at the time called for Van Hook’s counsel to cover several broad categories of mitigating evidence, which they did. And given all the evidence they unearthed from those closest to Van Hook’s upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents.” (citation omitted)).

the Court in *Van Hook* may have wanted to avoid taking a position about the applicability of the *Guidelines* and other ABA standards, it has implicitly done so several times over by actually relying on those standards in its analysis of counsel's performance—including in the *Van Hook* opinion itself.⁶⁸ Capital defense practitioners should challenge any suggestion that *Van Hook* altered or overruled the favorable line of cases using ABA standards as guides to counsel performance—a misguided notion that finds no support either in the Court's statements of the law or in its actual analysis of ineffective assistance of counsel claims.⁶⁹

*B. Norms of Practice Existed Long Before the Guidelines
Were Adopted or Published*

Perhaps the greatest point of confusion caused by the *Van Hook* opinion is how courts ought to use the *Guidelines* in cases that occurred prior to their date of adoption as ABA policy. Contrary to what some jurists appear to have concluded,⁷⁰ the plain language of the Court's opinion does not universally restrict application of the *Guidelines* to counsel performance that occurred on or after the date of their adoption as policy by the ABA. Instead, the Court reversed the Sixth Circuit's *unreasoned* application of the 2003 version of the *Guidelines* to counsel performance that occurred in 1985.⁷¹ The Court emphasized that the *Guidelines* are useful guides to what reasonableness entails only to the extent they "describe professional norms prevailing when the representation took place."⁷² The error was not in using the 2003 *Guidelines* to judge the 1985 performance per se, but rather that the court did so "without even pausing to consider whether they reflected

68. *Id.*

69. It is also important for practitioners to challenge the inaccurate notion advanced by Justice Alito in *Van Hook* that the ABA invented the *Guidelines*. See *id.* at 13-14 (Alito, J., concurring). The *Guidelines* first and foremost represent the consensus of an extensive and diverse group of capital defense practitioners and others actively involved in the criminal justice system, with the unanimous approval of the American Bar Association as a whole providing additional evidence of the fact that the *Guidelines* are not aspirational but reflect well-established norms. See Maher, *supra* note 1, at 421 ("There was nothing 'new' or invented by the ABA for the 2003 publication. But there was a need for an authoritative resource that could synthesize these many provisions with the wisdom of experienced capital defenders and apply this understanding to the current requirements of the law."); Stetler & Tabuteau, *supra* note 1, at 742 ("Thus, the ABA *Guidelines* were the product of the dedicated indigent defense professionals, who were representing capital clients effectively, and who freely shared their knowledge and experience through *The Champion*, training programs, and the manuals that recirculated much of the best material.").

70. See, e.g., *supra* note 48 and accompanying text.

71. *Van Hook*, 558 U.S. at 7-9.

72. *Id.* at 7.

the prevailing professional practice at the time of trial”⁷³ Several lower courts have declined to read more into this than is supported by the actual words of *Van Hook* and have found the Court did not establish a categorical prohibition on application of the *Guidelines* to performance that predated their publication; rather it instructed courts to ask whether the *Guidelines* reflect the professional norms as they existed at the time of counsel’s performance.⁷⁴ Even for performance that predates the publication of the *Guidelines* by more than a decade, the answer to that question may very well be “yes.”

Two words in the *Van Hook* opinion have exacerbated this issue: “in effect.” The Court wrote that “[t]he ABA standards *in effect* in 1985 described defense counsel’s duty to investigate both the merits and mitigating circumstances in general terms”⁷⁵ This phrase has become the shorthand used by courts and practitioners alike to describe whether a particular set of *Guidelines* applies to counsel performance on a certain date. Unfortunately, the term is misleading at best when talking about the norms codified in the *Guidelines*, and its use can lead to arbitrary denial of relief in cases where counsel’s performance was truly deficient.

The phrase “in effect” suggests that there is a date on which the *Guidelines* became the governing standard of care in capital cases, and that before this date, the norms reflected in the *Guidelines* did not exist. When courts have drawn such a bright line rule, they have typically used the date of the ABA’s Midyear Meeting in February 2003, where it considered and approved adoption of the *Guidelines* as Association policy as part of its regular business of considering and adopting policy positions.⁷⁶ This precise date has virtually no significance outside of the Association itself and certainly not for the purpose of assessing whether a lawyer’s performance met the applicable standard of care. The norms reflected in the *Guidelines* were no more or less “in effect” the day before the vote or the day after. Yet at least some courts have given that date profound and unwarranted legal significance.⁷⁷

73. *Id.* at 8 (emphasis added).

74. *See supra* note 47.

75. *Van Hook*, 558 U.S. at 7 (emphasis added) (referring to the 1979 ABA Criminal Justice Standards). This phrase also appeared in *Rompilla v. Beard* in reference to the ABA Criminal Justice Standards. *Rompilla v. Beard*, 545 U.S. 374, 387 n.6 (“The new version of the Standards now reads that any ‘investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities’ whereas the version *in effect* at the time of *Rompilla*’s trial provided that the ‘investigation’ should always include such efforts.” (emphasis added)).

76. *See supra* note 48.

77. *See supra* note 48 and accompanying text.

By the Court's own strict admonition in *Van Hook*, the *Guidelines* must not be treated by courts as a set of mandatory rules with which counsel must unquestionably comply. If they were, an effective date might have more logical meaning and relevance.⁷⁸ Rather, according to both the Court⁷⁹ and the ABA itself,⁸⁰ the *Guidelines* were written as a codification of already existing, well-defined norms of practice. It would be virtually impossible to determine a precise date on which any norm came into "effect." But logically speaking, the norm must have already existed and become well-established before it was included in a codification of existing norms—particularly one that received the unanimous approval of the ABA House of Delegates⁸¹ and found agreement among a group of lawyers and experts as diverse as members of the drafting committee⁸² and the ABA Criminal Justice Section.⁸³ It is not necessary, however, to rely on logic alone. As discussed in Part III,

78. Setting aside the rather off-hand use of the phrase in *Rompilla* and *Van Hook*, the Court has only described guidelines as being "in effect" in the context of statutory guidelines that have an effective date. See, e.g., *Beckles v. United States*, 137 S. Ct. 886, 890 n.1 (2017) ("With one exception not relevant here, 18 U.S.C. § 3553(a)(4)(A) instructs sentencing courts to consider the [Federal Sentencing] Guidelines ranges that 'are *in effect* on the date the defendant is sentenced.' Accordingly, references in this opinion to the [Federal Sentencing] Guidelines are to the 2006 version." (emphasis added)). Wherever possible, defense counsel should draw the courts attention to the meaningful differences between standards, such as the Federal Sentencing Guidelines—which have an effective date under U.S. law and are subject to ex post facto restrictions on retroactive application—and restatements of existing norms, such as the ABA Guidelines—for which the concept of an effective date has little logical relevance.

79. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. . . . Despite *these well-defined norms*, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." (second emphasis added) (internal citations omitted)).

80. See *ABA Guidelines*, *supra* note 2, at 920 (the Guidelines are "designed to express existing practice norms and constitutional requirements" and "are not aspirational" but instead "embody the current consensus about what is required to provide effective defense representation in capital cases."); see also Maher, *supra* note 1, at 421 ("There was nothing 'new' or invented by the ABA for the 2003 [Guidelines] publication." (footnote omitted)).

81. The ABA House of Delegates consists of hundreds of members, including delegates from every U.S. state and state bar association, with dozens of additional representatives of local bar associations and other affiliated organization delegates, including the U.S. Attorney General. See *House of Delegates – General Information*, AM. BAR ASS'N, <https://www.americanbar.org/groups/leadership/delegates.html> (last visited Aug. 23, 2018). This diverse group reflects the composition of the Association as a whole, which has more than 400,000 members that include prosecutors, defense attorneys, judges, academics, and government officials.

82. See *ABA Guidelines*, *supra* note 2, at 914-16 (listing individuals and organizations that contributed to the drafting of the 2003 ABA Guidelines).

83. The ABA Criminal Justice Section's membership includes roughly equal numbers of prosecutors and defense attorneys, and it strives to serve as the "unified voice of criminal justice." Criminal Justice Section, *About Us*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/about_us.html (last visited Aug. 23, 2018).

the ABA has developed extensive resources to help counsel locate the evidence that will establish the pre-existence of these norms.

Given the poor fit between the inherent nature of the *Guidelines* and the idea of an effective date, it is important for capital defense practitioners to be thoughtful about the use of the phrase “in effect.” While it serves as a convenient shorthand for a much more complex idea, the phrase implicitly suggests that the *Guidelines*’ chronological applicability is much more limited than it ought to be. As is clear from the discussion above, problems with the idea of an effective date of the *Guidelines* have become readily apparent in decisions issued since *Van Hook*.⁸⁴ When practitioners use the phrase “in effect” to describe the *Guidelines*, courts will naturally be predisposed to look for an effective date as if the *Guidelines* were part of a statute or a court rule. If they do so, they will inevitably select a date that is years—and perhaps decades—after the norms were already well-established as the standard of care in capital defense. Practitioners can begin to correct this error by referring to the *Guidelines* in terminology that reflects what they actually are. Rather than saying that the *Guidelines* were “in effect” on a certain date, counsel should phrase their arguments in terms of the prevailing norms at a certain time, which were later codified in an edition of the *Guidelines*. This approach allows capital defense practitioners to make full use of the *Guidelines* by not arbitrarily limiting their application to counsel performance that occurred long after the norms reflected in the *Guidelines* were established.

C. ABA Resources for Supporting the Guidelines

Once courts and advocates stop thinking about the *Guidelines* as having an effective date, they can follow the instructions of *Van Hook*, which are to assess whether the *Guidelines* reflect the norms that existed at the time of the challenged performance.⁸⁵ To assist with that, the ABA has developed a number of online tools. Some of these resources are password protected and available only to approved members who are actively defending a capital case or representing a prisoner in post-conviction proceedings (including habeas, clemency, and related civil challenges). Others are publicly available and are made available for easy citation in pleadings and arguments.

84. See *supra* Part II.B.

85. See *supra* notes 30-33 and accompanying text.

1. National Capital Standards Database

The primary resource created by the ABA to assist practitioners with supporting the *Guidelines* is a large online resource, the National Capital Standards Database, accessible at www.capstandards.org.⁸⁶ This website, which requires approval to access and is available only to practicing capital defense attorneys, is divided into three primary areas: Standards, Caselaw Summaries, and Interactive Guidelines.⁸⁷ Each is designed to help practitioners make the case to the courts about the validity of the *Guidelines* and establish the standard of care to challenge prior defective representation.

a. Standards

The largest section of the site, found under the heading “Standards,” contains defender training conference materials, codified standards, and articles written by capital defense experts dating back more than thirty years. The content of the Standards mirrors the types of items and sources used by the Supreme Court in *Padilla v. Kentucky*, a post-*Van Hook*, non-capital case raising claims of ineffective assistance of counsel for failure to advise about collateral consequences of an immigration plea.⁸⁸ The *Padilla* opinion squarely rejected the notion that the professional standards (such as ABA standards) have no relevance⁸⁹ and also looked to several other sources of information for evidence of prevailing professional norms,⁹⁰ including other professional

86. See Am. Bar Ass’n, *Welcome to the ABA National Capital Standards Database*, ABA NAT’L CAP. STANDARDS DATABASE, <https://www.capstandards.org> (last visited Aug. 23, 2018).

87. See Am. Bar Ass’n, *Caselaw Summaries*, ABA NAT’L CAP. STANDARDS DATABASE, <https://www.capstandards.org/caselaw-summaries> (last visited Aug. 23, 2018); Am. Bar Ass’n, *Standards*, ABA NAT’L CAP. STANDARDS DATABASE, <https://www.capstandards.org/standards> (last visited Aug. 23, 2018).

88. *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010). The Court has since relied on the language of *Padilla* in capital cases as well. See *Hinton v. Alabama*, 571 U.S. 263 (2014) (“The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” (quoting *Padilla*, 559 U.S. 356, 366)).

89. *Id.* at 367 (“Although [the ABA Guidelines and similar standards] are ‘only guides,’ and not ‘inexorable commands,’ these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.”) (first citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984); then citing *Bobby v. Van Hook*, 558 U.S. 4, 7-8 (2009)).

90. See Stetler & Tabuteau, *supra* note 1, *passim* (discussing in detail the types of sources used in the Guidelines and their legal relevance as established in *Padilla*); Stetler & Wendell, *supra* note 1, at 670-71 (discussing *Padilla*’s “succinct tutorial” about how to assess deficient performance); see also *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (citing 2003 Guidelines and underlying source article in tandem when applying the Guidelines to counsel performance that

association standards, law review articles, practice manuals, and practitioner guides.⁹¹

The sources are searchable on a number of fields, including title, author, keyword, geographical focus, and date range.⁹² The conference materials are further searchable by specific conference, and a full list of conferences whose materials are available (in whole or in part) on the site is available at <https://www.capstandards.org/conf-mats-list>.⁹³ The materials can also be searched or browsed by “category.” The following categories of documents are currently available on the site:

- ABA Guidelines: Formal guidelines or standards adopted as ABA Policy;
- National Guidelines: Other formal guidelines or standards promulgated by organizations outside of the ABA;
- State Guidelines: Formal rules or statutes governing capital counsel appointment and performance, with applicability limited to a particular jurisdiction;
- Training Manuals: Practice guides for capital defense or areas of the law related to capital defense;
- Training Conference Materials: Materials distributed as part of capital defender training programs;
- Capital Defense Articles: Law review articles or articles written for trade publications such as *The Champion*; and
- ABA Guidelines Sources: Sources that are directly cited or

occurred in 1985).

91. *Id.* at 367-68 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. ‘[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients’” (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae Supporting Petitioner at 12-14, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651) and citing STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14–3.2(f) (AM. BAR ASS’N 1999); NATIONAL LEGAL AID AND DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL PROSECUTION, § 6.2 (1997); STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 4–5.1(a) (AM. BAR ASS’N 1993); G. NICHOLAS HERMAN, PLEA BARGAINING § 3.03, pp. 20–21 (1997); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 13:23, pp. 555, 560 (3d ed. 2004); DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, 2 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, STANDARDS FOR ATTORNEY PERFORMANCE D10, H8-H9, J8 (2000); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 713-18 (2002)); *see also* Stetler & Wendel, *supra* note 1, at 670-71 (Justice Stevens’s Guidance: *Padilla v. Kentucky*)).

92. Am. Bar Ass’n, *Standards / Search All*, ABA NAT’L CAP. STANDARDS DATABASE, <https://www.capstandards.org/standards/search-all> (last visited Aug. 23, 2018).

93. Am. Bar Ass’n, *Standards / Currently Available Conference Materials*, ABA NAT’L CAP. STANDARDS DATABASE, <https://www.capstandards.org/conf-mats-list> (last visited Aug. 23, 2018).

referenced in the commentary to the ABA Guidelines. These may overlap with many of the categories described above and also include a number of court opinions, news articles, statutes, and pleadings.⁹⁴

Using this tool, practitioners can search for and locate materials that reflect the prevailing norms at the time of the representation they are seeking to challenge and, in many instances, in the geographical location where the representation took place.

b. 2003 *Guidelines*—Interactive Edition

The 2003 *Guidelines* and accompanying commentary contain citations and references to more than 400 sources that establish the basis for the blackletter language of the *Guidelines*.⁹⁵ Because the *Guidelines* represent norms that predate their publication by years or even decades, many of these sources predate the digital era and can be difficult to locate. The ABA has created an online version of the 2003 *Guidelines* that includes both blackletter text and commentary, with virtually every source and related standard cited in the *Guidelines* available directly via hyperlink and hyperlinked cross-references between and among the Guideline sections.⁹⁶ As described in the example in Part IV, this tool provides an efficient way to identify sources that form the underlying basis for the particular norms embodied in the *Guidelines* and can provide strong factual and legal support for the argument that the *Guidelines* accurately reflect the prevailing professional norms on a certain date prior to their publication.

Practitioners are encouraged to think creatively and pursue the trail of the norms as far back as possible when looking at the sources cited in the *Guidelines*. For example, the commentary to Guideline 10.7 discusses the need for counsel representing a recent immigrant to be familiar with the client's culture and country of origin.⁹⁷ In support of this statement, the commentary cites to *Mak v. Blodgett*, a 1992 decision where the Ninth Circuit found trial counsel ineffective for failing to present witnesses who could have talked about the challenges the

94. Am. Bar Ass'n, *Standards*, *supra* note 87 (noting various categories in "Standards: Browse By Category" drop down button located at top of page).

95. Maher *supra* note 1, at 420-21 ("Each of the ABA Guidelines in the 2003 publication is validated with reference to prior standards, practices, and policies, and further explained with a detailed Commentary.").

96. The Guidelines Sources can also be accessed via the Standards search form by selecting the Category "ABA Guidelines Sources" and the subject matter corresponding to the Guideline number in question.

97. *ABA Guidelines*, *supra* note 2, at 1026.

defendant faced when emigrating from Hong Kong.⁹⁸ The *Mak* decision establishes the existence of the norm in 1992, more than a decade before publication of the 2003 *Guidelines*, but counsel need not stop there with the analysis. Mr. Mak's trial—and thus the performance found to be deficient—took place in the early 1980s. Since counsel's actions must be assessed by comparison to prevailing norms *at the time of the performance*, the court's decision implicitly includes a factual finding that it was the prevailing norm in the early 1980s to present such cultural evidence—more than twenty years before the publication of the 2003 *Guidelines*. As this example demonstrates, simply looking at the date provided in a source cited by the *Guidelines* may be unnecessarily limiting; counsel should instead follow every source back as far as possible to demonstrate the true temporal scope of the existence of the norm.

c. Caselaw Summaries

The National Capital Standards Database also contains a database of summaries of court opinions citing to the *ABA Guidelines*.⁹⁹ These summaries have been prepared by the staff of the ABA Death Penalty Representation Project, and efforts have been made to include every published or reported decision that cites or refers to the 1989 *Guidelines*, 2003 *Guidelines*, or the 2008 *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.¹⁰⁰ The depth of treatment by the courts varies widely, from cases where the *Guidelines* are merely mentioned as an argument raised by the prisoner, to in-depth analysis of the *Guidelines* and their relevance in cases like *Van Hook*.¹⁰¹ The summaries are searchable based on the authoring court, the year (or year range) of publication, the state where the case originated, and the Guideline number cited.¹⁰²

98. *Mak v. Blodgett*, 970 F.2d 614, 616 (9th Cir. 1992).

99. See Am. Bar Ass'n, *Caselaw Summaries*, *supra* note 87.

100. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008). Not currently included in the database are cases that cite only to the ABA Criminal Justice Standards or other restatements of professional norms such as the NLADA Guidelines. While these opinions fall outside the scope of the database, they still may contain helpful information to establish the foundation for the ABA Guidelines.

101. See Am. Bar Ass'n, *Caselaw Summaries*, *supra* note 87.

102. Wherever possible, efforts have been made to identify the relevant Guideline number or numbers to which the court is referring in its opinion. In many instances, this number is provided either in the text of the opinion or in a citation to a page in the Hofstra Law Review edition where the Guidelines were first published. In certain instances, however, a court simply refers to the Guidelines without providing any number or specific citation. If it is clear from the context of the discussion which Guideline number is at issue, that number will be used (for example, a discussion about the Guidelines and specific duties of counsel regarding representation of Foreign Nationals is

The summaries are generally limited to a description of the court's treatment of the *Guidelines*. Except as needed for context to understand the court's comments about the *Guidelines*, they do not provide detailed background about the ineffective assistance of counsel claims raised in the case, nor are the cases routinely "Shepardized" to ensure that they are still good law.¹⁰³ They are intended to serve as a *starting point* for practitioners to gather case law from the jurisdiction where they will be submitting their claims and also be aware of any particularly positive or negative past language used by their judge or court when discussing the *Guidelines*. If the target audience has previously dismissed the relevance of the *Guidelines* for any of the reasons discussed above, it will be particularly important to bolster arguments about the *Guidelines* using the available resources described in this Article.

2. Americanbar.org Resources

The ABA Death Penalty Representation Project also maintains a number of publicly available resources available on its website.¹⁰⁴ This includes a public library of codified state and national capital defense performance standards; a state-by-state compilation of capital defender appointment standards; web-friendly versions of the blackletter text of the 1989 and 2003 ABA *Guidelines* and the 2008 *Supplementary Guidelines*; full versions of the 1989, 2003, and 2008 *Guidelines* with commentary in .pdf format;¹⁰⁵ a library of amicus briefs submitted by the ABA in death penalty cases, the majority of which discuss the *Guidelines*; and a library of ABA policies related to death penalty issues.¹⁰⁶ A page dedicated to the ABA *Guidelines* contains links to the original text of the *Guidelines*, articles about the *Guidelines* published in

a clear reference to Guideline 10.6). If the context does not provide enough information to determine which Guideline number or numbers the court is looking at, or if the discussion refers to the *Guidelines* as a whole (e.g. Justice Alito's concurrence in *Van Hook*), the Guideline is marked as referring to "Guidelines (General)."

103. See, e.g., Am. Bar Ass'n, *Caselaw Summaries / State v. Sykes*, ABA NAT'L CAP. STANDARDS DATABASE, <https://www.capstandards.org/summary/state-v-sykes-e015> (last visited Aug. 23, 2018).

104. See *Death Penalty Representation Project: Resources*, AM. BAR ASS'N, https://www.americanbar.org/groups/committees/death_penalty_representation/resources.html (last visited Aug. 23, 2018).

105. The ABA strongly encourages use of its "short URLs" when providing internet citations to the full version of the *Guidelines*. These short URLs do not change, even if the file is moved within the ABA website. See *Death Penalty Representation Project: ABA Guidelines*, AM. BAR ASS'N, https://www.americanbar.org/groups/committees/death_penalty_representation/aba_guidelines.html (last visited Aug. 23, 2018). This will help avoid "link rot" in pleadings and court opinions. The 2003 *Guidelines* are available at <https://ambar.org/2003guidelines> and the 1989 *Guidelines* are available at <https://ambar.org/1989guidelines>.

106. See *Death Penalty Representation Project: Resources*, *supra* note 104.

the *Hofstra Law Review*, and information about implementation of the *Guidelines*.¹⁰⁷

The ABA has worked in states across the country to encourage adoption of the appointment and performance standards found in the *Guidelines*.¹⁰⁸ An Implementation Fact Sheet, which is typically updated once or twice per year by Death Penalty Representation Project staff, summarizes information about how states and the federal government have chosen to incorporate the *Guidelines* into their own statutes and court rules.¹⁰⁹ Even if practitioners are litigating a capital case in a state that has not formally adopted the *Guidelines*, this information can be used to further bolster the *Guidelines*' credibility and to challenge the notion that the *Guidelines* have "no special relevance." The resource page also includes a regularly updated listing of all court opinions that have favorably cited to the *Guidelines* and summaries of those opinions.¹¹⁰ This is the same information that can be found at the National Capital Standards Database website in the Caselaw Summaries section, here in a consolidated format that can be attached as an appendix or cited in pleadings.¹¹¹

Using these resources, capital defense practitioners can better understand the underlying basis for the *Guidelines* and make the necessary arguments to the courts to support reliance on the *Guidelines*, regardless of whether the counsel performance in question pre-dates or post-dates the *Guidelines*' publication.

IV. SAMPLE ANALYSIS: GUIDELINE 10.7 AND THE STANDARD OF CARE IN 1985

As an example of how these resources can be used to establish the prevailing norms of practice at a certain time, the final part of this Article will examine the ineffective assistance of counsel claims raised by Robert Van Hook and the *Guidelines* on which he and the Sixth Circuit attempted to rely. The Sixth Circuit's opinion primarily looked to Guideline 10.7 (Investigation), and specifically focused on the need for

107. See *Death Penalty Representation Project: ABA Guidelines*, *supra* note 105.

108. For a detailed discussion of the ABA's work to implement the *Guidelines*, see Maher, *supra* note 1, at 420-23.

109. Am. Bar Ass'n, IMPLEMENTATION OF THE 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 1-6 (July 2018), https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/ImplementationFactSheetJul2018.pdf.

110. See *Death Penalty Representation Project: Resources*, *supra* note 104.

111. See Am. Bar Ass'n, *Caselaw Summaries*, *supra* note 87.

counsel to begin the investigative process early in the case and speak with a variety of individuals who know or knew the defendant.¹¹² The Supreme Court admonished the Sixth Circuit for not “pausing to consider” whether the standards announced by Guideline 10.7 reflected the prevailing professional norms in 1985.¹¹³

A. Sources Found in the Interactive Guidelines

Using the Interactive Guidelines, there are several available sources that can help establish that, even in 1985, the prevailing professional norm for counsel preparing to defend a capital case was to locate and interview the client’s family members, friends, clergy, teachers, and many others who could provide information about the defendant’s social history and background. The prevailing professional norms relevant to an inquiry regarding counsel’s effectiveness under *Strickland* are those established by experts in the field of capital defense, rather than simply the most common practice.¹¹⁴ Accordingly, the *Guidelines*, like Justice Stevens in *Padilla*, cite to the articles, practice guides, and other materials authored by those experienced practitioners to support the existence of those norms.

Looking at the relevant text in the commentary to Guideline 10.7, the first source is Gary Goodpaster’s article *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*.¹¹⁵ This Article was first published in the *N.Y.U. Law Review* in 1983, two years before the challenged performance in *Van Hook* and two decades before publication of the 2003 *ABA Guidelines*. Since then, it has been widely

112. *ABA Guidelines*, *supra* note 2, at 1023-24 (“The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses . . . decisions about the need for expert evaluations . . . motions practice, and plea negotiations. . . . It is necessary to locate and interview the client’s family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others.”).

113. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009).

114. See *Stetler & Wendel supra* note 1, at 638-40 (“The standard of care for cardiac surgeons is, of course, not set by just any physician with a medical degree and a license to practice. Treatment guidelines for medical specialties are based on a combination of scientific evidence and collaboration between the professionals who have devoted their careers to the area of practice—for example, peer review by the cardiac surgeons themselves. Similarly, the standard of care in capital defense representation is set not by just any lawyer who happens to have a bar card but by the professionals who specialize in this complex area of practice. . . . [T]he objective standard of reasonableness articulated in *Strickland v. Washington* is best understood as using the considered judgement of the legal profession as a benchmark rather than mere custom.”).

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

cited and used as a tool to train capital defenders.¹¹⁶ In it, the author provides instructions about the fundamental aspects of a mitigation investigation, which mirror the language of the *Guidelines*:

Counsel will have to explore the defendant's past, upbringing and youth, relationships, treatment by adults, traumatic experiences, and other formative influences. Counsel will have to uncover witnesses from a possibly distant past, not only relatives, but childhood friends, teachers, ministers, neighbors, all of whom may be scattered like a diaspora of leaves along the tracks of defendant's travels. A substantial mitigating case may be impossible to construct without this kind of life-history investigation . . . Trial counsel has a duty to investigate the client's life history, and emotional and psychological make-up, as well as the substantive case and defenses. There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings.¹¹⁷

This description of counsel's obligations with respect to the mitigation phase of a death penalty case is supported in turn by citations to two different capital trial practice manuals, one published in 1981¹¹⁸ and the other in 1980.¹¹⁹

Similarly, with respect to Guideline 10.7's discussion of the timing of the penalty phase investigation, the Interactive Guidelines link directly to sources that, in the case of Mr. Van Hook, provide contemporary norms of practice which are no different than those provided in the *Guidelines*.¹²⁰

116. Stetler & Wendel *supra* note 1, at 672-73.

117. Goodpaster, *supra* note 115, at 321, 323-24.

118. *Id.* at 324 n.118 (citing SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE 8-20 (1981)).

119. *Id.* at 324 n.123 (citing 3 CALIFORNIA DEATH PENALTY MANUAL at SN-2 (1980)).

120. *Id.* at 324-25.

The timing of this investigation is critical. If the life investigation awaits the guilt verdict, it will be too late. Although a continuance should be requested and may be granted between the guilt and penalty phases of a trial, it is likely to be too brief to afford defense counsel the opportunity to conduct a substantial investigation.

Moreover, an immediate and thorough investigation of the client's life is essential to the guilt trial because the results of the investigation will influence, if not determine, the trial strategy for the guilt phase. It is essential that counsel try the guilt phase in a manner calculated to preserve credibility at the penalty phase. Counsel's portrayal of her client and the nature of the defense at the guilt phase may significantly, perhaps determinatively, affect the sentencer's perceptions of the defendant at the penalty trial.

Id. (citing 3 CALIFORNIA DEATH PENALTY MANUAL at SN-2 (1980)) (other footnotes omitted)).

B. Sources Found Through Searching the Standards Database

After exhausting the sources available through the Interactive Guidelines (and the underlying sources for those sources, and so on¹²¹), practitioners can use the general Standards search form to search for sources within a certain time frame, or related to a particular subject matter or geographic location.¹²² For older cases, where the number of sources predating the date of trial will be relatively few, a simple date-restricted search may suffice. For more recent trials, restricting by date may still return thousands of sources, necessitating the addition of more criteria to meaningfully narrow the results.

In the example of Mr. Van Hook's case, searching for practice manuals published in 1985 or earlier returns sources such as Lois Heaney's 1984 guide, *Constructing A Social History*. This guide to the fundamental tasks required to assemble a social history talks about identifying and interviewing friends, neighbors, teachers, coaches, ministers, spouses, children, correctional personnel, and "people who are likely to care about [the defendant]."¹²³ Similar information is provided in the same author's 1983 guide, "Preparing the Penalty Phase." This guide also provides support for the need to begin the penalty phase investigation as soon as possible.¹²⁴ Similarly, the Southern Poverty Law Center's guide, *The Better Defense: A Team Guide for Defendants and Lawyers in Death Penalty Cases*, published in 1984, talks about a variety of mitigation witnesses that are important to explore and potentially present to the jury.¹²⁵ In addition to family and friends, this brief guide discusses interviewing prison guards, clergy, and psychiatrists.¹²⁶

Searching next within the category of "National Guidelines" published in or before 1985 returns the 1985 National Legal Aid and Defender Association ("NLADA") Counsel Standards. This set of standards is of particular importance when gathering support for the *ABA Guidelines* because it formed the basis for the blackletter text of the 1989 *ABA Guidelines*.¹²⁷ NLADA Standard 11.4.1 (which is

121. See *supra* Part III.C.1.b.

122. Am. Bar Ass'n, *Standards / Search All*, *supra* note 92.

123. Lois Heaney, *Constructing a Social History*, in NATIONAL JURY PROJECT, CAPITAL TRIALS: JUROR ATTITUDES AND SELECTION STRATEGIES 11-13 (1983).

124. Lois Heaney, *Preparing the Penalty Phase*, in NATIONAL JURY PROJECT, CAPITAL TRIALS: JUROR ATTITUDES AND SELECTION STRATEGIES 8 (1983) ("Collecting Penalty Phase Evidence: Begin Early. You are not investigating an incident; you are investigating a lifetime.").

125. MAUREEN McLAUGHLIN, *THE BETTER DEFENSE: A TEAM GUIDE FOR DEFENDANTS AND LAWYERS IN DEATH PENALTY CASES* 61-63 (1984).

126. *Id.*

127. See Stetler & Tabuteau, *supra* note 1, at 741 ("After a period of years of drafting and

identical to 1989 Guideline 11.4.1¹²⁸) instructs that counsel should consider interviewing:

- (A) eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;
- (B) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;
- (C) members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.¹²⁹

The 1985 NLADA standards also instruct that both the guilt and penalty phase investigation "should begin immediately upon counsel's entry into the case and should be pursued expeditiously."¹³⁰

These types of resources make it clear that the norms embodied in the 2003 *Guidelines*, which the Sixth Circuit found that Mr. Van Hook's trial counsel failed to follow, did not spring into existence on the date of the ABA Midyear Meeting in February 2003. They predate the publication of those *Guidelines* by more than two decades and were unquestionably "in effect" at the time of Mr. Van Hook's trial. If the Sixth Circuit had, after full briefing, conducted the analysis that the Supreme Court said was needed, it could properly have concluded that trial counsel's performance did indeed violate then-existing norms. As the outcome of Mr. Van Hook's case makes clear, however, counsel must take care at every opportunity to support the use of later-published

circulating preliminary versions, the NLADA published its 'Standards for the Appointment of Defense Counsel in Death Penalty Cases' in 1985. While the text was not amended, the name of the document was changed between 1987 and 1988 to 'Standards for the Performance of Counsel in Death Penalty Cases' (adopted December 1, 1987, and amended November 16, 1988) ('Standards'). In February 1988, the NLADA referred its Standards to the ABA's Standing Committee on Legal Aid and Indigent Defendants. The Standards were then further circulated within the ABA, which incorporated some concerns expressed by its Criminal Justice Section and changed the name from Standards to Guidelines. The ABA House of Delegates formally adopted the Guidelines at its 1989 Midyear Meeting.").

128. ABA GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1 (AM. BAR ASS'N 1989), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/1989guidelines/authcheckdam.pdf.

129. NLADA COUNSEL STANDARDS, Standard 11.4.1(d)(3) (NAT. LEGAL AID & DEF. ASS'N 1985), https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/NLADA_Counsel_Standards_1985.authcheckdam.pdf.

130. NLADA COUNSEL STANDARDS, Standard 11.4.1(a) (NAT. LEGAL AID & DEF. ASS'N 1985).

Guidelines by showing that they reflect the prevailing professional norms at the time of the challenged performance. Not doing so invites the risk that the ineffectiveness claim will be judged by long-outdated or overly generic standards—or, even worse, by no standards¹³¹—all greatly increasing the chances that relief will be denied even though the client truly received ineffective representation.

V. CONCLUSION

If there is one clear message sent by the Court in *Van Hook* and reflected in subsequent lower court opinions, it is that the burden will largely fall on the prisoner to identify sources that demonstrate the standard of care at the time of trial. This starts with changing the terminology used by courts and practitioners to reflect the reality that restatements of professional norms do not *create* those norms, and that the date of the publication of such a restatement is an extraordinarily poor proxy for establishing the date when a standard of practice emerged. It then requires using the types of resources used by Justice Stevens in *Padilla* to establish the norms at the time of the challenged performance. These sources should be used in tandem with the *ABA Guidelines*. Particularly where the publication date of the *Guidelines* post-dates the trial, it will be important to give the court all the support it needs to make a finding that the *Guidelines* reflect the prevailing norms from decades prior to their publication—as is indeed the case. Using the tools this Article has described, practitioners can stop trying to avoid *Van Hook* and instead embrace the opinion as providing validation and support for the proposition that the *Guidelines* are guides that courts can and should use to assess reasonable counsel performance in capital cases.

131. See Stetler & Wendell, *supra* note 1, at 676-681 (discussing inherent problems with judicial reliance on personal experience as a measure of reasonable counsel performance).