

Memorandum

Date: November 10, 2009

Subject: **Bobby v. Van Hook**

In 1985 Robert Van Hook was convicted of murder and sentenced to death. In 2007 the United States Court of Appeals for the 6th Circuit granted Van Hook habeas relief on the grounds that his counsel was ineffective, relying on the American Bar Association's 2003 Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines"). *Van Hook v. Anderson*, 560 F.3d 523, 525 (6th Cir. 2009). The state of Ohio petitioned the United States Supreme Court for a writ of certiorari. In a per curiam opinion, the Court granted the state's petition and reversed the 6th Circuit's decision. *Bobby v. Van Hook*, No. 09-144, 2009 U.S. Lexis 7976, at *2 (Nov. 9, 2009). Although the Court's opinion is critical of the way in which the 6th Circuit applied the Guidelines, it did not overrule prior precedent that favorably cites the Guidelines as "guides to determining what is reasonable." See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

The Court took issue with the 6th Circuit's application of the 2003 Guidelines to representation that occurred in 1985. 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." 2009 U.S. Lexis 7976, at *2. The Court did not categorically state that the 2003 Guidelines can never serve as guides to the prevailing norms prior to 2003; rather the Court criticized the 6th Circuit for "[j]udging counsel's conduct in the 1980's on the basis of these 2003 Guidelines . . . without even pausing to consider whether they reflected the prevailing professional practice at the time of trial . . ." *Id.* (emphasis added). It is reasonable to conclude that retroactive application may be permissible, provided there is evidence that the Guidelines reflect prevailing norms at the time of representation.¹

The Court also criticized the 6th Circuit for treating the 2003 Guidelines as "inexorable commands." *Id.* Although the Court apparently disfavors this categorical use of the Guidelines, the opinion favorably cites past precedent which has declared that the Guidelines are guides to what is objectively reasonable when assessing claims of ineffective assistance of counsel under the 6th Amendment. *Id.* at *3 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Wiggins*, 539 U.S. at 524). It reiterated that since *Strickland*, the Court has viewed the Guidelines as "guides to what reasonableness means" *Id.* (internal quotations omitted).²

The Court's opinion in *Van Hook* does not alter its prior jurisprudence regarding the ABA Guidelines. It merely states what has already been expressed in other cases: defendants are entitled to representation that meets objective standards of reasonableness given the prevailing professional norms of that time. The Court continues to favorably cite prior cases which indicate that the ABA Guidelines reflect these norms.

¹ The Court reversed of the 6th Circuit's decision based on its assessment that Van Hook's counsel's performance met the ABA Standards for Criminal Justice, which were published in 1980. Notably, the 6th Circuit relied exclusively on the 2003 Guidelines when granting relief to Van Hook. It is unclear what, if any, difference it would have made if the 6th Circuit had also relied on the 1989 Guidelines which were published much closer to the time of the representation

² The opinion contains a footnote that, somewhat paradoxically, explicitly declines to express a view as to whether the Guidelines reflect "prevailing norms of practice." Yet the opinion cites to precedent which has already held that the Guidelines do reflect these norms.

Summary points:

- The decision does not categorically prohibit retroactive application of the 2003 Guidelines, but in cases decided prior to 2003 defense counsel should take care to demonstrate that the norms were in effect at the time of trial.
- The Court has not overruled its own precedent which states that the ABA Guidelines are guides to determining what is professionally reasonable legal representation in capital cases. The ABA Guidelines therefore remain important to any ineffectiveness of counsel analysis.
- Nothing in this decision changes the relevance and importance of the 2003 Guidelines to capital trials that were held during or since 2003.
- The ABA Guidelines have never been construed as “inexorable commands.” They have always been described as codification of the national standard of care in the defense of capital cases.
- Nothing in this opinion indicates that trial counsel, post-conviction counsel, and judges should not continue to use the ABA Guidelines as important guidance regarding the appointment, funding, and performance of the defense function in capital cases.