

Summaries of Cases Citing to the 2003 ABA Guidelines

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Guideline 1.1 -- Objective and Scope of Guidelines

1. *Yates v. Sinclair*, 2014 WL 499003 (W.D. Wash. 2014)

The United States District Court for the Western District of Washington granted Petitioner Robert Lee Yates, Jr.'s Motion for Stay and Abeyance on two unexhausted claims in his habeas corpus action. He sought to stay the Court's consideration of his federal habeas petition so that he could exhaust two claims in state court. In support of his motion, Yates submitted an expert's opinion that his trial counsel had "abandoned a vital legal issue and that this error constituted a violation of the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. ed.2003)." (internal quotation omitted) [ed. note: the duty of counsel to raise every legal claim that may ultimately prove meritorious is covered in the commentary to 2003 Guideline 1.1]. The district court found that this issue was not "plainly without merit." Further finding that the claim satisfied the other requirements of the U.S. Supreme Court's test in *Rhines v. Weber*, the court granted the stay to permit Yates to exhaust the claim in state court.

2. *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir 2013)

The Court of Appeals for the Tenth Circuit affirmed the district court's judgment on all grounds except for the petitioner's claims of ineffective assistance of counsel at the penalty phase and remanded the case to the district court for an evidentiary hearing.

In concluding that counsel's performance was deficient, the court stated that counsel must perform in accordance with "prevailing professional norms, which in capital cases . . . refer to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases . . . "

3. *In re Reno on Habeas Corpus*, 283 P.3d 1181 (Cal. 2012)

The Supreme Court of California denied the petitioner's second habeas corpus petition and found that the second writ was an abuse of the writ process because of its voluminous size and abounding detail, and because it raised claims almost all of which are procedurally barred.

The Court then used this opinion as an opportunity to "establish some new ground rules for exhaustion petitions in capital cases that will speed the [Court's] consideration of them without unfairly limiting petitioners from raising (and exhausting) justifiably new claims." The Court partly relied on suggestions made by the parties and amici curiae to adopt measures by which petitions may be streamlined, making preparation and review of the petition simpler and more efficient.

On the issue of raising the procedurally barred claims, the petitioner and amici curiae point to the 2003 ABA Guidelines as the source of their ethical obligation to raise defaulted claims.

The Court held that "those standards are not congruent with constitutional standards for effective legal representation," and are "inconsistent with this [C]ourt's standards." It pointed to ABA Guideline Section 10.15.1(C), its commentary, and 10.7(A)(1) as specific examples of ABA Guidelines that "require much more of counsel than is required by state or federal law governing ineffective assistance of counsel."

In reaching this determination, the Court agreed with the Supreme Court's characterization of the ABA Guidelines in *Bobby v. Van Hook* that:

"[r]estatements of professional standards . . . 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..." and "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."

The Court concluded that petitioner failed to demonstrate that counsel was deficient in failing to raise any of the nonrepetitive claims in the petition (i.e., claims prior counsel did not raise) or that the omission caused him prejudice. With regard to any new claims raised in the petition that the petitioner pointed to suggest that his counsel was constitutionally ineffective, the Court found them "wanting" and concluded-without citing to the ABA Guidelines-that petitioner's counsel was not deficient and the omissions did not cause him prejudice.

4. *Link v. Luebbers*, 830 F. Supp. 2d 729 (E.D. Mo. 2011)

In a case dealing with compensation for federal civil actions dealing with clemency, the U.S. District Court for the Eastern District of Mississippi held that counsel may be compensated for pursuing a Section 1983 due process challenge seeking an unbiased clemency decision maker. In this case, the complaint was brought because the Missouri Governor, while acting as Attorney General, filed an amicus brief supporting the death penalty for perpetrators of child rape, of which Link had been convicted. The Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted, and the motion was granted, with the court stating:

Although some minimal due process protections apply to a State clemency proceeding, under Missouri law the decisions of whether to grant or deny clemency and whether to appoint a board of inquiry are left to the discretion of the governor. According to Plaintiff's allegations, Governor Nixon's views regarding clemency were made public while he was Attorney General. Subsequently, Missouri voters elected Nixon to the position of Governor, holding the constitutional power to make clemency determinations. It is not alleged that Defendants simply rolled a dice to determine whether to grant clemency or intentionally interfered with Link's access to full clemency proceedings. Link's theory that Governor Nixon is simply predisposed to reject his petition for clemency fails to state a claim for which relief may be granted."

Link v. Nixon, 2:11-CV-04040-NKL (W.D. Mo.). In determining duties of clemency counsel, the Court, citing to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, said "in addition to assembling the most persuasive possible

record for the decisionmaker [sic], counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process." (ABA Guidelines 1.1, at 937). The court stated that "some minimal due process protections apply to state clemency proceedings," and that because this is a developing area of the law, Link's due process challenge was not frivolous. "Moreover, the Guidelines recommend that clemency counsel be prepared to raise due process challenges in furtherance of clemency proceedings." The Court, noting that Link's motion was "an essential part" of the clemency proceeding, held that the work performed in Nixon is compensable.

5. *State v. Hunter*, 960 N.E.2d 955 (Ohio 2011)

Ohio Supreme Court affirmed the conviction and sentence of Lamont Hunter, denying Hunter's ineffective assistance of counsel claim.

Hunter argued that his counsel was ineffective during both the penalty and sentencing phase of trial, stating that trial counsel's performance must be judged based on the standards set forth in the ABA Guidelines. The Ohio Supreme Court noted that "the ABA guidelines present a detailed prescription for the legal representation of capital defendants," but said that Hunter failed to specify the provisions of the guidelines that his counsel violated. Additionally, the Ohio Supreme Court, citing to the U.S. Supreme Court, said the ABA guidelines are guide to reasonableness, rather than the definition.

Citing to the holding of *Van Hook*, the Ohio Supreme Court said that the proper standard to judge counsel performance is the standard set forth in *Strickland*. Hunter argued that his retained counsel, Clyde Bennett II, was ineffective because he was facing federal criminal charges while representing him. Hunter dismissed his appointed counsel in order to retain Bennett. Bennett was convicted in federal court for unlawfully structuring financial transactions about two months after Hunter was sentenced to death. Bennett's pending charges were not mentioned during any party during trial, but Hunter argued that Bennett failed to get involved in his case from the "onset of law enforcement's focus on Hunter." He argued that the failure was due to distraction by his own charges. "[T]his ineffectiveness claim lacks merit because Bennett was not retained to represent Hunter until shortly before his scheduled trial date. Thus, Bennett could not have become involved in assisting Hunter earlier. In any event, Bennett's legal problems relating to pending charges do not establish ineffective assistance of counsel."

Further, the court held that Hunter's claims that his counsel was "desperate for cash" and "not inclined" to disclose his distractions are speculative. "In sum, Hunter's ineffectiveness claim fails to satisfy the two-pronged *Strickland* standard. Hunter has failed to demonstrate that counsel provided deficient performance because he was facing unrelated criminal charges in federal court. Hunter has also failed to demonstrate that the result of his trial would have been different if trial counsel had not been facing these charges."

6. *Gardner v. Super. Ct.*, 111 Cal. Rptr. 3d 155 (Cal. Ct. App. 2010)

The Court of Appeals of California held that a defendant in a "special circumstance murder case" is entitled to investigative funding, provided under state statute to defendants in capital

cases, when the district attorney has not yet declared that he or she will seek the death penalty. *Id.* at 2. The Court held that Gardner's petition for funding was moot because the District Attorney did not intend to seek the death penalty. *Id.* at 6. However, the Court held that the petition warranted review because it addressed an "important question affecting public interest that is capable of repetition yet is likely to evade review" *Id.* at 6 (citations omitted). In its analysis, the Court noted that "[c]apital defense often includes an attempt to convince the district attorney to forego the death penalty" and is "often accomplished by presenting mitigation evidence as early as possible--a strategy, not incidentally, recognized by objective standards for defense representation in capital cases." *Id.* at 23. The Court then quoted the 2003 American Bar Association Guidelines, which explain that "[i]nvestigation and planning for both [trial and penalty] phases must begin immediately upon counsel's entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty." *Id.* at 23 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) p. 5-6). Additionally, the Court noted that the Guidelines advise that "[c]omprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence, to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty." *Id.* at 23. (citations omitted). The Court also dismissed the prosecution's argument that the guidelines do not apply in light of *Bobby v. Van Hook* by noting that the Supreme Court has stated that the ABA guidelines may be used as "guides" in determining whether representation was reasonable. *Id.* at 24 (citations omitted).

7. *Mulero v. Thompson*, 751 F. Supp. 2d 1009 (N.D. Ill. 2010)

The Seventh Circuit Court of Appeals affirmed the district court's holding that many of Mulero's ineffective assistance of counsel claims were defaulted, and the claims that were not failed on the merits. The district court granted a certificate of appealability on the issue of whether Mulero's counsel was ineffective for 1) failing to investigate witnesses, and 2) failing to obtain supporting services, prior to advising Mulero about her desire to enter a blind guilty plea, in violation of the ABA death penalty case guidelines.

With regard to Mulero's three ineffective assistance of counsel arguments, the Eighth Circuit noted that the Illinois state trial court did not address the performance prong of *Strickland*, meaning that they never determined whether counsel's guidance in advising Mulero on her desire to enter a blind plea fell below "an objective standard of reasonableness." Because of this, the Eighth Circuit could review the question *de novo*, but did not because it found that Mulero could "not establish that the state court's conclusion that she did not suffer prejudice was unreasonable."

Mulero argued her counsel was ineffective for failing to investigate a specific witness to obtain a statement from that witness that she saw someone else shoot the victim. The Eighth Circuit concluded that it was not unreasonable for counsel not to investigate this witness because counsel had taken the case over from a public defender who had an investigator who had spoken to the witness and Lynch found that the witness's statement was not definitive, and that there were inconsistencies in the witness's statements. Mulero said she still wanted to plead guilty. Mulero also claimed that counsel was inefficient for failing to obtain psychological evidence that Mulero's confession was involuntary. The Eighth Circuit

disagreed, finding that counsel tried to suppress Mulero's confession on the grounds that it was psychologically coerced and the state rejected the argument. Further, psychological evidence obtained from an expert was rejected as not credible. "Under these circumstances, the state court did not act unreasonably in concluding that had Lynch obtained additional psychological evidence, it would not have changed his advice or convinced Mulero to change her mind about entering a blind plea of guilty."

Lastly, Mulero argued that the counsel should have called inconsistencies of a witness's statements into question. In the state court proceedings, counsel testified that he knew of the inconsistencies in the witness's statements, as well as the fact that the witness was in custody on drug charges at the time she implicated Mulero. "Thus, there is no reason to believe that Lynch did not recognize that he could challenge Rodriguez's testimony if Mulero pleaded not guilty and proceeded to trial."

The Eighth Circuit found that, ultimately, there was an "overwhelming prosecutorial case against Mulero," and that because of that, even if Mulero's counsel's performance was objectively unreasonable, it was not reasonable to believe that there was any prejudice.

8. *Richie v. Sirmons*, 563 F. Supp. 2d 1250 (N.D. Okla. 2008)

The Court held that the Petitioner was entitled to habeas corpus relief because of the inadequate mitigation investigation received during the penalty phase. The Petitioner claimed that his trial attorney failed to present a defense based on voluntary intoxication and failed to develop evidence of psychological impairment. The first claim was dismissed because "it is unclear who trial counsel could have presented to testify". In reviewing the second claim the court noted that trial counsel had focused on testimony from family members and presented brief school records. Counsel failed to present psychiatric evidence which the "Tenth Circuit court of Appeals has noted . . . is 'exactly the sort of evidence that garners the most sympathy from jurors. *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004)". Citing *Smith* the court went on to note that:

The Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the American Bar Association (ABA) ... as 'guides to determining what is reasonable' performance. Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase.' See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for Mr. Watson to omit this evidence from his case for mitigation.

(Internal citations omitted). The Court noted that "Counsel simply did not take any action to determine whether such evidence was available" and thus concluded that counsel's failure was "constitutionally deficient under *Strickland*." In light of the new psychiatric evidence the court concluded that Petitioner's claim satisfied *Strickland* prejudice and he was entitled to habeas relief.

9. *State v. Garza*, 163 P.3d 1006 (Ariz. 2007)

The Arizona Supreme Court automatically reviewed the sentence of death pursuant to A.R.S. Section 13-703.04 (2006). In its review, the court affirmed the conviction and sentence. While the court did find that the presence of aggravating factors and the presentation of minimal mitigating evidence was sufficient for a sentence of death, it did note that defense counsel has numerous duties during the course of the trial.

In citing to the Guidelines, the court references to Guideline 10.11(L) (2003), indicating that death penalty counsel has a duty "at every state of the case" to "take advantage of all appropriate opportunities to argue why death is not a suitable punishment for their particular client." *Id.* at 1022 n.16. The court stated that in its automatic review of the sentence, it "should have been aided by argument of counsel" on the point of mitigation. *Id.* at 1021. The court also stated that death penalty counsel should not merely rely on the State's statutory duty to review the record, referencing Guideline 10.15.1(C). Instead, the court declared that defense counsel should "seek to litigate all issues . . . that are arguably meritorious." *Id.* at 1022 n.16.

10. *State v. Young*, 172 P.3d 138 (N.M. 2007)

The Fourth Judicial District Court judge denied defense counsel's motion which requested "compensa[ti]on at an hourly rate, to be allowed to withdraw, and/or to dismiss the death penalty." *Id.* at 140. The judge denied the motion but noted, ". . . defense counsel should receive fair compensation for their excellent representation of the defendants, and that the State's failure to pay fair compensation indicates that New Mexico cannot afford the death penalty." *Id.*

Citing to the 2003 ABA Guidelines, the Supreme Court of New Mexico acknowledged the complexity of death penalty cases that "require a significantly greater degree of skill and experience on the part of defense counsel than is required in a noncapital case. See 2003 ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 1.1, History of Guideline (rev. ed. 2003), in 31 Hofstra L.Rev. 913, 921 (2004) [hereinafter ABA Guidelines]." *Id.* at 141. Furthermore, the Court scrutinized the use of a flat fee granted by the Public Defender Department which fails to compensate the defense counsel's overhead costs, and is less than the hourly wage a videographer working on the case would receive. The Court stated:

Because of the extraordinary demands on capital defense attorneys, ABA Guidelines, Guideline 8.1 Commentary, in 31 Hofstra L.Rev. at 979, the American Bar Association has condemned flat fees, caps on compensation, and lump-sum contracts in death penalty cases. *Id.*, Guideline 9.1(B)(1), in 31 Hofstra L.Rev. at 981. Rather than a flat fee or a capped rate, the ABA Guidelines stress that "[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation." *Id.*, Guideline 9.1(B), in 31 Hofstra L.Rev. at 981.

172 P.3d at 142. The Supreme Court reasoned inadequate compensation gives rise "to a presumption of ineffective assistance of counsel." *Id.* With these findings the Court ordered a stay of prosecution for the death penalty pending the state's ability to provide reasonable compensation. *Id.* at 144.

11. *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir 2007)

The Tenth Circuit Court of Appeals reversed the district court's denial of habeas relief as to the defendant's sentencing and was remanded to the district court with instructions to issue a writ of habeas corpus. The court found that defense counsel's failure to investigate or discover readily available mitigation evidence regarding the defendant's family history and mental health amounted to constitutionally deficient performance. In addition, the court also found that defense counsel's conduct prejudiced the proceedings, as it left the motive for the murders unanswered.

In citing to the ABA Guidelines, the court noted that investigation into mitigating evidence involves discovering "all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 1142 (citing ABA Guideline 11.4.1(C)). The court declared that evidence relating to the defendant's mental health history and family life represented "just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of the trial." *Id.* at 1144.

12. *Yarbrough v. Johnson*, 490 F. Supp. 2d 694 (E.D. Va. 2007)

The U.S. District Court for the Eastern District of Virginia adopted a magistrate judge's report and recommendation denying Robert Stacy Yarbrough's petition for federal habeas relief. Yarbrough argued that his counsel's failure to request funds for a DNA expert amounted to constitutionally deficient performance. The magistrate judge had determined that Yarbrough's references to the ABA Guidelines, in support of his claim that his counsel was ineffective, were procedurally defaulted because Yarbrough had not raised them as the appropriate benchmark of counsel performance in the state proceedings. The district court disagreed with that conclusion after discussing the meaning of a "controlling legal principle" in the context of whether a claim has been fairly presented to a state court. In this case, the controlling legal principle was *Strickland v. Washington*, and Yarbrough "supplement[ed] his prior argument" by using the Guidelines as "an aid in defining the effectiveness threshold." The court also went further to state that even if Yarbrough was precluded from raising the Guidelines, "nothing prevents this court from considering the Guidelines sua sponte as the court is tasked with [determining] whether petitioner's counsel provided effective assistance and such determination necessitates consideration of the prevailing norms of the defense bar." The court also held that consideration of the Guidelines was "supported by the United States Supreme Court's repeated citation to ABA Guidelines as a helpful tool for measuring counsel's performance" and then cited to several of those decisions, including *Wiggins v. Smith* and *Rompilla v. Beard*.

Before analyzing the effectiveness claim, the court then discussed the Guidelines' position on defense experts at great length. The court first examined language in 1989 Guidelines 5.1, 8.1, 11.4.1, and 11.5.1, all of which describe counsel's responsibilities with regard to preparing and litigating forensic evidence. The court noted in a footnote that although the Guidelines use the word "should," the introduction provides that they are "mandatory" and "minimum requirements." The court also noted that the commentary to 1989 Guideline 1.1 states that "[u]tilization of experts has become the rule, rather than the exception, in proper preparation

of capital cases." The court also discussed the 2003 Guidelines, although it stated they "warrant less attention" not only because they were not yet in existence when Yarbrough was tried but also because his counsel was "per se ineffective" under those standards. The court noted that Yarbrough was tried in 1998, a decade after the 1989 edition but five years before the 2003 edition, and thus the prevailing professional norms were "somewhere in between" the two editions. After reviewing both editions of the Guidelines, the court stated that the "Guideline provisions discussed above plainly suggest that Yarbrough's trial counsel was ineffective for failing to hire a DNA expert."

The court, however, wrote that it disagreed with commentary within the 2003 Guidelines that they are "not aspirational" and embody "current consensus," stating that other commentary "to the Guidelines themselves belies such an assertion, at least with respect to obtaining public funds for independent defense experts." Because commentary to 1989 Guideline 8.1 stresses that jurisdictions must authorize sufficient funds for this purpose and criticized states that do not, the court found that "[s]uch language definitively establishes the aspirational nature of this aspect of the Guidelines." The court held that it was subject to "standards dictated by the United States Supreme Court and the federal Constitution and not the ABA," and the court found a failure to seek public funds for expert assistance "does not constitute ineffective assistance of counsel even if certain members of the bar label a state's application of such onerous standard as 'unconscionable.'" The court ultimately found that trial counsel's performance was not deficient and denied relief.

13. Kilgore v. State, 933 So. 2d 1192 (Fla. Dist. Ct. App. 2006)

Florida's Second District Court of Appeal granted Dean Kilgore's appeal of an order from the Circuit Court of Polk County, which had dismissed the Office of the Capital Collateral Representative (CCRC) from representing Kilgore in a collateral attack challenging the validity of Kilgore's 1978 first-degree murder conviction which had been used as an aggravating factor in the penalty phase of his 1994 murder case. CCRC had been representing Kilgore in post-conviction for the 1994 conviction, for which he received the death penalty. The Circuit Court's order did not dismiss the underlying collateral proceeding, but dismissed CCRC from the representation of Kilgore in that proceeding.

The Second District Court of Appeal also certified to the Florida Supreme Court "a question of great importance to the Florida Supreme Court...

Are counsel appointed to provide collateral representation to defendants sentenced to death, pursuant to Section 27.702, authorized to bring proceedings to attack the validity of a prior first-degree murder conviction that was used as a primary aggravator in the death sentencing phase?"

Id. at 1193.

The Court of Appeal certified the question because the Florida statute governing appointed counsel does not "explicitly deal with the situation where . . . a previous conviction is the primary aggravator for imposition of the death penalty, and to challenge the death penalty, the previous conviction must be challenged." Id. In certifying the question to the Florida Supreme

Court, the Court of Appeal stated that, "in order to challenge the murder conviction aggravator, the prior judgment must have been set aside [and] that is the course that CCRC was attempting to take, and it is consistent with ABA Guidelines." *Id.* The Court of Appeal noted that CCRC's attempt to challenge Kilgore's previous first-degree murder conviction conformed with the requirements of the 2003 ABA Guidelines. The court also cited to the ABA Guidelines dealing with investigation (10.7), the duty to assert legal claims (10.8), and the duty of post-conviction counsel (10.15.1.E.4). *Id.*

As stated by the court, the Florida statute permits CCRC to challenge a death sentence as well as the conviction, and in this case one "method of attacking the sentence of death is to attack the primary aggravator, a prior first degree murder conviction." *Id.* The court noted the importance of this tactic, stating that "attacking an aggravating factor is a traditional and well-accepted method used to challenge death sentences." *Id.* The court cited the ABA Guidelines to show that the collateral attack of an aggravating factor is often necessary, noting 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. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Rev. ed. Feb. 2003) (10.8, Duty to Assert Legal Claims, and such obligations are extended to post-conviction counsel, 10.15.1.E.4). Failure to pursue such a well-established course of action can be used to assert an ineffective assistance of counsel claim, if there was a right to counsel in this context.

Id.

While serving a life sentence, Petitioner was charged with the murder of an inmate. Petitioner was convicted and during the penalty phase, a previous first-degree murder conviction was submitted by the State as an aggravator to justify the death sentence. The sentencing court sentenced Petitioner to death after finding two aggravating circumstances: (1) Petitioner was under sentence of imprisonment at the time he committed the murder; and (2) Petitioner had been previously convicted of a felony involving the use or threat of violence to the person both of which are related to the previous first degree murder conviction.

Subsequently, the Office of the Capital Collateral Regional Counsel (CCRC) was appointed to represent Petitioner to collaterally challenge the first-degree murder conviction and death sentence. Having identified what counsel believed to be substantial grounds to challenge an important aggravator used by the State to justify a death sentence, CCRC sought to vacate the first-degree murder conviction based upon the holding in *Brady* requiring disclosure of exculpatory evidence, including impeachment evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963). In turn, however, the State filed a motion to bar CCRC from representing Petitioner in the first-degree murder case, and the circuit court granted the motion on the basis that Florida's statutory scheme for appointment of counsel did not authorize CCRC's representation in the non-capital case.

"The district court concluded that because Florida law required the prior judgment to be set aside in order for the aggravator to be challenged in the capital case, Petitioner was entitled to have effective counsel do what CCRC was attempting to do on his behalf, a course of action

also consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)." Kilgore at 2201. However, the Supreme Court of Florida determined that while Petitioner himself is entitled to prosecute a collateral claim attacking a prior conviction utilized as an aggravator in his capital case, CCRC is not authorized to do so on his behalf since Florida's statute for appointment of counsel did not authorize CCRC's representation in a non-capital case.

14. Keenan v. Bagley, 400 F.3d 417 (6th Cir 2005)

The U.S. Court of Appeals for the 6th Circuit vacated and remanded the Northern District of Ohio's order denying habeas corpus relief to petitioner Thomas M. Keenan. The district court dismissed Keenan's petition on the grounds that it was untimely. The federal petition was filed more than a year after the conviction became final, but the Sixth Circuit found that it was not clear whether the federal statute of limitations was tolled by an order extending the time to file the state petition, which was entered after the time to file the state petition had long-since expired but before the federal limit expired. This confusing circumstance arose because of the Ohio statute which begins the 180-day clock for filing a state post-conviction petition while the direct appeal is still pending. Concurring with the majority's decision to remand the case to the district court for a hearing on equitable tolling, Judge Merritt wrote separately to say that the federal statute of limitations ought to be tolled in this case given the complex interaction of the Ohio statute with AEDPA's statute of limitations. He noted that the Ohio statutory scheme also makes it difficult or impossible for post-conviction counsel to properly raise claims. He wrote "This system requires post-conviction counsel to file claims of ineffective assistance of trial and appellate counsel, prosecutorial suppression of exculpatory evidence, newly discovered evidence and similar claims even before Ohio's Supreme Court considers the case on appeal and before trial and appellate counsel are replaced by post-conviction counsel." Merritt also noted that this process "makes the American Bar Ass'n Guidelines for the Appointment of Counsel in Death Penalty Cases Section Section 1.1 and 15.1 (2003) practically impossible to meet." He wrote, "The ABA standards contemplate the appointment of new or separate counsel at the habeas stage of the case. If the post conviction and federal habeas stages of the case must begin before final judgment, the appointment of new counsel becomes difficult to manage."

Judge Merritt concluded that he would both remand the case and order consideration of the merits of the claim, "either because the Ohio statutory maze created a situation that no sane lawyer could figure out or because an effective lawyer would have found some solution that escapes me-one or the other."

15. Smith v. Mullin, 379 F.3d 919 (10th Cir 2004)

The Tenth Circuit held that counsel was ineffective for not presenting evidence of defendant's mental retardation, brain damage, and troubled background in the penalty phase.

Looking to the United States Supreme Court in its analysis, the Tenth Circuit noted that "[t]he Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the (ABA) ... as guides to determining what is reasonable' performance." *Id.* at 942. (citations omitted). "Those standards repeatedly reference mental health evidence, describing it as 'of

vital importance to the jury's decision at the punishment phase. See (2003) ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for [trial counsel] to omit this evidence from his case for mitigation." *Id.* (citations omitted).

16. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004)

The Supreme Court of Pennsylvania examined a number of claims for post-conviction relief presented by Williams, among them ineffective assistance of counsel, prosecutorial misconduct, and various due process violations. The Court held that none of the claims merited relief.

Justice Saylor dissented, arguing that Williams had established ineffective assistance of counsel at the penalty phase, primarily for failing to develop adequate mitigating evidence. Citing a reference to the 1989 ABA Guideline 11.4.1 (C) in *Wiggins v. Smith*, 539 U.S. 510 (2003), the opinion recognized defense counsel's "obligation to 'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Williams*, 863 A.2d at 527 (citation omitted). Justice Saylor drew upon substantial support from the 2003 ABA Guidelines throughout his opinion, commenting that "[I]n my view, the drafters' claim that the Guidelines 'embody the current consensus about what is required to provide effective defense representation in capital cases' is not an exaggerated one. *Id.* at 527 n.6 (citation omitted). In particular the Saylor refers to 2003 ABA Guidelines 1.1, 4.1, 10.5, 10.7(A)(2), and 10.11.

The dissent pointed to a number of instances in which the conduct of defense counsel fell short of professional standards. Justice Saylor utilized 2003 ABA Guideline 4.1 in arguing that counsel was irresponsible in scheduling his first meeting with the defendant only one week before trial, *id.* at 528 n.7, that "competent counsel would have reviewed records from Appellant's other criminal proceedings," *id.* at 528, that a previous psychotic episode merited professional evaluation, *id.* at 528 n.8, and that counsel was unjustified in relying on his own opinion of the defendant's psychological state, *id.* at 528 n.9. Then, Saylor used 2003 ABA Guidelines 10.5 and 10.7(A)(2) to rebut counsel's suggestion that the defendant's adamant commitment to fighting the validity of his conviction excused a lack of penalty phase preparation. *Id.* at 531 n.17, n.19.

The dissent criticized the majority for too lightly disregarding "the potency of life-history and mental-health mitigation in terms of capital sentencing," claiming that such an approach is contrary to Supreme Court precedent and the ABA Guidelines. *Id.* at 533 (citation omitted). Justice Saylor explained his perspective on the role of mitigating evidence in the sentence process, quoting 2003 ABA Guideline 10.11: "None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]" *Id.* at 534, n.22 (citation omitted). Indeed, psychological evidence of the type at issue here would "provide some sort of explanation for Simmons's abhorrent behavior." *Id.* at 543, n.23 (relying on 2003 ABA Guideline 10.11 to support this contention).

Justice Nigro filed a separate dissent, agreeing with Justice Saylor that the defendant received ineffective assistance of counsel in the penalty phase. *Id.* at 524.

Guideline 2.1 -- Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases

1. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

2. *Commonwealth v. Wright*, 961 A.2d 119 (Pa. 2008)

The Supreme Court of Pennsylvania affirmed Mr. Wright's convictions and death sentence, holding that it "perceive[d] no due process violation" at trial. *Id.* at 134. Mr. Wright cited the ABA Guidelines to argue that the late appointment of his co-counsel resulted in counsel having insufficient time to prepare for the trial. *Id.* at 132 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 2.1). The court disagreed, finding that the appointment of additional counsel "is not a right; it is within the trial court's discretion." *Id.* The court also noted that it "has never endorsed or adopted the ABA guidelines in full" and "[w]e do not do so now." *Id.* (citing *Commonwealth v. Williams*, 863 A.2d 505, 527 n.6 (Pa. 2004) (Saylor, J., dissenting)).

3. *Eaton v. State*, 192 P.3d 36 (Wyo. 2008)

The court affirmed the trial court's conviction and death sentence. *Inter alia*, that appellant argued that he received ineffective counsel at both trial and sentencing that failed to meet the ABA guidelines. Specifically: Guideline 2.1 (jurisdictional plan), 10.5 (client relationship) and 10.10 (trial preparation overall). The court noted that although the ABA guidelines are not "black-letter rules, they are guidelines of significance that we consider in our review of this case." *Id.* at 119. Following *Strickland*, the court noted with regards to strategic trial choices that "a heavy measure of deference [should be given] to counsel's judgments." *Id.* The court

found that the Wyoming's lack of a formal death penalty plan did not have "a dispositive effect on this case." *Id.* Although the defense team had difficulties working with Eaton (including a mitigation specialist who declined to meet with him again after her first meeting), the assistant defense attorney was "eventually able to develop a working relationship with Eaton." *Id.* at 120. The court noted that Eaton was most critical of the theory of defense that was chosen. But the court held that "juries have minds of their own, and a theory such as that propounded by the defense team was as good as anything we can think of, given the circumstances of this case. Appellate counsel offer no more compelling theory that might have been pursued. As required by the ABA Guidelines, the theory did provide consistency between the guilt/innocence and penalty phases."

With respect to Eaton's mitigation complaints, the Court opinion details an extensive comparison of the proposed additional mitigation facts (see *id.* at 143 - 172) and those that were presented in the county court. The court noted, *inter alia*, that the new evidence was "cumulative to similar evidence that that trial counsel presented in the sentencing phase." *Id.* at 155 and that any failure by trial counsel to properly prepare their mitigation witnesses did not render "a breakdown in the adversary process." *Id.* at 166.

Guideline 4.1 -- The Defense Team and Supporting Services

1. *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir 2013)

The Court of Appeals for the Tenth Circuit affirmed the district court's judgment on all grounds except for the petitioner's claims of ineffective assistance of counsel at the penalty phase and remanded the case to the district court for an evidentiary hearing.

In concluding that counsel's performance was deficient, the court stated that counsel must perform in accordance with "prevailing professional norms, which in capital cases . . . refer to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases . . . "

2. *Nesbit v. State*, 2013 WL 1282326 (Tenn. Crim. App. 2013)

The Tennessee Court of Criminal appeals affirmed the judgment denying Clarence Nesbit's petition for post-conviction relief as it related to the guilt phase of his trial but granting a new sentencing hearing.

William Massey, a death penalty litigation expert, testified during an evidentiary hearing. Massey identified a number of areas where counsel failed to comply with Tennessee and ABA counsel standards, including failure to conduct an adequate investigation, failure to inform the client of plea offers, and failure to retain the necessary experts. He testified that counsel failed to uncover available evidence that would have "dilute[d]" the impact of the State's aggravating evidence, including an allegation that the defendant engaged in "satanic worship." [Ed. note: This subject is covered in Guidelines 10.7 and 10.11, although those guidelines are not specifically referenced by number in the opinion].

Massey also testified that counsel failed to inform their client about plea offers as required by

the ABA Guidelines. [Ed. note: this subject is covered in Guideline 10.9.1, although it is not cited by number in the opinion.] Here, the twenty-five year plea offer should have been discussed promptly, and counsel should have spent more than fifteen minutes discussing the offer with an individual with a low I.Q. and who was unfamiliar with the criminal justice system. Massey stated that conveying the substance of the offer to the client was only part of the ABA Guidelines requirement. The Guidelines also instruct attorneys to keep the client apprised of the theory of the case, the proof that supports the chosen theory, the State's evidence, how the defense could rebut the State's evidence, and the probability of the client's success at trial.

Massey also stated that "in order to qualify with the new ABA Guidelines and 4.1, it required that at least one team member be qualified to screen for mental or psychological disorders or impairments." Massey argued that a forensic psychologist would be qualified for that duty. Defense counsel did not necessarily give ineffective assistance of counsel without the forensic psychologist, but it depended on whether the forensic psychologists' absence and the subsequent lack of information caused prejudice. Massey stated that the Guidelines and the courts were telling defense counsel to take these necessary steps in death penalty cases, even if the defendant did not show any signs of mental health issues or defects.

Upon Massey's testimony, the post-conviction court granted sentencing relief because defense counsel had failed to investigate, prepare, and present mitigation evidence, and therefore Nesbit had received ineffective assistance of trial counsel.

3. Williams v. Workman, (N.D. Okla. 2012)

The U.S. District Court for the Northern District Oklahoma denied petitioner's writ of habeas corpus under Section 2254. Petitioner-citing ABA Guideline Section 4.1- claimed trial counsel failed to seek the assistance of a mitigation specialist and failed to utilize available mitigation witnesses. Petitioner further argued that direct appeal counsel failed to raise trial counsel's deficiencies on appeal. The court found, without citing the ABA Guideline, that petitioner failed to show any concrete evidence indicating that additional mitigation evidence would have been discovered had if trial counsel had used a mitigation specialist or that the decision to not present the available witnesses was not a reasonable trial strategy. Thus, the court concluded that counsel was not ineffective and denied this aspect of petitioner's claim.

The court then turned to the remaining claims of inefficiency of counsel and determined that it need not address the deficiency prong of the Strickland standard, because petitioner failed to demonstrate prejudice resulting from the deficiencies alleged in his claim. In making this determination, the court considered the strength of the state's case and the number of aggravating factors the jury found to exist, as well as the mitigating evidence the defense offered and any additional mitigating evidence it could have offered. The court concluded that although the additional mitigation evidence petitioner pointed to, if discovered and presented, may have provided some additional insight into his upbringing and his family relationships, much of it was cumulative. Thus, the court concluded that there was not a reasonable probability that the introduction of the additional witness testimony would have caused the jury to decline to impose the death penalty and denied petitioner's claim.

4. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

5. *Mendoza v. Thaler*, 2012 U.S. Dist. LEXIS 140645 (E.D. Tex. 2012)

The United States Magistrate Judge reviewed petitioner's for a writ of habeas corpus under Section 2254 and prepared a report and recommendation recommending that the District Court for the Eastern District of Texas deny petitioner's claims of ineffective assistance of counsel. Petitioner argued his counsel was constitutionally ineffective for failing (1) to obtain a comprehensive psycho-social history so as to put forth a unified defense theory in the guilt-determination and the penalty-determination phase; (2) to consider, investigate, and present condition-of-the-mind evidence to negate the mens rea element in the guilt-determination phase of his trial.; (3) to adequately investigate and develop crucial mitigating evidence; and (4) to present testimony to support a sentence less than death and to give a favorable opinion concerning the petitioner's risk assessment.

The magistrate rejected petitioner's claim that his counsel failure to put forth a unified defense theory in the guilt-determination and the penalty-determination phase demonstrated that further investigation into his psycho-social history was warranted. Citing *Strickland*, *Wiggins*, and the ABA Guidelines, the magistrate recognized that counsel in capital cases have a duty to conduct a reasonable investigation into the background of their client prior to making tactical decisions about what mitigation theories to advance and what mitigating evidence to present. Specifically, the magistrate noted that ABA Guideline Section 10.10.1 provides that as the information from the investigation becomes available, counsel should formulate a defense theory and counsel should seek a theory that will be effective in connection with both the guilt determination and the punishment-determination phase of the trial. The magistrate accepted the petitioner's thesis that if defense counsel's guilt-determination phase strategy is inconsistent with his punishment-determination phase strategy, he probably ought not end his

investigation into possible defenses. In this case, however, the magistrate-without additional reasoning-found that the defense theories in petitioner's trial counsel's guilt-determination phase and punishment-determination phase were in no way inconsistent as petitioner contended. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that this counsel failed to consider, investigate, and present condition-of-the-mind evidence to negate the mens rea element. The magistrate recognized that defense counsel-based on their own observations of the petitioner and from their consultations with the petitioner's mental-health expert-they did not believe that a defense of a mental disorder which negated the intent to kill was viable, and therefore did not pursue further investigation of this issue. The magistrate also recognized that other mental health professionals revealed evidence of petitioner's brain damage and mental illness. In this case, the magistrate found that petitioner's counsel's decision not to pursue further investigation into a defense of the lack of mens rea is not deficient. Citing ABA Guideline Section 4.1, the magistrate noted that the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments to assist the jury in understanding the effects of these impairments on the defendant's judgment and impulse control. In this case, the magistrate reasoned that although other mental health professionals revealed evidence of petitioner's brain damage and mental illness their statements fall well short of suggesting that any competent mental health expert would have recommended further testing. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that his counsel failed to adequately investigate and develop crucial mitigating evidence. Citing ABA Guideline Section 10.11, the magistrate recognized that in situations where the mental and emotional functioning of the defendant is part of the mitigation case, the normal practice should be to investigate the defendant's complete social history, from before conception to the present. In this case, the magistrate found that petitioner's counsel-based upon their investigation-formulated the mitigation theory that petitioner fell in with a bad crowd and engaged in substance abuse and other self-destructive behavior as a result of loneliness and alienation caused by his father's absences and mental illness; that there was a causal relationship between these events but did not cite to "attachment disorder," a recognized psychological disorder. The magistrate reasoned that expert testimony as to a recognized disorder would not be required for the mitigation theory to be persuasive. And, when viewed deferentially, the magistrate determined that counsel's judgment that their mitigation theory was strong enough that further investigation into petitioner's psycho-social history was not necessary and was not unreasonable. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that his counsel failed to present testimony to support a sentence less than death. Citing Strickland but not the ABA Guidelines, the magistrate recognized that while not all of petitioner's four mitigation experts who were knowledgeable about the issues of future dangerousness and mitigation testified, trial counsel's decision regarding examination and presentation of some of the witnesses and evidence cannot be found deficient as long as the choices are the result of a conscious and informed decision on trial tactics. In the present case, the magistrate found that petitioner's counsel's stated

reasons for their choices as to which mitigation experts would testify at the punishment-determination phase of his trial appear to have been conscious and informed; therefore, petitioner cannot rebut the presumption that his counsel's conduct might be considered sound strategy, and within the wide range of professionally competent assistance. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

6. *Reynolds v. Warden*, 2011 Conn. Super. LEXIS 1558 (Conn. Super. Ct. 2011)

Reynolds was convicted of capital and felony murder and sentenced to death. *Reynolds*, 2011 Conn. Super. LEXIS at *7, 14. The Supreme Court of Connecticut affirmed the conviction and sentence. *Id.* at *9. Reynolds's petition for post-conviction relief, based mostly on ineffective assistance of counsel, was denied. The court only briefly discussed the Guidelines in relation to the standard of using a mitigation specialist.

Reynolds claimed that his trial counsel erred by introducing evidence that he suffered from Antisocial Personality Disorder (APD) and by not introducing evidence that he suffered from Posttraumatic Stress Disorder (PTSD). *Id.* at *14. He argued that in addition to offering evidence of PTSD, trial counsel could have hired a mitigation specialist to testify at the penalty stage. *Id.* at *27. The court noted that the hiring of a mitigation specialist was not the standard used in 1995, as it was not mentioned in the 1989 version of the ABA Guidelines. *Id.* at *28. It further noted that even in the 2003 version, the Guidelines call for a mitigation specialist to be part of the defense team, but not necessarily to testify at the penalty phase of trial. *Id.* Because trial counsel did employ an investigator at the time of trial who acted in a mitigation role, the court found this to be an unwarranted basis for finding Reynolds suffered from ineffective assistance of counsel. *Id.* at *29.

7. *Criminal Specialists Investigations, Inc. v. State*, 58 So. 3d 883 (Fla. Dist. Ct. App. 2011)

The Florida District Court of Appeals quashed the trial court's order denying Petitioner's motion for additional mitigation coordinator fees in a capital case. The Court heavily cited 2003 ABA Guidelines for the Appointment and Performance of Death Counsel, referencing Section 10.4(C)(3)(a) and Section 4.1(A)(1) that that the "defense team" in a capital case includes "at least one mitigation specialist and one fact investigator." *Id.* *2. Furthermore:

The commentary to section 4.1 of the ABA Guidelines explains the role of a mitigation specialist, calling this person 'an indispensable member of the defense team throughout all capital proceedings' and stating that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."

Id. Therefore, the Court concluded that based on the widespread use of mitigation specialists and the ABA Guidelines recommendation to consult them, the trial court erred in its suggestion that there was no such position recognized under applicable law and ruled in Petitioner's favor. *Id.*

8. *Brawner v. Epps*, 2010 WL 383734 (N.D. Miss. 2010)

The U.S. District Court for the Northern District of Mississippi denied Jan Michael Brawner's petition for federal habeas corpus relief. Brawner argued that his trial counsel had been

ineffective in failing to investigate and present mitigating evidence, in part for delegating significant responsibilities to co-counsel at a time when co-counsel was not yet admitted to practice and had previously failed the bar examination on at least one occasion. Co-counsel was eventually sworn in to practice law on the day that Brawner's trial commenced. Brawner argued that law students "are per se incapable of fulfilling duties of counsel under the American Bar Association Guidelines," citing to 1989 Guidelines 4.1 and 5.1. The court made no further mention of the Guidelines but concluded that counsel did not make a wholesale delegation of his case to co-counsel and that counsel's investigation was reasonable. The court denied relief.

9. *Smith v. Mahoney*, 596 F.3d 1133 (9th Cir 2010)

The US Court of Appeals for the Ninth Circuit affirmed the district court's denial of Smith's IAC claim. At his trial in 1982, Smith plead guilty and requested and received a death sentence. The 9th Circuit found that Smith's defense attorney "fell below an objective standard of reasonableness because he failed to investigate the facts of the crime, failed to investigate Smith's mental state at the time of the crime, and failed to discuss possible defenses before Smith pled guilty." In analyzing the claim of ineffectiveness, the court looked to the ABA Standards for Criminal Justice that were in place at the time of trial. The court also found that Smith's attorney was "on notice" that he might have mental health problems due to the fact that his client wanted to seek the death penalty and cited to the commentary in 2003 ABA Guidelines Section 4.1: "Mental illness can be difficult for non-mental health professionals to detect. Recognizing this fact, the ABA in 2003 issued guidelines on mental illness detection in capital cases." The court then noted that the 2003 Guidelines "were not the 'prevailing legal norms at the time' of Smith's first sentencing." Ultimately the court concluded that Smith failed to show prejudice under the second prong of Strickland.

10. *Fulks v. United States*, 875 F. Supp. 2d 535 (D.S.C. 2010)

The U.S. District Court for the District of South Carolina denied Chadrick Evans Fulks' petition for federal habeas corpus relief. Fulks argued that his counsel was ineffective for failing to present a meaningful mental health case in mitigation. Before analyzing the merits of the claim, the court stated that it "notes for the record Petitioner's emphasis on the ABA Guidelines, rather than the prevailing professional practice, at the time of the trial." Because the "Supreme Court has made clear that the ABA Guidelines do not set the standard for effective representation," the court stated that it "refuses to recognize them as the constitutional standard here." In a subsequent footnote, the court quoted Justice Alito's concurrence in *Bobby v. Van Hook*, where he noted that the ABA is a private organization with limited membership and he saw "no reason why the ABA Guidelines should be given a privileged position" in determining the obligations imposed by the Constitution. The court determined that Fulks' counsel was not ineffective and denied relief.

The court also cited to the Guidelines in examining a subsequent claim that counsel was ineffective for assigning law students to carry out part of the mitigation investigation. Despite noting that the court "does not recognize the ABA Guidelines as the constitutional standard for effective representation," the court compared the investigation to the Guidelines and determined that the petitioner benefited from a "pretrial team that far surpassed the 'minimum'

assistance of a professional investigator and a mitigation specialist suggested by the 2003 ABA Guideline 4.1 that [Fulks] cites." The court accordingly denied relief on that claim as well.

11. O'Shea v. S.C. Law Enforcement Div., 700 S.E.2d 255 (S.C. Ct. App. 2010)

Respondent, O'Shea, is a death penalty mitigation specialist. This Court upheld an order from the Administrative Law Court (ALC) in response to the South Carolina Law Enforcement Division's (SLED) Appeal, finding that Respondent did not have to be licensed as a private investigator in order to work as a court appointed mitigation specialist on death penalty cases. *Id.* The Court cited the ALC's finding that "(1) a mitigation specialist is recognized as an essential component of a capital defense team and (2) the mitigation specialist's only role is to assist attorneys in the defense of death penalty cases" pursuant to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, as well as other resources.

12. Lee v. State, 308 S.W.3d 596 (Ark. 2009)

The Supreme Court of Arkansas affirmed the capital murder conviction of Mr. Lee, holding that Mr. Lee did not receive ineffective assistance of counsel. According to the court, Mr. Lee relied on the ABA Guidelines (2003) to argue that (1) counsel failed to secure a mitigation specialist and (2) essential mitigating evidence was never presented. *Id.* at *6. The court found Mr. Lee's arguments unconvincing because the Guidelines were "significantly revised in 2003, many years after his trial." *Id.* Therefore, the court concluded that Mr. Lee was not rendered ineffective assistance of counsel as provided by the 2003 Guidelines.

13. Lynch v. Hudson, 2009 U.S. Dist. LEXIS 105296 (S.D. Ohio 2009)

Petitioner filed a motion for funds to retain a neuropsychologist and rehire the clinical psychologist used at trial. The Court granted Petitioner's request for funds to retain a neuropsychologist, finding that the services of a neuropsychologist were reasonably necessary, but denied Petitioner's request for funds to rehire the clinical psychologist, finding that the claim had already been explored and Petitioner failed to present what more could be found by rehiring the clinical psychologist.

During the mitigation hearing, Petitioner presented evidence from a clinical psychologist, Dr. Tureen, that Petitioner fell within the borderline range of intellectual functioning with an IQ of 72. In preparing for Petitioner's post-conviction proceedings, a different clinical psychologist, Dr. Friday, conducted further tests and recommended a complete neurological evaluation and found that an expert in the area of mental retardation should have been made available at trial. Petitioner related his request for funds to retain a neuropsychologist to his claims for ineffective assistance of trial council, citing ABA Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases arguing that his counsel was ineffective because they failed to secure neuropsychological testing when Dr. Tureen's findings indicated that Petitioner's functioning was borderline.

14. Fitzpatrick v. Bradshaw, 2009 U.S. Dist. LEXIS 105102 (S.D. Ohio 2009)

Petitioner filed an Amended Petition for a writ of habeas corpus to the United States District

Court for the Southern District of Ohio. *Id.* at 1. The Court acknowledged that the ABA Guidelines "provide the guiding rules and standards to be used in de-fining the 'prevailing professional norms' in ineffective assistance cases." *Id.* at 94 (citations omitted). The Court then relied on Guideline 11.4.1(D)(7) of the 1989 ABA Guidelines. *Id.* at 95. The Court noted that the 1989 Guidelines were the standard in effect at the time of Fitzpatrick's trial, and that the revised 2003 ABA Guidelines at Guideline 4.1(A) "were more explicit in requiring death penalty trial counsel to retain a mitigation specialist." *Id.* at 95. Ultimately, the Court held that Fitzpatrick did not overcome the "prejudice" prong of the Strickland test because he did not cite to "any authority suggesting a reasonable probability that the results of the sentencing hearing would have been different had trial counsel retained a mitigation specialist and presented this additional evidence." *Id.* at 96-97. The Court denied the Petition overruling this and all other objections that were made by Fitzpatrick. *Id.* at 2.

15. *Frogge v. Branker*, 286 F. App'x. 51 (4th Cir 2008)

Petitioner appealed his denial of federal habeas relief. Petitioner claims ineffective assistance of counsel for the failure to properly investigate and present mitigating evidence about petitioner's organic brain damage from a head injury suffered in 1990. Ultimately, the court held that the lack of investigation and presentation of organic brain damage was a strategic decision made by counsel and therefore not ineffective assistance. Therefore petitioner was denied his federal habeas petition.

In his dissent, Chief Justice Gregory cites to commentary from the 2003 ABA Guideline for the Appointment and Performance of Defense Council in Death Penalty Cases 4.1 which explains the importance of mental health mitigation evidence. He dismisses the idea that the lack of investigation and presentation of organic brain damage was a strategic decision because there was no evidence from counsel to support this conclusion. Judge Gregory asserts that the failure to investigate and present such evidence was prejudicial and that petitioner should have been granted relief.

16. *Gray v. Branker*, 529 F.3d 220 (4th Cir 2008)

Petitioner filed a writ of habeas corpus claiming ineffective assistance of counsel because counsel failed to present mitigation evidence concerning petitioner's mental state during the penalty phase of trial. The court acknowledged that the 1989 ABA Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases are merely guides, but asserted that "it was a "well-defined norm[]" at the time of Gray's trial that "investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence.'" *Wiggins*, 539 U.S. at 524 (quoting [the 1989] American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1.C)." *Id.* at 229.

The court cited 1989 ABA Guidelines 11.8.3 (F)(2) and 11.8.6(B) which suggest that counsel investigate the defendant's mental health and enlist the help of a specialist. Counsel's refusal to hire a psychologist was not acceptable even though the non-indigent client specified he did not want money spent on a psychologist and counsel did not immediately know that the death penalty would be sought because a psychologist had volunteered to give a diagnosis free of

charge. The court then cited 1989 ABA Guidelines 5.1, 8.1 and 11.8.6 and 2003 ABA Guideline 4.1 which explain the importance of medical testimony during the sentencing phase. Counsel's failure to present important medical mitigation evidence was prejudicial. Therefore, the court found ineffective assistance of counsel and granted petitioner's habeas claim for a new penalty hearing.

17. *Moore v. Mitchell*, 531 F. Supp. 2d 845 (S.D. Ohio 2008)

Moore appealed a supplemental petition for writ of habeas corpus to the District Court for the Southern District of Ohio. Among Moore's twenty-five claims for relief, the District Court analyzed whether trial counsel rendered ineffective assistance of counsel. Moore claimed trial counsel employed a mitigation specialist who failed to discuss substantive mitigation issues with Moore and failed to adequately assist in the preparation of the mitigation phase. *Id.* at 866.

In the Report and Recommendations of the District Court, the Chief Judge Magistrate addressed this issue and stated, "neither the Constitution nor the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) ("ABA Death Penalty Guidelines") guarantee or mandate the right to an "effective mitigation specialist." *Id.* at 867. Moore appealed this finding citing to ABA Guidelines 4.1(A)(1) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."); and Guideline 10.4(C)(2) (requiring lead attorneys to retain a mitigation specialist as soon as possible after being designated as counsel). *Id.* The District Court ultimately found that although trial counsel may have been ". . . deficient in failing to obtain the services of an effective mitigation specialist, the subclaim would nonetheless fail . . ." *Id.* Moore failed to establish prejudice under the Strickland standard and was therefore unsuccessful on this claim.

18. *Fitzpatrick v. Bradshaw*, 2008 WL 7055605 (S.D. Ohio 2008)

A magistrate judge of the U.S. District Court for the Southern District of Ohio denied Stanley Fitzpatrick's petition for federal habeas corpus relief. Fitzpatrick argued that his trial counsel had been ineffective in part for failing to hire a mitigation specialist and an addictions expert. Summarizing the claim, the court noted that Fitzpatrick had cited to the ABA Guidelines, which "state that a defense team should consist of no fewer than two qualified attorneys, an investigators, and a mitigation specialist." [Ed. note: This is a reference to Guideline 4.1]. In the next paragraph, the court also noted that Fitzpatrick "makes the general argument that the mitigation evidence should have included 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for the defendant,'" citing to 2003 Guideline 10.7. Without any further mention of the Guidelines, the court determined Fitzpatrick's claim to be without merit and denied relief.

19. *Richie v. Sirmons*, 563 F. Supp. 2d 1250 (N.D. Okla. 2008)

The Court held that the Petitioner was entitled to habeas corpus relief because of the inadequate mitigation investigation received during the penalty phase. The Petitioner claimed that his trial attorney failed to present a defense based on voluntary intoxication and failed to develop evidence of psychological impairment. The first claim was dismissed because "it is

unclear who trial counsel could have presented to testify". In reviewing the second claim the court noted that trial counsel had focused on testimony from family members and presented brief school records. Counsel failed to present psychiatric evidence which the "Tenth Circuit court of Appeals has noted . . . is 'exactly the sort of evidence that garners the most sympathy from jurors. *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004)". Citing *Smith* the court went on to note that:

The Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the American Bar Association (ABA) ... as 'guides to determining what is reasonable' performance. Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase.' See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for Mr. Watson to omit this evidence from his case for mitigation.

(Internal citations omitted). The Court noted that "Counsel simply did not take any action to determine whether such evidence was available" and thus concluded that counsel's failure was "constitutionally deficient under *Strickland*." In light of the new psychiatric evidence the court concluded that Petitioner's claim satisfied *Strickland* prejudice and he was entitled to habeas relief.

20. *Jackson v. Bradshaw*, 2007 U.S. Dist. LEXIS 75523 (S.D. Ohio 2007)

Petitioner, a prisoner sentenced to death by the State of Ohio, filed a habeas corpus action under 28 U.S.C. Section 2254. In support of his position, Petitioner argued that defense counsel failed to adequately investigate his psychological background and failed to present psychological evidence. Specifically, Petitioner contended that as a result of counsel's deficient performance, the trier of fact never heard a comprehensive evaluation of his psychological functioning. He further argued that because of counsel's deficient performance, the prosecution essentially was able to assert that Petitioner had a normal childhood when, in fact, it was fraught with domestic violence, drug abuse, and instability in his life. Petitioner explained that, under *Wiggins v. Smith*, 539 U.S. 510 (2003), prejudice from counsel's unreasonable failure to investigate and present psychological evidence is assessed by reweighing the evidence in aggravation against the totality of available mitigating evidence to determine whether there is a reasonable probability that at least one juror would have struck a different balance. *Id.* at 534-35, 537.

The court, in response to Petitioner's argument, recognized that the ABA Guidelines articulating standards for capital defense work--"standards to which we long have referred as 'guides to determining what is reasonable,'" *Wiggins*, 539 U.S. at 524--emphasize the importance of testimony by a psychologist or mental health expert at the mitigation phase of death penalty cases. See *Clark v. Mitchell*, 425 F.3d at 294 (Merritt, J., dissenting) ("the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." (quoting Commentary to Section 4.1 of the 2003 ABA Guidelines)). However, contrary to Petitioner's argument, the court concluded that counsel does not have an absolute duty to present the testimony of a psychologist at the mitigation hearing. Cf. *Carter v. Mitchell*, 443 F.3d 517, 527 (6th Cir.

2006) ("Counsel does not perform unreasonably merely by not ruling out every possible psychological mitigator through specialized evaluations"), cert. denied, 127 S.Ct. 955 (2007) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 772 (6th Cir. 2006)).

21. *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir 2007)

The Tenth Circuit Court of Appeals reversed the district court's denial of habeas relief as to the defendant's sentencing and was remanded to the district court with instructions to issue a writ of habeas corpus. The court found that defense counsel's failure to investigate or discover readily available mitigation evidence regarding the defendant's family history and mental health amounted to constitutionally deficient performance. In addition, the court also found that defense counsel's conduct prejudiced the proceedings, as it left the motive for the murders unanswered.

In citing to the ABA Guidelines, the court noted that investigation into mitigating evidence involves discovering "all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 1142 (citing ABA Guideline 11.4.1(C)). The court declared that evidence relating to the defendant's mental health history and family life represented "just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of the trial." *Id.* at 1144.

22. *Ex Parte Van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007)

Van Alstyne argued that he cannot be subjected to the death penalty, consistent with *Atkins v. Virginia*, because he is mentally retarded. The court noted that the lower court judge who convicted Petitioner maintained a healthy skepticism of his own ability to gauge mental retardation based upon nothing more than his intuitive assessment of Petitioner's performance during a media interview. The court noted:

...[b]oth the American Bar Association and the State Bar of Texas recognize the important role of experts in screening defendants for mental health issues, including mental retardation. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES Guideline 4.1 (2003) ("The Defense Team and Supporting Services) Commentary, at 31 ("Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions [including mental retardation] that could be of critical importance. Accordingly, Subsection A(2) [of Guideline 4.1] mandates that at least one member of the defense team . . . be a person qualified by experience and training to screen for mental and psychological disorders or defects and recommend such further investigation of the subject as may be deemed appropriate."); STATE BAR OF TEXAS GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL Guidelines 10.1(B)(2)(c) ("The Defense Team") & 12.2(B)(5)(b) ("Duties of Post-Trial Counsel") (2006) ("Habeas corpus counsel should not rely on his or her own observations of the capital client's mental status as sufficient to detect the array of conditions [including mental retardation] that could be of critical importance. For that reason, at least one member of the defense team should be qualified to screen for mental and psychological disorders or defects and recommend further investigation of the client if

necessary.").

239 S.W.3d at 823 n.22. The court held that the record supports the lower court's finding that Petitioner has shown by a preponderance of the evidence that he falls within the range of mentally retarded offenders about whom there is a national consensus that they should not be executed.

23. *Yarbrough v. Johnson*, 490 F. Supp. 2d 694 (E.D. Va. 2007)

The U.S. District Court for the Eastern District of Virginia adopted a magistrate judge's report and recommendation denying Robert Stacy Yarbrough's petition for federal habeas relief. Yarbrough argued that his counsel's failure to request funds for a DNA expert amounted to constitutionally deficient performance. The magistrate judge had determined that Yarbrough's references to the ABA Guidelines, in support of his claim that his counsel was ineffective, were procedurally defaulted because Yarbrough had not raised them as the appropriate benchmark of counsel performance in the state proceedings. The district court disagreed with that conclusion after discussing the meaning of a "controlling legal principle" in the context of whether a claim has been fairly presented to a state court. In this case, the controlling legal principle was *Strickland v. Washington*, and Yarbrough "supplement[ed] his prior argument" by using the Guidelines as "an aid in defining the effectiveness threshold." The court also went further to state that even if Yarbrough was precluded from raising the Guidelines, "nothing prevents this court from considering the Guidelines sua sponte as the court is tasked with [determining] whether petitioner's counsel provided effective assistance and such determination necessitates consideration of the prevailing norms of the defense bar." The court also held that consideration of the Guidelines was "supported by the United States Supreme Court's repeated citation to ABA Guidelines as a helpful tool for measuring counsel's performance" and then cited to several of those decisions, including *Wiggins v. Smith* and *Rompilla v. Beard*.

Before analyzing the effectiveness claim, the court then discussed the Guidelines' position on defense experts at great length. The court first examined language in 1989 Guidelines 5.1, 8.1, 11.4.1, and 11.5.1, all of which describe counsel's responsibilities with regard to preparing and litigating forensic evidence. The court noted in a footnote that although the Guidelines use the word "should," the introduction provides that they are "mandatory" and "minimum requirements." The court also noted that the commentary to 1989 Guideline 1.1 states that "[u]tilization of experts has become the rule, rather than the exception, in proper preparation of capital cases." The court also discussed the 2003 Guidelines, although it stated they "warrant less attention" not only because they were not yet in existence when Yarbrough was tried but also because his counsel was "per se ineffective" under those standards. The court noted that Yarbrough was tried in 1998, a decade after the 1989 edition but five years before the 2003 edition, and thus the prevailing professional norms were "somewhere in between" the two editions. After reviewing both editions of the Guidelines, the court stated that the "Guideline provisions discussed above plainly suggest that Yarbrough's trial counsel was ineffective for failing to hire a DNA expert."

The court, however, wrote that it disagreed with commentary within the 2003 Guidelines that they are "not aspirational" and embody "current consensus," stating that other commentary "to

the Guidelines themselves belie such an assertion, at least with respect to obtaining public funds for independent defense experts." Because commentary to 1989 Guideline 8.1 stresses that jurisdictions must authorize sufficient funds for this purpose and criticized states that do not, the court found that "[s]uch language definitively establishes the aspirational nature of this aspect of the Guidelines." The court held that it was subject to "standards dictated by the United States Supreme Court and the federal Constitution and not the ABA," and the court found a failure to seek public funds for expert assistance "does not constitute ineffective assistance of counsel even if certain members of the bar label a state's application of such onerous standard as 'unconscionable.'" The court ultimately found that trial counsel's performance was not deficient and denied relief.

24. Buckner v. Polk, 453 F.3d 195 (4th Cir 2006)

The U.S. Court of Appeals for the 4th Circuit affirmed the district court's denial of petitioner George Cale Buckner's petition for a writ of habeas corpus. Buckner claimed that his trial counsel was ineffective for failing to investigate, discover, develop, and present mitigating evidence. The majority declined to decide whether counsel's performance, including his failure to allow adequate time to prepare for the penalty phase, constituted deficient performance, deciding the claim instead on the prejudice prong of the Strickland analysis. Finding that the evidence that counsel could have presented differed "primarily in degree rather than in kind" from the evidence presented at trial, the court found that Buckner suffered no prejudice as a result of counsel's performance and denied the claim.

Circuit Judge Gregory dissented from the portion of the majority opinion discussing the ineffective assistance of counsel claim. He wrote that "No reasonable defense attorney in a death penalty case would fail to pursue mental health expert advice when faced with clear signs that the defendant had suffered psychological trauma." Judge Gregory noted that the 1989 ABA Guidelines, which the Supreme Court has recognized as a "guide for determining what is reasonable," instructs attorneys to begin preparations for both phases of trial immediately upon joining a case. 1989 ABA Guidelines 11.4.1.A, superseded by ABA Guidelines 4.1 (2003). He noted that the 2003 Guidelines further clarify that counsel should promptly obtain the necessary investigative resources, including a professional investigator and mitigation specialist. Judge Gregory explained that although Buckner's trial predated the publication of the 2003 Guidelines, he nevertheless cited to them as "the clearest exposition of counsel's duties at the penalty phase of a case." (Citing *Hamblin v. Mitchell*, 354 F. 3d 482, 488 (6th Circuit 2003)). He continued to say that "the 2003 ABA Guidelines merely 'explain in greater detail than the [1989 ABA Guidelines] the obligations of counsel to investigate mitigating evidence ... [and] do not depart in principle or concept' from Strickland or Wiggins. *Id.* at 487." Judge Gregory found that counsel failed to comply with this guideline, doing most of their preparation in the week before the penalty phase began.

Judge Gregory also wrote that Buckner's reluctance to submit to psychological evaluation did not obviate counsel's duty to investigate the warning signs of psychological trauma (citing to 11.4.1(c) and commentary). Relying on the commentary to 2003 Guideline 4.1, he said that counsel's own observations of his client could not justify his decision to abandon the investigation.

Citing to 11.4.1(d)(2)(c), Judge Gregory noted that counsel also failed to obtain Buckner's educational, military, and family records, and that counsel could not rely on "strategic considerations" to justify abandoning the investigation, because that decision was uninformed. Judge Gregory concluded that trial counsel's conduct "fell far below an objective standard of reasonableness, as defined by Strickland, Wiggins, and the 1989 ABA Guidelines . . ." and that the state court's conclusion rested on an unreasonable application of Strickland and Wiggins.

Judge Gregory also analyzed the prejudice prong of Strickland. As part of this analysis, he cited to the commentary to 2003 Guideline 4.1 which recognizes that evidence of PTSD, schizophrenia, and other mental disorders can be of "critical importance" in capital defense. Finding that counsel's performance was prejudicial, Judge Gregory wrote that he would grant relief on the claim of ineffective assistance of counsel.

25. *Green v. Johnson*, 2006 WL 3746138 (E.D. Va. 2006)

Magistrate Judge Miller of the Eastern District of Virginia recommended denial of petitioner Kevin Green's petition for a writ of habeas corpus. Green alleged that his counsel was ineffective for failing to preserve his objection to the trial court's denial of his request for a change of venue. Reviewing the claim under the Strickland standard, Judge Miller noted that the Supreme Court has identified the ABA Guidelines as "appropriate guides for determining whether counsels' performance was reasonable." Citing to 2003 Guideline 10.8(A)(3)(c), he found that the ABA Guidelines "require defense counsel to properly preserve a motion to change venue in order to avoid default." Consequently, he found that counsel "failed the competence prong" of Strickland.

Green also alleged that counsel was ineffective for failure to move for the appointment of a mitigation expert. Judge Miller noted that Guideline 4.1(A)(1) "mandates that a defense team should consist of no fewer than two attorneys, an investigator and a mitigation expert" and that "a mitigation expert is undoubtedly of substantial use in the sentencing phase of a capital trial." He concluded, "Because the decision not to request a mitigation expert was clearly a mistake, and because prevailing professional norms (as evinced by the ABA Guideline) recommend a mitigation expert, this Court finds that Green's counsels' performance fails the competence prong of the Strickland test."

Despite these findings of deficient performance, Judge Miller concluded that counsel's performance did not prejudice the defendant and therefore recommended denial of his ineffective assistance of counsel claims.

26. *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005)

The United States Court of Appeals for the Armed Forces affirmed the decision to set aside a conviction of premeditated capital murder on the basis that the general court-martial erred in refusing to appoint a mitigation specialist to the capital defense team. The Court cites to ABA Guidelines (2003) during its discussion of the role of the mitigation specialist, noting that such an investigator is referred to as a "core member" of the defense team. *Id.* at *9. The Court further noted that "[a]s the Commentary to ABA Death Penalty Counsel Guideline 4.1 states,

the mitigation specialist is an 'indispensable member of the defense team throughout all capital proceedings.'"

27. *Clark v. Mitchell*, 425 F.3d 270 (6th Cir 2005)

The Sixth Circuit affirmed Clark's conviction and sentence, holding that the defense failure to call a neuroscientist or pharmacologist to present mitigating evidence during sentencing did not constitute ineffective assistance of counsel. Clark argued that such testimony would have established the existence of organic brain damage. Defense counsel, however, relied upon the report of the retained psychologist, which did not indicate that such brain damage was a potential factor and did not recommend any further medical testing. The Court held that defense counsel was not ineffective for relying on the opinion of the expert psychologist. *Id.* at 286. The opinion made note of the fact that by employing a defense psychologist to conduct an independent evaluation, defense counsel was acting in conformity with 2003 ABA Guideline 4.1. *Id.* at n. 5.

In dissent, Circuit Judge Merritt argued that the necessity of further medical testing was indicated in the psychologist's report, in language simply ignored by the majority. The opinion cites to the 1989 ABA Guideline 11.4.1 (C) for the proposition that the defense must not rely on the counsel's own observations and beliefs regarding the defendant's symptoms but rather investigate the defendant's medical and educational history. The court then notes 2003 ABA Guideline 10.7 which further describes the necessity of a mental health investigation. *Id.* at 291, n.1. Merritt goes on to argue that the majority simply flouts the holdings of *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 347 (2005), which recognize the ABA Guidelines as the normative standards for defense counsel; the opinion emphasizes the duty as articulated in the 1989 edition of the Guidelines to provide for neurological testing in appropriate circumstances. *Id.* at 293-94.

28. *Torres v. State*, 120 P.3d 1184 (Okla. Crim. App. 2005)

The Court of Criminal Appeals in Oklahoma denied the petitioner's application for post-conviction relief based on trial counsel's failure to raise a violation of the Vienna Convention. In doing so, the Court acknowledged the defense counsel's argument that trial counsel failed to meet the capital defense requirements set forth in the 2003 ABA Guideline 4.1. Although the court recognized "the utility of guidelines for effective capital counsel," the Court stated that without an adequate showing of prejudice, "we will not find that capital counsel was per se ineffective simply because counsel's representation differed from current capital practice customs, even where the differences are significant." *Id.* at 1189.

29. *Commonwealth v. Brown*, 872 A.2d 1139 (Pa. 2005)

The Supreme Court of Pennsylvania held that the failure of counsel to investigate evidence of mental impairment to support a theory of manslaughter was insufficient to establish ineffective assistance, as no evidence was on record at the time of trial that might suggest further investigation was warranted. *Id.* at 1149.

In a dissenting opinion, Justice Saylor rejected the suggestion that counsel had no responsibility to investigate potential mental illness issues and instead expounded on the duty

of counsel to take the initiative in investigation, even in the face of an absence of evidence. Justice Saylor cited to 2003 ABA Guidelines 4.1 to demonstrate the near-ubiquity of mental health issues in the criminal justice system, noting that the performance of "a thorough mental-health investigation is a pillar of the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." *Id.* at 1173.

30. *Smith v. Mullin*, 379 F.3d 919 (10th Cir 2004)

The Tenth Circuit held that counsel was ineffective for not presenting evidence of defendant's mental retardation, brain damage, and troubled background in the penalty phase.

Looking to the United States Supreme Court in its analysis, the Tenth Circuit noted that "[t]he Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the (ABA) ... as guides to determining what is reasonable' performance." *Id.* at 942. (citations omitted). "Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase. See (2003) ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for [trial counsel] to omit this evidence from his case for mitigation.'" *Id.* (citations omitted).

31. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004)

The Supreme Court of Pennsylvania examined a number of claims for post-conviction relief presented by Williams, among them ineffective assistance of counsel, prosecutorial misconduct, and various due process violations. The Court held that none of the claims merited relief.

Justice Saylor dissented, arguing that Williams had established ineffective assistance of counsel at the penalty phase, primarily for failing to develop adequate mitigating evidence. Citing a reference to the 1989 ABA Guideline 11.4.1 (C) in *Wiggins v. Smith*, 539 U.S. 510 (2003), the opinion recognized defense counsel's "obligation to 'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Williams*, 863 A.2d at 527 (citation omitted). Justice Saylor drew upon substantial support from the 2003 ABA Guidelines throughout his opinion, commenting that "[I]n my view, the drafters' claim that the Guidelines 'embody the current consensus about what is required to provide effective defense representation in capital cases' is not an exaggerated one. *Id.* at 527 n.6 (citation omitted). In particular the Saylor refers to 2003 ABA Guidelines 1.1, 4.1, 10.5, 10.7(A)(2), and 10.11.

The dissent pointed to a number of instances in which the conduct of defense counsel fell short of professional standards. Justice Saylor utilized 2003 ABA Guideline 4.1 in arguing that counsel was irresponsible in scheduling his first meeting with the defendant only one week before trial, *id.* at 528 n.7, that "competent counsel would have reviewed records from Appellant's other criminal proceedings," *id.* at 528, that a previous psychotic episode merited professional evaluation, *id.* at 528 n.8, and that counsel was unjustified in relying on his own opinion of the defendant's psychological state, *id.* at 528 n.9. Then, Saylor used 2003 ABA Guidelines 10.5 and 10.7(A)(2) to rebut counsel's suggestion that the defendant's adamant commitment to fighting the validity of his conviction excused a lack of penalty phase

preparation. Id. at 531 n.17, n.19.

The dissent criticized the majority for too lightly disregarding "the potency of life-history and mental-health mitigation in terms of capital sentencing," claiming that such an approach is contrary to Supreme Court precedent and the ABA Guidelines. Id. at 533 (citation omitted). Justice Saylor explained his perspective on the role of mitigating evidence in the sentence process, quoting 2003 ABA Guideline 10.11: "None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]" Id. at 534, n.22 (citation omitted). Indeed, psychological evidence of the type at issue here would "provide some sort of explanation for Simmons's abhorrent behavior." Id. at 543, n.23 (relying on 2003 ABA Guideline 10.11 to support this contention).

Justice Nigro filed a separate dissent, agreeing with Justice Saylor that the defendant received ineffective assistance of counsel in the penalty phase. Id. at 524.

Guideline 5.1 -- Qualificaitons of Defense Counsel

1. Ivy v. State, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

2. Hodges v. Epps, 2010 U.S. Dist. LEXIS 95406 (N.D. Miss. 2010)

The United States District Court for the Northern District of Mississippi granted habeas relief to petitioner Quintez Hodges on several grounds, including ineffective assistance of counsel at the sentencing phase of his trial. Among a long list of errors committed by counsel, the court noted that Hodges' attorney was not qualified to serve as lead counsel under 2003 ABA

Guideline 5.1. His counsel had only been out of law school a year, admitted to the Mississippi bar less than a year before the start of the trial, and had never tried a case in circuit court. Consequently he did not meet the requirements of the "Guidelines in effect" at the time of Hodges' trial.

3. *Brawner v. Epps*, 2010 WL 383734 (N.D. Miss. 2010)

The U.S. District Court for the Northern District of Mississippi denied Jan Michael Brawner's petition for federal habeas corpus relief. Brawner argued that his trial counsel had been ineffective in failing to investigate and present mitigating evidence, in part for delegating significant responsibilities to co-counsel at a time when co-counsel was not yet admitted to practice and had previously failed the bar examination on at least one occasion. Co-counsel was eventually sworn in to practice law on the day that Brawner's trial commenced. Brawner argued that law students "are per se incapable of fulfilling duties of counsel under the American Bar Association Guidelines," citing to 1989 Guidelines 4.1 and 5.1. The court made no further mention of the Guidelines but concluded that counsel did not make a wholesale delegation of his case to co-counsel and that counsel's investigation was reasonable. The court denied relief.

4. *Galloway v. Thaler*, 344 F. App'x. 64 (5th Cir 2009)

The Court of Appeals for the Fifth Circuit denied the petitioner's application for a certificate of appealability as to his claim of ineffective assistance of counsel based upon the failure to investigate and present mitigation evidence. Prior to trial, the petitioner had instructed his counsel not to present any mitigation evidence that might cast his father in a negative light, including evidence of childhood abuse. In his federal habeas petition, the petitioner "asserted that his attorneys should have ignored his instructions and presented a mitigation case," relying upon the ABA Guidelines (2003 Guidelines Section 10.5 commentary, Section 10.7 (A)(2); 1989 Guidelines Section 11.4.2 commentary). The court agreed with the district court's conclusion that trial counsel had legitimate reasons to comply with their client's instructions, including their concern about their client's negative reaction and their belief that potential mitigation evidence could hurt their client's case. In addition, although the court recognized that "the Supreme Court has endorsed various sets of ABA Guidelines as instructive on the issue of reasonableness in representation, neither the Supreme Court nor this court have ever found the Guidelines to be dispositive of a claim of ineffective assistance of counsel."

5. *Moore v. Mitchell*, 531 F. Supp. 2d 845 (S.D. Ohio 2008)

Moore appealed a supplemental petition for writ of habeas corpus to the District Court for the Southern District of Ohio. Among Moore's twenty-five claims for relief, the District Court analyzed whether trial counsel rendered ineffective assistance of counsel. Moore claimed trial counsel employed a mitigation specialist who failed to discuss substantive mitigation issues with Moore and failed to adequately assist in the preparation of the mitigation phase. *Id.* at 866.

In the Report and Recommendations of the District Court, the Chief Judge Magistrate addressed this issue and stated, "neither the Constitution nor the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) ("ABA Death

Penalty Guidelines") guarantee or mandate the right to an "effective mitigation specialist." *Id.* at 867. Moore appealed this finding citing to ABA Guidelines 4.1(A)(1) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."); and Guideline 10.4(C)(2) (requiring lead attorneys to retain a mitigation specialist as soon as possible after being designated as counsel). *Id.* The District Court ultimately found that although trial counsel may have been ". . . deficient in failing to obtain the services of an effective mitigation specialist, the subclaim would nonetheless fail . . ." *Id.* Moore failed to establish prejudice under the Strickland standard and was therefore unsuccessful on this claim.

Guideline 6.1 -- Workload

1. *State v. Cheatham*, 292 P.3d 318 (Kan. 2013)

The Supreme Court of Kansas found that counsel's representation was deficient and denied him of the fair trial he is guaranteed by both the federal and state constitutions. The court reversed his convictions and remanded the case for a new trial.

2. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective *per se*." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

3. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007)

Petitioner was convicted of first degree murder and sentenced to death. Petitioner now seeks relief from his death sentence pursuant to 28 U.S.C Section 2254. Among other arguments, Petitioner asserted that trial counsel was ineffective. Specifically, Petitioner argued that because counsel tried several death penalty cases in a relatively short period of time, he failed to allocate a reasonable amount of time to investigate Petitioner's life history.

In his argument, Petitioner cited the 2003 ABA Guideline 6.1 mandating that counsel spend 1800 hours on this case and since counsel tried four other death penalty cases within a space of ten calendar months, he could not have allocated a reasonable amount of time to investigate Petitioner's life. The court found, however, that the ABA Guidelines cited by Petitioner were not adopted until Feb. 2003, roughly three years after Petitioner's trial. Further, the ABA Guidelines make it clear that many things other than the number of cases assigned to an attorney would have to be considered in ascertaining a reasonable workload for a given attorney.

Guideline 8.1 -- Training

1. State v. Cheatham, 292 P.3d 318 (Kan. 2013)

The Supreme Court of Kansas found that counsel's representation was deficient and denied him of the fair trial he is guaranteed by both the federal and state constitutions. The court reversed his convictions and remanded the case for a new trial.

2. Thacker v. Workman, 2010 U.S. Dist. LEXIS 92322 (N.D. Okla. 2010)

In his habeas petition, Petitioner Thacker raised a claim that his counsel was ineffective for recommending that he plead guilty and opt for a non-jury sentencing trial, citing 2003 Guideline 10.9.2 The U.S. District Court for the Eastern District of Oklahoma rejected this claim. It found that Thacker's counsel made a reasonable strategic decision in light of "overwhelming evidence" of Thacker's guilt. The court continued to say that "[t]he Supreme Court has advised that that the norms of practice reflected in American Bar Association standards are only guides. *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Further, 'imposing "specific guidelines" on counsel is "not appropriate.'" The court concluded that Thacker's counsel was not constitutionally deficient and denied habeas relief.

3. State v. Young, 172 P.3d 138 (N.M. 2007)

The Fourth Judicial District Court judge denied defense counsel's motion which requested "compensa[tion] at an hourly rate, to be allowed to withdraw, and/or to dismiss the death penalty." *Id.* at 140. The judge denied the motion but noted, ". . . defense counsel should receive fair compensation for their excellent representation of the defendants, and that the State's failure to pay fair compensation indicates that New Mexico cannot afford the death penalty." *Id.*

Citing to the 2003 ABA Guidelines, the Supreme Court of New Mexico acknowledged the complexity of death penalty cases that "require a significantly greater degree of skill and experience on the part of defense counsel than is required in a noncapital case. See 2003 ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 1.1, History of Guideline (rev. ed. 2003), in 31 Hofstra L.Rev. 913, 921 (2004) [hereinafter ABA Guidelines]." *Id.* at 141. Furthermore, the Court scrutinized the use of a flat fee granted by the Public Defender Department which fails to compensate the defense counsel's overhead costs, and is less than the hourly wage a videographer working on the case

would receive. The Court stated:

Because of the extraordinary demands on capital defense attorneys, ABA Guidelines, Guideline 8.1 Commentary, in 31 Hofstra L.Rev. at 979, the American Bar Association has condemned flat fees, caps on compensation, and lump-sum contracts in death penalty cases. Id., Guideline 9.1(B)(1), in 31 Hofstra L.Rev. at 981. Rather than a flat fee or a capped rate, the ABA Guidelines stress that "[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation." Id., Guideline 9.1(B), in 31 Hofstra L.Rev. at 981.

172 P.3d at 142. The Supreme Court reasoned inadequate compensation gives rise "to a presumption of ineffective assistance of counsel." Id. With these findings the Court ordered a stay of prosecution for the death penalty pending the state's ability to provide reasonable compensation. Id. at 144.

4. *Yarbrough v. Johnson*, 490 F. Supp. 2d 694 (E.D. Va. 2007)

The U.S. District Court for the Eastern District of Virginia adopted a magistrate judge's report and recommendation denying Robert Stacy Yarbrough's petition for federal habeas relief. Yarbrough argued that his counsel's failure to request funds for a DNA expert amounted to constitutionally deficient performance. The magistrate judge had determined that Yarbrough's references to the ABA Guidelines, in support of his claim that his counsel was ineffective, were procedurally defaulted because Yarbrough had not raised them as the appropriate benchmark of counsel performance in the state proceedings. The district court disagreed with that conclusion after discussing the meaning of a "controlling legal principle" in the context of whether a claim has been fairly presented to a state court. In this case, the controlling legal principle was *Strickland v. Washington*, and Yarbrough "supplement[ed] his prior argument" by using the Guidelines as "an aid in defining the effectiveness threshold." The court also went further to state that even if Yarbrough was precluded from raising the Guidelines, "nothing prevents this court from considering the Guidelines sua sponte as the court is tasked with [determining] whether petitioner's counsel provided effective assistance and such determination necessitates consideration of the prevailing norms of the defense bar." The court also held that consideration of the Guidelines was "supported by the United States Supreme Court's repeated citation to ABA Guidelines as a helpful tool for measuring counsel's performance" and then cited to several of those decisions, including *Wiggins v. Smith* and *Rompilla v. Beard*.

Before analyzing the effectiveness claim, the court then discussed the Guidelines' position on defense experts at great length. The court first examined language in 1989 Guidelines 5.1, 8.1, 11.4.1, and 11.5.1, all of which describe counsel's responsibilities with regard to preparing and litigating forensic evidence. The court noted in a footnote that although the Guidelines use the word "should," the introduction provides that they are "mandatory" and "minimum requirements." The court also noted that the commentary to 1989 Guideline 1.1 states that "[u]tilization of experts has become the rule, rather than the exception, in proper preparation of capital cases." The court also discussed the 2003 Guidelines, although it stated they "warrant less attention" not only because they were not yet in existence when Yarbrough was

tried but also because his counsel was "per se ineffective" under those standards. The court noted that Yarbrough was tried in 1998, a decade after the 1989 edition but five years before the 2003 edition, and thus the prevailing professional norms were "somewhere in between" the two editions. After reviewing both editions of the Guidelines, the court stated that the "Guideline provisions discussed above plainly suggest that Yarbrough's trial counsel was ineffective for failing to hire a DNA expert."

The court, however, wrote that it disagreed with commentary within the 2003 Guidelines that they are "not aspirational" and embody "current consensus," stating that other commentary "to the Guidelines themselves belies such an assertion, at least with respect to obtaining public funds for independent defense experts." Because commentary to 1989 Guideline 8.1 stresses that jurisdictions must authorize sufficient funds for this purpose and criticized states that do not, the court found that "[s]uch language definitively establishes the aspirational nature of this aspect of the Guidelines." The court held that it was subject to "standards dictated by the United States Supreme Court and the federal Constitution and not the ABA," and the court found a failure to seek public funds for expert assistance "does not constitute ineffective assistance of counsel even if certain members of the bar label a state's application of such onerous standard as 'unconscionable.'" The court ultimately found that trial counsel's performance was not deficient and denied relief.

Guideline 9.1 -- Funding and Compensation

1. Loden v. State, 971 So. 2d 548 (Miss. 2007)

Petitioner, during his appeal from a capital murder conviction and death sentence in the Supreme Court of Mississippi, contended that he was improperly denied funds to retain the assistance of a forensic social worker to investigate and present relevant mitigating factors. Petitioner filed an "Ex Parte Motion for Funds for Expert Assistance in the Field of Mitigation Investigation." The motion sought the services of a forensic social worker to assist counsel with interviews, preparation of mitigation witnesses, and adequately develop the full range of mitigation circumstances that existed in this case. The lower court denied Petitioner's motion stating that the forensic social worker would only repeat work of the investigator, the attorneys or psychiatrists.

However, Petitioner asserted that the forensic social worker would have uncovered substantial mitigation evidence and the denial of funds violated the Sixth, Eighth, and Fourteenth Amendments. Petitioner supported his argument by citing to the 2003 ABA Guideline 9.1 for the Appointment and Performance of Counsel in Death Penalty Cases.

In spite of Petitioner's argument, the Supreme Court of Mississippi, citing a reference a different set of ABA Guidelines in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), determined that while "the ABA Guidelines are guides to determining what is reasonable, they are only guides." The Court explained further that "[t]he State does not have a constitutional obligation to provide indigent defendants with the costs of expert assistance upon every demand."

2. State v. Young, 172 P.3d 138 (N.M. 2007)

The Fourth Judicial District Court judge denied defense counsel's motion which requested "compensa[ti]on at an hourly rate, to be allowed to withdraw, and/or to dismiss the death penalty." Id. at 140. The judge denied the motion but noted, ". . . defense counsel should receive fair compensation for their excellent representation of the defendants, and that the State's failure to pay fair compensation indicates that New Mexico cannot afford the death penalty." Id.

Citing to the 2003 ABA Guidelines, the Supreme Court of New Mexico acknowledged the complexity of death penalty cases that "require a significantly greater degree of skill and experience on the part of defense counsel than is required in a noncapital case. See 2003 ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 1.1, History of Guideline (rev. ed. 2003), in 31 Hofstra L.Rev. 913, 921 (2004) [hereinafter ABA Guidelines]." Id. at 141. Furthermore, the Court scrutinized the use of a flat fee granted by the Public Defender Department which fails to compensate the defense counsel's overhead costs, and is less than the hourly wage a videographer working on the case would receive. The Court stated:

Because of the extraordinary demands on capital defense attorneys, ABA Guidelines, Guideline 8.1 Commentary, in 31 Hofstra L.Rev. at 979, the American Bar Association has condemned flat fees, caps on compensation, and lump-sum contracts in death penalty cases. Id., Guideline 9.1(B)(1), in 31 Hofstra L.Rev. at 981. Rather than a flat fee or a capped rate, the ABA Guidelines stress that "[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation." Id., Guideline 9.1(B), in 31 Hofstra L.Rev. at 981.

172 P.3d at 142. The Supreme Court reasoned inadequate compensation gives rise "to a presumption of ineffective assistance of counsel." Id. With these findings the Court ordered a stay of prosecution for the death penalty pending the state's ability to provide reasonable compensation. Id. at 144.

Guideline 10.4 -- The Defense Team

1. Littlejohn v. Trammell, 704 F.3d 817 (10th Cir 2013)

The Court of Appeals for the Tenth Circuit affirmed the district court's judgment on all grounds except for the petitioner's claims of ineffective assistance of counsel at the penalty phase and remanded the case to the district court for an evidentiary hearing.

In concluding that counsel's performance was deficient, the court stated that counsel must perform in accordance with "prevailing professional norms, which in capital cases . . . refer to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases . . . "

2. Bigby v. Thaler, 2013 WL 1386667 (N.D. Tex. 2013)

The United States District Court for the Northern District of Texas, Fort Worth Division,

denied the petitioner's writ of habeas corpus. The petitioner argued that his counsel failed to conduct adequately a mitigation and social-history investigation in accordance with accepted practices and ABA Guidelines. Specifically, the petitioner argued that counsel failed to uncover psychiatric and/or institutional records of his brother, half-sister, and mother and overlooked critical information about his upbringing. The court disagreed.

In reviewing counsel's performance, the court found that counsel presented, but did not emphasize, evidence of the petitioner's childhood and possible genetic disposition to mental illness because counsel otherwise had strong proof that the petitioner was mentally ill at the time of the offense. The court reasoned that this was reasonable given that the State would have simply pointed out that none of the petitioner's family members committed capital murder. The court also found that the fact that the petitioner's second mitigation specialist was also employed by a professional agency that also provided psychological services does not demonstrate that the mitigation specialist's dual role was outside the range of reasonable representation. Citing section 10.4 of the 2003 ABA Guidelines, the court reasoned that counsel is free to allocate duties imposed by Guidelines to appropriate members of the defense team. Accordingly, the court concluded that counsel's decisions did not amount to deficient performance within the meaning of Strickland.

3. State v. Monfort, 312 P.3d 637 (Wash. 2013)

The Supreme Court of Washington reversed a trial court's grant of Christopher John Monfort's motion to strike the death penalty notice filed by a county prosecutor. Monfort had filed two motions, one arguing that the death notice should be stricken because the county prosecutor had insufficient facts to determine whether or not to seek the death penalty and another arguing that the prosecutor considered the facts of the crime when making the determination. In summarizing the facts of the case, the court noted that defense counsel sought additional time to complete its mitigation investigation because the ABA Guidelines "required it to exhaustively investigate Monfort's life." The prosecutor later filed a death notice before counsel had completed the mitigation investigation, and defense counsel moved to strike. The trial court subsequently denied the motion to strike because the prosecutor had considered the facts of the crime but granted the other motion arguing that the prosecutor had insufficient facts to seek death. In that decision, the trial court found that the defense was proceeding to develop its mitigation package in accordance with the ABA Guidelines and that the prosecutor "failed both to exercise the discretion it is statutorily and constitutionally obliged to exercise," and then the court struck the death notice. The trial court also found that the prosecutor "relied upon a flawed, practically useless mitigation investigation prepared by its own investigator."

The Supreme Court of Washington reversed, finding that the trial court "errantly struck the county prosecutor's death penalty notice" in part because "a county prosecutor's investigation does not have to comply with the ABA Guidelines and standards of effective assistance of counsel . . . because those standards apply only to the defense." The court further held that the trial court's assurances that defense counsel were "preparing a mitigation package in accordance with the ABA Guidelines do[] not preclude the country prosecutor from concluding that the defense's future mitigation evidence would also be insufficient." Justice Gordon McCloud filed a concurring opinion, in which she agreed that the prosecutors' efforts were reasonable and noted in a footnote that the "reasonable investigation" required of

prosecutors is "far less than what is required of effective defense counsel." The footnote cited 2003 ABA Guidelines 10.4 and 10.11, as well as the Supplementary Guideline for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11.

4. *Barrett v. State*, 733 S.E.2d 304 (Ga. 2012)

The Supreme Court of Georgia affirmed the trial court's ruling that Barrett was not denied effective assistance of counsel. Barrett contended that trial counsels' investigation and presentation of mitigating evidence was inadequate even though Barrett was adamant that no mitigation evidence be presented and refused to assist counsel in locating mitigation witnesses. The trial court, finding that trial counsel hired a private investigator to seek additional mitigating witnesses, concluded that trial counsel were not deficient, as they "did everything reasonably within their means to investigate mitigating evidence" and denied Barrett's claim.

On appeal to the Supreme Court of Georgia, Barrett, citing ABA Guideline Section 10.4.1 (C), argued that trial counsel was required to conduct an investigation seeking possible evidence for the sentencing phase regardless of any initial assertion by the client that mitigation is not to be offered. The Court agreed that this was the appropriate governing standard, but concluded that even if trial counsel failed to investigate mitigating evidence to the extent feasible, Barrett failed to show that he was prejudiced in either phase of his trial. The Court concluded that Barrett's claim could provide him no relief and affirmed the trial court's ruling that Barrett was not denied effective assistance of counsel.

5. *State v. Langley*, 273 P.3d 901 (Or. 2012)

The Oregon Supreme Court, on a third automatic and direct review of a judgment imposing a death sentence, reversed the trial court judgment and remanded for further penalty-phase proceedings.

Before the third review, the Oregon Supreme Court twice affirmed Langley's conviction, but twice vacated his death sentence. On the third review, Langley raised 27 claims related to his most recent penalty-phase proceeding. Among his claims was one that the trial court erred by requiring him to proceed *pro se* without a valid right to counsel waiver. On this ground, the Oregon Supreme Court reversed and remanded.

The Oregon Supreme Court discussed the legislature's creation of the Public Defense Service Commission, and the requirements of the commission. Among the requirements is a policy called "Legal Representation Plan for Death Penalty Cases" (the "Plan") which mandates the appointment of co-counsel whenever it is reasonable and necessary. The court further noted that the Plan adopts several standards from the ABA Guidelines, including Guidelines 10.4, which provides that the responsible agency "should designate lead counsel and one or more associate counsel." The adoption of this provision, the court said, "confirm[s] that, in a death penalty case involving an indigent defendant in Oregon, the defense team responsible for furnishing professional assistance to the accused ordinarily includes a lead counsel and a co-counsel."

In Langley's case, however, In this case, Smith and McCabe served in those roles until the July 13, 2005, hearing described above. The trial court, in describing its proposed "choice" [*21] to defendant, indicated that Smith and Bergland would serve in those roles unless defendant did not accept representation by them, in which case he would represent himself pro se.

Langley had two attorneys who served in that role until July 2005. The trial court said they would serve in that role unless Langley decided to proceed pro se. The court discussed that while there is a right to appointed counsel, there is no right to counsel of the defendant's choosing. Oregon statutorily limits the trial court's discretion to appoint substitute counsel, allowing it only if the court determines that counsel "cannot ethically continue to represent the client," or "in other circumstances, when the interests of justice so require." (internal citations omitted)

A defendant may proceed pro se and waive his right to counsel, but the waiver must be knowing and intentional. The trial court held a hearing on Langley's attorneys' joint and individual motions to withdraw, and prior to the hearing, the court did not allow the defendant to file a motion for substitute new counsel. The court allowed Langley to examine the affidavits and asked him his position on the motions. Langley said he supported the motions because he thought the attorney-client relationship had broken down. He sought to submit an affidavit under seal further explaining his position on the motions, but the court declined to consider it. With regard to one of the attorneys, McCabe, the trial court concluded that the relationship was irreparable, but with regard to the other attorney, Smith, the relationship could be "rehabilitated" if Langley cooperated. The trial court determined that the evidence was insufficient to show that Smith could not provide adequate representation. The trial court granted the motion of McCabe and denied that of Smith.

After denying Smith's motion, the court appointed Bergland as co-counsel and that made the defendant choose between accepting Smith and Bergland as his counsel or proceeding pro se. Langley said he did not want either choice and asked the court to direct him how to proceed, while stating that he did not wish to represent himself. The trial court treated Langley's response as a request to proceed pro se. The Oregon Supreme Court held that the trial court erred in inferring a waiver. Because the error was not harmless, the Oregon Supreme Court vacated the death sentence.

6. Ivy v. State, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a

proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

7. *Reynolds v. Warden*, 2011 Conn. Super. LEXIS 1558 (Conn. Super. Ct. 2011)

Reynolds was convicted of capital and felony murder and sentenced to death. *Reynolds*, 2011 Conn. Super. LEXIS at *7, 14. The Supreme Court of Connecticut affirmed the conviction and sentence. *Id.* at *9. Reynolds's petition for post-conviction relief, based mostly on ineffective assistance of counsel, was denied. The court only briefly discussed the Guidelines in relation to the standard of using a mitigation specialist.

Reynolds claimed that his trial counsel erred by introducing evidence that he suffered from Antisocial Personality Disorder (APD) and by not introducing evidence that he suffered from Posttraumatic Stress Disorder (PTSD). *Id.* at *14. He argued that in addition to offering evidence of PTSD, trial counsel could have hired a mitigation specialist to testify at the penalty stage. *Id.* at *27. The court noted that the hiring of a mitigation specialist was not the standard used in 1995, as it was not mentioned in the 1989 version of the ABA Guidelines. *Id.* at *28. It further noted that even in the 2003 version, the Guidelines call for a mitigation specialist to be part of the defense team, but not necessarily to testify at the penalty phase of trial. *Id.* Because trial counsel did employ an investigator at the time of trial who acted in a mitigation role, the court found this to be an unwarranted basis for finding Reynolds suffered from ineffective assistance of counsel. *Id.* at *29.

8. *Criminal Specialists Investigations, Inc. v. State*, 58 So. 3d 883 (Fla. Dist. Ct. App. 2011)

The Florida District Court of Appeals quashed the trial court's order denying Petitioner's motion for additional mitigation coordinator fees in a capital case. The Court heavily cited 2003 ABA Guidelines for the Appointment and Performance of Death Counsel, referencing Section 10.4(C)(3)(a) and Section 4.1(A)(1) that that the "defense team" in a capital case includes "at least one mitigation specialist and one fact investigator." *Id.* *2. Furthermore:

The commentary to section 4.1 of the ABA Guidelines explains the role of a mitigation specialist, calling this person 'an indispensable member of the defense team throughout all capital proceedings' and stating that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."

Id. Therefore, the Court concluded that based on the widespread use of mitigation specialists and the ABA Guidelines recommendation to consult them, the trial court erred in its suggestion that there was no such position recognized under applicable law and ruled in Petitioner's favor. *Id.*

9. State v. Jones, 2011 Ohio App. LEXIS 4949 (Ohio Ct. App. 2011)

The Ohio Court of Appeals affirmed the lower court's decision that Jones did not receive ineffective assistance of counsel during the guilt phase of his trial, but vacated and remanded for an evidentiary hearing on the lower court's determination that Jones did not receive ineffective assistance during the penalty phase of his trial.

Jones argued that his lawyers were ineffective during the guilt phase of his trial for failing to obtain an expert to refute the rape findings of the medical examiner. The court found that even if an expert had been presented, it would not have changed the outcome of his trial. In addition to failure to obtain an expert, Mr. Jones raised several other reasons why his counsel was ineffective during the guilt phase, but the Court found none of them persuasive.

With regard to the penalty phase, Jones argued that his counsel was ineffective because they "failed to discover the history of incest and sexual abuse in his family, presented an incomplete psychological assessment, failed to secure enough time to discover such information, and did not discover or present documents corroborating his life history." Citing to *Wiggins*, the Ohio Court of Appeals noted that the Supreme Court has long looked to the ABA standards as reasonableness guides. The court then went on to discuss how *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), clarified that the standards are "'only guides' to what reasonableness means, not its definition." The court further stated that the Supreme Court left open the possibility that the guidelines could be applied "more categorically" to post-2003 representation, "so long as they reflected prevailing norms of practice and were not 'so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.'" (internal citations omitted).

In this case, the doctor began meeting with Jones's lawyer six weeks pretrial, but spent less than eight hours conducting interviews and tests before the trial began. The social worker responsible for interviewing Jones's family members did not begin to work on his case until a week into trial. Citing the guidelines, the court said that lawyers should begin

[t]he mitigation investigation . . . as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations. . . . The guidelines also advise lawyers to 'devote substantial time to . . . choosing a jury most favorable to the theories of mitigation that will be presented.' . . . [T]he theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.

The court expressed overall concern with the amount of time spent investigating Jones's background, particularly potentially mitigating circumstances of sexual abuse. Citing once more to the guidelines, the court said that the issue is whether the investigation conducted was "extensive and generally unparalleled." (ABA Guidelines 10.7, at 1022) (internal citations omitted).

Citing to the guidelines, the Court said it is the duty of the lead counsel to direct the work of

the defense team, "in such a way that, overall, it provides high quality legal representation in accordance with . . . professional standards." (ABA Guidelines 10.4, at 1002). The duty to investigate a defendant's background applies regardless of the defendant's desires, specifically family and social history. (ABA Guidelines 10.7, at 1021-22).

Judge Carr concurred in the judgment but thought the majority put too much emphasis on the application of the ABA Guidelines. Carr cited to Van Hook and stated that the Supreme Court made it clear that the Guidelines "are 'only guides' to what reasonableness means, not its definition." Van Hook, 130 S. Ct. at 17. Judge Whitmore also concurred and essentially agreed with Judge Carr. "Reliance upon the Guidelines should be restricted to those few cases where there is little or no primary authority available."

10. Smith v. Mahoney, 596 F.3d 1133 (9th Cir 2010)

The US Court of Appeals for the Ninth Circuit affirmed the district court's denial of Smith's IAC claim. At his trial in 1982, Smith plead guilty and requested and received a death sentence. The 9th Circuit found that Smith's defense attorney "fell below an objective standard of reasonableness because he failed to investigate the facts of the crime, failed to investigate Smith's mental state at the time of the crime, and failed to discuss possible defenses before Smith pled guilty." In analyzing the claim of ineffectiveness, the court looked to the ABA Standards for Criminal Justice that were in place at the time of trial. The court also found that Smith's attorney was "on notice" that he might have mental health problems due to the fact that his client wanted to seek the death penalty and cited to the commentary in 2003 ABA Guidelines Section 4.1: "Mental illness can be difficult for non-mental health professionals to detect. Recognizing this fact, the ABA in 2003 issued guidelines on mental illness detection in capital cases." The court then noted that the 2003 Guidelines "were not the 'prevailing legal norms at the time' of Smith's first sentencing." Ultimately the court concluded that Smith failed to show prejudice under the second prong of Strickland.

11. Hasan v. Ishee, 2010 U.S. Dist. LEXIS 143195 (S.D. Ohio 2010)

Petitioner filed 35 grounds for relief in his habeas proceedings. His fourth ground of relief asserted that trial counsel rendered ineffective assistance when they abandoned a claim of grand jury bias. Specifically, Petitioner attempted to show that co-counsel's lack of communication about why this claim was abandoned violated ABA Guideline 10.4. The Court cited Bobby v. Van Hook, stating that the Guidelines were not "inexorable commands" but "only guides for what reasonableness means, not its definition." 130 S. Ct. 13, 17 (2009). The Court rejected Petitioner's argument that counsel's lack of communication constituted ineffective assistance of counsel.

12. State v. Kiles, 213 P.3d 174 (Ariz. 2009)

The Arizona Supreme Court dismissed Kiles' claim on direct appeal that "his attorneys failed to properly assemble a defense team, investigate the underlying facts of the case, communicate with Kiles, and represent him competently and diligently." Id. at 184 (citing Ariz. R. Sup. Ct. 42, E.R. 1.1, 1.3; ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) 10.4, 10.5; ABA Criminal Justice Defense Function Standards (3d ed. 1993) 4-2.1, 4-3.1, 4-4.1). Relying on Wiggins, Kiles argued "that breach of

these standards is qualitatively different from typical claims of ineffective assistance of counsel." *Id.* at 184 (citing *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)). However, the Court stated that "Wiggins announced no new category of structural error. *Id.* at 183. Rather, that case addressed an ineffective assistance of counsel claim, an issue on which professional standards have considerable bearing." *Id.* at 184 (citation omitted). The Court held that the allegations raised by Kiles did not warrant review at this time. *Id.* at 184.

13. *Whatley v. Smith*, 2009 U.S. Dist. LEXIS 111867 (N.D. Ohio 2009)

Petitioner Whatley was convicted of aggravated murder and sentenced to life in prison, although the charge potentially carried the death penalty. The U.S. District Court for the Northern District of Ohio denied habeas relief. Whatley claimed ineffective assistance of trial counsel on the grounds that his counsel did not obtain funding for a mental health expert. He argued that the role of the mitigation specialist who was retained did not include screening for mental or psychological disorders. The court relied on the ABA Guidelines in determining that Whatley's counsel's performance was indeed deficient:

"Whatley is correct that retention of a mitigation specialist is only one part of reasonably professional performance. See *Jells v. Mitchell*, 538 F.3d 478, 493-95(6th Cir. 2008). The ABA Guideline requires more" *Id.* at 8 (Citing 2003 ABA Guidelines for the Performance and Appointment of Counsel in Death Penalty Cases 10.4(C)).

The district court specifically criticized the state court for failure to compare counsel's performance with the norms of practice as defined in the ABA Guidelines:

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are "guides to determining what is reasonable" performance by defense counsel in capital cases. See *Rompilla v. Beard*, 545 U.S. at 387 & n. 6, 125 S.Ct. at 2466 & n.6 (quoting *Wiggins v. Smith*, 539 U.S. at 524, 123 S.Ct. at 2537; *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065). These constitute the "well-defined norms" of investigation into mitigating evidence. See *Wiggins*, 539 U.S. at 524, 123 S.Ct. at 2537. The state court decision made no attempt to weigh this norm supplied under Guideline 10.4(C) with defense counsel's performance, and hence was not a reasonable application of clearly established law according to the U.S. Supreme Court under *Strickland*, *Wiggins* and *Rompilla*.

Id. at 9. Because it found the state court's decision to be an unreasonable application of clearly established law, the district court reviewed *de novo* the claim of ineffectiveness and found that counsel's performance was deficient: "There is no justification for defense counsel's failure to file a request for funds to obtain a mental health expert to screen Whatley for possible mental disorder or impairment. The 'psychosocial investigation' by the mitigation specialist was no substitute." *Id.* Ultimately, however, the court denied relief on the grounds that the jury did not sentence him to death and therefore he could not show prejudice under *Strickland*.

14. *Moore v. Mitchell*, 531 F. Supp. 2d 845 (S.D. Ohio 2008)

Moore appealed a supplemental petition for writ of habeas corpus to the District Court for the Southern District of Ohio. Among Moore's twenty-five claims for relief, the District Court

analyzed whether trial counsel rendered ineffective assistance of counsel. Moore claimed trial counsel employed a mitigation specialist who failed to discuss substantive mitigation issues with Moore and failed to adequately assist in the preparation of the mitigation phase. *Id.* at 866.

In the Report and Recommendations of the District Court, the Chief Judge Magistrate addressed this issue and stated, "neither the Constitution nor the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) ("ABA Death Penalty Guidelines") guarantee or mandate the right to an "effective mitigation specialist." *Id.* at 867. Moore appealed this finding citing to ABA Guidelines 4.1(A)(1) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."); and Guideline 10.4(C)(2) (requiring lead attorneys to retain a mitigation specialist as soon as possible after being designated as counsel). *Id.* The District Court ultimately found that although trial counsel may have been ". . . deficient in failing to obtain the services of an effective mitigation specialist, the subclaim would nonetheless fail . . ." *Id.* Moore failed to establish prejudice under the Strickland standard and was therefore unsuccessful on this claim.

15. *Richie v. Sirmons*, 563 F. Supp. 2d 1250 (N.D. Okla. 2008)

The Court held that the Petitioner was entitled to habeas corpus relief because of the inadequate mitigation investigation received during the penalty phase. The Petitioner claimed that his trial attorney failed to present a defense based on voluntary intoxication and failed to develop evidence of psychological impairment. The first claim was dismissed because "it is unclear who trial counsel could have presented to testify". In reviewing the second claim the court noted that trial counsel had focused on testimony from family members and presented brief school records. Counsel failed to present psychiatric evidence which the "Tenth Circuit court of Appeals has noted . . . is 'exactly the sort of evidence that garners the most sympathy from jurors. *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004)". Citing *Smith* the court went on to note that:

The Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the American Bar Association (ABA) ... as 'guides to determining what is reasonable' performance. Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase.' See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for Mr. Watson to omit this evidence from his case for mitigation.

(Internal citations omitted). The Court noted that "Counsel simply did not take any action to determine whether such evidence was available" and thus concluded that counsel's failure was "constitutionally deficient under Strickland." In light of the new psychiatric evidence the court concluded that Petitioner's claim satisfied Strickland prejudice and he was entitled to habeas relief.

16. *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir 2007)

The Tenth Circuit Court of Appeals reversed the district court's denial of habeas relief as to the defendant's sentencing and was remanded to the district court with instructions to issue a writ of habeas corpus. The court found that defense counsel's failure to investigate or discover readily available mitigation evidence regarding the defendant's family history and mental health amounted to constitutionally deficient performance. In addition, the court also found that defense counsel's conduct prejudiced the proceedings, as it left the motive for the murders unanswered.

In citing to the ABA Guidelines, the court noted that investigation into mitigating evidence involves discovering "all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 1142 (citing ABA Guideline 11.4.1(C)). The court declared that evidence relating to the defendant's mental health history and family life represented "just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of the trial." *Id.* at 1144.

17. *State v. Whatley*, 2006 WL 1351668 (Ohio Ct. App. 2006)

The Court of Appeals of Ohio reversed the non-capital sentence of appellant Dwight Whatley and remanded the case for a new sentencing hearing. Whatley's direct appeal included a claim that his counsel was ineffective for failing to "obtain a psychologist or psychiatrist in violation of ABA Guideline 10.4 and federal case law." Without further discussion of the Guidelines, the court concluded that counsel's performance was reasonable because "[c]ounsel did, indeed, file a motion for the appointment of a mitigation specialist in order to, inter alia, '[c]onduct a psychosocial investigation' of their client" and "[u]pon the conclusion of the trial proceedings, the jury ultimately decided Whatley did not deserve the death penalty for his convictions." Sentencing phase relief was granted on unrelated grounds.

18. *Smith v. Mullin*, 379 F.3d 919 (10th Cir 2004)

The Tenth Circuit held that counsel was ineffective for not presenting evidence of defendant's mental retardation, brain damage, and troubled background in the penalty phase.

Looking to the United States Supreme Court in its analysis, the Tenth Circuit noted that "[t]he Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the (ABA) ... as guides to determining what is reasonable' performance." *Id.* at 942. (citations omitted). "Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase. See (2003) ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for [trial counsel] to omit this evidence from his case for mitigation.'" *Id.* (citations omitted).

19. *Zebroski v. State*, 822 A.2d 1038 (Del. 2003)

The Supreme Court of Delaware affirmed a denial of post-conviction relief for ineffective assistance of counsel. Among Zebroski's claims was that the appointment of a single defense counsel constituted ineffective assistance. *Id.* at 1045. Justice Steele, writing for the court, acknowledged that a trial may be "fundamentally unfair" if the defendant lacks "access to the

raw materials integral to the building of an effective defense." Id. at 1045 (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). The court further explained:

We also recognize that the American Bar Association recommends that each capital defendant possess a "lead counsel" who assembles a defense team with (a) at least one mitigation specialist and one fact investigator; (b) at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and (c) any other members needed to provide high quality legal representation.

Id. at 1046 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.4--The Defense Team (Revised ed., Feb. 2003)).

The court agreed that such a defense team was desirable when feasible and that a "lack of proper staffing" might properly be weighed as a factor in claims of ineffective assistance. Id. However, the Court found that the lone counsel passed the standard of reasonableness, noting his reliance on assistance from Public Defender's Office staff and his utilization of an outside psychologist. Id. at 1046.

20. *Com. v. Shabazz*, 2003 WL 1847388 (Va. Cir. Ct. 2003)

The Circuit Court of Virginia, Roanoke, entered an order in the form of a letter to counsel, finding that capital defendant Askia Naim Tahriq Shabazz had not met his burden of "demonstrating particularized need to employ a 'mitigation specialist,'" but authorizing limited employment of a mitigation specialist for the purpose of assisting the defense in meeting that burden. The defense sought to employ the services of experienced mitigation specialist Marie Deans. The court held a hearing on the appointment of Ms. Deans where the defense submitted her written notes into evidence. In its letter, the court said that these notes cited to ABA Guidelines 10.1 and 10.4 which "recommend that the capital case 'defense team' include at least one nonattorney 'mitigation specialist.'" The court's letter continued to say: "Both Professor Groot and Ms. Deans testified that-in the words of the ABA Guidelines-'it is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages. Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.'" With respect to the ABA Guidelines, the court noted that they purported to set forth a national standard of practice for capital defense, but that it had "not found any judicial decision that suggests that the ABA Guidelines do, in fact, set forth any such standard." Despite this skeptical view of the Guidelines, the court continued in its letter to cite to the ABA Guidelines when describing the duties of the mitigation specialist and assembly of the defense team. The court wrote: "While the ABA Guidelines recommend that the 'defense team' include 'at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments,' and recognize that this person may be the fact investigator or mitigation specialist, they also suggest that counsel should structure the team in such a way as to distinguish between experts who will play a 'consulting' role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who, because they will be called to testify, waive such protections. This might require, in the words of the Guidelines,' appropriate contractual arrangements.'" (citing 2003 Guideline 10.4(c)(2))

and commentary). The court concluded by authorizing the employment of Ms. Deans for up to 20 hours for the purpose of gathering information to demonstrate that there is a "genuine, particularized need" for the services of a mitigation specialist.

Guideline 10.5 -- Relationship with the Client

1. State v. Sykes, 2014 WL 619503 (Del. Super. Ct. 2014)

The Superior Court of Delaware denied Petitioner Ambrose Sykes' Amended Motion for Post-conviction Relief. Sykes raised twenty-three grounds for relief, many of them based on allegations of ineffective assistance of trial counsel for failing to conduct a reasonable investigation into evidence that would have demonstrated his innocence.

In arguing that the investigation was deficient in numerous ways, Sykes asserted that trial counsel failed to meet with him in a timely manner and failed to maintain ongoing dialogue. Sykes noted that 2003 ABA Guidelines 10.5(B)(2) and 10.5(C)(1) recommend interviewing a client within 24 hours of the attorney's appearance and maintaining an active dialogue with the client regarding factual investigation. However, the court pointed to Strickland, and noted that "[t]he guidelines are just that: guidelines. They are not binding law. Failure to comply with them does not automatically establish unrealistic performance."

Sykes also cited to the ABA Guidelines to support his claim that that trial counsel was ineffective for failing to conduct a thorough mitigation investigation at the penalty phase of trial. [ed. note: the duty to conduct a thorough investigation is covered in 2003 Guideline 10.7, although it was not identified by number by the court] The court stated that there was no absolute duty on the part of defense counsel to pursue all lines of investigation about mitigating evidence for potential use at the penalty stage. Further, counsel need not present all mitigating evidence the investigation uncovered. The court further cited Strickland, noting that "[n]either the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines is legally tantamount to ineffective assistance of counsel . . . The ABA Standards on mitigation investigation, while instructive on reasonableness, are merely guidelines, not legal mandates."

2. Washington v. Alabama, 95 So. 3d 26 (Ala. Crim. App. 2012)

The Court of Criminal Appeals of Alabama affirmed the circuit court's denial of the petitioner's petition for post-conviction relief. Petitioner argued his counsel's failure to investigate and to present mitigation evidence at the penalty phase of his capital-murder trial amounted to deficient representation and raised several different grounds in support of this claim. In particular, petitioner argued that the circuit court erred in finding that his counsel's performance was reasonable when counsel relied on an investigator to conduct the mitigation investigation and to interview witnesses.

The court disagreed. It found that counsel's reliance on the mitigation expert was reasonable. It reasoned that other courts have found that no ineffective assistance of counsel when counsel delegated the responsibility for investigating the case to a subordinate and that it is a reasonable practice for defense counsel in a capital-murder case to hire an investigator.

Further, the court noted the 2003 ABA Guidelines Section 10.7 & Commentary recognize as appropriate the hiring of an investigator to conduct interviews on behalf of appointed counsel. Accordingly, the court determined that the circuit court did not abuse its discretion in denying relief on this claim.

Petitioner also argued that the circuit court erred in summarily dismissing his claim that counsel was ineffective for failing to develop a relationship of trust with him. Citing 2003 ABA Guidelines Section 10.5, petitioner asserted that "[c]ounsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client." Without discussing the ABA Guidelines, the court agreed with the circuit court that petitioner's claim did not "contain a clear and specific statement of fact that would entitle [petitioner] to relief." Accordingly, the court determined that the circuit court did not abuse its discretion in denying relief on this claim.

3. *Hammonds v. Allen*, 849 F. Supp. 2d 1262 (M.D. Ala. 2012)

The United States District Court for the Middle District of Alabama denied Hammonds' petition for habeas relief. Among Hammonds' claims for relief was a claim of ineffective assistance of appellate counsel. Hammonds said his counsel was deficient in failing to argue that the trial court erred in its refusal to grant venue change and recusal motions, and by declining to argue that the trial court erred by questioning the State's witnesses on DNA evidence. The Alabama Court of Criminal Appeals rejected Hammonds' arguments because there was a lack of evidence to support them.

In looking to the performance of counsel, the District Court, citing to the ABA Guidelines, said that "prevailing professional norms for appellate lawyers require them to argue all arguably meritorious issues." The court said Hammonds' attorney was in the best position to weigh the merits of his arguments before submitting them to the state appellate courts. Counsel raised many issues related to Alabama's procedures for gaining and testing Hammonds' DNA; he made arguments related to Hammonds' change of venue motion, the judge's impartiality, the trial court's closing instructions, and the propriety of Hammonds' death sentence.

The District Court said that the attorney's choice not to present some of Hammonds' arguments does not mean that he did not provide effective assistance. The court further noted that because Hammonds' attorney was permitted vast discretion in his actions and Hammonds failed to submit evidence to counter the reasonableness of those actions, the court did not find that the state court acted contrary to, or unreasonably applied, federal law.

4. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "constitutionally ineffective" in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political

influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

5. *State v. Kiles*, 213 P.3d 174 (Ariz. 2009)

The Arizona Supreme Court dismissed Kiles' claim on direct appeal that "his attorneys failed to properly assemble a defense team, investigate the underlying facts of the case, communicate with Kiles, and represent him competently and diligently." *Id.* at 184 (citing Ariz. R. Sup. Ct. 42, E.R. 1.1, 1.3; ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) 10.4, 10.5; ABA Criminal Justice Defense Function Standards (3d ed. 1993) 4-2.1, 4-3.1, 4-4.1). Relying on *Wiggins*, Kiles argued "that breach of these standards is qualitatively different from typical claims of ineffective assistance of counsel." *Id.* at 184 (citing *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)). However, the Court stated that "*Wiggins* announced no new category of structural error. *Id.* at 183. Rather, that case addressed an ineffective assistance of counsel claim, an issue on which professional standards have considerable bearing." *Id.* at 184 (citation omitted). The Court held that the allegations raised by Kiles did not warrant review at this time. *Id.* at 184.

6. *Galloway v. Thaler*, 344 F. App'x. 64 (5th Cir 2009)

The Court of Appeals for the Fifth Circuit denied the petitioner's application for a certificate of appealability as to his claim of ineffective assistance of counsel based upon the failure to investigate and present mitigation evidence. Prior to trial, the petitioner had instructed his counsel not to present any mitigation evidence that might cast his father in a negative light, including evidence of childhood abuse. In his federal habeas petition, the petitioner "asserted that his attorneys should have ignored his instructions and presented a mitigation case," relying upon the ABA Guidelines (2003 Guidelines Section 10.5 commentary, Section 10.7 (A)(2); 1989 Guidelines Section 11.4.2 commentary). The court agreed with the district court's conclusion that trial counsel had legitimate reasons to comply with their client's instructions, including their concern about their client's negative reaction and their belief that potential mitigation evidence could hurt their client's case. In addition, although the court recognized that "the Supreme Court has endorsed various sets of ABA Guidelines as instructive on the issue of reasonableness in representation, neither the Supreme Court nor this court have ever found the Guidelines to be dispositive of a claim of ineffective assistance of counsel."

7. Galloway v. Quarterman, 2008 U.S. Dist. LEXIS 97839 (N.D. Tex. 2008)

Petitioner filed for a writ of habeas corpus, claiming that his Sixth Amendment right to effective assistance of counsel was violated because his trial attorneys failed to investigate, develop, and present mitigation evidence at the punishment phase of his trial. The court held that because the petitioner had instructed his attorneys not to present evidence relating to mitigation, his counsel could not be considered ineffective. Petitioner argued that his instructions should have been ignored, pointing to the 2003 Guidelines which state: "[s]ome clients will initially insist that they want to be executed . . . they would rather die than spend the rest of their lives in prison . . . [i]t is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide." Guidelines Section 10.5 commentary (2003). Petitioner also pointed to the 1989 Guidelines which state that "[c]apital counsel frequently 'must not only struggle against the public and prosecution but against self-destructive behavior of the client as well.'" Guidelines Section 11.4.2 commentary (1989). The court rejected the petitioner's claim, citing *Wood v. Quarterman*, 491 F.3d 196 (5th Cir. 2007) in which the court stated: "[n]either the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence." *Wood*, 491 F.3d at 203. The court in *Wood* added, "this court has held on several occasions that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following these instructions." *Id.* The court also stated that petitioner's counsel had strategic reasons for not presenting some the mitigating evidence because it would not have helped his case, but rather would have served to condemn him. The court denied Galloway's petition for a writ of habeas corpus.

8. Eaton v. State, 192 P.3d 36 (Wyo. 2008)

The court affirmed the trial court's conviction and death sentence. Inter alia, that appellant argued that he received ineffective counsel at both trial and sentencing that failed to meet the ABA guidelines. Specifically: Guideline 2.1 (jurisdictional plan), 10.5 (client relationship) and 10.10 (trial preparation overall). The court noted that although the ABA guidelines are not "black-letter rules, they are guidelines of significance that we consider in our review of this case." *Id.* at 119. Following *Strickland*, the court noted with regards to strategic trial choices that "a heavy measure of deference [should be given] to counsel's judgments." *Id.* The court found that the Wyoming's lack of a formal death penalty plan did not have "a dispositive effect on this case." *Id.* Although the defense team had difficulties working with Eaton (including a mitigation specialist who declined to meet with him again after her first meeting), the assistant defense attorney was "eventually able to develop a working relationship with Eaton." *Id.* at 120. The court noted that Eaton was most critical of the theory of defense that was chosen. But the court held that "juries have minds of their own, and a theory such as that propounded by the defense team was as good as anything we can think of, given the circumstances of this case. Appellate counsel offer no more compelling theory that might have been pursued. As required by the ABA Guidelines, the theory did provide consistency between the guilt/innocence and penalty phases."

With respect to Eaton's mitigation complaints, the Court opinion details an extensive comparison of the proposed additional mitigation facts (see *id.* at 143 - 172) and those that

were presented in the county court. The court noted, inter alia, that the new evidence was "cumulative to similar evidence that that trial counsel presented in the sentencing phase." Id. at 155 and that any failure by trial counsel to properly prepare their mitigation witnesses did not render "a breakdown in the adversary process." Id. at 166.

9. *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006)

The Supreme Court of Utah found that defense counsel provided ineffective assistance during the portion of the proceedings where he was providing representation. As such, the court reversed the judgment and remanded the case to the trial court and sent instructions to set aside the relevant proceedings. The court found that defense counsel only spoke to the client about the case and the expected strategy once and repeatedly ignored or deliberately avoided contact from the defendant.

In citing the 2003 ABA Guidelines, the court stated that "courts frequently rely on the professional standards established by the ABA when determining the relevant professional norms under the first prong of the Strickland analysis." Id. at 512. The court also noted that the Supreme Court of the United States referred to the Guidelines as "prevailing norms of practice." The court specifically stated that it would "rely on the ABA Death Penalty Guidelines to the extent that they are relevant to our decision," id. at 513, because Utah's post-conviction do not contain any rules or procedures regarding counsel's performance, id. at 512.

The court stated that one of the main duties of defense counsel is to "maintain close contact with the client regarding litigation developments." Id. at 513 (citing ABA Guideline 10.15.1(E)(1)). The court also noted that post-conviction counsel has additional obligations of investigating the performance of trial counsel as well as investigating the facts underlying the conviction and the sentence, referring to the comments to ABA Guideline 10.15.1. Id.

10. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004)

The Supreme Court of Pennsylvania examined a number of claims for post-conviction relief presented by Williams, among them ineffective assistance of counsel, prosecutorial misconduct, and various due process violations. The Court held that none of the claims merited relief.

Justice Saylor dissented, arguing that Williams had established ineffective assistance of counsel at the penalty phase, primarily for failing to develop adequate mitigating evidence. Citing a reference to the 1989 ABA Guideline 11.4.1 (C) in *Wiggins v. Smith*, 539 U.S. 510 (2003), the opinion recognized defense counsel's "obligation to 'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Williams*, 863 A.2d at 527 (citation omitted). Justice Saylor drew upon substantial support from the 2003 ABA Guidelines throughout his opinion, commenting that "[I]n my view, the drafters' claim that the Guidelines 'embody the current consensus about what is required to provide effective defense representation in capital cases' is not an exaggerated one. Id. at 527 n.6 (citation omitted). In particular the Saylor refers to 2003 ABA Guidelines 1.1, 4.1, 10.5, 10.7(A)(2), and 10.11.

The dissent pointed to a number of instances in which the conduct of defense counsel fell

short of professional standards. Justice Saylor utilized 2003 ABA Guideline 4.1 in arguing that counsel was irresponsible in scheduling his first meeting with the defendant only one week before trial, *id.* at 528 n.7, that "competent counsel would have reviewed records from Appellant's other criminal proceedings," *id.* at 528, that a previous psychotic episode merited professional evaluation, *id.* at 528 n.8, and that counsel was unjustified in relying on his own opinion of the defendant's psychological state, *id.* at 528 n.9. Then, Saylor used 2003 ABA Guidelines 10.5 and 10.7(A)(2) to rebut counsel's suggestion that the defendant's adamant commitment to fighting the validity of his conviction excused a lack of penalty phase preparation. *Id.* at 531 n.17, n.19.

The dissent criticized the majority for too lightly disregarding "the potency of life-history and mental-health mitigation in terms of capital sentencing," claiming that such an approach is contrary to Supreme Court precedent and the ABA Guidelines. *Id.* at 533 (citation omitted). Justice Saylor explained his perspective on the role of mitigating evidence in the sentence process, quoting 2003 ABA Guideline 10.11: "None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]" *Id.* at 534, n.22 (citation omitted). Indeed, psychological evidence of the type at issue here would "provide some sort of explanation for Simmons's abhorrent behavior." *Id.* at 543, n.23 (relying on 2003 ABA Guideline 10.11 to support this contention).

Justice Nigro filed a separate dissent, agreeing with Justice Saylor that the defendant received ineffective assistance of counsel in the penalty phase. *Id.* at 524.

Guideline 10.6 -- Additional Obligations of Counsel Representing a Foreign National

1. *Loza v. Mitchell*, 705 F. Supp. 2d 773 (S.D. Ohio 2010)

The United States District Court for the Southern District of Ohio examined a number of claims made by Petitioner including, ineffective assistance of counsel in representing a foreign national. *Id.* at 46. Petitioner maintained that counsel's "investigation, preparation and presentation of available evidence" was inadequate. In response, the Court stated "[u]nder the Ohio statute, a capital defendant found guilty of a death specification has to present some mitigating evidence in order to avoid the death penalty." (citing *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999); *Rompilla v. Beard*, 545 U.S. 374 (2005) (incorporating the 2003 American Bar Association ("ABA") Guidelines regarding competent representation in capital cases); and *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (discussing the duty to investigate mitigating evidence and incorporating the 1989 ABA Guidelines regarding competent representation in capital cases)). The Court asserted that the Sixth Circuit "has not hesitated to hold that 'failure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment.'" *Id.* at 82 (citing *Martin v. Mitchell*, 280 F.3d 594, 612 (6th Cir. 2002)). However, the Court found that counsel's mitigation investigation and preparation was not inadequate. *Id.* at 122.

2. *Mullings v. Di Guglielmo*, 2008 WL 1328090 (E.D. Pa. 2008)

Magistrate Judge Perkin recommended that Marlon Mullings' pro se petition for federal

habeas corpus relief be denied. Mullings asserted several claims for relief, including two claims that his trial counsel and direct appeal counsel failed to seek consular assistance under 2003 Guideline 10.6. Mullings filed his federal petition with a handwritten letter seeking that the petition be stayed until the resolution of his state petition for post-conviction relief, which had been filed several weeks before. The court noted that Mullings "mistakenly believes that he was required to file his federal habeas petition at the same time as the PCRA petition in order to preserve the timeliness of the federal petition under the AEDPA" and dismissed the federal petition without prejudice because state remedies had not yet been exhausted

3. *Sells v. Quarterman*, 2008 U.S. Dist. Lexis 78172 (W.D. Tex. 2008)

The U.S. District Court for the Western District of Texas reviewed the petitioner's motions requesting authorization to incur investigative expenses in connection with the petitioner's mental retardation claim. Trial counsel had requested expenses \$10,000 to secure petitioner's academic records.

The Court noted that petitioner's counsel had failed to file a completed CJA Form 31 and thus Court granted, at present, up to the limit for which a CJA Form 31 is required (\$7,500). In addition, the Court recommended that trial counsel extend the investigation beyond academic records to "those subjects which the American Bar Association has recently recommended be included in any adequate investigation of a capital defendant's life history, i.e., the petitioner's employment history, medical and mental health history, prison medical and disciplinary records, family history and military records, if any exist."

Furthermore the court concluded after reviewing the case file that the petitioner "requires not merely the assistance of a trained mitigation investigator but also an evaluation by an experienced, qualified, mental health professional if petitioner is to present this Court with an intelligible claim of mental retardation" - "a professor of education does not qualify as a 'mental health expert' within the meaning of this Order."

The Court noted that if any estimates exceeded \$7,500 then the petitioner shall accompany his motion requesting appointment of a qualified mental health expert with a properly completed CJA Form 31 and any other necessary documentation.

4. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (U.S. 2006)

In his dissenting opinion, Justice Breyer cited Guideline 10.6 to discuss the professional obligations defense counsel has in contacting the consular office for cases involving a foreign national sentenced to death. The majority held that a state court did not have the right to exclude evidence that was admitted into court in violation of the Vienna Convention. Nevertheless, Justice Breyer cited Guideline 10.6 to argue that the Convention did not forbid the "application of ordinary procedural default rules," which might include ineffective assistance of counsel claims. Thus, Justice Breyer cited the revised 2003 ABA Guidelines to emphasize counsel's obligation to seek consular's assistance when foreign nationals are defendants in capital cases.

Guideline 10.7 -- Investigation

1. State v. Sykes, 2014 WL 619503 (Del. Super. Ct. 2014)

The Superior Court of Delaware denied Petitioner Ambrose Sykes' Amended Motion for Post-conviction Relief. Sykes raised twenty-three grounds for relief, many of them based on allegations of ineffective assistance of trial counsel for failing to conduct a reasonable investigation into evidence that would have demonstrated his innocence.

In arguing that the investigation was deficient in numerous ways, Sykes asserted that trial counsel failed to meet with him in a timely manner and failed to maintain ongoing dialogue. Sykes noted that 2003 ABA Guidelines 10.5(B)(2) and 10.5(C)(1) recommend interviewing a client within 24 hours of the attorney's appearance and maintaining an active dialogue with the client regarding factual investigation. However, the court pointed to Strickland, and noted that "[t]he guidelines are just that: guidelines. They are not binding law. Failure to comply with them does not automatically establish unrealistic performance."

Sykes also cited to the ABA Guidelines to support his claim that that trial counsel was ineffective for failing to conduct a thorough mitigation investigation at the penalty phase of trial. [ed. note: the duty to conduct a thorough investigation is covered in 2003 Guideline 10.7, although it was not identified by number by the court] The court stated that there was no absolute duty on the part of defense counsel to pursue all lines of investigation about mitigating evidence for potential use at the penalty stage. Further, counsel need not present all mitigating evidence the investigation uncovered. The court further cited Strickland, noting that "[n]either the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines is legally tantamount to ineffective assistance of counsel . . . The ABA Standards on mitigation investigation, while instructive on reasonableness, are merely guidelines, not legal mandates."

2. United States v. Witt, 72 M.J. 727 (A.F. Ct. Crim. App. 2013)

A general court-martial found appellant Andrew Witt guilty of premeditated murder and attempted premeditated murder. He was sentenced to death.

On appeal, Witt raised eighty-eight issues. The U.S. Air Force Court of Criminal Appeals affirmed the findings but set aside the sentence, and returned the record of the trial to the Judge Advocate General for remand to the convening authority.

Appellant argued that his defense counsel were not qualified to represent him because they did not satisfy the ABA Guidelines. Appellant argued that the ABA Guidelines were binding on military and civilian defense counsel in Air Force courts. In 2005, the Judge Advocate General issued the policy memorandum "Air Force Standards for Criminal Justice" that was adapted from the ABA Standards for Criminal Justice. Appellant argued that because the ABA Standards incorporated the ABA Guidelines, therefore the Guidelines were also binding on Air Force practitioners. The court disagreed, and held that the ABA Standards and Guidelines were only recommended guidelines and not mandatory. The court stated that their superior court, the United States Court of Appeals for the Armed Forces, declined to mandate compliance with the Guidelines.

The court stated that Guideline 10.7 set forth the obligation that at every stage counsel should

conduct thorough and independent investigations relating to issues of guilt and penalty. The court cited the Guideline 10.7's commentary, stating that "counsel need to explore medical history, including hospitalization, mental illness, family history of mental illness, physical injury and neurological damage." Additionally, the court argued that "Guideline 10.11 sets forth an ongoing duty of counsel to seek information that supports mitigation or rebuts the prosecution's case in aggravation."

Here, the court found defense counsel's performance was unreasonable, because they did not investigate the possibility of a traumatic brain injury from a motorcycle accident four months before. Furthermore, the court held that defense counsel's efforts to investigate appellant's family history were deficient based on counsel's knowledge of the mental health history of appellant's mother, the recommendation of a professional mitigation specialist to obtain the records, the theory of the case presented by the forensic psychologist, and the ABA Guidelines.

3. Hamm v. Allen, 2013 WL 1282129 (N.D. Ala. 2013)

The United States District Court for the Northern District of Alabama denied the petitioner's writ of habeas corpus. The petitioner argued that trial counsel failed to properly investigate aggravating and mitigating circumstances for the penalty phase and failed to present compelling evidence at the sentencing portion of his trial.

In reviewing counsel's performance, the court noted that the ABA standards are useful as a guide, but it does not substitute ABA "Standards" for its own reasonableness standard under Strickland. *Id.* at 55. Instead, the court stated, the salient legal inquiry for this court is whether any reasonable jurists would debate whether the Alabama Court of Criminal Appeals' application of the Strickland standard resulted in a decision that is contrary to or an unreasonable application of clearly established federal law. In this case, the court agreed with the circuit court that trial counsel conducted an adequate investigation and further found that counsel presented much of this information by way of testimony at the sentencing hearing. The court agreed that the petitioner failed to establish any prejudice, because the evidence was cumulative and would not have affected the outcome of the proceeding.

4. Ploof v. State, 75 A.3d 840 (Del. 2013)

The Supreme Court of Delaware affirmed a lower court's decision denying Gary Ploof's motion for post-conviction relief. Ploof argued that his counsel failed to adequately investigate mitigating evidence related to physical and sexual abuse he suffered as a child. In setting forth the standard for evaluating Ploof's claim, the court noted that the U.S. Supreme Court "has recognized that defense attorneys are 'obligated to conduct a thorough investigation of the defendant's background' when preparing for the penalty phase" and then quoted to specific language in 1989 Guideline 11.4.1. In a footnote, the court stated that the ABA "updated its guidance shortly before Ploof's trial" to require that defense counsel "locate and interview the client's family members . . . and virtually everyone else who knew the client and his family." The court also noted that *Bobby v. Van Hook* "chided" a federal court for treating the 2003 Guidelines, specifically Guideline 10.7, as "inexorable commands" but that the Court in *Wiggins v. Smith* had "accepted the 1989 Guidelines' standard requiring counsel to make efforts to 'discover all reasonably available mitigating evidence.'" The footnote concluded that

counsel's investigation "fell short of the 1989 ABA Guideline requiring a 'thorough' investigation, which the State does not dispute was a well-defined norm" and that it would not address whether the 2003 Guidelines represented prevailing professional norms in Delaware at the time of Ploof's trial. The court found that counsel's performance fell below objective standards of reasonableness because counsel failed to investigate "red flags" and was thus deficient. But the court found that Ploof was not prejudiced by the deficient performance and denied relief.

5. *Diaz v. State*, 2013 WL 6170645 (Fla. 2013)

The Supreme Court of Florida denied petitioner Joel Diaz's original petition for a writ of habeas corpus and also affirming the orders of the post-conviction court denying his motion to vacate his conviction and sentence. Diaz alleged numerous instances of ineffective assistance of counsel. Citing to the ABA Guidelines, he claimed that trial counsel was ineffective for failing to obtain his school records, jail records, former attorney's notes, and police reports, among others. [Ed. note: this instruction is embodied in Guideline 10.7, although it is not referenced by number by the court.] Without further discussion of the Guidelines or reaching a conclusion as to counsel's performance, the court concluded that Diaz was not entitled to relief because he could not demonstrate prejudice.

Diaz also claimed that trial counsel were ineffective for failure to have a cohesive theme at the guilt and penalty phases, contrary to Guideline 10.11. Again without discussion of the Guidelines, the court rejected this claim, finding that Diaz had mischaracterized the evidence in the record as to counsel's theory of the case, and that in any case he could not demonstrate prejudice.

6. *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir 2013)

The Court of Appeals for the Tenth Circuit affirmed the district court's judgment on all grounds except for the petitioner's claims of ineffective assistance of counsel at the penalty phase and remanded the case to the district court for an evidentiary hearing.

In concluding that counsel's performance was deficient, the court stated that counsel must perform in accordance with "prevailing professional norms, which in capital cases . . . refer to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases . . . "

7. *Nesbit v. State*, 2013 WL 1282326 (Tenn. Crim. App. 2013)

The Tennessee Court of Criminal appeals affirmed the judgment denying Clarence Nesbit's petition for post-conviction relief as it related to the guilt phase of his trial but granting a new sentencing hearing.

William Massey, a death penalty litigation expert, testified during an evidentiary hearing. Massey identified a number of areas where counsel failed to comply with Tennessee and ABA counsel standards, including failure to conduct an adequate investigation, failure to inform the client of plea offers, and failure to retain the necessary experts. He testified that counsel failed to uncover available evidence that would have "dilute[d]" the impact of the State's aggravating

evidence, including an allegation that the defendant engaged in "satanic worship." [Ed. note: This subject is covered in Guidelines 10.7 and 10.11, although those guidelines are not specifically referenced by number in the opinion].

Massey also testified that counsel failed to inform their client about plea offers as required by the ABA Guidelines. [Ed. note: this subject is covered in Guideline 10.9.1, although it is not cited by number in the opinion.] Here, the twenty-five year plea offer should have been discussed promptly, and counsel should have spent more than fifteen minutes discussing the offer with an individual with a low I.Q. and who was unfamiliar with the criminal justice system. Massey stated that conveying the substance of the offer to the client was only part of the ABA Guidelines requirement. The Guidelines also instruct attorneys to keep the client apprised of the theory of the case, the proof that supports the chosen theory, the State's evidence, how the defense could rebut the State's evidence, and the probability of the client's success at trial.

Massey also stated that "in order to qualify with the new ABA Guidelines and 4.1, it required that at least one team member be qualified to screen for mental or psychological disorders or impairments." Massey argued that a forensic psychologist would be qualified for that duty. Defense counsel did not necessarily give ineffective assistance of counsel without the forensic psychologist, but it depended on whether the forensic psychologists' absence and the subsequent lack of information caused prejudice. Massey stated that the Guidelines and the courts were telling defense counsel to take these necessary steps in death penalty cases, even if the defendant did not show any signs of mental health issues or defects.

Upon Massey's testimony, the post-conviction court granted sentencing relief because defense counsel had failed to investigate, prepare, and present mitigation evidence, and therefore Nesbit had received ineffective assistance of trial counsel.

8. *Washington v. Alabama*, 95 So. 3d 26 (Ala. Crim. App. 2012)

The Court of Criminal Appeals of Alabama affirmed the circuit court's denial of the petitioner's petition for post-conviction relief. Petitioner argued his counsel's failure to investigate and to present mitigation evidence at the penalty phase of his capital-murder trial amounted to deficient representation and raised several different grounds in support of this claim. In particular, petitioner argued that the circuit court erred in finding that his counsel's performance was reasonable when counsel relied on an investigator to conduct the mitigation investigation and to interview witnesses.

The court disagreed. It found that counsel's reliance on the mitigation expert was reasonable. It reasoned that other courts have found that no ineffective assistance of counsel when counsel delegated the responsibility for investigating the case to a subordinate and that it is a reasonable practice for defense counsel in a capital-murder case to hire an investigator. Further, the court noted the 2003 ABA Guidelines Section 10.7 & Commentary recognize as appropriate the hiring of an investigator to conduct interviews on behalf of appointed counsel. Accordingly, the court determined that the circuit court did not abuse its discretion in denying relief on this claim.

Petitioner also argued that the circuit court erred in summarily dismissing his claim that counsel was ineffective for failing to develop a relationship of trust with him. Citing 2003 ABA Guidelines Section 10.5, petitioner asserted that "[c]ounsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client." Without discussing the ABA Guidelines, the court agreed with the circuit court that petitioner's claim did not "contain a clear and specific statement of fact that would entitle [petitioner] to relief." Accordingly, the court determined that the circuit court did not abuse its discretion in denying relief on this claim.

9. *Moorman v. Schiro*, 2012 U.S. Dist. LEXIS 24426 (D. Ariz. 2012)

The United States District Court for the District of Arizona denied petitioner's Rule 60(b)(6) motion for relief from judgment and request to stay execution.

Petitioner claimed that the Supreme Court's decision in *Maples v. Thomas* changed the law by providing a ground for the district court to reopen judgment to reconsider its determination of procedural default on his claim of ineffective assistance of counsel at sentencing.

Petitioner argued that the court should reopen his judgment based on the *Maples* decision, a case in which the Supreme Court recognized that attorney abandonment may provide "cause" to excuse procedural default. Moorman claimed he was abandoned by his second post-conviction counsel, which should give cause to excuse his defaulted ineffectiveness claim. He claimed that his attorney did not conduct any investigation, did not retain or consult any mental health experts about his background, and did not have any mental health experts interview or evaluate him. He further claimed that his attorney failed to perform the tasks because of his attorney's belief that he could assert only record-based claims of constitutional violations, which, Moorman claimed, was a violation of his professional obligations under the ABA Guidelines.

In *Maples*, the Supreme Court left in tact the general rule that negligence does not constitute cause, and distinguished between negligence of counsel and complete abandonment "that severs the agency relationship and terminates the lawyer's authority to act for the client."

The District Court found that Moorman's attorney did not abandon him. He filed a post-conviction petition raising a claim of ineffective assistance at sentencing for failure to investigate and present mitigation evidence. He also sought appellate review of the superior court's order summarily dismissing the petition. His failure to investigate and develop expert evidence, the District Court contended, was "nothing more than ordinary negligence, not abandonment," and thus, Moorman did not establish the "extraordinary circumstances" required for Rule 60(b) relief.

10. *In re Reno on Habeas Corpus*, 283 P.3d 1181 (Cal. 2012)

The Supreme Court of California denied the petitioner's second habeas corpus petition and found that the second writ was an abuse of the writ process because of its voluminous size and abounding detail, and because it raised claims almost all of which are procedurally barred.

The Court then used this opinion as an opportunity to "establish some new ground rules for exhaustion petitions in capital cases that will speed the [Court's] consideration of them without unfairly limiting petitioners from raising (and exhausting) justifiably new claims." The Court partly relied on suggestions made by the parties and amici curiae to adopt measures by which petitions may be streamlined, making preparation and review of the petition simpler and more efficient.

On the issue of raising the procedurally barred claims, the petitioner and amici curiae point to the 2003 ABA Guidelines as the source of their ethical obligation to raise defaulted claims. The Court held that "those standards are not congruent with constitutional standards for effective legal representation," and are "inconsistent with this [C]ourt's standards." It pointed to ABA Guideline Section 10.15.1(C), its commentary, and 10.7(A)(1) as specific examples of ABA Guidelines that "require much more of counsel than is required by state or federal law governing ineffective assistance of counsel."

In reaching this determination, the Court agreed with the Supreme Court's characterization of the ABA Guidelines in *Bobby v. Van Hook* that:

"[r]estatements of professional standards . . . 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...," and "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."

The Court concluded that petitioner failed to demonstrate that counsel was deficient in failing to raise any of the nonrepetitive claims in the petition (i.e., claims prior counsel did not raise) or that the omission caused him prejudice. With regard to any new claims raised in the petition that the petitioner pointed to suggest that his counsel was constitutionally ineffective, the Court found them "wanting" and concluded-without citing to the ABA Guidelines-that petitioner's counsel was not deficient and the omissions did not cause him prejudice.

11. *Barrett v. State*, 733 S.E.2d 304 (Ga. 2012)

The Supreme Court of Georgia affirmed the trial court's ruling that Barrett was not denied effective assistance of counsel. Barrett contended that trial counsel's investigation and presentation of mitigating evidence was inadequate even though Barrett was adamant that no mitigation evidence be presented and refused to assist counsel in locating mitigation witnesses. The trial court, finding that trial counsel hired a private investigator to seek additional mitigating witnesses, concluded that trial counsel were not deficient, as they "did everything reasonably within their means to investigate mitigating evidence" and denied Barrett's claim.

On appeal to the Supreme Court of Georgia, Barrett, citing ABA Guideline Section 10.4.1 (C), argued that trial counsel was required to conduct an investigation seeking possible evidence for the sentencing phase regardless of any initial assertion by the client that mitigation is not to be offered. The Court agreed that this was the appropriate governing standard, but concluded that even if trial counsel failed to investigate mitigating evidence to the extent

feasible, Barrett failed to show that he was prejudiced in either phase of his trial. The Court concluded that Barrett's claim could provide him no relief and affirmed the trial court's ruling that Barrett was not denied effective assistance of counsel.

12. Ward v. State, 969 N.E.2d 46 (Ind. 2012)

The Supreme Court of Indiana affirmed a lower court's decision denying Roy Lee Ward's petition for state post-conviction relief. Ward argued that his counsel had been ineffective in investigating and presenting mitigation evidence during the penalty phase of his trial. In analyzing his claim, the court determined that counsel's investigation was reasonable after "[u]sing the ABA standards as a guide." The court cited to 2003 Guideline 10.7 and noted the topics that the Guideline sets out for investigation in a parenthetical. The court also cited to the per curiam decision in Bobby v. Van Hook and included a parenthetical stating that "restatements of professional standards can be useful guides as to what is reasonable." The court denied relief.

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

Johnson sought habeas relief from several 2005 convictions, raising sixty-four grounds for relief, forty-eight of which were claims of ineffective assistance of counsel claims. Of those claims, relief was ultimately granted on four of the IAC claims. The ABA Guidelines were discussed both generally and in the context of two of Johnson's IAC claims: one on which she got relief, one on which she did not get relief.

The District Court, citing to Van Hook, explained that the Supreme Court has said that the guidelines are "useful as 'guides' to what reasonableness [of counsel's performance] entails, but only to the extent they describe the professional norms prevailing when the representation took place." (internal citations omitted). The District Court said that the Supreme Court's decision in Wiggins v. Smith said that the ABA standards are "only guides," and the District Court has since "regarded them as such."

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

(internal citations omitted). The court considered the Guidelines to be guides as to whether counsel's choices were objectively reasonable "subject to my determination of whether specific ABA Guidelines are so detailed that they interfere with the constitutionally protected independence of counsel or restrict counsel's wide latitude to make tactical decisions."

Johnson raised several allegations with regard to errors about her mental state at the time of the offense arising from her trial counsel's failure to investigate, prepare, and present mitigating evidence. The District Court, cited to the Eighth Circuit Court of Appeals decision in Ortiz v. United States and noted that the ABA standards in effect during Ortiz's trial, "are a useful guide in this case, [and] provide [that] '[c]ounsel should conduct independent

investigations relating to the . . . penalty phase of a capital trial . . . regardless of any initial assertion by the client that mitigation is not to be offered . . . [and] this investigation should comprise efforts to discover all reasonably available mitigating evidence.' " The court, further citing to the Guidelines as quoted in Ortiz, noted that they require counsel to interview potential witnesses that may be familiar with client history that might affect mitigating evidence, as well as any members of the victim's family that would not want the client sentenced to death. Citing to the commentary of Guideline 11.4.1, the court said that the duty to investigate "is not negated by the expressed desires of a client." (internal citations omitted).

The court also discussed the ABA guidelines with respect to Johnson's claim that trial counsel was ineffective for failing to investigate and present evidence of her mental state at the time of the offenses. The District Court found the performance of Johnson's counsel was not reasonable. "Here, trial counsel's preparation for the mitigation phase not only was not 'ideal,' the record is clear that no reasonable attorney would have failed to pursue further evidence." Counsel's "pulling the plug" on the investigation was "not based on any advice of the experts, but contrary to it." The District Court further found that trial counsel ignored trial experts' suggestions about avenues to develop an "appropriate and effective mental health mitigation case." The court further found that if counsel's decision was strategic, "it was the worst strategic decision by any defense counsel that I have ever seen in my entire career: It effectively doomed Johnson's mitigation case from the start."

The District Court concluded that counsel's deficient performance prejudiced Johnson, and thus, she was entitled to relief from the mitigation phase verdict.

14. *Wilson v. State*, 81 So. 3d 1067 (Miss. 2012)

The Mississippi Supreme Court, granted in part and denied in part Wilson's motion for post-conviction relief, finding that he was entitled to an evidentiary hearing on certain grounds.

Wilson contended that his trial counsel was ineffective for failing to communicate or form a relationship with him, failing to properly investigate his case, and failing to prepare for the penalty phase of his trial. Wilson argued that these errors resulted in his loss of the benefit of the plea agreement he had reached with the state.

In assessing this claim, the Mississippi Supreme Court noted that the ABA Guidelines have long been looked to for determining reasonableness of attorney performance. The Mississippi Supreme Court, quoting the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (1073), said, "Although they are 'only guides' . . . and not 'inexorable commands,' . . . these standards may be valuable measures of the prevailing professional norms of effective representation. . . ." (internal citations omitted). The court further noted that in order to present mitigating evidence, an adequate investigation must be conducted.

Both of Wilson's attorneys signed affidavits in support of his post-conviction motion. One of his attorney's cited to the ABA Guidelines in his affidavit, mentioning that he learned at a capital defense seminar that a defense attorney should spend 400 hours on mitigation, and that he doubted that much time was spent on mitigation in Wilson's case.

Based on Wilson's affidavit, the attorneys' affidavits, and the direct-appeal record, the Mississippi Supreme Court found counsel's performance deficient. The Mississippi Supreme Court found that Wilson's attorneys conducted "virtually no investigation to obtain mitigation evidence," and that because of this, his counsel "had no hope of knowing what his defenses might be or what his mitigation evidence might be," and granted Wilson an evidentiary hearing on the issue. The court further noted that the ABA guidelines require counsel to "know and fully explain to the client: . . . the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority. . . ." ABA Guideline 10.9.1.B.7. Because of this, the court found this issue to have merit and granted Wilson an evidentiary hearing on the issue.

15. Walker v. Epps, 2012 U.S. Dist. LEXIS 41604 (S.D. Miss. 2012)

The United States District Court for the Southern District of Mississippi denied Walker habeas relief on his all of his claims, including eight claims of ineffective assistance of counsel at both the guilt and penalty phases of his trial.

The ABA Guidelines were discussed in relation to two of his claims: 1) that trial counsel was ineffective for failing to prepare for the possibility that his codefendant would plead guilty and testify against him, and 2) that his trial counsel was ineffective for failing to investigate and present mitigating evidence at the sentencing phase.

Walker claimed that his attorney's lack of preparation put his performance below the standards set forth in the ABA Guidelines. The District Court, however, said that Bobby v. Van Hook "made it clear that those Guidelines are not dispositive on the issue of performance." The District Court said that Walker did not establish what the prevailing norms for preparing a capital mitigation case in Mississippi were at the time Walker was tried. Walker said his attorneys failed to investigate his background, arguing that the investigation would have provided valuable mitigation evidence, such as "extensive evidence of chaos, intellectual shortcomings, dysfunction, substance abuse, and bizarre and inappropriate sexual conduct." The court concluded that none of Walker's claims warranted habeas relief.

16. Bolin v. Baker, 2012 WL 2138160 (D. Nev. 2012)

The United States District Court for the District of Nevada granted petitioner Gregory Bolin's motion to dismiss counsel.

Bolin filed a pro-se motion asking for the dismissal of his counselor. Bolin and his defense counsel disagreed on the focus of habeas proceedings for guilt-phase or penalty phase relief. Bolin argued that there was an irreconcilable conflict between himself and defense counsel because of defense counsel failed to: 1) file a notice abandoning unexhausted claims; 2) communicate with petitioner; and 3) be honest with petitioner.

Defense counsel argued that under ABA Guidelines, he was required to investigate and present all arguably meritorious issues, even if this conflicted with his client's wishes. The court acknowledged that the Supreme Court uses the Guidelines as a way to measure reasonableness of defense counsel's performance. The district court opined that although defense counsel has competently represented his client, the lack of communication between

defense counsel and petitioner, as well as petitioner's genuine concern that his case might be dismissed because of counsel's actions, has led to a broken attorney-client relationship. The court held that under the Martel interests of justice standard, the lack of communication between client and attorney affected defense counsel's ability to pursue habeas relief on petitioner's behalf, and thus counsel was dismissed.

17. Barnes v. Branker, 2012 U.S. Dist. LEXIS 13213 (M.D. N.C. 2012)

The District Court for the Middle District of North Carolina denied William Leroy Barnes' petition for habeas corpus challenging his 1994 state court conviction and death sentence. Barnes asserted that his conviction and sentence were unconstitutional, claiming, among other things, that his counsel was ineffective.

In discussing how to evaluate Barnes' ineffective assistance claims, the court referred to the two-prong Strickland test, stating that the performance of counsel must be looked at under " 'prevailing professional norms,' and in light of the facts 'as seen from counsel's perspective at the time.' " (internal citations omitted). The court stated that counsel's conduct is presumed to be reasonable. With regard to capital cases, the Middle District, citing to the ABA guidelines as quoted in Wiggins, trial counsel's mitigation strategy "should comprise efforts to discover all reasonably available mitigating evidence." (internal citations omitted). The court further quoted the guidelines to say that the duty includes an obligation to interview "witnesses familiar with aspects of the client's life history" that might uncover "possible mitigating reasons for the offense(s)," and that it is "necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client.")).

Barnes said his counsel was ineffective at the sentencing phase in at least five ways: "(1) failure to present evidence of Petitioner's "adjustment to incarceration"; (2) failure to properly prepare witness Michael Barnes, Petitioner's brother; (3) failure to prepare Willie Mae Barnes, Petitioner's grandmother, for her testimony; (4) failure to call Anthony Barnes, another of Petitioner's brothers; and (5) failure to interview or call as a witness Della Barnes, Petitioner's mother."

At sentencing, Barnes' counsel presented six witnesses in mitigation. A licensed psychologist testified about psychological studies regarding development of children exposed to violence and who lack male role models. He further testified that petitioner was neglected, raised by alcoholic parents, and had no positive role model. Barnes' former girlfriend, Vanessa Davis, testified that she met him while working with him at a fast-food restaurant and that he was an "excellent worker" and "got along well with the managers." She testified that he stopped going to work at some point and was drinking and doing drugs, which made him "different." Barnes' cousin, Ronnie Miller, testified that he and Barnes were best friends and that Barnes' had a drug and alcohol problem. Barnes' grandmother, Willie Barnes, testified that Barnes lived with her while growing up because his mother was incarcerated, and his father was not around much. Barnes' older brother testified that their mother went to prison when petitioner was about ten years old, and that they lived with their grandmother in the projects. He further testified that his brother began to get into trouble at that time. The last witness was Larry Murphy, a food services supervisor at the prison who testified about Barnes' job as a cook in the prison kitchen. He testified that Barnes' worked his way up to head cook and supervised

three or four people.

While Barnes set forth several reasons for why his counsel was ineffective, the guidelines were only referenced with respect to his claim that counsel did not properly investigate or present mitigating evidence of his troubling childhood. Specifically, he said his mother should have been called to testify. However, the lower court found that her testimony would have been cumulative and would have invited potentially damaging cross. The Middle District, citing to Wiggins and the ABA Guidelines, said 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" (internal citations omitted). The court, further citing Wiggins and the guidelines in noting that counsel must consider "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences," found that the MAR court "reasonably found that counsel made an informed and reasonable decision not to call Della Barnes as a witness."

18. Judge v. Beard et al., 2012 WL 5960643 (E.D. Pa. 2012)

The U.S. District Court for the Eastern District of Pennsylvania denied, in part, petitioner's writ of habeas corpus under Section 2254. Petitioner argued his counsel's failure to investigate and to present mitigation evidence at the penalty phase of his capital-murder trial amounted to deficient representation and raised several different grounds in support of this claim. Particularly, petitioner argued that his trial counsel's failure to (1) object to the prosecution's exercise of peremptory challenges on the basis of race, (2) investigate his competency to stand trial and to request the trial court to conduct a hearing to ascertain whether he was mentally competent to stand trial, and (3) to investigate, develop and present mitigating evidence mental illness or of his dysfunctional family upbringing during the sentencing phase of his trial amounted to deficient representation.

Regarding the first and second claims, the court-under the second prong of Strickland found that find petitioner's trial counsel was not constitutionally ineffective declined to grant the writ. Regarding the third claim, the court agreed with the petitioner and found it to be reasonably probable that had counsel's failures amounted to ineffective assistance of counsel and granted the writ on this ground.

In analyzing the this claim, the court highlighted that the ABA Guidelines impose a forceful directive to counsel to make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. The court found that in petitioner's case, the extent of the mitigation evidence presented consisted of the testimony of just one witness-his mother, whose testimony was apparently confined to the fact that Petitioner was a good son and a good father to his young daughter. The court further found that counsel did no investigation into petitioner's family background, medical, psychiatric, social or school history, or anything else either in advance of and/or in preparation for the sentencing portion of the trial. The court found also that having failed to conduct any investigation, petitioner's trial attorney also made no efforts to have Petitioner psychiatrically evaluated. The court reasoned that had counsel done so, he would have learned that as a result of petitioner's Schizotypal Personality Disorder, that petitioner's thought process is significantly

disorganized, he is paranoid, he cannot make rational judgments without the assistance of others who are rational, and he has such a distorted view of reality that he can not appreciate the consequences of his behavior. The court found that these deficiencies undermined the court's confidence in the outcome of the sentencing hearing. Accordingly, the court concluded that petitioner's Sixth Amendment right to the effective assistance of counsel was violated by the failure to conduct a reasonable investigation and found that the petitioner was entitled to a new penalty hearing

19. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

20. *Escamilla v. Thaler*, 2012 U.S. Dist. LEXIS 41784 (N.D. Tex. 2012)

The United States District for the Northern District of Texas overruled Escamilla's objections to the recommendation of the magistrate judge, accepted the recommendations of the magistrate judge as modified by its order, and dismissed one ground for relief without prejudice, and denied the remaining grounds for habeas relief.

Escamilla asserted fifteen grounds for relief, including five claims of ineffective assistance of trial counsel and two claims of ineffective assistance of appellate counsel. The ABA Guidelines were discussed with respect to Escamilla's claim that trial counsel was ineffective for failing to investigate and present mitigating evidence in the penalty phase.

The magistrate judge found that Escamilla's trial attorneys began investigating potentially mitigating evidence right after appointment, and did not complete their investigation earlier because Escamilla's family avoided phone calls, were reluctant to meet, failed to return call, cancelled meetings, and did not appear for scheduled meetings. The judge also found that the

doctor who examined Escamilla at the beginning of trial did not make any evaluations that would have helped the defense, and that Escamilla did not present evidence that the doctor or any other expert would have testified any differently if retained earlier. The magistrate further found that Escamilla applied the wrong version of the ABA Guidelines, relying on the 2003 Guidelines when he was tried in 2002, and that the state habeas court found that trial counsel complied with the applicable guidelines by hiring appropriate expert assistance, and concluded that Escamilla had not shown that the state court's finding that trial counsel was not ineffective for hiring the doctor who evaluated her to be unreasonable, nor did he establish that counsel was ineffective for making the strategic decision not to call him as a witness.

Escamilla objected to the magistrate judge's finding that he did not show the inadequacy of counsel's mitigation investigation because the recommendation failed, among other things, to properly apply the ABA Guidelines.

The District Court, citing to *Bobby v. Van Hook*, noted that while the magistrate judge applied the 1989 Guidelines, even those do not control evaluation of counsel performance, and the guidelines are helpful only if they "reflect 'prevailing norms of practice.' "

The professional norms in Dallas County at the time, the court noted, were set forth in an affidavit of a law partner in the firm of one of the appointed counsel. The District Court noted that the norms that existed at the time of Escamilla's trial were not clear from the affidavit, and citing to *Cullen v. Pinholster*, said that because the affidavit was not presented in state court, it could not be considered in federal habeas.

The court found that Escamilla did not "overcome the presumption of correctness afforded the state court findings." The court said that trial counsel began their investigation immediate and presented a reasonable mitigation case "inconsistent with the evidence of an abusive, alcoholic father that is now being presented and that was not revealed to trial counsel despite their efforts to discover it." Additionally, evidence of Escamilla's substance abuse and lack of treatment were presented as mitigation. Trial counsel also presented evidence of Escamilla's substance abuse and lack of treatment.

In denying relief on Escamilla's claim, the District Court said that, "[a]ny failure of trial counsel to discover evidence of an abusive, alcoholic father was caused by Escamilla, his family and friends. Escamilla has not made the showing of unreasonableness required under Section 2254(d) for relief on this claim."

21. *Washington v. Sanchez*, (Wash. Ct. App. 2012)

The Court of Appeals of Washington affirmed the trial court's judgment that the potential of criminal charges being filed against the defendant's attorneys was a tenable reason supporting disqualification of defendant's original court-appointed attorneys and appointing new counsel, but found that the trial court committed legal error when it reasoned that the lawyer's participation in witness interviews was a sufficient basis for disqualification.

In this case, the defendant's lawyers (Witchley and Walsh) became aware that defendant's co-defendant (Mendez) was in custody and unrepresented. Witchley then acted quickly to

interview Mendez three times before lawyers were appointed for him and then cut off further conversations. The trial court characterized Witchley's actions in seeking and conducting interviews with Mendez as "aggressive, unusual and controversial" but did not find a disqualifying ethical violation because (1) Mendez was not yet represented in the criminal matter when the interviews occurred, and (2) the court recognized Witchley's duty in a potential capital case to conduct a thorough investigation and seek out and interview potential witnesses-citing 2003 ABA Guidelines p79. Nonetheless, the court ruled that while Witchley's interviewing of Mendez did not itself warrant disqualification, it concluded that the Mendez interviews "posed a serious potential for lawyer-witness or lawyer-as-unsworn-witness conflict that weighed in favor of disqualification."

The Court of Appeals of Washington disagreed with the trial court's reasoning and was unwilling to treat the prospect that a lawyer might conduct himself as an unsworn witness as a separate basis for disqualification. It found that while Witchley's three interviews of Mendez created a prospect that Witchley would have personal knowledge of impeaching matter should Mendez testify inconsistently at trial, Witchley had his investigator join him for his interviews of Mendez. Accordingly, the investigator would have been available to testify should it be necessary to impeach Mendez at trial with statements made during the interview. The court noted-citing ABA Guidelines at 79-that to avoid lawyer-witness problems, it is typical and advisable for lawyers to conduct witness interviews in this manner, so that a third person can be called as an impeachment witness if the interviewee testifies inconsistently at trial.

22. *McWhorter v. State*, 2011 Ala. Crim. App. LEXIS 76 (Ala. Crim. App. 2011)

McWhorter's denial of state post-conviction relief was affirmed by the Alabama Court of Criminal Appeals. McWhorter's 1994 murder conviction and death sentence were affirmed on direct appeal by the appellate court and the Alabama Supreme Court affirmed. *McWhorter*, 2011 Ala. Crim. App. at *1. McWhorter filed for state post-conviction relief, but many of his claims were dismissed as procedurally barred, insufficiently plead, or facially meritless. *Id.* at *2. His remaining claims were eventually denied and he appealed to the Court of Criminal Appeals. *Id.* at *3-4.

The appellate court discussed the ABA Guidelines in its consideration of McWhorter's claim that his trial counsel was ineffective for failing to investigate and present certain mitigating evidence at the penalty phase of his trial. *Id.* at *101-02. McWhorter asserted that this failure by trial counsel was in violation of the ABA Guidelines. *Id.* at *101. However, the appellate court noted that adherence to the Guidelines was not dispositive of the issue regarding reasonable investigation. The appellate court cited its own precedent stating that the Guidelines are for guidance only and the Fourth Circuit's decisions regarding the dangerousness of using the Guidelines as determinative of reasonableness. *Id.* at *102. The appellate court agreed with the lower court that trial counsel's performance was not deficient and that McWhorter was not prejudiced, but rather that his claim was simply that his counsel should have presented more mitigating evidence. *Id.* at *119-20.

23. *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228 (11th Cir 2011)

Harvey claims ineffective assistance of counsel during the penalty phase for failing properly

to investigate mitigation evidence regarding both to his personal history and mental health, citing 2003 ABA Guideline 10.7 commentary that counsel "should have interviewed 'virtually everyone else who knew [Harvey] and his family.'" Id. at *22. However, the Court found this was an inappropriate standard for judging counsel's performance because counsel's performance existed from 1985-1986. (Citing *Bobby v. Van Hook*, that the Guidelines are only relevant "to the extent they describe the professional norms prevailing when the representation took place"). 130 S. Ct. 13, 16 (2009). Therefore, the Court disagreed with Harvey and instead found that the appropriate ABA Guidelines were more general and that counsel did not fall short of that standard.

24. *Hall v. State*, 253 P.3d 716 (Idaho 2011)

The District Court previously denied Hall's motion to contact jurors without prior court approval and motion to depose his trial counsel's investigator. The Idaho Supreme Court affirmed these decisions. Hall argued for heightened procedural safeguards during the discovery in capital cases, but the Court found no authority for that argument, citing *State v. Porter*, which "expressly decline[d] to adopt ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003)." 130 Idaho 772, 782 (1997).

25. *State v. Jones*, 2011 Ohio App. LEXIS 4949 (Ohio Ct. App. 2011)

The Ohio Court of Appeals affirmed the lower court's decision that Jones did not receive ineffective assistance of counsel during the guilt phase of his trial, but vacated and remanded for an evidentiary hearing on the lower court's determination that Jones did not receive ineffective assistance during the penalty phase of his trial.

Jones argued that his lawyers were ineffective during the guilt phase of his trial for failing to obtain an expert to refute the rape findings of the medical examiner. The court found that even if an expert had been presented, it would not have changed the outcome of his trial. In addition to failure to obtain an expert, Mr. Jones raised several other reasons why his counsel was ineffective during the guilt phase, but the Court found none of them persuasive.

With regard to the penalty phase, Jones argued that his counsel was ineffective because they "failed to discover the history of incest and sexual abuse in his family, presented an incomplete psychological assessment, failed to secure enough time to discover such information, and did not discover or present documents corroborating his life history." Citing to *Wiggins*, the Ohio Court of Appeals noted that the Supreme Court has long looked to the ABA standards as reasonableness guides. The court then went on to discuss how *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), clarified that the standards are "'only guides' to what reasonableness means, not its definition." The court further stated that the Supreme Court left open the possibility that the guidelines could be applied "more categorically" to post-2003 representation, "so long as they reflected prevailing norms of practice and were not 'so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.'" (internal citations omitted).

In this case, the doctor began meeting with Jones's lawyer six weeks pretrial, but spent less

than eight hours conducting interviews and tests before the trial began. The social worker responsible for interviewing Jones's family members did not begin to work on his case until a week into trial. Citing the guidelines, the court said that lawyers should begin

[t]he mitigation investigation . . . as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations. . . . The guidelines also advise lawyers to 'devote substantial time to . . . choosing a jury most favorable to the theories of mitigation that will be presented.' . . . [T]he theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.

The court expressed overall concern with the amount of time spent investigating Jones's background, particularly potentially mitigating circumstances of sexual abuse. Citing once more to the guidelines, the court said that the issue is whether the investigation conducted was "extensive and generally unparalleled." (ABA Guidelines 10.7, at 1022) (internal citations omitted).

Citing to the guidelines, the Court said it is the duty of the lead counsel to direct the work of the defense team, "in such a way that, overall, it provides high quality legal representation in accordance with . . . professional standards." (ABA Guidelines 10.4, at 1002). The duty to investigate a defendant's background applies regardless of the defendant's desires, specifically family and social history. (ABA Guidelines 10.7, at 1021-22).

Judge Carr concurred in the judgment but thought the majority put too much emphasis on the application of the ABA Guidelines. Carr cited to Van Hook and stated that the Supreme Court made it clear that the Guidelines "are 'only guides' to what reasonableness means, not its definition." Van Hook, 130 S. Ct. at 17. Judge Whitmore also concurred and essentially agreed with Judge Carr. "Reliance upon the Guidelines should be restricted to those few cases where there is little or no primary authority available."

26. *Lynch v. Hudson*, 2011 U.S. Dist. LEXIS 110652 (S.D. Ohio 2011)

The United States District Court for the Southern District of Ohio granted Petitioner's motion for funds for neuropsychological testing. *Id.* at 14. Petitioner relied on the ABA Guidelines, "arguing that those standards highlight the need for counsel to obtain 'a thorough physical and neurological examination,' as well as '[d]iagnostic studies, neuropsychological testing, [and] appropriate brain scans." *Id.* at 7. Pursuant to 18 U.S.C Section 3599(f), the Court held that neuropsychological testing was reasonably necessary because the defense expert's report contained at least some indication that additional testing was warranted, and because the clinical psychologist that evaluated the Petitioner recommended a battery of neuropsychological tests. *Id.* at 8.

27. *Rojem v. Workman*, 655 F.3d 1199 (10th Cir 2011)

Rojem sought post-conviction relief after a second appeal of his sentence resulted in his being sentenced to death for a third time. *Rojem*, 2011 U.S. App. LEXIS at *2. His appointed

counsel filed a preliminary budget that sought funding not only for post-conviction relief proceedings, but also for investigation of the guilt phase. *Id.* at *2. Rojem cited the 2003 ABA Guidelines in arguing that "counsel was required to undertake an extensive pre-petition investigation." *Id.* at *3. However, the magistrate judge only approved 45% of what Rojem sought, limiting the budget to penalty stage claims and minimal review of background and history. *Id.* The district court rejected Rojem's subsequent motions for de novo review of the magistrate's decision and for expert funding. *Id.* at *4.

Upon appeal to the Tenth Circuit, the court noted that unlike the petitioner in *Harbison v. Bell*, 129 S. Ct. 1481 (2009), Rojem was not being denied counsel for post-conviction or clemency proceedings. *Rojem*, 2011 U.S. App. LEXIS at *8. Rather, he was only contesting the amount of compensation awarded counsel for representation. *Id.* at *8-9. Accordingly, the Tenth Circuit found that pursuant to *United States v. French*, 556 F.3d 1091 (10th Cir. 2009), it lacked jurisdiction to hear Rojem's claim, as a district court's fee determination is not an appealable order. *Rojem*, 2011 U.S. App. LEXIS at *8-9.

28. *Coddington v. State*, 259 P.3d 833 (Okla. Crim. App. 2011)

Coddington's death sentence was overturned on appeal, and at resentencing he was again sentenced to death. This sentence was affirmed. Subsequently, *Coddington* filed for post-conviction relief based on ineffective assistance of appellate counsel, which was denied. *Coddington*, 2011 Okla. Crim. App. at **1.

Coddington first argued that his appellate counsel was ineffective for failing to fully investigate jurors' backgrounds or sufficiently interview them; doing so would have revealed that six jurors answered voir dire questions inaccurately. *Id.* at **5. *Coddington* cited to the 2003 ABA Guidelines, noting that appellate counsel is required to "aggressively investigate all aspects of the case," thus rendering counsel ineffective for not investigating the jury pool adequately. *Id.* at **9. The court rejected this reference to the guidelines, however, and stated that "the suggestion that compliance with published ABA standards or guidelines is required to meet the standard of effective assistance set forth in *Strickland*" was rejected in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009). *Coddington*, 2011 Okla. Crim. App. at **9. The court pointed out that it previously rejected the argument that assistance can be rendered "per se ineffective simply because . . . representation differed from current capital practice customs *Torres v. State*, 2005 OK CR 17, Para. 12, 120 P.3d 1184, 1189." *Coddington*, 2011 Okla. Crim. App. at **9. The court found that appellate counsel was not ineffective for failing to investigate jurors' backgrounds because there was no duty to do so and failing to do so did not prejudice *Coddington*. *Coddington*, 2011 Okla. Crim. App. at **10.

Coddington also alleged that appellate counsel should have argued that the State brought on resentencing trial counsel's ineffectiveness because it did not provide adequate resources for defense: the second chair counsel changed during the resentencing and trial counsel filed for a continuance based on her heavy load of capital cases. *Coddington*, 2011 Okla. Crim. App. at **18. *Coddington* argued that these factors disregarded the ABA Guidelines on capital representation because counsel lacked resources, which are provided by the State, to give competent representation. *Id.* at **18-19. The court repeated that it will not hold counsel ineffective for failing to comply with the ABA Guidelines and, as such, *Coddington* needed to

show he was prejudiced by his counsel's representation. Id. at **20. Because the record did not show that trial counsel was "unprepared, rushed, unable to engage in the adversarial process, or less than zealous in representing" him, Coddington's claim of ineffective assistance by his appellate counsel for failing to raise the issue that resentencing trial counsel lacked resources sufficient to represent him. Id. at **19-20.

Because Coddington could not show on these claims or any others that he was prejudiced by the representation he received from appellate counsel, his petition for post-conviction relief was denied.

29. *Showers v. Beard*, 635 F.3d 625 (3rd Cir 2011)

Petitioner claimed her trial counsel was ineffective for failing to rebut expert testimony and that her appellate counsel was ineffective for failing to raise the claim of ineffective assistance of trial counsel on direct appeal. Petitioner was sentenced to life in prison without parole. This Court upheld the District Court's grant of habeas relief in the form of a new trial, citing 2003 ABA Guideline 11.4.1 (D)(7):

"We do not hold that defense attorneys must always enlist expert testimony but it depends on the specific circumstances of the case. The 1989 American Bar Association ("ABA") Guideline for Appointment and Performance of Counsel in Death Penalty Cases, which is informative, albeit not dispositive, calls for retention of expert witnesses when necessary or appropriate for preparation of the defense, adequate understanding of the prosecution's case and rebuttal of any portion of the prosecution's case at the guilt/innocence phase. Section 11.4.1(D)(7). The District Court held that the 1989 Guideline is relevant for evaluating prevailing norms and provides added support for its conclusion that Rudinski provided deficient performance and that the Superior Court's contrary conclusion was unreasonable." Id. at *6-7.

30. *United States v. Savage*, 2011 U.S. Dist. LEXIS 147635 (E.D. Pa. 2011)

The United States District Court for the Eastern District of Pennsylvania denied Savage's Motion to Preclude the Death Penalty.

Savage argued that her motion should be granted because: 1) counsel did not have sufficient time to prepare the presentation of mitigation to the U.S. Attorney's Office on Oct. 14th, and to the Capital Crimes Review Committee (CCRC) on December 5th, and 2) with the trial scheduled to take place in Sept. 2012, counsel would not have time to prepare the presentation of mitigation evidence at trial. The Government responded that Savage had no constitutional or substantive right to present mitigation evidence to the U.S. Attorney's Office or to the DOJ. They further argued that defense counsel would have sufficient time to prepare for the penalty phase of trial.

Savage referred to the ABA Guidelines in support of her argument. The district court, citing to the Third Circuit, stated that "[t]he ABA Guidelines are meant to serve as models for what is reasonable; strict adherence is not required by the law. . . . Investigations into mitigation necessarily have limitations. The law 'does not require that counsel investigate every

conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.' " (internal citations omitted).

The district noted that counsel already had six months to identify and interview key mitigation witnesses, and that trial was more than eight months away, so counsel would have sufficient time "to continue their efforts in investigating mitigating factors in preparation for the penalty phase." The court further held that despite defendant's protests that counsel had inadequate time to investigate and prepare, the remedy of precluding the death penalty was not justified. "Defendant has not pointed to any case where a court has imposed such a drastic sanction, either preemptively, or as a result of defense counsel's lack of time to investigate and develop a mitigation strategy."

31. *United States v. Bourgeois*, 2011 U.S. Dist. LEXIS 55859 (S.D. Tex. 2011)

The Court denied Bourgeois post-conviction relief on his claims, one of which included ineffective assistance of trial counsel for failure to prepare and present mitigation evidence. Bourgeois heavily relied on American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, arguing that trial counsel fell short of those guidelines. In its decision, the Court cited *Rompilla v. Beard*, which stated that the Guidelines were a useful measure to determine the reasonableness of a capital defense attorney's actions. 545 U.S. 374, 387 (2005). Furthermore, the Court cited the *Strickland v. Washington* decision that "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." 466 U.S. 668, 688-89 (1984). However, the Court also stated that the Guidelines were not a "checklist to effective representation," but that "Guidelines established by professional organizations do not supplant, but rather inform, Strickland's penetrating performance and prejudice inquiry." *Bourgeois*, 2011 U.S. Dist. LEXIS 55859 at *45 (See *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). Ultimately, the Court decided that trial counsel's performance was constitutionally sound.

32. *Winston v. Kelly*, 784 F. Supp. 2d 623 (W.D. Va. 2011)

This Court held an evidentiary hearing to determine Petitioner's claim that counsel was ineffective for failing to bring a claim of mental retardation at trial. The Court found that counsel was ineffective for failing to determine whether Petitioner was mentally retarded and referenced 2003 ABA Guideline 10.7 which states, "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Counsel had a school record indicating that Winston was eligible for special education due to "mild retardation," but failed to read it. The Court determined that this conduct fell below the prevailing norms of the profession and counsel's performance was not objectively reasonable. The Court furthermore found that had counsel's performance been different, there was a reasonable probability that the outcome of the proceedings would have been different. Therefore, Winston's petition for writ of habeas was granted.

33. *Phillips v. Bradshaw*, 607 F.3d 199 (6th Cir 2010)

The Court of Appeals for the 6th Circuit affirmed the judgment of the US District Court for the Northern District Ohio denying habeas relief. Petitioner Phillips argued that his trial counsel was ineffective at the sentencing phase for failure to investigate and develop evidence

concerning Phillips' abusive childhood and for failure to retain a mitigation specialist. This information was particularly relevant because Phillips' was charged with physically and sexually abusing his girlfriend's young daughter, which led to her death, and his trial counsel failed to discover and present evidence that Phillips and his siblings had all been severely physically and sexually abused by their parents. The majority found that counsel was not ineffective because the additional information that they could have uncovered would have only supported an "alternate" strategy, and counsel was not ineffective for choosing one strategy over another. The majority opinion did not mention the ABA Guidelines.

In dissent, Judge Cole wrote that he would grant habeas relief on the ineffective assistance of counsel claims. He found it unreasonable for counsel to rely on the words of Phillips' family that no abuse had occurred and for counsel to fail to conduct an independent investigation when there were several "red flags" that important information about Phillips' past was available. Judge Cole wrote that "[a]ccording to the ABA Guidelines on death penalty representation, which the Supreme Court has used in determining whether penalty-phase counsel's investigation of a defendant's background was deficient . . . defense counsel should consider introducing evidence 'that would be explanatory of the offense(s) for which the client is being sentenced' as well as that which would provide insights 'into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offenses.'" (citing 2003 Guideline 10.11(F)). He also noted the Guideline's "charge" to review records from government agencies (citing 2003 Guideline 10.7), which Phillips' counsel failed to do. Judge Cole wrote that if trial counsel had "met these professional standards," they would have uncovered evidence that likely would have led at least one juror to vote for life. He found that Phillips' counsel "could not have made a reasonable strategic decision not to introduce evidence of Phillips's abusive childhood environment because they failed to learn of it."

34. Mack v. Bradshaw, 2010 U.S. Dist. LEXIS 30901 (N.D. Ohio 2010)

The United States District Court for the Northern District of Ohio granted Petitioner's Motion to Expand the Record, and his Motion for Evidentiary Hearing was granted in part for Petitioner's claims of ineffective assistance of counsel and was denied in part as to the remaining requests. *Id.* at 1. The Court noted that the Supreme Court "has unequivocally declared that a thorough and complete mitigation investigation is absolutely necessary in capital cases." *Id.* at 21 (citing *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). Additionally, the Court stated that a "partial, but incomplete mitigation investigation does not satisfy the requirements of *Strickland*." *Id.* at 21 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Then, noting that the Sixth Circuit uses the 2003 ABA Guidelines, the Court referenced Guideline 10.7 regarding investigations. *Id.* at 21. According to the Court, "a strategic decision not to perform a complete investigation is inadequate when a full investigation would have revealed extensive mitigation evidence." *Id.* at 22 (Citations omitted). Petitioner's counsel did not initiate an investigation for mitigation until after Petitioner was found guilty. *Id.* at 24. Counsel maintained that he feared Petitioner would lose confidence if he began the investigation before Petitioner was found guilty. *Id.* at 24. Thus, the Court granted Petitioner an evidentiary hearing. *Id.* at 24.

35. Keough v. State, 2010 WL 2612937 (Tenn. 2010)

The Tennessee Court of Criminal Appeals affirmed a lower court's decision denying Roy E. Keough's petition for state post-conviction relief. Keough argued that his trial counsel was ineffective in investigating and presenting mitigation evidence for the penalty phase of his trial for failing to elicit testimony regarding the circumstances of a prior manslaughter conviction. Keough relied heavily on *Rompilla* in arguing this claim but cited 2003 Guideline 10.7 to argue that the circumstances "should have been offered to lessen the weight of the prior conviction." Without commentary on the Guidelines, the court determined that Keough's case was "easily distinguishable from *Rompilla*" and that there was "no reasonable probability" that the jury would have imposed a sentence other than death if they had heard about the circumstances of the prior offense. Accordingly, the court denied relief on that claim. This decision was later reversed by the Supreme Court of Tennessee on separate grounds.

36. *Jackson v. Kelly*, 699 F.Supp.2d 838 (E.D. Va. 2010)

NOTE: Reversed by 4th Circuit in 2011.

The United States District Court for the Eastern District of Virginia granted habeas relief to Petitioner based on the failure of the trial counsel to investigate and present mitigating evidence and the failure of the trial court to give adequate mitigation instructions. *Id.* at 92. Looking to the Supreme Court in its analysis, the Court noted that the 2003 ABA Guidelines "represent the reasonable practice of capital defense counsel at the time of Jackson's trial, which took place in October and November 2002." *Id.* at 15. The Court also noted that although the ABA Guidelines are not dispositive, they serve as a useful guide in determining whether the legal representation was reasonable. *Id.* at 15 (citing *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); see *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009)).

The Court asserted that the Counsel's objective "in the penalty phase of a capital case, should be to help the jury see the client as someone they do not want to kill." *Id.* at 63 (quoting citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.8.6 (1989). Citing a reference to the 1989 ABA Guideline 11.4.1 (C) in *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), the Court emphasized that mitigation strategy "should comprise efforts to discover all reasonably available mitigation evidence." *Id.* at 14 (citations omitted). Quoting the Guidelines, the Court stated that "[t]his obligation includes interviewing "witnesses familiar with aspects of the client's life history" that might uncover "possible mitigating reasons for the offense(s)." *Id.* at 14 (also citing 2003 ABA Guideline 10.7). According to the Court, "numerous entries within the records should have prompted further investigation by Jackson's attorneys" and "would unquestionably lead a reasonable attorney to investigate further." *Id.* at 17.

The Court stayed the writ for sixty days in order for the Commonwealth to either initiate a new sentencing hearing or to sentence Petitioner to life in prison. *Id.* at 92.

37. *Lawley v. Wong*, 2009 U.S. Dist. LEXIS 37513 (E.D. Cal. 2009)

The United States District Court for the Eastern District of California granted Mr. Lawley's motion for equitable tolling. At issue was whether to allow Mr. Lawley's appointed counsel

more time to review the record, pursuant to the ABA Guidelines under the "Duties of Post-Conviction Counsel," or strictly apply the one-year statute of limitations to the appeal, pursuant to AEDPA under Section 2254(d). *Id.* at *3. The court granted Mr. Lawley an additional 106 days for his counsel to more thoroughly review the record and file the federal petition for writ of habeas corpus.

In reaching its decision, the court extensively discussed the ABA Guidelines. Citing Guidelines 10.15.1(E)(4), 10.7(A), and their respective Commentaries, the court "recognize[d] that the ABA Guidelines, and particularly the Commentary to the Guidelines, impose a high quality of legal representation on counsel." *Id.* According to the court, the "high standards" of representation in the Guidelines might conflict with the "adequate" representation standards of 18 U.S.C. Section 3599(a)(2). *Id.* To determine the proper standard, the court looked at the costs of representation and applied a "reasoned approach to budget authorizations." *Id.* According to the court, the reasoned approach did not allow for counsel to "completely reinvent [the case]," but would allow "a thorough investigation . . . particularly in areas where the development of claims and evidence in the state proceeding is said to have been weak but cognizable." *Id.*

The court also noted that "while the Commentary to the Guidelines cannot be viewed as overly compelling, the Guidelines themselves have been cited with approval in many Supreme Court and Ninth Circuit cases as a starting point for determining what professional standards are reasonable for trial capital counsel." *Id.* (emphasis omitted). Thus, the court provided the progeny of Supreme Court and Ninth Circuit cases that cited the ABA Guidelines. *Id.* (citing *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Strickland v. Washington*, 466 U.S. 668, 688 (1985); *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623, 638 (9th Cir. 2005); *Washington v. Lampert*, 422 F.3d 864, 872 (9th Cir. 2005); *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005); *Davis v. Woodford*, 384 F.3d 628, 661 (9th Cir. 2004)).

38. *Rhode v. Hall*, 582 F.3d 1273 (11th Cir 2009)

The Court of Appeals for the Eleventh Circuit affirmed the district court's order denying the petitioner habeas relief, concluding that the petitioner's ineffective assistance of counsel claim at the penalty phase premised upon deficient investigation and presentation of mitigation evidence lacked merit. In rejecting the petitioner's contention that trial counsel was deficient in overseeing the mitigation investigation, the court relied upon the ABA Guidelines. The court concluded that trial counsel complied with the ABA Guidelines, which it identified as "prevailing norms" of defense practice:

One of those norms is that "[c]ounsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. . . . [or] have an investigator or mitigation specialist conduct the interviews." [2003 ABA Guidelines, Section 10.7 cmt.] Since Rhode's counsel hired investigators who interviewed potential witnesses and shared all of their information with counsel, we cannot say that counsel performed deficiently by delegating the mitigation investigation to them.

39. *Hodge v. Haeberlin*, 579 F.3d 627 (6th Cir 2009)

The Court of Appeals for the Sixth Circuit affirmed the district court's denial of the appellant's petition for habeas relief, concluding that the petitioner failed to establish ineffective assistance of counsel. One of the petitioner's central ineffective assistance claims focused upon his trial counsel's cross-examination of a key prosecution witness. Applying AEDPA, the majority concluded that the Kentucky Supreme Court's determination that trial counsel's performance in the cross-examination did not constitute ineffective assistance was not contrary to or an unreasonable application of clearly established Supreme Court precedent. In a dissenting opinion, Judge Martin explained his view that the petitioner was entitled to habeas relief due to counsel's ineffective assistance in cross-examining the key prosecution witness. Judge Martin noted that trial counsel failed to prepare for the cross-examination, asked a series of unrelated questions that introduced harmful testimony that would have been inadmissible otherwise, and failed to object to the answers. With respect to counsel's failure to prepare for the cross-examination, Judge Martin observed that the 2003 ABA Guidelines, Section 10.7, "require counsel to 'conduct thorough and independent investigations' to prepare for their cases." Moreover, Judge Martin emphasized that the 1989 ABA Guidelines "explicitly required counsel to interview government witnesses."

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

Following a rehearing en banc that vacated part of a prior decision and remanded for further proceedings, the U.S. Court of Appeals for the Sixth Circuit reversed a district court's denial of Robert Van Hook's petition for federal habeas corpus relief. Van Hook argued that his trial counsel was deficient in failing to conduct a full and timely investigation into his background. In initially setting out its conclusion that counsel was ineffective, the court stated that Van Hook's Sixth Amendment rights were violated under three Supreme Court cases, *Strickland v. Washington*, *Wiggins v. Smith*, and *Rompilla v. Beard*. The court noted in a parenthetical that *Wiggins* incorporated the ABA Guidelines as the "professional standard of performance." After discussing the applicable precedent in more detail, the court observed that, "[a]fter *Strickland*, this Court and the Supreme Court made clear in a number of cases that counsel in death cases should follow closely the ABA standards referred to above." The court further stated that it has "explained clearly" that the ABA Guidelines "provide the 'guiding rules and standards to be used in defining prevailing professional norms in ineffective assistance cases.'"

The court proceeded to discuss the scope of a proper mitigation investigation under case law and also stated that the "ABA Guidelines explain that this investigation ought to include interviews with family members and all other people who knew the client." The court quoted at length from 2003 Guideline 10.7 to describe the types of individuals counsel should interview. Finally, the court discussed the necessity of beginning a mitigation investigation early and not waiting until the last minute. Following a description of precedent, the court stated that the "requirement for counsel to perform thorough, not last-minute, investigations before a mitigation hearing is further reinforced by the ABA Guidelines," again quoting language from Guideline 10.7, which states that the investigation "should be as quickly as possible" and "preparing for the mitigation phase of trial 'requires extensive and generally unparalleled investigation into personal and family history.'" Applying case law and the ABA Guidelines, the court found that counsel's mitigation investigation was deficient in scope and did not "begin quickly" after appointment. The court determined that Van Hook was

prejudiced by the deficient performance and granted relief.

41. Lynch v. Hudson, 2009 U.S. Dist. LEXIS 105296 (S.D. Ohio 2009)

Petitioner filed a motion for funds to retain a neuropsychologist and rehire the clinical psychologist used at trial. The Court granted Petitioner's request for funds to retain a neuropsychologist, finding that the services of a neuropsychologist were reasonably necessary, but denied Petitioner's request for funds to rehire the clinical psychologist, finding that the claim had already been explored and Petitioner failed to present what more could be found by rehiring the clinical psychologist.

During the mitigation hearing, Petitioner presented evidence from a clinical psychologist, Dr. Tureen, that Petitioner fell within the borderline range of intellectual functioning with an IQ of 72. In preparing for Petitioner's post-conviction proceedings, a different clinical psychologist, Dr. Friday, conducted further tests and recommended a complete neurological evaluation and found that an expert in the area of mental retardation should have been made available at trial. Petitioner related his request for funds to retain a neuropsychologist to his claims for ineffective assistance of trial council, citing ABA Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases arguing that his counsel was ineffective because they failed to secure neuropsychological testing when Dr. Tureen's findings indicated that Petitioner's functioning was borderline.

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

The defendant's convictions for aggravated robbery and aggravated murder with one capital specification were affirmed. The Ohio courts denied the defendant's petition for post-conviction relief. The district court also denied all of the defendant's claims in a federal habeas petition.

En banc the Sixth Circuit twice vacated and remanded a Sixth Circuit panel's rulings on the federal habeas petition. The panel's third and final ruling granted relief to the defendant on the sole ground that his lawyers performed deficiently in investigating and presenting mitigation evidence. The ruling relied on the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003).

The state petitioned for a writ of certiorari. The U.S. Supreme Court granted the writ and reversed the Sixth Circuit.

The Supreme Court found error in the Sixth District's judgment of counsel's conduct from the defendant's 1985 trial based on Guidelines from 2003, without considering whether the 2003 Guidelines reflected the prevailing professional practice at the time. Bobby v. Van Hook, No. 09-144, 2009 WL 3712013, at *2 (U.S. Nov. 9, 2009).

The Supreme Court also found that the U.S. Court of Appeals erred when it treated the ABA's 2003 Guidelines as inexorable commands with which all capital defense counsel "must fully comply" rather than merely as evidence of what reasonably diligent attorneys would do. *Id.* at *3. Court precedent regarding the ABA Guidelines establishes that the ABA standards are

only guides to what reasonableness is, not its definition. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). States may impose whatever specific rules they see fit to ensure that criminal defendants are well represented. However, the Supreme Court has held that the federal Constitution imposes one general requirement: that counsel make objectively reasonable choices. 2009 WL 3712013, at *3 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).

Justice Alito issued a brief concurring opinion to which no other justices joined, stating that ABA Guidelines do not have special relevance to determine whether an attorney's performance meets the Sixth Amendment standard. *Id.* at *6 (Alito, J., concurring). The views from the ABA and the group that made the 2003 Guidelines do not necessarily reflect the views of the American Bar as a whole. *Id.* It is the courts' responsibility to determine the nature of a defense attorney's work in a capital case to meet the obligation imposed by the Constitution. *Id.*

43. *Galloway v. Thaler*, 344 F. App'x. 64 (5th Cir 2009)

The Court of Appeals for the Fifth Circuit denied the petitioner's application for a certificate of appealability as to his claim of ineffective assistance of counsel based upon the failure to investigate and present mitigation evidence. Prior to trial, the petitioner had instructed his counsel not to present any mitigation evidence that might cast his father in a negative light, including evidence of childhood abuse. In his federal habeas petition, the petitioner "asserted that his attorneys should have ignored his instructions and presented a mitigation case," relying upon the ABA Guidelines (2003 Guidelines Section 10.5 commentary, Section 10.7 (A)(2); 1989 Guidelines Section 11.4.2 commentary). The court agreed with the district court's conclusion that trial counsel had legitimate reasons to comply with their client's instructions, including their concern about their client's negative reaction and their belief that potential mitigation evidence could hurt their client's case. In addition, although the court recognized that "the Supreme Court has endorsed various sets of ABA Guidelines as instructive on the issue of reasonableness in representation, neither the Supreme Court nor this court have ever found the Guidelines to be dispositive of a claim of ineffective assistance of counsel."

44. *Allison v. Ayers*, 2008 U.S. Dist. LEXIS 120865 (C.D. Cal. 2008)

Respondent made objections to evidence regarding events that occurred before Petitioner was born. However, the Court ruled that this objection was without merit with reference to the ruling in *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) "Because the sentencer in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history" (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.7, at 80-83 (2003)).

45. *Bowles v. State*, 979 So. 2d 182 (Fla. 2008)

The Supreme Court of Florida affirmed denial of Mr. Bowles petition for post-conviction relief based in part on claims of ineffective assistance of counsel for failure to call mitigation experts. Bowles cited to sections 10.7(A), 10.11(A), and 10.11(F) of the ABA Guidelines in

support of his claim, but this was summarily dismissed by the court which claimed that Bowles had failed to allege specific ways in which his counsel failed to meet the ABA Guidelines. The court stated further that "the Guidelines are not inconsistent with trial counsel's actions." It found that counsel had a strategic reason for failing to call one particular expert who, according to the court, had potentially harmful opinions about Bowles. The court also held it was reasonable to not pursue other expert testimony having received unfavorable results from the first expert.

46. *Mason v. Mitchell*, 543 F.3d 766 (6th Cir 2008)

The U.S. Court of Appeals for the Sixth Circuit reversed a district court's denial of Maurice Mason's petition for federal habeas relief and remanded for further proceedings. Moore argued that his trial counsel had provided ineffective assistance during the sentencing phase of his trial. Before analyzing Mason's claim that his counsel was deficient in his mitigation investigation, the court set out the "minimum standards the Supreme Court has established for such investigations." The court noted that the "Supreme Court has described 'the standards for capital defense work articulated by the American Bar Association (ABA)' as 'standards to which we long have referred as guides to determining what is reasonable.'" The court then noted what is required by the "edition of those standards current at the time of Mason's trial" and quoted the language from *Wiggins v. Smith* that cites to 1989 Guideline 11.4.1. The court then examined counsel's performance, finding that counsel's "woefully inadequate" mitigation investigation was constitutionally deficient and that Mason had shown that he was prejudiced by the deficient performance. The court accordingly concluded that Mason was entitled to habeas relief and remanded for further proceedings. Judge Boggs filed a dissenting opinion that also included a mention of the Guidelines. Judge Boggs stated that the majority opinion "sets an almost impossibly high bar for defense counsel in capital cases," quoting language from *Van Hook v. Anderson*, a Sixth Circuit decision that described the individuals counsel should seek to interview in the course of a proper mitigation investigation according to 2003 Guideline 10.7.

47. *Van Hook v. Anderson*, 535 F.3d 458 (6th Cir 2008)

The Sixth Circuit reversed the decision of the district court and remanded the case to the district court with instruction to issue a writ of habeas corpus. The court found that defense counsel failed to first, "investigate and present as evidence all available mitigation factors; second . . . fail[ed] to secure or attempt to secure an independent mental health expert to testify that the crime was the product of a mental disease; and third, by mistakenly introducing and also fail[ed] to object to proscribed evidence that was clearly damaging to Van Hook's case." *Id.* at 460, 465 (citing 2003 ABA Guidelines 10.7 and 10.11). The court noted that that the ABA Guidelines provide help "in defining the 'prevailing professional norms' in ineffective assistance cases." *Id.* at 462 (quoting *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003)). The court went on to note that "all three of the deficiencies listed above . . . fall well below objective standards of reasonableness outlined in the ABA standards as applied in the case law developed in capital cases interpreting the Sixth Amendment requirement of the effective 'assistance of counsel for his defense.'" *Id.*

48. *Fautenberry v. Mitchell*, 515 F.3d 614 (6th Cir 2008)

The Sixth Circuit affirmed the Southern District of Ohio's denial of Fauntenberry's petition for writ of habeas corpus. Although Fauntenberry's trial counsel failed to present significant mitigating evidence pertaining to Fauntenberry's potential brain damage and failed to properly utilize the defense expert witness, the Sixth Circuit found that defense counsel's actions did not constitute ineffective assistance of counsel.

In the dissenting opinion, Judge Moore wrote that she did not agree with the majority's conclusion that Fauntenberry had failed to establish ineffective assistance of counsel. Judge Moore opined that although "reasonably diligent counsel" may conclude when further investigation would be a waste, it is the attorney's "constitutional duty" to thoroughly investigate the defendant's background. *Id.* at 646. Judge Moore also noted that the fact that the defendant can be sentenced to death "magnifies counsel's responsibility to investigate." *Id.* (citing Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, Guideline 10.7 Commentary (Am. Bar Ass'n, Rev. Ed. 2003)).

The State argued that Fauntenberry's refusal to cooperate with defense attorneys and the defense expert witness precludes his claim that he received ineffective representation. *Id.* at 650. Citing to section 10.7(A)(2) of the ABA Guidelines, Judge Moore identified that the Guidelines "specifically state that mitigating evidence must be pursued regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." *Id.* The fact that Fauntenberry did not make investigation easy for counsel, does not excuse counsel from failing to investigate mitigating evidence. Judge Moore wrote:

. . . the ABA demands that defense counsel go beyond the barriers that their client may erect. The ABA even recognizes that when pursuing mitigating evidence, "[o]btaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer." 2003 GUIDELINES, 10.7 commentary. While the ABA recognizes the challenges that defense counsel may face and exhorts counsel to continue pursuing mitigating evidence in the face of those challenges, the majority condones a half-hearted effort.

Id. at 651. Judge Moore found defense counsel had significant "red flags" to fully investigate Fauntenberry's medical history and because they failed to do so, she dissented.

49. Jackson v. Houk, 2008 U.S. Dist. LEXIS 36061 (N.D. Ohio 2008)

Petitioner argues that he was denied effective relief because trial counsel failed to investigate and present evidence about his childhood, did not interview or present evidence from petitioner's aunts or mother, and did not present evidence from the neuro-psychologist. Petitioner also argues that counsel failed to obtain expert assistance to aid in the investigation and presentation of this mitigating information. The court notes that the Sixth Circuit has adopted the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. It cites to guideline 10.7 to acknowledge that counsel has an obligation to investigate and present mitigating evidence during both the guilt and penalty phases of trial. However, counsel is not required to present the material if they have made a thorough investigation and do not present the material for strategic reasons. The court found that because counsel (1) requested appointment of a neuro-psychologist to evaluate petitioner,

(2) petitioner was evaluated by the neuro-psychologist, (3) ordered records from county child services and Ohio youth services, (4) interviewed petitioner's older half brother, (5) requested the services of a ballistics/forensic scientist and (6) had two mitigation specialists working on the case, counsel adequately investigated and presented mitigating evidence.

50. *Jalowiec v. Bradshaw*, 2008 U.S. Dist. LEXIS 18855 (N.D. Ohio 2008)

Jalowiec appealed pro se his amended petition for writ of habeas corpus to the District Court for the Northern District of Ohio. Among Jalowiec's forty-six claims for relief, Jalowiec claimed his counsel was ineffective for failing to fully investigate and "gather documentary evidence related to his history, background, and character and by failing to hire a qualified psychologist to examine him. . ." 2008 U.S. Dist. LEXIS at *248.

The Ohio District Court cited to *Rompilla*, *Wiggins*, and the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to evaluate whether Jalowiec's counsel acted ineffectively. *Id.* at 250. The court stated:

The ABA Guidelines provide that penalty phase preparation requires extensive investigation into personal and family history, and anything in the life of the defendant which might mitigate against the appropriateness of the death penalty. The investigation should begin with the moment of conception and should include medical history, family and social history, educational history and employment and training history. According to the ABA Guidelines, it is necessary to locate and interview the defendant's family members and virtually anyone else who knew the defendant and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers and others. Also, records from government agencies, the military and employers should be requested. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases P 10.7 (2003), pgs. 80-83.

Id. at *250-51. In this case, counsel's investigation may not have been as thorough as the ABA Guidelines suggest, however, "Jalowiec must [also] show that his counsels' ineffective assistance constitutes prejudice." *Id.* at *255-56. The court concluded that the introduction of additional mitigation evidence was, ". . . just as likely, if not more likely, to be viewed by the jury in a negative manner and not of any assistance or evidence of mitigation." *Id.* at *257. The court ruled Jalowiec's claim was without merit. *Id.*

51. *Brinkley v. Houk*, 2008 U.S. Dist. LEXIS 41371 (N.D. Ohio 2008)

In an opinion granting motions for discovery, the District Court for the Northern District of Ohio discussed the adoption by the Sixth Circuit of the 2003 ABA Guidelines, which it described as requiring "extensive investigation into personal and family history, or anything in the life of the defendant that might mitigate against the appropriateness of the death penalty." The court continued on with a list of "necessary" tasks for a proper mitigation investigation:

Under these guidelines, such an investigation should begin with the moment of conception and should include medical history, family and social history, educational history and employment and training history. It is then necessary to locate and interview the defendant's family members and virtually anyone else who knew the defendant and his family, including

neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers and others. Also records from courts, government agencies, the military and employers should be requested. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases P 10.7 (2003), pgs. 80-83.

The court also held that even a strategic decision not to perform a "complete investigation" is ineffective representation when there was significant mitigation evidence that could have been found.

52. *Fitzpatrick v. Bradshaw*, 2008 WL 7055605 (S.D. Ohio 2008)

A magistrate judge of the U.S. District Court for the Southern District of Ohio denied Stanley Fitzpatrick's petition for federal habeas corpus relief. Fitzpatrick argued that his trial counsel had been ineffective in part for failing to hire a mitigation specialist and an addictions expert. Summarizing the claim, the court noted that Fitzpatrick had cited to the ABA Guidelines, which "state that a defense team should consist of no fewer than two qualified attorneys, an investigators, and a mitigation specialist." [Ed. note: This is a reference to Guideline 4.1]. In the next paragraph, the court also noted that Fitzpatrick "makes the general argument that the mitigation evidence should have included 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for the defendant,'" citing to 2003 Guideline 10.7. Without any further mention of the Guidelines, the court determined Fitzpatrick's claim to be without merit and denied relief.

53. *Sowell v. Collins*, 557 F. Supp. 2d 843 (S.D. Ohio 2008)

Sowell was tried and sentenced to death before a three-judge panel. Sowell appealed to the District Court for the Southern District of Ohio seeking federal habeas corpus relief. Sowell argued that his counsel was ineffective for failing to present an adequate mitigation investigation into his background and childhood.

The District court cited to the Supreme Court's practice of referring to the "standards of the American Bar Association ("ABA") as guides to determining what is reasonable representation in a capital case." *Id.* at *53. The District court specifically addressed *Wiggins v. Smith*:

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.' ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

Id. at *54-55. Similar to *Wiggins*, Sowell's defense counsel failed to present an investigation into his childhood:

Despite the fact that petitioner grew up in extreme poverty and suffered severe abuse and neglect as a child, counsel did not present any information concerning petitioner's childhood,

background, or social history. Counsel did not call one family member to testify. The panel did not hear that petitioner was one of seven children, and the Sowell family was so poor that the children were malnourished and routinely had nothing to eat. The panel did not hear that petitioner began stealing food at a young age, and his infant brother died of starvation. The panel did not hear that petitioner had no shoes until he was five years old, and that he and his siblings were often bitten by rats.

Id. at *11-12. Citing to the 2003 ABA Guideline 10.7 in *Hamblin v. Mitchell*, the District court continued:

The 2003 ABA guidelines state that "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." Id. at 487 n.2. The guidelines further provide that counsel need to explore family and social history, including physical, sexual or emotional abuse, and family history of mental illness, cognitive impairments, substance abuse or domestic violence, as well as poverty and familial instability. Id.

Id. at *55. The District court identified defense counsel failures as constituting ineffective assistance. "[Sowell's] counsel performed deficiently by failing to discover, develop or present substantial mitigating evidence concerning petitioner's background and social history." Id. at *53. The court concluded, ". . . there is a reasonable probability that had counsel done so, at least one member of the three-judge panel would have voted against the imposition of the death penalty." Id. As a result, Sowell was granted federal habeas relief on his ineffective assistance of counsel claim.

54. *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir 2008)

The Court of Appeals for the 10th Circuit remanded the case for an evidential sentence hearing. The court found that both the OCCA and District court relied solely upon trial mitigation contrary to Strickland evidential standards despite their adherence to Oklahoma Appellate Rule 3.11(B)(3)(b). The court noted that the appellant had received ineffective assistance from counsel during the mitigation phase. The court applying Strickland found that "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 1093.

The court noted that they "must look first to the ABA Guidelines, which serve as reference points for what is acceptable preparation for the mitigation phase of a capital case" and that "[the ABA Guidelines should be used] as guides to determining what is reasonable." Id. at 1085. The court found that trial counsel fell below these accepted standards in at least three ways.

First, by not engaging a psychologist until three weeks before trial, the court found that counsel failed to make adequate "preparation[s] for the sentencing phase, in the form of investigation, [which] should begin immediately upon counsel's entry into the case" citing the 2003 version of the ABA Guidelines 10.7. The court also re-iterated that they regarded this delay as indicative of ineffectiveness, even without specific evidence regarding the consequences of delay. See *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007) (citing ABA

Guidelines 10.7 (2003)).

Second, trial counsel failed to conduct "even the most basic investigation" because it did not interview willing and available family members. The court held this contrary to ABA Guidelines 11.8.3 (1989) which specifically includes "[w]itnesses drawn from the victim's family or intimates who are willing to speak against killing the client." *Id.* at 1087.

Third, the court found that trial counsel failed to present mental health diagnoses that the psychiatric expert had been able to develop prior to testifying, noting that "[c]ounsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." *Id.* at 1091 (quoting ABA Guidelines 11.8.6 (1989)).

55. *Richie v. Sirmons*, 563 F. Supp. 2d 1250 (N.D. Okla. 2008)

The Court held that the Petitioner was entitled to habeas corpus relief because of the inadequate mitigation investigation received during the penalty phase. The Petitioner claimed that his trial attorney failed to present a defense based on voluntary intoxication and failed to develop evidence of psychological impairment. The first claim was dismissed because "it is unclear who trial counsel could have presented to testify". In reviewing the second claim the court noted that trial counsel had focused on testimony from family members and presented brief school records. Counsel failed to present psychiatric evidence which the "Tenth Circuit court of Appeals has noted . . . is 'exactly the sort of evidence that garners the most sympathy from jurors. *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004)". Citing *Smith* the court went on to note that:

The Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the American Bar Association (ABA) ... as 'guides to determining what is reasonable' performance. Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase.' See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for Mr. Watson to omit this evidence from his case for mitigation.

(Internal citations omitted). The Court noted that "Counsel simply did not take any action to determine whether such evidence was available" and thus concluded that counsel's failure was "constitutionally deficient under *Strickland*." In light of the new psychiatric evidence the court concluded that Petitioner's claim satisfied *Strickland* prejudice and he was entitled to habeas relief.

56. *Owens v. Guida*, 549 F.3d 399 (6th Cir 2008)

Petitioner appealed the district court's dismissal of her petition for a writ of habeas corpus. The Sixth Circuit Court of Appeals held that all three of the petitioner's habeas claims failed. In his dissenting opinion, Judge Merritt pointed to the ABA Guidelines, citing Section 10.7 on "Investigation": "1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or

overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented. 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." Judge Merritt argued that had petitioner's counsel conducted an investigation as suggested by the ABA, important evidence about the physical and psychological abuse inflicted on the petitioner by her husband would have been revealed. Judge Merritt concluded that the petitioner was provided ineffective assistance of council.

57. *Eaton v. State*, 192 P.3d 36 (Wyo. 2008)

The court affirmed the trial court's conviction and death sentence. Inter alia, that appellant argued that he received ineffective counsel at both trial and sentencing that failed to meet the ABA guidelines. Specifically: Guideline 2.1 (jurisdictional plan), 10.5 (client relationship) and 10.10 (trial preparation overall). The court noted that although the ABA guidelines are not "black-letter rules, they are guidelines of significance that we consider in our review of this case." *Id.* at 119. Following *Strickland*, the court noted with regards to strategic trial choices that "a heavy measure of deference [should be given] to counsel's judgments." *Id.* The court found that the Wyoming's lack of a formal death penalty plan did not have "a dispositive effect on this case." *Id.* Although the defense team had difficulties working with Eaton (including a mitigation specialist who declined to meet with him again after her first meeting), the assistant defense attorney was "eventually able to develop a working relationship with Eaton." *Id.* at 120. The court noted that Eaton was most critical of the theory of defense that was chosen. But the court held that "juries have minds of their own, and a theory such as that propounded by the defense team was as good as anything we can think of, given the circumstances of this case. Appellate counsel offer no more compelling theory that might have been pursued. As required by the ABA Guidelines, the theory did provide consistency between the guilt/innocence and penalty phases."

With respect to Eaton's mitigation complaints, the Court opinion details an extensive comparison of the proposed additional mitigation facts (see *id.* at 143 - 172) and those that were presented in the county court. The court noted, inter alia, that the new evidence was "cumulative to similar evidence that that trial counsel presented in the sentencing phase." *Id.* at 155 and that any failure by trial counsel to properly prepare their mitigation witnesses did not render "a breakdown in the adversary process." *Id.* at 166.

58. *Woods v. State*, 13 So. 3d 1 (Ala. Crim. App. 2007)

The Alabama Court of Criminal Appeals affirmed the defendant's conviction and remanded the case for the trial court to make specific findings as to the existence or nonexistence of nonstatutory mitigating circumstances. Although the case was on direct appeal, appellate counsel raised a claim of ineffective assistance of trial counsel during the penalty phase of trial. The defendant argued that his trial counsel failed to meet the standards set forth in the ABA Guidelines, failed to consult a mitigation expert, and failed to present additional evidence of mitigation. The court rejected the defendant's claim because it was not supported by the record.

59. *Hodges v. State*, 2007 WL 866658 (Ala. Crim. App. 2007)

The Alabama Court of Criminal Appeals affirmed a circuit court's denial of Melvin Hodges' motion seeking discovery of "prosecution files, records and information" during his state post-conviction proceedings. In his motion, quoted at length by the court, Hodges cited the requirement in 2003 Guideline 10.7 that trial counsel "conduct thorough and independent investigations relating to the issues of both guilt and penalty" as a touchstone for reasonable representation under professional norms and sought discovery of information that trial counsel should have investigated and that would likely lead to the discovery of relevant information. The court held that the motion had been properly denied the motion because it did not contain information regarding specific claims for which the discovery was sought and was a "fishing expedition" prohibited under Alabama precedent. The decision also remanded the case to the circuit court with instructions related to a separate claim of ineffective assistance of counsel.

60. *Prevatte v. French*, 499 F. Supp. 2d 1324 (N.D. Ga. 2007)

Petitioner challenges two aspects of the Court's decision to deny relief on his claim based upon the ineffective assistance of counsel: (1) that counsel's failure to seek a continuance was not objectively unreasonable, and (2) that counsel's failure to interview one of the state's witnesses was neither objectively unreasonable nor prejudicial.

Petitioner argued that "barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to ... eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself." 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7. However, the court does not find this persuasive, considering this Guideline was issued almost 20 years after Petitioner's trial. Supporting this contention the court notes, contrary to Petitioner's argument, that Supreme Court in *Rompilla* did not rely on the 2003 Guidelines in concluding that defense counsel conducted an inadequate investigation in 1989. Rather, in assessing the adequacy of counsel's investigation in that case, the Supreme Court relied upon the 1982 ABA Standards for Criminal Justice which were in effect at the time of *Rompilla*'s trial. See *Rompilla*, 545 U.S. at 387 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). While the Court did make reference to later-promulgated versions of the Guidelines, the Court viewed those Guidelines as simply more explicit statements of the pronouncements contained in 1982 Guidelines. *Id.* at 387 n.6 (noting that the Court saw "no material difference" between the phrasing of 1982 and 1993 versions of ABA guidelines); *id.* at 387 n.7 (noting that 1989 version of ABA Guidelines, promulgated shortly after *Rompilla*'s trial, "applied the clear requirements for investigation set forth in the earlier [1982] Standards of death penalty cases," and that 2003 Guidelines "are even more explicit"). "Thus, the Supreme Court in *Rompilla* did not rely on ABA Guidelines promulgated years after the defendant's trial to assess his attorney's performance, and the Court is not required to do so in this case."

Furthermore, the court contended that even if it were required to consider the 2003 Guidelines, it would not reconsider its prior judgment. While the Supreme Court has recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable," *Strickland*, 466 U.S. at 688; see also *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (finding that trial counsel's conduct "fell short" of the standards set forth in the ABA

Guidelines), the Supreme Court has emphasized that they are only guides.

61 . Hartman v. Bagley, 492 F.3d 347 (6th Cir 2007)

The Sixth Circuit Court of Appeals affirmed the district court's denial of petitioner's writ of habeas corpus but added three more claims to the petitioners COA.

In citing the ABA Guidelines in his concurrence, Judge Clay wrote that "trial counsel unreasonably limited his investigation, all but foreclosing consideration of three potential mitigating factors." He noted that consistent with the ABA Guidelines "[r]ecords should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help . . . underscore the hereditary nature of a particular impairment. Hamblin v. Mitchell, 354 F.3d 482, 487 n.2, 488 (6th Cir. 2003) (quoting ABA Guidelines for the Appointment & Performance of Def. Counsel in Death Penalty Cases 10.7, at 80-83 (2003)) (citing the "2003 ABA Guidelines . . . because they are the clearest exposition of counsel's duties at the penalty phase . . . , duties that were recognized by this court as applicable to the 1982 trial of the defendant in Glenn v. Tate"). A "reasonably competent attorney" would have pursued stronger evidence of genetic alcoholism. See Wiggins, 539 U.S. at 534.

62 . Haliym v. Mitchell, 492 F.3d 680 (6th Cir 2007)

The Sixth Circuit Court of Appeals affirmed the denial of the plaintiff-prisoner's writ of habeas corpus concerning the convictions, but reversed the denial of the writ with respect to the sentences. 492 F.3d at 685. The court found that the defendant was denied effective assistance of counsel during the mitigation phase of his sentencing proceedings. *Id.*

In citing the (2003) ABA Guidelines, the court noted that defense counsel's performance "fell short of several of the American Bar Association's Guidelines." *Id.* at 716. The court stated that the Guidelines have long been considered guides to determining what reasonable conduct is for defense counsel, and specifically stated that they "explicitly recognize that competent counsel will investigate and discover all the evidence that Petitioner's counsel failed to unearth." *Id.* at 717. Finally, the court noted that when defense counsel presents mitigating evidence during sentencing proceedings, counsel has "an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." *Id.* (citing ABA Guideline 10.7). The court elaborated on this by commenting that investigation should include "members of the client's immediate and extended family;" but also "medical history, which includes physical injury and neurological damage; and family and social history, which includes physical . . . abuse, . . . domestic violence . . . exposure to criminal violence, [and] the loss of a loved one." *Id.*

63 . Anderson v. Sirmons, 476 F.3d 1131 (10th Cir 2007)

The Tenth Circuit Court of Appeals reversed the district court's denial of habeas relief as to the defendant's sentencing and was remanded to the district court with instructions to issue a writ of habeas corpus. The court found that defense counsel's failure to investigate or discover readily available mitigation evidence regarding the

defendant's family history and mental health amounted to constitutionally deficient performance. In addition, the court also found that defense counsel's conduct prejudiced the proceedings, as it left the motive for the murders unanswered.

In citing to the ABA Guidelines, the court noted that investigation into mitigating evidence involves discovering "all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 1142 (citing ABA Guideline 11.4.1(C)). The court declared that evidence relating to the defendant's mental health history and family life represented "just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of the trial." *Id.* at 1144.

64. *Young v. Sirmons*, 2007 WL 2248158 (N.D. Okla. 2007)

The U.S. District Court for the Northern District of Oklahoma denied Julius Recardo Young's petition for post-conviction habeas relief. Young claimed that his trial counsel had provided ineffective assistance of counsel in failing to adequately investigate and present a case of mitigation during the penalty phase. The court stated that counsel performance must be measured "against an objective standard of reasonable performance based on accepted professional norms." The court set out those norms in a long quote from *Anderson v. Sirmons*, a Tenth Circuit case that discusses the importance of sentencing in death penalty cases. The language from *Anderson* discussed *Wiggins v. Smith* and quoted 1989 Guideline 11.4.1 and 2003 Guideline 10.7 to describe the scope of a proper investigation for the penalty phase. According to those standards, the court concluded that there was "little doubt that [Young's] trial attorney stopped short of making a reasonable investigation for purposes of uncovering relevant mitigating evidence." However, the court also concluded that Young had failed to demonstrate that he had been prejudiced by the deficient performance and denied relief.

65. *Welch v. Sirmons*, 2007 WL 927950 (N.D. Okla. 2007)

The U.S. District Court for the Northern District of Oklahoma denied Gary Roland Welch's petition for post-conviction habeas relief. Welch claimed that his trial counsel had performed ineffectively due to a failure to adequately investigate and present mitigating evidence. In the course of considering this claim, the court quoted *Anderson v. Sirmons*, a Tenth Circuit case that discusses the importance of sentencing in death penalty cases. The language from *Anderson* discussed *Wiggins v. Smith* and quoted 2003 Guideline 10.7 to describe the information that counsel should investigate for the penalty phase. The court concluded that counsel's conduct was reasonable and that trial counsel is free to exercise professional judgment in trial strategy decisions. The court further found that the claim was procedurally barred and denied relief.

66. *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007)

The trial court in this case granted the defendant a new trial based on an ineffective assistance of counsel claim. On appeal from that ruling, the Supreme Court of South Carolina found that the failure of defense counsel to introduce evidence which supported the conclusion that the victim may have handled the gun and to retain an independent expert amounted to ineffective assistance of counsel.

In citing the 2003 ABA Guideline 10.7, the court noted that defense counsel has an obligation at every stage of the proceedings to "conduct thorough and independent investigations." *Id.* at 332. At trial, defense counsel hired the resigned supervisor of law enforcement officials who provided testimony in the case. The court found that the 2003 ABA Guidelines direct defense counsel to "aggressively examine all of the government's forensic evidence" with "the assistance of appropriate experts." *Id.* The court also stated that the ABA Guidelines "are not aspirational," but rather "are the same type of longstanding norms referred to in *Strickland* in 1984." *Id.* at 332 n.14.

67. *Clark v. Quarterman*, 2007 U.S. Dist. LEXIS 68249 (E.D. Tex. 2007)

The District Court for the Eastern District of Texas reversed the decision of the Texas Court of Criminal Appeals, holding that petitioner did in fact show that his trial counsel was ineffective for failing to interview Petitioner's mother.

Petitioner, an inmate convicted of capital murder and sentenced to death, filed a habeas petition pursuant to 28 U.S.C. Section 2254 in the Eastern District of Texas. Petitioner argued that defense counsel failed to investigate or present evidence which would have mitigated against the imposition of the death penalty. Specifically, Petitioner claims that counsel failed to investigate his family background or his social, medical and mental history.

The District Court cited a well-established precedent, that to prove ineffective assistance of counsel, a criminal defendant must show that his attorney's assistance was deficient and that the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an objective standard or reasonableness. *Id.* at 688. To determine what is reasonable, the district court looked to the (2003 and 1989) ABA Guidelines. See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Specifically, the court referred to ABA Guideline 11.8.6 which states that counsel should consider presenting information on medical history, educational history, and family and social history. *Id.* Petitioner's defense counsel admittedly failed to consider this potentially mitigating evidence. Thus, the court was persuaded that Petitioner's counsel fell "far short of professional norms when they failed to investigate his background, [especially since] counsel's affidavit indicates that there was no strategy behind the decision to forego an investigation of or to present evidence or Petitioner's childhood." *Clark*, 2007 U.S. Dist. LEXIS 68249, at *6.

The district court held that defense counsel was ineffective for failing to interview Petitioner's parents, despite arguments that Petitioner himself blocked counsel from conducting the interviews. However, the fact that Petitioner insisted his parents not be called to testify at the punishment phase does not excuse counsel's duty to investigate possible mitigating evidence. The ABA Guidelines expressly state that "[t]he duty to investigate [mitigating evidence] exists regardless of the expressed desires of a client."

68. *Shelton v. Carroll*, 464 F.3d 423 (3rd Cir 2006)

Shelton appealed to the Third Circuit seeking federal habeas corpus relief. Shelton argued that his counsel was ineffective for failing to present an adequate mitigation investigation into his

background and childhood. The Court noted 11.4.1 of the 1989 Guidelines:

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

....

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all 16 reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

and the commentary to current Guideline 10.7:

This Guideline is based on portions of Guideline 11.4.1 of the original edition. Changes in this Guideline [not applicable to trial counsel's performance in this case] clarify that counsel should conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty. American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 (2003).

Ultimately, however, the Court decided that "it was Shelton, not his attorney, who decided to limit the scope of the investigation and the presentation of mitigating evidence to the jury" and denied Shelton's' claim for habeas relief on that basis.

69. Kilgore v. State, 933 So. 2d 1192 (Fla. Dist. Ct. App. 2006)

Florida's Second District Court of Appeal granted Dean Kilgore's appeal of an order from the Circuit Court of Polk County, which had dismissed the Office of the Capital Collateral Representative (CCRC) from representing Kilgore in a collateral attack challenging the validity of Kilgore's 1978 first-degree murder conviction which had been used as an aggravating factor in the penalty phase of his 1994 murder case. CCRC had been representing Kilgore in post-conviction for the 1994 conviction, for which he received the death penalty. The Circuit Court's order did not dismiss the underlying collateral proceeding, but dismissed CCRC from the representation of Kilgore in that proceeding.

The Second District Court of Appeal also certified to the Florida Supreme Court "a question of great importance to the Florida Supreme Court...

Are counsel appointed to provide collateral representation to defendants sentenced to death, pursuant to Section 27.702, authorized to bring proceedings to attack the validity of a prior first-degree murder conviction that was used as a primary aggravator in the death sentencing phase?"

Id. at 1193.

The Court of Appeal certified the question because the Florida statute governing appointed counsel does not "explicitly deal with the situation where . . . a previous conviction is the primary aggravator for imposition of the death penalty, and to challenge the death penalty, the previous conviction must be challenged." Id. In certifying the question to the Florida Supreme Court, the Court of Appeal stated that, "in order to challenge the murder conviction aggravator, the prior judgment must have been set aside [and] that is the course that CCRC was attempting to take, and it is consistent with ABA Guidelines." Id. The Court of Appeal noted that CCRC's attempt to challenge Kilgore's previous first-degree murder conviction conformed with the requirements of the 2003 ABA Guidelines. The court also cited to the ABA Guidelines dealing with investigation (10.7), the duty to assert legal claims (10.8), and the duty of post-conviction counsel (10.15.1.E.4). Id.

As stated by the court, the Florida statute permits CCRC to challenge a death sentence as well as the conviction, and in this case one "method of attacking the sentence of death is to attack the primary aggravator, a prior first degree murder conviction." Id. The court noted the importance of this tactic, stating that "attacking an aggravating factor is a traditional and well-accepted method used to challenge death sentences." Id. The court cited the ABA Guidelines to show that the collateral attack of an aggravating factor is often necessary, noting 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. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Rev. ed. Feb. 2003) (10.8, Duty to Assert Legal Claims, and such obligations are extended to post-conviction counsel, 10.15.1.E.4). Failure to pursue such a well-established course of action can be used to assert an ineffective assistance of counsel claim, if there was a right to counsel in this context.

Id.

While serving a life sentence, Petitioner was charged with the murder of an inmate. Petitioner was convicted and during the penalty phase, a previous first-degree murder conviction was submitted by the State as an aggravator to justify the death sentence. The sentencing court sentenced Petitioner to death after finding two aggravating circumstances: (1) Petitioner was under sentence of imprisonment at the time he committed the murder; and (2) Petitioner had been previously convicted of a felony involving the use or threat of violence to the person both of which are related to the previous first degree murder conviction.

Subsequently, the Office of the Capital Collateral Regional Counsel (CCRC) was appointed to represent Petitioner to collaterally challenge the first-degree murder conviction and death sentence. Having identified what counsel believed to be substantial grounds to challenge an important aggravator used by the State to justify a death sentence, CCRC sought to vacate the first-degree murder conviction based upon the holding in *Brady* requiring disclosure of exculpatory evidence, including impeachment evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963). In turn, however, the State filed a motion to bar CCRC from representing Petitioner in the first-degree murder case, and the circuit court granted the motion on the basis that Florida's

statutory scheme for appointment of counsel did not authorize CCRC's representation in the non-capital case.

"The district court concluded that because Florida law required the prior judgment to be set aside in order for the aggravator to be challenged in the capital case, Petitioner was entitled to have effective counsel do what CCRC was attempting to do on his behalf, a course of action also consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)." Kilgore at 2201. However, the Supreme Court of Florida determined that while Petitioner himself is entitled to prosecute a collateral claim attacking a prior conviction utilized as an aggravator in his capital case, CCRC is not authorized to do so on his behalf since Florida's statute for appointment of counsel did not authorize CCRC's representation in a non-capital case.

70. *Dickerson v. Bagley*, 453 F.3d 690 (6th Cir 2006)

The Sixth Circuit granted Dickerson a new penalty phase, finding that trial counsel was ineffective for failing to conduct a proper investigation into available mitigation evidence. Citing the 1989 and 2003 ABA Guidelines, the court noted that "the Supreme Court, in the last three years, in two different death penalty ineffective assistance of counsel cases, has made it clear and come down hard on the point that a thorough and complete mitigation investigation is absolutely necessary in capital cases." Id. at 691. In applying Guideline 10.7 (2003), the court noted that "the ABA Guidelines . . . create the required standards of performance for counsel in capital cases regarding the investigation of mitigating circumstances" and found that Dickerson's counsel fell "far short" of meeting the applicable standards. Id. at 692. In particular, the Sixth Circuit found that there was no explanation for counsel not conducting "any mitigation investigation of facts concerning Dickerson's medical history, family and social history, educational history, or any of the other factors listed in the ABA Guidelines." Id. at 693.

71. *Joseph v. Coyle*, 469 F.3d 441 (6th Cir 2006)

The U.S. Court of Appeals for the 6th Circuit affirmed the district court's grant of habeas relief to petitioner Joseph Coyle on four grounds. Coyle alleged that he was denied his due process rights because his indictment and jury instructions incorrectly stated the only capital specification with which he was charged. The state argued that this claim was waived because his attorney failed to object. Coyle also raised a separate stand-alone claim of ineffective assistance of counsel. Noting that ineffective assistance of counsel serves as cause to overcome a procedural bar, and finding that relief was warranted on the stand-alone IAC claim, the court upheld the grant of relief as to both claims. The court found that counsel's failure to understand the basic elements of the indictment - which erroneously conflated a murder and kidnapping charge and made the offense death-eligible when it otherwise would not have been so - was deficient performance. The court wrote: "Understanding the elements of the specification that makes a defendant eligible for the death penalty is perhaps the most basic aspect of representing a capital defendant." Noting that this proposition should be obvious, the court said that it also finds support in "the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which [the Supreme Court] long ha [s] referred as 'guides to determining what is reasonable.'" (Citing Wiggins). Citing to

Guideline 11.4.1(D)(1)(A), the court said that counsel must procure charging documents to identify elements of the charged offense. Citing to 2003 Guideline 10.7, the court noted that the "most recent version" of the guideline is "substantially similar." The court found that "failing to understand even the basic elements of the principal-offender specification" amounted to constitutionally deficient performance.

Rejecting the state court's argument that counsel's error was minimal because the trial court and the prosecution made the same mistake, and finding that there was a reasonable probability that the outcome would have been different if counsel had objected, the court granted relief.

72. *Lundgren v. Mitchell*, 440 F.3d 754 (6th Cir 2006)

The Sixth Circuit affirmed Lundgren's conviction and sentence, stating that defense's failure to present an insanity plea did not constitute ineffective assistance of counsel. In this case, both the majority and the dissent cited the ABA Guidelines. The majority cites to *Wiggins* and the ABA Guidelines in the context of discussing the reasonableness of counsel's decision: "More recent ABA Guidelines, which the United States Supreme Court has recognized as reflecting prevailing professional norms, emphasize 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.' *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Section 11.4.1(C), p. 93 (1989) and adding emphasis)." 440 F. 3d at 771.

The lengthy dissent cites both the 1989 and the 2003 ABA Guidelines in finding that the failure of Lundgren's counsel to present the insanity defense was "manifestly ineffective." Judge Gilbert Merritt's dissent quotes *Hamblin v. Mitchell*, 354 F. 3d 482, 487 (6th Cir. 2003), for the principle that the 2003 Guidelines "merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases." 440 F. 3d at 797. The dissent in *Lundgren* also went on to cite the Commentary to the 1989 and 2003 Guidelines: "The 2003 ABA Guidelines similarly counsel attorneys to 'consider all legal claims potentially available,' to 'thoroughly investigate the basis for each potential claim,' and to 'be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.'" ABA Guidelines 10.8(1)-(2), p. 86 (2003); *id.* at 10.8, commentary, p. 89." 440 F. 3d at 797.

73. *Murphy v. Bradshaw*, 2006 WL 5575813 (S.D. Ohio 2006)

Magistrate Judge Michael Merz, writing for the U.S. District Court for the Southern District of Ohio recommended dismissal of petitioner Ulysses Murphy's petition for a writ of habeas corpus. Among other claims, Murphy raised several claims of ineffective assistance of counsel. In one claim, he alleged that his counsel were ineffective for following a strategy he opposed and which amounted to a guilty plea. The court rejected this claim based on the Supreme Court's decision in *Florida v. Nixon*. Finding support in *Nixon*, the court discussed the "unique challenges" facing capital counsel and quoted *Nixon's* statement that "In such cases [when the evidence is overwhelming and the crime heinous], 'avoiding execution [may be] the best and only realistic result possible.'" ABA Guidelines for the Appointment and

Performance of Defense Counsel in Death Penalty Cases Section 10.9.1, Commentary (rev.ed.2003)."

Murphy also alleged that his counsel was ineffective for failing to conduct a multi-generational mitigation investigation, citing to the 2003 Guidelines (ed. note: although not specified by the court, the instruction to conduct this investigation is found in Guidelines 10.7 and 10.11). Citing to 1989 Guidelines 11.4.1, 11.8.3, and 11.8.6, the court rejected Murphy's reliance on these guidelines, finding that the 2003 Guidelines were "were not in existence during his 1998 trial" and that there is "similar direction to counsel in the 1989 predecessor." While dismissive of the importance of such investigation, the court ultimately concluded that the claim was procedurally defaulted.

74. Commonwealth v. Spotz, 896 A.2d 1191 (Pa. 2006)

Defendant appealed from an order of the Court of Common Pleas of Schuylkill County (Pennsylvania), which denied defendant's petition for post conviction relief, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Section Section 9541-9546. Spotz raised, among other issues, an ineffective assistance of counsel claim. The Court noted that

. . . the United States Supreme Court recently elucidated in *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), this duty to perform a prompt investigation into the circumstances of a case includes the duty to "investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence." *Id.* at 2466 n.7 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.7, cmt. (2003 rev. ed.)).

With the Guidelines in mind they examined each of the claims raised by Spotz concerning mitigating evidence. The Court ruled that Spotz failed to show how his counsel was ineffective.

75. *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006)

The Supreme Court of Utah found that defense counsel provided ineffective assistance during the portion of the proceedings where he was providing representation. As such, the court reversed the judgment and remanded the case to the trial court and sent instructions to set aside the relevant proceedings. The court found that defense counsel only spoke to the client about the case and the expected strategy once and repeatedly ignored or deliberately avoided contact from the defendant.

In citing the 2003 ABA Guidelines, the court stated that "courts frequently rely on the professional standards established by the ABA when determining the relevant professional norms under the first prong of the Strickland analysis." *Id.* at 512. The court also noted that the Supreme Court of the United States referred to the Guidelines as "prevailing norms of practice." The court specifically stated that it would "rely on the ABA Death Penalty Guidelines to the extent that they are relevant to our decision," *id.* at 513, because Utah's post-conviction do not contain any rules or procedures regarding counsel's performance, *id.* at 512.

The court stated that one of the main duties of defense counsel is to "maintain close contact with the client regarding litigation developments." *Id.* at 513 (citing ABA Guideline 10.15.1(E)(1)). The court also noted that post-conviction counsel has additional obligations of investigating the performance of trial counsel as well as investigating the facts underlying the conviction and the sentence, referring to the comments to ABA Guideline 10.15.1. *Id.*

76. *Clark v. Mitchell*, 425 F.3d 270 (6th Cir 2005)

The Sixth Circuit affirmed Clark's conviction and sentence, holding that the defense failure to call a neuroscientist or pharmacologist to present mitigating evidence during sentencing did not constitute ineffective assistance of counsel. Clark argued that such testimony would have established the existence of organic brain damage. Defense counsel, however, relied upon the report of the retained psychologist, which did not indicate that such brain damage was a potential factor and did not recommend any further medical testing. The Court held that defense counsel was not ineffective for relying on the opinion of the expert psychologist. *Id.* at 286. The opinion made note of the fact that by employing a defense psychologist to conduct an independent evaluation, defense counsel was acting in conformity with 2003 ABA Guideline 4.1. *Id.* at n. 5.

In dissent, Circuit Judge Merritt argued that the necessity of further medical testing was indicated in the psychologist's report, in language simply ignored by the majority. The opinion cites to the 1989 ABA Guideline 11.4.1 (C) for the proposition that the defense must not rely on the counsel's own observations and beliefs regarding the defendant's symptoms but rather investigate the defendant's medical and educational history. The court then notes 2003 ABA Guideline 10.7 which further describes the necessity of a mental health investigation. *Id.* at 291, n.1. Merritt goes on to argue that the majority simply flouts the holdings of *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 347 (2005), which recognize the ABA Guidelines as the normative standards for defense counsel; the opinion emphasizes the duty as articulated in the 1989 edition of the Guidelines to provide for neurological testing in appropriate circumstances. *Id.* at 293-94.

77. *Rompilla v. Beard*, 545 U.S. 374 (U.S. 2005)

The Supreme Court overturned the Third Circuit's decision in *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), and found the Pennsylvania Supreme Court's failure to find defense counsel ineffective objectively unreasonable. Specifically, the Court held that counsel was required to review the record of the defendant's previous conviction when they had been put on notice by the prosecution that the prior record was going to be introduced as aggravating evidence during sentencing. *Rompilla*, 545 U.S. at 377. In discussing the obligations of defense counsel as they were understood at the time of *Rompilla*'s trial, the opinion emphasizes that counsel is required to review material that the state will use against the defendant, *id.* at 375, and discusses the ABA Guidelines in detail:

In 1989, shortly after *Rompilla*'s trial, the ABA promulgated a set of Guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly forceful directive: "Counsel should make efforts

to secure information in the possession of the prosecution or law enforcement authorities, including police reports." Guideline 11.4.1.D.4. When the United States argues that Rompilla's defense counsel complied with these Guidelines, it focuses its attentions on a different Guideline, 11.4.1.D.2. Brief for United States as Amicus Curiae 20-21. Guideline 11.4.1.D.2 concerns practices for working with the defendant and potential witnesses, and the United States contends that it imposes no requirement to obtain any one particular type of record or information. *Id.* But this argument ignores the subsequent Guideline quoted above, which is in fact reprinted in the appendix to the United States' brief, that requires counsel to " 'make efforts to secure information in the possession of the prosecution or law enforcement authorities.'" Later, and current, ABA Guidelines (2003) relating to death penalty defense are even more explicit: "Counsel must ... investigate prior convictions ... that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction. "Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S. at 524 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" For reasons given in the text, no such further investigation was needed to point to the reasonable duty to look in the file in question here.

Id. at 387, n.7.

78. *Smith v. Mullin*, 379 F.3d 919 (10th Cir 2004)

The Tenth Circuit held that counsel was ineffective for not presenting evidence of defendant's mental retardation, brain damage, and troubled background in the penalty phase.

Looking to the United States Supreme Court in its analysis, the Tenth Circuit noted that "[t]he Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the (ABA) ... as guides to determining what is reasonable' performance." *Id.* at 942. (citations omitted). "Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase. See (2003) ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for [trial counsel] to omit this evidence from his case for mitigation.'" *Id.* (citations omitted).

79. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004)

The Supreme Court of Pennsylvania examined a number of claims for post-conviction relief presented by Williams, among them ineffective assistance of counsel, prosecutorial misconduct, and various due process violations. The Court held that none of the claims merited relief.

Justice Saylor dissented, arguing that Williams had established ineffective assistance of counsel at the penalty phase, primarily for failing to develop adequate mitigating evidence. Citing a reference to the 1989 ABA Guideline 11.4.1 (C) in *Wiggins v. Smith*, 539 U.S. 510

(2003), the opinion recognized defense counsel's "obligation to 'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Williams, 863 A.2d at 527 (citation omitted). Justice Saylor drew upon substantial support from the 2003 ABA Guidelines throughout his opinion, commenting that "[I]n my view, the drafters' claim that the Guidelines 'embody the current consensus about what is required to provide effective defense representation in capital cases' is not an exaggerated one. Id. at 527 n.6 (citation omitted). In particular the Saylor refers to 2003 ABA Guidelines 1.1, 4.1, 10.5, 10.7(A)(2), and 10.11.

The dissent pointed to a number of instances in which the conduct of defense counsel fell short of professional standards. Justice Saylor utilized 2003 ABA Guideline 4.1 in arguing that counsel was irresponsible in scheduling his first meeting with the defendant only one week before trial, id. at 528 n.7, that "competent counsel would have reviewed records from Appellant's other criminal proceedings," id. at 528, that a previous psychotic episode merited professional evaluation, id. at 528 n.8, and that counsel was unjustified in relying on his own opinion of the defendant's psychological state, id. at 528 n.9. Then, Saylor used 2003 ABA Guidelines 10.5 and 10.7(A)(2) to rebut counsel's suggestion that the defendant's adamant commitment to fighting the validity of his conviction excused a lack of penalty phase preparation. Id. at 531 n.17, n.19.

The dissent criticized the majority for too lightly disregarding "the potency of life-history and mental-health mitigation in terms of capital sentencing," claiming that such an approach is contrary to Supreme Court precedent and the ABA Guidelines. Id. at 533 (citation omitted). Justice Saylor explained his perspective on the role of mitigating evidence in the sentence process, quoting 2003 ABA Guideline 10.11: "None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]" Id. at 534, n.22 (citation omitted). Indeed, psychological evidence of the type at issue here would "provide some sort of explanation for Simmons's abhorrent behavior." Id. at 543, n.23 (relying on 2003 ABA Guideline 10.11 to support this contention).

Justice Nigro filed a separate dissent, agreeing with Justice Saylor that the defendant received ineffective assistance of counsel in the penalty phase. Id. at 524.

80. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir 2003)

In this capital case from Ohio, the Sixth Circuit granted a new penalty phase trial as the result of ineffective assistance of counsel. Defense counsel made no investigation into Hamblin's severely deprived and violent childhood or his psychological condition, and did nothing in preparation for the sentencing phase. The majority opinion opened with an analysis of the proper standard against which to measure counsel's performance. It looked to the Supreme Court's decision in Wiggins, noting that "[i]n its discussion of the 1989 ABA Guidelines for counsel in capital cases, the Court held that the Guidelines set the applicable standards of performance for

counsel Thus, the Wiggins case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases" (emphasis added). Id. at 486 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). The court then cited

1989 ABA Guidelines 11.4.1 and 11.8.6 describing counsel's duty to investigate and present mitigating evidence at both the guilt and sentencing phases of trial. The court went on to review several of its own prior decisions from the 1990s, concluding that "[o]ur analysis of counsel's obligations matches the standards of the 1989 Guidelines quoted by the Supreme Court in *Wiggins*." *Id.* at 486.

Although Hamblin's trial took place before publication of the 1989 Guidelines, the court explained that they apply nonetheless: [T]he standards merely represent a codification of longstanding, common sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland*. They are the same type of longstanding norms referred to in *Strickland* in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past. The Court in *Wiggins* clearly holds . . . that it is not making "new law" on the effective assistance of counsel" *Id.* at 487 (internal citations omitted). The court also noted that the "[n]ew 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 circumstances." *Id.* at 487. The court then quoted extensively from the Guidelines regarding the duty to investigate mitigating evidence. In concluding its discussion of the appropriate standards to use in evaluating counsel's performance, the Sixth Circuit explained that "[w]e cite the 1989 and 2003 ABA Guidelines simply because they are the clearest exposition of counsel's duties at the penalty phase of a capital case, duties that were recognized by this court as applicable [in] 1982." *Id.* at 488.

The court held that "[t]he record reveals that defense counsel's representation of Hamblin at the penalty stage of the case fell far short of prevailing standards of effective assistance of counsel as outlined in *Wiggins*, our previous cases and the 1989 and 2003 ABA Guidelines." *Id.* at 489. In its analysis, the court quoted from 2003 ABA Guideline 10.7, explaining that "ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested." *Id.* at 492.

Guideline 10.8 -- The Duty to Assert Legal Claims

1. *In re Reno on Habeas Corpus*, 283 P.3d 1181 (Cal. 2012)

The Supreme Court of California denied the petitioner's second habeas corpus petition and found that the second writ was an abuse of the writ process because of its voluminous size and abounding detail, and because it raised claims almost all of which are procedurally barred.

The Court then used this opinion as an opportunity to "establish some new ground rules for exhaustion petitions in capital cases that will speed the [Court's] consideration of them without unfairly limiting petitioners from raising (and exhausting) justifiably new claims." The Court partly relied on suggestions made by the parties and amici curiae to adopt measures by which petitions may be streamlined, making preparation and review of the petition simpler and more efficient.

On the issue of raising the procedurally barred claims, the petitioner and amici curiae point to the 2003 ABA Guidelines as the source of their ethical obligation to raise defaulted claims. The Court held that "those standards are not congruent with constitutional standards for effective legal representation," and are "inconsistent with this [C]ourt's standards." It pointed to ABA Guideline Section 10.15.1(C), its commentary, and 10.7(A)(1) as specific examples of ABA Guidelines that "require much more of counsel than is required by state or federal law governing ineffective assistance of counsel."

In reaching this determination, the Court agreed with the Supreme Court's characterization of the ABA Guidelines in *Bobby v. Van Hook* that:

"[r]estatements of professional standards . . . 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...," and "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."

The Court concluded that petitioner failed to demonstrate that counsel was deficient in failing to raise any of the nonrepetitive claims in the petition (i.e., claims prior counsel did not raise) or that the omission caused him prejudice. With regard to any new claims raised in the petition that the petitioner pointed to suggest that his counsel was constitutionally ineffective, the Court found them "wanting" and concluded-without citing to the ABA Guidelines-that petitioner's counsel was not deficient and the omissions did not cause him prejudice.

2. *Bolin v. Baker*, 2012 WL 2138160 (D. Nev. 2012)

The United States District Court for the District of Nevada granted petitioner Gregory Bolin's motion to dismiss counsel.

Bolin filed a pro-se motion asking for the dismissal of his counselor. Bolin and his defense counsel disagreed on the focus of habeas proceedings for guilt-phase or penalty phase relief. Bolin argued that there was an irreconcilable conflict between himself and defense counsel because of defense counsel failed to: 1) file a notice abandoning unexhausted claims; 2) communicate with petitioner; and 3) be honest with petitioner.

Defense counsel argued that under ABA Guidelines, he was required to investigate and present all arguably meritorious issues, even if this conflicted with his client's wishes. The court acknowledged that the Supreme Court uses the Guidelines as a way to measure reasonableness of defense counsel's performance. The district court opined that although defense counsel has competently represented his client, the lack of communication between defense counsel and petitioner, as well as petitioner's genuine concern that his case might be

dismissed because of counsel's actions, has led to a broken attorney-client relationship. The court held that under the Martel interests of justice standard, the lack of communication between client and attorney affected defense counsel's ability to pursue habeas relief on petitioner's behalf, and thus counsel was dismissed.

3. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

4. *Woods v. State*, 13 So. 3d 1 (Ala. Crim. App. 2007)

The Alabama Court of Criminal Appeals affirmed the defendant's conviction and remanded the case for the trial court to make specific findings as to the existence or nonexistence of nonstatutory mitigating circumstances. Although the case was on direct appeal, appellate counsel raised a claim of ineffective assistance of trial counsel during the penalty phase of trial. The defendant argued that his trial counsel failed to meet the standards set forth in the ABA Guidelines, failed to consult a mitigation expert, and failed to present additional evidence of mitigation. The court rejected the defendant's claim because it was not supported by the record.

5. *Kilgore v. State*, 933 So. 2d 1192 (Fla. Dist. Ct. App. 2006)

Florida's Second District Court of Appeal granted Dean Kilgore's appeal of an order from the Circuit Court of Polk County, which had dismissed the Office of the Capital Collateral Representative (CCRC) from representing Kilgore in a collateral attack challenging the validity of Kilgore's 1978 first-degree murder conviction which had been used as an aggravating factor in the penalty phase of his 1994 murder case. CCRC had been representing Kilgore in post-conviction for the 1994 conviction, for which he received the death penalty. The Circuit Court's order did not dismiss the underlying collateral proceeding, but dismissed

CCRC from the representation of Kilgore in that proceeding.

The Second District Court of Appeal also certified to the Florida Supreme Court "a question of great importance to the Florida Supreme Court...

Are counsel appointed to provide collateral representation to defendants sentenced to death, pursuant to Section 27.702, authorized to bring proceedings to attack the validity of a prior first-degree murder conviction that was used as a primary aggravator in the death sentencing phase?"

Id. at 1193.

The Court of Appeal certified the question because the Florida statute governing appointed counsel does not "explicitly deal with the situation where . . . a previous conviction is the primary aggravator for imposition of the death penalty, and to challenge the death penalty, the previous conviction must be challenged." Id. In certifying the question to the Florida Supreme Court, the Court of Appeal stated that, "in order to challenge the murder conviction aggravator, the prior judgment must have been set aside [and] that is the course that CCRC was attempting to take, and it is consistent with ABA Guidelines." Id. The Court of Appeal noted that CCRC's attempt to challenge Kilgore's previous first-degree murder conviction conformed with the requirements of the 2003 ABA Guidelines. The court also cited to the ABA Guidelines dealing with investigation (10.7), the duty to assert legal claims (10.8), and the duty of post-conviction counsel (10.15.1.E.4). Id.

As stated by the court, the Florida statute permits CCRC to challenge a death sentence as well as the conviction, and in this case one "method of attacking the sentence of death is to attack the primary aggravator, a prior first degree murder conviction." Id. The court noted the importance of this tactic, stating that "attacking an aggravating factor is a traditional and well-accepted method used to challenge death sentences." Id. The court cited the ABA Guidelines to show that the collateral attack of an aggravating factor is often necessary, noting 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. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Rev. ed. Feb. 2003) (10.8, Duty to Assert Legal Claims, and such obligations are extended to post-conviction counsel, 10.15.1.E.4). Failure to pursue such a well-established course of action can be used to assert an ineffective assistance of counsel claim, if there was a right to counsel in this context.

Id.

While serving a life sentence, Petitioner was charged with the murder of an inmate. Petitioner was convicted and during the penalty phase, a previous first-degree murder conviction was submitted by the State as an aggravator to justify the death sentence. The sentencing court sentenced Petitioner to death after finding two aggravating circumstances: (1) Petitioner was under sentence of imprisonment at the time he committed the murder; and (2) Petitioner had been previously convicted of a felony involving the use or threat of violence to the person

both of which are related to the previous first degree murder conviction.

Subsequently, the Office of the Capital Collateral Regional Counsel (CCRC) was appointed to represent Petitioner to collaterally challenge the first-degree murder conviction and death sentence. Having identified what counsel believed to be substantial grounds to challenge an important aggravator used by the State to justify a death sentence, CCRC sought to vacate the first-degree murder conviction based upon the holding in *Brady* requiring disclosure of exculpatory evidence, including impeachment evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963). In turn, however, the State filed a motion to bar CCRC from representing Petitioner in the first-degree murder case, and the circuit court granted the motion on the basis that Florida's statutory scheme for appointment of counsel did not authorize CCRC's representation in the non-capital case.

"The district court concluded that because Florida law required the prior judgment to be set aside in order for the aggravator to be challenged in the capital case, Petitioner was entitled to have effective counsel do what CCRC was attempting to do on his behalf, a course of action also consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)." *Kilgore* at 2201. However, the Supreme Court of Florida determined that while Petitioner himself is entitled to prosecute a collateral claim attacking a prior conviction utilized as an aggravator in his capital case, CCRC is not authorized to do so on his behalf since Florida's statute for appointment of counsel did not authorize CCRC's representation in a non-capital case.

6. *Lundgren v. Mitchell*, 440 F.3d 754 (6th Cir 2006)

The Sixth Circuit affirmed *Lundgren's* conviction and sentence, stating that defense's failure to present an insanity plea did not constitute ineffective assistance of counsel. In this case, both the majority and the dissent cited the ABA Guidelines. The majority cites to *Wiggins* and the ABA Guidelines in the context of discussing the reasonableness of counsel's decision: "More recent ABA Guidelines, which the United States Supreme Court has recognized as reflecting prevailing professional norms, emphasize 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.' *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Section 11.4.1(C), p. 93 (1989) and adding emphasis)." 440 F. 3d at 771.

The lengthy dissent cites both the 1989 and the 2003 ABA Guidelines in finding that the failure of *Lundgren's* counsel to present the insanity defense was "manifestly ineffective." Judge Gilbert Merritt's dissent quotes *Hamblin v. Mitchell*, 354 F. 3d 482, 487 (6th Cir. 2003), for the principle that the 2003 Guidelines "merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases." 440 F. 3d at 797. The dissent in *Lundgren* also went on to cite the Commentary to the 1989 and 2003 Guidelines: "The 2003 ABA Guidelines similarly counsel attorneys to 'consider all legal claims potentially available,' to 'thoroughly investigate the basis for each potential claim,' and to 'be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.'" ABA Guidelines 10.8(1)-(2), p. 86 (2003); *id.* at 10.8, commentary, p. 89." 440 F. 3d at 797.

7. *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006)

The Supreme Court of Utah found that defense counsel provided ineffective assistance during the portion of the proceedings where he was providing representation. As such, the court reversed the judgment and remanded the case to the trial court and sent instructions to set aside the relevant proceedings. The court found that defense counsel only spoke to the client about the case and the expected strategy once and repeatedly ignored or deliberately avoided contact from the defendant.

In citing the 2003 ABA Guidelines, the court stated that "courts frequently rely on the professional standards established by the ABA when determining the relevant professional norms under the first prong of the Strickland analysis." *Id.* at 512. The court also noted that the Supreme Court of the United States referred to the Guidelines as "prevailing norms of practice." The court specifically stated that it would "rely on the ABA Death Penalty Guidelines to the extent that they are relevant to our decision," *id.* at 513, because Utah's post-conviction do not contain any rules or procedures regarding counsel's performance, *id.* at 512.

The court stated that one of the main duties of defense counsel is to "maintain close contact with the client regarding litigation developments." *Id.* at 513 (citing ABA Guideline 10.15.1(E)(1)). The court also noted that post-conviction counsel has additional obligations of investigating the performance of trial counsel as well as investigating the facts underlying the conviction and the sentence, referring to the comments to ABA Guideline 10.15.1. *Id.*

8. *Green v. Johnson*, 2006 WL 3746138 (E.D. Va. 2006)

Magistrate Judge Miller of the Eastern District of Virginia recommended denial of petitioner Kevin Green's petition for a writ of habeas corpus. Green alleged that his counsel was ineffective for failing to preserve his objection to the trial court's denial of his request for a change of venue. Reviewing the claim under the Strickland standard, Judge Miller noted that the Supreme Court has identified the ABA Guidelines as "appropriate guides for determining whether counsels' performance was reasonable." Citing to 2003 Guideline 10.8(A)(3)(c), he found that the ABA Guidelines "require defense counsel to properly preserve a motion to change venue in order to avoid default." Consequently, he found that counsel "failed the competence prong" of Strickland.

Green also alleged that counsel was ineffective for failure to move for the appointment of a mitigation expert. Judge Miller noted that Guideline 4.1(A)(1) "mandates that a defense team should consist of no fewer than two attorneys, an investigator and a mitigation expert" and that "a mitigation expert is undoubtedly of substantial use in the sentencing phase of a capital trial." He concluded, "Because the decision not to request a mitigation expert was clearly a mistake, and because prevailing professional norms (as evinced by the ABA Guideline) recommend a mitigation expert, this Court finds that Green's counsels' performance fails the competence prong of the Strickland test."

Despite these findings of deficient performance, Judge Miller concluded that counsel's performance did not prejudice the defendant and therefore recommended denial of his ineffective assistance of counsel claims.

9. Cone v. Bell, 359 F.3d 785 (6th Cir 2004)

The Sixth Circuit granted a new penalty phase proceeding to Cone on the grounds that one of the aggravating factors found by the jury--that the crime was "especially heinous, atrocious or cruel"--was unconstitutionally vague. The majority found that Cone had not procedurally defaulted on his Eighth Amendment claim because the State Supreme Court implicitly ruled on it.

In his concurring opinion, Judge Merritt argued that even had Cone procedurally defaulted on the claim, his attorney's failure to raise the issue and preserve it for review constituted ineffective assistance of counsel. Judge Merritt highlighted trial counsel's failure to object to the aggravator despite a recent Supreme Court decision invalidating similar language and found support for his opinion in the 2003 ABA Guidelines, particularly 10.8:

This conclusion is further supported by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. As pointed out in Strickland, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688, 104 S.Ct. 2052. American Bar Association standards are only "guides" and not "rules" for what constitutes ineffective assistance of counsel, *id.*, but in this case the guidelines speak clearly:

One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial. For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 91-92 (rev. ed.2003) (internal quotations omitted).

In this case, not only did Cone's counsel fail to preserve "any and all" errors, he failed to preserve a claim based on binding Supreme Court precedent that was a sure winner as a matter of federal law and that, given the role of the "heinous, atrocious, and cruel" aggravator in the jury's deliberation of the death sentence, may well have saved his client's life. There can be no doubt that this error was "sufficiently egregious and prejudicial" to constitute cause for the procedural default of that claim."

359 F.3d at 803-04. Judge Merritt also pointed out that, although the 2003 edition of the Guidelines had not been published at the time of Cone's trial, his citation to them was appropriate because they are "an articulation of long-established 'fundamental' duties of trial counsel." *Id.* at 804 n.2 (internal citations omitted).

In subsequent history, the U.S. Supreme Court stated that the Tennessee Supreme Court's affirmance of the death sentence imposed based on jury's finding that murders were "especially heinous, atrocious, or cruel" was not contrary to clearly established Supreme Court precedent. See *Bell v. Cone*, 543 U.S. 447 (2005).

Guideline 10.9.1 -- The Duty to Seek an Agreed-upon Disposition

1. Jackson v. Florida, 127 So.3d 447 (Fla. 2013)

The Supreme Court of Florida affirmed the post-conviction court's denial of relief, and thus denied Appellant Michael James Jackson's habeas petition. Jackson was convicted for the first-degree murders of Carol and James Sumner and sentenced to death.

Jackson argued that by not approaching the victims' family members and asking them to plead for mercy from the prosecutor, his trial counsel provided ineffective assistance of counsel. In support of his arguments, Jackson cited to the U.S. Supreme Court's discussion of the ABA Guidelines in *Wiggins v. Smith*. Jackson referred to the commentary for 2003 Guideline 10.9.1 that discusses how plea negotiations in death penalty cases often involve contact with a victim's family members. Without a detailed discussion of the issue, the Supreme Court of Florida noted that the Guidelines do not appear to address a duty on behalf of counsel to pursue victim outreach.

However, the court later cited the 1989 Guidelines, stating that "Counsel should be creative in proposing resolutions that may satisfy the needs of the victim's family, including . . . arranging an apology." Jackson admitted that at the time of trial, he was unwilling to apologize for his involvement in the murders. Defense counsel testified that Jackson was against presenting any mitigation evidence and was adamant that he was innocent. The court held that defense counsel were reasonable in their decision not to pursue victim outreach as part of trial strategy and denied relief.

2. Jackson v. Florida, 2013 WL 5269865 (Fla. 2013)

The Supreme Court of Florida affirmed the post-conviction court's denial of relief, and thus denied appellant Michael James Jackson's habeas petition. Jackson was convicted for the first-degree murders of Carol and James Sumner and sentenced to death.

Jackson argued that by not approaching the victims' family members and asking them to plead for mercy from the prosecutor, his trial counsel denied him his Sixth Amendment right to effective representation. Jackson cited to the case of *Wiggins v. Smith* in support of his argument. In *Wiggins*, the Supreme Court held that trial counsel did not meet the ABA Guidelines' standards for capital defense work. Jackson referred to the Guidelines' commentary that discussed how plea negotiations in death penalty cases often involve contact with a victim's family members. The Supreme Court of Florida noted that the Guidelines do not appear to address a duty on behalf of counsel to pursue victim outreach.

However, the court later cited the Guidelines, stating that "Counsel should be creative in proposing resolutions that may satisfy the needs of the victim's family, including . . . arranging an apology." Jackson admitted that at the time of trial, he was unwilling to apologize for his involvement in the murders. Defense counsel testified that Jackson was against presenting any mitigation evidence and was adamant that he was innocent. The court held that defense counsel were reasonable in their decision not to pursue victim outreach as part of trial strategy.

Jackson also argued that his attorneys should have presented the testimony of the victims' daughter. The daughter made statements against the death penalty at Jackson's co-defendant's trial. The Supreme Court of Florida concluded that she would not have been allowed to testify about her feelings towards the death penalty during the penalty phase of Jackson's trial, and thus trial counsel were not ineffective for not attempting victim outreach with her. Even if defense counsel had participated in victim outreach opportunities and persuaded the victims' family to approach the prosecutor to plead for a reduced sentence, Jackson did not present evidence that there was a reasonable probability that the State would have agreed to any such proposal, and thus Jackson did not suffer prejudice.

3. *Nesbit v. State*, 2013 WL 1282326 (Tenn. Crim. App. 2013)

The Tennessee Court of Criminal Appeals affirmed the judgment denying Clarence Nesbit's petition for post-conviction relief as it related to the guilt phase of his trial but granting a new sentencing hearing.

William Massey, a death penalty litigation expert, testified during an evidentiary hearing. Massey identified a number of areas where counsel failed to comply with Tennessee and ABA counsel standards, including failure to conduct an adequate investigation, failure to inform the client of plea offers, and failure to retain the necessary experts. He testified that counsel failed to uncover available evidence that would have "dilute[d]" the impact of the State's aggravating evidence, including an allegation that the defendant engaged in "satanic worship." [Ed. note: This subject is covered in Guidelines 10.7 and 10.11, although those guidelines are not specifically referenced by number in the opinion].

Massey also testified that counsel failed to inform their client about plea offers as required by the ABA Guidelines. [Ed. note: this subject is covered in Guideline 10.9.1, although it is not cited by number in the opinion.] Here, the twenty-five year plea offer should have been discussed promptly, and counsel should have spent more than fifteen minutes discussing the offer with an individual with a low I.Q. and who was unfamiliar with the criminal justice system. Massey stated that conveying the substance of the offer to the client was only part of the ABA Guidelines requirement. The Guidelines also instruct attorneys to keep the client apprised of the theory of the case, the proof that supports the chosen theory, the State's evidence, how the defense could rebut the State's evidence, and the probability of the client's success at trial.

Massey also stated that "in order to qualify with the new ABA Guidelines and 4.1, it required that at least one team member be qualified to screen for mental or psychological disorders or impairments." Massey argued that a forensic psychologist would be qualified for that duty. Defense counsel did not necessarily give ineffective assistance of counsel without the forensic psychologist, but it depended on whether the forensic psychologists' absence and the subsequent lack of information caused prejudice. Massey stated that the Guidelines and the courts were telling defense counsel to take these necessary steps in death penalty cases, even if the defendant did not show any signs of mental health issues or defects.

Upon Massey's testimony, the post-conviction court granted sentencing relief because defense

counsel had failed to investigate, prepare, and present mitigation evidence, and therefore Nesbit had received ineffective assistance of trial counsel.

4. *United States v. Akbar*, 2012 CCA LEXIS 247 (A. Ct. Crim. App. 2012)

The United States Army Criminal Court of Appeals affirmed the lower court's guilt and sentencing holding, denying the petitioner a new trial. *Id.* at 102. First, the court discussed the 2003 Guidelines generally when deciding whether defense counsel was qualified to handle a capital murder trial despite never having litigated a capital case. *Id.* at 33-34. The court refused to set any qualification standards for counsel to represent a capital client. *Id.* at 33. Instead, the court insisted that the court would only review counsel's actual performance. *Id.* at 33-34. To evaluate counsel's performance, the court used Guideline 10.9.1 to support the reasoning that utilizing a strategy designed to avoid the death penalty rather than prove innocence is permissible. *Id.* at 59. The court found that by arguing against the intent requirement using the prisoner's mental illness, counsel was able to argue against guilt while preserving the mental illness issue for mitigation. *Id.* Therefore, counsel's performance conformed to the necessary standards and did not constitute ineffective assistance of counsel. *Id.*

5. *Wilson v. State*, 81 So. 3d 1067 (Miss. 2012)

The Mississippi Supreme Court, granted in part and denied in part Wilson's motion for post-conviction relief, finding that he was entitled to an evidentiary hearing on certain grounds.

Wilson contended that his trial counsel was ineffective for failing to communicate or form a relationship with him, failing to properly investigate his case, and failing to prepare for the penalty phase of his trial. Wilson argued that these errors resulted in his loss of the benefit of the plea agreement he had reached with the state.

In assessing this claim, the Mississippi Supreme Court noted that the ABA Guidelines have long been looked to for determining reasonableness of attorney performance. The Mississippi Supreme Court, quoting the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (1073), said, "Although they are 'only guides' . . . and not 'inexorable commands,' . . . these standards may be valuable measures of the prevailing professional norms of effective representation. . . ." (internal citations omitted). The court further noted that in order to present mitigating evidence, an adequate investigation must be conducted.

Both of Wilson's attorneys signed affidavits in support of his post-conviction motion. One of his attorney's cited to the ABA Guidelines in his affidavit, mentioning that he learned at a capital defense seminar that a defense attorney should spend 400 hours on mitigation, and that he doubted that much time was spent on mitigation in Wilson's case.

Based on Wilson's affidavit, the attorneys' affidavits, and the direct-appeal record, the Mississippi Supreme Court found counsel's performance deficient. The Mississippi Supreme Court found that Wilson's attorneys conducted "virtually no investigation to obtain mitigation evidence," and that because of this, his counsel "had no hope of knowing what his defenses might be or what his mitigation evidence might be," and granted Wilson an evidentiary

hearing on the issue. The court further noted that the ABA guidelines require counsel to "know and fully explain to the client: . . . the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority. . . ." ABA Guideline 10.9.1.B.7. Because of this, the court found this issue to have merit and granted Wilson an evidentiary hearing on the issue.

6. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

7. *Miller v. Alabama*, 99 So. 3d 349 (Ala. Ct. Crim. App. 2011)

The Alabama Court of Criminal Appeals affirmed the circuit court's findings that the defendant failed to prove his underlying allegations of ineffective assistance of trial counsel had merit. The defendant alleged that his trial counsel's investigation into the mitigating evidence failed to comply with the ABA guidelines for conducting an appropriate investigation into potential mitigating evidence in death-cases because trial counsel failed to: (1) adequately interview the defendant and the defendant's close relatives; and (2) collect the defendant's employment, educational, and medical records, and medical records of his numerous family members with documented serious mental illness.

The court disagreed. The court first noted that whether the defendant's trial counsel's investigation into potential mitigating evidence adhered to the ABA Guidelines was not dispositive of whether counsel's investigation was reasonable. Citing *Jones v. State*, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007), the court reasoned that the ABA Guidelines may "'provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative.'" Then, without discussing the ABA Guidelines, the court agreed with the circuit court's findings that the defendant's counsel's performance was not deficient under

Strickland and that the defendant failed to establish the requisite prejudice.

8. Henry v. McDonough, 2011 U.S. Dist. LEXIS 14343 (M.D. Fla. 2011)

Petitioner filed for federal habeas relief claiming ineffective assistance of counsel during the guilt phase of trial because counsel disclosed too much prejudicial information about Petitioner's past. The Court determined that counsel made a tactical decision in disclosing Petitioner's previous murder convictions and denied Petitioner habeas relief. The Court cited the rationale in Florida v. Nixon, 543 U.S. 175 (2004):

Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. . . . In such cases, 'avoiding execution [may be] the best and only realistic result possible.' ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.9.1, Commentary (rev. ed. 2003).

9. Overstreet v. Superintendent, 2011 U.S. Dist. LEXIS 22175 (N.D. Ind. 2011)

Petitioner filed a federal habeas claim, including 11 grounds for relief which consisted of many varying claims of ineffective assistance of counsel. Discussion of ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases relates to Petitioner's claim that counsel was ineffective for failure to meaningfully convey to Petitioner the State's offer of a plea agreement. Petitioner argued that at the time he was told about the plea offer he was "acutely psychotic" and unable to effectively evaluate the offer. Id. at *3.

Throughout the trial process, Petitioner refused to accept the plea agreement because he claimed he could not remember the crime and therefore did not want to admit doing something of which he had no memory. Petitioner asserted that trial counsel should have asked for an extension to accept the plea agreement, but the Court decided that this argument was insignificant because there was no indication that an extension would have benefited Petitioner. Finally, Petitioner asserted that trial counsel had an obligation to continue using their best efforts in regards to the plea offer because according to 2003 ABA Guideline 10.9.1 (e), a "client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest." However, the Court denied this argument for two reasons. First, 2003 ABA Guidelines are not applicable to a trial that occurred prior to their creation. See Bobby v. Van Hook, 130 S.Ct. 13 (2009). Second, Indiana does not accept "best interest" or Alford pleas, so Petitioner could not have plead guilty based on the facts because he had no memory of the crime. See Carter v. State, 739 N.E. 2d 126, 128-29 (Ind. 2000). Ultimately, Petitioner's federal habeas claim was denied.

10. Post v. Bradshaw, 621 F.3d 406 (6th Cir 2010)

The 6th Circuit Court of Appeals affirmed the Northern District of Ohio's denial of post-conviction relief for Post. Post was initially offered a plea agreement where he would be sentenced to life in prison, but he refused to plead guilty. The offer was withdrawn. Post's counsel later persuaded him to plead no contest in front of a three judge panel although this

time there was no agreement that the state would not seek death. The panel found him guilty and he was sentenced to death. In his post-conviction petitions, Post claimed that his counsel was ineffective for advising him to plead no contest, citing to 1989 Guideline 11.6.2. The Ohio Supreme Court found that counsel's strategy was professionally reasonable because 1) Post was "virtually certain" to be found guilty if he went to trial and 2) pleading no contest would preserve an issue for appeal. The 6th Circuit found both of these rationales to be unreasonable applications of Strickland. The court went on to conduct a de novo review, however, and found a separate rationale that rendered counsel's performance professionally reasonable: counsel's hope that the plea would be considered a mitigating factor. The court explicitly rejected Post's argument that, according to the Guidelines, it is per se ineffective assistance of counsel to plead no contest without a guaranteed life sentence. It cited to Van Hook in saying that the Guidelines are "not inexorable commands" but "only guides" and found that counsel's performance was reasonable under the circumstances.

Judge Cole issued a dissenting opinion and discussed the issue of ineffectiveness and the ABA Guidelines at length. He found that Post's counsel was ineffective for failing to secure a life sentence before advising him to plead no contest. He referenced the language of both the 1989 and 2003 ABA Guidelines (including 1989 Guideline 11.6.3), and cited to the US Supreme Court's language in *Florida v. Nixon*: "[P]leading guilty [to a capital offense] without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant" (citing to the 2003 ABA Guidelines). Cole also referenced further language from *Nixon* and the ABA Guidelines (10.9.1 cmt) saying that attorneys often do face daunting challenges, particularly when the defendant's guilt is clear. But in those cases "avoiding execution [may be] the best and only realistic result possible." Based on this, Cole found that "the Constitution required Post's counsel to make a strategic judgments based on something more concrete than an unsubstantiated hope that his no-contest plea would be considered a mitigating factor, particularly because their client's life was on the line." He noted that the majority provided no reason why the ABA Guidelines should be disregarded or why there was any reason for Post's counsel to think that a plea of no contest would be a mitigating factor. He said:

In this situation, the ABA Guidelines' recommendation is clear. In following their guidance we do not, as the majority seems to suggest, need to adopt them as per se rules. Rather, as both this Court and the Supreme Court has stated repeatedly, we look to them for guidance in determining whether counsel's representation was constitutionally inadequate.

. . . .
I imagine that Post may have gained some comfort in knowing that his attorney hoped his no-contest plea would be treated as a mitigating factor. But this comfort was short-lived. Post's counsel's foremost duty in that situation was not to keep hope alive, but to keep Post alive. Viewed in this light, it certainly was unreasonable to advise him to plead no contest and waive all of his trial rights without a guarantee, or at least some concrete indication, that doing so might help spare his life.

11. *Lee v. State*, 44 So. 3d 1145 (Ala. Crim. App. 2009)

The Alabama Court of Criminal Appeals affirmed the circuit court's summary denial of the appellant's petition for post-conviction relief. In discussing the petitioner's ineffective

assistance of counsel claim premised upon trial counsel's conceding the petitioner's guilt without first obtaining the petitioner's consent, the court examined *Florida v. Nixon*, 543 U.S. 175 (2004), where the U.S. Supreme Court noted that the ABA Guidelines recognize that endeavoring to avoid execution may be "the best and only realistic result possible" in a death penalty case. (Quoting 2003 ABA Guidelines, Section 10.9.1, cmt.) The court then concluded that "[i]n light of the overwhelming evidence presented against Lee, counsel's strategy was not unreasonable."

12. *State v. Perez*, 920 N.E.2d 104 (Ohio 2009)

On direct appeal, the Ohio Supreme Court affirmed the defendant's death sentence. In his appeal, Perez claimed that his trial counsel were ineffective. During his opening statement, Perez's counsel conceded that Perez had confessed and that there was no real dispute about the facts. The court held that conceding guilt in a capital case does not necessarily constitute deficient performance. In support of this proposition the court cited the Supreme Court's opinion in *Florida v. Nixon* which referred to 2003 Guideline 10.9.1:

Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. * * * In such cases, 'avoiding execution [may be] the best and only realistic result possible.'" *Nixon*, 543 U.S. at 191, 125 S.Ct. 551, 160 L.Ed.2d 565, quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Section 10.9.1, Commentary (Rev.Ed.2003), reprinted in 31 Hofstra L.Rev. (2003) 913, 1040.

Id. at 20.

13. *Adams v. Quarterman*, 2009 WL 7445295 (S.D. Tex. 2009)

The U.S. District Court for the Southern District of Texas denied petitioner Timothy Wayne Adams' petition for habeas corpus relief. Among others, Adams raised a claim that he received ineffective assistance of counsel "because trial counsel had 'no trial strategy during the trial's guilt/innocence phase,' especially with respect to his guilty plea." He argued that counsel failed to analyze the benefit of the decision to plead guilty and failed to prevent details of the crimes from being presented to the jury following the plea. Trial counsel testified that they had few other options after the court refused to suppress Adams' confession, and their strategy was to focus on Adams' mental state at the time of the offense. The court noted that the defense strategy "comports with well-accepted trial practice" quoting the commentary to 2003 Guideline 10.9.1: "Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, 'avoiding execution [may be] the best and only realistic result possible.'" The court went on to note that Adams did not offer an alternative strategy or even challenge the strategy itself, only defense counsel's efficacy in carrying it out. The court found that counsel's performance was not deficient and also that Adams had failed to show prejudice, because the same information would have been presented to the jury at the punishment phase. Accordingly, the court denied relief.

14. Henry v. State, 948 So.2d 609 (Fla. 2006)

The Supreme Court of Florida affirmed the circuit court's denial his motion for post-conviction relief based on ineffective assistance of counsel. The court concluded that counsel's strategy to disclose at guilt phase the defendant's prior murder conviction and death sentence "entailed significant risk to the defendant" but concluded that it did not fall below the "wide range of professionally competent assistance." As part of its Strickland analysis, the court noted the "importance of preparing for the penalty phase" and how this can affect strategic decisions. Quoting Florida v. Nixon's citation to 2003 Guideline 10.9.1, the court found that in cases where evidence of guilt is overwhelming, "avoiding execution [may be] the best and only realist result possible" and therefore "in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed." The court concluded that counsel's performance was not constitutionally deficient.

Concurring specially to respond to Judge Anstead's dissent, Judge Wells wrote that the dissent failed to give appropriate deference to both trial counsel and the trial judge. In support of this conclusion, he quoted the same language as the majority from Nixon, citing to ABA Guideline 10.9.1. He concluded that it is reasonable strategy for defense counsel to focus on the penalty phase in some cases.

15. State v. Johnson, 858 N.E.2d 1144 (Ohio 2006)

On direct appeal, the Supreme Court of Ohio affirmed appellant Johnson's conviction and death sentence. Johnson raised several claims of error including ineffective assistance of counsel at both the guilt and penalty phases of trial. With respect to the guilt phase, he alleged that counsel was ineffective for admitting to the jury that he had killed the victim. The court found that a concession of guilt is not necessarily deficient performance. Citing to 2003 Guideline 10.9.1 and Florida v. Nixon, the court said that "Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. In such cases, 'avoiding execution [may be] the best and only realistic result possible.'" The court "decline[d] to second-guess" counsel's strategy and also noted that Johnson could not demonstrate how he was prejudiced by counsel's actions. It therefore denied the claim.

16. Murphy v. Bradshaw, 2006 WL 5575813 (S.D. Ohio 2006)

Magistrate Judge Michael Merz, writing for the U.S. District Court for the Southern District of Ohio recommended dismissal of petitioner Ulysses Murphy's petition for a writ of habeas corpus. Among other claims, Murphy raised several claims of ineffective assistance of counsel. In one claim, he alleged that his counsel were ineffective for following a strategy he opposed and which amounted to a guilty plea. The court rejected this claim based on the Supreme Court's decision in Florida v. Nixon. Finding support in Nixon, the court discussed the "unique challenges" facing capital counsel and quoted Nixon's statement that "In such cases [when the evidence is overwhelming and the crime heinous], 'avoiding execution [may be] the best and only realistic result possible.' ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.9.1, Commentary (rev.ed.2003)."

Murphy also alleged that his counsel was ineffective for failing to conduct a multi-generational mitigation investigation, citing to the 2003 Guidelines (ed. note: although not specified by the court, the instruction to conduct this investigation is found in Guidelines 10.7 and 10.11). Citing to 1989 Guidelines 11.4.1, 11.8.3, and 11.8.6, the court rejected Murphy's reliance on these guidelines, finding that the 2003 Guidelines were "were not in existence during his 1998 trial" and that there is "similar direction to counsel in the 1989 predecessor." While dismissive of the importance of such investigation, the court ultimately concluded that the claim was procedurally defaulted.

17. Florida v. Nixon, 543 U.S. 175 (U.S. 2004)

The Supreme Court held that trial counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance ineffective. The Court noted that counsel's effectiveness must be evaluated under Strickland v. Washington's standard: whether "counsel's representation 'fell below an objective standard of reasonableness'." 543 U.S. at 178, citing Strickland v. Washington, 466 U.S. 668, 688 (1984). Justice Ginsburg's decision notes that, under the facts of this particular case, "the gravity of the potential sentence in a capital trial and the proceeding's two phase structure vitally affect counsel's strategic calculus In such cases, 'avoiding execution [may be] the best and only realistic result possible.'" Nixon, 543 U.S. at 191 (citing the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Section 10.9.1, Commentary). The Court further cites the Guidelines to support the premise that "pleading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant." Id. at 191 n.6.

Guideline 10.10.1 -- Trial Preparation Overall

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

Johnson sought habeas relief from several 2005 convictions, raising sixty-four grounds for relief, forty-eight of which were claims of ineffective assistance of counsel claims. Of those claims, relief was ultimately granted on four of the IAC claims. The ABA Guidelines were discussed both generally and in the context of two of Johnson's IAC claims: one on which she got relief, one on which she did not get relief.

The District Court, citing to Van Hook, explained that the Supreme Court has said that the guidelines are "useful as 'guides' to what reasonableness [of counsel's performance] entails, but only to the extent they describe the professional norms prevailing when the representation took place." (internal citations omitted). The District Court said that the Supreme Court's decision in Wiggins v. Smith said that the ABA standards are "only guides," and the District Court has since "regarded them as such."

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

(internal citations omitted). The court considered the Guidelines to be guides as to whether counsel's choices were objectively reasonable "subject to my determination of whether specific ABA Guidelines are so detailed that they interfere with the constitutionally protected independence of counsel or restrict counsel's wide latitude to make tactical decisions."

Johnson raised several allegations with regard to errors about her mental state at the time of the offense arising from her trial counsel's failure to investigate, prepare, and present mitigating evidence. The District Court, cited to the Eighth Circuit Court of Appeals decision in *Ortiz v. United States* and noted that the ABA standards in effect during Ortiz's trial, "are a useful guide in this case, [and] provide [that] '[c]ounsel should conduct independent investigations relating to the . . . penalty phase of a capital trial . . . regardless of any initial assertion by the client that mitigation is not to be offered . . . [and] this investigation should comprise efforts to discover all reasonably available mitigating evidence.'" The court, further citing to the Guidelines as quoted in *Ortiz*, noted that they require counsel to interview potential witnesses that may be familiar with client history that might affect mitigating evidence, as well as any members of the victim's family that would not want the client sentenced to death. Citing to the commentary of Guideline 11.4.1, the court said that the duty to investigate "is not negated by the expressed desires of a client." (internal citations omitted).

The court also discussed the ABA guidelines with respect to Johnson's claim that trial counsel was ineffective for failing to investigate and present evidence of her mental state at the time of the offenses. The District Court found the performance of Johnson's counsel was not reasonable. "Here, trial counsel's preparation for the mitigation phase not only was not 'ideal,' the record is clear that no reasonable attorney would have failed to pursue further evidence." Counsel's "pulling the plug" on the investigation was "not based on any advice of the experts, but contrary to it." The District Court further found that trial counsel ignored trial experts' suggestions about avenues to develop an "appropriate and effective mental health mitigation case." The court further found that if counsel's decision was strategic, "it was the worst strategic decision by any defense counsel that I have ever seen in my entire career: It effectively doomed Johnson's mitigation case from the start."

The District Court concluded that counsel's deficient performance prejudiced Johnson, and thus, she was entitled to relief from the mitigation phase verdict.

2. *Ivy v. State*, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from

being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

3. *Mendoza v. Thaler*, 2012 U.S. Dist. LEXIS 140645 (E.D. Tex. 2012)

The United States Magistrate Judge reviewed petitioner's for a writ of habeas corpus under Section 2254 and prepared a report and recommendation recommending that the District Court for the Eastern District of Texas deny petitioner's claims of ineffective assistance of counsel. Petitioner argued his counsel was constitutionally ineffective for failing (1) to obtain a comprehensive psycho-social history so as to put forth a unified defense theory in the guilt-determination and the penalty-determination phase; (2) to consider, investigate, and present condition-of-the-mind evidence to negate the mens rea element in the guilt-determination phase of his trial.; (3) to adequately investigate and develop crucial mitigating evidence; and (4) to present testimony to support a sentence less than death and to give a favorable opinion concerning the petitioner's risk assessment.

The magistrate rejected petitioner's claim that his counsel failure to put forth a unified defense theory in the guilt-determination and the penalty-determination phase demonstrated that further investigation into his psycho-social history was warranted. Citing *Strickland*, *Wiggins*, and the ABA Guidelines, the magistrate recognized that counsel in capital cases have a duty to conduct a reasonable investigation into the background of their client prior to making tactical decisions about what mitigation theories to advance and what mitigating evidence to present. Specifically, the magistrate noted that ABA Guideline Section 10.10.1 provides that as the information from the investigation becomes available, counsel should formulate a defense theory and counsel should seek a theory that will be effective in connection with both the guilt determination and the punishment-determination phase of the trial. The magistrate accepted the petitioner's thesis that if defense counsel's guilt-determination phase strategy is inconsistent with his punishment-determination phase strategy, he probably ought not end his investigation into possible defenses. In this case, however, the magistrate-without additional reasoning-found that the defense theories in petitioner's trial counsel's guilt-determination phase and punishment-determination phase were in no way inconsistent as petitioner contended. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that this counsel failed to consider, investigate, and present condition-of-the-mind evidence to negate the mens rea element. The magistrate recognized that defense counsel-based on their own observations of the petitioner and from their consultations with the petitioner's mental-health expert-they did not believe that a defense of a mental disorder which negated the intent to kill was viable, and therefore did not

pursue further investigation of this issue. The magistrate also recognized that other mental health professionals revealed evidence of petitioner's brain damage and mental illness. In this case, the magistrate found that petitioner's counsel's decision not to pursue further investigation into a defense of the lack of mens rea is not deficient. Citing ABA Guideline Section 4.1, the magistrate noted that the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments to assist the jury in understanding the effects of these impairments on the defendant's judgment and impulse control. In this case, the magistrate reasoned that although other mental health professionals revealed evidence of petitioner's brain damage and mental illness their statements fall well short of suggesting that any competent mental health expert would have recommended further testing. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that his counsel failed to adequately investigate and develop crucial mitigating evidence. Citing ABA Guideline Section 10.11, the magistrate recognized that in situations where the mental and emotional functioning of the defendant is part of the mitigation case, the normal practice should be to investigate the defendant's complete social history, from before conception to the present. In this case, the magistrate found that petitioner's counsel-based upon their investigation-formulated the mitigation theory that petitioner fell in with a bad crowd and engaged in substance abuse and other self-destructive behavior as a result of loneliness and alienation caused by his father's absences and mental illness; that there as a causal relationship between these events but did not cite to "attachment disorder," a recognized psychological disorder. The magistrate reasoned that expert testimony as to a recognized disorder would not be required for the mitigation theory to be persuasive. And, when viewed deferentially, the magistrate determined that counsel's judgment that their mitigation theory was strong enough that further investigation into petitioner's psycho-social history was not necessary and was not unreasonable. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that his counsel failed to present testimony to support a sentence less than death. Citing Strickland but not the ABA Guidelines, the magistrate recognized that while not all of petitioner's four mitigation experts who were knowledgeable about the issues of future dangerousness and mitigation testified, trial counsel's decision regarding examination and presentation of some of the witnesses and evidence cannot be found deficient as long as the choices are the result of a conscious and informed decision on trial tactics. In the present case, the magistrate found that petitioner's counsel's stated reasons for their choices as to which mitigation experts would testify at the punishment-determination phase of his trial appear to have been conscious and informed; therefore, petitioner cannot rebut the presumption that his counsel's conduct might be considered sound strategy, and within the wide range of professionally competent assistance. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

4. *Mendoza v. State*, 87 So. 3d 644 (Fla. 2011)

On appeal to the Florida Supreme Court, *Mendoza* was denied postconviction relief from his death sentence on claims of ineffective assistance of counsel during the guilt and sentencing phase, among others. *Mendoza* relied on the finding in *Wiggins v. Smith*, that the 2003 ABA

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases "supply a norm as to what amounts to 'reasonable' standards of representation in a capital case." 539 U.S. 510, 524 (2003). Specifically, Mendoza asserted that his counsel's inconsistent statements to the jury were inconsistent with 2003 ABA Guideline 10.10.1, providing that counsel should formulate an internally consistent theory of the case. Mendoza, at *15-16. However, the Florida Supreme Court insisted that while the ABA Guidelines were "guides to determining what is reasonable," they were "only guides." See *Strickland v. Washington*, 466 U.S. 668 at 688 (1984). "The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's Strickland analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence." Mendoza, at *17. Because the Court could not find a showing that Mendoza's counsel was deficient, he was denied postconviction relief.

5. *Eaton v. State*, 192 P.3d 36 (Wyo. 2008)

The court affirmed the trial court's conviction and death sentence. Inter alia, that appellant argued that he received ineffective counsel at both trial and sentencing that failed to meet the ABA guidelines. Specifically: Guideline 2.1 (jurisdictional plan), 10.5 (client relationship) and 10.10 (trial preparation overall). The court noted that although the ABA guidelines are not "black-letter rules, they are guidelines of significance that we consider in our review of this case." *Id.* at 119. Following *Strickland*, the court noted with regards to strategic trial choices that "a heavy measure of deference [should be given] to counsel's judgments." *Id.* The court found that the Wyoming's lack of a formal death penalty plan did not have "a dispositive effect on this case." *Id.* Although the defense team had difficulties working with Eaton (including a mitigation specialist who declined to meet with him again after her first meeting), the assistant defense attorney was "eventually able to develop a working relationship with Eaton." *Id.* at 120. The court noted that Eaton was most critical of the theory of defense that was chosen. But the court held that "juries have minds of their own, and a theory such as that propounded by the defense team was as good as anything we can think of, given the circumstances of this case. Appellate counsel offer no more compelling theory that might have been pursued. As required by the ABA Guidelines, the theory did provide consistency between the guilt/innocence and penalty phases."

With respect to Eaton's mitigation complaints, the Court opinion details an extensive comparison of the proposed additional mitigation facts (see *id.* at 143 - 172) and those that were presented in the county court. The court noted, inter alia, that the new evidence was "cumulative to similar evidence that that trial counsel presented in the sentencing phase." *Id.* at 155 and that any failure by trial counsel to properly prepare their mitigation witnesses did not render "a breakdown in the adversary process." *Id.* at 166.

Guideline 10.11 -- The Defense Case Concerning Penalty

1. *United States v. Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. 2013)

A general court-martial found appellant Andrew Witt guilty of premeditated murder and attempted premeditated murder. He was sentenced to death.

On appeal, Witt raised eighty-eight issues. The U.S. Air Force Court of Criminal Appeals affirmed the findings but set aside the sentence, and returned the record of the trial to the Judge Advocate General for remand to the convening authority.

Appellant argued that his defense counsel were not qualified to represent him because they did not satisfy the ABA Guidelines. Appellant argued that the ABA Guidelines were binding on military and civilian defense counsel in Air Force courts. In 2005, the Judge Advocate General issued the policy memorandum "Air Force Standards for Criminal Justice" that was adapted from the ABA Standards for Criminal Justice. Appellant argued that because the ABA Standards incorporated the ABA Guidelines, therefore the Guidelines were also binding on Air Force practitioners. The court disagreed, and held that the ABA Standards and Guidelines were only recommended guidelines and not mandatory. The court stated that their superior court, the United States Court of Appeals for the Armed Forces, declined to mandate compliance with the Guidelines.

The court stated that Guideline 10.7 set forth the obligation that at every stage counsel should conduct thorough and independent investigations relating to issues of guilt and penalty. The court cited the Guideline 10.7's commentary, stating that "counsel need to explore medical history, including hospitalization, mental illness, family history of mental illness, physical injury and neurological damage." Additionally, the court argued that "Guideline 10.11 sets forth an ongoing duty of counsel to seek information that supports mitigation or rebuts the prosecution's case in aggravation."

Here, the court found defense counsel's performance was unreasonable, because they did not investigate the possibility of a traumatic brain injury from a motorcycle accident four months before. Furthermore, the court held that defense counsel's efforts to investigate appellant's family history were deficient based on counsel's knowledge of the mental health history of appellant's mother, the recommendation of a professional mitigation specialist to obtain the records, the theory of the case presented by the forensic psychologist, and the ABA Guidelines.

2. Mashburn v. State, 2013 WL 3589300 (Ala. Crim. App. 2013)

The Court of Criminal Appeals of Alabama affirmed the lower court's summary dismissal of petitioner's petition for post-conviction relief. Petitioner argued that his counsel was constitutionally ineffective for not objecting to certain statements made by the prosecution in the penalty phase. The prosecution made several remarks minimizing the mitigating evidence presented by petitioner, stating, "You know we've all known people who have had problems like this . . . That doesn't mean that is an automatic connection between those problems and somebody killing somebody." Petitioner cited ABA Guideline 10.11, arguing that the comments were objectionable on Eighth Amendment grounds for nullifying the effect of mitigation and that failing to object rendered counsel's assistance ineffective.

In reviewing the petitioner's brief, the court noted that the Guidelines may "provide guidance as to what is reasonable in terms of counsel's representation, but they are not determinative." Citing to *Yarbrough v. Johnson*, 520 F.3d 329 (4th Cir. 2008), the court discussed that recognizing the Guidelines as the minimum standard would be detrimental to nuanced, individualized responses from defense counsel. "Those needs call for more nuanced responses than can be provided by following pre-established mechanical rules of representation..." The

court held that while, under the Guidelines, an objection would have been proper, the prosecutor may argue that the jury should give mitigating evidence little or no weight, and therefore the statements to the jury were proper.

3. Hamm v. Allen, 2013 WL 1282129 (N.D. Ala. 2013)

The United States District Court for the Northern District of Alabama denied the petitioner's writ of habeas corpus. The petitioner argued that trial counsel failed to properly investigate aggravating and mitigating circumstances for the penalty phase and failed to present compelling evidence at the sentencing portion of his trial.

In reviewing counsel's performance, the court noted that the ABA standards are useful as a guide, but it does not substitute ABA "Standards" for its own reasonableness standard under Strickland. *Id.* at 55. Instead, the court stated, the salient legal inquiry for this court is whether any reasonable jurists would debate whether the Alabama Court of Criminal Appeals' application of the Strickland standard resulted in a decision that is contrary to or an unreasonable application of clearly established federal law. In this case, the court agreed with the circuit court that trial counsel conducted an adequate investigation and further found that counsel presented much of this information by way of testimony at the sentencing hearing. The court agreed that the petitioner failed to establish any prejudice, because the evidence was cumulative and would not have affected the outcome of the proceeding.

4. Diaz v. State, 2013 WL 6170645 (Fla. 2013)

The Supreme Court of Florida denied petitioner Joel Diaz's original petition for a writ of habeas corpus and also affirming the orders of the post-conviction court denying his motion to vacate his conviction and sentence. Diaz alleged numerous instances of ineffective assistance of counsel. Citing to the ABA Guidelines, he claimed that trial counsel was ineffective for failing to obtain his school records, jail records, former attorney's notes, and police reports, among others. [Ed. note: this instruction is embodied in Guideline 10.7, although it is not referenced by number by the court.] Without further discussion of the Guidelines or reaching a conclusion as to counsel's performance, the court concluded that Diaz was not entitled to relief because he could not demonstrate prejudice.

Diaz also claimed that trial counsel were ineffective for failure to have a cohesive theme at the guilt and penalty phases, contrary to Guideline 10.11. Again without discussion of the Guidelines, the court rejected this claim, finding that Diaz had mischaracterized the evidence in the record as to counsel's theory of the case, and that in any case he could not demonstrate prejudice.

5. Littlejohn v. Trammell, 704 F.3d 817 (10th Cir 2013)

The Court of Appeals for the Tenth Circuit affirmed the district court's judgment on all grounds except for the petitioner's claims of ineffective assistance of counsel at the penalty phase and remanded the case to the district court for an evidentiary hearing.

In concluding that counsel's performance was deficient, the court stated that counsel must perform in accordance with "prevailing professional norms, which in capital cases . . . refer to

the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases . . . "

6. *Nesbit v. State*, 2013 WL 1282326 (Tenn. Crim. App. 2013)

The Tennessee Court of Criminal appeals affirmed the judgment denying Clarence Nesbit's petition for post-conviction relief as it related to the guilt phase of his trial but granting a new sentencing hearing.

William Massey, a death penalty litigation expert, testified during an evidentiary hearing. Massey identified a number of areas where counsel failed to comply with Tennessee and ABA counsel standards, including failure to conduct an adequate investigation, failure to inform the client of plea offers, and failure to retain the necessary experts. He testified that counsel failed to uncover available evidence that would have "dilute[d]" the impact of the State's aggravating evidence, including an allegation that the defendant engaged in "satanic worship." [Ed. note: This subject is covered in Guidelines 10.7 and 10.11, although those guidelines are not specifically referenced by number in the opinion].

Massey also testified that counsel failed to inform their client about plea offers as required by the ABA Guidelines. [Ed. note: this subject is covered in Guideline 10.9.1, although it is not cited by number in the opinion.] Here, the twenty-five year plea offer should have been discussed promptly, and counsel should have spent more than fifteen minutes discussing the offer with an individual with a low I.Q. and who was unfamiliar with the criminal justice system. Massey stated that conveying the substance of the offer to the client was only part of the ABA Guidelines requirement. The Guidelines also instruct attorneys to keep the client apprised of the theory of the case, the proof that supports the chosen theory, the State's evidence, how the defense could rebut the State's evidence, and the probability of the client's success at trial.

Massey also stated that "in order to qualify with the new ABA Guidelines and 4.1, it required that at least one team member be qualified to screen for mental or psychological disorders or impairments." Massey argued that a forensic psychologist would be qualified for that duty. Defense counsel did not necessarily give ineffective assistance of counsel without the forensic psychologist, but it depended on whether the forensic psychologists' absence and the subsequent lack of information caused prejudice. Massey stated that the Guidelines and the courts were telling defense counsel to take these necessary steps in death penalty cases, even if the defendant did not show any signs of mental health issues or defects.

Upon Massey's testimony, the post-conviction court granted sentencing relief because defense counsel had failed to investigate, prepare, and present mitigation evidence, and therefore Nesbit had received ineffective assistance of trial counsel.

7. *State v. Monfort*, 312 P.3d 637 (Wash. 2013)

The Supreme Court of Washington reversed a trial court's grant of Christopher John Monfort's motion to strike the death penalty notice filed by a county prosecutor. Monfort had filed two motions, one arguing that the death notice should be stricken because the county prosecutor

had insufficient facts to determine whether or not to seek the death penalty and another arguing that the prosecutor considered the facts of the crime when making the determination. In summarizing the facts of the case, the court noted that defense counsel sought additional time to complete its mitigation investigation because the ABA Guidelines "required it to exhaustively investigate Monfort's life." The prosecutor later filed a death notice before counsel had completed the mitigation investigation, and defense counsel moved to strike. The trial court subsequently denied the motion to strike because the prosecutor had considered the facts of the crime but granted the other motion arguing that the prosecutor had insufficient facts to seek death. In that decision, the trial court found that the defense was proceeding to develop its mitigation package in accordance with the ABA Guidelines and that the prosecutor "failed both to exercise the discretion it is statutorily and constitutionally obliged to exercise," and then the court struck the death notice. The trial court also found that the prosecutor "relied upon a flawed, practically useless mitigation investigation prepared by its own investigator."

The Supreme Court of Washington reversed, finding that the trial court "errantly struck the county prosecutor's death penalty notice" in part because "a county prosecutor's investigation does not have to comply with the ABA Guidelines and standards of effective assistance of counsel . . . because those standards apply only to the defense." The court further held that the trial court's assurances that defense counsel were "preparing a mitigation package in accordance with the ABA Guidelines do[] not preclude the country prosecutor from concluding that the defense's future mitigation evidence would also be insufficient." Justice Gordon McCloud filed a concurring opinion, in which she agreed that the prosecutors' efforts were reasonable and noted in a footnote that the "reasonable investigation" required of prosecutors is "far less than what is required of effective defense counsel." The footnote cited 2003 ABA Guidelines 10.4 and 10.11, as well as the Supplementary Guideline for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11.

8. *State v. Hausner*, 280 P.3d 604 (Ariz. 2012)

During the penalty phase, Hausner waived mitigation other than allocution and the jury determined that death was the appropriate sentence for each of the six murder convictions. On direct appeal to the Supreme Court of Arizona, Hausner argued that once he elected to waive the presentation of mitigation and to prevent his lawyers from arguing for leniency, the lawyers' continued representation violated ABA Guideline Section 10.11(L) (2003), which requires counsel to fully investigate mitigation and "to take advantage of all appropriate opportunities to argue why death is not suitable punishment."

The Court noted that the ABA Guidelines are guidelines under Arizona Criminal Rules and not requirements. It recognized that Arizona Criminal Rule 6.8(b)(1)(iii) states that trial counsel "shall be familiar with and guided by the performance standards" of the 2003 ABA Guidelines, and the 2006 comment to this Rule notes that "[s]ome guidelines may not be applicable to Arizona practice or to the circumstances of a particular case." The court reasoned that because Hausner was entitled to waive the presentation of mitigation, his lawyers were ethically required to abide by that decision. The Court concluded that while Hausner's decision to waive mitigation and to instruct his lawyers not to argue for a life sentence "unquestionably put them in a difficult position and one they may have found morally repugnant. The trial court, however, did not abuse its discretion in denying their

motion to withdraw."

9. *State v. Santiago*, 49 A.3d 566 (Conn. 2012)

The Supreme Court of Connecticut recognized the importance of proper investigation of mitigation evidence when it reviewed the issue of whether the trial court had improperly refused to disclose to the defendant the entire social services file on his family. *Id.* at 40. The court dedicated an entire section of its opinion on the importance of the Guidelines to in camera review of privileged records. *Id.* at 46. The court cited Guideline 10.11(F)(2), noting the importance of gathering appropriate documentation regarding the defendant's life history to support mitigating the defendant's sentence to less than death *Id.* The court also addressed Supplementary Guideline 10.11(F), again citing a duty to gather mitigating documentation on the defendant's behalf, specifically including material from social services. *Id.* The court does caution, however, that the manner in which the documentation may be obtained will be on a case-by-case basis as is reflected in Supplementary Guidelines 10.11(D) and 4.1(D). *Id.* at 47.

Calling the 2003 and Supplementary Guidelines "substantive guideposts", the court concluded that the department failed to disclose certain documents from social services that would have made the defendant's social history more complete to consider as a mitigating factor. *Id.* The court subsequently went on to announce a new procedure for a defendant to obtain sealed records to be used in mitigation efforts. *Id.* Since in this case the material was deemed relevant to the defendant's mitigation, the defendant was allowed access to his sealed records in accordance with the new procedure. *Id.* The court reversed the death sentence and remanded for a new penalty phase hearing, following in camera review of the department's files and disclosure of relevant mitigation evidence.

10. *Walker v. State*, 88 So.3d 128 (Fla. 2012)

The Florida Supreme Court affirmed the order of the post-conviction court for a new penalty phase after finding that defense counsel was ineffective. *Id.* at 137. The court cited to 2003 Guideline 10.11 in emphasizing that a defense attorney has a responsibility to investigate mitigating evidence despite a client's objection. *Id.* Counsel's only mitigation investigation consisted of a few phone calls to the defendant's mother and sister; additionally, counsel refused to interview a cousin who had testified at a previous evidentiary hearing. *Id.* at 138. No medical, educational, criminal, drug treatment, or social services records were collected. *Id.* Finally, the only two witnesses that testified at the penalty hearing only provided background information on the effects of bi-polar disorder and failed to discuss the defendant's own history with the illness. *Id.* The court, therefore, found defense counsel's performance in this case to be ineffective and was prejudicial by the standards of *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *Id.*

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

Johnson sought habeas relief from several 2005 convictions, raising sixty-four grounds for relief, forty-eight of which were claims of ineffective assistance of counsel claims. Of those claims, relief was ultimately granted on four of the IAC claims. The ABA Guidelines were discussed both generally and in the context of two of Johnson's IAC claims: one on which she got relief, one on which she did not get relief.

The District Court, citing to Van Hook, explained that the Supreme Court has said that the guidelines are "useful as 'guides' to what reasonableness [of counsel's performance] entails, but only to the extent they describe the professional norms prevailing when the representation took place." (internal citations omitted). The District Court said that the Supreme Court's decision in *Wiggins v. Smith* said that the ABA standards are "only guides," and the District Court has since "regarded them as such."

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

(internal citations omitted). The court considered the Guidelines to be guides as to whether counsel's choices were objectively reasonable "subject to my determination of whether specific ABA Guidelines are so detailed that they interfere with the constitutionally protected independence of counsel or restrict counsel's wide latitude to make tactical decisions."

Johnson raised several allegations with regard to errors about her mental state at the time of the offense arising from her trial counsel's failure to investigate, prepare, and present mitigating evidence. The District Court, cited to the Eighth Circuit Court of Appeals decision in *Ortiz v. United States* and noted that the ABA standards in effect during Ortiz's trial, "are a useful guide in this case, [and] provide [that] '[c]ounsel should conduct independent investigations relating to the . . . penalty phase of a capital trial . . . regardless of any initial assertion by the client that mitigation is not to be offered . . . [and] this investigation should comprise efforts to discover all reasonably available mitigating evidence.'" The court, further citing to the Guidelines as quoted in *Ortiz*, noted that they require counsel to interview potential witnesses that may be familiar with client history that might affect mitigating evidence, as well as any members of the victim's family that would not want the client sentenced to death. Citing to the commentary of Guideline 11.4.1, the court said that the duty to investigate "is not negated by the expressed desires of a client." (internal citations omitted).

The court also discussed the ABA guidelines with respect to Johnson's claim that trial counsel was ineffective for failing to investigate and present evidence of her mental state at the time of the offenses. The District Court found the performance of Johnson's counsel was not reasonable. "Here, trial counsel's preparation for the mitigation phase not only was not 'ideal,' the record is clear that no reasonable attorney would have failed to pursue further evidence." Counsel's "pulling the plug" on the investigation was "not based on any advice of the experts, but contrary to it." The District Court further found that trial counsel ignored trial experts' suggestions about avenues to develop an "appropriate and effective mental health mitigation case." The court further found that if counsel's decision was strategic, "it was the worst strategic decision by any defense counsel that I have ever seen in my entire career: It effectively doomed Johnson's mitigation case from the start."

The District Court concluded that counsel's deficient performance prejudiced Johnson, and thus, she was entitled to relief from the mitigation phase verdict.

12. Bolin v. Baker, 2012 WL 2138160 (D. Nev. 2012)

The United States District Court for the District of Nevada granted petitioner Gregory Bolin's motion to dismiss counsel.

Bolin filed a pro-se motion asking for the dismissal of his counselor. Bolin and his defense counsel disagreed on the focus of habeas proceedings for guilt-phase or penalty phase relief. Bolin argued that there was an irreconcilable conflict between himself and defense counsel because of defense counsel failed to: 1) file a notice abandoning unexhausted claims; 2) communicate with petitioner; and 3) be honest with petitioner.

Defense counsel argued that under ABA Guidelines, he was required to investigate and present all arguably meritorious issues, even if this conflicted with his client's wishes. The court acknowledged that the Supreme Court uses the Guidelines as a way to measure reasonableness of defense counsel's performance. The district court opined that although defense counsel has competently represented his client, the lack of communication between defense counsel and petitioner, as well as petitioner's genuine concern that his case might be dismissed because of counsel's actions, has led to a broken attorney-client relationship. The court held that under the Martel interests of justice standard, the lack of communication between client and attorney affected defense counsel's ability to pursue habeas relief on petitioner's behalf, and thus counsel was dismissed.

13. Feldman v. Thaler, 695 F.3d 372 (5th Cir 2012)

The U.S. Fifth Circuit Court of Appeals denied petitioner's writ of habeas corpus under Section 2254. Petitioner argued that his trial counsel's failure to present readily available mitigating evidence of petitioner's bipolar disorder amounted to deficient representation. The court disagreed. It found that while petitioner's counsel had a forensic psychiatrist and a psychologist evaluate petitioner's mental condition, because petitioner was uncooperative during the evaluation and the experts were unable to render a diagnosis, the evaluation produced no mitigating evidence and actually disclosed facts harmful to petitioner; therefore, his counsel did not introduce evidence of the evaluation at trial.

Citing 2003 ABA Guidelines Section 10.11.G (rev. ed. Feb. 2003) in a footnote, the court reasoned that counsel's omission "might be considered sound trial strategy." In this case, the court reasoned, putting an expert on the stand to explain the diagnosis would have opened the door to the prosecution to bring in its own expert on rebuttal. And, as petitioner's own experts could not make a favorable diagnosis, he would have been foolhardy to ignore the risk that the prosecution could produce an adverse expert. The court concluded that because jurists of reason could not debate the district court's denial of habeas relief under Section 2254(d), it denied petitioner's application on his ineffective assistance claim.

14. Mendoza v. Thaler, 2012 U.S. Dist. LEXIS 140645 (E.D. Tex. 2012)

The United States Magistrate Judge reviewed petition's for a writ of habeas corpus under Section 2254 and prepared a report and recommendation recommending that the District Court for the Eastern District of Texas deny petitioner's claims of ineffective assistance of counsel. Petitioner argued his counsel was constitutionally ineffective for failing (1) to obtain a comprehensive psycho-social history so as to put forth a unified defense theory in the guilt-

determination and the penalty-determination phase; (2) to consider, investigate, and present condition-of-the-mind evidence to negate the mens rea element in the guilt-determination phase of his trial.; (3) to adequately investigate and develop crucial mitigating evidence; and (4) to present testimony to support a sentence less than death and to give a favorable opinion concerning the petitioner's risk assessment.

The magistrate rejected petitioner's claim that his counsel failure to put forth a unified defense theory in the guilt-determination and the penalty-determination phase demonstrated that further investigation into his psycho-social history was warranted. Citing Strickland, Wiggins, and the ABA Guidelines, the magistrate recognized that counsel in capital cases have a duty to conduct a reasonable investigation into the background of their client prior to making tactical decisions about what mitigation theories to advance and what mitigating evidence to present. Specifically, the magistrate noted that ABA Guideline Section 10.10.1 provides that as the information from the investigation becomes available, counsel should formulate a defense theory and counsel should seek a theory that will be effective in connection with both the guilt determination and the punishment-determination phase of the trial. The magistrate accepted the petitioner's thesis that if defense counsel's guilt-determination phase strategy is inconsistent with his punishment-determination phase strategy, he probably ought not end his investigation into possible defenses. In this case, however, the magistrate-without additional reasoning-found that the defense theories in petitioner's trial counsel's guilt-determination phase and punishment-determination phase were in no way inconsistent as petitioner contended. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim hat this counsel failed to consider, investigate, and present condition-of-the-mind evidence to negate the mens rea element. The magistrate recognized that defense counsel-based on their own observations of the petitioner and from their consultations with the petitioner's mental-health expert-they did not believe that a defense of a mental disorder which negated the intent to kill was viable, and therefore did not pursue further investigation of this issue. The magistrate also recognized that other mental health professionals revealed evidence of petitioner's brain damage and mental illness. In this case, the magistrate found that petitioner's counsel's decision not to pursue further investigation into a defense of the lack of mens rea is not deficient. Citing ABA Guideline Section 4.1, the magistrate noted that the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments to assist the jury in understanding the effects of these impairments on the defendant's judgment and impulse control. In this case, the magistrate reasoned that although other mental health professionals revealed evidence of petitioner's brain damage and mental illness their statements fall well short of suggesting that any competent mental health expert would have recommended further testing. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that his counsel failed to adequately investigate and develop crucial mitigating evidence. Citing ABA Guideline Section 10.11, the magistrate recognized that in situations where the mental and emotional functioning of the defendant is part of the mitigation case, the normal practice should be to investigate the defendant's complete social history, from before conception to the present. In this case, the magistrate

found that petitioner's counsel-based upon their investigation-formulated the mitigation theory that petitioner fell in with a bad crowd and engaged in substance abuse and other self-destructive behavior as a result of loneliness and alienation caused by his father's absences and mental illness; that there as a causal relationship between these events but did not cite to "attachment disorder," a recognized psychological disorder. The magistrate reasoned that expert testimony as to a recognized disorder would not be required for the mitigation theory to be persuasive. And, when viewed deferentially, the magistrate determined that counsel's judgment that their mitigation theory was strong enough that further investigation into petitioner's psycho-social history was not necessary and was not unreasonable. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

The magistrate also rejected petitioner's claim that his counsel failed to present testimony to support a sentence less than death. Citing Strickland but not the ABA Guidelines, the magistrate recognized that while not all of petitioner's four mitigation experts who were knowledgeable about the issues of future dangerousness and mitigation testified, trial counsel's decision regarding examination and presentation of some of the witnesses and evidence cannot be found deficient as long as the choices are the result of a conscious and informed decision on trial tactics. In the present case, the magistrate found that petitioner's counsel's stated reasons for their choices as to which mitigation experts would testify at the punishment-determination phase of his trial appear to have been conscious and informed; therefore, petitioner cannot rebut the presumption that his counsel's conduct might be considered sound strategy, and within the wide range of professionally competent assistance. Accordingly, the magistrate recommended the District Court deny petitioner's claim.

15. Miller v. Alabama, 99 So. 3d 349 (A. Ct. Crim. App. 2011)

The Alabama Court of Criminal Appeals affirmed the circuit court's findings that the defendant failed to prove his underlying allegations of ineffective assistance of trial counsel had merit. The defendant alleged that his trial counsel's investigation into the mitigating evidence failed to comply with the ABA guidelines for conducting an appropriate investigation into potential mitigating evidence in death-cases because trial counsel failed to: (1) adequately interview the defendant and the defendant's close relatives; and (2) collect the defendant's employment, educational, and medical records, and medical records of his numerous family members with documented serious mental illness.

The court disagreed. The court first noted that whether the defendant's trial counsel's investigation into potential mitigating evidence adhered to the ABA Guidelines was not dispositive of whether counsel's investigation was reasonable. Citing Jones v. State, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007), the court reasoned that the ABA Guidelines may "provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative." Then, without discussing the ABA Guidelines, the court agreed with the circuit court's findings that the defendant's counsel's performance was not deficient under Strickland and that the defendant failed to establish the requisite prejudice.

16. State v. Group, 2011 Ohio App. LEXIS 5282 (Ohio Ct. App. 2011)

The Ohio Court of Appeals affirmed the lower court's denial of Group's petition for post-

conviction relief. Group raised thirteen various claims, and the Court of Appeals found all of them to be without merit.

The court of appeals said that Group's post-conviction petition was largely based on ineffective assistance of counsel claims. Citing to Van Hook, the court of appeals said the ABA Guidelines are " 'only guides' with regard to counsel's effectiveness" (internal citations omitted). Counsel need only make "objectively reasonable choices." *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000). While Group claimed that counsel was ineffective during the penalty phase of trial, the court of appeals held that the claims was not only barred by *res judicata*, but that the only evidence presented by Group in support of his claim was an affidavit. "And as the trial court noted, Group's heavy reliance on the ABA Standards is misplaced as those standards are not dispositive indicators of constitutionally effective assistance of counsel." Because of this, the court of appeals held that the trial court correctly dismissed Group's claim.

17. *Phillips v. Bradshaw*, 607 F.3d 199 (6th Cir 2010)

The Court of Appeals for the 6th Circuit affirmed the judgment of the US District Court for the Northern District Ohio denying habeas relief. Petitioner Phillips argued that his trial counsel was ineffective at the sentencing phase for failure to investigate and develop evidence concerning Phillips' abusive childhood and for failure to retain a mitigation specialist. This information was particularly relevant because Phillips' was charged with physically and sexually abusing his girlfriend's young daughter, which lead to her death, and his trial counsel failed to discover and present evidence that Phillips and his siblings had all been severely physically and sexually abused by their parents. The majority found that counsel was not ineffective because the additional information that they could have uncovered would have only supported an "alternate" strategy, and counsel was not ineffective for choosing one strategy over another. The majority opinion did not mention the ABA Guidelines.

In dissent, Judge Cole wrote that he would grant habeas relief on the ineffective assistance of counsel claims. He found it unreasonable for counsel to rely on the words of Phillips' family that no abuse had occurred and for counsel to fail to conduct an independent investigation when there were several "red flags" that important information about Phillips' past was available. Judge Cole wrote that "[a]ccording to the ABA Guidelines on death penalty representation, which the Supreme Court has used in determining whether penalty-phase counsel's investigation of a defendant's background was deficient . . . defense counsel should consider introducing evidence 'that would be explanatory of the offense(s) for which the client is being sentenced' as well as that which would provide insights 'into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offenses.'" (citing 2003 Guideline 10.11(F)). He also noted the Guideline's "charge" to review records from government agencies (citing 2003 Guideline 10.7), which Phillips' counsel failed to do. Judge Cole wrote that if trial counsel had "met these professional standards," they would have uncovered evidence that likely would have led at least one juror to vote for life. He found that Phillips' counsel "could not have made a reasonable strategic decision not to introduce evidence of Phillips's abusive childhood environment because they failed to learn of it."

18. *Dixon v. Houk*, 627 F.3d 553 (6th Cir 2010)

NOTE: Reversed on 11/7/2011 (2011 U.S. LEXIS 7926).

The Court of Appeals for the Sixth Circuit reversed the judgment of the Northern District of Ohio and granted habeas relief to petitioner Dixon on a claim that his Miranda rights were violated. In his petition, Dixon also raised claims of ineffective assistance of counsel for failure to present mitigating evidence and failure to file a motion in limine to prohibit evidence of a past conviction from being admitted. The majority opinion did not address these claims. In a concurring opinion, Judge Cole wrote that he would also grant relief on the ineffective assistance of counsel claims. Citing to Van Hook, Cole concluded that the 1989 Guidelines were the appropriate standards by which to assess counsel's performance in 1995. He said that Guidelines 11.5.1 and 11.8.6 "support the common-sense notion that when faced with the possibility of the prosecution introducing damaging rebuttal evidence, counsel should make reasonable efforts to prevent this from occurring", and also cited 2003 Guideline 10.11, which explicitly stands for this proposition. Cole found counsel's performance to be deficient and that this deficiency was prejudicial, and therefore would have granted relief on this claim as well.

19. *State v. Speer*, 212 P.3d 787 (Ariz. 2009)

On direct appeal, the Arizona Supreme Court affirmed the death sentence for the defendant. In its opinion the court noted that counsel had failed to "question the propriety" of the death sentence in his briefs on appeal, although he had done so at oral argument. *Id.* at 801. Although the court went on to review evidence of aggravating and mitigating circumstances as directed by statute, it was critical of counsel's failure to raise this argument and admonished counsel of their duty to raise claims, citing the 2003 ABA Guidelines:

We have reminded capital defense counsel on two recent occasions of their professional obligation "to take advantage of all appropriate opportunities to argue why death is not a suitable punishment" for their client, and not to "simply rely on this Court's statutory duty to review the record." *Garza*, 216 Ariz. at 71 P 74 & n.16, 163 P.3d at 1021 & n.16 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)); *Morris*, 215 Ariz. at 330 P 76 & n.10, 160 P.3d at 209 & n.10 (same). We emphasize that admonition again today.

20. *Cooke v. State*, 977 A.2d 803 (Del. 2009)

The Supreme Court of Delaware reversed the defendant's conviction and death sentence and remanded the case for a new trial because defense counsel's strategy violated the defendant's right to due process and right to the assistance of counsel. Because trial counsel (1) pursued a "guilty by mentally ill" verdict despite the defendant's objections and repeated statements that he was innocent and not mentally ill, (2) refused to call the defendant as a witness despite his desire to testify, and (3) interfered with the defendant's right to a jury trial, the defendant was deprived of his constitutional right to make fundamental decisions regarding his case. Moreover, the inherent conflict between trial counsel's strategy and the defendant's desires violated the defendant's right to the effective assistance of counsel under the framework of *United States v. Cronin*, 466 U.S. 648 (1984).

In a dissenting opinion, Justice Steele, joined by Justice Jacobs, expressed his view that trial counsel "pursued an appropriate strategy while upholding all of Cooke's fundamental rights." The dissenting justices cited the 2003 ABA Guidelines, Section 10.11 cmt., for the proposition that where overwhelming evidence of guilt exists, defense counsel's best strategy might be to present a case for a life sentence without professing innocence but instead testing the prosecution's case.

21. *Bowles v. State*, 979 So. 2d 182 (Fla. 2008)

The Supreme Court of Florida affirmed denial of Mr. Bowles petition for post-conviction relief based in part on claims of ineffective assistance of counsel for failure to call mitigation experts. Bowles cited to sections 10.7(A), 10.11(A), and 10.11(F) of the ABA Guidelines in support of his claim, but this was summarily dismissed by the court which claimed that Bowles had failed to allege specific ways in which his counsel failed to meet the ABA Guidelines. The court stated further that "the Guidelines are not inconsistent with trial counsel's actions." It found that counsel had a strategic reason for failing to call one particular expert who, according to the court, had potentially harmful opinions about Bowles. The court also held it was reasonable to not pursue other expert testimony having received unfavorable results from the first expert.

22. *Hall v. McPherson*, 663 S.E.2d 659 (Ga. 2008)

The petitioner (Warden) argues that the habeas court erred when using the ABA Guidelines as the standard for the investigation and presentation of mitigating evidence and that the lack of such evidence was not prejudicial. The court held that the U.S. Supreme Court has been using the ABA Guidelines as an appropriate standard since at least 2003. Furthermore, the court finds that

"no reasonable lawyer in counsel's position would have decided not to seek McPherson's drug treatment records Trial counsel's investigation also was not reasonable in light of the guidelines set forth by the [ABA], which provide that counsel at every stage of a capital case 'have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.' [2003 ABA Guideline 10.11 (A).] As counsel had no rational strategy or reason for failing to develop this mitigating evidence, their performance fell below an objective standard of reasonableness."

Id. at *31-32. Ultimately, the court found that the habeas court had not erred in using the Guidelines as standards for counsel and that counsel's errors were prejudicial. Therefore, the habeas court's decision to amend respondent's death sentence to life in prison was appropriate.

23. *Johnson v. Bagley*, 544 F.3d 592 (6th Cir 2008)

The Court affirmed the district court's decision to grant a writ of habeas corpus on the grounds of ineffective assistance of counsel during sentencing. All other claims were dismissed.

The Court adopted the two pronged approach of *Strickland v Washington*, 466 U.S. 668, 687 (1984). Under the deficient-performance prong they noted that the court "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance" *Id.* at 689. Reasonableness was interpreted in light of *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005) even though the state court's decision predated both options - because they did not rest on "new law" but instead "applied the same 'clearly established' precedent of *Strickland*" *Wiggins*, 539 U.S. at 522. Following cases such as *Rompilla*'s reliance on the ABA Guidelines, the court noted that 'at a surface level, it appears that Johnson's counsel considered all of these [guidelines], performed some investigation with respect to each . . . and deployed some of these strategies. However, the Johnson's 'counsel pursued this strategy after what can only be described as an anemic and leaderless investigation that suffered from at least conspicuous flaws': 1) counsel never interviewed Johnson's mother despite knowing her whereabouts and ability to explain Johnson's childhood'; 2) failed to forward to their mitigation specialist, read or organize documents sent the Ohio Department of Human Services which would have revealed Faulkner's abusive custody; 3) "counsel failed to make any deliberate decisions about the scope of the investigation, let alone the "reasonable" ones *Strickland* requires" (for example, midway through the trial, defense counsel still did not "even know what records [they were] going to have.") The Court found on the facts these errors satisfied the *Strickland* prejudice prong.

24. *Van Hook v. Anderson*, 535 F.3d 458 (6th Cir 2008)

The Sixth Circuit reversed the decision of the district court and remanded the case to the district court with instruction to issue a writ of habeas corpus. The court found that defense counsel failed to first, "investigate and present as evidence all available mitigation factors; second . . . fail[ed] to secure or attempt to secure an independent mental health expert to testify that the crime was the product of a mental disease; and third, by mistakenly introducing and also fail[ed] to object to proscribed evidence that was clearly damaging to Van Hook's case." *Id.* at 460, 465 (citing 2003 ABA Guidelines 10.7 and 10.11). The court noted that that the ABA Guidelines provide help "in defining the 'prevailing professional norms' in ineffective assistance cases." *Id.* at 462 (quoting *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003)). The court went on to note that "all three of the deficiencies listed above . . . fall well below objective standards of reasonableness outlined in the ABA standards as applied in the case law developed in capital cases interpreting the Sixth Amendment requirement of the effective 'assistance of counsel for his defense.'" *Id.*

25. *Richie v. Sirmons*, 563 F. Supp. 2d 1250 (N.D. Okla. 2008)

The Court held that the Petitioner was entitled to habeas corpus relief because of the inadequate mitigation investigation received during the penalty phase. The Petitioner claimed that his trial attorney failed to present a defense based on voluntary intoxication and failed to develop evidence of psychological impairment. The first claim was dismissed because "it is unclear who trial counsel could have presented to testify". In reviewing the second claim the court noted that trial counsel had focused on testimony from family members and presented brief school records. Counsel failed to present psychiatric evidence which the "Tenth Circuit court of Appeals has noted . . . is 'exactly the sort of evidence that garners the most sympathy from jurors. *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004)". Citing *Smith* the court went on to note that:

The Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the American Bar Association (ABA) ... as 'guides to determining what is reasonable' performance. Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase.' See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for Mr. Watson to omit this evidence from his case for mitigation.

(Internal citations omitted). The Court noted that "Counsel simply did not take any action to determine whether such evidence was available" and thus concluded that counsel's failure was "constitutionally deficient under Strickland." In light of the new psychiatric evidence the court concluded that Petitioner's claim satisfied Strickland prejudice and he was entitled to habeas relief.

26. Woods v. State, 13 So. 3d 1 (Ala. Crim. App. 2007)

The Alabama Court of Criminal Appeals affirmed the defendant's conviction and remanded the case for the trial court to make specific findings as to the existence or nonexistence of nonstatutory mitigating circumstances. Although the case was on direct appeal, appellate counsel raised a claim of ineffective assistance of trial counsel during the penalty phase of trial. The defendant argued that his trial counsel failed to meet the standards set forth in the ABA Guidelines, failed to consult a mitigation expert, and failed to present additional evidence of mitigation. The court rejected the defendant's claim because it was not supported by the record.

27. State v. Morris, 160 P.3d 203 (Ariz. 2007)

This case is the first case to be heard after the Arizona Legislature adopted Section 13-703.05, which requires the Arizona Supreme Court to determine if the trier of fact abused its discretion in finding aggravating circumstances and imposing a sentence of death. *Id.* at 218. Other than the issue of prosecutorial misconduct, Morris did not raise any challenges to the penalty or aggravating phases of his trial. Nevertheless, the court determined that it must review all death sentences as the Arizona statute contains mandatory language. *Id.* at 219.

The court notes that mandatory review of all death sentences does not relieve death penalty counsel of its duty to "raise all meritorious arguments against a death sentence." *Id.* n.10. The court cited to Guideline 10.11.L (2003) which states that "[c]ounsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client." *Id.*

28. State v. Andriano, 161 P.3d 540 (Ariz. 2007)

The Supreme Court of Arizona affirmed Andriano's death sentence for the murder of her husband. Among Andriano's eleven claims was the trial court's failure to find "that the mitigating circumstances were 'sufficiently substantial to call for leniency.' A.R.S. Section 13-703(E)." *Id.* at 554. The Court pointed to defense counsel as failing to fully argue this claim:

Andriano did not argue why the Court should find in its independent review that the mitigating

circumstances were "sufficiently substantial to call for leniency." A.R.S. Section 13-703(E). Counsel in capital cases "should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 10.11(L) (2003).

161 P.3d at 554. Although Andriano offered numerous mitigating factors to call for leniency (such as childhood abuse, strong religious convictions, domestic violence victim, and good inmate behavior), the Court affirmed the trial court's decision to give these factors minimal weight. *Id.* at 555.

29. *State v. Garza*, 163 P.3d 1006 (Ariz. 2007)

The Arizona Supreme Court automatically reviewed the sentence of death pursuant to A.R.S. Section 13-703.04 (2006). In its review, the court affirmed the conviction and sentence. While the court did find that the presence of aggravating factors and the presentation of minimal mitigating evidence was sufficient for a sentence of death, it did note that defense counsel has numerous duties during the course of the trial.

In citing to the Guidelines, the court references to Guideline 10.11(L) (2003), indicating that death penalty counsel has a duty "at every state of the case" to "take advantage of all appropriate opportunities to argue why death is not a suitable punishment for their particular client." *Id.* at 1022 n.16. The court stated that in its automatic review of the sentence, it "should have been aided by argument of counsel" on the point of mitigation. *Id.* at 1021. The court also stated that death penalty counsel should not merely rely on the State's statutory duty to review the record, referencing Guideline 10.15.1(C). Instead, the court declared that defense counsel should "seek to litigate all issues . . . that are arguably meritorious." *Id.* at 1022 n.16.

30. *Meyer v. Branker*, 506 F.3d 358 (4th Cir 2007)

Petitioner challenged his capital sentence raising claims relating to the effectiveness of his counsel. Specifically, Petitioner contended that the failure of his sentencing attorney to present mental health mitigation testimony constituted ineffective assistance of counsel. The lower court cited to the (2003) ABA Guidelines, noting that mental health evidence is extremely important to capital sentencing juries and defense counsel therefore "should consider" including it at trial. ABA Guideline 10.11.F.2. Based upon this, Petitioner argued that reasonably competent attorney performance demands the presentation of available mental health mitigation evidence at trial, absent some "weighty tactical advantage" to be gained by its withholding. Since no such "weighty advantage" was present in this case, petitioner concluded that counsel's failure to present mental health mitigation testimony constituted ineffective assistance of counsel.

The court rejected this argument, holding that Petitioner was unable to satisfy either the "performance" or the "prejudice" prong of the Supreme Court's Strickland test. *Strickland v. Washington*, 466 U.S. 668 (1984). In addition, the court noted that although the ABA Guidelines, which emphasize the importance of mental health mitigation evidence, may be of some relevance in determining what constitutes reasonable performance in a capital trial, they

certainly cannot be dispositive in and of themselves. See *Rompilla v. Beard*, 545 U.S. 374 (2005). No per se rule requires the presentment of such evidence at trial.

31. *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir 2007)

The Tenth Circuit Court of Appeals reversed the district court's denial of habeas relief as to the defendant's sentencing and was remanded to the district court with instructions to issue a writ of habeas corpus. The court found that defense counsel's failure to investigate or discover readily available mitigation evidence regarding the defendant's family history and mental health amounted to constitutionally deficient performance. In addition, the court also found that defense counsel's conduct prejudiced the proceedings, as it left the motive for the murders unanswered.

In citing to the ABA Guidelines, the court noted that investigation into mitigating evidence involves discovering "all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 1142 (citing ABA Guideline 11.4.1(C)). The court declared that evidence relating to the defendant's mental health history and family life represented "just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of the trial." *Id.* at 1144.

32. *Henry v. State*, 937 So. 2d 563 (Fla. 2006)

In denying petitioner's request for habeas corpus relief, the Florida Supreme Court ruled that defense counsel's performance was not inadequate. Citing the *Wiggins* decision, the court noted that the "principal concern . . . is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of defendant's background was itself reasonable." *Id.* at 568. The court also stated that even where the defendant waives mitigation, trial counsel may still be ineffective for failing to properly investigate and prepare for the penalty phase of the trial. *Id.* at 570. The court additionally noted that the 2003 ABA Guideline 10.11 "mandate mitigation investigation and preparation, even if the client objects." *Id.* at 573.

In *Henry's* case, the court found that defense counsel complied with the ABA Guidelines by investigating the defendant's mental health history and subpoenaing witnesses for the penalty phase. *Id.* *Henry* refused to participate in the investigation and preparation of any type of mitigation, however, and the court concluded that trial counsel's preparation and *Henry's* decision to waive mitigation did not deny him a "reliable penalty phase proceeding." *Id.*

33. *Kilgore v. State*, 933 So. 2d 1192 (Fla. Dist. Ct. App. 2006)

Florida's Second District Court of Appeal granted Dean Kilgore's appeal of an order from the Circuit Court of Polk County, which had dismissed the Office of the Capital Collateral Representative (CCRC) from representing Kilgore in a collateral attack challenging the validity of Kilgore's 1978 first-degree murder conviction which had been used as an aggravating factor in the penalty phase of his 1994 murder case. CCRC had been representing Kilgore in post-conviction for the 1994 conviction, for which he received the death penalty. The Circuit Court's order did not dismiss the underlying collateral proceeding, but dismissed

CCRC from the representation of Kilgore in that proceeding.

The Second District Court of Appeal also certified to the Florida Supreme Court "a question of great importance to the Florida Supreme Court...

Are counsel appointed to provide collateral representation to defendants sentenced to death, pursuant to Section 27.702, authorized to bring proceedings to attack the validity of a prior first-degree murder conviction that was used as a primary aggravator in the death sentencing phase?"

Id. at 1193.

The Court of Appeal certified the question because the Florida statute governing appointed counsel does not "explicitly deal with the situation where . . . a previous conviction is the primary aggravator for imposition of the death penalty, and to challenge the death penalty, the previous conviction must be challenged." Id. In certifying the question to the Florida Supreme Court, the Court of Appeal stated that, "in order to challenge the murder conviction aggravator, the prior judgment must have been set aside [and] that is the course that CCRC was attempting to take, and it is consistent with ABA Guidelines." Id. The Court of Appeal noted that CCRC's attempt to challenge Kilgore's previous first-degree murder conviction conformed with the requirements of the 2003 ABA Guidelines. The court also cited to the ABA Guidelines dealing with investigation (10.7), the duty to assert legal claims (10.8), and the duty of post-conviction counsel (10.15.1.E.4). Id.

As stated by the court, the Florida statute permits CCRC to challenge a death sentence as well as the conviction, and in this case one "method of attacking the sentence of death is to attack the primary aggravator, a prior first degree murder conviction." Id. The court noted the importance of this tactic, stating that "attacking an aggravating factor is a traditional and well-accepted method used to challenge death sentences." Id. The court cited the ABA Guidelines to show that the collateral attack of an aggravating factor is often necessary, noting 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. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Rev. ed. Feb. 2003) (10.8, Duty to Assert Legal Claims, and such obligations are extended to post-conviction counsel, 10.15.1.E.4). Failure to pursue such a well-established course of action can be used to assert an ineffective assistance of counsel claim, if there was a right to counsel in this context.

Id.

While serving a life sentence, Petitioner was charged with the murder of an inmate. Petitioner was convicted and during the penalty phase, a previous first-degree murder conviction was submitted by the State as an aggravator to justify the death sentence. The sentencing court sentenced Petitioner to death after finding two aggravating circumstances: (1) Petitioner was under sentence of imprisonment at the time he committed the murder; and (2) Petitioner had been previously convicted of a felony involving the use or threat of violence to the person

both of which are related to the previous first degree murder conviction.

Subsequently, the Office of the Capital Collateral Regional Counsel (CCRC) was appointed to represent Petitioner to collaterally challenge the first-degree murder conviction and death sentence. Having identified what counsel believed to be substantial grounds to challenge an important aggravator used by the State to justify a death sentence, CCRC sought to vacate the first-degree murder conviction based upon the holding in *Brady* requiring disclosure of exculpatory evidence, including impeachment evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963). In turn, however, the State filed a motion to bar CCRC from representing Petitioner in the first-degree murder case, and the circuit court granted the motion on the basis that Florida's statutory scheme for appointment of counsel did not authorize CCRC's representation in the non-capital case.

"The district court concluded that because Florida law required the prior judgment to be set aside in order for the aggravator to be challenged in the capital case, Petitioner was entitled to have effective counsel do what CCRC was attempting to do on his behalf, a course of action also consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)." Kilgore at 2201. However, the Supreme Court of Florida determined that while Petitioner himself is entitled to prosecute a collateral claim attacking a prior conviction utilized as an aggravator in his capital case, CCRC is not authorized to do so on his behalf since Florida's statute for appointment of counsel did not authorize CCRC's representation in a non-capital case.

34. *Murphy v. Bradshaw*, 2006 WL 5575813 (S.D. Ohio 2006)

Magistrate Judge Michael Merz, writing for the U.S. District Court for the Southern District of Ohio recommended dismissal of petitioner Ulysses Murphy's petition for a writ of habeas corpus. Among other claims, Murphy raised several claims of ineffective assistance of counsel. In one claim, he alleged that his counsel were ineffective for following a strategy he opposed and which amounted to a guilty plea. The court rejected this claim based on the Supreme Court's decision in *Florida v. Nixon*. Finding support in *Nixon*, the court discussed the "unique challenges" facing capital counsel and quoted Nixon's statement that "In such cases [when the evidence is overwhelming and the crime heinous], 'avoiding execution [may be] the best and only realistic result possible.' ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.9.1, Commentary (rev.ed.2003)."

Murphy also alleged that his counsel was ineffective for failing to conduct a multi-generational mitigation investigation, citing to the 2003 Guidelines (ed. note: although not specified by the court, the instruction to conduct this investigation is found in Guidelines 10.7 and 10.11). Citing to 1989 Guidelines 11.4.1, 11.8.3, and 11.8.6, the court rejected Murphy's reliance on these guidelines, finding that the 2003 Guidelines were "were not in existence during his 1998 trial" and that there is "similar direction to counsel in the 1989 predecessor." While dismissive of the importance of such investigation, the court ultimately concluded that the claim was procedurally defaulted.

35. *United States v. Karake*, 370 F. Supp. 2d 275 (D.D.C. 2005)

The District Court, in deciding what evidence a defendant is entitled to in discovery regarding the aggravating factors enumerated in a death penalty notice, utilized the ABA Guidelines as guiding principles in determining how broad in scope the discovery should be. Recognizing that the government would use the aggravating factors in the potential penalty phase of the trial, the court cited the ABA Guidelines governing the investigatory duties of counsel with respect to the penalty phase of a capital trial. *Id.* at 278. Citing Guideline 11.4.1(C)(1989), the court stated that counsel must "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* Additionally, the court noted Guideline 10.11(A) (2003), which states that counsel must "seek information that . . . rebuts the prosecution's case in aggravation" and Guideline 10.11(H)(2003) which requires counsel to "determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof." *Id.* The court noted that these Guidelines are "fundamental principles" and looking to them would "assist the government in its assessment of whether and how to narrow the scope of any amended death penalty notice." While the court did not formally determine what discovery would be granted regarding the aggravating factors, it did set out what principles should be followed by the government regarding discovery of the aggravating factors.

36. *Canaan v. McBride*, 395 F.3d 376 (7th Cir 2005)

The Seventh Circuit held that defense counsel rendered ineffective assistance when it failed to advise a client on trial for capital murder that he was entitled to testify at the penalty phase. The court "follow[ed] the [Supreme] Court's lead in *Strickland* and *Wiggins* by looking first to the ABA Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" to assess whether counsel's performance was reasonable under prevailing professional norms. *Id.* at 384. The court found that "Canaan's counsel fell short of professional norms" under the ABA Guideline standards:

Under the heading 'The Defense Case Concerning Penalty,' the ABA Guidelines provide that 'counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.' ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 10.11 (2003) (emphasis added).

Id. at 384-85. The court further stated, "The ABA's Commentary to Guideline 10.11 reiterates this standard: 'Counsel should also consider, in consultation with the client, the possibility of the client expressing remorse for the crime in testimony, in allocution, or in a post-trial statement.' *Id.* Guideline 10.11 cmt." *Id.* at 385.

The court affirmed the "district court's grant of habeas corpus relief to Canaan with respect to his ineffective assistance of counsel claim" *Id.* at 387.

37. *State v. Reddish*, 859 A.2d 1173 (N.J. 2004)

The New Jersey Supreme Court reversed and remanded defendant Charles Reddish's conviction and death sentence. The court held as a matter of first impression that capital

defendants who knowingly and voluntarily waive their right to the assistance of counsel may represent themselves at both the guilt and penalty phases of a capital trial. The court acknowledged the potential difficulties of pro se representation, particularly at the penalty phase. Citing to ABA Guideline 10.11, the court noted that a pro se defendant may be unwilling or unable to investigate the "poverty and abuse that characterize the lives of many capital defendants." The court attempted to strike a balance between these competing concerns by requiring that standby counsel be appointed and prepared to assist the defendant whenever a capital defendant is allowed to represent himself pro se at any stage of trial.

38. *Hartman v. Bagley*, 333 F. Supp. 2d 632 (N.D. Ohio 2004)

Although they failed to find ineffectiveness in this case, the District Court began its discussion of Hartman's ineffective assistance of counsel claim by recognizing that in *Wiggins*, "the Supreme Court found that the American Bar Association's standards for counsel in death penalty cases provide the guiding standards to be used in defining the prevailing norms for capital cases." *Id.* at 672 (citing *Wiggins v. Smith*, 539 U.S. 510, 522). "The Sixth Circuit has recently addressed the *Wiggins* case and concluded that the '*Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the prevailing professional norms in ineffective assistance case.'" *Id.* (quoting *Hamblin v. Mitchell*, 354 F.3d 482 at 486). The court refers to the 2003 ABA Guideline 10.11 and states that defense's mitigation evidence only covered 41 pages of transcript. The court went on to find that "[t]rial counsel's mitigation presentation was not exemplary and in certain respects may have fallen short of the ABA's standards." *Id.*

39. *Smith v. Mullin*, 379 F.3d 919 (10th Cir 2004)

The Tenth Circuit held that counsel was ineffective for not presenting evidence of defendant's mental retardation, brain damage, and troubled background in the penalty phase.

Looking to the United States Supreme Court in its analysis, the Tenth Circuit noted that "[t]he Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the (ABA) ... as guides to determining what is reasonable' performance." *Id.* at 942. (citations omitted). "Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase. See (2003) ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, 4.1, 10.4, 10.7, 10.11. It was patently unreasonable for [trial counsel] to omit this evidence from his case for mitigation.'" *Id.* (citations omitted).

40. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004)

The Supreme Court of Pennsylvania examined a number of claims for post-conviction relief presented by Williams, among them ineffective assistance of counsel, prosecutorial misconduct, and various due process violations. The Court held that none of the claims merited relief.

Justice Saylor dissented, arguing that Williams had established ineffective assistance of counsel at the penalty phase, primarily for failing to develop adequate mitigating evidence. Citing a reference to the 1989 ABA Guideline 11.4.1 (C) in *Wiggins v. Smith*, 539 U.S. 510

(2003), the opinion recognized defense counsel's "obligation to 'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Williams, 863 A.2d at 527 (citation omitted). Justice Saylor drew upon substantial support from the 2003 ABA Guidelines throughout his opinion, commenting that "[I]n my view, the drafters' claim that the Guidelines 'embody the current consensus about what is required to provide effective defense representation in capital cases' is not an exaggerated one. Id. at 527 n.6 (citation omitted). In particular the Saylor refers to 2003 ABA Guidelines 1.1, 4.1, 10.5, 10.7(A)(2), and 10.11.

The dissent pointed to a number of instances in which the conduct of defense counsel fell short of professional standards. Justice Saylor utilized 2003 ABA Guideline 4.1 in arguing that counsel was irresponsible in scheduling his first meeting with the defendant only one week before trial, id. at 528 n.7, that "competent counsel would have reviewed records from Appellant's other criminal proceedings," id. at 528, that a previous psychotic episode merited professional evaluation, id. at 528 n.8, and that counsel was unjustified in relying on his own opinion of the defendant's psychological state, id. at 528 n.9. Then, Saylor used 2003 ABA Guidelines 10.5 and 10.7(A)(2) to rebut counsel's suggestion that the defendant's adamant commitment to fighting the validity of his conviction excused a lack of penalty phase preparation. Id. at 531 n.17, n.19.

The dissent criticized the majority for too lightly disregarding "the potency of life-history and mental-health mitigation in terms of capital sentencing," claiming that such an approach is contrary to Supreme Court precedent and the ABA Guidelines. Id. at 533 (citation omitted). Justice Saylor explained his perspective on the role of mitigating evidence in the sentence process, quoting 2003 ABA Guideline 10.11: "None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]" Id. at 534, n.22 (citation omitted). Indeed, psychological evidence of the type at issue here would "provide some sort of explanation for Simmons's abhorrent behavior." Id. at 543, n.23 (relying on 2003 ABA Guideline 10.11 to support this contention).

Justice Nigro filed a separate dissent, agreeing with Justice Saylor that the defendant received ineffective assistance of counsel in the penalty phase. Id. at 524.

41. Bryan v. Mullin, 335 F.3d 1207 (10th Cir 2003)

The Tenth Circuit, sitting en banc, affirmed a three-judge panel's denial of habeas relief and held that trial counsel's failure to present evidence regarding Bryan's mental health did not constitute ineffective assistance of counsel. The court found that although Bryan had organic brain disease brought on by severe diabetes, suffered from paranoid delusions, and had previously been adjudicated incompetent to stand trial, his counsel's decision not to introduce this evidence at trial or during sentencing was reasonable.

Judge Henry, joined by three other judges, wrote separately to disagree with the majority's determination that Bryan had received effective assistance of counsel. He took issue with the majority's repeated references to the fact that Bryan and his elderly parents objected to the presentation of evidence regarding Bryan's mental health. In his discussion of whether Bryan's counsel had properly explained the importance of mitigation evidence to the defendant and his

family, Judge Henry cited to the Guidelines:

The ABA's guidelines for capital defense work are "standards to which [the Supreme Court has] long referred to as " 'guides to determining what is reasonable.'" Wiggins, 539 U.S. 510, 524 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). For example, "[p]rior to the sentencing phase ... counsel should discuss with the client the specific sentencing phase procedures ... and advise the client of steps being taken in preparation for sentencing." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.11(C) (2003). Similarly, [c]ounsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body ..., means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation. Id. Section 10.11(D). Furthermore, "[c]ounsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing ... body." Id. Section 10.11(E). Despite these "well-defined norms," Wiggins, 539 U.S. at 524, however, it appears that counsel disregarded such responsibilities.

335 F.3d at 1238 n.6. Judge Henry also dismissed the argument that trial counsel's decision not to present mitigating evidence was reasonable because such evidence was inconsistent with trial strategy. He cited to the commentary for Guideline 10.11, "whether or not the guilt phase defense will be that the defendant did not commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase." Id. at 1238-39 (citation omitted).

Guideline 10.15.1 -- Duties of Post-Conviction Counsel

1. In re Reno on Habeas Corpus, 283 P.3d 1181 (Cal. 2012)

The Supreme Court of California denied the petitioner's second habeas corpus petition and found that the second writ was an abuse of the writ process because of its voluminous size and abounding detail, and because it raised claims almost all of which are procedurally barred.

The Court then used this opinion as an opportunity to "establish some new ground rules for exhaustion petitions in capital cases that will speed the [Court's] consideration of them without unfairly limiting petitioners from raising (and exhausting) justifiably new claims." The Court partly relied on suggestions made by the parties and amici curiae to adopt measures by which petitions may be streamlined, making preparation and review of the petition simpler and more efficient.

On the issue of raising the procedurally barred claims, the petitioner and amici curiae point to the 2003 ABA Guidelines as the source of their ethical obligation to raise defaulted claims. The Court held that "those standards are not congruent with constitutional standards for effective legal representation," and are "inconsistent with this [C]ourt's standards." It pointed to ABA Guideline Section 10.15.1(C), its commentary, and 10.7(A)(1) as specific examples of ABA Guidelines that "require much more of counsel than is required by state or federal law governing ineffective assistance of counsel."

In reaching this determination, the Court agreed with the Supreme Court's characterization of

the ABA Guidelines in *Bobby v. Van Hook* that:

"[r]estatements of professional standards . . . 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..." and "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."

The Court concluded that petitioner failed to demonstrate that counsel was deficient in failing to raise any of the nonrepetitive claims in the petition (i.e., claims prior counsel did not raise) or that the omission caused him prejudice. With regard to any new claims raised in the petition that the petitioner pointed to suggest that his counsel was constitutionally ineffective, the Court found them "wanting" and concluded-without citing to the ABA Guidelines-that petitioner's counsel was not deficient and the omissions did not cause him prejudice.

2. *Bolin v. Baker*, 2012 WL 2138160 (D. Nev. 2012)

The United States District Court for the District of Nevada granted petitioner Gregory Bolin's motion to dismiss counsel.

Bolin filed a pro-se motion asking for the dismissal of his counselor. Bolin and his defense counsel disagreed on the focus of habeas proceedings for guilt-phase or penalty phase relief. Bolin argued that there was an irreconcilable conflict between himself and defense counsel because of defense counsel failed to: 1) file a notice abandoning unexhausted claims; 2) communicate with petitioner; and 3) be honest with petitioner.

Defense counsel argued that under ABA Guidelines, he was required to investigate and present all arguably meritorious issues, even if this conflicted with his client's wishes. The court acknowledged that the Supreme Court uses the Guidelines as a way to measure reasonableness of defense counsel's performance. The district court opined that although defense counsel has competently represented his client, the lack of communication between defense counsel and petitioner, as well as petitioner's genuine concern that his case might be dismissed because of counsel's actions, has led to a broken attorney-client relationship. The court held that under the Martel interests of justice standard, the lack of communication between client and attorney affected defense counsel's ability to pursue habeas relief on petitioner's behalf, and thus counsel was dismissed.

3. *People v. Ray*, 252 P.3d 1042 (Colo. 2011)

Ray was sentenced to death after being convicted for murdering a prosecution witness in a previous case. During his post-conviction proceedings, the trial court lifted a protection order, thereby giving post-conviction counsel access to the names and addresses of multiple witnesses. Upon exercising original jurisdiction over the trial court's order to review it for abuse of discretion, the Supreme Court vacated the order.

The court noted that the defendant's right to confrontation in criminal cases is subject to a "personal safety" exception" in *Colorado. Ray*, 252 P.3d at 1048. The prosecution must demonstrate that the witness's safety would be threatened by the disclosure and that the threat

is related to the defendant. *Id.* The defendant must show that the materiality of the information about the witness is sufficiently related to the issue of guilt and outweighs the concerns for safety of the witness. *Id.* at 1048-49. An important consideration in this balancing test is whether the witness can be confronted in some setting not necessitating access to the witness's address. *Id.* at 1049.

The court then pointed out that, though this framework carries over into post-conviction proceedings, post-conviction counsel has a different role than that of trial counsel. *Id.* Because a death sentence is a uniquely harsh punishment, post-conviction counsel needs to conduct an "aggressive investigation of all aspects of the case." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.15.1(E)(4)." *Id.* Post-conviction counsel cannot rely on the record and must reinvestigate many of the underlying facts. *Id.* However, the court went on to find that the prosecution had made a far greater showing of the potential threat to the witnesses should their addresses be disclosed than post-conviction counsel had made regarding the need to access the addresses. *Id.* at 1050. Because the trial court abused its discretion in lifting the protective order, its decision was vacated by the Supreme Court. *Id.*

4. *Gissendaner v. Seabolt*, 2010 WL 691669 (N.D. Ga. 2010)

The U.S. District Court for the Northern District of Georgia granted in part and denied in part the State's motion to dismiss procedurally defaulted and unexhausted claims in Kelly Renee Gissendaner's petition for federal habeas corpus relief. Gissendaner argued that the court should hear her procedurally defaulted claims because her counsel's failure to raise the claims on appeal amounted to ineffective assistance and demonstrated cause to excuse the default. In support of this claim, Gissendaner cited 2003 Guideline 10.15.1's requirement that attorneys "litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation." The court stated that Gissendaner "fails to demonstrate, however, how her attorneys failed to comply with these guidelines" or how the defaulted claims were "arguably meritorious." In addition, the court stated that "even if [Gissendaner] could show that her attorneys did not comply with the ABA guidelines, such guidelines are not dispositive as to whether an attorney rendered reasonable representation," citing to the language in *Strickland* that ABA standards are "guides to determining what is reasonable, but they are only guides." Declining to find that counsel was ineffective, the court dismissed the claim as procedurally defaulted.

5. *Higgs v. United States*, 711 F. Supp. 2d 479 (D. Md. 2010)

The United States District Court for the District of Maryland examined twenty-five claims made by Petitioner, among which included juror misconduct. *Id.* at 195. The Court held that the Petitioner had procedurally defaulted on his juror misconduct claim and that, even if he had not, the claim was invalid. *Id.* at 196. Petitioner argued that he should have been permitted to conduct juror interviews because the gravity and irreversibility of a death sentence required a heightened standard of review under the Eighth Amendment. *Id.* at 197. In support of his argument, Petitioner relied on Guideline 10.15.1 of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases which states, "it is clear that, where permitted, post-conviction counsel have a duty to interview jurors." *Id.* at

197. In response, the Court asserted that Petitioner's Eighth Amendment argument was not supported by the law. *Id.* at 197. Additionally, the Court noted that local court rules restricts juror interviews post-trial unless approved by the presiding judge. *Id.* at 197. Because the Petitioner failed to identify a specific incident or show that he was prejudiced by the "lack of a sequestration order," the Court denied Petitioner's request. *Id.* at 196-198.

6. *Moeller v. Weber*, 2010 U.S. Dist. LEXIS 28670 (D.S.D. 2010)

The United States District Court for the Southern Division of South Dakota denied Petitioner's motion for leave to conduct discovery. *Id.* at 1. Although the Court acknowledged that Petitioner's request was made "in good faith and in compliance with the American Bar Association's Guideline that post-conviction counsel 'continue an aggressive investigation of all aspects' of a death penalty case," the court held that there was no good cause to allow the motion. *Id.* at 2 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.15.1(E)(4)(Feb. 2003)).

7. *Nash v. Ryan*, 581 F.3d 1048 (9th Cir 2009)

The Court of Appeals for the Ninth Circuit held that "the statutory right to competence in capital habeas cases," which was recognized in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), applies to an appeal from the denial of habeas relief, and that "a petitioner who lacks the ability to communicate rationally, and who seeks to raise claims on appeal that could potentially benefit from such communications is entitled to a stay of the appeal until the petitioner is found competent." In reaching this conclusion, the court specifically considered the ABA Guidelines: "The [ABA Guidelines], while silent on the precise issue we consider, are not to the contrary. The Guidelines note that 'winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments . . . are unlikely to motivate a collateral court.' [quoting 2003 ABA Guidelines, Section 10.15.1, cmt.] New counsel must 'continue an aggressive investigation of all aspects of the case.' [quoting 2003 ABA Guidelines, Section 10.15.1(E)(4).] On appeal, as well as in the district court habeas proceeding, counsel may need to communicate rationally with the petitioner to determine which facts and arguments to emphasize."

8. *State v. Speer*, 212 P.3d 787 (Ariz. 2009)

On direct appeal, the Arizona Supreme Court affirmed the death sentence for the defendant. In its opinion the court noted that counsel had failed to "question the propriety" of the death sentence in his briefs on appeal, although he had done so at oral argument. *Id.* at 801. Although the court went on to review evidence of aggravating and mitigating circumstances as directed by statute, it was critical of counsel's failure to raise this argument and admonished counsel of their duty to raise claims, citing the 2003 ABA Guidelines:

We have reminded capital defense counsel on two recent occasions of their professional obligation "to take advantage of all appropriate opportunities to argue why death is not a suitable punishment" for their client, and not to "simply rely on this Court's statutory duty to review the record." *Garza*, 216 Ariz. at 71 P 74 & n.16, 163 P.3d at 1021 & n.16 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)); *Morris*, 215 Ariz. at 330 P 76 & n.10, 160 P.3d at 209 & n.10 (same). We emphasize

that admonition again today.

9. *Mitchell v. United States*, 2009 U.S. Dist. LEXIS 86294 (D. Ariz. 2009)

The district court denied the petitioner's request for authorization to interview jurors in his case because of its conclusion that the petitioner failed to establish good cause for the interviews. Although the petitioner relied upon the ABA Guidelines to support his position that interviewing jurors to uncover potential juror misconduct is required in every capital case, the court refused to create an exception to the requirement of a showing of good cause prior to allowing juror interviews.

10. *Lawley v. Wong*, 2009 U.S. Dist. LEXIS 37513 (E.D. Cal. 2009)

The United States District Court for the Eastern District of California granted Mr. Lawley's motion for equitable tolling. At issue was whether to allow Mr. Lawley's appointed counsel more time to review the record, pursuant to the ABA Guidelines under the "Duties of Post-Conviction Counsel," or strictly apply the one-year statute of limitations to the appeal, pursuant to AEDPA under Section 2254(d). *Id.* at *3. The court granted Mr. Lawley an additional 106 days for his counsel to more thoroughly review the record and file the federal petition for writ of habeas corpus.

In reaching its decision, the court extensively discussed the ABA Guidelines. Citing Guidelines 10.15.1(E)(4), 10.7(A), and their respective Commentaries, the court "recognize[d] that the ABA Guidelines, and particularly the Commentary to the Guidelines, impose a high quality of legal representation on counsel." *Id.* According to the court, the "high standards" of representation in the Guidelines might conflict with the "adequate" representation standards of 18 U.S.C. Section 3599(a)(2). *Id.* To determine the proper standard, the court looked at the costs of representation and applied a "reasoned approach to budget authorizations." *Id.* According to the court, the reasoned approach did not allow for counsel to "completely reinvent [the case]," but would allow "a thorough investigation . . . particularly in areas where the development of claims and evidence in the state proceeding is said to have been weak but cognizable." *Id.*

The court also noted that "while the Commentary to the Guidelines cannot be viewed as overly compelling, the Guidelines themselves have been cited with approval in many Supreme Court and Ninth Circuit cases as a starting point for determining what professional standards are reasonable for trial capital counsel." *Id.* (emphasis omitted). Thus, the court provided the progeny of Supreme Court and Ninth Circuit cases that cited the ABA Guidelines. *Id.* (citing *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Strickland v. Washington*, 466 U.S. 668, 688 (1985); *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623, 638 (9th Cir. 2005); *Washington v. Lampert*, 422 F.3d 864, 872 (9th Cir. 2005); *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005); *Davis v. Woodford*, 384 F.3d 628, 661 (9th Cir. 2004)).

11. *State ex rel. Frank v. Cain*, 10 So. 3d 717 (La. 2009)

In an opinion dissenting from the Supreme Court of Louisiana's decision to allow the relator to file a supplemental application for post-conviction relief and to overturn the denial of her "shell" petition for post-conviction relief and to vacate the trial court's warrant setting an execution date, Justice Traylor, joined by Justice Knoll, expressed his view that the ABA Guidelines "are merely precatory" for post-conviction proceedings. The specific issue in question was the need to reinvestigate a capital case for post-conviction proceedings. Justice Traylor's dissenting opinion states that he "do[es] not believe the law requires that counsel reinvestigate the entire case, as though the case had never been investigated, brought to trial, and affirmed on appeal."

12. State v. Garza, 163 P.3d 1006 (Ariz. 2007)

The Arizona Supreme Court automatically reviewed the sentence of death pursuant to A.R.S. Section 13-703.04 (2006). In its review, the court affirmed the conviction and sentence. While the court did find that the presence of aggravating factors and the presentation of minimal mitigating evidence was sufficient for a sentence of death, it did note that defense counsel has numerous duties during the course of the trial.

In citing to the Guidelines, the court references to Guideline 10.11(L) (2003), indicating that death penalty counsel has a duty "at every state of the case" to "take advantage of all appropriate opportunities to argue why death is not a suitable punishment for their particular client." Id. at 1022 n.16. The court stated that in its automatic review of the sentence, it "should have been aided by argument of counsel" on the point of mitigation. Id. at 1021. The court also stated that death penalty counsel should not merely rely on the State's statutory duty to review the record, referencing Guideline 10.15.1(C). Instead, the court declared that defense counsel should "seek to litigate all issues . . . that are arguably meritorious." Id. at 1022 n.16.

13. Kilgore v. State, 933 So. 2d 1192 (Fla. Dist. Ct. App. 2006)

Florida's Second District Court of Appeal granted Dean Kilgore's appeal of an order from the Circuit Court of Polk County, which had dismissed the Office of the Capital Collateral Representative (CCRC) from representing Kilgore in a collateral attack challenging the validity of Kilgore's 1978 first-degree murder conviction which had been used as an aggravating factor in the penalty phase of his 1994 murder case. CCRC had been representing Kilgore in post-conviction for the 1994 conviction, for which he received the death penalty. The Circuit Court's order did not dismiss the underlying collateral proceeding, but dismissed CCRC from the representation of Kilgore in that proceeding.

The Second District Court of Appeal also certified to the Florida Supreme Court "a question of great importance to the Florida Supreme Court...

Are counsel appointed to provide collateral representation to defendants sentenced to death, pursuant to Section 27.702, authorized to bring proceedings to attack the validity of a prior first-degree murder conviction that was used as a primary aggravator in the death sentencing phase?"

Id. at 1193.

The Court of Appeal certified the question because the Florida statute governing appointed counsel does not "explicitly deal with the situation where . . . a previous conviction is the primary aggravator for imposition of the death penalty, and to challenge the death penalty, the previous conviction must be challenged." *Id.* In certifying the question to the Florida Supreme Court, the Court of Appeal stated that, "in order to challenge the murder conviction aggravator, the prior judgment must have been set aside [and] that is the course that CCRC was attempting to take, and it is consistent with ABA Guidelines." *Id.* The Court of Appeal noted that CCRC's attempt to challenge Kilgore's previous first-degree murder conviction conformed with the requirements of the 2003 ABA Guidelines. The court also cited to the ABA Guidelines dealing with investigation (10.7), the duty to assert legal claims (10.8), and the duty of post-conviction counsel (10.15.1.E.4). *Id.*

As stated by the court, the Florida statute permits CCRC to challenge a death sentence as well as the conviction, and in this case one "method of attacking the sentence of death is to attack the primary aggravator, a prior first degree murder conviction." *Id.* The court noted the importance of this tactic, stating that "attacking an aggravating factor is a traditional and well-accepted method used to challenge death sentences." *Id.* The court cited the ABA Guidelines to show that the collateral attack of an aggravating factor is often necessary, noting 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. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Rev. ed. Feb. 2003) (10.8, Duty to Assert Legal Claims, and such obligations are extended to post-conviction counsel, 10.15.1.E.4). Failure to pursue such a well-established course of action can be used to assert an ineffective assistance of counsel claim, if there was a right to counsel in this context.

Id.

While serving a life sentence, Petitioner was charged with the murder of an inmate. Petitioner was convicted and during the penalty phase, a previous first-degree murder conviction was submitted by the State as an aggravator to justify the death sentence. The sentencing court sentenced Petitioner to death after finding two aggravating circumstances: (1) Petitioner was under sentence of imprisonment at the time he committed the murder; and (2) Petitioner had been previously convicted of a felony involving the use or threat of violence to the person both of which are related to the previous first degree murder conviction.

Subsequently, the Office of the Capital Collateral Regional Counsel (CCRC) was appointed to represent Petitioner to collaterally challenge the first-degree murder conviction and death sentence. Having identified what counsel believed to be substantial grounds to challenge an important aggravator used by the State to justify a death sentence, CCRC sought to vacate the first-degree murder conviction based upon the holding in *Brady* requiring disclosure of exculpatory evidence, including impeachment evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963). In turn, however, the State filed a motion to bar CCRC from representing Petitioner in the first-degree murder case, and the circuit court granted the motion on the basis that Florida's statutory scheme for appointment of counsel did not authorize CCRC's representation in the

non-capital case.

"The district court concluded that because Florida law required the prior judgment to be set aside in order for the aggravator to be challenged in the capital case, Petitioner was entitled to have effective counsel do what CCRC was attempting to do on his behalf, a course of action also consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)." Kilgore at 2201. However, the Supreme Court of Florida determined that while Petitioner himself is entitled to prosecute a collateral claim attacking a prior conviction utilized as an aggravator in his capital case, CCRC is not authorized to do so on his behalf since Florida's statute for appointment of counsel did not authorize CCRC's representation in a non-capital case.

14. *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006)

The Supreme Court of Utah found that defense counsel provided ineffective assistance during the portion of the proceedings where he was providing representation. As such, the court reversed the judgment and remanded the case to the trial court and sent instructions to set aside the relevant proceedings. The court found that defense counsel only spoke to the client about the case and the expected strategy once and repeatedly ignored or deliberately avoided contact from the defendant.

In citing the 2003 ABA Guidelines, the court stated that "courts frequently rely on the professional standards established by the ABA when determining the relevant professional norms under the first prong of the Strickland analysis." *Id.* at 512. The court also noted that the Supreme Court of the United States referred to the Guidelines as "prevailing norms of practice." The court specifically stated that it would "rely on the ABA Death Penalty Guidelines to the extent that they are relevant to our decision," *id.* at 513, because Utah's post-conviction do not contain any rules or procedures regarding counsel's performance, *id.* at 512.

The court stated that one of the main duties of defense counsel is to "maintain close contact with the client regarding litigation developments." *Id.* at 513 (citing ABA Guideline 10.15.1(E)(1)). The court also noted that post-conviction counsel has additional obligations of investigating the performance of trial counsel as well as investigating the facts underlying the conviction and the sentence, referring to the comments to ABA Guideline 10.15.1. *Id.*

15. *Keenan v. Bagley*, 400 F.3d 417 (6th Cir 2005)

The U.S. Court of Appeals for the 6th Circuit vacated and remanded the Northern District of Ohio's order denying habeas corpus relief to petitioner Thomas M. Keenan. The district court dismissed Keenan's petition on the grounds that it was untimely. The federal petition was filed more than a year after the conviction became final, but the Sixth Circuit found that it was not clear whether the federal statute of limitations was tolled by an order extending the time to file the state petition, which was entered after the time to file the state petition had long-since expired but before the federal limit expired. This confusing circumstance arose because of the Ohio statute which begins the 180-day clock for filing a state post-conviction petition while the direct appeal is still pending. Concurring with the majority's decision to remand the case to the district court for a hearing on equitable tolling, Judge Merritt wrote separately to say that

the federal statute of limitations ought to be tolled in this case given the complex interaction of the Ohio statute with AEDPA's statute of limitations. He noted that the Ohio statutory scheme also makes it difficult or impossible for post-conviction counsel to properly raise claims. He wrote "This system requires post-conviction counsel to file claims of ineffective assistance of trial and appellate counsel, prosecutorial suppression of exculpatory evidence, newly discovered evidence and similar claims even before Ohio's Supreme Court considers the case on appeal and before trial and appellate counsel are replaced by post-conviction counsel." Merritt also noted that this process "makes the American Bar Ass'n Guidelines for the Appointment of Counsel in Death Penalty Cases Section Section 1.1 and 15.1 (2003) practically impossible to meet." He wrote, "The ABA standards contemplate the appointment of new or separate counsel at the habeas stage of the case. If the post conviction and federal habeas stages of the case must begin before final judgment, the appointment of new counsel becomes difficult to manage."

Judge Merritt concluded that he would both remand the case and order consideration of the merits of the claim, "either because the Ohio statutory maze created a situation that no sane lawyer could figure out or because an effective lawyer would have found some solution that escapes me-one or the other."

Guideline 3.1 -- Designation of a Responsible Agency

1. Ivy v. State, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

2. Galloway v. Thaler, 344 F. App'x. 64 (5th Cir 2009)

The Court of Appeals for the Fifth Circuit denied the petitioner's application for a certificate

of appealability as to his claim of ineffective assistance of counsel based upon the failure to investigate and present mitigation evidence. Prior to trial, the petitioner had instructed his counsel not to present any mitigation evidence that might cast his father in a negative light, including evidence of childhood abuse. In his federal habeas petition, the petitioner "asserted that his attorneys should have ignored his instructions and presented a mitigation case," relying upon the ABA Guidelines (2003 Guidelines Section 10.5 commentary, Section 10.7 (A)(2); 1989 Guidelines Section 11.4.2 commentary). The court agreed with the district court's conclusion that trial counsel had legitimate reasons to comply with their client's instructions, including their concern about their client's negative reaction and their belief that potential mitigation evidence could hurt their client's case. In addition, although the court recognized that "the Supreme Court has endorsed various sets of ABA Guidelines as instructive on the issue of reasonableness in representation, neither the Supreme Court nor this court have ever found the Guidelines to be dispositive of a claim of ineffective assistance of counsel."

Guideline 10.1 -- Establishment of Performance Standards

1. State v. Cheatham, 292 P.3d 318 (Kan. 2013)

The Supreme Court of Kansas found that counsel's representation was deficient and denied him of the fair trial he is guaranteed by both the federal and state constitutions. The court reversed his convictions and remanded the case for a new trial.

2. Com. v. Shabazz, 2003 WL 1847388 (Va. Cir. Ct. 2003)

The Circuit Court of Virginia, Roanoke, entered an order in the form of a letter to counsel, finding that capital defendant Askia Naim Tahriq Shabazz had not met his burden of "demonstrating particularized need to employ a 'mitigation specialist,'" but authorizing limited employment of a mitigation specialist for the purpose of assisting the defense in meeting that burden. The defense sought to employ the services of experienced mitigation specialist Marie Deans. The court held a hearing on the appointment of Ms. Deans where the defense submitted her written notes into evidence. In its letter, the court said that these notes cited to ABA Guidelines 10.1 and 10.4 which "recommend that the capital case 'defense team' include at least one nonattorney 'mitigation specialist.'" The court's letter continued to say: "Both Professor Groot and Ms. Deans testified that-in the words of the ABA Guidelines-'it is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages. Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.'" With respect to the ABA Guidelines, the court noted that they purported to set forth a national standard of practice for capital defense, but that it had "not found any judicial decision that suggests that the ABA Guidelines do, in fact, set forth any such standard." Despite this skeptical view of the Guidelines, the court continued in its letter to cite to the ABA Guidelines when describing the duties of the mitigation specialist and assembly of the defense team. The court wrote: "While the ABA Guidelines recommend that the 'defense team' include 'at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments,' and recognize that this person may be the fact investigator or mitigation specialist, they also suggest that counsel should structure the team in such a way as

to distinguish between experts who will play a 'consulting' role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who, because they will be called to testify, waive such protections. This might require, in the words of the Guidelines,' appropriate contractual arrangements.'" (citing 2003 Guideline 10.4(c)(2) and commentary). The court concluded by authorizing the employment of Ms. Deans for up to 20 hours for the purpose of gathering information to demonstrate that there is a "genuine, particularized need" for the services of a mitigation specialist.

Guideline 10.3 -- Obligations of Counsel Respecting Workload

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2. Ivy v. State, 2012 WL 6681905 (Tenn. Crim. App. 2012)

The Tennessee Court of Criminal Appeals affirmed a trial court's denial of David Ivy's petition for post-conviction relief. Ivy claimed that the Capital Defense Team at the Shelby County Public Defender's Office is "'constitutionally ineffective' in both its formation and lack of formal procedures." Specifically, Ivy argued that:

"[T]he defense team was not structured to ensure that counsel were free from political influence and were able to provide zealous advocacy in accordance with professional standards in violation of sections 2.1 and 3.1; that the defense team had no procedures in place to properly train attorneys, investigators, and mitigation specialists in violation of sections 4.1, 5.1, and 10.4; that the defense team had no procedures in place to prevent team members from being overworked in violation of sections 6.1 and 10.3; that the team failed to establish a proper working relationship with the Petitioner in violation of section 10.5; and that the defense team failed to investigate the Petitioner's case, present adequate claims and defenses, and attempt to negotiate a plea in violation of sections 10.7, 10.8, 10.9.1, and 10.10.1."

The court stated that the Guidelines "are merely guides in determining what is reasonable and are not the standards for reasonableness," citing to *Strickland v. Washington*. Thus, the court said that "[f]ailure to comply with the ABA Guidelines does not render counsel ineffective per se." Because Ivy had not established how his counsel's failure to "comply strictly" with the Guidelines had been ineffective or had prejudiced him, the court denied relief.

Guideline 10.9.2 -- Entry of a Plea of Guilty

1. Hodges v. Colson, 727 F.3d 517 (6th Cir 2013)

The United States Court of Appeals for the Sixth Circuit upheld the United States District Court for the Middle District of Tennessee's denial of petitioner Hodge's petition for a writ of habeas corpus. Petitioner Hodges claimed ineffective assistance of counsel because his attorneys told him to plead guilty without a trial before securing the prosecution's assurance of not seeking the death penalty.

The court cited the 1989 ABA Guidelines, stating that the Supreme Court in Padilla approved of using the Guidelines to determine if counsel's performance was reasonable. The court specified that the Guidelines are not commands, or definitions, but guides. The court cited the 1989 Guidelines to demonstrate that at the time of petitioner's trial, counsel should have negotiated guilty pleas only if petitioner was assured of a punishment less than death. The court cited the Guidelines, and explained that "if no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights." The court acknowledged that petitioner's counsel chose an ineffective strategy to try and prevent their client from receiving the death penalty. Counsel admitted that they did not sit down and plan their strategy, that they forgot about petitioner's aggravated robbery charge, and that they would have not plead guilty if they had better understood the law. The state court found that "although defense counsel's strategy for avoiding the death penalty was thwarted, the decision to pursue this particular strategy cannot be deemed incompetent." Under Section 2254 (d), the federal court was unwilling to hold that the state court's decision involved an unreasonable application of federal law. The court disposed of the IAC claim under the prejudice requirement of Strickland.

The Dissent (Judge White) used the Guidelines to demonstrate that petitioner did not receive effective assistance of counsel, and Judge White would have granted his petition for a writ of habeas corpus. Counsel's advisement to plead guilty was not intelligently made based on law, and therefore did not live up to standards of representation for capital cases. The Dissent argued that pleading guilty held little benefits for the petitioner, and that the Guidelines discouraged waiving client's trial rights if counsel could not obtain a written guarantee that the death penalty would not be imposed.

2. Hodges v. Colson, 711 F.3d 589 (6th Cir 2013)

The Court of Appeals for the Sixth Circuit affirmed the denial of the petitioner's writ of habeas corpus. The petitioner argued that his counsel was deficient in advising him to plead guilty and then provided deficient performance at the sentencing phase of his trial, which resulted in a sentence of death. The court disagreed.

In reviewing counsel's performance, the court acknowledged that section 11.6.1 of the 1989 ABA Guidelines, which contemplated negotiated guilty pleas only where the defendant is assured of a sentence less than death, was in effect at the time of the petitioner's trial. The court acknowledged that while trial counsel's advice to plead guilty here was questionable, the "ABA Guidelines are not inexorable commands . . . and our task is not to determine whether trial counsel's performance was deficient. Rather, we must determine whether there is any reasonable argument that counsel satisfied Strickland's deferential standard. And here, as identified by the Tennessee Court of Criminal Appeals, there is a reasonable argument that counsel satisfied Strickland's deferential standard. *Id.* at 608 (internal citations omitted).

The court reasoned that in this case, counsel was between a rock and a hard place in determining the best way to spare the petitioner a death sentence given the overwhelming evidence of his guilt. Further, the court noted that although counsel's strategy for avoiding the death penalty was thwarted, the decision to pursue that particular strategy cannot be deemed

incompetent. Accordingly, the court affirmed the denial of the petitioner's writ of habeas corpus.

3. *United States v. Sampson*, 820 F. Supp. 2d 202 (D. Mass. 2011)

The U.S. District Court for the District of Massachusetts granted in part and denied in part a government motion to summarily dismiss Gary Lee Sampson's motion to vacate, set aside, or correct his sentence. Sampson argued in part that his counsel had been ineffective in failing to conduct an adequate mitigation investigation. Before analyzing the claim, the court set forth the standard for evaluating ineffective assistance of counsel. Discussing the how to assess reasonableness under the first prong of *Strickland*, the court cited a number of cases concerning the ABA Guidelines and other ABA standards. The court cited the per curiam opinion in *Bobby v. Van Hook*, which rejected the reliance on the Guidelines that were announced 18 years before trial, and *Wiggins v. Smith*, noting that the court cited local practice and the ABA Guidelines as sources of prevailing professional standards. The court included a footnote at the end of its discussion noting that the ABA Guidelines were approved in 2003, but that they also "represent the product of a drafting process that began in April, 2001, and, presumably, codify professional norms as they existed during that drafting period." Thus, the court stated that it would be guided "primarily by the 2003 Guidelines" instead of the 1989 Guidelines, although the latter were still relevant.

The court also assessed a claim that counsel was ineffective by advising Sampson to plead guilty before trial but after the decision in *Ring*. Sampson relied in part on the ABA Guidelines to argue that his representation fell below prevailing professional norms. The court rejected this argument noting that while the Guidelines advise "that counsel should 'be extremely reluctant' to advise a defendant to plead guilty in these circumstances," they establish "no definitive bar to doing so in all circumstances." The court declined to find that counsel had been ineffective in advising a guilty plea and denied relief. The court did find that counsel had been ineffective, however, because they failed to adequately investigate and present mitigation evidence and determined that additional development of the facts was necessary before prejudice to the defendant could be assessed. The court also determined that Sampson was entitled to a new sentencing proceeding on an unrelated claim.

4. *Post v. Bradshaw*, 621 F.3d 406 (6th Cir 2010)

The 6th Circuit Court of Appeals affirmed the Northern District of Ohio's denial of post-conviction relief for Post. Post was initially offered a plea agreement where he would be sentenced to life in prison, but he refused to plead guilty. The offer was withdrawn. Post's counsel later persuaded him to plead no contest in front of a three judge panel although this time there was no agreement that the state would not seek death. The panel found him guilty and he was sentenced to death. In his post-conviction petitions, Post claimed that his counsel was ineffective for advising him to plead no contest, citing to 1989 Guideline 11.6.2. The Ohio Supreme Court found that counsel's strategy was professionally reasonable because 1) Post was "virtually certain" to be found guilty if he went to trial and 2) pleading no contest would preserve an issue for appeal. The 6th Circuit found both of these rationales to be unreasonable applications of *Strickland*. The court went on to conduct a *de novo* review, however, and found a separate rationale that rendered counsel's performance professionally

reasonable: counsel's hope that the plea would be considered a mitigating factor. The court explicitly rejected Post's argument that, according to the Guidelines, it is per se ineffective assistance of counsel to plead no contest without a guaranteed life sentence. It cited to Van Hook in saying that the Guidelines are "not inexorable commands" but "only guides" and found that counsel's performance was reasonable under the circumstances.

Judge Cole issued a dissenting opinion and discussed the issue of ineffectiveness and the ABA Guidelines at length. He found that Post's counsel was ineffective for failing to secure a life sentence before advising him to plead no contest. He referenced the language of both the 1989 and 2003 ABA Guidelines (including 1989 Guideline 11.6.3), and cited to the US Supreme Court's language in *Florida v. Nixon*: "[P]leading guilty [to a capital offense] without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant . . ." (citing to the 2003 ABA Guidelines). Cole also referenced further language from *Nixon* and the ABA Guidelines (10.9.1 cmt) saying that attorneys often do face daunting challenges, particularly when the defendant's guilt is clear. But in those cases "avoiding execution [may be] the best and only realistic result possible." Based on this, Cole found that "the Constitution required Post's counsel to make a strategic judgments based on something more concrete than an unsubstantiated hope that his no-contest plea would be considered a mitigating factor, particularly because their client's life was on the line." He noted that the majority provided no reason why the ABA Guidelines should be disregarded or why there was any reason for Post's counsel to think that a plea of no contest would be a mitigating factor. He said:

In this situation, the ABA Guidelines' recommendation is clear. In following their guidance we do not, as the majority seems to suggest, need to adopt them as per se rules. Rather, as both this Court and the Supreme Court has stated repeatedly, we look to them for guidance in determining whether counsel's representation was constitutionally inadequate.

. . .
I imagine that Post may have gained some comfort in knowing that his attorney hoped his no-contest plea would be treated as a mitigating factor. But this comfort was short-lived. Post's counsel's foremost duty in that situation was not to keep hope alive, but to keep Post alive. Viewed in this light, it certainly was unreasonable to advise him to plead no contest and waive all of his trial rights without a guarantee, or at least some concrete indication, that doing so might help spare his life.

5. *Thacker v. Workman*, 2010 U.S. Dist. LEXIS 92322 (N.D. Okla. 2010)

In his habeas petition, Petitioner Thacker raised a claim that his counsel was ineffective for recommending that he plead guilty and opt for a non-jury sentencing trial, citing 2003 Guideline 10.9.2 The U.S. District Court for the Eastern District of Oklahoma rejected this claim. It found that Thacker's counsel made a reasonable strategic decision in light of "overwhelming evidence" of Thacker's guilt. The court continued to say that "[t]he Supreme Court has advised that that the norms of practice reflected in American Bar Association standards are only guides. *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Further, 'imposing "specific guidelines" on counsel is "not appropriate.'" The court concluded that Thacker's counsel was not constitutionally deficient and denied habeas relief.

6. Florida v. Nixon, 543 U.S. 175 (U.S. 2004)

The Supreme Court held that trial counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance ineffective. The Court noted that counsel's effectiveness must be evaluated under Strickland v. Washington's standard: whether "counsel's representation 'fell below an objective standard of reasonableness'." 543 U.S. at 178, citing Strickland v. Washington, 466 U.S. 668, 688 (1984). Justice Ginsburg's decision notes that, under the facts of this particular case, "the gravity of the potential sentence in a capital trial and the proceeding's two phase structure vitally affect counsel's strategic calculus In such cases, 'avoiding execution [may be] the best and only realistic result possible.'" Nixon, 543 U.S. at 191 (citing the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Section 10.9.1, Commentary). The Court further cites the Guidelines to support the premise that "pleading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant." Id. at 191 n.6.

Guideline 10.10.2 -- Voir Dire and Jury Selection

1. Cox v. McNeil, 638 F.3d 1356 (11th Cir 2011)

Petitioner alleged ineffective assistance of counsel during the guilt and penalty phases of trial. Specifically, Cox argues that his counsel was ineffective because he 1) failed to object to the prosecutor's misstatements of law; 2) failed to conduct a meaningful voir dire, which deprived Cox of an impartial jury; 3) presented a defense during his opening statement that had no legal basis, which prejudiced Cox in the eyes of the jury; 4) failed to object to prejudicial testimony from the State's medical examiner; 5) questioned a defense witness at trial in a manner that elicited prejudicial testimony; and 6) failed to adequately investigate and present mitigating evidence at the penalty phase of trial. Id. However, this Court upheld the District Court's denial of Cox's petition for habeas corpus on this claim.

In reference to the second argument that counsel was ineffective for failing to conduct a meaningful voir dire, the Court cited 2003 ABA Guideline 10.10.2 which provides that "Counsel should be familiar with techniques for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence." However, the Court found that even if counsel's performance was deficient in this manner, no prejudice was shown and Petitioner was not entitled to relief.

Furthermore, Petitioner argued that counsel failed to meet 1989 ABA Guideline 11.4.1 that "investigations for both the guilt and penalty phase should begin immediately upon counsel's entering the case" because of counsel's delayed start to investigation of mitigating evidence. The lower courts denied this claim and the Eleventh Circuit affirmed.

2. State v. Jones, 2011 Ohio App. LEXIS 4949 (Ohio Ct. App. 2011)

The Ohio Court of Appeals affirmed the lower court's decision that Jones did not receive ineffective assistance of counsel during the guilt phase of his trial, but vacated and remanded for an evidentiary hearing on the lower court's determination that Jones did not receive

ineffective assistance during the penalty phase of his trial.

Jones argued that his lawyers were ineffective during the guilt phase of his trial for failing to obtain an expert to refute the rape findings of the medical examiner. The court found that even if an expert had been presented, it would not have changed the outcome of his trial. In addition to failure to obtain an expert, Mr. Jones raised several other reasons why his counsel was ineffective during the guilt phase, but the Court found none of them persuasive.

With regard to the penalty phase, Jones argued that his counsel was ineffective because they "failed to discover the history of incest and sexual abuse in his family, presented an incomplete psychological assessment, failed to secure enough time to discover such information, and did not discover or present documents corroborating his life history." Citing to Wiggins, the Ohio Court of Appeals noted that the Supreme Court has long looked to the ABA standards as reasonableness guides. The court then went on to discuss how *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), clarified that the standards are "'only guides' to what reasonableness means, not its definition." The court further stated that the Supreme Court left open the possibility that the guidelines could be applied "more categorically" to post-2003 representation, "so long as they reflected prevailing norms of practice and were not 'so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.'" (internal citations omitted).

In this case, the doctor began meeting with Jones's lawyer six weeks pretrial, but spent less than eight hours conducting interviews and tests before the trial began. The social worker responsible for interviewing Jones's family members did not begin to work on his case until a week into trial. Citing the guidelines, the court said that lawyers should begin

[t]he mitigation investigation . . . as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations. . . . The guidelines also advise lawyers to 'devote substantial time to . . . choosing a jury most favorable to the theories of mitigation that will be presented.' . . . [T]he theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.

The court expressed overall concern with the amount of time spent investigating Jones's background, particularly potentially mitigating circumstances of sexual abuse. Citing once more to the guidelines, the court said that the issue is whether the investigation conducted was "extensive and generally unparalleled." (ABA Guidelines 10.7, at 1022) (internal citations omitted).

Citing to the guidelines, the Court said it is the duty of the lead counsel to direct the work of the defense team, "in such a way that, overall, it provides high quality legal representation in accordance with . . . professional standards." (ABA Guidelines 10.4, at 1002). The duty to investigate a defendant's background applies regardless of the defendant's desires, specifically family and social history. (ABA Guidelines 10.7, at 1021-22).

Judge Carr concurred in the judgment but thought the majority put too much emphasis on the application of the ABA Guidelines. Carr cited to Van Hook and stated that the Supreme Court made it clear that the Guidelines "are 'only guides' to what reasonableness means, not its definition." Van Hook, 130 S. Ct. at 17. Judge Whitmore also concurred and essentially agreed with Judge Carr. "Reliance upon the Guidelines should be restricted to those few cases where there is little or no primary authority available."

3. Keith v. Mitchell, 455 F.3d 662 (6th Cir 2006)

The U.S. Court of Appeals for the 6th Circuit affirmed the Northern District of Ohio's denial of habeas corpus relief to petitioner Kevin Keith. Judge Clay wrote separately, concurring with the court's rejection of guilt-phase claims but dissenting from the denial of sentencing relief. He wrote that there is a "long and well-recognized line of Supreme Court case law" requiring counsel to conduct a basic mitigation investigation. He found that Keith's post-conviction counsel uncovered a wealth of mitigating evidence that trial counsel had failed to discover. In addition, trial counsel voluntarily submitted to the jury a pre-sentence and psychological report containing "pages documenting Petitioner's prior record, impact of the crime on the victims and their families, evidence implicating Petitioner, erroneous statements about Petitioner's background and childhood, and a psychologist's conclusion that no mitigating factors existed." He found this conduct "fell well below the standards set forth in ABA Guideline 10.12." He noted that Guideline 10.12 places an obligation upon counsel to consider the strategic implications of requesting a pre-sentence report where such reports are optional and that the commentary to Guideline 10.12 "expressly notes that requesting such a report in Ohio may amount to ineffective assistance of counsel because it allows the prosecution to present a defendant's prior record and victim impact evidence, where such information would otherwise be inadmissible." He also noted that Guideline 10.12 instructs counsel to provide favorable information to the preparer of the report and ensure that the report is accurate.

Judge Clay concluded that it was highly unlikely that trial counsel considered the strategic implications of providing that information to the jury and that no reasonable lawyer would think that a "few positive sentences" about the defendant outweighed all the aggravating evidence. He also found it unreasonable for counsel not to provide positive information about his client to the report preparer and to fail to correct the errors in the report.

After finding that counsel's performance was deficient, Judge Clay also concluded that counsel's performance was prejudicial to Keith. Citing again to Guideline 10.12, he found that the jury would not have had access to the aggravating evidence but for counsel's error.

Judge Clay also found counsel's performance during voir dire to be deficient. He wrote, "Despite the ABA death penalty guidelines clear mandate that counsel should "develop a strategy for rehabilitating ... [scrupled] jurors," Comments to Guideline 10.10.2., defense counsel utterly failed to even attempt to rehabilitate scrupled jurors." Post-conviction counsel submitted the affidavit of a defense expert who echoed the instructions of the Guidelines. Judge Clay concluded that "In light of Simmons' affidavit and the ABA guidelines, there is no reason for this Court to presume that counsel's conduct during voir dire was strategic."

Judge Clay noted that the 2003 Guidelines were "compiled . . . many years after [trial counsel]'s conduct at voir dire" but that the Guidelines "are primarily a summary of existing practice and rely on numerous sources that predate [counsel]'s conduct."

Finding a reasonable probability the jurors could have been rehabilitated, Judge Clay concluded that the was therefore prejudiced by counsel's conduct.

4. *Sterling v. Dretke*, 117 Fed. Appx. 328 (5th Cir 2004)

The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's denial of habeas relief to petitioner Gary Sterling. Sterling claimed that his trial counsel was ineffective for failing to investigate and question jurors about their racial biases. Trial counsel argued that this was a strategic decision, because he rarely receives truthful responses to questions about racial bias. Sterling based his claim, in part, on ABA Guideline 10.10.2(A) and (B), and the State argued in response that nothing in the ABA Guideline on voir dire and jury selection establishes that trial counsel's proffered strategy was unreasonable. Without further discussion of the Guidelines, the court agreed with the State that Sterling had not overcome the strong presumption that counsel's strategy was reasonable, and it affirmed the decision of the district court denying relief.

Guideline 10.12 -- The Official Presentence Report

1. *State v. Loftin*, 922 A.2d 1210 (N.J. 2007)

The Supreme Court of New Jersey reversed a lower court's denial of Donald Loftin's petition for post-conviction relief, reversed the guilt and penalty verdicts, and remanded for a new trial due to racially biased comments made by a juror to his co-workers in advance of the trial that appeared to prejudice the defendant's guilt and the trial court's failure to remove him from the jury despite knowledge of the comments. To guide the trial court and counsel on remand, the court also addressed a separate claim that trial counsel had provided ineffective assistance by allowing the defendant to be interviewed alone by a probation officer preparing a pre-sentence investigation report following a separate non-capital murder conviction. The court agreed with the lower court that that counsel was deficient in failing to consult with the client before or accompany him to the interview, stating that it was "a professional obligation, a minimal standard that should have been followed by capital counsel." The court then noted that the ABA Guidelines are "consistent with that approach" and cited language in 2003 Guideline 10.12 requiring counsel to become familiar with official presentence report procedures, specifically emphasizing that if counsel determines that their client should speak with the individual preparing the report, "counsel should discuss the interview in advance with the client and attend it." The court stated that their approach "is equally applicable to a pre-sentence interview for a predicate murder conviction that precedes an impending capital trial." The court concluded that capital counsel "failed to provide reasonably competent representation to the defendant when they allowed him to be interviewed alone by the Atlantic County Probation Department" but concluded that it was not an appropriate remedy to exclude the statements made by the defendant during that interview "merely because those statements may be inconsistent with the penalty defense he presents."

2. Keith v. Mitchell, 466 F.3d 540 (6th Cir 2006)

(note that this dissent is taken in whole from his dissent in 455 F.3d 662. The summary of the copied language is therefore the same).

Judge Clay of the U.S. Court of Appeals for the 6th Circuit, joined by three other judges, dissented from the court's decision to deny rehearing en banc to Petitioner Kevin Keith. Judge Clay wrote that there is a "long and well-recognized line of Supreme Court case law" requiring counsel to conduct a basic mitigation investigation. He found that Keith's post-conviction counsel uncovered a wealth of mitigating evidence that trial counsel had failed to discover. In addition, trial counsel voluntarily submitted to the jury a pre-sentence and psychological report containing "pages documenting Petitioner's prior record, impact of the crime on the victims and their families, evidence implicating Petitioner, erroneous statements about Petitioner's background and childhood, and a psychologist's conclusion that no mitigating factors existed." He found this conduct "fell well below the standards set forth in ABA Guideline 10.12." He noted that Guideline 10.12 places an obligation upon counsel to consider the strategic implications of requesting a pre-sentence report where such reports are optional and that the commentary to Guideline 10.12 "expressly notes that requesting such a report in Ohio may amount to ineffective assistance of counsel because it allows the prosecution to present a defendant's prior record and victim impact evidence, where such information would otherwise be inadmissible." He also noted that Guideline 10.12 instructs counsel to provide favorable information to the preparer of the report and ensure that the report is accurate.

Judge Clay concluded that it was highly unlikely that trial counsel considered the strategic implications of providing that information to the jury and that no reasonable lawyer would think that a "few positive sentences" about the defendant outweighed all the aggravating evidence. He also found it unreasonable for counsel not to provide positive information about his client to the report preparer and to fail to correct the errors in the report.

After finding that counsel's performance was deficient, Judge Clay also concluded that counsel's performance was prejudicial to Keith. Citing again to Guideline 10.12, he found that the jury would not have had access to the aggravating evidence but for counsel's error. Judge Clay concluded that he would grant the petition for rehearing and vacate the death sentence.

3. Keith v. Mitchell, 455 F.3d 662 (6th Cir 2006)

The U.S. Court of Appeals for the 6th Circuit affirmed the Northern District of Ohio's denial of habeas corpus relief to petitioner Kevin Keith. Judge Clay wrote separately, concurring with the court's rejection of guilt-phase claims but dissenting from the denial of sentencing relief. He wrote that there is a "long and well-recognized line of Supreme Court case law" requiring counsel to conduct a basic mitigation investigation. He found that Keith's post-conviction counsel uncovered a wealth of mitigating evidence that trial counsel had failed to discover. In addition, trial counsel voluntarily submitted to the jury a pre-sentence and psychological report containing "pages documenting Petitioner's prior record, impact of the crime on the victims and their families, evidence implicating Petitioner, erroneous statements about Petitioner's background and childhood, and a psychologist's conclusion that no mitigating factors existed." He found this conduct "fell well below the standards set forth in

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Judge Clay concluded that it was highly unlikely that trial counsel considered the strategic implications of providing that information to the jury and that no reasonable lawyer would think that a "few positive sentences" about the defendant outweighed all the aggravating evidence. He also found it unreasonable for counsel not to provide positive information about his client to the report preparer and to fail to correct the errors in the report.

After finding that counsel's performance was deficient, Judge Clay also concluded that counsel's performance was prejudicial to Keith. Citing again to Guideline 10.12, he found that the jury would not have had access to the aggravating evidence but for counsel's error.

Judge Clay also found counsel's performance during voir dire to be deficient. He wrote, "Despite the ABA death penalty guidelines clear mandate that counsel should "develop a strategy for rehabilitating ... [scrupled] jurors," Comments to Guideline 10.10.2., defense counsel utterly failed to even attempt to rehabilitate scrupled jurors." Post-conviction counsel submitted the affidavit of a defense expert who echoed the instructions of the Guidelines. Judge Clay concluded that "In light of Simmons' affidavit and the ABA guidelines, there is no reason for this Court to presume that counsel's conduct during voir dire was strategic."

Judge Clay noted that the 2003 Guidelines were "compiled . . . many years after [trial counsel]'s conduct at voir dire" but that the Guidelines "are primarily a summary of existing practice and rely on numerous sources that predate [counsel]'s conduct."

Finding a reasonable probability the jurors could have been rehabilitated, Judge Clay concluded that the was therefore prejudiced by counsel's conduct.

Guideline 10.13 -- The Duty to Facilitate the Work of Successor Counsel

1. In re Patrick McCann, 2013 WL 6081455 (Tex. Crim. App. 2013)

The Texas Court of Criminal Appeals granted Texas defense attorney Patrick McCann's request for a writ of mandamus overturning a court's order holding him in contempt for refusing to turn over his client's file to court-appointed post-conviction counsel for that client. The client initially withheld consent for the transfer of the file to the Texas Office of Capital Writs, because the client was suspicious of the office due to its status as a state agency. McCann refused to release the file, invoking his right to keep privileged information confidential. The Office of Capital Writs withdrew representation and a second lawyer was appointed, who also sought the client's file. In discussing the question of who owns a client's file, the court noted that the second attorney cited 2003 ABA Guideline 10.13 and a similar

provision of the Texas Guidelines and Standards for Texas Capital Counsel, both of which require that trial counsel retain a copy of the trial file for the benefit of subsequent counsel. The court, however, stated that the second attorney failed to cite Texas Guideline 12.1, which limits the ability of trial counsel to turn over a client's file if the client does not consent. The court further stated that the Guidelines were "only persuasive authority" and "are designed to safeguard a criminal-defendant's interests, not a successor counsel's 'right' to force trial counsel to retain, and turn over, a client's file (or a copy) without the consent of the client." The court held that the client, and not his trial attorney, owned the file and that the attorney could not be compelled to turn over the client's file to new post-conviction counsel without the client's consent. The court thus granted the writ of mandamus.

2. *Bane v. State*, 2011 Tenn. Crim. App. LEXIS 574 (Tenn. Crim. App. 2011)

Bane was convicted of felony murder and sentenced to death. *Bane*, 2011 Tenn. Crim. App. LEXIS 574 at *2. Upon being granted a resentencing, he was again sentenced to death, which was affirmed by the Tennessee Supreme Court. *Id.* at *3. Bane sought post-conviction relief, which was denied and the appellate court affirmed. *Id.*

Bane based his petition on ineffective assistance of counsel and error in jury instruction, both at trial and the resentencing hearing. *Id.* at *21. On appeal, he raised similar issues of ineffective assistance of counsel, but included in this the conduct of his trial attorney at the post-conviction hearing itself. *Id.* at *43. Bane cited to ABA Guideline 10.13 when alleging that the post-conviction court erred in giving deference to trial counsel's strategic decisions when, at the post-conviction hearing, counsel failed to remember what happened at trial and showed up unprepared. *Id.* at *85.

The State responded by stating that Bane failed to note where the post-conviction court applied the guideline, how it applied it wrongly, and how its application affected the denial of relief. *Id.* at *86. However, the court did not acknowledge the guideline any further and denied the claim. The court stated that the post-conviction court only deferred to the trial counsel's strategic decisions in two instances, both of which were not in clear error. *Id.* at *86-87.

Guideline General -- general commentary on 2003 Guidelines

1. *State v. Sykes*, 2014 WL 619503 (Del. Super. Ct. 2014)

The Superior Court of Delaware denied Petitioner Ambrose Sykes' Amended Motion for Post-conviction Relief. Sykes raised twenty-three grounds for relief, many of them based on allegations of ineffective assistance of trial counsel for failing to conduct a reasonable investigation into evidence that would have demonstrated his innocence.

In arguing that the investigation was deficient in numerous ways, Sykes asserted that trial counsel failed to meet with him in a timely manner and failed to maintain ongoing dialogue. Sykes noted that 2003 ABA Guidelines 10.5(B)(2) and 10.5(C)(1) recommend interviewing a client within 24 hours of the attorney's appearance and maintaining an active dialogue with the client regarding factual investigation. However, the court pointed to *Strickland*, and noted that "[t]he guidelines are just that: guidelines. They are not binding law. Failure to comply with

them does not automatically establish unrealistic performance."

Sykes also cited to the ABA Guidelines to support his claim that that trial counsel was ineffective for failing to conduct a thorough mitigation investigation at the penalty phase of trial. [ed. note: the duty to conduct a thorough investigation is covered in 2003 Guideline 10.7, although it was not identified by number by the court] The court stated that there was no absolute duty on the part of defense counsel to pursue all lines of investigation about mitigating evidence for potential use at the penalty stage. Further, counsel need not present all mitigating evidence the investigation uncovered. The court further cited Strickland, noting that "[n]either the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines is legally tantamount to ineffective assistance of counsel . . . The ABA Standards on mitigation investigation, while instructive on reasonableness, are merely guidelines, not legal mandates."

2. *Ploof v. Delaware*, 75 A.3d 811 (Del. 2013)

The Supreme Court of Delaware affirmed in part and remanded in part the lower court's denial of Petitioner's post-conviction relief. Petitioner argued that he received ineffective assistance of counsel during the guilt phase and that his appellate counsel failed to raise all "arguably meritorious" issues on direct appeal. Petitioner also raised ineffective assistance counsel claims based on failure to investigate and present additional mitigating evidence during the penalty phase.

The court recognized the ABA Guidelines as standards of reasonableness, but noted several times that "they are only guides," (citing to *Bobby v. Van Hook*) and that counsel's conduct is to be measured against an objective standard based on professional norms. The court held that the Petitioner did not receive ineffective assistance of counsel during the guilt phase trial or on his appeal as he failed to establish prejudice under the second prong of Strickland. The court reasoned that the purported errors fell "far short of establishing a reasonable probability of a different result" both during trial or on appeal. However, the court remanded Petitioner's penalty phase IAC claims for a more thorough analysis before the Supreme Court would review it.

3. *Ploof v. State*, 75 A.3d 840 (Del. 2013)

The Supreme Court of Delaware affirmed a lower court's decision denying Gary Ploof's motion for post-conviction relief. Ploof argued that his counsel failed to adequately investigate mitigating evidence related to physical and sexual abuse he suffered as a child. In setting forth the standard for evaluating Ploof's claim, the court noted that the U.S. Supreme Court "has recognized that defense attorneys are 'obligated to conduct a thorough investigation of the defendant's background' when preparing for the penalty phase" and then quoted to specific language in 1989 Guideline 11.4.1. In a footnote, the court stated that the ABA "updated its guidance shortly before Ploof's trial" to require that defense counsel "locate and interview the client's family members . . . and virtually everyone else who knew the client and his family." The court also noted that *Bobby v. Van Hook* "chided" a federal court for treating the 2003 Guidelines, specifically Guideline 10.7, as "inexorable commands" but that the Court in *Wiggins v. Smith* had "accepted the 1989 Guidelines' standard requiring counsel to make efforts to 'discover all reasonably available mitigating evidence.'" The footnote concluded that

counsel's investigation "fell short of the 1989 ABA Guideline requiring a 'thorough' investigation, which the State does not dispute was a well-defined norm" and that it would not address whether the 2003 Guidelines represented prevailing professional norms in Delaware at the time of Ploof's trial. The court found that counsel's performance fell below objective standards of reasonableness because counsel failed to investigate "red flags" and was thus deficient. But the court found that Ploof was not prejudiced by the deficient performance and denied relief.

4. Commonwealth v. Padilla, 80 A.3d 1238 (Pa. 2013)

The Supreme Court of Pennsylvania affirmed Appellant Miguel Padilla's convictions and death sentence. Padilla was not appointed counsel until 47 days after his arrest, and he asserted that this delay violated his rights under the Sixth and Fourteenth Amendments. Padilla's main defense at trial was that he was intoxicated during the night of the murders. Because of the delay in appointment of counsel, Padilla argued that there was no appointed mental health expert, and therefore evidence as to his mental state and his degree of alcohol- and drug-induced intoxication at the time of the offense was irrevocably lost.

Padilla argued that the delay in the appointment of counsel was "an extreme departure from . . . and breached norms established by the American Bar Association." In a footnote of the opinion, the court disagreed, stating that "[t]his Court has never endorsed or adopted the ABA guidelines in full. We do not do so now." The court also noted that deviations from the norms established by the ABA Guidelines do not establish that a capital defendant's constitutional rights were violated.

5. United States v. Akbar, 2012 CCA LEXIS 247 (A. Ct. Crim. App. 2012)

The United States Army Criminal Court of Appeals affirmed the lower court's guilt and sentencing holding, denying the petitioner a new trial. *Id.* at 102. First, the court discussed the 2003 Guidelines generally when deciding whether defense counsel was qualified to handle a capital murder trial despite never having litigated a capital case. *Id.* at 33-34. The court refused to set any qualification standards for counsel to represent a capital client. *Id.* at 33. Instead, the court insisted that the court would only review counsel's actual performance. *Id.* at 33-34. To evaluate counsel's performance, the court used Guideline 10.9.1 to support the reasoning that utilizing a strategy designed to avoid the death penalty rather than prove innocence is permissible. *Id.* at 59. The court found that by arguing against the intent requirement using the prisoner's mental illness, counsel was able to argue against guilt while preserving the mental illness issue for mitigation. *Id.* Therefore, counsel's performance conformed to the necessary standards and did not constitute ineffective assistance of counsel. *Id.*

6. State v. Wright, 2012 Del. Super. LEXIS 3 (Del. Super. Ct. 2012)

The Superior Court of Delaware held that the defendant's conviction and sentence was constitutionally infirm based on various Miranda and Brady violations. Because of the success of these three claims, Wright's convictions and death sentence were vacated; however, Wright raised several other unsuccessful claims.

Wright argued that his counsel was ineffective at his second penalty hearing because he failed to interview certain family members and failed to discover information about his childhood which might have persuaded the court to spare his life. He cited to the ABA Guidelines in support of his claim, but did not say when the guidelines were promulgated or whether they existed at the time of his second hearing. The court addressed the ABA Guidelines in general:

At the outset the court notes that the ABA Guidelines are not the Holy Grail of effective assistance claims. As Justice Alito has observed: '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 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.' (internal citations omitted).

The Delaware Court, citing to Van Hook, stated that the record did not contain any evidence showing when the ABA Guidelines relied upon were promulgated, and they are only useful to the extent that they "describe the professional norms prevailing when the representation took place." (internal citations omitted). The Delaware Superior Court stated that the defendant "failed to develop any factual basis upon which the court could decide whether his counsel's assistance was ineffective," nor did he provide any evidence "as to what was the standard expected of attorneys conducting a penalty hearing in 1995."

"In short, the court is left without a record as to what Wright's attorneys did, or did not, do in preparation for the penalty hearing. Likewise Defendant did not present any evidence which the court could use to measure the performance of those attorneys. The court therefore finds that this argument has been abandoned."

7. Rice v. State, (Ga. 2012)

The Supreme Court of Georgia affirmed the trial court's ruling that Rice was not denied effective assistance of counsel. Rice contended that trial counsel failed to perform an adequate mitigation investigation, was deficient in certain aspects of its trial strategy, and that one of the three attorneys was not qualified under the Unified Appeal Procedure or the 2003 ABA Guidelines (2003).

The Court disagreed with Rice's arguments. It found that that although Rice was uncooperative with a series of attorneys and was generally opposed to the preparation of mitigating evidence, the attorneys nevertheless, went to great lengths to develop mitigating evidence in the hope that Rice would allow them to use it at trial and concluded that very little in trial counsel's performance that was arguably deficient under constitutional standards.

The Court also found that while one of the three attorneys was not qualified under the Unified Appeal Procedure or the 2003 ABA Guidelines (2003), Rice was represented by two attorneys who were fully qualified. Moreover, the third attorney entered the case just as the trial was beginning, had only a minor role and was fully supervised by the two lead attorneys. Also, the Court found that Rice failed to show that any actions taken by the third attorney prejudiced his defense. Thus, the Court concluded that there was no deficiency or prejudice in the decision of the two lead attorneys to allow the third attorney to assist.

Finally, assuming counsel's deficiency on several points, the Court concluded that the collective prejudice of those assumed deficiencies did not in reasonable probability affect the outcome of Rice's trial. Accordingly, the Court concluded that Rice's ineffective assistance of counsel claim must fail and affirmed the trial court's ruling.

8. *Bratcher v. Kentucky*, (Ky. Ct. App. 2012)

The Kentucky Court of Appeals affirmed the circuit court's denial of the defendants' (brothers Mark and Phillip Bratcher) motions to vacate. Both argued ineffective assistance of counsel on various grounds. Specifically, Mark alleged that his trial counsel's investigation into mitigating evidence failed to comply with the ABA Guidelines and amounted to deficient representation.

The court disagreed. Without citing the ABA Guidelines, the court determined that Mark's counsel reasonably investigated and evaluated the case. It found that counsel began introducing mitigation evidence during the guilt phase of trial and reiterated it during the penalty phase-despite Mark's unwillingness to discuss mitigation and that further testimony would have been redundant and cumulative. Further, the court found that Mark had not established that hiring a mitigation specialist would have revealed additional facts that would have persuaded jurors to reach a different verdict. In so finding, the court, citing *Strickland*, noted that the "ABA Guidelines are just that-guidelines-having neither the force nor the effect of statutory or case law."

9. *Coleman v. Bradshaw*, 2012 U.S. Dist. LEXIS 170609 (S.D. Ohio 2012)

A magistrate judge for the U.S. District Court for the Southern District of Ohio recommended the court deny petitioner's writ of habeas corpus under Section 2254. The petitioner argued that his counsel's failure to investigate and fully present petitioner's background, character, and development amounted to deficient representation.

The magistrate, citing *Strickland*, *Wiggins*, and the 1989 and 2003 ABA Guidelines determined that counsel's investigation fell below the standard of "reasonableness under prevailing professional norms. It found that counsel failed to make an adequate investigation when they only met with a small number of potential witnesses, such as the petitioner's father, but they failed to speak with other family members and close friends that would have been willing to testify on petitioner's behalf. Furthermore, the court found that counsel failed to explain the mitigation process and prepare the one witness they did present. The magistrate also found that counsel were deficient in their late hiring of an investigator, which resulted in the investigation not beginning until the day before the start of voir dire.

Moreover, the magistrate found no evidence that counsel or the investigator looked into petitioner's medical, educational, employment, or additional family and social history, or looked into his prior adult correctional experience, religious or cultural influences. The magistrate reasoned if no investigation is conducted, counsel could not have known if additional mitigation evidence would be counterproductive or fruitless. Therefore, the magistrate concluded that counsel's investigation fell below the standard of "reasonableness under prevailing professional norms."

The magistrate, however, found that the petitioner failed to show that counsel's deficiencies resulted in prejudice under the second prong of Strickland. It reasoned that the majority of the information offered during post-conviction was either cumulative (or did not rise to the level that a reasonable jurist would have found that it outweighed the aggravating circumstance. Accordingly, the magistrate recommended U.S. District Court for the Southern District of Ohio recommended the court deny petitioner's writ of habeas corpus.

10. *Coleman v. Thaler*, 2012 U.S. Dist. LEXIS 6840 (N.D. Tex. 2012)

The United States District Court for the Northern District of Ohio denied Coleman's petition for habeas relief. Among the claims rejected by the court was an ineffective assistance of counsel claim based on an inadequate investigation and presentation of mitigation evidence.

The state court found that Coleman's assertion was unsupported by the record: trial counsel sought the assistance of a mitigation expert to formulate a strategy and Coleman's family did not provide relevant evidence that would mitigate punishment. The state court further found that while Coleman argued that additional mitigating evidence could have been discovered, she did not identify the sources of that evidence, and that counsel's investigation of possible mitigating evidence was not unreasonable considering the available background evidence. Coleman based most of her argument on the ABA Guidelines, but the district court said 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."

The court, quoting Alito's concurrence in *Van Hook*, said that the ABA is a private group, and "[i]t 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." (internal citations omitted).

The court found that trial counsel's failure to conduct "a greater investigation for mitigation evidence or to present more mitigation evidence" did not constitute ineffective assistance of counsel, nor would Coleman have been prejudiced if more mitigation had been presented.

11. *Miller v. Alabama*, 99 So. 3d 349 (A. Ct. Crim. App. 2011)

The Alabama Court of Criminal Appeals affirmed the circuit court's findings that the defendant failed to prove his underlying allegations of ineffective assistance of trial counsel had merit. The defendant alleged that his trial counsel's investigation into the mitigating evidence failed to comply with the ABA guidelines for conducting an appropriate investigation into potential mitigating evidence in death-cases because trial counsel failed to:

(1) adequately interview the defendant and the defendant's close relatives; and (2) collect the defendant's employment, educational, and medical records, and medical records of his numerous family members with documented serious mental illness.

The court disagreed. The court first noted that whether the defendant's trial counsel's investigation into potential mitigating evidence adhered to the ABA Guidelines was not dispositive of whether counsel's investigation was reasonable. Citing *Jones v. State*, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007), the court reasoned that the ABA Guidelines may "provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative." Then, without discussing the ABA Guidelines, the court agreed with the circuit court's findings that the defendant's counsel's performance was not deficient under *Strickland* and that the defendant failed to establish the requisite prejudice.

12. *Ray v. State*, 80 So. 3d 965 (Ala. Crim. App. 2011)

On appeal for post-conviction relief, Ray asserted that his trial counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase of trial. Ray relied on the Supreme Court decision in *Wiggins v. Smith* that his counsel's performance was inadequate for failing to adhere to ABA Guidelines that govern the standards for investigation in a capital-murder case. 539 U.S. 510 (2003). However, the Court stated that the ABA Guidelines may "provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative." Ray at *12 (citing *Jones v. State*, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007)). Furthermore, the Court upheld the rationale in of the Court of Appeals for the Fourth Circuit in *Yarborough v. Johnson*, which states:

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as 'guides,' *Strickland*, 466 U.S. at 688, not minimum constitutional standards. 520 F.3d 329, 339 (4th Cir. 2008). Therefore, the Court found that the mitigating evidence omitted from the penalty phase would have no impact on his sentence and Ray was denied relief based on his claim for ineffective assistance of counsel.

13. *Reynolds v. Warden*, 2011 Conn. Super. LEXIS 1558 (Conn. Super. Ct. 2011)

Reynolds was convicted of capital and felony murder and sentenced to death. *Reynolds*, 2011 Conn. Super. LEXIS at *7, 14. The Supreme Court of Connecticut affirmed the conviction and sentence. *Id.* at *9. Reynolds's petition for post-conviction relief, based mostly on ineffective assistance of counsel, was denied. The court only briefly discussed the Guidelines in relation to the standard of using a mitigation specialist.

Reynolds claimed that his trial counsel erred by introducing evidence that he suffered from Antisocial Personality Disorder (APD) and by not introducing evidence that he suffered from Posttraumatic Stress Disorder (PTSD). *Id.* at *14. He argued that in addition to offering evidence of PTSD, trial counsel could have hired a mitigation specialist to testify at the penalty stage. *Id.* at *27. The court noted that the hiring of a mitigation specialist was not the standard used in 1995, as it was not mentioned in the 1989 version of the ABA Guidelines. *Id.*

at *28. It further noted that even in the 2003 version, the Guidelines call for a mitigation specialist to be part of the defense team, but not necessarily to testify at the penalty phase of trial. *Id.* Because trial counsel did employ an investigator at the time of trial who acted in a mitigation role, the court found this to be an unwarranted basis for finding Reynolds suffered from ineffective assistance of counsel. *Id.* at *29.

14. *Baer v. State*, 942 N.E.2d 80 (Ind. 2011)

Baer argued on appeal for post-conviction relief for ineffective assistance of appellate counsel, one reason being that appellate counsel failed to request co-counsel. However, the Indiana Supreme Court noted that Baer cited no authority for this contention and that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases did not require appellate counsel to associate with co-counsel. Therefore, the Indiana Supreme Court did not find that appellate counsel's performance fell below the standard established in the Sixth Amendment of the U.S. Constitution.

15. *United States v. Sampson*, 820 F. Supp. 2d 202 (D. Mass. 2011)

The U.S. District Court for the District of Massachusetts granted in part and denied in part a government motion to summarily dismiss Gary Lee Sampson's motion to vacate, set aside, or correct his sentence. Sampson argued in part that his counsel had been ineffective in failing to conduct an adequate mitigation investigation. Before analyzing the claim, the court set forth the standard for evaluating ineffective assistance of counsel. Discussing the how to assess reasonableness under the first prong of *Strickland*, the court cited a number of cases concerning the ABA Guidelines and other ABA standards. The court cited the *per curiam* opinion in *Bobby v. Van Hook*, which rejected the reliance on the Guidelines that were announced 18 years before trial, and *Wiggins v. Smith*, noting that the court cited local practice and the ABA Guidelines as sources of prevailing professional standards. The court included a footnote at the end of its discussion noting that the ABA Guidelines were approved in 2003, but that they also "represent the product of a drafting process that began in April, 2001, and, presumably, codify professional norms as they existed during that drafting period." Thus, the court stated that it would be guided "primarily by the 2003 Guidelines" instead of the 1989 Guidelines, although the latter were still relevant.

The court also assessed a claim that counsel was ineffective by advising Sampson to plead guilty before trial but after the decision in *Ring*. Sampson relied in part on the ABA Guidelines to argue that his representation fell below prevailing professional norms. The court rejected this argument noting that while the Guidelines advise "that counsel should 'be extremely reluctant' to advise a defendant to plead guilty in these circumstances," they establish "no definitive bar to doing so in all circumstances." The court declined to find that counsel had been ineffective in advising a guilty plea and denied relief. The court did find that counsel had been ineffective, however, because they failed to adequately investigate and present mitigation evidence and determined that additional development of the facts was necessary before prejudice to the defendant could be assessed. The court also determined that Sampson was entitled to a new sentencing proceeding on an unrelated claim.

16. *In re Elizabeth Unger Carlyle*, 644 F.3d 694 (8th Cir 2011)

Carlyle was appointed by the district court to represent a death row inmate in his habeas corpus petition. In *re Carlyle*, 644 F.3d at 695. Carlyle and her co-counsel filed numerous motions with the court during the period of their representation of the inmate in order to have their fees raised and fee caps lifted. After winning clemency for the inmate, whose sentence was commuted to life in prison, Carlyle filed her final CJA voucher for reimbursement of over \$35,000. *Id.* at 697. The court refused to lift its previous cap of \$7,000. *Id.* Carlyle then sent the Chief Judge of the Court of Appeals for the Eighth Circuit a letter, asking him to reconsider the district court's fee cap of \$7,000. *Id.* The chief judge dismissed the appeal for lack of jurisdiction. *Id.* at 698.

Carlyle cited to the ABA Guidelines to highlight the fact that she had certain ethical duties to the inmate as his post-conviction counsel that she simply could not fulfill on such a low budget. *Id.* at 698 n.4. The chief judge mentioned this when stating that Carlyle cited no authority which gives him jurisdiction to review the district court's reduction of a CJA voucher. *Id.* at 698. The chief judge noted that the ABA Guidelines, along with the Missouri Rules of Professional Conduct, are the only authority cited by Carlyle in her letter to him. *Id.* The chief judge noted that the CJA allows him to "approve[e] or disapprove[e] . . . certified requests for payments in excess of statutory limitations." *Id.* (emphasis in original). He is not, however, permitted to review reduced or denied vouchers. Thus, he dismissed Carlyle's appeal for lack of subject matter jurisdiction. *Id.* at 700.

17. *State v. Jones*, 2011 Ohio App. LEXIS 4949 (Ohio Ct. App. 2011)

The Ohio Court of Appeals affirmed the lower court's decision that Jones did not receive ineffective assistance of counsel during the guilt phase of his trial, but vacated and remanded for an evidentiary hearing on the lower court's determination that Jones did not receive ineffective assistance during the penalty phase of his trial.

Jones argued that his lawyers were ineffective during the guilt phase of his trial for failing to obtain an expert to refute the rape findings of the medical examiner. The court found that even if an expert had been presented, it would not have changed the outcome of his trial. In addition to failure to obtain an expert, Mr. Jones raised several other reasons why his counsel was ineffective during the guilt phase, but the Court found none of them persuasive.

With regard to the penalty phase, Jones argued that his counsel was ineffective because they "failed to discover the history of incest and sexual abuse in his family, presented an incomplete psychological assessment, failed to secure enough time to discover such information, and did not discover or present documents corroborating his life history." Citing to *Wiggins*, the Ohio Court of Appeals noted that the Supreme Court has long looked to the ABA standards as reasonableness guides. The court then went on to discuss how *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), clarified that the standards are "'only guides' to what reasonableness means, not its definition." The court further stated that the Supreme Court left open the possibility that the guidelines could be applied "more categorically" to post-2003 representation, "so long as they reflected prevailing norms of practice and were not 'so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.'" (internal citations omitted).

In this case, the doctor began meeting with Jones's lawyer six weeks pretrial, but spent less than eight hours conducting interviews and tests before the trial began. The social worker responsible for interviewing Jones's family members did not begin to work on his case until a week into trial. Citing the guidelines, the court said that lawyers should begin

[t]he mitigation investigation . . . as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations. . . . The guidelines also advise lawyers to 'devote substantial time to . . . choosing a jury most favorable to the theories of mitigation that will be presented.' . . . [T]he theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.

The court expressed overall concern with the amount of time spent investigating Jones's background, particularly potentially mitigating circumstances of sexual abuse. Citing once more to the guidelines, the court said that the issue is whether the investigation conducted was "extensive and generally unparalleled." (ABA Guidelines 10.7, at 1022) (internal citations omitted).

Citing to the guidelines, the Court said it is the duty of the lead counsel to direct the work of the defense team, "in such a way that, overall, it provides high quality legal representation in accordance with . . . professional standards." (ABA Guidelines 10.4, at 1002). The duty to investigate a defendant's background applies regardless of the defendant's desires, specifically family and social history. (ABA Guidelines 10.7, at 1021-22).

Judge Carr concurred in the judgment but thought the majority put too much emphasis on the application of the ABA Guidelines. Carr cited to Van Hook and stated that the Supreme Court made it clear that the Guidelines "are 'only guides' to what reasonableness means, not its definition." Van Hook, 130 S. Ct. at 17. Judge Whitmore also concurred and essentially agreed with Judge Carr. "Reliance upon the Guidelines should be restricted to those few cases where there is little or no primary authority available."

18. *Rojem v. Workman*, 655 F.3d 1199 (10th Cir 2011)

Rojem sought post-conviction relief after a second appeal of his sentence resulted in his being sentenced to death for a third time. *Rojem*, 2011 U.S. App. LEXIS at *2. His appointed counsel filed a preliminary budget that sought funding not only for post-conviction relief proceedings, but also for investigation of the guilt phase. *Id.* at *2. Rojem cited the 2003 ABA Guidelines in arguing that "counsel was required to undertake an extensive pre-petition investigation." *Id.* at *3. However, the magistrate judge only approved 45% of what Rojem sought, limiting the budget to penalty stage claims and minimal review of background and history. *Id.* The district court rejected Rojem's subsequent motions for de novo review of the magistrate's decision and for expert funding. *Id.* at *4.

Upon appeal to the Tenth Circuit, the court noted that unlike the petitioner in *Harbison v. Bell*, 129 S. Ct. 1481 (2009), Rojem was not being denied counsel for post-conviction or clemency

proceedings. *Rojem*, 2011 U.S. App. LEXIS at *8. Rather, he was only contesting the amount of compensation awarded counsel for representation. *Id.* at *8-9. Accordingly, the Tenth Circuit found that pursuant to *United States v. French*, 556 F.3d 1091 (10th Cir. 2009), it lacked jurisdiction to hear *Rojem's* claim, as a district court's fee determination is not an appealable order. *Rojem*, 2011 U.S. App. LEXIS at *8-9.

19. *Wilson v. Workman*, 2011 U.S. Dist. LEXIS 17924 (N.D. Okla. 2011)

Petitioner filed for federal habeas relief claiming ineffective assistance of counsel during the sentencing phase of trial for failing to investigate and prepare mitigating evidence. However, Petitioner was ultimately denied relief for failure to meet both the deficient performance and prejudice prongs of *Strickland v. Washington*. 466 U.S. 668 (1984).

The District Court first established that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases provided consideration as to the standards of objective reasonableness of counsel's performance, and also included language from Justice Alito's concurring opinion in *Bobby v. Van Hook* regarding 1989 ABA Guidelines, to which Petitioner heavily relied and the Court found instructive:

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 (rev. ed. 2003) (2003 Guideline or ABA Guideline) 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. 130 S. Ct. 13 (Justice Alito, concurring opinion).

Specifically, Petitioner alleged that his counsel was ineffective for failing to meet the standards set forth in 1989 Guideline 2.1 Number of Attorneys Per Case; 3.1 The Legal Representation Plan; 5.1 Attorney Eligibility; 6.1 Workload; 11.2 Minimum Standards Not Sufficient; 11.3 Determining that Death Penalty is Being Sought; 11.4 Investigation; 11.8.3 Preparation for the Sentencing Phase; and 11.8.6 The Defense Case at the Sentencing Phase. Respondent, however, argued that Petitioner relied too heavily on ABA Guidelines, and the Court cited the *Strickland* rationale that the Guidelines were "only guides" to determining reasonableness. 466 U.S. at 688-89. While the Court admitted that counsel did not conform to some of the standards in the 1989 ABA Guidelines, they concluded that counsel's performance was not constitutionally ineffective and denied habeas relief for failing to meet the *Strickland* prongs.

20. *Coddington v. State*, 259 P.3d 833 (Okla. Crim. App. 2011)

Coddington's death sentence was overturned on appeal, and at resentencing he was again sentenced to death. This sentence was affirmed. Subsequently, Coddington filed for post-conviction relief based on ineffective assistance of appellate counsel, which was denied. Coddington, 2011 Okla. Crim. App. at **1.

Coddington first argued that his appellate counsel was ineffective for failing to fully investigate jurors' backgrounds or sufficiently interview them; doing so would have revealed that six jurors answered voir dire questions inaccurately. Id. at **5. Coddington cited to the 2003 ABA Guidelines, noting that appellate counsel is required to "aggressively investigate all aspects of the case," thus rendering counsel ineffective for not investigating the jury pool adequately. Id. at **9. The court rejected this reference to the guidelines, however, and stated that "the suggestion that compliance with published ABA standards or guidelines is required to meet the standard of effective assistance set forth in Strickland" was rejected in Bobby v. Van Hook, 130 S. Ct. 13 (2009). Coddington, 2011 Okla. Crim. App. at **9. The court pointed out that it previously rejected the argument that assistance can be rendered "per se ineffective simply because . . . representation differed from current capital practice customs Torres v. State, 2005 OK CR 17, Para. 12, 120 P.3d 1184, 1189." Coddington, 2011 Okla. Crim. App. at **9. The court found that appellate counsel was not ineffective for failing to investigate jurors' backgrounds because there was no duty to do so and failing to do so did not prejudice Coddington. Coddington, 2011 Okla. Crim. App. at **10.

Coddington also alleged that appellate counsel should have argued that the State brought on resentencing trial counsel's ineffectiveness because it did not provide adequate resources for defense: the second chair counsel changed during the resentencing and trial counsel filed for a continuance based on her heavy load of capital cases. Coddington, 2011 Okla. Crim. App. at **18. Coddington argued that these factors disregarded the ABA Guidelines on capital representation because counsel lacked resources, which are provided by the State, to give competent representation. Id. at **18-19. The court repeated that it will not hold counsel ineffective for failing to comply with the ABA Guidelines and, as such, Coddington needed to show he was prejudiced by his counsel's representation. Id. at **20. Because the record did not show that trial counsel was "unprepared, rushed, unable to engage in the adversarial process, or less than zealous in representing" him, Coddington's claim of ineffective assistance by his appellate counsel for failing to raise the issue that resentencing trial counsel lacked resources sufficient to represent him. Id. at **19-20.

Because Coddington could not show on these claims or any others that he was prejudiced by the representation he received from appellate counsel, his petition for post-conviction relief was denied.

21. Showers v. Beard, 635 F.3d 625 (3rd Cir 2011)

Petitioner claimed her trial counsel was ineffective for failing to rebut expert testimony and that her appellate counsel was ineffective for failing to raise the claim of ineffective assistance of trial counsel on direct appeal. Petitioner was sentenced to life in prison without parole. This Court upheld the District Court's grant of habeas relief in the form of a new trial, citing 2003 ABA Guideline 11.4.1 (D)(7):

"We do not hold that defense attorneys must always enlist expert testimony but it depends on the specific circumstances of the case. The 1989 American Bar Association ("ABA") Guideline for Appointment and Performance of Counsel in Death Penalty Cases, which is informative, albeit not dispositive, calls for retention of expert witnesses when necessary or appropriate for preparation of the defense, adequate understanding of the prosecution's case and rebuttal of any portion of the prosecution's case at the guilt/innocence phase. Section 11.4.1(D)(7). The District Court held that the 1989 Guideline is relevant for evaluating prevailing norms and provides added support for its conclusion that Rudinski provided deficient performance and that the Superior Court's contrary conclusion was unreasonable." Id. at *6-7.

22. Duffey v. Beard, 2011 U.S. Dist. LEXIS 102322 (M.D. Pa. 2011)

Duffey was sentenced to death following convictions for first-degree murder and robbery. Duffey, 2011 U.S. Dist. LEXIS at *2. Upon automatic review to the Pennsylvania Supreme Court, Duffey's appeal was denied and the trial court affirmed the death sentence. Id. at *4. Eventually, new counsel was appointed to Duffey and a petition for post-conviction relief was filed; the petition made its way to the Pennsylvania Supreme Court, where it was ultimately denied. Id. at *4-5. Duffey then filed this federal habeas corpus petition.

Duffey's main claim for relief was ineffective counsel at trial. His first sub-claim was that his trial counsel was ineffective at sentencing, based in part on the incompleteness of mitigating evidence presented. Id. at *29. In analyzing the professional norms in place at the time of Duffey's 1984 trial, the court first noted what ABA standards were in place for defense counsel at the time. The court pointed out that the ABA Standards for Criminal Justice, developed in 1980, described a duty to investigate mitigating evidence "in general terms." Id. at *24. The court then moved on to discuss the ABA Guidelines specific to representation of capital defendants. Following the reasoning in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), the court decided on a combination of the 1980 Standards and the 1989 Guidelines as representative of the prevailing norms during 1984, when Duffey was tried. Because the 2003 ABA Guidelines contain "131 pages of substance, a stark contrast to the standards applied in the mid-1980s," the court determined that Duffey's counsel in 1984 could not be judged based on the norms promulgated in the 2003 Guidelines. Duffey, 2011 U.S. Dist. LEXIS at *25-26.

Using the 1980 Standards and the 1989 Guidelines, the court noted that counsel "had a duty to ensure that all reasonably available mitigating evidence was presented to the jury," which could include witnesses familiar with Duffey's background, expert testimony regarding his medical or psychological state at the time of the offense, and members of Duffey's family to argue against a death sentence. Id. at *27-28. For each of Duffey's sub-claims under his ineffective assistance of counsel claim, the court found that his counsel's actions were reasonable under the 1989 Guidelines and, therefore, within the "wide range of reasonable professional assistance" under *Strickland v. Washington*, 466 U.S. 668 (1984). Duffey, 2011 U.S. Dist. LEXIS at *32. Specifically, when Duffey cites to the 2003 Guidelines in his claim that counsel should have uncovered the fact that Duffey grew up in an EPA Superfund site, the court rejects the idea that the prevailing norm in 1984 was to investigate neighborhood surroundings and refuses to hold counsel to such a standard. Because Duffey could not show that counsel knew or should have known of the evidence, counsel could not be held

responsible for failing to investigate it. *Id.* at *31-32. In all other circumstances that made up Duffey's ineffective assistance claim, the court found that his counsel acted reasonably and, as such, the state Supreme Court's decision to deny his claim was not in error. After analyzing Duffey's other claims for relief, the court denied his petition. *Id.* at *126.

23. *Commonwealth v. Paddy*, 15 A.3d 431 (Pa. 2011)

The Supreme Court of Pennsylvania affirmed dismissal of Appellant's claims, with the sole exception of remanding one claim of ineffective assistance of counsel for the failure to investigate and present mitigating evidence of Appellant's background and life history during the penalty phase of trial. In his concurring opinion, Justice Eakin stated that counsel's performance should be held to standards that were in place at the time of trial, not thereafter. "The United States Supreme Court held the United States Court of Appeals for the Sixth Circuit erred in applying the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to representation which occurred in the 1980s, without considering whether those guidelines reflect 'the prevailing professional practice at the time of the trial'" *Id.* at *29 (See *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009) (*per Curiam*)).

24. *State v. Gamble*, 63 So. 3d 707 (Ala. Crim. App. 2010)

The Alabama Court of Criminal Appeals affirmed the grant of post-conviction relief by the circuit court, based on petitioner Gamble's claim of ineffective assistance of counsel. The circuit court found that Gamble's trial counsel conducted no mitigation investigation at all, and he had no idea what he wanted Gamble's family to say when he considered calling them as witnesses. The Court of Criminal Appeals quoted a lengthy portion of the circuit court's findings, which included a discussion of the ABA Guidelines and their applicability to cases predating the 1989 Guidelines:

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. See e.g., *Dickerson v. Bagley*, 453 F.3d 690 (6th Cir 2002)) *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir 2003) 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,' *Hamblin*, *supra*, 354 F.3d at 487, 488. These duties are rooted in *Strickland* as well as longstanding, common-sense principles of representation understood by competent counsel in death-penalty cases. Notably, in *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), the United States Supreme Court seemed to adopt this approach, and applied the 1989 and 2003 ABA Guidelines as the guiding rules and standards to a case whose trial occurred before the publication of the 1989 ABA Guidelines.

The court went on to say that it did not have to resolve this issue in Gamble's case because his trial was in 1997, and it could apply the 1989 Guidelines to resolve the issue. The court then cited 1989 Guidelines 11.4.1(A), (C), and (D)(2)(CC), continuing to say: "This Court finds

that not one of the ABA Guidelines concerning the investigation into mitigating evidence was adopted by Gamble's counsel. There was no mitigation plan, an inconsequential mitigation investigation, no mitigation investigator or specialist, and no mitigating evidence presented at the sentencing phase. On this evidence alone, this Court finds trial counsel deficient." The Court of Criminal Appeals agreed with this assessment and discussed the extensive evidence that counsel could have presented in mitigation. The court affirmed the circuit court's finding of ineffective assistance of counsel and granted relief.

25. *West v. Ryan*, 608 F.3d 477 (9th Cir 2010)

The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling to deny Petitioner's claim of ineffective assistance of counsel without holding an evidentiary hearing. *Id.* at 1. Petitioner relied on the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases to argue that counsel failed to adequately investigate mitigating evidence during the penalty phase of the trial. *Id.* 20. The Court, citing to *Van Hook*, stated that "the ABA guidelines are 'only guides' and are only relevant to the extent they reflect prevailing norms at the time of counsel's performance." *Id.* at 20 (citing *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009)). The Court then asserted that it was inappropriate for Petitioner to rely on the 1989 ABA Guidelines because they did not come into effect until after Petitioner's trial, which occurred in 1988. *Id.* at 20. Applying AEDPA and *Strickland*, the Court ultimately held that counsel's performance was not deficient. *Id.* at 32.

26. *Rhodes v. Sec'y, Dep't of Corr.*, 2010 U.S. Dist. LEXIS 108605 (M.D. Fla. 2010)

Petitioner was denied federal habeas relief on his claim of, among other things, ineffective assistance of trial counsel. Petitioner alleged that his counsel failed to investigate or prepare his mitigation case prior to trial. The Court found that counsel's decision not to present certain witnesses provided by the Petitioner was a strategic decision which did not amount to ineffective assistance, and furthermore that counsel's decision not to contact or investigate other witnesses was not unreasonable. The Court rejected Petitioner's reliance on ABA Guidelines, citing *Bobby v. Van Hook*, stating that they are merely useful as "guides" to reasonableness. 130 S.Ct. 13, 16 (2009). "As Justice Alito's concurring opinion noted, '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.'" *Rhodes* (quoting *Bobby v. Van Hook*, 130 S.Ct. 13, 16 (2009)).

27. *Sinisterra v. United States*, 600 F.3d 900 (8th Cir 2010)

The United States Court of Appeals for the Eight Circuit reversed the ruling that Petitioner's claims of ineffective assistance of counsel could be decided without an evidentiary hearing. *Id.* at 903. Relying on the 2003 ABA Guidelines, *Sinisterra* argued that counsel was ineffective due to their failure to hire a mitigation specialist. *Id.* at 908. However, the Court noted that the Supreme Court recently held that "the ABA guidelines may serve as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Id.* at 908 (citing *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009)). The Court then maintained that the ABA Standards in effect at the time of *Sinisterra's* trial "contemplated that the attorneys would complete the mitigation investigation,

hiring a mitigation specialist or other expert to assist in the investigation and presentation of mitigation evidence if necessary." Id. at 908 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty (1989)). The Court asserted that "the substance of Sinisterra's claim is whether counsel adequately investigated and presented mitigation evidence, including mental health and capacity evidence, and that an affirmative answer to that question will moot the question whether they should have retained a mitigation specialist." Id. at 909. The Court then remanded the case "with instructions to hold an evidentiary hearing to determine whether counsel were ineffective for failing to investigate and present mitigation evidence." Id. at 912.

28. *Post v. Bradshaw*, 621 F.3d 406 (6th Cir 2010)

The 6th Circuit Court of Appeals affirmed the Northern District of Ohio's denial of post-conviction relief for Post. Post was initially offered a plea agreement where he would be sentenced to life in prison, but he refused to plead guilty. The offer was withdrawn. Post's counsel later persuaded him to plead no contest in front of a three judge panel although this time there was no agreement that the state would not seek death. The panel found him guilty and he was sentenced to death. In his post-conviction petitions, Post claimed that his counsel was ineffective for advising him to plead no contest, citing to 1989 Guideline 11.6.2. The Ohio Supreme Court found that counsel's strategy was professionally reasonable because 1) Post was "virtually certain" to be found guilty if he went to trial and 2) pleading no contest would preserve an issue for appeal. The 6th Circuit found both of these rationales to be unreasonable applications of Strickland. The court went on to conduct a de novo review, however, and found a separate rationale that rendered counsel's performance professionally reasonable: counsel's hope that the plea would be considered a mitigating factor. The court explicitly rejected Post's argument that, according to the Guidelines, it is per se ineffective assistance of counsel to plead no contest without a guaranteed life sentence. It cited to Van Hook in saying that the Guidelines are "not inexorable commands" but "only guides" and found that counsel's performance was reasonable under the circumstances.

Judge Cole issued a dissenting opinion and discussed the issue of ineffectiveness and the ABA Guidelines at length. He found that Post's counsel was ineffective for failing to secure a life sentence before advising him to plead no contest. He referenced the language of both the 1989 and 2003 ABA Guidelines (including 1989 Guideline 11.6.3), and cited to the US Supreme Court's language in *Florida v. Nixon*: "[P]leading guilty [to a capital offense] without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant . . ." (citing to the 2003 ABA Guidelines). Cole also referenced further language from *Nixon* and the ABA Guidelines (10.9.1 cmt) saying that attorneys often do face daunting challenges, particularly when the defendant's guilt is clear. But in those cases "avoiding execution [may be] the best and only realistic result possible." Based on this, Cole found that "the Constitution required Post's counsel to make a strategic judgments based on something more concrete than an unsubstantiated hope that his no-contest plea would be considered a mitigating factor, particularly because their client's life was on the line." He noted that the majority provided no reason why the ABA Guidelines should be disregarded or why there was any reason for Post's counsel to think that a plea of no contest would be a mitigating factor. He said:

In this situation, the ABA Guidelines' recommendation is clear. In following their guidance we do not, as the majority seems to suggest, need to adopt them as per se rules. Rather, as both this Court and the Supreme Court has stated repeatedly, we look to them for guidance in determining whether counsel's representation was constitutionally inadequate.

...

I imagine that Post may have gained some comfort in knowing that his attorney hoped his no-contest plea would be treated as a mitigating factor. But this comfort was short-lived. Post's counsel's foremost duty in that situation was not to keep hope alive, but to keep Post alive. Viewed in this light, it certainly was unreasonable to advise him to plead no contest and waive all of his trial rights without a guarantee, or at least some concrete indication, that doing so might help spare his life.

29. *State v. Craig*, 2010 Ohio App. LEXIS 975 (Ohio Ct. App. 2010)

The Court of Appeals of Ohio affirmed the trial court's denial for post conviction relief and held that the trial court used the proper standard to assess whether Craig received ineffective assistance of counsel. *Id.* at 1. Relying on the Supreme Court decisions in *Van Hook*, *Belmontes*, and *Strickland*, the Court of Appeals of Ohio rejected Craig's argument that effective assistance of counsel should be measured by the professional standards of the American Bar Association, which requires a thorough and complete investigation. *Id.* at 11. First, the Court referred to *Van Hook* and stated that the Supreme Court "rejected holding counsel to the standards announced by the American Bar Association." *Id.* at 8 (citing *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009)). Then, the Court reiterated the standard set forth by *Strickland* that legal representation should not "fall 'below an objective standard of reasonableness' in light of 'prevailing professional norms.'" *Id.* at 8 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). Finally the court looked to *Belmontes* to highlight that a court must determine the reasonableness of representation "in light of the variety of circumstances facing counsel" and that "scrutiny of counsel's performance must be highly deferential." *Id.* at 10 (citing *Wong v. Belmontes*, 130 S.Ct. 383, 384 (2009)). Ultimately, the Court affirmed the trial court's ruling that Craig was not denied effective assistance of counsel. *Id.* at 22.

30. *LaMar v. Ishee*, 2010 U.S. Dist. LEXIS 139621 (S.D. Ohio 2010)

Magistrate Judge Merz, Southern District of Ohio, reviewed Petitioner Lamar's habeas petition and recommended that relief be denied. Among Lamar's claims for relief was a claim that his counsel was ineffective on direct appeal. Magistrate Merz found that Lamar's "bare-bones allegations" were insufficient to meet his burden under AEDPA. Lamar alleged that his counsel had "no tactical or strategic reason for foregoing 'these claims.'" The court declined to determine for itself which claims Lamar was referring to in his petition. The court noted that Lamar cited the 2003 Guidelines, and noted that these "were not in existence at the time of his direct appeal in state court [in 1998]." The court did not discuss the Guidelines further or explain why the timing of his direct appeal was relevant.

31. *Coleman v. Bradshaw*, (S.D. Ohio 2010)

Note: the citation is 2010 but the order at the end is dated 2012 and is identical to the 2012 *Coleman v. Bradshaw* order. Need to clear up what is going on here.

32. *Loza v. Mitchell*, 705 F. Supp. 2d 773 (S.D. Ohio 2010)

The United States District Court for the Southern District of Ohio examined a number of claims made by Petitioner including, ineffective assistance of counsel in representing a foreign national. *Id.* at 46. Petitioner maintained that counsel's "investigation, preparation and presentation of available evidence" was inadequate. In response, the Court stated "[u]nder the Ohio statute, a capital defendant found guilty of a death specification has to present some mitigating evidence in order to avoid the death penalty." (citing *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999); *Rompilla v. Beard*, 545 U.S. 374 (2005) (incorporating the 2003 American Bar Association ("ABA") Guidelines regarding competent representation in capital cases); and *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (discussing the duty to investigate mitigating evidence and incorporating the 1989 ABA Guidelines regarding competent representation in capital cases)). The Court asserted that the Sixth Circuit "has not hesitated to hold that 'failure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment.'" *Id.* at 82 (citing *Martin v. Mitchell*, 280 F.3d 594, 612 (6th Cir. 2002)). However, the Court found that counsel's mitigation investigation and preparation was not inadequate. *Id.* at 122.

33. *Duty v. Workman*, 366 F. App'x. 863 (10th Cir 2010)

The US Court of Appeals for the 10th Circuit affirmed the judgment of the circuit court denying relief to Duty on his federal habeas claims. Contained with the habeas petition was a claim of ineffective assistance of counsel. The court found that Duty had failed to show prejudice and therefore declined to consider the deficiency prong of *Strickland*. In a footnote, however, the court noted that Duty had relied "almost exclusively" on the standards set forth in the 2003 ABA Guidelines. Quoting *Van Hook*, the court noted that "The ABA Guidelines are useful as 'guides' in determining whether counsel's performance was reasonable. [B]ut only to the extent they describe the professional norms prevailing when the representation took place." (Internal citations omitted; emphasis in original). The court then noted that "The 2003 ABA Guidelines were approved on Feb. 10, 2003, over three months after the challenged representation." The court ended its analysis there and did not discuss whether it actually believes that the norms embodied in the Guidelines were not in existence only 3 months before the final approval vote in the ABA.

In that same footnote, the court also noted that not every failure to comply with the ABA Guidelines necessarily constitutes deficient performance, citing again to *Van Hook*: "Moreover, to the extent Duty argues a failure to comply with the ABA Guidelines will, in every instance, result in ineffective assistance, he is wrong. The ABA Guidelines 'are only guides to what reasonableness means, not its definition.' *Id.* at 17 (quotations omitted) (rejecting appellate court's treatment of ABA Guidelines as 'inexorable commands with which all capital defense counsel must fully comply' rather than as mere 'evidence of what reasonably diligent attorneys would do).'"

34. *Cauthern v. Bell*, 2010 U.S. Dist. LEXIS 31835 (M.D. Tenn. 2010)

The United States District Court for the Middle District of Tennessee examined a number of claims by Petitioner, among them ineffective assistance of counsel. *Id.* at 299. The Court ruled

that none of the claims merited relief. *Id.* at 299. In its analysis, the Court asserted that the "American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("the ABA Guidelines") establishes the standards of performance for defense counsel in capital cases." *Id.* at 130 (citing *Strickland v. Washington*, 466 U.S. 668; *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003)). However, the Court ruled that Petitioner's claim of ineffective assistance of counsel claim was "procedurally defaulted for the purpose of federal habeas corpus," and even if it was not, Petitioner did not overcome the prejudice prong of the *Strickland* test. *Id.* at 197.

35. *Johnson v. United States*, 2010 U.S. Dist. LEXIS 144149 (N.D. Tex. 2010)

Johnson sought habeas relief from several 2005 convictions, raising sixty-four grounds for relief, forty-eight of which were claims of ineffective assistance of counsel claims. Of those claims, relief was ultimately granted on four of the IAC claims. The ABA Guidelines were discussed both generally and in the context of two of *Johnson's* IAC claims: one on which she got relief, one on which she did not get relief.

The District Court, citing to *Van Hook*, explained that the Supreme Court has said that the guidelines are "useful as 'guides' to what reasonableness [of counsel's performance] entails, but only to the extent they describe the professional norms prevailing when the representation took place." (internal citations omitted). The District Court said that the Supreme Court's decision in *Wiggins v. Smith* said that the ABA standards are "only guides," and the District Court has since "regarded them as such."

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

(internal citations omitted). The court considered the Guidelines to be guides as to whether counsel's choices were objectively reasonable "subject to my determination of whether specific ABA Guidelines are so detailed that they interfere with the constitutionally protected independence of counsel or restrict counsel's wide latitude to make tactical decisions."

Johnson raised several allegations with regard to errors about her mental state at the time of the offense arising from her trial counsel's failure to investigate, prepare, and present mitigating evidence. The District Court, cited to the Eighth Circuit Court of Appeals decision in *Ortiz v. United States* and noted that the ABA standards in effect during *Ortiz's* trial, "are a useful guide in this case, [and] provide [that] '[c]ounsel should conduct independent investigations relating to the . . . penalty phase of a capital trial . . . regardless of any initial assertion by the client that mitigation is not to be offered . . . [and] this investigation should comprise efforts to discover all reasonably available mitigating evidence.'" The court, further citing to the Guidelines as quoted in *Ortiz*, noted that they require counsel to interview potential witnesses that may be familiar with client history that might affect mitigating evidence, as well as any members of the victim's family that would not want the client sentenced to death. Citing to the commentary of Guideline 11.4.1, the court said that the duty

to investigate "is not negated by the expressed desires of a client." (internal citations omitted).

The court also discussed the ABA guidelines with respect to Johnson's claim that trial counsel was ineffective for failing to investigate and present evidence of her mental state at the time of the offenses. The District Court found the performance of Johnson's counsel was not reasonable. "Here, trial counsel's preparation for the mitigation phase not only was not 'ideal,' the record is clear that no reasonable attorney would have failed to pursue further evidence." Counsel's "pulling the plug" on the investigation was "not based on any advice of the experts, but contrary to it." The District Court further found that trial counsel ignored trial experts' suggestions about avenues to develop an "appropriate and effective mental health mitigation case." The court further found that if counsel's decision was strategic, "it was the worst strategic decision by any defense counsel that I have ever seen in my entire career: It effectively doomed Johnson's mitigation case from the start."

The District Court concluded that counsel's deficient performance prejudiced Johnson, and thus, she was entitled to relief from the mitigation phase verdict.

36. *Sparks v. State*, 2010 Tex. Crim. App. LEXIS 629 (Tex. Crim. App. 2010)

The Court of Criminal Appeals of Texas affirmed the judgment and death sentence of the appellant on direct appeal. Appellant argued that the jury instructions given pursuant to Texas Article 37.071 were not in accord with ABA Guidelines. Article 37.071 states:

The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue: Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Code Crim. Proc. Ann. art 37.071, Section 2(e)(1) (1991). However, the court rejected this argument because Appellant's contentions were based on case precedent rulings prior to a 1991 amendment to Article 37.071 and because Appellant did not explain how those case rulings invalidated the jury instructions.

37. *Jackson v. Kelly*, 699 F.Supp.2d 838 (E.D. Va. 2010)

NOTE: Reversed by 4th Circuit in 2011.

The United States District Court for the Eastern District of Virginia granted habeas relief to Petitioner based on the failure of the trial counsel to investigate and present mitigating evidence and the failure of the trial court to give adequate mitigation instructions. *Id.* at 92. Looking to the Supreme Court in its analysis, the Court noted that the 2003 ABA Guidelines "represent the reasonable practice of capital defense counsel at the time of Jackson's trial, which took place in October and November 2002." *Id.* at 15. The Court also noted that although the ABA Guidelines are not dispositive, they serve as a useful guide in determining whether the legal representation was reasonable. *Id.* at 15 (citing *Wiggins v. Smith*, 539 U.S.

510, 523 (2003); see *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009)).

The Court asserted that the Counsel's objective "in the penalty phase of a capital case, should be to help the jury see the client as someone they do not want to kill." *Id.* at 63 (quoting citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.8.6 (1989). Citing a reference to the 1989 ABA Guideline 11.4.1 (C) in *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), the Court emphasized that mitigation strategy "should comprise efforts to discover all reasonably available mitigation evidence." *Id.* at 14 (citations omitted). Quoting the Guidelines, the Court stated that "[t]his obligation includes interviewing "witnesses familiar with aspects of the client's life history" that might uncover "possible mitigating reasons for the offense(s)." *Id.* at 14 (also citing 2003 ABA Guideline 10.7). According to the Court, "numerous entries within the records should have prompted further investigation by Jackson's attorneys" and "would unquestionably lead a reasonable attorney to investigate further." *Id.* at 17.

The Court stayed the writ for sixty days in order for the Commonwealth to either initiate a new sentencing hearing or to sentence Petitioner to life in prison. *Id.* at 92.

38. *State v. Speer*, 212 P.3d 787 (Ariz. 2009)

On direct appeal, the Arizona Supreme Court affirmed the death sentence for the defendant. In its opinion the court noted that counsel had failed to "question the propriety" of the death sentence in his briefs on appeal, although he had done so at oral argument. *Id.* at 801. Although the court went on to review evidence of aggravating and mitigating circumstances as directed by statute, it was critical of counsel's failure to raise this argument and admonished counsel of their duty to raise claims, citing the 2003 ABA Guidelines:

We have reminded capital defense counsel on two recent occasions of their professional obligation "to take advantage of all appropriate opportunities to argue why death is not a suitable punishment" for their client, and not to "simply rely on this Court's statutory duty to review the record." *Garza*, 216 Ariz. at 71 P 74 & n.16, 163 P.3d at 1021 & n.16 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)); *Morris*, 215 Ariz. at 330 P 76 & n.10, 160 P.3d at 209 & n.10 (same). We emphasize that admonition again today.

39. *Pinholster v. Ayers*, 590 F.3d 651 (9th Cir 2009)

Sitting en banc, the US Court of Appeals for the 9th Circuit reversed the decision of a three-judge panel, granting habeas relief on Pinholster's claim that his counsel was ineffective in the punishment phase of his trial and remanding for imposition of a lesser sentence or new penalty phase hearing. Importantly, this case was decided after the Supreme Court issued its opinion in *Bobby v. Van Hook*. Pinholster's trial occurred in 1984, and the majority opinion cites to the ABA Standards for Criminal Justice in analyzing counsel's performance. In doing so, the majority reaffirmed that the ABA Guidelines are a guide to determining what is reasonable:

Strickland also instructs that "[t]he proper measure of attorney performance [is] reasonableness under prevailing professional norms." *Id.* at 688. As one example of a "guide[]

to determining what is reasonable," the Court referenced "[p]revailing norms of practice as reflected in American Bar Association standards." *Id.*; see also *Rompilla*, 545 U.S. at 387 ("[W]e long have referred [to these ABA Standards] as guides to determining what is reasonable." (citation and internal quotation marks omitted) (alterations in original)).

2009 U.S. App. LEXIS 26850 at 12. In response to the dissent, the majority briefly discusses *Van Hook*, asserting that it neither changed how the Guidelines are used nor precludes the use of the Criminal Justice Standards in *Pinholster*'s case:

The dissent labors to convince us that *Bobby v. Van Hook*, 558 U.S. , No. 09-144 (2009), somehow changed the rules with regard to the ABA standards. *Diss.* at 16116-20. However, the Court held that it is permissible to use a re-statement of professional standards to help determine an attorney's obligation towards a client only when those standards "describe the professional norms prevailing when the representation took place." *Van Hook*, No. 09-144, slip op. at 4. That is precisely what we do here. We refer to the 1982 edition of the ABA standards that were in effect at the time of *Pinholster*'s 1984 trial. Moreover, in *Van Hook*, the Sixth Circuit erroneously stated that attorneys "must fully comply" with the ABA guidelines. *Id.* (citing *Van Hook v. Anderson*, 560 F.3d 523, 526 (6th Cir. 2009)). Here we make clear, as the Supreme Court has, that such standards do not define reasonable representation, but rather are "guides to determining what is reasonable." *Strickland*, 466 U.S. at 688. The dissent's jeremiad is therefore misplaced.

The dissent written by Judge Kozinski and joined by Judges Rymer and Kleinfeld, disapproves of both the majority's use of the Criminal Justice Standards and use of the ABA Guidelines in general.

The opinion here illustrates just how far we've strayed from the Court's wise cautions in *Strickland*. Rather than looking to the standards of practice applicable in the community at the time trial was held, we have now adopted a national standard embodied in the ABA Guidelines, which are read rigidly to require a certain kind of investigation and a certain kind of mitigation defense (what is known as "humanizing" the defendant) in every capital case. *Contra Strickland*, 466 U.S. at 689. . . . This is exactly what the Supreme Court summarily reversed the Sixth Circuit for doing in *Van Hook*: "Judging counsel's conduct in the 1980s on the basis of [later ABA Guidelines]--without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial--was," the Court held, "error." *Van Hook*, No. 09-144, slip op. at 5. It's the same error the majority commits today.

2009 U.S. App. LEXIS 26850 at 27. The dissent continues to assert that *Pinholster* "offers no evidence that the 1982 ABA Guidelines meet this standard [of prevailing norms of practice] for a capital trial in Los Angeles in 1984." *Id.* at 28. The dissent also attacks the ABA as an authority on lawyer conduct:

Terry Williams, Wiggins and *Rompilla* rely on the ABA Guidelines as background support where they overlap with local standards (Terry Williams and Wiggins) or where the proposition is so obvious that it's a matter of common sense (*Rompilla*). See *Van Hook*, No. 09-144, slip op. at 8. These cases don't establish the ABA as the final authority on how lawyers must conduct criminal trials, with the power to override contrary determinations by the state courts about the lawyers they admit to practice.

2009 U.S. App. LEXIS at 30.

40. Hall v. Lee, 684 S.E.2d 868 (Ga. 2009)

The Georgia Supreme Court reversed a lower court's grant of habeas relief to appellee James Lee based on a finding of ineffective assistance of counsel. In assessing counsel's performance, the court made general reference to the ABA Guidelines:

While it is appropriate to measure counsel's performance against prevailing norms of practice as reflected in publications such as the Southern Center's manual, as well as American Bar Association standards like the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, we remind habeas courts that such publications "are only guides" in determining the reasonableness of counsel's performance, as no set of rules can adequately allow for "the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (Emphasis supplied.) *Strickland v. Washington*, supra, 466 U.S. at 709. See *Hall v. McPherson*, 284 Ga. 219 (2) (663 SE2d 659) (2008).

684 S.E.2d at 873.

41. State ex rel. Weary v. State, 12 So. 3d 968 (La. 2009)

In an opinion written by Judge Pilip Ciaccio, the Supreme Court of Louisiana ordered the district court to enroll Edward Qu. Cassidy as co-counsel with the Capital Post-Conviction Project of Louisiana (CPCPL) to represent Michael Weary in post-conviction proceedings. *Id.* at *1. Judge Ciaccio granted counsel 180 days to file a supplemental application for post-conviction relief. *Id.* at *2.

In the dissenting opinion, Judges Knoll viewed 90 days as sufficient. *Id.* at *5. Although the CPCPL cited the ABA Guidelines (2003) to maintain that Mr. Weary should be afforded the extra time to "relaunch a reinvestigation of the entire case," Judge Knoll argued that "many of the ABA Guidelines are merely suggestive and not law." *Id.* at *4 (citing *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003)). Judge Knoll stated that he does not "believe [that] the law requires that counsel reinvestigate the entire case, as though the case never been investigated, brought to trial, and affirmed on appeal." *Id.* Thus, Judge Knoll concluded that "[i]nstead of steeping [Mr. Weary] in precatory guidelines, I would suggest allowing newly appointed counsel . . . no more than 90 days to file a supplemental application for post-conviction relief." *Id.* at *5-6.

Judge Knoll also expressed his disagreement with the practice of defense counsel filing shell petitions in state court. *Id.* at *6-7. Judge Knoll argued that shell petitions have caused "unreasonable" delays and have "effectively stopped the State from carrying out the sentence in capital cases at a great expense to the State." *Id.* at 7. In acknowledging that "courts have had little effect in discouraging" shell petitions, Judge Knoll called on the legislature to intervene: "It is probably appropriate now for the Legislature to address this aspect of post-conviction proceedings if this State is going to continue to have capital sentences." *Id.*

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

Following a rehearing en banc that vacated part of a prior decision and remanded for further proceedings, the U.S. Court of Appeals for the Sixth Circuit reversed a district court's denial of Robert Van Hook's petition for federal habeas corpus relief. Van Hook argued that his trial counsel was deficient in failing to conduct a full and timely investigation into his background. In initially setting out its conclusion that counsel was ineffective, the court stated that Van Hook's Sixth Amendment rights were violated under three Supreme Court cases, *Strickland v. Washington*, *Wiggins v. Smith*, and *Rompilla v. Beard*. The court noted in a parenthetical that *Wiggins* incorporated the ABA Guidelines as the "professional standard of performance." After discussing the applicable precedent in more detail, the court observed that, "[a]fter *Strickland*, this Court and the Supreme Court made clear in a number of cases that counsel in death cases should follow closely the ABA standards referred to above." The court further stated that it has "explained clearly" that the ABA Guidelines "provide the 'guiding rules and standards to be used in defining prevailing professional norms in ineffective assistance cases.'"

The court proceeded to discuss the scope of a proper mitigation investigation under case law and also stated that the "ABA Guidelines explain that this investigation ought to include interviews with family members and all other people who knew the client." The court quoted at length from 2003 Guideline 10.7 to describe the types of individuals counsel should interview. Finally, the court discussed the necessity of beginning a mitigation investigation early and not waiting until the last minute. Following a description of precedent, the court stated that the "requirement for counsel to perform thorough, not last-minute, investigations before a mitigation hearing is further reinforced by the ABA Guidelines," again quoting language from Guideline 10.7, which states that the investigation "should be as quickly as possible" and "preparing for the mitigation phase of trial 'requires extensive and generally unparalleled investigation into personal and family history.'" Applying case law and the ABA Guidelines, the court found that counsel's mitigation investigation was deficient in scope and did not "begin quickly" after appointment. The court determined that Van Hook was prejudiced by the deficient performance and granted relief.

43. Wiles v. Bagley, 561 F.3d 636 (6th Cir 2009)

The Sixth Circuit affirmed a three-judge panel decision from Ohio for the death sentence of aggravated murder, holding that Mr. Wiles failed to show the necessary elements for an ineffective assistance of counsel claim. However, in the concurring opinion, Justice Martin agreed with the court's decision but questioned the continuation of capital punishment generally. Justice Martin argued that the death penalty is too expensive to maintain, and cited the ABA Guidelines (2003) to illustrate the tremendous resources that are required for litigating capital punishment cases, including: "far greater time, support services, and expertise to prepare." *Id.* at 644. Justice Martin also cited the Supplementary Guidelines (2008) to note the added costs of the "second trial" that is conducted during the penalty phase. *Id.* Thus, according to Justice Martin, the death penalty may no longer be financially justified.

44. State v. Mills, 2009 Ohio App. LEXIS 4755 (Ohio Ct. App. 2009)

In this non-capital case, the Court of Appeals of Ohio affirmed the trial court's denial of the defendant's petition for post-conviction relief. The Court of Appeals rejected the petitioner's

ineffective assistance of counsel claims because, among other things, trial counsel's performance did not violate any objective standards or guidelines of performance. In support of the significance of such "objectively established standards or guidelines" the court specifically pointed to the ABA Guidelines and quoted several U.S. Supreme Court cases, including *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003).

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

The defendant's convictions for aggravated robbery and aggravated murder with one capital specification were affirmed. The Ohio courts denied the defendant's petition for post-conviction relief. The district court also denied all of the defendant's claims in a federal habeas petition.

En banc the Sixth Circuit twice vacated and remanded a Sixth Circuit panel's rulings on the federal habeas petition. The panel's third and final ruling granted relief to the defendant on the sole ground that his lawyers performed deficiently in investigating and presenting mitigation evidence. The ruling relied on the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003).

The state petitioned for a writ of certiorari. The U.S. Supreme Court granted the writ and reversed the Sixth Circuit.

The Supreme Court found error in the Sixth District's judgment of counsel's conduct from the defendant's 1985 trial based on Guidelines from 2003, without considering whether the 2003 Guidelines reflected the prevailing professional practice at the time. *Bobby v. Van Hook*, No. 09-144, 2009 WL 3712013, at *2 (U.S. Nov. 9, 2009).

The Supreme Court also found that the U.S. Court of Appeals erred when it treated the ABA's 2003 Guidelines as inexorable commands with which all capital defense counsel "must fully comply" rather than merely as evidence of what reasonably diligent attorneys would do. *Id.* at *3. Court precedent regarding the ABA Guidelines establishes that the ABA standards are only guides to what reasonableness is, not its definition. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). States may impose whatever specific rules they see fit to ensure that criminal defendants are well represented. However, the Supreme Court has held that the federal Constitution imposes one general requirement: that counsel make objectively reasonable choices. 2009 WL 3712013, at *3 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).

Justice Alito issued a brief concurring opinion to which no other justices joined, stating that ABA Guidelines do not have special relevance to determine whether an attorney's performance meets the Sixth Amendment standard. *Id.* at *6 (Alito, J., concurring). The views from the ABA and the group that made the 2003 Guidelines do not necessarily reflect the views of the American Bar as a whole. *Id.* It is the courts' responsibility to determine the nature of a defense attorney's work in a capital case to meet the obligation imposed by the Constitution. *Id.*

46. *Morton v. State*, 995 So. 2d 233 (Fla. 2008)

Appellant/Petitioner Morton appealed his denial of post-conviction relief and petitioned for a writ of habeas corpus to the Florida Supreme Court. Morton claimed that his trial counsel failed to meet the minimum standard provided by the ABA Guidelines and that the post-conviction court erred in failing to take judicial notice of the ABA Guidelines. The Florida Supreme Court referenced *Wiggins v. Smith* (2003), in which the U.S. Supreme Court acknowledged the importance of the Guidelines, but added that the ABA standards are "guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." As a result, the Court held that a reversal for a new evidentiary hearing was not required. The Court affirmed the trial court's denial of post-conviction relief and denied Morton's habeas corpus petition.

47. *Hall v. McPherson*, 663 S.E.2d 659 (Ga. 2008)

The petitioner (Warden) argues that the habeas court erred when using the ABA Guidelines as the standard for the investigation and presentation of mitigating evidence and that the lack of such evidence was not prejudicial. The court held that the U.S. Supreme Court has been using the ABA Guidelines as an appropriate standard since at least 2003. Furthermore, the court finds that

"no reasonable lawyer in counsel's position would have decided not to seek McPherson's drug treatment records Trial counsel's investigation also was not reasonable in light of the guidelines set forth by the [ABA], which provide that counsel at every stage of a capital case 'have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.' [2003 ABA Guideline 10.11 (A).] As counsel had no rational strategy or reason for failing to develop this mitigating evidence, their performance fell below an objective standard of reasonableness."

Id. at *31-32. Ultimately, the court found that the habeas court had not erred in using the Guidelines as standards for counsel and that counsel's errors were prejudicial. Therefore, the habeas court's decision to amend respondent's death sentence to life in prison was appropriate.

48. *State v. Davis*, 2008 Ohio App. LEXIS 5718 (Ohio Ct. App. 2008)

Davis appealed the denial of his amended petition of Post Conviction Relief to the Court of Appeals of Ohio, Fifth Appellate District. The ABA Guidelines were briefly mentioned when the Court noted that the U.S. Supreme Court considers the ABA Guidelines to be the norms in ineffective assistance of counsel cases, citing *Rompilla v. Beard* and *Wiggins v. Smith*. The Court concluded that there was no reason to believe that appellant's trial counsel violated the ABA Guidelines or any other standards. The Court affirmed the denial of appellant's PCR petition.

49. *Commonwealth v. Gibson*, 951 A.2d 1110 (Pa. 2008)

Petitioner appealed the dismissal of his claim of ineffective assistance of counsel among other things. The Post Conviction Relief Act (hereinafter PCRA) court dismissed petitioner's claims of ineffective assistance of counsel for failure to investigate and present mitigation evidence related to petitioner's role in the murders and his diminished capacity, as well as failing to challenge a ballistics report during the guilt phase of trial. Ultimately, the Pennsylvania Supreme Court held that trial counsel did not present this evidence for strategic reasons; therefore counsel's performance was effective for these claims.

The PCRA court found that petitioner's ineffective assistance of counsel for failure to investigate and present mitigation evidence related to petitioner's history of drug and alcohol abuse and dysfunctional family life during the penalty phase of trial was meritorious and granted a new penalty phase hearing. In affirming the PCRA court's decision, the Pennsylvania Supreme Court notes that the PCRA court relied on the ABA Guidelines which state that "trial counsel's performance is deficient whenever he breaches the duty to conduct a thorough investigation of defendant's background." *Id.* at *17. The Court remanded the case to the PCRA court to develop mental health mitigation evidence, as well as a comparison of the mitigation evidence offered at trial with the mitigation evidence developed during post-conviction trial and to elaborate why the failure to present such evidence was prejudicial.

50. *Chalmers v. State*, 2008 Tenn. Crim. App. LEXIS 464 (Tenn. Crim. App. 2008)

The Tennessee Court of Criminal Appeals affirmed a decision denying post conviction relief for Chalmers. In his petition, Chalmers claimed that "trial counsel failed to properly cross-examine certain witnesses at trial, failed to properly investigate petitioner's case and failed to present adequate mitigation including evidence[] of petitioner's alleged drug use, intellectual deficits; Post Traumatic Stress Disorder, and personality disorder." The court acknowledged that Chalmers' counsel failed to meet all of the ABA Guidelines' criteria, it dismissed the criteria as not binding on the court:

Moreover, while the American Bar Association (ABA) standards as to capital representation were in place at the time of the appointment and while it must be conceded that Ms. Kendall-Garner failed to satisfy all of the suggested criteria established by the ABA, these guidelines are not binding upon the trial courts of this state. There is no authority that the aspirational qualifications of counsel in a capital trial set forth in the ABA standards or that the required qualifications of capital counsel set forth in Rule 13, Rules of the Tennessee Supreme Court, are constitutionally compelled. See generally *Trent Starks v. State*, No. W2005-02478-CCA-R3-PC, 2006 Tenn. Crim. App. LEXIS 860 (Tenn. Crim. App., at Jackson, Nov. 2, 2006), perm. to appeal denied, (Tenn. Mar. 5, 2007). The Fourteenth Amendment guidelines simply require the appointment of an attorney to a capital petitioner. While the Tennessee Supreme Court has put into place heightened requirements in Rule 13, including the requirements of two attorneys that meet certain specific eligibility criteria, the attorneys need not meet these stringent standards to pass constitutional muster. *Id.*

Citing the guidelines, the court admitted that "special skills are necessary to assure adequate representation of defendants in death penalty cases" but went on to hold that lack of experience does not per se render counsel ineffective. "Rather, the petitioner must demonstrate with specificity that counsel made errors so serious that counsel was not functioning as

counsel guaranteed the petitioner by the Sixth Amendment and that such errors prejudiced the defense."

51. *Yarbrough v. Johnson*, 520 F.3d 329 (4th Cir 2008)

On appeal to the 4th Circuit, Yarbrough argued his trial counsel was ineffective for failing to hire a DNA expert to contradict the evidence that was used against him. The state's case relied heavily on the DNA evidence at the crime scene and Yarbrough argued that his counsel's failure to rebut any of this evidence "fell below 'prevailing professional norms' as they are defined by the [2003] American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ('ABA Guidelines')." *Id.* at 334. Yarbrough asserted that the ABA Guidelines "require that 'expert assistance should always be requested and provided' for the 'proper preparation of capital cases' (emphasis added), and which are not to be taken as 'aspirational' but as a minimum standard under the Sixth Amendment." *Id.*

The District Court rejected this argument and the 4th Circuit agreed that the "failure to comply with the ABA Guidelines regarding the requesting of funds for expert assistance does not establish counsel's performance as constitutionally deficient *per se.*" *Id.* at 338.

The 4th Circuit analyzed the language of the ABA Guidelines and determined that the Guidelines give a "mixed message about whether they are aspirational or mandatory in every circumstance." *Id.* The court continues:

On the one hand they would impose on defense counsel a mandatory, nonaspirational, minimum requirement to request public funds and obtain expert assistance in the preparation of virtually every capital case, because everywhere that the Guidelines direct what counsel "should" do, they advise that the term "should" is to be construed as a mandatory term. See ABA Guidelines intro. (1989) ("'Should' is used throughout as a mandatory term and refers to activities which are minimum requirements"). In this manner, the ABA Guidelines appear to mandate that "[u]tilization of experts has become the rule, rather than the exception, in proper preparation of capital cases," *id.* 1.1 cmt., and "counsel should demand on behalf of the client all necessary experts for preparation of both phases of trial," *id.* 11.4.1 cmt. On the other hand, the Guidelines also seem to acknowledge that a defendant cannot routinely have experts, because to have them requires calling upon local jurisdictions "to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation . . . and to procure the necessary expert witnesses and documentary evidence," *id.* 8.1 cmt., which suggests an aspirational nature to the Guidelines. The Guidelines observe that "funds available to appointed defense counsel are substantially below those available to the prosecution" and that "[t]his inequity is unconscionable." *Id.* In short, the ABA Guidelines say that defense counsel should - now meaning only "should" - try to use experts more routinely, but that this goal depends on government funding which, for now, does not allow this goal to be achieved routinely.

Id. at 338. The court concluded that the "ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as a part of the overall calculus of whether counsel's

representation falls below an objective standard of reasonableness; they still serve only as "guides," Strickland, 466 U.S. at 688, not minimum constitutional standards." Id. at 339.

52. Jones v. State, 43 So. 3d 1258 (Ala. Crim. App. 2007)

The Court of Criminal Appeals of Alabama affirmed petitioner's conviction and sentence of death. Id. at *9. Among other arguments, petitioner contended that since the state of Alabama does not provide for representation in capital cases in accordance with the (2003) ABA Guidelines, petitioner's constitutional rights were denied. Id. The Court ruled that "petitioner failed to set forth any specific facts to establish that his rights to counsel and due process have been adversely affected because the state of Alabama has not adopted the ABA Guidelines." Id. The court held that in order for a convicted defendant's claim that counsel's assistance was so defective as to warrant reversal of conviction or death sentence, two requirements, as outlined in Strickland v. Washington, 466 U.S. 668, 687-89 (1984), must be met:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Moreover, the court insisted that more specific guidelines than those detailed in Strickland are not appropriate. In fact, the court believes its ruling comports with all the Federal Courts of Appeals that have considered the issue; that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. See Michael v. Louisiana, 350 U.S. 91, 100-101 (1955).

Although the court mentions the ABA Guidelines as a method to determine what is reasonable, the court reaffirmed its notion that "the Guidelines set forth by the ABA are only guidelines and are not determinative, since no set of detailed rules can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." See United States v. Decoster, 624 F.2d at 208.

In closing, the court asserted that it declined to find that counsel is per se ineffective simply because Alabama has not adopted the ABA Guidelines. "Although the ABA Guidelines may, in some instances, provide guidance as to what is reasonable in terms of counsel's representation they are not determinative. Rather, the two pronged analysis set forth in Strickland remains the standard for deciding ineffective assistance of counsel. . ." Jones, 2007 Ala. Crim. App. LEXIS 156, at *10.

53. State v. Kilgore, 976 So. 2d 1066 (Fla. 2007)

The Florida Supreme Court held that while a defendant is "entitled to prosecute a collateral claim attacking a prior conviction utilized as an aggravator in his capital case, he is not entitled to representation by the same counsel appointed to represent him in the capital case." Kilgore was represented by the Office of the Capital Collateral Regional Counsel in his post-conviction proceedings (CCRC). The CCRC discovered grounds to challenge one of the main

aggravators used at Kilgore's sentencing trial: a prior non-capital first-degree murder and kidnapping conviction. The court noted that the ABA Guidelines supported Kilgore's right to effective representation in his collateral claim attacking the prior conviction:

The district court concluded that because Florida law required the prior judgment to be set aside in order for the aggravator to be challenged in the capital case, Kilgore was entitled to have effective counsel do what CCRC was attempting to do on his behalf, a course of action also consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003). See *id.* at 1195 & n.10.

The court ultimately held that the CCRC was not legislatively authorized to represent death-sentenced individuals in a post-conviction proceeding attacking the validity of a prior conviction used as an aggravator.

54. *Campbell v. Bradshaw*, 2007 U.S. LEXIS 101936 (S.D. Ohio 2007)

Campbell was convicted of aggravated and felony murder and sentenced to death. *Campbell*, 2007 U.S. LEXIS at *2. On appeal, the Ohio Supreme Court remanded for resentencing because Campbell was denied his right to allocution during the first sentencing; upon remand, he was again sentenced to death. *Id.* at *2-3. He sought post-conviction relief, which was denied by the trial court and the appellate court; the Ohio Supreme Court denied jurisdiction. *Id.* at *37-8. Campbell then sought habeas relief based on twelve different grounds, including various claims of ineffective assistance of counsel. *Id.* at *38-42. The court found that none of his claims warranted relief.

The court addressed the ABA Guidelines while analyzing whether Campbell's trial counsel was ineffective in failing to present certain mitigating evidence at the penalty phase of Campbell's trial. *Id.* at *56. Specifically, Campbell alleged that his trial counsel erred in not presenting evidence of the conditions at his multiple foster home and state placements, thus prejudicing him by misleading the jury into thinking he benefited from opportunities after being taken from his family's home. *Id.* at *57. He also alleged that because trial counsel did not put on expert testimony regarding prison and detention home culture or of the effect of being a "state-raised" youth," the jury missed an important piece of Campbell's life story. *Id.*

The court noted the ABA Guidelines as the standard by which to measure professional norms in its discussion of the legal standards regarding ineffective assistance of counsel. *Id.* at * 59. It went on to cite paragraphs from *Wiggins v. Smith*, 539 U.S. 510 (2003), that discussed 11.4.1(C) and 11.8.6, pertaining to mitigating evidence. However, the court found that despite testimony from experts regarding the gap trial counsel had left in the mitigation stage, the defendant was not prejudiced by it; rather, the court found had all of the evidence been presented, it may have prejudiced Campbell rather than helped in mitigation. *Id.* at *70-71.

55. *Yarbrough v. Johnson*, 490 F. Supp. 2d 694 (E.D. Va. 2007)

The U.S. District Court for the Eastern District of Virginia adopted a magistrate judge's report and recommendation denying Robert Stacy Yarbrough's petition for federal habeas relief. Yarbrough argued that his counsel's failure to request funds for a DNA expert amounted to

constitutionally deficient performance. The magistrate judge had determined that Yarbrough's references to the ABA Guidelines, in support of his claim that his counsel was ineffective, were procedurally defaulted because Yarbrough had not raised them as the appropriate benchmark of counsel performance in the state proceedings. The district court disagreed with that conclusion after discussing the meaning of a "controlling legal principle" in the context of whether a claim has been fairly presented to a state court. In this case, the controlling legal principle was *Strickland v. Washington*, and Yarbrough "supplement[ed] his prior argument" by using the Guidelines as "an aid in defining the effectiveness threshold." The court also went further to state that even if Yarbrough was precluded from raising the Guidelines, "nothing prevents this court from considering the Guidelines sua sponte as the court is tasked with [determining] whether petitioner's counsel provided effective assistance and such determination necessitates consideration of the prevailing norms of the defense bar." The court also held that consideration of the Guidelines was "supported by the United States Supreme Court's repeated citation to ABA Guidelines as a helpful tool for measuring counsel's performance" and then cited to several of those decisions, including *Wiggins v. Smith* and *Rompilla v. Beard*.

Before analyzing the effectiveness claim, the court then discussed the Guidelines' position on defense experts at great length. The court first examined language in 1989 Guidelines 5.1, 8.1, 11.4.1, and 11.5.1, all of which describe counsel's responsibilities with regard to preparing and litigating forensic evidence. The court noted in a footnote that although the Guidelines use the word "should," the introduction provides that they are "mandatory" and "minimum requirements." The court also noted that the commentary to 1989 Guideline 1.1 states that "[u]tilization of experts has become the rule, rather than the exception, in proper preparation of capital cases." The court also discussed the 2003 Guidelines, although it stated they "warrant less attention" not only because they were not yet in existence when Yarbrough was tried but also because his counsel was "per se ineffective" under those standards. The court noted that Yarbrough was tried in 1998, a decade after the 1989 edition but five years before the 2003 edition, and thus the prevailing professional norms were "somewhere in between" the two editions. After reviewing both editions of the Guidelines, the court stated that the "Guideline provisions discussed above plainly suggest that Yarbrough's trial counsel was ineffective for failing to hire a DNA expert."

The court, however, wrote that it disagreed with commentary within the 2003 Guidelines that they are "not aspirational" and embody "current consensus," stating that other commentary "to the Guidelines themselves belies such an assertion, at least with respect to obtaining public funds for independent defense experts." Because commentary to 1989 Guideline 8.1 stresses that jurisdictions must authorize sufficient funds for this purpose and criticized states that do not, the court found that "[s]uch language definitively establishes the aspirational nature of this aspect of the Guidelines." The court held that it was subject to "standards dictated by the United States Supreme Court and the federal Constitution and not the ABA," and the court found a failure to seek public funds for expert assistance "does not constitute ineffective assistance of counsel even if certain members of the bar label a state's application of such onerous standard as 'unconscionable.'" The court ultimately found that trial counsel's performance was not deficient and denied relief.

56. *Murphy v. Bradshaw*, 2006 WL 5575813 (S.D. Ohio 2006)

Magistrate Judge Michael Merz, writing for the U.S. District Court for the Southern District of Ohio recommended dismissal of petitioner Ulysses Murphy's petition for a writ of habeas corpus. Among other claims, Murphy raised several claims of ineffective assistance of counsel. In one claim, he alleged that his counsel were ineffective for following a strategy he opposed and which amounted to a guilty plea. The court rejected this claim based on the Supreme Court's decision in *Florida v. Nixon*. Finding support in *Nixon*, the court discussed the "unique challenges" facing capital counsel and quoted Nixon's statement that "In such cases [when the evidence is overwhelming and the crime heinous], 'avoiding execution [may be] the best and only realistic result possible.' ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.9.1, Commentary (rev.ed.2003)."

Murphy also alleged that his counsel was ineffective for failing to conduct a multi-generational mitigation investigation, citing to the 2003 Guidelines (ed. note: although not specified by the court, the instruction to conduct this investigation is found in Guidelines 10.7 and 10.11). Citing to 1989 Guidelines 11.4.1, 11.8.3, and 11.8.6, the court rejected Murphy's reliance on these guidelines, finding that the 2003 Guidelines were "were not in existence during his 1998 trial" and that there is "similar direction to counsel in the 1989 predecessor." While dismissive of the importance of such investigation, the court ultimately concluded that the claim was procedurally defaulted.

57. *Rompilla v. Beard*, 545 U.S. 374 (U.S. 2005)

The Supreme Court overturned the Third Circuit's decision in *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), and found the Pennsylvania Supreme Court's failure to find defense counsel ineffective objectively unreasonable. Specifically, the Court held that counsel was required to review the record of the defendant's previous conviction when they had been put on notice by the prosecution that the prior record was going to be introduced as aggravating evidence during sentencing. *Rompilla*, 545 U.S. at 377. In discussing the obligations of defense counsel as they were understood at the time of *Rompilla*'s trial, the opinion emphasizes that counsel is required to review material that the state will use against the defendant, *id.* at 375, and discusses the ABA Guidelines in detail:

In 1989, shortly after *Rompilla*'s trial, the ABA promulgated a set of Guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly forceful directive: "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports." Guideline 11.4.1.D.4. When the United States argues that *Rompilla*'s defense counsel complied with these Guidelines, it focuses its attentions on a different Guideline, 11.4.1.D.2. Brief for United States as Amicus Curiae 20-21. Guideline 11.4.1.D.2 concerns practices for working with the defendant and potential witnesses, and the United States contends that it imposes no requirement to obtain any one particular type of record or information. *Id.* But this argument ignores the subsequent Guideline quoted above, which is in fact reprinted in the appendix to the United States' brief, that requires counsel to " 'make efforts to secure information in the possession of the prosecution or law enforcement authorities.'" Later, and current, ABA Guidelines (2003) relating to death penalty defense are

even more explicit: "Counsel must ... investigate prior convictions ... that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction." Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S. at 524 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" For reasons given in the text, no such further investigation was needed to point to the reasonable duty to look in the file in question here.

Id. at 387, n.7.

58. *Rompilla v. Horn*, 355 F.3d 233 (3rd Cir 2004)

**NOTE: Subsequently reversed by Supreme Court. (545 U.S. 374)

A three-judge panel of the Third Circuit overturned the district court's decision granting *Rompilla* a new penalty phase trial, which had been based in part on a finding that his trial counsel was ineffective during the sentencing phase. At issue was counsel's failure to adequately investigate and present evidence regarding *Rompilla*'s family history and educational background, as well as his mental competence. The majority insisted that the Guidelines are "only guides," and that counsel's failure to meet the standards set forth there does not necessarily indicate ineffective assistance under the standards articulated in *Strickland*. *Id.* at 259 n.14.

But in a strongly worded dissent, Judge Sloviter argued that *Wiggins* and *Williams* were both decided under the *Strickland* standard, and, therefore "these two later cases demonstrate how *Strickland* should be applied." *Id.* at 275. She noted that "[i]n *Wiggins*, the Supreme Court quoted from the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). . ." regarding the investigation of mitigating evidence, and found that counsel's performance fell short of its "well-defined norms." *Id.* at 283 (citation omitted). Judge Sloviter considered the majority's "attempt to reconcile its conclusion that *Rompilla*'s counsel provided effective assistance of counsel with the conclusion in *Wiggins* . . . nothing short of astonishing." *Id.*

However, Judge Nygaard filed an opinion, joined by Judges Sloviter and McKee, agreeing with Judge Sloviter's earlier dissent. Judge Nygaard wrote: [t]he issue before us implicates the most fundamental and important of all rights - to be represented by effective counsel. All other rights will turn to ashes in the hands of a person who is without effective, professional and zealous representation when accused of a crime (emphasis added). *Id.* at 310. After giving examples of other capital cases in which "the range of what is deemed 'effective' (by the courts) has widened to . . . an astonishing spectrum of shabby lawyering." *Id.* at 311. He continued: These disturbing examples of inept lawyering in capital cases have propelled professional organizations to act. The American Bar Association has promulgated "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." These Guidelines

upgrade the minimum standard from "quality" legal representation to "high quality" legal representation. See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 939 (2003) (outlining the 2003 Revisions to the Guidelines). Included in those guidelines is the requirement that the capital defendant should "receive the assistance of all expert, investigative, and other ancillary professional services . . . appropriate ... at all stages of the proceedings." Here, in my view, counsel's failure to conduct even the most rudimentary investigation into Rompilla's background falls short of being "effective" representation. I believe this level of representation violates not only the standards set out by the American Bar Association, but by accepting it as adequately effective, we continue to degrade the standard set out in Strickland, and ignore the sentiments expressed by Justice Sutherland in *Powell v. Alabama*. Id. at 311-12 (citation omitted).

59. *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir 2003)

In this capital case from Ohio, the Sixth Circuit granted a new penalty phase trial as the result of ineffective assistance of counsel. Defense counsel made no investigation into Hamblin's severely deprived and violent childhood or his psychological condition, and did nothing in preparation for the sentencing phase. The majority opinion opened with an analysis of the proper standard against which to measure counsel's performance. It looked to the Supreme Court's decision in *Wiggins*, noting that "[i]n its discussion of the 1989 ABA Guidelines for counsel in capital cases, the Court held that the Guidelines set the applicable standards of performance for counsel Thus, the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases" (emphasis added). Id. at 486 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). The court then cited 1989 ABA Guidelines 11.4.1 and 11.8.6 describing counsel's duty to investigate and present mitigating evidence at both the guilt and sentencing phases of trial. The court went on to review several of its own prior decisions from the 1990s, concluding that "[o]ur analysis of counsel's obligations matches the standards of the 1989 Guidelines quoted by the Supreme Court in *Wiggins*." Id. at 486.

Although Hamblin's trial took place before publication of the 1989 Guidelines, the court explained that they apply nonetheless: [T]he standards merely represent a codification of longstanding, common sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland*. They are the same type of longstanding norms referred to in *Strickland* in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past. The Court in *Wiggins* clearly holds . . . that it is not making "new

law" on the effective assistance of counsel" Id. at 487 (internal citations omitted). The court also noted that the "[n]ew 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 circumstances." Id. at 487. The court then quoted extensively from the Guidelines regarding the duty to investigate mitigating evidence. In concluding its discussion of the appropriate standards to use in evaluating counsel's performance, the Sixth Circuit explained that "[w]e cite the 1989 and 2003 ABA Guidelines simply because they are the clearest exposition of counsel's duties at the penalty phase of a capital case, duties that were recognized by this court as applicable [in] 1982." Id. at 488.

The court held that "[t]he record reveals that defense counsel's representation of Hamblin at the penalty stage of the case fell far short of prevailing standards of effective assistance of counsel as outlined in Wiggins, our previous cases and the 1989 and 2003 ABA Guidelines." Id. at 489. In its analysis, the court quoted from 2003 ABA Guideline 10.7, explaining that "ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested." Id. at 492.