

Cases citing to the ABA Guidelines for the Appointment and Performance of Defense Counsel In Capital Cases (1989 and 2003 versions)

U.S. SUPREME COURT

Rompilla v. Beard, 545 U.S. 374 (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 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

Rompilla, 545 U.S. at 387, n.7.

Florida v. Nixon, 543 U.S. 175 (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 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 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.

Wiggins v. Smith, 539 U.S. 510, (2003).

The Supreme Court granted a new sentencing hearing after holding that trial counsel's failure to fully investigate Wiggins' background constituted ineffective assistance of counsel. Counsel failed to present evidence of several physical and sexual abuse Wiggins experienced at the hand of his mother and a series of foster parents. Wiggins' mother, a chronic alcoholic, frequently left Wiggins and his siblings at home alone without any food or money, forcing them to beg for food and to eat paint chips and garbage. She once forced Wiggins to put his hand up against a hot stove burner, which led to his hospitalization. The father in Wiggins' second foster home repeatedly molested and raped him. At age 16, Wiggins ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. Trial counsel failed to conduct a mitigation investigation and social history, and none of this information was presented at the penalty phase of trial.

The Supreme Court noted that:

Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra*, at 688, 466 U.S. 668; *Williams v. Taylor, supra*, at 396, 529 U.S. 362. 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. *Cf. id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added).

Id. at 524.

FEDERAL COURTS

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.” *Dickerson*, 453 F.3d 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.

Hedrick v. True, 443 F. 3d 342 (4th Cir. 2006).

In the course of assessing Hedrick’s claim of ineffective assistance of counsel due to inadequate mitigation investigation, the Fourth Circuit majority noted 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 v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989) [hereinafter ABA Guidelines]). *Hedrick*, 443 F.3d at 347. The Fourth Circuit concluded that even though the trial counsel did not uncover and present all evidence of Hedrick’s family history of drug and alcohol abuse, incompetent parenting, and his mother’s criminal record (welfare fraud), this did not arise to the level of ineffective assistance of counsel.

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 § 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.

Martinez v. Dretke, No. Civ.A. G-02-718, 2006 WL 305666 (S.D. Tex. Feb. 7, 2006), *rev'd*, *Martinez v. Quarterman*, 481 F.3d 249 (5th Cir. 2007)

The District Court granted Martinez's petition for writ of habeas corpus based on the ineffective assistance of counsel provided to Martinez. Martinez's counsel failed to properly investigate his client's epilepsy, which could have been used as mitigation evidence. 2006 WL 305666 at 4. While defense counsel claimed that he believed a death sentence in the case was a "virtual guarantee" and that is why no mitigation investigation was undertaken, the court pointed to the ABA Guidelines which state that counsel "may not sit idly by, thinking that investigation would be futile." *Id.* at 3. Relying on the 1989 Guidelines and the *Wiggins* decision, the court noted that while the Guidelines are not binding on a federal court's decision, the Supreme Court has clearly indicated that they should be taken into consideration. In light of what the ABA Guidelines dictate about the duty to fully investigate a client's case and the *Wiggins* decision, the district court held that Martinez's attorney had not fully investigated potential mitigation evidence and, in so doing, had rendered ineffective counsel. *Id.*

The Fifth Circuit Court of Appeals reversed, and stated that defense counsel made reasonable professional judgment to limit their investigation into the defendant's mitigating evidence at the punishment phase; and also that the defendant could not show that this strategic decision by defense counsel had prejudiced him, but the court did not claim that any ABA Guidelines were improper. *See Martinez v. Quarterman*, 481 F.3d 249 (5th Cir. 2007)

Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005).

The Ninth Circuit granted a petition for habeas relief as to the penalty phase of a capital trial, holding that defense counsel was prejudicially ineffective for failure to present mitigating evidence. The court cites *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) for the proposition that ABA Standards for Criminal Justice represent the "indicia of obligations for criminal defense attorneys. Following this, the opinion makes several references to the 1980 ABA Standards for Criminal Justice in effect at the time of the trial in question. The court begins by identifying the general duty to investigate mitigating evidence, and moves on to cite specific areas (such as mental health, substance abuse, and prior criminal record) which defense counsel has a duty to investigate. The 1989 Guidelines are cited once (along with several references to the 1980 standards) in a paragraph underlining counsel's "virtually absolute" duty to do whatever necessary to "avoid the death penalty and achieve the least restrictive and burdensome sentencing alternative," even in the face of resistance by the criminal defendant. 427 F. 3d at 638.

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 ABA Guidelines. *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 Guidelines for the proposition that the defense must not rely on the counsel's own observations and beliefs regarding the defendant's symptoms. *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.

Moore v. Parker, 425 F. 3d 250 (6th Cir. 2005)(dissent).

The Sixth Circuit affirmed a denial of post-conviction relief for ineffective assistance of counsel. In dissent, Judge Martin argued that at the sentencing phase of trial defense counsel failed to perform according to prevailing professional standards, as reflected by the duties of counsel articulated in the ABA Guidelines. Citing to the reference to the ABA Guidelines in *Wiggins v. Smith*, 539 U.S. 510 (2003), the dissent powerfully emphasizes that defense counsel has a duty to thoroughly investigate the background of the defendant, including medical history, family and social history, and prior correctional experience; this duty was breached when counsel decided to more narrowly limit the scope of the investigation into mitigating circumstances. "The Supreme Court has made clear 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.'" *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir.2004)(quoting *Wiggins*, 539 U.S. at 524.)" *Id.* at 261.

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 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."

Harries v. Bell, 417 F.3d 631 (6th Cir. 2005).

Judge Cook wrote for the Sixth Circuit affirming a finding of ineffective assistance of counsel for failure to investigate and present any mitigating evidence at the penalty phase of Randy Harries' Tennessee murder trial. Citing to *Wiggins* as an example, the opinion notes that "notwithstanding the deference *Strickland* requires, neither this court nor the Supreme Court has hesitated to deem deficient counsel's failure to fulfill this obligation." *Id.* at 637. In discussing whether the failure to investigate mitigating evidence could be seen as reasonable, the court notes that in 1973 the Tennessee Supreme Court adopted the American Bar Association Standards for the Administration of Criminal Justice as the "standard for defense counsel," as

well as noting the more recent adoption of the ABA Guidelines by the Supreme Court in *Wiggins*. *Id.* at 638. The Court refers to this adoption as “binding precedent.” *Id.*

Earp v. Ornoski, 431 F.3d 1158 (9th Cir. 2005).

The Ninth Circuit held that the petitioner was entitled to, among other things, an evidentiary hearing on his ineffective assistance of counsel claim “because he has demonstrated a colorable claim that counsel’s mitigation investigation was deficient in light of the evidence uncovered, and that he suffered prejudice thereby.” *Id.* at 1185.

Earp had argued that he was denied effective assistance of counsel due to defense counsel’s failure to follow up on leads discovered by the defense investigator. The defense counsel failed to present the following mitigating evidence in the penalty phase: 1) records of Earp’s educational history, including documentation of a history of emotional problems and possible psychological or neurological problems, 2) further information about Earp’s family background (history of alcoholism, depression and suicide), a history of substance abuse and mental problems, and 3) neurological and psychiatric evaluations indicating organic brain damage resulting from a childhood head injury. The Ninth Circuit analyzed the facts presented in relation to those presented in the *Wiggins v. Smith* case. In doing so, the Ninth Circuit cited to the ABA Guidelines: “The relevant ABA guidelines state that counsel in capital cases should consider the following information about a petitioner: medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Id.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, p. 133).” *Earp*, 431 F. 3d at 1175.

Smith v. Dretke, 422 F. 3d 269 (5th Cir. 2005).

In this opinion, the Fifth Circuit granted a certificate of appealability to Smith on several issues, including the issue of whether his trial counsel was ineffective. In doing so, the Fifth Circuit discussed at length the Supreme Court jurisprudence in *Wiggins* and *Rompilla* and cited to the ABA Guidelines. “The [Supreme] Court held that *Wiggins*’ trial counsel’s investigation was inadequate because ‘counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources.’ 539 U.S. at 524 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989)(stating that among the topics counsel should consider presenting are medical history, educational history, employment history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences)).” 422 F. 3d at 279. At the penalty phase, Smith’s counsel called only 4 witnesses to testify. One was Smith’s mother, who testified that he grew up in impoverished circumstances and that she was a single mother on welfare. In post-conviction, however, affidavits from many family members, including several of Smith’s siblings, many cousins, and his grandmother, with whom he lived at some points in his childhood, indicated that Smith’s mother frequently abused and whipped her children and that none of her children could read nor write. Smith’s trial counsel did not interview any of these family members.

Mason v. Mitchell, 396 F.Supp.2d 837 (N.D. Ga. 2005).

The District Court, in denying Mason’s petition for habeas corpus relief, held that Mason’s counsel did not provide ineffective assistance in conducting the mitigation investigation for the sentencing phase of the trial. In reaching this determination, the court looked to the 1989 ABA Guidelines and quoted Guideline 11.4.1, as well as the commentary to the Guideline. 396 F.Supp.2d at 852. The court used Guideline 11.4.1 to detail what investigation Mason’s

attorney should have undertaken in regard to mitigation evidence, and then turned to Guideline 11.8.3 to analyze what steps the counsel needed to take in preparation for the mitigation presentation. *Id.* As noted by the court, the ABA Guidelines state that counsel should discuss the sentencing phase with their client and that counsel must be proactive in their mitigation investigation and presentation. *Id.* at 852-53. After quoting the Guidelines, the court held that Mason's counsel undertook sufficient efforts to investigate and procure mitigation evidence and found that the investigation was not unreasonable. *Id.* at 854. In reaching their ultimate decision the court contrasted the facts in Mason's case from those present in *Wiggins*. *Id.* Finally, the court found that defense counsel's overall mitigation strategy was sufficient, based on ABA Guideline 11.8.6 (1989). *Id.* at 855. The court found that counsel performed a thorough investigation of Mason's background and that he sought advice from other qualified attorneys, who had experience in trying death penalty cases. *Id.* The court noted that obtaining advice from other counsel regarding mitigation strategy comports with ABA Guidelines. *Id.*

Crowe v. Terry, 426 F.Supp.2d 1310 (N.D. Ga. 2005).

In denying Crowe's petition for writ of habeas corpus, the District Court ruled that defendant counsel's performance was not inadequate. In support of Crowe's claim of ineffective assistance, Crowe pointed to his attorney's failure to interview and challenge the designation of experts used by the prosecution. *Crowe*, 426 F.Supp.2d at 1317. In making this argument, Crowe pointed to the ABA Guidelines, which state that trial counsel must be experienced in the utilization of expert witnesses. The court, addressing the argument, cited the 2003 ABA Guidelines: "The guidelines state that trial counsel 'must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination.' American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Introduction (2003)." *Id.* The court further stated that whether or not counsel's cross-examination was "effective" must be decided on a case-by-case basis and concluded that the counsel's assistance in this instance was not ineffective.

Mitts v. Bagley, 2005 WL 2416929 (N.D. Ohio Sept. 29, 2005).

In denying Mitts' petition for writ of habeas corpus, the District Court ruled that Mitts' counsel did not render ineffective assistance in his investigation of potential mitigation evidence. In reaching this decision, the court cited the *Wiggins* decision and quoted ABA Guideline 11.4.1.(C) (1989). 2005 WL 2416929 at *83. After quoting the Guideline, and setting out the facts of the counsel's performance in *Wiggins*, the court in this case found that Mitts' counsel sufficiently investigated potential mitigation evidence and found that the counsel did not render ineffective assistance. *Id.*

Thomas v. Beard, 388 F.Supp.2d 489 (E.D. Pa. 2005).

The District Court granted Thomas's petition for writ of habeas corpus based on ineffective assistance of counsel. The court found that Thomas' trial counsel failed to investigate and/or present mitigating evidence during the sentencing phase of the murder trial and that this failure was prejudicial to Thomas. In making this determination, the court cited to the *Wiggins* decision and quoted ABA Guideline 11.4.1(C) (1989). *Thomas*, 388 F.Supp.2d at 505. Specifically, the court quoted language from *Wiggins* which held that a mitigation investigation "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* The court found Thomas's counsel to be ineffective based on the ABA Guidelines even though Thomas may have directed his attorney not to present the mitigating evidence. *Id.* at 508.

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. *Karake*, 370 F.Supp2d 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.

Stitt v. United States, 369 F.Supp.2d 679 (E.D. Va. 2005).

Judge Jackson in the Eastern District of Virginia evaluated a petition for post-conviction relief, including multiple ineffective assistance claims. Considering one such claim based on the failure of counsel to advise the defendant to take a plea agreement for a life sentence, the *Stitt* opinion notes that “[t]he standards of the American Bar Association (“ABA”) may serve as a guide to what is reasonable, but only as a guide, not a determinative rule. See *Strickland*, 466 U.S. at 688-89; see also *Jones v. Murray*, 947 F.2d 1106, 1110 (4th Cir.1991).” *Stitt*, 369 F.Supp.2d at 689. The court goes on to quote the 1989 Guidelines concerning negotiated pleas at length, emphasizing that in a capital case attorneys ought to remain open to the possibility of a settlement, regardless of personal opinions about the likely outcome of the case. *Id.* Although critical of the lead counsel’s insistent refusal to enter negotiations with the State Department, the court found the claim to be without merit because co-counsel made repeated efforts to secure a plea agreement that the defendant rejected after weighing the differing advice offered by members of the defense team. *Id.* at 691. Ultimately, the court granted relief for ineffective assistance of counsel based on a conflict of interest hidden by lead counsel during trial for financial reasons. *Id.* at 695.

Rev’d on other grounds, 475 F.Supp.2d. 571 (holding that the district court must hold a resentencing hearing without convening a jury to consider the death penalty).

Canaan v. McBride, 395 F. 3d 376 (7th Cir. 2005).

In an opinion by Judge Harlington Wood Jr., 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 Seventh Circuit “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. *Canaan*, 395 F. 3d at 384. The court further noted that the ABA Guidelines “represent ‘well-defined norms’ on which the [Supreme] Court has routinely relied.” *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005), amending *Allen v. Woodford*, 366 F.3d 823 (9th Cir. 2004).

The Ninth Circuit affirmed Allen's conviction and sentence. Although the court found that trial counsel's performance had been deficient during sentencing, it did not find that his deficient performance prejudiced the outcome of the trial and therefore denied relief.

Regarding the fact that second counsel was not sought, the court recognized that "the use of second counsel in defending capital cases is now recommended by the American Bar Association," but found that such a standard was not the prevailing norm at the time of Allen's trial in 1982. *Allen*, 395 F.3d at 998 (internal citation omitted).

The court looked to *Wiggins* when it assessed counsel's failure to adequately investigate and present mitigation evidence and cited the relevant ABA Guideline providing 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." *Id.* at 1001. The court found that counsel did not begin to prepare mitigation evidence until a week before trial, and that his performance failed to meet the prevailing norms for reasonable performance at the time of trial. For these reasons, the court held that "counsel's untimely, hasty, and incomplete investigation of potential mitigation evidence for the penalty phase fell outside the 'range of reasonable professional assistance.'" *Id.* at 1001 (citing *Strickland*, 466 U.S. 668, 689 (1984)).

Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004).

In the majority opinion, Judge Gregory stated that "[t]he Supreme Court, while using standards such as those set forth by the American Bar Association as guides for what is reasonable, has repeatedly declined to adopt a rigid checklist of things that defense counsel must do in *all* cases because '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.'" *Id.* at 470 (quoting *Strickland v. Washington*, 466 U.S. 668 at 688-89).

In his concurring opinion, Judge Michael analyzed Mr. Kandies' counsel's performance by looking to the ABA Guidelines. Judge Michael emphasized that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." *Id.* at 479 (quoting *Strickland*, 466 U.S. at 688). " Judge Michael further noted that "courts must measure 'reasonableness under prevailing professional norms.' The American Bar Association's standards describing the duties of counsel are 'guides to determining what is reasonable.' Here, the ABA's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases offer specific guidance for client interviews in death penalty cases. 'As soon as is appropriate, counsel should,' among other things, 'collect information relevant to the sentencing phase of trial including, but not limited to: . . . family and social history (including physical, *sexual* or emotional abuse).' ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(D)(2) (1989) (emphasis added). The state court and my colleagues overlook this crucial standard." *Kandies*, 385 F.3d at 479.

Pointing out that defense counsel in this case failed to investigate evidence of childhood sexual abuse as a mitigating factor, Judge Michael stated that "[c]ounsel's utter failure to inquire into an area specifically mentioned in the ABA guidelines is a good indicator that his performance was

constitutionally deficient.” *Id.* (quoting *Strickland*, 466 U.S. at 688). Judge Michael further stated that “the ABA guidelines and common sense dictate that it is counsel's responsibility to inquire into specific areas that might prove useful in mitigation. Counsel cannot expect the accused or his family and friends to know what sorts of facts in the accused's background might be relevant to sentencing. Moreover, it is unrealistic to assume that facts going to mitigation - facts that are often painful to discuss because they may involve abuse or emotional trauma -- will be freely volunteered in open-ended interviews.” *Id.* at 480.

Cert. granted, 545 U.S. 1137 (2005) (Judgment vacated and remanded to the Fourth Circuit Court of Appeals)

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 guidelines 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.*

Lovitt v. True, 330 F. Supp. 2d 603 (E.D. Va. 2004).

In response to Mr. Lovitt’s argument that his counsel’s background investigation fell short of what is required by both the prevailing professional norms and the standards established by the American Bar Association, the Eastern District of Virginia acknowledged that the ABA standards “are widely accepted by federal courts.” *Id.* at 643. The court went on to state that “[t]he ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’” *Id.* (quoting ABA Guidelines 11.4.1(c)). The Eastern District recognized that “[f]ederal courts have frequently relied upon the ABA standards as ‘guides to determining what is reasonable’ and that “[t]he ABA standards suggest that the scope of counsel's inquiry should include the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experiences, and religious and cultural influences. ABA Guidelines, 11.8.6, at 113.” *Lovitt*, 330 F. Supp. 2d at 643.

The Court held, however, that “[p]etitioner has failed to persuade this Court that his counsel's decision not to perform additional mitigation investigation constituted anything less than sound trial strategy.” *Id.* at 644-645.

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. ... It was patently unreasonable for [trial counsel] to omit this evidence from his case for mitigation.’” *Id.* (citations omitted).

Davis v. Woodford, 384 F.3d 628 (9th Cir. 2004).

In *Davis*, Judge Betty Binns Fletcher cited the 2003 ABA Guidelines in her dissent, finding that “ineffective assistance of counsel probably affected the outcome” of the case. *Id.* at 655. Judge Fletcher noted that Davis’s defense attorneys failed in their duty to present all available, non-cumulative mitigating evidence: “In *Wiggins*, the Court noted that the ABA Guidelines for capital defense work provide that effective assistance ‘should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’” *Id.* at 661-62 (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) emphasis in the original). The dissent concluded that the petitioner should be granted an evidentiary hearing on several issues, including his competence to stand trial during the penalty phase and the incompetence of counsel based on failure to call additional mitigation witnesses.

Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), *rev’d*, *Bell v. Cone*, 543 U.S. 447 (2005).

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 ABA Guidelines:

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).

Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004).

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 . . ." 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.*

Rompilla's petition for rehearing was denied by a closely divided court. 359 F.3d 310 (3d Cir. 2004). 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 ... and 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. 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).

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 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*." *Hamblin*, 354 F.3d 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 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.

Longworth v. Ozmint, 302 F. Supp. 2d 535 (D.S.C. 2003).

The District Court in South Carolina found that failure to address the petitioner's procedurally defaulted claim of ineffective assistance of counsel would not result in a fundamental miscarriage of justice. Distinguishing the facts of this case from the petitioner's case in *Wiggins v. Smith*, the District Court emphasized that "[t]he Supreme Court noted in *Wiggins* that counsel 'abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.' 123 S.Ct. at 2537 (citing the ABA Guidelines for capital defense work)." *Id.* at 569 n.23. In *Longworth*, the District Court found that "by contrast, the evidence demonstrates that an investigation was made into the Petitioner's social, family, educational, medical, and employment history, through family members, medical records and experts, and that this information was known to counsel, but that counsel made the strategic decision not to use it because it was 'unremarkable'." *Id.*

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 § 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.* § 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.* § 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).

United States v. Suarez, 233 F.Supp.2d 269 (D.P.R. Nov. 22, 2002).

The District Court held that the Federal Public Defender met all criteria necessary for appointment as "learned counsel" required by federal statute for capital cases. In making this determination, the court looked to the ABA Guidelines. *Suarez*, 233 F.Supp.2d at 271. The court stated that it was unable to find any federal appellate court guidance on the precise definition of "learned counsel" and instead looked to the ABA Guidelines. *Id.* The court's opinion reproduced Guideline 5.1 (1989). *Id.* at 272. Following Guideline 5.1 in the opinion, the court applied the Guideline to the public defender appointed in the case and found that he was qualified to be appointed as "learned counsel" pursuant to ABA Guidelines.

United States v. Miranda, 148 F.Supp.2d 292 (S.D.N.Y. June 21, 2001).

After being indicted for conspiracy and murder, which carried a possible death sentence, Miranda sought additional court-appointed counsel on the grounds that he was charged with a capital crime. Judge Cote ordered a conference to determine whether the proposed second court-appointed attorney requested by Miranda qualified as "learned" in the law applicable to capital cases.

In Judge Cote's decision to hold a conference, she relied upon ABA Guideline 5.1 (1989), cited in full in the opinion. *Miranda*, 148 F.Supp.2d at 295-6. In writing about the Guidelines, Judge Cote explained that, "[I]n addition to familiarity with the jurisdiction and extensive criminal litigation training and experience, the ABA recommends that at least one attorney representing a defendant charged with a capital crime have previously 'tried to completion' a capital case." *Id.* at 296. The requirements of Guideline 5.1 were comparable to those required of counsel in capital cases tried in New York pursuant to Section 35-b of the Judiciary Law. *Id.*

United States v. Murphy, 50 M.J. 4 (C.A.A.F. 1998).

The U.S. Court of Appeals for the Armed Forces set aside the death sentence of James Murphy because Murphy was denied effective assistance of counsel. While the court cited its decision in *Loving* (34 M.J. 1065), wherein the court declined to mandate that military defense counsel meet the ABA Guidelines, the court in this case did note that the ABA Guidelines are "instructive." *Murphy*, 50 M.J. at 13. After analyzing Murphy's various claims of ineffective assistance, the Court of Appeals agreed with the district court that his trial counsel was ineffective.

Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998), *overruled by Schell v. Witek*, 218 F. 3d 1017 (Cal. 2000).

The Ninth Circuit affirmed the district court's grant of Crandell's petition for habeas corpus. Judge Beezer held that defense counsel's representation was incompetent and the appointment of substitute counsel was warranted.

The district court, in granting the habeas petition, made a number of findings regarding the ineffectiveness of Crandell's trial counsel. Among these findings were that the public defender personally visited Crandell only one or two times, "violently disagreed" with Crandell, "failed to make reasonable efforts to establish a relationship of trust and confidence with Crandell," undertook little discovery, initiated no investigation of either guilt or penalty phase evidence, and made no attempt to interview any witnesses. 144 F.3d at 1217. At the district court habeas petition hearing, Crandell presented an expert witness on the professional norms for counsel in capital defense cases who testified that the public defender's behavior was "absolutely outrageous." *Id.* The expert's conclusion was based in part on the ABA Guidelines and the Ninth Circuit cited specifically to ABA Guideline 11.4.2 (1989) *Id.* The Ninth Circuit affirmed the district court's finding that Crandell's trial counsel was incompetent and that the state trial court should have appointed substitute counsel. *Id.*

The case was overruled by *Schell v. Witek*, only as to the standard applicable to motions to substitute counsel. 218 F. 3d. 1017 (Cal. 2000)

Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994) (Ebel, J., dissenting).

The Tenth Circuit affirmed the Eastern District of Oklahoma's denial of Brecheen's petition for writ of habeas corpus. Although Brecheen's trial counsel failed to present certain mitigating evidence at the penalty phase, the Tenth Circuit found this did not constitute ineffective representation.

Judge Ebel wrote in a dissenting opinion that he did not agree with the majority's conclusion that Brecheen had failed to establish that he had ineffective trial counsel during the sentencing phase. Judge Ebel wrote that, "The sentencing phase of a capital case is a vitally important proceeding and it requires careful preparation, advanced consultation with the client, and vigorous advocacy. It is not a stepchild to the guilt phase of the trial, but itself deserves to share center stage with the guilt phase." *Brecheen*, 41 F.3d at 1370. The dissent continued to explain the importance of mitigating evidence in the sentencing phase of a trial and cited ABA Guidelines 11.4.1(A) & (C) (1989). *Id.*

STATE CASES

Arizona v. Morris, No. CR-05-0267-AP, 2007 Ariz. LEXIS 65, (Ariz. Jun. 18, 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. 2007 Ariz. LEXIS at*38. 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 *39.

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.* at *39-40 n.10. The court cited to Guideline 10.11.L, 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.* at *40 n.10.

Commonwealth v. Spatz, 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. §§ 9541-9546. Spatz 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** § 10.7, cmt. (2003 rev. ed.)).

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

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?"

Kilgore, 933 So. 2d. 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. See *Rompilla v. Beard*, 545 U.S. 374 (2005).

Id.

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.” *Henry*, 937 So. 2d 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 Guidelines “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.*

Davis v. State, No. CC-93-534, 2006 WL 510508 (Ala.Crim.App. March 3, 2006), *abrogated by Ex parte Clemons*, No. 1041915, 2007 WL 1300722 (Ala. May 04, 2007)

In denying petitioner’s request for habeas corpus relief, the Court of Criminal Appeals ruled that *Davis*’ claim of ineffective assistance of counsel was procedurally barred. 2006 WL 510508 at *10. The court noted, however, that had the claim not been procedurally barred the court would be “compelled to grant relief and order a new sentencing hearing.” *Id.* The court stated that “*Davis*’s most troubling claim is that counsel failed to investigate and present mitigation evidence at the penalty phase. The evidence *Davis* alleges should have been discovered and presented is powerful.” *Id.* at *7. The court concluded that counsel “failed to conduct the type of reasonable investigation sanctioned by the ABA.” *Id.* at *10.

Citing ABA Guideline 11.4.1(C) (1989), the court noted that “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.’” *Id.* at 9. According to the court, petitioner’s counsel “failed to

conduct the type of investigation sanctioned by the guidelines developed by the American Bar Association.” *Id.* Additionally, the court found that defendant’s counsel did nothing to investigate the prior offense that the State relied on to prove the aggravating circumstance that Davis had previously been convicted of a crime of violence. *Id.* As noted by the court, the United States Supreme Court ruled in *Rompilla v. Beard*, 545 U.S. 374, that counsel’s performance was ineffective at the penalty phase because of a failure to investigate a prior felony that the State relied on to establish an aggravating circumstance. *Id.* The Davis court stated that the *Rompilla* decision, which determined that undiscovered mitigating evidence “might well have influenced the jury’s appraisal of culpability,” was applicable to Davis’ case. *Id.*

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 ABA Guidelines. 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.

Commonwealth v. Hall, 872 A.2d 1177, (Pa. 2005) (Saylor, J., dissenting).

Dissenting from a denial of post-conviction relief for ineffective assistance of counsel in the Supreme Court of Pennsylvania, Justice Saylor emphasized the duty of counsel to investigate “relevant mental-health and life-history aspects of mitigation,” criticizing the majority for failing to address the question of whether counsel ever in fact did so. *Id.* at 1193 (citing *Wiggins v. Smith*, 539 U.S. 510, 525-26 (2003)). The dissent quotes a reference to the ABA Guidelines used in *Wiggins* the counsel must “discover *all* reasonably available mitigating evidence.” *Id.* at 1194 n.3 (citation omitted).

Commonwealth v. Brown, 872 A.2d 1139, (Pa. 2005) (Saylor, J., dissenting).

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 to counsel that 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 ABA Guidelines 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.

Presley v. State, 2005 Ala. Crim. App. LEXIS 52 (Feb. 25, 2005).

The Court of Criminal Appeals of Alabama reversed the summary dismissal of Presley’s appeal for relief from his capital murder conviction and sentence of death. The court held that due process was violated when the lower circuit court failed to serve petitioner’s counsel with a copy of orders filed in the case and subsequently summarily dismissed the case.

The Court of Criminal Appeals noted that another reason for its decision was that Presley raised claims of ineffective assistance of counsel at the penalty phase—claims that required further investigation rather than a summary dismissal. Presley alleged that trial counsel conducted no investigation into his history and upbringing, and had such investigation been done, counsel would have discovered a troubled background, including sexual and physical abuse, drug and alcohol abuse, and extreme poverty. The court further noted that the trial record “reflect[ed] that counsel presented no evidence at the sentencing hearing and that he argued at closing that only one mitigating circumstance applied—that Presley was 16 years old at the time of the crime.” *Id.* at *19. The court cited *Wiggins v. Smith*, 539 U.S. 510 (2003), for its standard on deficient performance based on counsel’s failure to investigate and present evidence of Wiggins’ background and difficult life history:

The [Supreme] Court noted that it had previously referred to the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we have long referred as guides to determining what is reasonable. Noting that the ABA guidelines provide that counsel should attempt to discover ‘*all reasonably available* mitigating evidence,’ the [Supreme] Court found that counsel’s review of only social services records and the presentence investigation report and the failure to pursue additional information was unreasonable.

Presley, 2005 Ala. Crim. App. LEXIS 52 at *21, citing [Wiggins v. Smith, 539 U.S. at 524](#) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added in *Wiggins*).

Commonwealth v. Williams, 863 A.2d 505 (Pa. 2004) (Saylor, J., dissenting). 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 ABA Guidelines 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 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).

The dissent pointed to a number of instances in which the conduct of defense counsel fell short of professional standards. Justice Saylor utilized the Guidelines 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. More broadly, the Guidelines were cited 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. *Williams*, 863 A.2d at 533 (citation omitted). Justice Saylor explained his perspective on the role of mitigating evidence in the sentence process, quoting the Guidelines: “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 the ABA Guidelines 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. *Williams*, 863 A.2d at 524.

Harris v. State, 947 So. 2d. 1079 (Ala. Crim. App. 2004), *rev'd on other grounds, Ex Parte Jenkins*, 2005 Ala. LEXIS 49 (Ala. Apr. 8, 2005).

The Court of Criminal Appeals of Alabama found that Harris’s trial counsel (who had previously never represented a defendant in a capital case) was ineffective during the penalty phase of the trial. Trial counsel did not offer evidence of the abuse Ms. Harris suffered in her three marriages, including at the hand of the man she was convicted of killing in this case. The court cited to *Wiggins v. Smith*, 539 U.S. 510 (2003), in its analysis of counsel’s effectiveness and noted that “any reasonably competent attorney would have realized that pursuing these leads [the available mitigating evidence about Ms. Harris’ troubled past] was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner’s background.” *Harris*, 2004 WL 2418073, *43 (citations omitted).

In finding counsel’s performance deficient, the court stated that “Harris has affirmatively shown ... that there was a wealth of mitigating evidence readily available to counsel that counsel should have investigated before it can be said that counsel's strategy for the penalty phase was a reasonable strategic choice. In other words, counsel made their decision while uninformed as to ‘the overall character’ of potential witnesses testimony.” *Id.* (citations omitted). *Id.* at *44.

In its discussion of the ABA Guidelines, the court noted that “[a]s the United States Supreme Court explained in *Wiggins*, the value of counsel's ‘strategic’ decision depends on ‘the adequacy of the investigations supporting [that] judgment.’” *Id.* at *42 (citations omitted). The court then quoted from the *Wiggins* opinion’s language on the ABA Guidelines.

Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as 'guides to determining what is reasonable.' (Citations omitted). 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). 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. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ('The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing ... Investigation is essential to fulfillment of these functions').

Harris, 2004 WL 2418073, *42 (quoting *Wiggins*, 539 U.S. at 524-25.)

"[T]he record reveals that before the penalty phase of the trial counsel had before them documents, notations, information from family and friends that, if pursued, would have led to the discovery of statutory and nonstatutory mitigating evidence. In summary, it was disclosed at the hearing on the Rule 32, Ala. R. Crim. P., petition that [a number of important] facts were readily discoverable for presentation as mitigating evidence. ... [C]ounsel had before them many clues suggesting that Harris's troubled past, yet they declined to investigate those clues for possible use in the penalty phase. Instead, counsel relied on only the sparse testimony of character witnesses, who, while adequately painting a picture of Harris as an affable, hard working, Christian woman, completely failed to offer any insight into Harris's psyche or the very difficult life Harris had experienced." *Id.* at *43.

In re Larry Douglas Lucas, 94 P.3d 477 (Cal. 2004).

The California Supreme Court found that defense counsel's failure to conduct an adequate investigation of available mitigating evidence for possible use at penalty trial was ineffective assistance of counsel. Trial counsel's

failure to investigate petitioner's early social history was not consistent with established norms prevailing in California at the time of trial, norms that directed counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history--as agreed by respondent's own expert and as reflected in the ABA standards relied upon by the court in the *Wiggins* case. The ABA Guidelines provide that investigation into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence....' 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. Cf. [ABA Guidelines] 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, ... *family and social history*, [and] prior ... juvenile correctional experience....")

Id. at 503, citing ([Wiggins](#), 539 U.S. at 524, 123 S.Ct. at pp. 2536-2537.)

Franks v. State, 278 Ga. 246 (2004).

The Supreme Court of Georgia affirmed Franks' conviction and sentence, finding no reversible error in the trial court's decision. The court addressed Mr. Frank's claim that trial counsel's mitigation investigation was inadequate by reviewing *Wiggins v. Smith*, 539 U.S. 510 (2003): "In

Wiggins v. Smith, the United States Supreme Court measured trial counsel's mitigation investigation against the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The Court described these guidelines as 'well-defined norms' and noted that they have long been considered as appropriate guides to determining the reasonableness of counsel's performance." *Id.* at 147 (citations omitted).

Peterka v. State, 890 So.2d 219, (Fla. 2004).

The Supreme Court of Florida affirmed the trial court's order denying post-conviction relief and denied Peterka's petition for habeas corpus. The Court, discussing a claim of ineffective assistance in the penalty phase, reviewed the standards for the investigation of mitigating evidence established in *Wiggins v. Smith*, 539 U.S. 510 (2003):

[E]fforts should be made to discover available mitigating evidence and evidence to rebut any aggravating evidence from such sources as "medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influence." *Id.* at 223, 123 S.Ct. 2527 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, at 133 (1989)).

890 So.2d 219, 236. The Court determined that counsel's investigation of mitigating circumstances had been adequate and that the failure to present certain mitigating elements was a legitimate strategic decision. *Id.*

Armstrong v. State, 862 So.2d 705 (Fla. 2003).

The Supreme Court of Florida ordered a new penalty phase proceeding as the result of the introduction of a vacated prior conviction. Judge Anstead wrote a concurring opinion focusing on Armstrong's claim of ineffective assistance of counsel during the penalty phase. He first reviewed the standards for the investigation of mitigation evidence set forth by the Supreme Court in *Wiggins* and then compared the performance of Armstrong's counsel with that of counsel in *Wiggins*:

The 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in *Wiggins* should have provided similar guidance to Armstrong's counsel. These standards underscore not only the importance of defense counsel's investigation into mitigating factors, but also the understanding that often strategy shifts between the penalty and guilt phases of a capital trial. In general, preparation for both the penalty and guilt phases is essential, and counsel should be aware that "the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." 1989 ABA Guidelines 11.8.1, at 123. "If inconsistencies between the guilt/innocence and the penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics." 1989 ABA Guidelines 11.7.1(B), at 115. In conducting the investigation into those individuals who might present testimony at the penalty phase, counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect ... possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death." *Id.* 11.4.1(D)(3)(B), at 95.

862 So.2d at 723. He also cited to Guideline commentary, which explained the unique nature of sentencing proceedings in capital cases. Judge Anstead concluded that defense counsel's

investigation into mitigation was inadequate because it failed to discover the quantity and quality of evidence that actually existed.

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.

822 A.2d 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. 822 A.2d at 1046.

Pruett v. State, 574 So.2d 1342 (Miss. 1990) (Anderson, J. dissenting).

In a case upholding the constitutionality of a Mississippi statute governing pay rates for appointed defense counsel, Justice Anderson wrote a dissenting opinion urging the court to view death penalty cases as unique and to adopt a new method for paying appointed defense counsel in death penalty cases. Justice Anderson noted that in Pruet's case, because of the \$1,000 per attorney cap for any given case, the appointed attorneys ended up being paid \$2.22 per hour and \$2.07 per hour for their hundreds of hours of work. 574 So.2d at 1348.

In advocating for pay rates higher than the \$1,000 per attorney maximum set out in the statute, Justice Anderson argued that death penalty counsel "must have particular skills for competent representation in a capital case because those cases involve extraordinary circumstances and unusual representation." 574 So.2d at 1346. To show that death penalty litigation has become "highly specialized" and requires certain standards for adequate representation, Justice Anderson cited ABA Guideline 11.2(1989), saying that "As a matter of fact, the ABA has established guidelines for appointing counsel." *Id.* According to Justice Anderson, the statutory cap on fees has "impacted adversely upon the legal profession in this state. Because of the extreme financial hardship that capital proceedings bring ... this renders the difficult task of persuading competent counsel to take capital cases virtually impossible." *Id.* at 1350.

State v. Savage, 120 N.J. 594 (1990).

In reversing defendant's murder conviction and ordering a new trial, the New Jersey Supreme Court ruled that Savage was denied effective assistance of counsel. The court ruled that defense counsel was ineffective in not performing a "thorough investigation of law and facts;" in particular, counsel failed to conduct an adequate investigation into a possible psychiatric or

diminished capacity defense. 120 N.J. at 618. As the court noted, there were numerous facts indicating past hospitalization and erratic behavior. *Id.* According to the court, “the behavior of defendant, during and after the crime, so strongly indicates that he may have been suffering from mental problems that we find it incomprehensible that counsel never even considered a psychiatric defense.”

Additionally, the court found that defense counsel conducted an inadequate investigation pre-trial because defense counsel only met with his client once prior to trial. *Id.* at 620. In making this determination, the court cited ABA Guideline 11.4.1(1989) mandating that the “initial step of any capital investigation is a personal consultation with the defendant.” *Id.* As explained by the court, “The Guidelines stress that such a meeting is necessary in order to explore other potential sources of information as well as the defendant’s mental state.” *Id.* The court also cited the commentary to the Guideline emphasizing that “client interviews are vital for establishing the trust between attorney and client ... Counsel cannot frame an adequate defense without knowing what is likely to develop at trial.” Defense counsel, however, only met with his client once prior to trial. *Id.*

Furthermore, the court found that defense counsel pursued “no independent areas of investigation in formulating his defense strategy.” *Id.* The ABA Guidelines cited by the court, however, “emphasize the importance of interviewing potential witnesses during pre-trial investigation.” *Id.* Defense counsel declined to interview any of the State’s witnesses, however, and was “unable to fully evaluate the strength of the State’s case and thus his own strategy.” *Id.*