

Mend It or End It?: The Revised ABA Capital Defense Representation Guidelines as an Opportunity to Reconsider the Death Penalty

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I. INTRODUCTION

On February 10, 2003, the American Bar Association (ABA) approved the revised edition of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.¹ Their purpose is to articulate the “national standard of practice for the defense of capital cases;”² they “are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.”³

The Guidelines are not the work of an organization opposed to capital punishment,⁴ nor are they intended to address the issue of its desirability. Rather, their core is a mandate that “any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with these Guidelines.”⁵

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¹ See American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913 (2003). The black-letter Guidelines [hereinafter *Guidelines*], which represent the official position of the ABA, are accompanied by a lengthy and heavily-documented Commentary [hereinafter *Commentary*], which, though unofficial, “serves as useful explanation of the black-letter Guidelines.” *Id.* at 914. The issue of the Hofstra Law Review in which the Guidelines are reprinted also contains individual commentaries by various outside authors.

² *Guidelines*, *supra* note 1, at 919 (Guideline 1.1.A).

³ *Commentary*, *supra* note 1, at 920.

⁴ Except for opposing execution of persons who are mentally retarded or were under eighteen at the time of their crimes, the ABA “takes no position on the death penalty;” it simply calls upon all jurisdictions wishing to retain capital punishment to comply with a series of policies—including the Guidelines—intended to insure due process and minimize the risk of execution of the innocent. See <http://www.abanet.org/moratorium/resolution.html> (containing ABA resolution of Feb. 3, 1997 embodying this position, with links to relevant policies).

⁵ *Commentary*, *supra* note 1, at 938.

Read holistically and quite apart from the specifics of their prescriptions, though, the Guidelines offer a lens through which to consider whether retention of capital punishment is sensible public policy. The product of many people actively at work in different aspects of the field,⁶ the Guidelines and their associated Commentary set forth a number of discrete problems that will confront the states and individual lawyers seeking to provide capital defendants with effective defense representation, and offer solutions to those problems.⁷ Taken together, these form a vivid mosaic portrait of the death penalty system as it exists in America today.

To view that sobering picture from the viewpoint of a rational steward of public resources is to gain a new appreciation of the reasons why we should end the death penalty rather than make the effort—which is certain to require enormous investments for uncertain payoffs—to mend it.

II. SOME KEY ISSUES

A. *Severely Impaired Clients*

The Guidelines make clear that the lawyer venturing into Death Row is entering a mental hospital at least as much as a prison:

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that “[i]t must be assumed that the client is emotionally and intellectually impaired.”⁸

⁶ See *Guidelines*, *supra* note 1, at 914–16.

⁷ In what follows, I discuss only a selection of these problems. The Guidelines also deal with many others. For example, in response to persisting concerns that the quality of justice in capital cases has been degraded by political pressures on judges, Guideline 3.1.B requires that both the institutional structure for the provision of defense services and the appointment of counsel to individual cases be “independent of the judiciary.” *Guidelines*, *supra* note 1, at 944. This aspect of the Guidelines is the subject of Ronald J. Tabak, *Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105 (2003).

⁸ *Commentary*, *supra* note 1, at 1007 (quoting Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, ADVOC., Mar. 2000, at 31, available at <http://www.dpa.state.ky.us/library/advocate/mar00/plea.html>). For a fuller description of the impairments commonly found among Death Row inmates, see Craig Haney, *Mitigation and the Study of Lives: On*

These special characteristics of the Death Row population exacerbate the “significant cultural and/or language barriers between the client and his lawyers”⁹ that are likely to exist in criminal defense work generally.

Insofar as the issues relate to attorney-client communications, the Guidelines suggest that “a mitigation specialist, social worker, or other mental health expert can help identify and overcome these barriers.”¹⁰

But the disabilities of the clients raise legal issues as well, ones that arise only in the capital context. First, the Eighth Amendment creates certain categorical exemptions from execution (e.g., mental retardation)¹¹ that do not apply to non-capital sentences. Second, because of the penalty at stake, the sentencing phase of a capital case is uniquely searching; as a matter of Constitutional mandate, the defendant must be allowed to proffer, and have the sentencer consider, any factor that might in justice or mercy militate in favor of a lesser punishment.¹²

As a result, not only is mental retardation “a necessary area of inquiry in every case,” but counsel must also arrange to compile “extensive historical data,” obtain “a thorough physical and neurological examination” and any needed additional “diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies” as may be needed “to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, schizophrenia . . .) that could be of critical importance.”¹³

Moreover, even a client who suffers from none of these organic deficits may well be profoundly psychologically damaged as a result, for example, of a history of childhood sexual abuse. Hence, counsel must also conduct a searching inquiry into the client’s personal history.¹⁴ Beginning with the moment of the client’s conception,¹⁵ counsel must explore:

the Roots of Violent Criminality and the Nature of Criminal Justice, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 469, 481–92 (James Acker et al. eds., 2d ed. 2003).

⁹ *Commentary, supra* note 1, at 1007–08.

¹⁰ *Id.* at 1008.

¹¹ *See Atkins v. Virginia*, 536 U.S. 304 (2002).

¹² *See Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). For an example of this process working as it should, see Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, § 6 (Magazine), at 32.

¹³ *Commentary, supra* note 1, at 956–57.

¹⁴ *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 516 (2003) (inadequacy of trial counsel’s mitigation investigation demonstrated by post-conviction presentation of expert’s report that demonstrated “the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents” through “state social services, medical, and school records, as well as interviews with petitioner and numerous family members”); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (counsel ineffective where they “failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and

- (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
- (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
- (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
- (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- (5) Employment and training history (including skills and performance, and barriers to employability);
- (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).¹⁶

Having unearthed this data, counsel is expected to present it persuasively to the jury and to all subsequent decision-makers so that they may act on a well-informed basis.¹⁷

repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.") (footnote omitted); *Jermyn v. Horn*, 266 F.3d 257, 307-08 (3d Cir. 2001) (counsel ineffective for failing to obtain school records that disclosed childhood abuse).

¹⁵ See *Commentary*, *supra* note 1, at 1022.

¹⁶ *Commentary*, *supra* note 1, at 1022-23. There is a detailed discussion of the specific tools that counsel will need to employ in order to generate information on these subjects. *Id.* at 1023-26.

¹⁷ See *Guidelines*, *supra* note 1, at 1058 (Guideline 10.11.K).

B. *A System Permeated With Racism*

In *McKleskey v. Kemp*,¹⁸ the Supreme Court rejected a Constitutional attack based on the fact, which it accepted as true,¹⁹ that race—both the race of the defendant and that of the victim—significantly influenced who was chosen to die in Georgia’s electric chair.²⁰

Whatever may be said about the merits of the Court’s holding, there is no doubt as to the correctness of the underlying factual premise. In repeated studies, capital sentencing decisions “have consistently been found to turn primarily on the race of the victim and secondarily on the race of the defendant.”²¹ The ultimate result of a series of discretionary decisions from charging through clemency is that “the lives of African-Americans are doubly devalued.”²²

In response to the reality that “the history of capital punishment in this country is intimately bound up with its history of race relations,”²³ the Guidelines urge defense counsel to make every effort “to determine whether discrimination is involved in the jury selection process.”²⁴

C. *A Tilted Playing Field at the Guilt Phase*

Death penalty cases are tried under rules that systematically increase the chances that the innocent will be convicted compared to the trial of the same case where the death penalty is not sought.

This jarring injustice flows from the “death qualification” of the jury. Death penalty cases are bifurcated into guilt and penalty phases. States are entitled to

¹⁸ 481 U.S. 279 (1987).

¹⁹ *See id.* at 291 n.7.

²⁰ Indeed, Mr. McKleskey showed that, holding all other factors equal, a defendant who killed a white person was 4.3 times as likely to be sentenced to death one who killed a black person. *See id.* at 297 (dissenting opinion of Justices Brennan, Marshall, Blackmun, and Stevens).

²¹ Brief of Amici Curiae Law Professors, *People v. Harris*, 98 N.Y.2d 452 (2002) (No. 80), reprinted in 27 N.Y.U. REV. L. & SOC. CHANGE 399, 443 (2001/2002). This scholarly brief, written by Professors Anthony G. Amsterdam and Randy Hertz for a group of New York law professors with expertise in capital punishment (including myself), collects the relevant studies at 442–49.

²² *Id.* at 444. For a subsequent rigorous statistical study reaching the same results, see Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 J. LEG. STUD. 255 (2004).

²³ *Commentary, supra* note 1, at 1053 (citing Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439–42 (1995)) (examining the historic relationship between racial violence and the death penalty, and describing how racial prejudice continues to influence capital sentencing decisions); William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1535 (2002) (presenting social science data correlating intensity of death penalty application in various jurisdictions with race-specific factors).

²⁴ *Commentary, supra* note 1, at 1053.

exclude from the penalty phase those with a fixed conviction in opposition to capital punishment.²⁵ But such jurors are more likely to acquit at the guilt phase, and thus their exclusion results in a non-representative pro-prosecution jury at that phase.²⁶ Nevertheless, says the Supreme Court, the state may “death qualify” the jury²⁷ before the guilt phase—even though views about the death penalty are not relevant at that phase—and thus obtain a more conviction-prone jury than would be sitting if the charges were non-capital.²⁸

The Guidelines make clear that for so long as that remains the governing law the defense will only be able to mitigate the unfairness, not eliminate it. They simply advise counsel to design a jury selection strategy crafted to “minimize the problem of ‘death qualified’ juries that result from exclusion of potential jurors whose opposition to capital punishment effectively skews the jury pool not only as to imposition of the death penalty but [also] as to conviction.”²⁹

D. *Less Effective Defense Counsel*

Any rational system of criminal justice would assign its most effective defense lawyers to the most serious cases. Our country systematically provides capital defendants with less effective counsel than they would receive in the equivalent non-capital case. The scandal of “representation” by defense lawyers who are drunk, on drugs, mentally ill³⁰ or simply don’t perform³¹—whether

²⁵ See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

²⁶ See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 & n.164 (2000) (describing studies demonstrating that the death qualification process produces juries more likely to convict than non-death-qualified juries); Adam Liptak, *Trial and Error: Facing a Jury of (Some of) One’s Peers*, N.Y. TIMES, July 20, 2003, § 12 (Week in Review), at 12 (“Studies have shown that juries in capital cases are more likely to believe that a defendant’s failure to testify indicates guilt, more hostile to the insanity defense, more mistrustful of defense attorneys and less concerned about the possibility of convicting innocent people than a random sample of the population,” as well as being disproportionately white.).

²⁷ That is, prosecutors may voir dire the venire members about their views on the death penalty and strike those whose opposition to it meets the criteria of *Witherspoon*.

²⁸ See *Lockhart v. McCree*, 476 U.S. 162 (1986), a case whose judicial repudiation or legislative nullification should continue to be sought by every lawyer who believes in justice, irrespective of his or her views on the death penalty.

²⁹ *Commentary, supra* note 1, at 1052. For a discussion of available techniques for achieving this goal, see John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209 (2001).

³⁰ See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455–60 (1996) (listing cases of appointed capital defense counsel who were intoxicated, abusing drugs, or mentally ill). See generally *Commentary, supra* note 1, at 928 n.29 (collecting scholarly studies on ineffective representation in death penalty cases).

³¹ The *Commentary* provides large numbers of examples. See *Commentary, supra* note 1, at 1018–21 nn.204–08.

through ignorance, sloth, or lack of resources—is qualitatively worse in death penalty cases than in others.³²

The Guidelines straightforwardly recognize the cause of the problem: lack of government money. “For better or worse, a system for the provision of defense services in capital cases will get what it pays for.”³³ As the Guidelines stress throughout, death penalty representation is uniquely demanding. The daunting personal stakes for the client with the resulting emotional demands on the lawyer, the complexity of the governing law, the two-fold effort required by a bifurcated trial, and the likelihood of involvement in protracted appellate proceedings are just some of the factors that make death penalty representation exponentially more demanding than non-capital representation.³⁴ Because “death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases,”³⁵ representing a capital defendant as competently as a non-capital one requires vastly more resources.³⁶ But the states do not provide them.³⁷ Since no economically rational lawyer would choose to take a death penalty case under these circumstances, the ones who do are often, like the borrowers from a usurer, those with no choice in the matter—and present the same risk of defaulting on their responsibilities.

Moreover, the Guidelines appropriately reject the idea that providing the capital defendant with representation only as good as the non-capital one would receive is sufficient.³⁸

³² See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 337, 398 (1995) (reviewing studies showing that “attorneys defending death penalty cases, as a class, are less experienced and far more likely to be disciplined for unprofessional conduct than the bar as a whole”).

³³ *Commentary*, *supra* note 1, at 988.

³⁴ See *Commentary*, *supra* note 1, at 923; COMM. ON CIVIL RIGHTS, ASS’N OF THE BAR OF THE CITY OF N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS’N OF THE BAR OF THE CITY OF N.Y. 848, 854 (1989) (“[For a lawyer], taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one’s personal responsibility for the outcome.”).

³⁵ *Commentary*, *supra* note 1, at 923. The remainder of the Commentary to Guideline 1.1 documents this proposition at some length. Cf. Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167 (2003).

³⁶ See *McFarland v. Scott*, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of certiorari) (“The unique, bifurcated nature of capital trials and the special investigation into a defendant’s personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials.”).

³⁷ See *Commentary*, *supra* note 1, at 984–87.

³⁸ See *id.* at 991 (“The level of attorney competence that may be tolerable in noncapital cases can be fatally inadequate in capital ones.”) (footnotes omitted).

The first edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of “quality legal representation.” The language has been amended to call for “high quality legal representation” to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.³⁹

The Guidelines’ strategy for achieving the goal of the provision of high quality legal representation is to require the states to allocate significant resources towards a two-part effort, one aimed at obtaining competent lawyers⁴⁰ and the other at providing the structural conditions within which they are able to function effectively.⁴¹

E. *A Post-conviction Review System Constructed of Barbed Wire*

It is a “near certainty”⁴² that if a death sentence is imposed a capital case will enter what the Guidelines describe as “The Labyrinth of Post-conviction Litigation.”⁴³

The man-made monster therein:

³⁹ *Guidelines*, *supra* note 1, at 921 (History of Guideline 1.1).

⁴⁰ *Guidelines*, *supra* note 1, at 981 (Guideline 9.1.B) (attorney compensation should be a rate that “reflects the extraordinary responsibilities inherent in death penalty representation”).

⁴¹ I have described this aspect of the Guidelines in detail in Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097 (2003). As a rough guide to the costs involved, one might note the Guidelines’ reiteration of existing ABA policy that, “jurisdictions should provide funding for defender services that maintains parity between the defense and prosecution,” *Commentary*, *supra* note 1, at 985, and their observation that, in fact, current data shows “that funding for prosecution is on the average three times greater than funding that is provided for defense services at both the state and federal levels.” *Id.* at n.135.

⁴² *Guidelines*, *supra* note 1, at 1028 (Guideline 10.8.A.3.b).

⁴³ *Commentary*, *supra* note 1, at 1083. As a matter of system design, this focus on the post-conviction phase is simply irrational. See Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089, 1106–07 (2001); Liebman, *supra* note 26, at 2154–56. The explanations for it are political, see Freedman, *supra* note 41, at 1099–1101, and practical, see Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316 n.7 (1990–1991) (“[T]he insufficiency of legal resources results in a system of triage that generally finds the most qualified lawyers concentrating their efforts on those defendants closest to execution.”).

- does not recognize a right to counsel after direct appeal,⁴⁴ but does hold the client to be bound by the errors of such counsel as he does obtain.⁴⁵ “In other words, the system works only one way: A lawyer may default claims on behalf of a petitioner, but a petitioner may not attack the lawyer as ineffective for having done so.”⁴⁶ Consistent with its general stance of protecting the states from undue costs by enforcing “a complex set of procedural rules,”⁴⁷ the Court has explained that this “allocation of costs” between the prisoner seeking to avoid execution pursuant to a possibly unconstitutional sentence and the state “that must retry the petitioner if the federal courts reverse his conviction” is “appropriate [since] the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden.”⁴⁸
- routinely provides shorter deadlines in capital than in non-capital cases, enforcing those deadlines by the threat of execution.⁴⁹ Thus, in addition to having less time to do their jobs than the non-capital

⁴⁴ See *Ross v. Moffitt*, 417 U.S. 600 (1974) (rejecting claim of right to counsel on certiorari). At the state post-conviction stage, the states, relying upon *Murray v. Giarratano*, 492 U.S. 1 (1989), do not recognize any constitutional obligation to provide counsel, notwithstanding the suggestion in the controlling opinion of Justice Kennedy in that 4-1-4 decision that such an obligation might exist in certain factual circumstances. See *id.* at 14–16 (emphasizing that concurrence is based “on the facts and records of this case,” in which “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief”). The result is that the general state of post-conviction capital representation in the states is scandalously poor. See *Commentary*, *supra* note 1, at 992 n.47 (noting that “even in those states that nominally do provide counsel for collateral review the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment . . . have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance”).

⁴⁵ See *Coleman v. Thompson*, 501 U.S. 772 (1991) (lawyer forfeited federal habeas corpus review of client’s claims by filing his state post-conviction appeals papers three days late; since client had no right to counsel, he could not attack lawyer as ineffective).

⁴⁶ Eric M. Freedman, *Habeas Corpus Cases Rewrote the Doctrine*, NAT’L L.J., Aug. 19, 1991, at S6.

⁴⁷ *Commentary*, *supra* note 1, at 936. See *id.* at n.57 (quoting description of habeas doctrine by Linda Greenhouse of *The New York Times*: “so complex as to be almost theological”). The same footnote cites *Teague v. Lane*, 489 U.S. 288 (1989), a case premised on the view “that prisoners should be executed because they failed to delay their cases sufficiently and it is now too expensive to give them justice.” *COMM. ON CIVIL RIGHTS*, *supra* note 34, at 853.

⁴⁸ *Coleman*, 501 U.S. at 739, 754.

⁴⁹ One example is described in *Commentary*, *supra* note 1, at 1081 n.334; see also *id.* at 1082 n.337 (describing early attempt by Missouri to achieve this result that was blocked by Justice Blackmun).

defense lawyer, the attorneys for a Death Row defendant must often spend a valuable portion of that time seeking a stay of execution simply to preserve the client's right to any review at all.⁵⁰

- has so far refused to recognize as a claim cognizable on federal habeas corpus the assertion that the defendant is to be executed for a crime of which he is innocent.⁵¹
- systematically makes obtaining review in the Supreme Court of the United States more difficult for capital defendants than for any other class of litigant,⁵² thus compounding the ineluctable structural problem that the certiorari system is neither designed for nor capable of providing individual justice to capital prisoners.⁵³

⁵⁰ See *id.* at 1081–82.

⁵¹ See *Herrera v. Collins*, 506 U.S. 390 (1993). This barrier exists even though, for the reasons already described, wrongful convictions are more likely in capital cases than in others; indeed, well over 100 prisoners have been released from Death Row in recent decades after the emergence of evidence of innocence. See Death Penalty Information Center, *Innocence and the Death Penalty*, at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited Feb. 19, 2005) (listing cases of 118 people since 1973 who “have been released from death row with evidence of their innocence”).

The resulting incongruity between legal doctrine and empirical reality results in judicial opinions that can aptly be described as surreal. Consider, for example, the recent en banc opinion of the Sixth Circuit in *House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (en banc). There, eight judges found that, although petitioner had “presented a colorable claim of actual innocence,” *id.* at 684, he was entitled to no relief under existing law; one judge concluded that since there was “grave doubt” as to House’s guilt he should receive a new trial, *id.* at 709–10; and six judges ruled that, because he had “established his actual innocence,” *id.* at 686, House had met the criteria hypothesized by *Herrera* and was entitled to his immediate release, *id.* at 708. The practical result of this 8–7 ruling is as clear as its doctrinal underpinnings are murky: “Unless the Supreme Court intervenes or Mr. House dies first from the multiple sclerosis he has, he will be executed.” Adam Liptak, *Execution May Occur Despite Votes of 7 Judges*, N.Y. TIMES, Oct. 7, 2004, at A17.

⁵² See Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?*, 36 SUFFOLK U. L. REV. 1 (2002); Eric M. Freedman, *Can Justice be Served by Appeals of the Dead?*, NAT’L L.J., Oct. 19, 1992, at 13.

⁵³ For example, during the seven years prior to the time that Justice Scalia wrote the opinion for a unanimous Court in favor of the petitioner in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Court repeatedly denied “*certiorari* petitions raising the very issue presented by that case, and Florida executed at least 13 men whose petitions presented the identical claim based on similar or identical facts.” RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4c, at 1589 n.59 (4th ed. 2001).

More recently, it has been estimated that between the time of the Court’s ruling in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) (see also *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) (re-iterating this holding)) that the Texas capital punishment system unconstitutionally restricted the presentation of mitigating evidence, and its ruling in *Tennard v. Dretke*, 124 S. Ct. 2562 (2004) that the Fifth Circuit had erroneously “invoked its own restrictive gloss on *Penry I*,” one which “ha[d] no foundation in the decisions of this Court,” and was inconsistent with the principles underlying *Penry I*, *id.* at 2569–70, forty prisoners who presented that claim were executed. See Adam Liptak & Ralph

Well aware of these problems and concerned that developments under the Antiterrorism and Effective Death Penalty Act of 1996 may make post-conviction review even less effective as a check on error,⁵⁴ the Guidelines require the states to provide effective counsel throughout the post-conviction process⁵⁵ and urge those counsel to be aggressive in challenging existing legal limitations.⁵⁶

III. POSSIBLE SOLUTIONS

Problems that are unique to the death penalty could be ended by its abolition. They could also be ameliorated by large expenditures of resources. As indicated,⁵⁷ the Guidelines take the second approach.

While avoiding a stance in favor of abolition may perhaps enhance the ABA's political credibility on the death penalty issue, the organization's position has two significant weaknesses from the perspective of public policy design.

First, regardless of how much money is spent, the problems can only be lessened, not solved. The unique barriers to communicating with Death Row clients, for example, may be lowered by enlisting a specialist to assist counsel. But a system built on the foundation that such assistance will be sufficient to "overcome these barriers"⁵⁸ is premised on a triumph of hope over experience.

Second, the additional substantial resources required to address the major structural flaws in the current system of capital punishment⁵⁹ will have to come from somewhere. This leads to two further questions: (A) what affirmative benefits is the money buying, and (B) at what opportunity cost?

Blumenthal, *Death Sentences in Texas Capital Cases Try Supreme Court's Patience*, N.Y. TIMES, Dec. 5, 2004, at A1.

Like the rest of the Court, Justice Scalia is well aware of these institutional constraints. Dissenting in *Kyles v. Whitley*, 514 U.S. 419, 457–58 (1995), he wrote on behalf of four Justices:

The greatest puzzle of today's decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol, to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that.

See generally, Joan Biskupic, *Justices Granting Fewer Stays of Execution*, USA TODAY, Oct. 28, 2003, at A13 (statistical analysis of nearly 1000 stay requests during past decade shows steep decline in grants, from approximately 24% in 1993–94 Term to approximately 3% in 2002–03 Term).

⁵⁴ *Commentary*, *supra* note 1, at 929 n.34.

⁵⁵ *See Guidelines*, *supra* note 1, at 919 (Guideline 1.1.B).

⁵⁶ *See* Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 904 n.11 (2003) (collecting examples).

⁵⁷ *See supra* text accompanying note 4.

⁵⁸ *Commentary*, *supra* note 1, at 1008 (discussed *supra* text accompanying note 10).

⁵⁹ These include not just the resources required to provide individual defendants with effective counsel, *see supra* note 41, but also those needed to achieve changes in the governing law, e.g., abrogating the *Lockhart* case discussed *supra* Part II.C and overhauling the rules governing post-conviction review, *see supra* Part II.E.

(A) Whatever the benefits of the death penalty might be, they are not ones that reveal themselves to social science research.⁶⁰ If there are some immeasurable benefits, such as sending an especially strong message of condemnation of certain crimes, they are just that—immeasurable.⁶¹

(B) The opportunity costs incurred in the effort to patch up the death penalty system, on the other hand, are not evanescent. The money spent on a relatively small number of cases to solve problems unique to capital litigation (e.g., implementing a dual-jury system to overcome the problem of death qualification) would, if spent on sensible criminal justice reforms (e.g., improving crime labs, videotaping interrogations), have a far bigger impact on the system as a whole.⁶²

After all, many of the concerns in capital cases (like race discrimination or conviction of the innocent) are ones common to the entire criminal justice system.⁶³ To spend a large amount of money fixing problems unique to the death penalty—or even problems common to the criminal justice system that cost uniquely more to fix in the death penalty context (e.g., provision of effective post-conviction counsel)⁶⁴—in the absence of tangible benefits unique to the death penalty is simply inefficient.

⁶⁰ See Brief of Amici Curiae Law Professors, *supra* note 21, at 469–73 (reviewing research on deterrence); see also Rudolph J. Gerber, *Death is Not Worth It*, 28 ARIZ. ST. L.J. 335 (1996).

⁶¹ And even then, as fully canvassed in Brief of Amici Curiae Law Professors, *supra* note 21, at 466–73, a belief in the existence of such immeasurable benefits must rest on the antecedent beliefs

that the system for selecting those who will be put to death is capable of (i) sorting out the worst murders from the others, (ii) consistently imposing capital sentences for the worst murders, and (iii) consistently avoiding capital sentences for the others. No one familiar with the realities could believe that American capital-sentencing systems do this or are capable of doing this.

Id. at 468.

⁶² See Eric M. Freedman, *The Case Against The Death Penalty*, USA TODAY, Mar. 1, 1997, (Magazine), at 48, 49.

⁶³ In both *McCleskey* (discussed *supra* text accompanying note 18) and *Herrera* (discussed *supra* note 51), the majority supported its refusal to grant relief on just this basis. See *McCleskey*, 481 U.S. 279, 314–15 (1987) (“McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties.”); *Herrera*, 506 U.S. 390, 398 (1993) (“Petitioner asserts that the . . . Constitution prohibit[s] the execution of a person who is innocent of the crime for which he was convicted. This proposition has an elemental appeal, as would the similar proposition that the Constitution prohibits the imprisonment of one who is innocent . . .”).

⁶⁴ See Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325, 341–45 (2003) (outlining resources needed to provide effective post-conviction representation to capital defendants).

Moreover, in contrast to the strategy of throwing good money after bad,⁶⁵ a decision in favor of abolition would yield an immediate windfall⁶⁶ that could be spent on sensibly-directed improvements to the entire criminal justice system.

IV. CONCLUSION

The intended effect of the Guidelines was to improve capital defense representation in death penalty states.⁶⁷ As the states consider the problem, perhaps an unintended but welcome effect of the Guidelines' stark portrayal of the realities confronting them will be to prompt a re-consideration of their choice to have a death penalty at all.¹

⁶⁵ Precisely how much good money will be required to implement such a strategy will ultimately be a function of how much certainty we demand of the government before allowing it to take the irrevocable step of killing one of its prisoners.

⁶⁶ See Freedman *supra* note 41, at 1097–99 (canvassing incremental costs imposed on criminal justice system by existence of death penalty); Jeff Scullin, *Death Penalty: Is Price of Justice Too High? States Wonder if the Extreme Punishment is Worth the Cost*, LAKELAND REG. (Fla.), Dec. 14, 2003, at 1.

⁶⁷ In view of the influence of the ABA and the institutional commitments made by bar leaders to push for implementation of the Guidelines in the states where the death penalty still exists, see Leigh Jones, *ABA Launches Effort to Improve Capital Case Defense*, N.Y. L.J., Oct. 27, 2003, at 1, this will probably be their practical effect as well.

¹ As this article goes to press in early 2005, such a reconsideration is well under way in New York, see Marc Santora, *New Debate Over Restoring Death Penalty*, N.Y. TIMES, Dec. 16, 2004, at B1, and has garnered support in Kansas, see Chris Moon, *Education, Health Care and the Death Penalty are Likely to be Headliners During the 2005 Session*, TOPEKA CAP.-J., Jan. 9, 2005, at 6F, and Maryland, see Daily Record Editorial Advisory Board, *It is Time to say "Enough" to Death Penalty*, BALT. DAILY REC., Dec. 20, 2004, available at 2004 WL 102801879. In Ohio, legislation calling for a study of the death penalty, which passed the House but not the Senate late in 2004, could be re-introduced in 2005.

