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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULE 6.8 OF THE RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-050031 MARICOPA COUNTY ATTORNEY'S COMMENT IN OPPOSITION TO PETITION TO AMEND RULE 6.8 OF THE RULES OF CRIMINAL PROCEDURE

The Maricopa County Attorney hereby comments in opposition to the Petition to Amend Rule 6.8 of the Rules of Criminal Procedure.

Respectfully submitted this 22 day of May, 2006.

ANDREW P. THOMAS
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BY: Philip J. MacDonnell
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROPOSED AMENDMENT IS CONTRARY TO UNITED STATES SUPREME COURT'S INEFFECTIVE ASSISTANCE OF COUNSEL DOCTRINE

The Maricopa County Attorney opposes the petition to amend Rule 6.8 of the Arizona Rules of Criminal Procedure, submitted by the Indigent Defense Task Force (IDTF) to the Arizona Supreme Court. The IDTF asserts that their proposed amendment is a "logical extension of the United States Supreme Court's jurisprudence" on the issue of attorney performance in capital cases. (Petition at 1.) The Maricopa County Attorney disagrees.

IDTF's Proposed Amendment to Rule 6.8

Currently, Rule 6.8 of the Arizona Rules of Criminal Procedure outlines the standards for appointment of counsel in capital cases. In its petition, IDTF is seeking to broaden the scope of Rule 6.8 to include not only the standards for appointment of counsel in capital cases, but also to regulate the performance of counsel in these types of cases. (Petition at 3.) The stated purpose of IDTF's petition is to "ensure that counsel appointed in capital cases comply with the practitioner specific guidelines set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." (*Id.* at 1.) IDTF's petition also states that their proposed amendment is a "logical extension of United States Supreme Court jurisprudence addressing this issue," citing *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 125 S.Ct. 2456 (2005). (*Id.* at 1-2.)

Therefore, in order to determine the validity of IDTF's proposed amendment, it is necessary to analyze in some detail the United States Supreme Court's jurisprudence concerning what constitutes effective assistance of counsel. This analysis will begin with the four cases cited by the IDTF in their petition.

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

In *Strickland v. Washington*, the Court addressed, for the first time, the claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. 466 U.S. at 683. The Court explained that in cases presenting claims of "actual ineffectiveness," the Court is guided by the purpose of the Sixth Amendment – to ensure a fair trial. *Id.* at 686. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Id.* This definition of the constitution's requirement forms the background to the now-familiar two-prong test for ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Id. at 687, (quotes in the original). The Court went on to state that, when asserting ineffectiveness, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88.

Notably, the Court resisted adopting any lists or specifications regarding counsel's conduct beyond an objective standard of reasonableness, stating that "[m]ore specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Id.* at 688. The Court reiterated that, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

The Court then addressed the basic duties that an attorney should provide in order to be effective under the Sixth Amendment. *Id.* at 688. However, the Court cautioned that "[t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial

evaluation of attorney performance." *Id.* at 688. In this context, the Court cited to the American Bar Association's guidelines for representation in a criminal case as a measure of "prevailing norms of practice." *Id.* at 688-89. The following is the Court's complete discussion of the ABA guidelines in *Strickland*:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, *but they are only guides*. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.*

Id. (emphasis added, citations omitted).

The Court has consistently applied the test for ineffectiveness it articulated in *Strickland*, and has reaffirmed its resistance to implementation of specific guidelines or rules beyond simply an objective standard of reasonableness. For example, in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), in rejecting a bright-line rule that counsel must always consult with the defendant regarding an appeal, the Court reiterated, quoting *Strickland*, that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." 528 U.S. 477, 480 (citations omitted). Regarding the ABA Standards for Criminal Justice, the Court again quoted *Strickland* that the ABA standards "are only guides, and imposing specific guidelines on counsel is not appropriate." *Id.* at 479 (citations and quotations omitted). The Court further stated:

> And, while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.

Id. (citations omitted). The Court further explained its resistance to imposing specific guidelines as

follows:

> But we have consistently declined to impose mechanical rules on counsel – even when those rules might lead to better representation – not simply out of a deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, ... [but rather] simply to ensure that criminal defendant's receive a fair trial."

Id. at 481. (quotations in original, citations omitted). *See also*, *Burger v. Kemp*, 483 U.S. 776, 788-95 (1987) (citing and quoting *Strickland* in rejecting defendant's ineffective assistance of counsel claim regarding attorney's strategic decision not to develop and present evidence of defendant's troubled family background); *Darden v. Wainwright*, 477 U.S. 168, 185-87 (1986) (citing and quoting *Strickland* in rejecting defendant's ineffective assistance of counsel claim regarding attorney's strategic decision not to present certain evidence at sentencing phase).

***Williams v. Taylor* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).**

In *Williams v. Taylor*, the Supreme Court held that Williams' constitutional right to the effective assistance of counsel as defined in *Strickland* was violated. 529 U.S. at 399. In its discussion of Williams' attorney's performance at sentencing, the Court stated that, "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. *See* 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)." *Id.* at 396.

The above cited quote is the only reference that the Court made to the ABA Standards in *Williams*. The Court, in *Williams*, did not expound on its previous position taken in *Strickland*, that the ABA Standards are to be used by capital defense counsel as "guides as to determining what is reasonable" when litigating a death penalty case.

***Wiggins v. Smith* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).**

In *Wiggins*, petitioner claimed that his attorney's performance at sentencing violated his Sixth Amendment right to effective assistance of counsel. 539 U.S. at 520-21. Wiggins' ineffective

assistance of counsel claim stemmed from his attorney's decision to limit the scope of their investigation into potential mitigating evidence. *Id.* at 521.

In deciding whether Wiggins' attorneys provided constitutionally effective assistance of counsel, the Court focused on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable. 539 U.S. at 523. In analyzing whether counsel's investigation into Wiggins' history was deficient, the Court relied on the professional standards that prevailed in Maryland in 1989 (the time that Wiggins' case was litigated) and the standards for capital defense work articulated by the ABA. *Id.* at 524. In discussing the ABA standards for capital work, the Court described them as "standards to which we long have referred as "guides to determining what is reasonable."" *Id.* Although the Court referred to the ABA standards for capital work as a guide in determining what constitutes reasonable actions by an attorney, the Court also reiterated its holding in *Strickland* and stated that, "[w]e have *declined to articulate specific guidelines for appropriate attorney conduct* and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."" *Id.* at 521 (emphasis added, citations omitted). The Court also warned that imposing specific requirements on counsel's duty to investigate and present mitigating evidence would "interfere with the 'constitutionally protected independence of counsel' at the heart of *Strickland*. *Id.* at 533 (citations omitted).

In dissenting from the majority opinion, Justice Scalia, joined by Justice Thomas, noted that *Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," and further stated that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, *but they are only guides*." 539 U.S. at 546-47 (emphasis in original).

***Rompilla v. Beard* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).**

In *Rompilla*, the Court again addressed an ineffective assistance of counsel claim grounded in defense counsel's failure to examine the file on the defendant's prior conviction for rape and assault – despite the fact that the defendant and his family suggested that no mitigating evidence was available. 125 S.Ct. at 2460. In a 5 to 4 decision, the Court found that defense counsel was deficient for failing to examine the court file on the defendant's prior conviction. *Id.* at 2463. In reaching this conclusion, the Court discussed the ABA Standards for Criminal Justice's description of defense counsel's obligation to investigate, referring again to *Strickland's* language describing the ABA standards as "guides to determining what is reasonable." *Id.* at 2465-66 (citations omitted). However, in response to the dissent, the majority still denied that it was imposing a "rigid *per se*" rule regarding conduct of counsel. *Id.* at 2467. In a concurring opinion, Justice O'Connor reiterated that the Court was not imposing any rigid requirement, but was applying the *Strickland* reasonableness standard. *Id.* at 2469.

In dissenting from the majority opinion, Justice Kennedy, joined by Justices Rehnquist, Scalia, and Thomas, argued that the Court had imposed a rigid requirement on defense counsel that "has no place in our Sixth Amendment jurisprudence and, if followed, often will result in less effective counsel by diverting limited defense resources from other important tasks in order to satisfy the Court's new *per se* rule. *Id.* at 2471. The dissent goes on to point out that "[a] *per se* rule requiring counsel in every case to review the records of prior convictions used by the State as aggravation evidence is a radical departure from *Strickland* and its progeny." *Id.* at 2473. The dissent quotes *Strickland* and cites *Wiggins* and *Flores-Ortega* for the Court's previous warnings against the creation of "specific guidelines" or "checklists" for evaluating counsel's performance. *Id.* (citations omitted). Justice Kennedy further pointed out that the Court has used the ABA

Standards for Criminal Justice as a useful point of reference, but they "are only guides." *Id.* (citation omitted). As Justice Kennedy explained:

> One of the many primary reasons this Court has rejected a checklist approach to effective assistance of counsel is that each new requirement risks distracting attorneys from the real objective of providing vigorous advocacy as dictated by the facts and circumstances in the particular case.

Id. at 2474.

Thus, it appears that, although the majority and the dissent differ regarding the effect of the Court's holding in *Rompilla*, *all* seem to agree that *Strickland's* rejection of *per se*, mechanical rules is still good law. Even the Court's recent decisions using the ABA Guidelines as a reference point to find counsel ineffective have steadfastly refused to adopt any mechanical rule. This point is particularly salient given the change in the makeup of the United States Supreme Court. For example, the five justice majority in *Rompilla* included Justice O'Connor – who was recently replaced by Justice Samuel Alito. Interestingly, then-Judge Alito authored the Third Circuit opinion in *Rompilla* finding no ineffective assistance of counsel that the Court later overturned with its closely divided opinion.

IDTF's proposed amendment to Rule 6.8 of the Arizona Rules of Criminal Procedure is contrary to established United States Supreme Court precedent and would be counterproductive in assuring that capital defendants receive the effective and independent representation guaranteed under the Sixth Amendment. In their petition to amend Rule 6.8, IDTF stated that their proposed change is a "logical extension of United States Supreme Court jurisprudence." (Petition at 1.) The detailed examination above of the United States Supreme Court cases cited by IDTF in their petition reveals the opposite to be the case. In fact, the proposed adoption in capital cases of the ABA Guidelines would constitute a repudiation in capital cases of the United States Supreme Court's approach to ineffective assistance of counsel.

II. SERIOUS FLAWS IN GUIDELINES RAISE OTHER ISSUES

Additionally, for practical purposes, the proposed rules are unworkable, not only because they potentially divest counsel of their constitutionally mandated independence, but because the rules themselves conflict – making it impossible for an attorney to ever comply with them all simultaneously. For example, Guideline 10.5 requires counsel to "at all stages of the case make every appropriate effort to establish a relationship of trust with the client." Yet, Guideline 10.7 states that counsel "at every stage has an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." These investigations should be "conducted *regardless of any statement by the client*" concerning the facts of the crime or whether "evidence bearing upon the penalty is not to be collected or presented." (*See* Guideline 10.7(A)(1) and (2), emphasis added). Using these two guidelines as examples, it is not hard to envision a situation where defense counsel would be faced with a Hobson's choice: maintain a relationship of trust with the client or conduct an investigation irrespective of the client's wishes. Either choice would result in a violation of the ABA Guidelines and could provide the basis for an ineffective assistance of counsel claim.

In a similar manner, Guideline10.11(K) should be compared with Guideline 10.8. Guidelines 10.11(K) requires defense counsel to object to instructions or verdict forms that are "constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions." This mandatory provision requires counsel to take a stand in these issues regardless of their tactical effect in the client's case. If an instruction is ambiguous or legally flawed, counsel must object even if the ambiguity or flaw favors the defendant. Yet, Guideline 10.8 requires defense counsel to exercise professional judgment in asserting legal claims. Thus, if a defense counsel objects to an ambiguous or legally flawed instruction in order to satisfy Guideline 10.11(K), he or she very likely

to be violating Guideline 10.8 by that action. These rules provide basis for never-ending post conviction review.

The proposed Guidelines have other problematic provisions. For example, Guideline 10.1 gives a unique lawmaking authority to defense agencies. Under the Guideline they must "establish standards of performance for all counsel in death penalty cases." The standards are not limited to the specific provisions of the Guidelines. The defense agencies could specify a lower case load or higher salary rate or different staffing requirements than the Guidelines propose. Violation of these internal standards could presumably be additional grounds for post conviction reversal.

III. CONCLUSION

Currently, Rule 6.8(b)(iii) provides that trial counsel in capital cases, "[s]hall be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." The existing language of Rule 6.8 is consistent with the United States Supreme Court precedent regarding the duty of counsel in capital cases to provide constitutionally effective representation. By mandating that counsel in capital cases *comply* with the ABA Guidelines, Arizona would be adopting "specific guidelines" or "checklists" that the Supreme Court has specifically disapproved of since *Strickland*. IDTF's proposal that counsel at all stages in a capital cases *comply* with the ABA Guidelines would also entail many unpredictable, costly and harmful effects. For the above stated reasons, the Maricopa County Attorney requests that this Court reject the IDTF's proposed amendment to Rule 6.8.

Respectfully submitted this 22 day of May, 2006.

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Copies of the forgoing hand delivered this 22nd day of May, 2006 to:

Clerk of the Court
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