

ARIZONA SUPREME COURT

COMMENT ON PETITION TO AMEND
RULE 6.8 OF THE ARIZONA RULES
OF CRIMINAL PROCEDURE

No. R-05-0031

The Arizona Attorney General opposes the Arizona State Bar Indigent Defense Task Force (IDTF)'s Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, which seeks to incorporate the performance standards set forth in the ABA Guidelines for Indigent Counsel in Capital Cases into the Arizona Rules of Criminal Procedure. Over the past decade, the Attorney General's Office has represented the State of Arizona in all capital post-conviction proceedings; those proceedings provide a vehicle for pursuing claims of ineffective assistance of counsel in the trial court and in this Court. Based on that experience, the Office offers its perspective on the proposed amendments to Rule 6.8.

IDTF's petition should be rejected for at least two reasons. First, the current version of Rule 6.8 already provides an effective framework for the appointment of competent counsel in capital cases. Effective November 1, 1996, Rule 6.8 was amended to provide for two qualified attorneys in every capital case and to specifically require significant criminal trial experience, as well as familiarity with

the ABA Guidelines. Since 1996, no lawyer appointed under the current version of Rule 6.8 has been found to have rendered ineffective assistance of counsel at trial or at sentencing in a capital case. Although there have been reversals or remands in some of those cases, *none* of the reversals or remands resulted from claims of ineffective assistance of counsel. Thus, to the extent IDTF's petition is proffered to address a perceived problem of ineffective assistance of counsel in capital cases, the petition fails to acknowledge changes that have already been implemented and is unwarranted.

Second, contrary to IDTF's assertion, the proposed amendment to Rule 6.8 is not a logical extension of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. In *Strickland*, the Court set forth a two-part test for evaluating Sixth Amendment ineffective assistance of counsel claims, analyzing whether (a) counsel's performance was deficient under the circumstances of the case, and (b) the deficient performance prejudiced the defense. *Id.* at 687. In discussing the deficient performance prong, the Court referenced "prevailing norms of practice as reflected in American Bar Association standards and the like," but noted that such standards are "only guides" and cautioned against the adoption of detailed lists of rules for counsel's conduct. *Id.* at 688. In post-*Strickland* cases, the Court has reiterated that the ABA standards are only guides and that the Court has never adopted or articulated "specific guidelines for appropriate attorney conduct." *See*

Wiggins v. Smith, 539 U.S. 510, 521 (2003) (reiterating that “[w]e have declined to articulate specific guidelines for appropriate attorney conduct”). Thus, the proposal to incorporate the ABA Guidelines into Rule 6.8 is not a logical extension of United States Supreme Court case law.

Strickland and its progeny provide a sufficient basis for assessing counsel’s performance. The appropriate test set forth by the United States Supreme Court is reasonableness under the specific facts and circumstances of the case, and a laundry list of requirements would not improve on that test. Amending Rule 6.8 to incorporate the ABA standards would increase the likelihood of litigation over whether defense counsel complied with a checklist of required conduct, without a corresponding increase in the likelihood that the underlying trial proceedings were fair and reliable. Accordingly, and for reasons set forth in the accompanying Memorandum of Points and Authorities, IDTF’s petition should be denied.

RESPECTFULLY SUBMITTED this 5th day of June, 2006.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. *Rule 6.8 Already Creates A Framework For Appointing Competent Counsel Who Are Familiar With The ABA Guidelines.*

Contrary to what IDTF representatives have asserted, there is no empirical evidence supporting an argument that unqualified counsel who are unfamiliar with the ABA Guidelines have been handling capital cases in Arizona over the past decade.

Under Rule 6.2 of the Arizona Rules of Criminal Procedure, two attorneys who must meet the qualification standards set forth in Rule 6.8 are appointed in every capital trial proceeding. Rule 6.8(b) requires that lead counsel:

- (i) Shall have practiced in the area of state criminal litigation for five years immediately preceding the appointment;
- (ii) Shall have been lead counsel in at least nine felony jury trials that were tried to completion and have been lead counsel or co-counsel in at least one capital murder jury trial;
- (iii) **Shall be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases;**
- (iv) Shall have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.

(Emphasis added).

IDTF’s petition seeks to amend Rule 6.8(b) (iii) to add a requirement that lead counsel “shall comply with Guidelines 1.1, 10.2, 10.3, 10.4(B-D), 10.5, 10.6, 10.7, 10.8, 10.9.1, 10.9.2, 10.10.1, 10.10.2, 10.11, 10.12, 10.13, and 10.14.” IDTF also seeks to impose the same requirement on co-counsel (the Rule currently does not reference the ABA Guidelines in discussing the requirements for co-counsel), and to impose a requirement on appellate and post-conviction counsel that counsel “shall comply with ABA Guidelines 1.1, 10.15.1, and 10.15.2.”

A review of cases in which attorneys were appointed under Rule 6.8 suggests that there is no reasoned basis for arguing that the current rule is ineffectual. Since the November 1, 1996 effective date of the current version of Rule 6.8, sixty-eight defendants in sixty-nine cases have been sentenced to death in Arizona. *See* Exhibit A, Inmates Sentenced After November 1, 1996. None of those cases (including eight cases handled by counsel appointed prior to the effective date of Rule 6.8) have been reversed on the basis of ineffective assistance of counsel. *Id.* Of the sixty-one cases in which counsel was appointed under the current version of Rule 6.8, thirty have been reversed or remanded thus far, all for reasons other than ineffective assistance of counsel.¹ *See* Exhibit B, Cases

¹ Of the eight cases in which a defendant was sentenced to death after November 1, 1996, but where counsel was appointed prior to November 1, 1996, there were two reversals—in *State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1806 (1998), and *State v.* (continued ...)

Reversed or Remanded on Direct Appeal; Exhibit C, Cases Reversed in Post-Conviction Proceedings. Twenty-four of those cases were reversed on direct appeal based on *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that a jury, rather than a judge must make findings regarding aggravating circumstances that subject a defendant to the death penalty).² *Id.* Two cases, including one of the *Ring* remands,³ were remanded (at the post-conviction stage) for resentencing based on *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that defendants who were under age 18 at the time of the crime are not eligible for the death penalty). *Id.* The remaining five of those thirty cases were reversed on direct appeal for reasons unrelated to ineffective assistance of counsel. *Id.* In the thirty-one cases that have not been reversed at any stage, one defendant died in custody (Bernard Smith), one was executed for a separate crime (Robert Vickers) and seven have progressed through the post-conviction stage of the state appeals process. *Id.*

IDTF's suggestion that unqualified counsel unfamiliar with the ABA Guidelines are handling capital cases is unfounded given the absence of any

(... continued)

Bocharski, 200 Ariz. 50, 22 P.3d 43 (2001). Toribio Rodriguez' sentence was reversed because of an improper jury instruction; Phillip Bocharski's sentence was reversed because the trial court's failure to provide funding for a mitigation investigation rendered Bocharski's waiver of mitigation invalid.

² Two *Ring* remands also involved conviction reversals unrelated to ineffective assistance of counsel. *See State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003), *State v. Hall*, 204 Ariz. 442, 65 P.3d 90 (2003).

³ The James Davolt case was reversed based on both *Ring* and *Roper*.

finding of ineffective assistance in post-November 1, 1996 cases. There is no evidence that adding a laundry list of required conduct for defense counsel is necessary to ensure effective assistance of counsel in capital cases in Arizona.

Because there is already an adequate mechanism for assessing ineffective assistance of counsel under *Strickland* and its progeny, the addition of a checklist will create potential claims to litigate (based on a failure to comply with the checklist) without increasing the likelihood of a fair and reliable trial and sentencing proceeding. *See Strickland*, 466 U.S. at 689 (detailed guidelines “would encourage the proliferation of ineffectiveness challenges”). That result would run counter to the interests of justice and would be inconsistent with victims’ constitutional right to a prompt and final conclusion of a criminal case after conviction and sentence. Ariz. Const. Article II, § 2.1; Ariz. R. Crim. P. 39 (b) (15).

No other state has incorporated the ABA Guidelines into state rules of criminal procedure. There is no compelling reason for Arizona to do so.

II. *The Proposed Amendment To Rule 6.8 Is Not A Logical Extension Of United States Supreme Court Authority.*

The IDTF petition notes that the United States Supreme Court has cited portions of the ABA Guidelines with approval in addressing claims of ineffective assistance of counsel under *Strickland*, and posits that incorporation of the ABA

guidelines is a “logical extension of United States Supreme Court jurisprudence addressing this issue.” Petition at 1-2, citing *Strickland, 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). Those cases evidence the United States Supreme Court’s approval of portions of the ABA Guidelines. They do not, however, support an assertion that the Guidelines should be adopted as mandatory in every case.

In *Strickland*, in discussing the performance prong of the test for whether an attorney rendered effective assistance of counsel under the Sixth Amendment, the Court emphasized that the proper measure of attorney performance is “reasonableness under prevailing professional norms.” *Id.* at 688. The Court cited to the ABA Standards in effect at that time, but relied on them as guidelines only, and not as mandatory standards:

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).

Neither *Strickland* nor any of the other cases cited by IDTF provides support for the proposition that incorporation of the ABA Guidelines into the rules of procedure is a logical extension of Supreme Court authority. *See Wiggins*, 539 U.S. at 521, 533 (reiterating 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,” and warning that imposing a specific requirement on counsel’s duty to investigate and present mitigating evidence would “interfere with the constitutionally protected independence of counsel” at the heart of *Strickland*.); *Rompilla*, 125 S. Ct. at 2469 (J. O’Connor, concurring) (reiterating that although the ABA Standards are “guides to determining what is reasonable” the Court was not imposing any rigid requirement, but was applying the *Strickland* reasonableness standard).

The United States Supreme Court has never held that the ABA standards as a whole represent the standard for determining ineffective assistance of counsel and should be mandatory in every case. In fact, the Court stated the opposite in *Jones v. Barnes*, 463 U.S. 745, 753, n. 6 (1983): “In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution.” *Strickland* and its progeny have not altered that position.

There are provisions in the ABA standards that are in fact inconsistent with controlling United States Supreme Court authority. For example, under Guideline 10.7, a defense attorney should conduct a mitigation investigation “regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.” This standard does not necessarily reflect current case law regarding investigation and presentation of mitigation over a defendant’s objection. *See Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990) (affirming a death sentence where “after receiving repeated warnings from the trial judge, and contrary advice from counsel, the defendant decided not to present any mitigating evidence”); *Wiggins*, 539 U.S. at 534 (emphasizing that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant, and that *Strickland* does not require defense counsel to present mitigating evidence at sentencing in every case. While there is undoubtedly a duty on the part of defense counsel to investigate mitigation notwithstanding a client’s wishes to the contrary, the level of that investigation cannot be the same in every case “regardless of” the client’s wishes.

Other ABA Guidelines similarly create duties that may not necessarily be required in every case, and their adoption as a required checklist would create a basis for litigation without increasing the reliability of the underlying proceedings. *See* Guideline 10.3 (limiting case loads); Guideline 10.4 (imposing a requirement

that lead counsel handle certain aspects of the case and create a team of at least one mitigation specialist and one fact investigator; and at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments); Guideline 10.9.1 (imposing a duty to seek an agreed-upon disposition “at every stage of the case”); Guideline 10.10.2 (Counsel should be familiar with “techniques” for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction); Guideline 10.11.(F)(3) (requiring investigation of witnesses who can testify about the applicable alternative to a death sentence and or the conditions under which the alternative sentence would be served); Guideline 10.11.(J)(3) (requiring attendance at all interviews of defendant by witnesses associated with the government – presumably including expert witnesses); Guideline 10.15.1 (imposing duty on post-conviction counsel to litigate all issues, *whether or not previously presented*, that are arguably meritorious under the standards applicable to high quality capital defense representation).

The defense bar and organizations such as the ABA are entitled to establish guidelines for how capital cases should be handled, and such guidelines serve an important role in the criminal justice system. Such guidelines should not, however, be incorporated into Arizona’s rules of criminal procedure as mandatory performance measures.

CONCLUSION

IDTF's petition to amend Rule 6.8 does not address a demonstrated problem with the current version of the rule. The current version of the rule, which already requires familiarity with the ABA Guidelines, has been in effect for almost 10 years. During that time, no case in which an attorney was appointed under the rule has been reversed on the basis of ineffective assistance of counsel.

Adopting the ABA Guidelines as mandatory performance measures is not a logical extension of *Strickland* and its progeny. The focus of those cases is reasonableness under the circumstances, and the United States Supreme Court has expressly counseled against a detailed set of rules for how a case should be handled. Adopting a checklist of required duties would create potential claims to litigate without increasing the likelihood of a fair and reliable trial and sentencing proceeding. That result would run counter to the interests of justice and would be inconsistent with victims' constitutional rights. The ABA Guidelines should remain as guides only, and should not be incorporated into Rule 6.8.

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RESPECTFULLY SUBMITTED this 5th day of June, 2006.

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ORIGINAL and seven copies filed with the Arizona Supreme Court Clerk.

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