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STATEMENT OF THE AMERICAN BAR ASSOCIATION

to the

SUPREME COURT OF THE STATE OF ARIZONA

on the subject of

PROPOSED AMENDMENT TO RULE 6.8 of ARIZONA RULES OF CRIMINAL PROCEDURE (No. R-05-0031)

Submitted by:

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Pursuant to this Court's order of January 18, 2006, the American Bar Association, on behalf of its more than 400,000 members and at the request of its President, Michael S. Greco, respectfully submits the following comments in support of the petition to amend Arizona Rule of Criminal Procedure 6.8 to ensure that counsel in capital cases comply with the practitioner specific guidelines set forth in the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Counsel in Death Penalty Cases (2003 ed.).

The effect of the amendment would be to require capital defense counsel to perform at the level of the existing national standard of care. That is the purpose of the Guidelines themselves and that is the use to which they have been repeatedly put by the Supreme Court of the United States and numerous federal courts.

Background

The ABA is not opposed to the death penalty, but it is in favor of justice in capital cases.[1] The bedrock definition of justice in this context is the establishment of a legal

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[1]Except for opposing execution of persons who are mentally retarded or were under 18 at the time of their crimes (both of which exceptions were eventually recognized by the Supreme Court), 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 Death Penalty Representation Guidelines, intended to insure due process and minimize the risk of execution of the innocent. *See* http://www.abanet.org/moratorium/resolution.html (containing both ABA resolution of Feb. 3, 1997, which embodies this position, and links to relevant policies).

system that functions reliably to punish the guilty, acquit the innocent, and eliminate the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[2] Like the Supreme Court of the United States,[3] the ABA has long recognized that the achievement of these goals in death penalty cases requires the government to provide competent counsel to indigent capital defendants at each and every phase of the criminal process. When it does, both speed and justice are immeasurably improved. When it does not, both are in peril.

Simply put, "All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed."[4]

For these reasons, the ABA in 1989 adopted its first set of Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. In commentary,[5] the document explained that it was designed to express the "practice norms and constitutional requirements" that were in existence at the time. When, after an extended study, the ABA

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[2]Lockett v. Ohio, 438 U.S. 586, 605 (1978).

[3]*See* Powell v. Alabama, 287 U.S. 45 (1932).

[4]Comm. on Civ. Rts., 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 CITY OF N.Y. 848, 854 (1989).

[5]The official policy of the ABA is stated in the black-letter of the Guidelines. The commentary, although it has not been formally adopted by the House of Delegates (and is not proposed to be adopted by the Court), is designed to serve as a useful explanation of the black-letter.

revised the Guidelines in 2003, this thought was "moved to the black letter in order to emphasize that these guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases."[6]

The updated Guidelines came to the floor of the ABA House of Delegates on February 10, 2003 with the co-sponsorship of a broad spectrum of ABA entities. No speaker opposed them and they passed without a single dissenting vote.

The Guidelines in Practice

As currently articulated by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984) (O'Connor, J.), there is a two-pronged test for determining whether a criminal defendant has received the effective assistance of counsel that the Constitution requires:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that

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[6]History of Guideline 1.1, *reprinted in* 31 Hofstra L. Rev. 913, 920 (2003). Documenting these points, the commentary supporting the 2003 edition of the Guidelines as reprinted in id. runs to more than 150 pages and 350 footnotes.

renders the result unreliable.

Id. at 687.

With respect to the first prong, the performance prong, the Court elaborated:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. 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.

Id. at 688.

In many subsequent cases, the Court, citing to this passage of *Strickland*, has relied upon the ABA's standards in the criminal justice field generally,[7] and in the capital defense field particularly, in assessing whether or not counsel's performance met prevailing professional norms. Recent examples include *Rompilla v. Beard*, 125 S.Ct. 2456, 2465-66 (2005) and *Wiggins v. Smith*, 123 S.Ct. 2527, 2536-37 (2003) (O'Connor, J.).

Unsurprisingly, therefore, both state and federal lower courts have done likewise. In dozens of instances they have relied upon the Death Penalty Representation Guidelines in considering whether the performance of defense counsel complied with the applicable standards of best practices.[8] Of course, the ultimate judicial ruling in some cases was

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[7]*See, e.g.*, Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failure "to conduct a thorough investigation of the client's background," *citing* ABA Standards for Criminal Justice 4-4.1, cmt. (2d ed. 1980)).

[8]*See, e.g*, Hedrick v. True, 443 F.3d 342 (4th Cir. 2006) (citing ABA Guidelines in considering whether defense counsel's decision not to present some evidence at mitigation was reasonable and concluding performance was not ineffective); Lundgren v. Mitchell, 440 F. 3d 754 (6th Cir.

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2006) (affirming conviction and sentence citing ABA Guidelines in assessing reasonableness of counsel's mitigation investigation); id. (Merritt, J., dissenting) (citing 1989 and 2003 versions of ABA Guidelines in finding that counsel's failure to present insanity defense was "manifestly ineffective"); Martinez v. Dretke, No. Civ.A. G-02-718, 2006 WL 305666 (S.D. Tex. Feb. 7, 2006) (finding counsel failed to investigate potential mitigation evidence as outlined in 1989 ABA Guidelines and granting petition for habeas corpus); Summerlin v. Schriro, 427 F. 3d 623, 638 (9th Cir. 2005) (granting penalty phase relief due to defense counsel's failure to present mitigating evidence and citing to the 1989 Guidelines in reference to counsel's "virtually absolute" duty to do anything necessary to "avoid the death penalty and achieve the least restrictive and burdensome sentencing alternative"); Clark v. Mitchell, 425 F.3d 270, 286 (6th Cir. 2005) (affirming conviction and sentence, finding that defense counsel was not ineffective for failing to call a neuroscientist or pharmacologist at sentencing phase and noting that defense counsel's retention of a psychologist was in conformance with ABA Guidelines); Moore v. Parker, 425 F.3d 250 (6th Cir. 2005) (Martin, J., dissenting) (citing ABA Guidelines in explicating defense counsel's duty to investigate); United States v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005) (affirming decision to set aside conviction based on military judge's refusal to provide appropriate assistance to defense team in accordance with 2003 ABA Guidelines); Harries v. Bell, 417 F. 3d 631 (6th Cir. 2005) (finding ineffective assistance of counsel due to failure to investigate and present any mitigating evidence at penalty phase and noting the approval of ABA Guidelines by Supreme Court in *Wiggins*); Earp v. Ornoski, 431 F. 3d 1158, 1175 (9th Cir. 2005) (granting evidentiary hearing on ineffective assistance of counsel claim in light of 2003 ABA Guidelines); Smith v. Dretke, 422 F. 3d 269 (5th Cir. 2005) (granting certificate of appealability on ineffectivess, citing to ABA Guidelines concerning duty to investigate); Mason v. Mitchell, 396 F.Supp.2d 837 (N.D. Ohio Oct. 31, 2005) (using ABA Guidelines to assess defense counsel's conduct in investigating mitigating evidence and finding that counsel did not provide ineffective assistance); Crowe v. Terry, No. CIV.1:02-CV-2265-OD, 2005 WL 3964732 (N.D. Ga. Sept. 30, 2005) (citing ABA Guidelines' requirement that counsel must be experienced in the utilization of expert witnesses and concluding that counsel in this instance was not ineffective); Mitts v. Bagley, No. 1:03CV1131, 2005 WL 2416929 (N.D. Ohio Sept. 29, 2005) (finding after consideration of ABA Guidelines that counsel's mitigation investigation in the instant case was reasonable); Thomas v. Beard, 388 F.Supp.2d 489 (E.D. Pa. 2005) (granting petition for habeas corpus based on deficient performance under prevailing professional standards including ABA Guidelines); Stitt v. United States, 369 F.Supp.2d 679 (E.D. Va. 2005) (granting relief on ineffective assistance of counsel claim based on trial counsel's conflict of interest and assessing other ineffective assistance of counsel claims in light of ABA Guidelines); Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005) (using the ABA Guidelines to assess counsel's performance and holding that defense counsel rendered ineffective assistance by failing to advise defendant he was entitled to testify at penalty phase); Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005) (denying relief due to lack of prejudice, but finding trial counsel's performance deficient during sentencing phase, ABA Guidelines); Kandies v. Polk,

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385 F.3d 457, 479-80 (4th Cir. 2004) (Michael, J., concurring) (relying on ABA Guidelines as guide to reasonable conduct for defense attorneys and finding that counsel's performance deficient); Hartman v. Bagley, 333 F. Supp. 2d 632 (N.D. Ohio Aug. 31, 2004) (noting 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" and that " in certain respects [mitigation presentation] may have fallen short of the ABA's standards" but concluding that defense counsel was not ineffective for failing to expand on defendant's history of substance abuse in sentencing phase); Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004) (noting the ABA Guidelines' emphasis on the "vital importance" of mental health evidence in mitigation and finding counsel ineffective for failing to present evidence of defendant's mental retardation, brain damage and troubled background in penalty phase); Davis v. Woodford, 384 F.3d 628 (9th Cir. 2004) (Fletcher, J., dissenting) (assessing counsel's performance using the ABA Guidelines and concluding that petitioner should be granted an evidentiary hearing on several issues, including ineffective assistance of counsel); Longworth v. Ozmint, 302 F. Supp.2d 535 (D.S.C. 2003) (denying petitioner's claim of ineffective assistance, distinguishing counsel's performance from that found in previous cases to be ineffective under ABA Guidelines); Bryan v. Mullin, 335 F.3d 1207 (10th Cir. 2003) (Henry, J., concurring) (relying upon ABA Guidelines in finding defense counsel ineffective based on decision not to present mitigating evidence during penalty phase); United States v. Murphy, 50 M.J. 4 (C.A.A.F. 1998) (setting aside defendant's death sentence because defendant was denied effective assistance of counsel and noting that the ABA Guidelines are "instructive"); Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998) (affirming finding that defendant's trial counsel was ineffective based on refusal to meet with client or investigate mitigating evidence, citing 1989 ABA Guidelines); Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994) (Ebel, J., dissenting) (relying on ABA Guidelines requiring adequate investigation into mitigating evidence in finding defense counsel ineffective); Torres v. State, 120 P.3d 1184 (Okla. Crim. App. 2005) (noting that trial counsel's performance failed to meet the ABA Guidelines' requirements but finding defendant was not prejudiced); Commonwealth v. Hall, 872 A.2d 1177 (Pa. 2005) (Saylor, J., dissenting) (citing the ABA Guidelines and finding trial counsel ineffective due to failure to conduct mental health investigation); Commonwealth v. Brown, 872 A.2d 1139 (Pa. 2005) (Saylor, J., dissenting) (same); Presley v. State, 2005 Ala. Crim. App. LEXIS 52 (Feb. 25, 2005) (citing ABA Guidelines in overturning circuit court's dismissal of petitioner's post-conviction petition based on ineffective assistance of counsel); Commonwealth v. Williams, 863 A.2d 505 (Pa. 2004) (Saylor, J., dissenting) (relying upon ABA Guidelines in finding defendant's trial counsel ineffective for failure to conduct psychological examination of client); In re Larry Douglas Lucas, 94 P.3d 477 (Cal. 2004) (citing ABA Guidelines in finding defense counsel ineffective due to failure to investigate client's early social history); Franks v. State, 599 S.E.2d 134 (Ga. 2004) (citing ABA Guidelines in denying petitioner's claim that trial counsel's mitigation investigation was inadequate); Peterka v. State, 890 So.2d 219 (Fla. 2004) (citing ABA Guidelines in determining that counsel's investigation of mitigating circumstances was adequate); Armstrong v. State, 862 So.2d 705 (Fla. 2003) (relying (continued...)

that counsel had done so and in others that counsel had not. And in still other cases the defendant was denied relief notwithstanding the deficient performance of counsel because of an inability to meet the prejudice prong of *Strickland.* But in each case the decisionmaking of all relevant actors – attorneys and judges alike – was assisted by the existence of professional guidelines, not as a "a checklist for judicial evaluation of attorney performance," *Strickland,* 466 U.S. at 688, but rather because they provided objective criteria to help delineate the applicable standard of care. In short the Guidelines are not intended as a substitute for the lawyer's professional judgment but rather as a resource for consultation in making such judgments.

The ABA believes that Arizona's adoption of the defense counsel performance sections of the 2003 Death Penalty Representation Guidelines will provide the same benefits as in other jurisdictions and urges the Court to amend Arizona Rule of Criminal Procedure 6.8 in accordance with the petition.

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upon ABA Guidelines in ordering new penalty phase of capital murder trial).