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DEATH WITHOUT JUSTICE

Ellen Kreitzberg*

I. INTRODUCTION

Richard Garrison was represented by a lawyer who, on the second day of jury selection, was arrested on his way to the courthouse with a .27 blood alcohol content.¹

Jack House was represented by a lawyer who did not investigate the crime, failed to file any pre-trial motions, and did not attempt to obtain discovery from the prosecutor. Three days before trial, the lawyer asked her husband to take charge of the case because she felt ill-prepared to handle it. Neither attorney was aware there was a separate sentencing hearing following a conviction of guilt so they prepared no evidence and no argument for the jury on the question of punishment.²

The lawyers for Marion Pruett were paid a total of $1000.00 each in fees for the investigation and trial of his capital case. Over 100 pre-trial motions were filed and litigated in pre-trial proceedings that lasted over nine days. The actual trial took more than four weeks. Based upon the hours documented by the lawyers, the fee represented $2.22 per hour for one lawyer and $2.07 for the other—far less than the minimum wage for the state. Although both counsel were from out-of-state, they were not reimbursed for their costs of lodging, meals and phone calls during the course of the trial.³

These examples highlight many of the problems that exist in the legal representation provided to indigent persons facing capital sentencing. Defense lawyers in capital cases

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are often untrained and inexperienced. All too frequently they lack the resources necessary to properly investigate, prepare and present an effective defense. At times they are even shamefully incompetent. Death "is different both in its severity and its finality," and its imposition demands "a corresponding . . . need for reliability." A careful review of capital cases shows that this has not happened. The actual record is troubling. There is no rational way to distinguish "the few cases in which [the death penalty] is imposed from the many cases in which it is not."

This article examines the failure of our system of justice to impose the death penalty in a manner that is consistent with the constitutional requirements set out by the Supreme Court. I argue that much of the blame for this failure rests with the Court's decision in Strickland v. Washington. Strickland both ignored precedents affirming the special nature of capital cases ("death is different"), and hindered the assurance of effective legal representation.

The Court's historical adherence to the notion that "death is different" is reviewed below, in part II, along with the special procedural requirements that the Court has established for capital cases. These requirements are markedly

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7. Gregg v. Georgia, 428 U.S. 153, 188 (1976). In Gregg, the Supreme Court upheld the constitutionality of Georgia's death penalty scheme. In its analysis the Court made clear that any sentence of death "could not be imposed under a sentencing procedure that created a substantial risk that it would be imposed in an arbitrary and capricious manner". Id.


9. Pruett v. State, 574 So.2d 1342, 1344 (Miss. 1990). Throughout the capital jurisprudence since Furman v. Georgia, 408 U.S. 238 (1972), every Supreme Court Justice has insisted or at least endorsed the notion that death penalty is different. Spaziano v. Florida, 468 U.S. 447, 468 (1984)(Stevens, J., concurring in part and dissenting in part)("In the 12 years since Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), every member of this Court has written or joined at least one opinion endorsing the proposition that because of the severity and irrevocability, the death penalty is qualitatively different from any other punishment and hence must be accompanied by unique standards . . . .") (footnote omitted).
different than those followed in other criminal trials,\textsuperscript{10} and include "individualized sentencing," which demands that an individual's background be considered before a sentence of death can be imposed.\textsuperscript{11} I discuss how this constitutional requirement is fulfilled only when counsel is allotted adequate resources, including both time and money, to perform a thorough investigation and, present mitigating evidence at trial.

Part III reviews the law that guarantees an indigent person the constitutional right to effective assistance of counsel and examines the historical record of its application. The question, essentially, is how well have lawyers represented indigent capital defendants since capital punishment was reinstated over two decades ago. Although the complex nature of capital litigation calls for defense attorneys with specialized skills, untrained lawyers have often been appointed. Inexperience, insufficient funding, and ineptitude too frequently contribute to ineffective counseling. The selection of who will live and who will die, thus appears to depend more on the performance of counsel than on the particular nature of the offender's crime.\textsuperscript{12}

The judicial and the legislative response to the mandate to provide counsel in capital cases has failed to distinguish the special needs inherent in capital case litigation. Therefore, in Part IV, I propose judicial and legislative solutions to ensure effective representation. The courts must review claims of effective assistance of counsel in capital cases differently from other criminal cases. Either a higher standard of performance must be imposed on counsel in the penalty trial of a capital case, or a presumption of ineffectiveness should be made when counsel neglects to thoroughly investigate and seek out mitigating evidence.

The state legislatures must enact guidelines for the appointment of counsel in a way that ensures effective representation. In addition, each state should provide counsel with adequate resources to effectively prepare and present a capital defense.

\textsuperscript{10} Gregg, 428 U.S. at 198 (providing an important procedural safeguard of an automatic appeal of all death sentences).

\textsuperscript{11} Id. at 199; Lockett v. Ohio, 438 U.S. 586, 602 (1978) (holding that the decision to impose death must focus on the circumstances of the crime and the individual defendant).

\textsuperscript{12} Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1841 (1994).
II. CAPITAL CASES ARE DIFFERENT

A. Death Is Different

Since 1972, in Furman v. Georgia, the Supreme Court has endorsed the notion that “death is different.” This refers to the unique nature of the penalty of death: its severity, its finality, and its irrevocability. The Supreme Court has cited this “qualitative” difference of the penalty of death as the basis for imposing additional procedural safeguards on capital trials that do not apply to other criminal cases. These protections are designed to ensure that any sentence of death is imposed in a fair and non-arbitrary manner.

Capital cases involve a bifurcated proceeding that is really akin to two separate trials: the first addresses the question of guilt, the second addresses the question of a penalty. The penalty trial is unlike a sentencing hearing which occurs in other criminal cases; it is a trial unto itself, with many of the constitutional protections that apply to a trial addressing the question of guilt or innocence. The penalty trial is fundamentally different from other criminal trials, however, because it is centered on the background and life of the defendant, rather than the circumstances of the crime.

16. Gregg, 428 U.S. at 191-92, 195. The court cited the Model Penal Code and stated that “the obvious solution [to ensuring a fair determination of the question of guilt separate from the question of penalty] is to bifurcate the proceeding.” Id. at 191.
17. Bullington v. Missouri, 451 U.S. 430, 446 (1981) (holding that because the sentencing proceeding was like a trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy clause to one acquitted by a jury is also available to him with respect to the death penalty.)
B. Litigation is Different

Capital defense litigation is more complex, and must be handled differently than other criminal cases. Both the guilt and penalty trials are presented to the same jury: often one right after the other.\(^{19}\) From the outset of the case, defense counsel needs to devise a common theme or strategy that effectively links the guilt and penalty phases. Counsel's challenge is to maintain credibility with jurors during the penalty trial, even after a guilty verdict is returned in the guilt trial.

In the beginning of the guilt trial, the defendant is afforded the presumption of innocence, and the jury is instructed not to look to the defendant to produce any evidence. The law is clear that the burden of proof rests solely with the prosecution—to demonstrate guilt beyond a reasonable doubt.\(^ {20}\)

The sentencing trial begins only after the jury has returned a verdict of guilty on first degree murder. The defense must then convince the same jurors that imposing a lengthy prison sentence is more justifiable than sentencing the defendant to death. As a practical necessity, defense counsel must "present the case for life" in order to forestall the jury from imposing a sentence of death. To present little or no evidence invites the jury to impose death.\(^ {21}\)

The two trials constituting a capital case increase the demands placed on defense counsel.\(^ {22}\) Ideally, a defense "team"

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19. The case of David Peek in Georgia is perhaps the most extreme example of how closely the penalty phase follows a conviction of guilt. Mr. Peak's trial began at nine o'clock in the morning. He was convicted by the jury at midnight the same night. The judge denied the defense request for a recess and immediately began the penalty phase of the trial. A death verdict was returned by 1:30 the same morning. Telephone Interview with Patsy Morris, Georgia Resource Center (July 1994) (discussing Peek v. Georgia, 238 S.E.2d 12 (Ga. 1977)).


is created that works together to prepare and present the best possible “case for life”. The team should include a minimum of two lawyers. In addition, the team should include a “mitigation” specialist (usually a psychologist or social worker) to direct the gathering of information for the penalty phase and several investigators to trace people and information, and obtain the documentation necessary to reveal and substantiate the complex underworking of an individual’s life. Typically, the team also needs a mental health expert (or experts) to conduct psychological testing and to help prepare or explain biographical information to jurors. Optimally, the complete team should be assembled when the case first begins, so that everyone can work together to present a complete and coherent defense at both trials.

The penalty trial is, in short, a trial for life and about life. It is a trial for life in the sense that the defendant’s life is at stake. It is a trial about life, because the central issue is the meaning and value of the defendant’s life.

C. Sentencing is Different

The Supreme Court has mandated that before someone may be sentenced to death, the jury must consider the life and background of the individual charged. This constitutional requirement of “individualized sentencing” addresses two fundamental concerns: the need to provide the jury with adequate information before they impose any sentence of death, and the need to ensure that the basic humanity of the individual against whom the death penalty is sought is not completely ignored. As Justice Mosk observed, “It follows that in a capital case the fundamental respect for humanity underlying the Eighth Amendment requires consideration of


25. Goodpaster, supra note 25, at 303.

26. Although in three jurisdictions, the judge makes the determination as to the question of penalty, I will refer to the factfinder as the “jury.”

the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."^{28}

Modern death penalty statutes have evolved since 1972, when the Supreme Court, in *Furman v. Georgia*, struck down all then existing death penalty statutes as unconstitutional.^{29} The Court found that the existing statutes permitted juries to exercise "unguided and unrestrained" discretion in the imposition of death. The Court held that this process resulted in the infliction of sentences of death in a wholly arbitrary and capricious manner; that the randomness of the process made it "cruel and unusual" in violation of the Eighth Amendment.^{30}

Legislatures around the country quickly drafted new death penalty statutes designed to survive the rule laid down in *Furman*. In 1976, the U.S. Supreme Court reviewed five of these statutes and, in a series of cases, set forth standards for the permissible imposition of the sentence of death.^{31} The re-

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28. *In re Jackson*, 835 P.2d 371, 432 (Cal. 1992) (Mosk, J., dissenting) (emphasis added) (citations omitted). Justice Mosk explained how the recognition of the individual was an indispensable part of the Eighth Amendment protection against cruel and unusual punishment:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . To impose a sentence of death ignorant of "the defendant's character, background, [and] history is to deny that dignity and treat the defendant as something less than a human being: 'A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless undifferentiated mass to be subjected to the "blind infliction of the penalty of death."

Id. (citations omitted)

29. 408 U.S. 238, 238 (1972).

30. Id. at 257 (5-4 decision) (per curiam) (Douglas, J., plurality opinion,); *Id.* at 291-92 (Brennan, J., concurring). These discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient incompatible with the idea of equal protection of the law that is implicit in the ban on cruel and unusual punishments. There was no opinion by the court. The 5-4 decision was announced in a per curiam statement followed by separate opinions.

quirement that any sentence of death reflect an "individualized determination" was of paramount concern. The Court held that to prevent the risk of the arbitrary infliction of the death sentence, the jury must be provided sufficient information on the background of the defendant, and adequate guidance on how to evaluate said information. Consistent with this view, the Court struck down those death penalty statutes that imposed a mandatory capital sentence upon conviction of capital murder, and upheld the statutes that provided for individualized consideration of each defendant.

The Court has, thus far, refused to depart from the doctrine of individual sentencing in any capital case. As recent as 1987, the Court struck down a Nevada statute which imposed a mandatory death sentence for anyone convicted of committing a capital murder while serving a sentence of life imprisonment without the possibility of parole. Even in this narrowly defined circumstance, the Court concluded that a departure from the notion of individualized sentencing "is not justified and could not be reconciled with the demands of the Eighth and Fourteenth Amendments". In another case, the Court stated, "the non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence."


32. Gregg, 428 U.S. at 192-93.
34. Sumner v. Shuman, 483 U.S. 66, 66 (1987). Under the Nevada statute, a mandatory death sentence was imposed where an inmate, while serving a sentence of life without the possibility of parole is convicted of capital murder. NEV. REV. STAT. § 200.030 (1957).
35. Sumner, 483 U.S. at 78.
36. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (emphasis added). The Court went on to explain:

We recognize that, in non-capital cases, the established practice of individualized sentences rests not on constitutional commands but on public policy enacted into statutes. . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs to name a few—and various post conviction remedies may be available to modify an initial sentence of confinement in noncapital cases.
D. *Representation is Different*

If the Supreme Court mandate for individualized sentencing in a capital case is to have any meaning, the Court must impose a duty on the part of counsel to investigate and assemble all possible evidence about a defendant's life.\(^{37}\)

The mandate for individualized sentencing requires not only a duty to investigate the background of a defendant, but also a responsibility to present any relevant evidence on this issue to the jury in order to "make the case for life".\(^{38}\) There is no doubt that a jury will receive ample information concerning the circumstances of the crime—the prosecution ensures that. It is only during the penalty phase of the trial, however, that a jury can learn about the individual who committed the offense.

As a practical matter, the importance of presenting mitigating evidence to a jury during the penalty trial cannot be overstated. Without access to a chronology of the defendant's life in a coherent and persuasive fashion, the jury is left with only the horror of the crime and information about the defendant that the prosecution has chosen to introduce. This hardly provides the jury with an opportunity to fairly evalu-

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The reliability of the process depends upon the sentencer's consideration of both tangibles and intangibles . . . in evaluating the individual character of the defendant and his acts. In light of the importance that this Court has placed upon the role of mitigating evidence in capital sentencing decisions, I cannot believe that *Strickland* was intended to permit a defendant to be sentenced to death solely on the basis of the State's evidence, when a powerful defense could easily have been marshalled on his behalf. Any reasonable standard of professionalism governing the conduct of a capital defense must impose upon the attorney, at a minimum, the obligation to explore aspects of his client's character that might persuade the sentencer to spare his life. Without even this effort, the adversarial process breaks down.

\(^{38}\) Eddings v. Oklahoma, 455 U.S. 104, 104 (1981). In *Eddings*, the Court stated:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.

We note that [any] death penalty statute permits the defendant to present evidence "as to any mitigating circumstances" . . . *Lockett* requires the sentencer to listen.
ate the life of the defendant in deciding whether he should be permitted to live.

The Supreme Court has repeatedly affirmed the constitutional right of the defense to present mitigating evidence and has reversed sentences of death where the trial court excluded mitigating evidence that was offered, even where the evidence would have been excluded pursuant to the state's evidentiary rules. The scope of mitigating evidence admissible at trial is broad, and includes any evidence that could be considered even "potentially mitigating". Justice Scalia, writing for a unanimous Court, confirmed this proposition by stating "[w]e have held that in capital cases 'the sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence.

39. Skipper v. South Carolina, 476 U.S. 1, 5 (1986). The Court reversed the decision of the state trial court to exclude the testimony of jailers and a visitor who would have attested to the defendant's good adjustment while incarcerated. The Court found that this evidence was clearly mitigating in the "sense that they might serve 'as a basis for a sentence less than death.'" Id. at 4-5. See also Lockett, 438 U.S. at 604-05. The Court stated:

we conclude that the Eighth, and Fourteenth amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis added).

40. Green v. Georgia, 442 U.S. 95, 97 (1979). The Court held that it was error to exclude testimony at the penalty phase of a trial even where the testimony was hearsay and not admissible under the Georgia rules of evidence. Id. The court stated "[r]egardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial."

See also Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987). In Dutton, the federal court reversed a sentence of death when the trial court did not permit the defendant's mother to testify at the penalty phase of the trial because she was present during the testimony of the guilt phase in violation of the state's sequestration rule. Id. The court recognized the importance and validity of a sequestration rule, but made it clear that this could not provide a basis to exclude relevant mitigating evidence from the jury during the penalty phase of the trial. See id. at 601-02.

41. Skipper, 416 U.S. at 5. "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration." Id.

42. Id. at 4.
The use of experts—primarily mental health experts—is also an essential part of the preparation of a capital case. Counsel needs the assistance of mental health experts to test and evaluate defendants as well as to explore their childhood and adolescence. Many persons charged with capital crimes suffered extreme violence as children, and those experiences, and their impact must be explored. Defense counsel are usually ill-equipped to explore this information on their own, underscoring the need for experts. Such information is essential in building an effective defense. The Supreme Court has acknowledged the constitutional right of the defendant to have access to expert assistance during the trial, and has recognized the critical role that an expert witness can play.

The jury in a capital case is instructed to consider the background and life of the defendant. In order to effectively present this information, counsel must prepare a complete social history of the defendant by engaging in a comprehensive investigation dissimilar to routine investigative efforts used in non-capital criminal cases. The time and resources required for a thorough investigation are tremendous. Counsel must interview all members of the extended family as well as neighbors, friends and associates. Investigators must explore personal and sensitive issues that many are reluctant to discuss. As the defendants life begins to unfold, counsel must discover and follow any “paper trail,” learning not only where the defendant has been, but reviewing all documents along the way. Counsel cannot begin to evaluate the importance of this evidence until the investigation is complete and the entire life unfolds.

Effective assistance of counsel in a capital case requires a lawyer who has the requisite experience and skills to manage a thorough investigation, and to properly prepare and present the “case for life.” Unless this is done, the jury has no choice but to return a verdict of death.
E. Summary

In order to make the "case for life", counsel in capital cases must undertake an in-depth investigation into the life and background of the defendant. This is mandated by the requirement of individualized sentencing—the requirement that the jury review the defendant's entire life, family, work, and background to determine whether a sentence of life or death is appropriate. In the penalty phase, this ultimate decision of life or death is, by its very nature, a completely subjective determination left to the evaluation of each individual juror.

This investigative review is no small undertaking and requires a lawyer with specialized skills in the handling of a complex case as well as access to adequate resources to conduct the comprehensive investigation that is required. The penalty trial gives the defense an opportunity to present the life and background of the defendant in such a way that he becomes real to the jurors: as a father, a brother, a victim of child-abuse, rather than a faceless monster guilty of a horrible crime. The penalty trial proceeding may be the last opportunity that the defense has to humanize the defendant and appeal to the humanity of the jury to spare the life of a fellow human being.

III. Effective Counsel

A. Constitutional Right to Effective Counsel

One of the hallmarks of our modern American system of justice is the constitutional right to counsel; the right of every person to have a lawyer represent them in a criminal proceeding.\(^{47}\) Over 60 years ago the U. S. Supreme Court affirmed the importance of counsel to a criminal defendant stating that the defendant "requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."\(^{48}\)

\(^{47}\) U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771. n.14 (1970). See also Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

\(^{48}\) Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (emphasis added). The Court stated:
Initially, this right was limited to persons charged in capital cases.\textsuperscript{49} Then in 1963, in \textit{Gideon v. Wainwright},\textsuperscript{50} the Warren Court\textsuperscript{51} decided that even in a simple burglary charge, a case with few witnesses, no scientific evidence, and only a few facts in dispute, counsel was necessary to ensure that the process was fair.\textsuperscript{52} \textit{Gideon} is still hailed as establishing the "noble ideal" of insuring that "every defendant stands equal before the law,"\textsuperscript{53} as the court unanimously extended the right to counsel to include the right of \textit{all} indigent defendants, in capital and non-capital felony cases, to have counsel appointed. On re-trial, Mr. Gideon was provided counsel and was subsequently acquitted of all charges.\textsuperscript{54} 

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\textsuperscript{49} Although \textit{Powell} did not specifically limit the appointment of counsel to capital cases for many years it was applied in that way.

\textsuperscript{50} 372 U.S. 335 (1963).

\textsuperscript{51} While many of this court's criminal law decisions have been criticized, limited, or reversed over the years, this decision has retained its force and respect.

\textsuperscript{52} \textsc{anthony lewis}, \textit{Gideon's Trumpet} 148 (1968).

\textsuperscript{53} \textit{Gideon}, 372 U.S. at 344. The Court in \textit{Gideon} stated: 

\textit{[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. [R]}
Although the decision in *Gideon* did not provide specifically for *effective* counsel, a few years later the Court made clear that effective counsel was necessary in criminal proceedings. For almost twenty years, the Supreme Court declined to establish the criteria for effective counsel, and provided no single test to review the performance of counsel. The Court left this task to the discretion of the trial courts who were told simply to “strive to maintain proper standards of performance by attorneys who are representing [criminal] defendants.”

In the two decades that followed *Gideon*, federal circuit courts established various standards to measure the performance of counsel. By the end of the 1970’s, eleven of the twelve federal circuits applied essentially the same standard, a test of “reasonableness” to review the effectiveness of representation.

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55. *McMann v. Richardson*, 397 U.S. 759, 770 (1969). In *McMann*, the Court upheld the defendant’s guilty plea deciding that since it was based upon “reasonably competent advice” of counsel it was “not open to attack”. *Id.* at 770. The Court discussed, in dicta, that the right to counsel is the right to effective assistance of counsel, and that “defendants cannot be left to the mercies of incompetent counsel.” *Id.* at 771.

56. *Id.* at 771.

57. Only the Second Circuit continued to apply the test that the representation must be such as “to make the trial a farce or a mockery of justice . . . and to shock the conscience of the court”. United States v. Wright, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). See also United States v. Helgeson, 669 F.2d 69, 71 (2d Cir. 1982). This test was criticized even within the Second Circuit’s own panel. See *Indiviglio v. United States*, 612 F.2d 628, 632 (2d Cir. 1979) (Mansfield, J., concurring).

The D.C. Circuit comes closest to the “farce and mockery standard by requiring the defendant to show a “substantial breach” or “serious incompetency.” United States v. Wood, 628 F.2d 554, 559 (D.C. Cir. 1980)(interpreting United States v. DeCoster, 624 F.2d 196 (D.C. Cir.), cert. denied, 444 U.S. 994 (1979)).

The Seventh Circuit frames the test as representation “which meets the minimum standard of professional representation.” United States v. Zylastra, 713 F.2d 1332, 1338 (7th Cir. 1983).

Six Circuits have adopted the “reasonably competent assistance” standard. United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) (“reasonably competent assistance . . . within the range of competence expected of attorneys in criminal cases.”); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (“customary skill and knowledge which normally prevails at the time and place”); Marzullo v. Md., 561 F.2d 540, 546 (4th Cir. 1977), cert denied, 435 U.S. 1011 (1978) (“within the range of competency normally expected of attorneys practicing criminal law”); Knott v. Mabry, 671 F.2d 1208, 1210 (8th Cir. 1982) (the degree of skill and diligence with which a competent attorney would perform under similar circumstances); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir.), cert. denied, 440 U.S. 974 (1978) (“reasonably competent and effective representation”); and United States v. Crouthers, 669 F.2d 635, 643 (10th Cir.)
Finally, in 1984, the Supreme Court took the case of Strickland v. Washington, a capital case in which the defendant claimed that his lawyer was ineffective in the preparation and presentation of the penalty phase of his trial.

In Strickland, the Supreme Court was presented with the issue of how to evaluate the performance of counsel in a criminal case. The Court in Strickland had the opportunity to ensure that indigent defendants would receive competent counsel, and be protected from the incompetent lawyers who plague the system. Regrettably, the Court declined to take that step. Although the Court in Strickland went to great lengths to reaffirm the importance of effective counsel at trial, echoing the sentiments raised in Powell and Gideon years earlier, the test set by the court created a difficult and almost insurmountable hurdle for a defendant to demonstrate ineffectiveness on appeal.

The Court in Strickland established a two-pronged test, addressing performance and prejudice, for determining when the assistance of counsel is so defective that it warrants re-

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1982) ("the skill, judgement, and diligence of a reasonably competent defense attorney").

Three circuits have adopted a variation of the "reasonably competent" test which provides that "counsel [was] reasonably likely to render . . . reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. 1982). See Mackenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); Birt v. Montgomery, 709 F.2d 690, 700 (11th Cir 1983).

58. 466 U.S. 668 (1984). See also, United States v. Cronic, 466 U.S. 648 (1984), a companion case to Strickland which also raised the issue of ineffective assistance of counsel.

59. Strickland, 466 U.S. at 696. In Strickland, trial counsel conducted virtually no investigation into the possibility of obtaining testimony from the defendant's relatives, friends or former employers. He did not seek any psychiatric or psychological evaluations of his client. Ultimately, he presented no evidence at the penalty phase of the trial.

60. Id. at 707 (Marshall, J., dissenting).

61.

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair . . . . In giving meaning to the requirement [of effective assistance of counsel], however, we must take its purpose—to ensure a fair trial—as the guide.

Id. at 685-86.
versal of a capital conviction. The "performance" prong requires a performance "so deficient and the errors so serious that counsel was not functioning as anticipated under the Sixth Amendment." The Court evidenced a reluctance to "second guess" defense counsel, and directed that review "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Furthermore, review should indulge a second presumption that "under the circumstances, the challenged action 'might be considered sound trial strategy.'

The "performance prong" established an ambiguous standard deeming any "reasonable" performance by counsel constitutionally sufficient. The presumption of "reasonable performance" and deference of "sound trial strategy" has made it almost impossible for an appeal based upon a claim of ineffective assistance of counsel to prevail. Reviewing courts uphold the performance of counsel when the court is able to attribute any conceivable strategy to the performance, even if there is no evidence that the attorney pursued that particular strategy.

62. Id. at 687.
63. Strickland v. Washington, 466 U.S. 668, 689 (1984). The Court stated that "judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time. Id.
64. Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). A few years later in Darden v. Wainwright, 477 U.S. 168, 186 (1986), the Supreme Court reaffirmed its adherence to this presumption. In Strickland, the Court stated:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91 (emphasis added).
65. See e.g., Darden, 477 U.S. at 186. In this case, petitioner claimed ineffective assistance of counsel at the sentencing phase of the trial during which counsel called no witnesses during the trial and relied on "a simple plea of mercy" from the petitioner. Id. at 186. The Court in Darden stated "that there are several reasons why counsel could have chosen to rely on a simple plea of mercy". Id. at 186 (emphasis added). The Court then went on to discuss sev-
A glaring hypocrisy in the logic of the *Strickland* decision is the obvious truth that any deference to strategy is valid only if counsel is competent and exercising an informed and appropriate course of action. Given the state of representation in capital cases today, this may rarely be the case.

The "prejudice" prong mandates that any deficient performance must also have prejudiced the defense. This requires the defendant, on appeal, to show "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different." This is widely seen as an even more difficult challenge to surmount than the performance prong, and has been compared to the proverbial "eye of the needle[,] through which few petitioners will be able to pass."

**B. Effective Counsel in Capital Cases**

In *Strickland*, the Court did not distinguish between a trial involving a question of guilt, or one involving capital sentencing. The Court maintained that for "purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." This failure to establish a higher standard or more stringent review for capital cases flew in the face of *Furman* and all of the previous capital case jurisprudence establishing that "death is different." Given that the quality of the defendant's coun-

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66. See infra part III.2.
70. *Strickland*, 466 U.S. at 687.
71. *Furman* v. Georgia, 408 U.S. 238, 306 (1972). The Court has reaffirmed this view in numerous cases. In *Gardner v. Florida*, 430 U.S. 349 (1977), the Court noted that "[f]rom the point of view of the defendant, [death] is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from other legitimate state actions." *Id.* at 357.

In Woodson v. North Carolina, 428 U.S. 280, (1976), the Court stated: The penalty of death is qualitatively different from a sentence of imprisonment no matter how long. Death, in its finality differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case.
sel during capital trials may be all that separates those con-
demned to die and those permitted to live, this aspect of the
Strickland decision is as disturbing as its nearly insurmount-
able two-pronged test. Strickland has made it extremely dif-
ficult for capital sentences to be successfully appealed on the
basis of ineffective counsel—no matter how poor the perform-
ance of defense lawyers.

This difficulty is fundamentally troubling not only be-
cause "death is different" (since the sentence is irreversible
once carried out), but because capital defendants are primar-
ily indigent and represented by court-appointed lawyers
who, all too frequently, provide ineffective counsel.

Numerous studies have documented the dramatic need
to improve the quality of counsel appointed in capital cases.72
Of the 28 people on Kentucky death row at the beginning of
1989, seven had been represented at trial by attorneys who
have since been disbarred, or who have resigned rather than
face disbarment.73 Even when blatantly negligent conduct
occurs in front of judges, appointed defense lawyers have
been permitted to continue representing defendants.74 For
example, In People v. Garrison, Garrison's counsel, an alco-
holic, was arrested en route to court and found to have a
blood alcohol level of .27!75 In Harrison v. Zant, defense
counsel was found to have slept through parts of the trial.76

Id. at 305.

In Pruett v. State, 574 So. 2d 1342 (Miss. 1990), Justice Anderson pointed
out that "every member of this [Supreme] Court has written or joined at least
one opinion endorsing the proposition that because of its irrevocability, the
death penalty is qualitatively different from any other punishment and hence
must be accompanied by unique standards." Id. at 1342 (Anderson, J.,
dissenting).

72. See e.g., A.B.A. & Nat. Legal Aid and Defender Assoc., Gideon Un-
done! The Crises of Indigent Defense Funding 3 (1982); Klein & Spangen-
the Indigent Defense Crisis 5; Robbins, Toward a Just and Effective Sys-

tem of Review in State Death Penalty Cases (1990) (ABA Recommendations
Concerning Death penalty Habeas Corpus and Related Materials from the ABA
Criminal Justice Section's Project on Death Penalty Habeas Corpus).


74. House v. Balkcom, 725 F.2d 608, 612 (11th Cir.), cert. denied, 469 U.S.


76. Harrison v. Zant, No. 880V-1640, Order at 2 (Super. Ct. Butts County,
Ga., Oct. 5, 1990), aff'd, 402 S.E.2d 518 (Ga. 1991) (Conviction affirmed where
defense counsel was found to have slept through parts of a capital trial).
Judicial tolerance of incompetence is troubling, as is an occasional preference for inexperienced counsel: one judge entered an order specifically stating that an "inexperienced lawyer" should be appointed to a case, rather than appointing the lawyer from the Legal Defense Fund who had secured a reversal for the client.77

I have argued that the capital defendant's constitutional right to individualized sentencing imposes a duty on the part of the defense counsel to investigate and present any mitigating evidence "to make the case for life." Many capital case histories demonstrate trial counsel's dereliction of this duty. When little or no mitigating evidence is presented during the penalty trial, juries inevitably return death verdicts (indeed, they have been given no reason to impose a more lenient sentence). These decisions normally withstand an ineffective assistance of counsel challenge due to the hurdles imposed by Strickland. However, when some of these cases are reversed for other reasons, and (competent) new counsel properly investigate and present mitigating evidence for a (new) penalty trial, verdicts of life imprisonment or pleas to life sentences are obtained.78

77. Victor V. Roberts had a capital trial that beat all speed records in the "rush to judgment." Georgia v. Roberts (unpublished opinion N.D. Ga., 1992). The crime occurred on February 1, 1984 and Mr. Roberts was on death row by April 1 of the same year. Id. On appeal, the conviction and sentence of death were reversed on several grounds and sent back for re-trial before the original trial judge. Id. The court refused to appoint one of the lawyers who had secured the appeal. Id.

78. In the following cases, mitigating evidence was not presented to the juries that returned sentences of death. When the cases were reversed on appeal, new counsel gathered mitigating evidence and presented it to the prosecutor and were able to secure pleas to life sentences.

In Holloway v. State, 361 S.E.2d 794 (Ga. 1987), during the first trial the court denied any funds to allow for an expert to demonstrate the mental limitations of the defendant. Id. at 796. On direct appeal, counsel secured an expert and presented evidence that the defendant had an I.Q. of 49 and the intellectual capacity of a seven year old. Id. The court reversed and a life plea was entered based upon the evidence of the expert witness. Id.

In Smith v. Kemp, 664 F. Supp. 500 (M.D. Ga. 1987), counsel presented a psychologist and a psychiatrist during post-conviction proceedings to demonstrate the mental retardation of the defendant and his failure to understand his Miranda warnings. Smith v. Kemp, 664 F. Supp. 500 (M.D. Ga. 1987) (setting aside death sentence on other grounds), aff'd sub nom. Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (en banc). After the case was reversed, this information led to a plea to a life sentence.

In Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986), cert. denied, 479 U.S. 996 (1986), two psychiatrists testified post-conviction to demonstrate that the
Nathan Brown was arrested shortly after his eighteenth birthday, and charged, along with two others, with murdering a young boy during a robbery. Despite Brown's youth, defendant was suffering from schizophrenia and was severely psychotic. *Id.* at 1324. After a reversal, according to Stephen B. Bright, counsel for Donny Thomas, this information was the basis for a plea to a life sentence. Telephone Interview with Stephen B. Bright, Counsel for Donny Thomas (July 1994).

In the following cases, the initial death sentence withstood the challenge for ineffective assistance of counsel but was reversed on other grounds. New counsel were able to secure a life verdict. These cases only reflect a sample of the many scenarios in which this occurred.

*See generally,* Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988) (ineffective assistance of counsel claims rejected, relief granted on jury challenge, in post-conviction proceedings counsel used an expert to explain the jury selection issue, counsel also presented numerous law witnesses in mitigation; this information was available to the district attorney when a subsequent plea to life was made and accepted); Bowen v. Kemp, 769 F.2d 672 (1985), *modified,* 832 F.2d 546 (11th Cir. 1987) (en banc), *cert. denied,* 478 U.S. 1021 (1988) (ineffective assistance claim rejected, relief granted on instruction error, life sentence imposed after retrial); Cervi v. Kemp, 855 F.2d 702, 705 n.7 (11th Cir. 1988), *cert. denied,* 109 S. Ct. 1172 (1989) (ineffective assistance claim rejected, relief granted on confession issue, subsequent plea to life); Corn v. Kemp, 837 F.2d 1474 (11th Cir.), *cert. denied,* 486 U.S. 1023 (1988) (ineffective assistance claim rejected, relief granted on instruction issue, subsequent plea to life); Drake v. Francis, 727 F.2d 990 (11th Cir. 1984), *vacated in part,* 762 F.2d 1449 (11th Cir. 1985) (en banc), *cert. denied,* 478 U.S. 1020 (1986) (ineffective assistance claim rejected, relief granted on instruction error, subsequent plea to life); Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983), *aff'd,* 471 U.S. 307 (1985) (ineffective assistance of counsel claim rejected, relief granted on instruction issue; life imposed by jury on retrial); Westbrook v. Zant, 704 F.2d 1457 (11th Cir. 1983) (ineffective assistance of counsel claim rejected, relief granted on instruction issue, on retrial, jury verdict of “mercy,” effectively life); Pruett v. Thigpen, 805 F.2d 1032, 1037 (5th Cir. 1986), *cert. denied,* 481 U.S. 1033 (1987) (summary affirmance of district court denial of ineffective assistance claim and habeas relief on voir dire issue, at re-trial one expert was called in the guilt phase, at the penalty phase, several mental health experts were used for assistance in preparation and consultation on the case, numerous law witnesses were brought in from all over the country to testify, life sentence imposed when jury deadlocked on the question of punishment); Washington v. Watkins, 655 F.2d 1346, 1366-67 (5th Cir. 1981), *cert. denied,* 456 U.S. 949 (1982) (ineffective assistance claim rejected, relief granted on instruction issue, subsequent plea to life).

In all but *Westbrook* and *Washington,* the error redressed by reversal pertained to the first phase of the trial and cannot account for the change in the outcome between life and death.

In Brooks v. Georgia, 716 F.2d 780 (11th Cir. 1983), Stephen Bright, counsel for Mr. Brooks explained that there were three experts at re-trial who testified in the penalty phase: a psychologist, a sociologist, and an expert in prison conditions and adjustment (other experts were used for consultation and preparation of the case). Telephone Interview with Stephen B. Bright, Counsel for William Brooks, July 1994. Numerous law witnesses were brought in to testify in mitigation. *Id.* The jury reached a life verdict. *Id.*
lack of prior record, and limited role in the crime, his lawyer presented no mitigating evidence and made no effort to plea for imprisonment rather than the electric chair. Brown received the death sentence.79

Eddie Ross, a black male, was represented at his murder trial by a lawyer who had been the head of the local Klu Klux Klan.80 The lawyer failed to present mitigating evidence during Ross' penalty trial, and Ross received the death penalty.81

Both sentences were reversed, Brown's because of his lawyer's conflict of interest, and Ross' because of his lawyer's ineffectiveness.82 In separate post-conviction proceedings, Brown and Ross were represented by the same lawyer, who investigated, prepared, and presented extensive mitigating evidence for each defendant. When the evidence was presented to the prosecutor for each case, a life sentence plea was obtained.

William Brooks was sentenced to death by a jury who heard no evidence during his penalty trial. Although counsel was not found to be ineffective, Mr. Brooks' case was reversed and a new trial granted. During the second trial three experts testified. The psychologist and the psychiatrist explained many of the mental health issues to the jury.83 An expert in prison conditions educated the jury about Mr. Brooks' institutional adjustment and how he would spend his years if permitted to live in prison.84 Numerous witnesses from the community testified on behalf of Mr. Brooks and told the jury of their experiences with him. The new jury returned a life verdict.85

These cases highlight the obvious: quality representation in capital cases can make the difference between life and death. Brown, Ross, and Brooks are the fortunate ones, who ultimately obtained decent representation and were able to present their "case for life." Other defendants are executed

81. Ross, 326 S.E.2d at 194.
82. See Brown v. State, No. CV-188-027 (1989) (reversed due to attorney conflict of interest for representing two co-defendants); see also Ross v. Kemp, 393 S.E.2d 244, 245 (Ga. 1990) (reversal for ineffectiveness of counsel).
83. Telephone Interview with Stephen B. Bright, Counsel for William Brooks (July 1994).
84. Id.
85. Id.
without ever receiving this opportunity, and therein lies the real tragedy of our justice system.

Horace Dunkins was executed in Alabama in 1989. He was mentally retarded, with an I.Q. below seventy, and did not have the mental development of a twelve year old. His jury was unaware of these facts at the time they sentenced him to death. When this information was reported in the newspapers, one juror came forward and stated that if she had known this information, she would not have voted for death. Dunkins died because of the ineffectiveness of his defense counsel.

Diverse reasons account for the frequent ineffectiveness and incompetence of capital defense counsel. These include inexperience, insufficient training, and negligence. But at the root of the problem is the failure of most states to establish standards and to provide resources that assure the appointment of competent counsel. The bottom line, unfortunately, is that capital defendants, who most critically deserve exceptional representation, may be the very individuals least likely to receive it. Moreover, relief on appeal is effectively blocked by Strickland.

C. Summary

Despite the rhetoric of Strickland reaffirming the need for competent counsel, the two-pronged test established by the Court creates an almost insurmountable hurdle for criminal defendants raising claims of ineffective assistance of counsel. The principles of Gideon are still cited today, but the promise of Gideon remains largely unfulfilled: many persons charged with capital crimes are still denied the "guiding hand" necessary to ensure a fair trial.

87. Peter Applebome, Two Electric Volts in Alabama Execution, N.Y. TIMES, July 15, 1989, at A6. See Mitchell v. Kemp, 483 U.S. 1026 (1987). In Mitchell, counsel made no attempt to investigate mitigating evidence which included witnesses such as a city council member, a former prosecutor, a pro football player, a bank vice-president and teachers. Id. at 1026-31 (Marshall, J., dissenting from denial of certiorari). See also Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985), cert. denied, 474 U.S. 1088 (1986). At the penalty phase in Messer, counsel failed to present mitigating evidence of steady employment, military record, church attendance, and co-operation with police. Id. at 1093-97 (Johnson, J., dissenting). Mitchell and Messer have been executed.
88. See infra part IV.
IV. Solutions

A. Introduction

The sorry state of capital defense chronicled above arises from judicial and legislative responses that ignore the special needs of capital litigation. Beginning with Strickland, the judiciary has failed to establish standards that will uphold a capital defendant's constitutional right to individualized sentencing. The Court should acknowledge the failure of Strickland and revise the test for evaluating the performance of counsel in capital cases. The Supreme Court's reluctance to revise Strickland may be understood as a hesitancy to burden courts with wholesale reversals. However, the Court's failure to act does not relieve the state legislatures from their obligation to adopt effective guidelines to insure competent legal representation for capital defendants.

B. Inadequate Judicial Response

The Court in Strickland failed to explicitly provide a higher standard of review in capital cases.\(^8^9\) Although the language of Strickland provided the opportunity to review penalty trials with a higher degree of scrutiny,\(^9^0\) such vigilance has not been applied. The Court needs to reconsider its test for evaluating effective assistance of counsel.

The Supreme Court must acknowledge the failure of Strickland to ensure effective representation in capital cases, and set up a new test for evaluating the performance of counsel in penalty trials. The Court should create a "presumption of ineffectiveness" when counsel fails to investigate the back-

\(^8^9\). This would have been consistent with earlier precedents requiring additional procedural safeguards in capital cases. See Gregg v. Georgia, 428 U.S. 153 (1976); Barefoot v. Estelle, 463 U.S. 880, 914 (1983) (Marshall, J., dissenting).

\(^9^0\). Strickland v. Washington, 466 U.S. 668, 704 (Brennan, J., concurring in part and dissenting in part). Brennan's concurring opinion suggested that the flexible language in Strickland would allow special consideration of capital cases by construing the phrase "reasonableness under prevailing professional norms" to take into account whether the proceedings involve a sentence of death. Id.

[T]he standards announced today can and should be applied with concern for the special considerations that must attend review of counsel's performance in a capital sentencing proceeding. . . . We have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.
ground and life of the defendant in preparation of a penalty trial. This presumption ensures adherence to the constitutional requirement of "individualized sentencing" and recognizes the practical necessity of making the "case for life" before a penalty phase jury. The addition of this presumption ensures that counsel's decision not to present mitigating evidence is, indeed, a strategic one, as it will be based upon a review of all possible mitigating evidence.

A higher standard of review for capital cases is consistent with the Supreme Court's adherence to "death is different," and the notion that additional procedural safeguards are appropriate in capital cases.91

The Court's modification of the standard of review for the performance of counsel would send a clear mandate to state legislatures to provide the resources necessary for a full and complete investigation of penalty phase trials. Without this requirement from the Court, financially burdened states have no motivation to replace existing systems with potentially more expensive ones.

Realistically, the Court is unlikely to engage in modifying any standard that could result in a wholesale reversal of pending cases.92 If any reform is to take place, we must look to the state and federal legislatures who can implement standards for the appointment of counsel that would be applied prospectively.

C. Inadequate State Legislative Response

Most state legislatures have failed both to establish standards for the appointment of competent capital counsel, and to provide adequate resources for capital defense. State action in both of these areas is essential to ensure effective representation.

92. McClesky v. Kemp, 481 U.S. 279 (1987). In McClesky, the Court acknowledged the statistical evidence indicates a discrepancy that appears to correlate with race. Id. at 3122. The Court declined to reverse on that basis and expressed its concern that such a ruling, "taken to its logical conclusion[, would have] thrown into serious question the principles that underlie our entire criminal justice system". Id. at 314-15.
1. Failure To Establish Guidelines

Standards for the appointment of counsel in capital cases rarely exist.\textsuperscript{93} It is not unusual in capital cases to have defense lawyers with little or no capital case experience.\textsuperscript{94}

The appointment of competent trial counsel is critical to maintaining a death penalty system which passes constitutional muster; it is the only means to ensure fairness in the procedure and reliability in the result. Experienced counsel would identify and litigate critical legal issues as they arise, allowing most issues to be resolved at trial. At the same time, skilled counsel could ensure that crucial constitutional claims are preserved for review on appeal.\textsuperscript{95}

\textsuperscript{93} In California, the State Bar of California recommended that standards be adopted for the appointment of counsel in capital cases. The California Supreme Court has declined to adopt this recommendation as a Rule of Court. Public Letter from the California Supreme Court Committee (Spring 1994) (on file with author).

\textsuperscript{94} See e.g., Paradis v. Arave, 954 F.2d 1483, 1490-91 (9th Cir. 1992) (defendant represented by lawyer who passed the bar six months earlier, had tried no criminal cases and had not taken any courses in criminal law, criminal procedure or trial advocacy in law school); Tyler v. Kemp, 755 F.2d 741, 743 (11th Cir. 1985) (defendant represented by lawyer who had been admitted to the bar just a few months earlier); Bell v. Watkins, 692 F.2d 999, 1008, (5th Cir. 1982) (defendant represented by lawyer who had recently graduated from law school and had never tried a criminal case to verdict).

\textsuperscript{95} Prior to 1977, a defendant was permitted to raise valid constitutional claims in federal courts unless he had "deliberately bypassed" those claims in state court. Fay v. Noia, 372 U.S. 391, 438 (1963). A defendant "deliberately bypassed a claim if he "understandingly and knowingly" decided to forego a claim for tactical or strategic reasons. \textit{Id.} at 439. In 1977, the Court held in Wainwright v. Sykes, 433 U.S. 72 (1977), that a defendant has waived his right to any claim unless he can show "cause" for not having raised them earlier and "prejudice" resulting from this failure. \textit{Id.} at 87. The result is that when trial counsel fails to object to certain procedures or to raise certain claims, a defendant may be barred from raising these same issues later, even when this failure occurs due to ignorance, inadvertence, or mistake.

There are numerous examples of persons who have meritorious claims that the courts will not address because of a failure of earlier counsel to raise these claims. Many of these persons have been executed.

Aubrey Adams was executed on May 4, 1989. Prior to his execution, the 11th Circuit had unanimously held that his death sentence was unconstitutional. Adams v. Wainwright, 804 F.2d 1526, 1528 (1989). The U.S. Supreme Court held by a 5-4 vote that the 11th Circuit should not have considered this claim because no objection was raised at trial and no "cause" for this failure to object was found. Dugger v. Adams, 489 U.S. 401 (1989).

John Eldon Smith was tried with his wife before a jury that was later found to have been unconstitutional because blacks and women had been systematically excluded. His wife, whose attorney had preserved her objection, was retried and was given a life sentence. Machetti v. Linahan, 679 F.2d 236
The time has come to acknowledge the gross inadequacy of representation in capital cases, and for state legislatures, bar committees or state courts to mandate minimum requirements for counsel in capital cases.

2. Proposed Guidelines for the Appointment of Counsel

In adopting minimum standards for counsel in capital cases, it is critical that requirements are not defined solely by an objective system based upon years of practice or prior experience with capital trials. This type of system will allow lawyers who have previously handled capital cases ineptly to continue to qualify for appointment.\(^9\) In order to ensure representation by competent counsel, the standards must in some way reflect counsel’s actual ability to handle complex litigation.\(^9\) The American Bar Association Task Force on Death Penalty Habeas Corpus suggested advocacy requirements as follows:

a. Training in trial advocacy such as completion of one of the two week sessions offered by the National College of Criminal Defense or the National Institute of Trial Advocacy,\(^9\)

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91. See supra note 79.
92. The American Bar Association discussed this issue stating:
   Standards [for counsel in capital cases] should also require skills in managing complex litigation and negotiations, demonstrated ability in the directions of investigations of guilt and mitigation, knowledge and experience in dealing with mental health issues, writing and analytical skills as evidenced in previously written briefs and memoranda, and trial advocacy skills. ROBBINS, supra note 73, at Minority Rep. app. A-20.
93. There are very few programs that provide advocacy training that is directed specifically to the defense of a capital case. The only two that presently recruit and admit lawyers from around the country are the Bryan R. Shechmeister Death Penalty College at Santa Clara University Law School and the Death Penalty Practice Institute by the Department of Public Advocacy in Kentucky.
b. After completion of such a program, six to twelve hours of continuing legal education each year in areas related to trial advocacy and the defense of criminal cases;

c. At least five years of providing competent representation in civil or criminal cases; that is representation in which the attorney filed case specific motions and memoranda supported by the applicable law, not "boilerplates," conducted full investigations, litigated pre-trial motions, examined witnesses, gave opening statements and closing arguments, submitted proposed jury instructions and submitted letters of memoranda to the court regarding sentencing.\textsuperscript{99}

Further, an organization or agency should be established to enforce these guidelines, provide training, and assist in obtaining support services. The organization should be run by a director who answers only to an independent board. Judges should have no role in setting up and implementing the internal guidelines of this office or in the decisions concerning the competence of counsel; their involvement in a purely "defense function" would create a conflict of interest.

D. Failure To Provide Adequate Resources

"PLEASE HELP - DESPERATE" This extreme notice was posted in a courthouse in Kentucky by a Judge trying to appoint a lawyer to a capital case. The lawyer who finally took the case had no active practice and no previous capital litigation experience. Not surprisingly, the defendant in the case was convicted and sentenced to death.\textsuperscript{100}

The difficulty of finding competent lawyers willing to take capital cases is one of the fundamental problems of the present capital justice system. Lawyers are unwilling to undertake capital representation due to low pay, high cost (of unfunded services), and severe emotional toll.\textsuperscript{101}

Numerous studies have reviewed and documented the disparity between the legal representation available to those

\textsuperscript{99} See Robbins, supra note 73, at app. A-20 n.33.

\textsuperscript{100} Klein, supra note 73, at 5 n.16.

\textsuperscript{101} Pruett v. State, 574 So. 2d 1342, 1350 (Miss. 1990) (Anderson, J., dissenting). Citing a death penalty questionnaire, the judge observed that "[b]ecause of the extreme financial hardship that capital proceedings bring with it, 82% of trial counsel who have represented indigent defendants in a capital murder case would either not accept another case or would be very reluctant to do so. Id."
with money, and the representation provided to those with none.\textsuperscript{102} Court opinions have discussed the impact of funding on the quality of legal services provided to indigent defendants.\textsuperscript{103} In capital cases, the impact of this disparity becomes much more serious, both because of the life and death nature of the trial, and the high cost of preparing an adequate defense.\textsuperscript{104} A report prepared for the American Bar Association concluded that “[i]nsufficient compensation [for defense counsel] has its most profound consequences in capital cases... [I]t is difficult to attract experienced counsel to or provide necessary training for capital cases when the total dollars available are so minimal.”\textsuperscript{105}

In return for the complex task of building a death penalty defense, appointed defense counsel typically will receive an hourly wage or a fixed rate that is less than the rate for comparable non-criminal cases and, in some states, less than the minimum wage.\textsuperscript{106} A recent study in Virginia concluded that after taking into account the attorney’s overhead ex-

\begin{footnotesize}
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\item See generally Paduano and Smith, The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases, 43 Rutgers L. Rev. 281, 334 n.209 (1991) (listing several articles and studies on relationship between funding and counsel).
\item White v. Board of Comm’rs, 537 So. 2d 1376, 1380 (Fla. 1989) “The relationship between an attorney’s compensation and the quality of his or her representation cannot be ignored.” Id.
The Florida Supreme Court stated that “[t]he link between compensation and the quality of representation remains too clear.” Makemson v. Martin County, 491 So. 2d 1109, 1114 (Fla. 1986) cert. denied, 479 U.S. 1043 (1987).
\item For example, the Wall Street firm of Cahill, Gordon and Reindel (litigating pro bono) incurred $1,700,000 in attorneys fees and expenses in successfully challenging the death sentence of a Mississippi inmate. Frank Judge, Death Row Defense, Wall Street Style, Am. Law., Jan.-Feb. 1989, at 35. In another case, the Wall Street firm of Sullivan and Cromwell (also litigating pro bono) incurred $1,600,000 in attorneys’ fees and more than 10,000 billable hours during a three year period in winning a new penalty phase based upon original counsel’s ineffectiveness, and then securing a life sentence before a new jury. Daniel Wise, Sullivan Effort Spares the Life of Ex-Marine, N.Y. L.J., Nov. 27, 1989, at 1.
\item See Klein, supra note 73, at 7.
\item Id. at app. A-21 n.37. It was discovered in Boone County, Georgia, that the person who fixed the air conditioner in the court house was paid more per hour than any lawyer had ever been paid to defend an indigent person in that county.
\item In Pruett v. State of Mississippi, 574 So. 2d 1342, Judge Anderson pointed out that the court reporter in the capital trial was paid “far more” than defense counsel in the case. Pruett v. Mississippi, 574 So. 2d 1342, 1349 (Anderson, J., dissenting) (challenging the constitutionality of the statutory fee cap of $1000.00 as compensation for counsel in a capital case).
\end{enumerate}
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penses, the effective hourly rate paid to Virginia counsel representing indigent capital defendants was $13.19.\textsuperscript{107}

Some systems place a "cap" on the total fees that can be paid to defense counsel for any one case. This structure is clearly incompatible with the demands of capital litigation and the complexity of capital cases. In some states this cap is as low as $1000.\textsuperscript{108} In one Mississippi case, the $1000 maximum fee paid to each of the attorneys represented $2.22 for one attorney and $2.07 for the other.\textsuperscript{109} In Kentucky, the maximum pay for a capital case was $1,250, which included counsel's pretrial preparation as well as the trial itself.\textsuperscript{110}

The complexity and extensive resource requirements inherent in competent capital defense efforts means that capital cases rarely receive sufficient funds. Not only does appointed defense counsel earn next to nothing, counsel also often ends up paying for ancillary efforts. A recent study in Texas found the average out of pocket amount spent by defense counsel handling post-conviction cases to be as high as $15,627.\textsuperscript{111}

In order to ensure competent representation in capital cases, it is not enough to appoint experienced and highly skilled counsel. The system must also provide for appropriate pay to counsel for the time spent in preparing the case

\textsuperscript{107} Klein, supra note 73, at 7.
\textsuperscript{108} See, e.g., Miss. CODE ANN. § 99-15-17 (Supp. 1994) (setting $1000 maximum for out of court time); ALA. CODE § 15-12-21 (1994) (same).

Other states set a maximum cap while allowing the court discretion to increase the amount. This, however, rarely occurs. See, e.g., FLA. STAT. ch. 925.036 (1994) (setting a maximum amount of $3500); GA. CODE ANN. § 17-12-61 (Michie 1994) (setting a maximum on appeal of $500 for all costs); NEV. REV. STAT. ANN. § 7.125 (Michie 1993) (setting a $12,000 limit).

In Pruett v. Mississippi, 574 So. 2d 1342, 1348 n.7 (1990).

\textsuperscript{110} KY. REV. STAT. ANN. § 31.170 (Baldwin 1994). The court, however, may find that special circumstances exist to warrant a higher fee. Id.

\textsuperscript{111} Klein, supra note 73, at 7.

In Pruett, the court acknowledged the financial hardship of capital cases in an underfunded system and observed that,

[other members of the Mississippi bar who participate on capital proceedings are rewarded with imminent financial ruin. . . . In Mississippi, for example, a lawyer paid $25.36 per hour in overhead in 1988. . . . Therefore, counsel [under our pay scheme] may well have lost over $23 for every hour worked on the case."

Pruett, 574 So. 2d at 1350. The judge went on to observe that in response to a questionnaire it was noted that because of the financial hardship of capital cases, 82% of trial counsel who have previously been appointed to a capital case would either not accept another appointed case or would be very reluctant to do so. Id.
and must provide funding for those ancillary services necessary for effective representation.

All of the procedural rights and protections afforded to capital defendants have no meaning if counsel is denied real access to necessary funding. A defendant's constitutional right to present mitigating evidence is a hollow right if the defense is denied money to obtain witnesses or experts to fully investigate and present evidence on a defendant's behalf.

The inexperience and resource-poor defense of the indigent capital defendant is in marked contrast to the experienced and resource-rich team of the prosecution. As a complicated crime of tax or securities law violation would inevitably have a specialist conducting any investigation and trial, so too, a capital criminal case inevitably attracts an experienced criminal prosecutor with capital case specialization. While a district attorney does not have unlimited resources, they are vast in comparison to those of the indigent defendant.

The district attorney need not measure the amount of time spent on a particular case to determine if it is financially viable. Government counsel receive regular salaries throughout a capital trial; they don't have to worry about paying office overhead expenses, as does the defense. The prosecution can employ the investigative resources of numerous agencies, without consideration of out-of-pocket payments. One capital case can involve one or more homicide detectives working full time, in addition to the help of various departmental experts in the areas of mental health, forensics, ballistics, hair and fiber, serology, fingerprints, and even DNA analysis. The prosecution can also seek help from the vast resources of federal agencies such as the FBI, DEA, and ATF.112

112. Bright, supra note 12, at 1844-1845.

Many death penalty states have two state funded offices that specialize in handling serious criminal cases. Both employ attorneys who generally spend years—some even their entire careers—handling criminal cases. Both pay decent annual salaries and provide health care and retirement benefits. Both send their employees to conferences and continuing legal education programs each year to keep them up to date on the latest developments in the law. Both have at their disposal a stable of investigative agencies, a wide range of experts, and mental health professionals anxious to help develop and interpret facts favorable to their side. Unfortunately, however, in many states both
For attorneys who are willing to take on an indigent capital client, the financial hardship will constantly affect how a case is prepared and how much time counsel can afford to spend on the case. The proper development of mitigating evidence and presentation of the "case for life" is time-consuming, resource intensive, and specialized.

There can be little dispute that inadequate funding impedes the proper investigation and preparation of capital cases. A report prepared for the American Bar Association by the Spangenberg group studied the impact of inadequate funding on assigned counsel programs and concluded that the result of the present system was "ineffective lawyering."

California has recognized the constitutional necessity of providing adequate funding in capital cases. They have implemented a system that, for the most part, provides reasonable pay for lawyers as well as funding for ancillary services "reasonably necessary" to the preparation of the defense.

In 1976, after the existing death penalty statute was declared unconstitutional, the California Legislature began consideration of a new death penalty bill. The bill had no pro-

of these offices are on the same side: the prosecution. One is the District Attorney’s office. . . .

The other office is the Attorney General’s office. . . .

In Alabama, Georgia, Mississippi, Louisiana, Texas, and many other states with a unique fondness for capital punishment, there is no similar degree of specialization or resources on the other side of capital cases.

Id.

113. A low hourly rate is a disincentive to the lawyer to commit large amounts of time to the capital case when the lawyer can make more money per hour conducting other business. If there is a low statutory cap placed on the fee, the disincentive is even greater because for every hour of work the hourly fee decreases. See generally McLaughlin v. Royster, 346 F. Supp. 297, 300 (E.D. Va. 1972) (court appointed counsel admitted that if he had been better paid he would have “proceeded in the case differently” and interviewed more people); State v. Pelfrey, 256 S.E.2d 438, 440 (W. Va. 1979) (court appointed counsel admitted that he refused to seek a mistrial even though he believed it was fully justified because he did not want to try the case again due to unsatisfactory compensation).

114. Telephone Interview with Stephen B. Bright, Director, Southern Center for Human Rights, and defense counsel in numerous capital cases (July 1994).

115. Klein, supra note 73, at 6.

116. Using California as an example is not to suggest that their system is one without problems. The hourly rate of pay in several counties is often still under the rate of pay for a lawyer of that level of skill and experience. Some counties are now moving toward a “cap” on the total fee to be paid for a capital case.

117. Penal Code Section 190 provided as follows:
vision for funding ancillary services for capital defense, but a "funding bill" was subsequently introduced which provided "for payment of investigators, experts and others in the preparation or presentation" of the defense of indigent defendants in capital cases. This mandate for funds for experts and services was considered essential in order to ensure both the constitutionality of the new death penalty law as well as the effective representation of indigent persons charged with the death penalty. The funding bill was

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Every person guilty of murder in the first degree shall suffer death, if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1. Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

Id.

In Rockwell v. Super. Ct. of Ventura County, 556 P.2d 1101 (1976), the California Supreme Court concluded:

Because [California Penal Code] sections 190 through 190.3 make death a mandatory punishment for those categories of first degree murder encompassed by the special circumstances enumerated in section 190.2, without provision for consideration of evidence of mitigating circumstances as to the offense or in the personal characteristics of the defendant, and afford no specific detailed guidelines as to the relevance of such evidence in determining whether death is an appropriate punishment, they permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Id.

118. Existing law allowed counties to elect to pay for investigative services and some expert witnesses generally of a psychiatric nature.

119. AB 938, CAPITAL CASES: INVESTIGATION FUNDS (introduced September, 1977).

120. Enrolled Bill Report from Department of Finance (Sept. 16, 1977). Under analysis of the bill, the report states that "[t]his bill would provide that the defendant in a capital case may, in addition, apply to the court for payment of investigators, experts and others in the preparation or presentation of his defense." Enrolled Bill Memorandum to Governor (Sept. 23, 1977); ANALYSIS OF ASSEMBLY BILL No. 938, (Aug. 19, 1977); Keenan v. Super. Ct. of San Francisco, 640 P.2d 108 (Cal. 1982).

121. In a letter to Governor Edmund G. Brown, Assemblyman Goggin, the author of the bill, summarized the rationale for the funding bill as follows:

The state currently provides an attorney for those accused of serious crimes who cannot afford one. However, adequate representation of a criminal defendant is often ineffective without the supporting services provided for in AB 938. These resources are usually available to police departments and prosecutors. If we are to have a death penalty, it is especially important that indigent defendants, against whom this sanction has been disproportionately applied in the past, have access to that which those who retain private counsel are able to afford.
passed with an "urgency" clause after the new death penalty law was already in effect.122

Other state legislatures should follow the lead of the California legislature, and recognize that adequate pay for counsel and funding for ancillary services and experts is constitutionally required in any death penalty scheme.

E. Summary

Experience shows that there is a general unavailability of competent trial counsel for the representation of indigent persons charged with a capital crime. The pervasive standard of low fees and inadequate funding for these cases discourages most lawyers from attempting to undertake death penalty representation. By paying lawyers reasonable fees for the time spent in the preparation and presentation of cap-

Letter from Terry Goggin, California Assemblyman, to Edmund G. Brown, Governor, California (Sept. 13, 1977) (on file at California State archives).

When the Senate Committee on the Judiciary prepared an analysis of the bill, the stated of the funding bill was to "allow for a non-discriminatory application of a death penalty statute against indigent defendants" (Sen. Comm. on Judiciary of Cal. for AB 938, Background Information form (on file at California State archives)) and to "increase the chances of a fair trial for an indigent defendant in a capital case" (Senate Committee on Judiciary of California, 1977-1978 Regular Session on AB 938).

122. The provision for an "urgency clause" is provided in the California Constitution which states:

Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house the section and the bill shall be passed separately, each by rollcall vote entered in the journal, two thirds of the membership concurring.

CAL. CONST. art. IV, § 8, cl. d. The urgency clause in the funding bill stated:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in the existing law, and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately.


In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds . . . shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. . . . In making such a ruling [on the reasonableness of the request for funds], the court shall be guided by the need to provide a complete and full defense for the defendant.

ital cases, the states will be better able to attract competent and skilled counsel.

V. Conclusion

We can no longer look to the courts to make the ideal of *Gideon* a reality. The standards set to evaluate the performance of counsel in capital cases has done little, if anything, to provide the "guiding hand of counsel" and to ensure that the results are fair and reliable. The Supreme Court under the direction of Chief Justice Rhenquist has abandoned the plight of the indigent defendant and has led the call to sure and swift executions. If we cannot protect those against whom the death penalty is most frequently sought, then we "no longer shall tinker with the machinery of death."

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