Speaking Truth to Power: Law Schools and Law Faculty as Constitutional Litigants
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This article examines the role of Law Schools and Law Faculty as constitutional litigants. The recent Grutter case and the case upholding the Solomon Amendment form the core of the article. The premise of the article is that Law Schools and law faculty as elites with control over legal resources and institutions representing the legal profession, have been given unique access to the Constitutional debate. As a result, they have an obligation to pursue difficult questions, questions that might not otherwise be addressed. The article looks at the unique quality of Constitutional litigation when these players are involved.

First, the article examines the favored status afforded law schools in constitutional litigiation using the Grutter case as an example. The article explores the unique relationship between the Court and Law School litigants as it has been expressed in the Court's opinions, both the incredible deference paid by the Court and the animosity that has cropped up from time to time. Even in cases, such as the litigation challenging the Solomon Amendment, the Constitutional debate is not limited by the briefs and litigation as it would otherwise be in a more typical case. The debate over the underlying Constitutional issue is thoroughly explored through the means of scholarship, conferences, and teaching.

The article then steps back to provide an institutional perspective. While on the one hand, the Supreme Court and Law Schools can be seen as cooperative institutional players, attending conferences, writing articles, hiring law clerks, and otherwise sharing the benefits of social status and political privilege, law faculty are obligated to criticize the Court. The article examines the institution of tenure and the production of "critical" work; criticism of the Supreme Court is generally limited to doctrinal and theoretical debates, although there are faculty who are willing to attack more directly the Court's political conservatism and the bias inherent in the social class and political affiliations of a majority of the Court. Just as the government is a repeat player in front of the Court, Law Schools and faculty litigants have a different relationship to the Court than typical, private litigants.

The article finally looks at why this type of litigation is so important. If we look at the years leading up to Grutter we see Law Schools threatened and under attack. In the south, especially in Texas following the Hopwood decision, schools became significant constitutional actors as they conducted the business of admitting students. There was little dispute that diversity was a social, political and professional goal worth pursuing. The question was whether or not it met constitutional muster as a compelling state interest warranting the limited use of race in admission decisions. The Solomon Amendment litigation is another example of a constitutional issue confronted daily by schools across the country. In both instances the school and the faculty had to act to resolve the pending constitutional question and allow the institution to get on with its work.

The ultimate goal of the article is to encourage continued conduct of this type and question the morality of schools or scholars who see themselves as disengaged from the ongoing Constitutional debate, a debate publicly expressed through litigation.

ABA Standards and the Supreme Court

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The United States Supreme Court has used ABA standards in a variety of contexts. They are used as secondary and primary authority in both majority and dissenting opinions. As early as 1971 the court used the standards in determining whether a defendant's right to a speedy trial was violated.[1]

In the following years he court has used the various standards in addressing a number questions presented: whether restraint of prisoners in the presence of the jury is permissible;[2] to determine police liability for civil action brought under 1983;[3] determining whether a immigration statute could be applied retroactively;[4] determining counsels obligation to file a notice of appeal in a criminal case;[5] determining the vagueness of a city ordinance;[6] determining the admissibility of plea statements for

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[1] U.S. v. Marion,404 U.S. 307, 322, 92 S.Ct. 455, 464 (1971) f/n 12 In its Standards Relating to Speedy Trial, n. 10, supra, at 6, the ABA defined the time at which the beginning of the delay period should be computed as
'the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer.' Rule 2.2(a).Under the ABA Standards, after a defendant is charged, it is contemplated that his right to a speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; there is no necessity to allege or show prejudice to the defense. Rule 2.1, ibid.

[2] Deck v. Missouri, ___U.S.___,___,125 S.Ct.2007,2012, 161 L.Ed.2d 953(2005) citing ABA standards for Criminal Justice: Discovery and Trial By Jury 15-3.2, pp. 188-191 (3rd ed. 1996).

[3] Town of Castle Rock, Colorado v. Gonzales, ___U.S.___,___, 125 S.Ct. 2796,2806, 162 L.Ed.2d 658 (2005) A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.
"In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police .... However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally ....[T]hey clearly do not mean that a police officer may not lawfully decline to make an arrest. As to third parties in these states, the full-enforcement statutes simply have no effect, and their significance is further diminished." 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed.1980) (footnotes omitted).

[4] I.N.S. v. St.Cyr, 533 U.S.289,323, 121 S.Ct. 2271, 2291(2001) f/n 48 And the American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel "should fully advise the defendant of these consequences." 3 ABA Standards for Criminal Justice 14-3.2 Comment, 75 (2d ed.1982).

[5] Roe v. Flores-Ortega, 528 U.S. 470,479, 120 S.Ct. 1029, 1035-36 (2000) Because the decision to appeal rests with the defendant, we agree with Justice SOUTER that the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal. See ABA Standards for Criminal Justice, Defense Function 4-8.2(a) (3d ed.1993); *post,* at 1041-1042 (opinion concurring in part and dissenting in part).

[6] City of Chicago v. Morales, 527 U.S. 41,109, 119 S.Ct.1849, 1884 (1999) Scalia dissenting The authority to issue dispersal orders continues to play a commonplace and crucial role in police operations, particularly in urban areas. (footnoted omitted) Even the **ABA Standards** for Criminal Justice recognize that "[i]n day-to-day police experience there are innumerable situations in which police are called upon to order people not to block the sidewalk, not to congregate in a given place, and not to 'loiter' .... The police may suspect the loiterer of considering engaging in some form of undesirable conduct that can be at least temporarily

impeachment at trial;[7] determining whether a state supreme court sanction for a lawyers pretrial press conference is constitutionally permitted;[8] determining whether a defendant in a criminal trial had a fair and impartial jury;[9] determining whether a conflict of interest

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frustrated by ordering him or her to 'move on.' " Standard 1-3.4(d), p. 1.88, and comments (2d ed.1980, Supp.1986).(footnote omitted).

[7] United States v. Mezzanatto, 513 U.S. 196, 214-15, 115 S.Ct. 797, 808 (1995) Souter dissentingSince the zone of unrestrained candor is diminished whenever a defendant has to stop to think about the amount of trouble his openness may cause him if the plea negotiations fall through, Congress must have understood that the judicial system's interest in candid plea discussions would be threatened by recognizing waivers under HRules 410H and 11(e)(6). See **ABA Standards** for Criminal Justice 14-3.4, commentary (2d ed. 1980) (a rule contrary to the one adopted by Congress "would discourage plea negotiations and agreements, for defendants would have ***215** to be constantly concerned whether, in light of their plea negotiation activities, they could successfully defend on the merits if a plea ultimately was not entered").

[8] Gentile v. State Bar of Nevada, 501 U.S. 1030,1036-37, 111 S.Ct. 2720, 2725 (1991) We are not called upon to determine the constitutionality of the ABA Model Rule of Professional Conduct 3.6 (1981), but only HRule 177H as it has been interpreted and applied by the State of Nevada. Model Rule 3.6's requirement of substantial likelihood of material prejudice is not necessarily flawed. Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm. A rule governing speech, even speech entitled to full constitutional protection, need not use the words "clear and present danger" in order to pass constitutional muster.

"Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.' H*Pennekamp v. Florida,* 328 U.S. 331, 353 [66 S.Ct. 1029, 1040, 90 L.Ed. 1295] (1946)H (Frankfurter, J., concurring). Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed." H*Landmark Communications, Inc. v. Virginia, supra,* 435 U.S., at 842-843, 98 S.Ct., at 1543-1544H. The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test. See ABA Annotated Model Rules of Professional Conduct 243 (1984) ("formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality"; citing H*Landmark Communications, supra,* at 844, 98 S.Ct., at 1544;H H*Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962)H; and H*Bridges v. California, supra,* 314 U.S., at 273, 62 S.Ct., at 198,H for guidance in determining whether statement "poses a sufficiently serious and imminent threat to the fair administration of justice"); G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 397 (1985) ("To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)"); H*In re Hinds,* 90 N.J. 604, 622, 449 A.2d 483, 493 (1982)H (substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger).

[9]Mu'Min v. Virginia,500 U.S. 415, 430, 111 S.Ct. 1899,1907-08 (1991) Petitioner also relies on the Standards for Criminal Justice 8-3.5 (2d ed. 1980) promulgated by the American Bar Association. These Standards require interrogation of each juror individually with respect to "what the prospective juror has read and heard about the case," "[i]f there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material." These Standards, of course, leave to the trial court the initial determination of whether there is such a substantial possibility. But, more importantly, the Standards relating to *voir dire* are based on a substantive rule that renders a potential juror subject to challenge for cause, without regard to his state of mind, if he has been exposed to and remembers "highly significant information" or "other incriminating matters that may be inadmissible in evidence." That is a stricter standard of juror eligibility than that which we have held the Constitution to require. Under the ABA Standard, answers to questions about content, without more, could disqualify the juror from sitting. Under the constitutional standard, on the other hand, "[t]he relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge

exists due to a literary agreement between defense counsel and their client;[10]determining whether a statement given by a defendant may be used for impeachment;[11] determining during the penalty phase of a death penalty prosecution the jury should consider evidence of the defendant's mental retardation and abused background as mitigating factors;[12] determining if attorney's fees are exempt from a federal forfeiture statute;[13] determining state department of correction could restrict visitation;[14] determining whether a dismissal of a federal indictment for violation of a speedy trial rule was appropriate;[15] determining

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impartially the guilt of the defendant." H*Patton, supra,* 467 U.S., at 1035, 104 S.Ct., at 2891.H Under this constitutional standard, answers to questions about content alone, which reveal that a juror remembered facts about the case, would not be sufficient to disqualify a juror. "It is not required ... that the jurors be totally ignorant of the facts and issues involved." H*Irvin,* 366 U.S., at 722, 81H HS.Ct., at 1642.H
The ABA Standards, as indicated in our previous discussion of state and federal court decisions, have not commended themselves to a majority of the courts that have considered the question. The fact that a particular rule may be thought to be the "better" view does not mean that it is incorporated into the Fourteenth Amendment. H*Cupp v. Naughten,* 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)H.

[10] Bonin v. California,494 U.S. 1039, 1042, 110 S.Ct. 1506, 1507 (Mem. 1990)It is also apparent that a literary rights agreement may seriously undermine an advocate's loyalty to his client's interests. In a passage quoted in the California Supreme Court's opinion, the American Bar Association underscores the dangers of such arrangements:
"A grave conflict of interest can arise out of an agreement between a lawyer and an accused giving the lawyer the right to publish books, plays, articles, interviews, pictures, or related literary rights concerning the case.... [I]t may place the lawyer under temptation to conduct the defense with an eye on the literary aspects and its dramatic potential. If such an arrangement or contract is part of the fee, in lieu of the fee, or a condition of accepting the employment, it is especially reprehensible." ABA Standards for Criminal Justice, 4-3.4 (2d ed. 1980). See also H47 Cal.3d, at 836, 765 P.2d, at 475H (quoting prior draft of ABA Standard).

[11] Michigan v. Harvey, 494 U.S. 344, 365, 110 S.Ct. 1176,1188(1990)(Stevens dissenting) Hf/n 8H See ABA Standards for Criminal Justice 3-3.9(a) (2d ed. 1980) ("It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction").

[12] Penry v. Lynaugh, 492 U.S. 302,337, 109 S.Ct. 2934, 2956 (1989) It is clear that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act. See *supra,* at 25-27; ABA Standards for Criminal Justice 7-9.3, commentary, at 463; H*State v. Hall,* 176 Neb. 295, 310, 125 N.W.2d 918, 927 (1964)H. See generally Ellis & Luckasson, H53 Geo.Wash.L.Rev., at 414.H In its most severe forms, mental retardation may result in complete exculpation from criminal responsibility.

[13]Caplin & Drysdale, Chartered v. U.S.**,** 491 U.S. 617, 645, 109 S.Ct. 2667,2673 (1989) (Blackman dissenting) The right to retain private counsel serves to foster the trust between attorney and client that is necessary for the attorney to be a truly effective advocate. See ABA Standards for Criminal Justice 4-3.1, p. 4-29 (commentary) (2d ed.1980).

[14] Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 468,109 S.Ct. 1904, 1913 (1989) (Marshall dissenting) f/n 4 ABA Standards for Criminal Justice 23-6.2, Commentary (2d ed. 1980) (hereinafter ABA) ("Because almost all inmates ultimately will be returned to the community at the expiration of their terms, it is important to preserve, wherever possible, family and community ties")

[15] U.S. v. Taylor**,** 487 U.S. 326, 353, 108 S.Ct. 2413, 2428 (1988)(Stevens dissenting) f/n5The House Committee on the Judiciary adopted the position of the American Bar Association concerning the need for dismissal with prejudice. See H.R. 17409, 93d Cong., 2d Sess., § 101 (1974). The Committee Report quotes the commentary accompanying the ABA Standards Relating to Speedy Trial:
" 'The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have

that state rule requiring counsel to state why appeal is frivolous is constitutional;[16]determining whether defense counsel had a conflict of interest where partner represented a coindictee in a separate prosecution;[17] determining whether the use of a death qualified jury when the death penalty is sought only against a codefendant violated the defendants right to a fair and impartial jury;[18] determining whether a statute authorized warrantless search of vehicle dismantling establishment falls within the

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not been deterred from undue delay.' " HH.R.Rep. No. 93-1508, p. 37H (1974), U.S.Code Cong. & Admin.News 1974, p. 7430.

[16] McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 436, 108 S.Ct. 1895, 1901(1988) f/n 8 "See ABA Standards for Criminal Justice, Commentary to 4--3.9 (2d ed. 1980) ('No lawyer, whether assigned by the court, part of a legal aid or defender staff, or privately retained or paid, has any duty to take any steps or present dilatory or frivolous motions or any actions that are unfounded according to the lawyer's informed professional judgment. On the contrary, to do so is unprofessional conduct'); ABA Standing Committee on Ethics and Professional Responsibility, Informal Opinion 955, Obligation to Take Criminal Appeal, reprinted in 2 Informal Ethics Opinions 955-956 (1975) (like court-appointed lawyer, private counsel 'ethically, should not clog the courts with frivolous motions or appeals').

[17] Burger v. Kemp,483 U.S. 776, 797,107 S.Ct. 3114,3128 (1987)(Blackmun dissenting) HHf/n 4 Ethical Canon 5-16 of the ABA Code of Professional Responsibility states:

"In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus, before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."

Disciplinary Rule 5-105(D) states:

"If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

See also ABA Model Rules of Professional Conduct 1.7 and 1.10(a) (1984). The American Bar Association, in its Standards for Criminal Justice, explains:

"Except for preliminary matters such as initial hearings or applications for bail, *a lawyer or lawyers who are associated in practice* should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants *except in unusual situations when, after careful investigation, it is clear that:*

"(i) no conflict is likely to develop;

"(ii) the several defendants give an informed consent to such multiple representation;

"(iii) the consent of the defendants is made a matter of judicial record.

"In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients.

"In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct". ABA Standards for Criminal Justice 4-3.5(b) (2d ed. 1979) (emphasis in original).

[18]Buchanan v. Kentucky,483 U.S. 402, 418, 107 S.Ct. 2906, 2915 (1987) Underlying the Commonwealth's interest in a joint trial is a related interest in promoting the reliability and consistency of its judicial process, an interest that may benefit the noncapital defendant as well. In joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials. From such a perspective, it may be able to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing. See ABA Standards for Criminal Justice Standard 13-2.2 (2d ed. 1980).

administrative inspection exception;[19] determining the reasonableness of a prison regulation restricting inmate correspondence with other inmates;[20] determining whether racial discrepancy in imposition of the death penalty violated constitutional safeguards;[21] determining whether an agreement where a defendant in criminal case forgoes their right to pursue a civil action in exchange for dismissal of the criminal charges is constitutional;[22] determining whether additional security placed in the front row of a spectators section deprived the defendant of a fair trial;[23] determining whether trial counsel was ineffective for threatening to withdraw as counsel based inconsistent statements by a defendant;[24] determining a petition for cert is denied raising the issue of

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[19]New York v. Burger,482 U.S. 691, 717,107 S.Ct. 2636,2651 (1987) It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. See H*People v. De Bour,* 40 N.Y.2d 210, 218, 352 N.E.2d 562, 568 (1976)H ("To consider the actions of the police solely in terms of arrest and criminal process is an unnecessary distortion"); see also ABA Standards for Criminal Justice 1-1.1(b) and commentary (2d ed. 1980, Supp.1982).

[20] Turner v. Safley, 482 U.S. 78, 112 107 S.Ct. 2254, 2273 (1987) (Stevens dissenting) f/n 14 See ABA Standards for Criminal Justice 23-6.1, Commentary, p. 23•76 (2d ed. 1980) ("[P]risoners can write at any length they choose, using any language they desire, to correspondents of their selection, including present or former prisoners, with no more controls than those which govern the public at large").

[21] McCleskey v. Kemp, 481 U.S. 279, 313, 107 S.Ct. 1756, 1778 (1987) f/n 37 The dissent contends that in Georgia "[n]o guidelines govern prosecutorial decisions ... and [that] Georgia provides juries with no list of aggravating and mitigating factors, nor any standard for balancing them against one another." Ibid. Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case. See ABA Standards for Criminal Justice 3-3.8, 3-3.9 (2d ed. 1982). Thus, it is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice. Indeed, the dissent suggests no such guidelines for prosecutorial discretion.

[22] Town of Newton v. Rumery**,** 480 U.S. 386, 398 107 S.Ct. 1187, 1195 (1987) f/n 9 Cf. ABA Standards for Criminal Justice 14-1.8(a)(iii) (2d ed. 1980) (following a guilty plea, it is proper for the sentencing judge to consider that the defendant "by making public trial unnecessary, has demonstrated genuine consideration for the victims ... by ... prevent[ing] unseemly public scrutiny or embarrassment").

[23] Holbrook v. Flynn,475 U.S. 560, 571, 106 S.Ct. 1340, 1347 (1986) We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. See ABA Standards for Criminal Justice 15-3.1(c) (2d ed. 1980). But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section.

[24] Nix v. Whiteside,475 U.S. 157, 170,106 S.Ct. 988, 996 (1986) f/n 6 In the evolution of the contemporary standards promulgated by the American Bar Association, an early draft reflects a compromise suggesting that when the disclosure of intended perjury is made during the course of trial, when withdrawal of counsel would raise difficult questions of a mistrial holding, counsel had the option to let the defendant take the stand but decline to affirmatively assist the presentation of perjury by traditional direct examination. Instead, counsel would stand mute while the defendant undertook to present the false version in narrative form in his own words unaided by any direct examination. This conduct was thought to be a signal at least to the presiding judge that the attorney considered the testimony to be false and was seeking to disassociate himself from that course. Additionally, counsel would not be permitted to discuss the known false testimony in closing arguments. See ABA Standards for Criminal Justice, Proposed Standard 4-7.7 (2d ed. 1980). Most courts treating the subject rejected this approach and insisted on a more rigorous standard, see, *e.g., H*United States v. Curtis, 742 F.2d 1070 (CA7 1984)*H*; H*McKissick v. United States,* 379 F.2d 754 (CA5 1967)H; H*Dodd v. Florida Bar,* 118 So.2d 17, 19 (Fla.1960)H. The Eighth Circuit in this case and the Ninth Circuit have expressed approval of the "free narrative" standards. H*Whiteside v. Scurr,* 744 F.2d 1323, 1331 (CA8 1984)H; H*Lowery v. Cardwell,* 575 F.2d 727 (CA9 1978)H.

pretrial publicity;[25] determining the permissibility of allowing fact finder in death penalty case to believe the responsibility to determine the imposition of the penalty is with the state supreme court;[26] determining whether the failure to record the reasons for not calling witnesses at a prison disciplinary hearing violates due process;[27] determining whether a sentencing court must take into alternatives to incarceration at a probation violation hearing;[28] determining whether a late filing of defense witnesses as grounds to exclude witness testimony violated sixth amendment right to present witnesses;[29] determining whether an indigent defendant was entitled to an expert witness at state expense;[30] determining the constitutional parameters of prison searches;[31] evaluating jury instructions in capital cases;[32] determining the appropriateness of standby counsels participation in trial of a defendant representing himself;[33] determining whether appellate

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[25] Davis v. Florida, 473 U.S. 913, 914, 105 S.Ct. 3540,3542 (1985) (Mem) See generally ABA Standards for Criminal Justice 8-3.5 (2d ed. 1980) (recommending individual *voir dire* when substantial possibility that potentially prejudicial material will make jurors ineligible to serve).

[26] Caldwell v. Mississippi, 472 U.S. 320, 334, 105 S.Ct. 2633, 2642 (1985) f/n 6 See ABA Standards for Criminal Justice 3-5.8 (2d ed. 1980) ("References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its
decision"). *Id.,* at 3.90.

[27]Ponte v. Real, 471 U.S. 491, 520-21, 105 S.Ct. 2192, 2208 (1985) (Marshall dissenting) Reasons for disallowing prisoners' requests for appearance of witnesses should be recorded for purposes of future review. ABA Standards for Criminal Justice 23-3.2, p. 23-41, n. 14 (2d ed. 1980) (as added 1983).

[28] Black v. Romano, 471 U.S. 606, 613, 105 S.Ct. 2254, 2258 (1985) We do not question the desirability of considering possible alternatives to imprisonment before probation is revoked. See, *e.g.,* ABA Standards for Criminal Justice 18-7.3, and Commentary (2d ed. 1980).

[29] Smith v. Jago,470 U.S. 1060, 1061, 105 S.Ct. 1777, 1778 (Mem) (1985) (White dissenting) there are those who have found arguable constitutional infirmity in such exclusionary sanctions. See, *e.g.,* 2 ABA Standards for Criminal Justice 11-4.7(a) and accompanying commentary (2d ed. 1980).

[30] Ake v. Oklahoma**,** 470 U.S. 68, 82,105 S.Ct. 1087, 1096 (1985) f/n 7 see also ABA Standards for Criminal Justice 5-1.4, Commentary, p. 5-20 (2d ed. 1980) ("The quality of representation at trial ... may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist ... and no such services are available").

[31] Hudson v. Palmer, 468 U.S. 517, 550 104 S.Ct. 3194, 3213 (1984)(Stevens concurring in part and dissenting in part) Virtually every federal judge to address the question over the past decade has concluded that the Fourth Amendment does apply to a prison cell. [footnote omitted] There is similar unanimity among the commentators. [f/n 20 See ABA Standards for Criminal Justice 23-6.10 Commentary (2d ed. 1980)].

[32] Spaziano v. Florida**,** 468 U.S. 447,463, 104 S.Ct. 3154, 3163 (1984) f/n 8 Petitioner's efforts to distinguish the considerations relevant to imposition of a capital or a noncapital sentence bear more on the jury's ability to function as the sentencer in a capital case than on the constitutionality of the judge's doing so. We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case. See ABA Standards for Criminal Justice 18-1.1, Commentary, pp. 18.21-18.22 (2nd ed. 1980) (reserving capital sentencing from general disapproval of jury involvement in sentencing); California v. Ramos**,** 463 U.S. 992, 1003 103 S.Ct. 3446, 3455 (1983) f/n 18 See also ABA Standards for Criminal Justice 18-2.5(c)(i) (2d ed.1980) (giving as example of legitimate reason for selecting total confinement fact that "confinement is necessary in order to protect the public from further serious criminal activity by the defendant").

[33] McKaskle v. Wiggins,465 U.S. 168, 196, 104 S.Ct. 944, 960 (1984)(White dissenting) In short, whatever advantage or satisfaction Wiggins might have hoped to derive from self-representation, see, *e.g.,* ABA Standards for Criminal Justice 6-3.6(a) (2d ed. 1980), was surely nullified by the trial court's tolerance of counsel's conduct.

counsel is obligated to raise ever issue client desires;[34] determining whether disclosure of grand jury materials to a government attorney is proper;[35] determining whether a court should revoke a defendant's probation for failure to pay restitution and a fine;[36] determining whether the exclusion of evidence by a state court for non compliance with a notice requirement violates due process;[37] determining whether not granting a continuance for substitute counsel to prepare for trial denied the defendant effective assistance of counsel;[38]denying certiorari and critiquing federal review of state claims;[39] determining federal courts should abstain from intervening in state disciplinary proceedings against attorneys;[40] determining whether a public defender was acting under

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[34] Jones v. Barnes, 463 U.S. 745, 753, 103 S.Ct. 3308, 3313(1983)f/n 6 The ABA Model Rules of Professional Conduct provide:
"A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.... In a criminal case, the lawyer shall abide by the client's decision, ... *as to a plea to be entered, whether to waive jury trial and whether the client will testify.*" Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added).
With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.
Respondent points to the ABA Standards for Criminal Appeals, which appear to indicate that counsel should accede to a client's insistence on pressing a particular contention on appeal, see ABA Standards for Criminal Justice 21-3.2, at 21-42 (2d ed. 1980). The ABA Defense Function Standards provide, however, that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client. See ABA Standards for Criminal Justice 4- 5.2 (2d ed. 1980). See also ABA Project on Standards for Criminal Justice, The Prosecution Function and The Defense Function § 5.2 (Tent. Draft 1970). In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution.
[35] U.S. v. Sells Engineering, Inc., 463 U.S. 418, 430, 103 S.Ct. 3133, 3140 (1983) fn/n 14 See generally H*United States v. Calandra,* 414 U.S. 338, 351, 94 S.Ct. 613, 621, 38 L.Ed.2d 561 (1974)H; H*Hale v. Henkel,* 201 U.S. 43, 60, 65, 26 S.Ct. 370, 373, 375, 50 L.Ed. 652 (1906)H; HFed.Rule of Crim.Proc. 7(c)(1)H (prosecutor to sign indictment); National District Attorneys Association, National Prosecution Standards 14.2-E, 14.4, and accompanying commentary (1977); ABA Standards for Criminal Justice 3-3.5, 3-3.6 (2d ed. 1980); ABA Grand Jury Policy and Model Act 4-9, 12 (2d ed. 1982).
[36] Bearden v. Georgia, 461 U.S. 660, 669, 103 S.Ct. 2064, 2071 (1983) f/n 10 ….. Commentators have similarly distinguished between the permissibility of revoking probation for contumacious failure to pay a fine, and the impermissibility of revoking probation when the probationer made good-faith efforts to pay. See, *e.g.,* ABA Standards for Criminal Justice 18-7.4 and Commentary (2d ed. 1980) ("incarceration should be employed only after the court has examined the reasons for nonpayment")
[37] Taliaferro v. Maryland, 461 U.S. 948, 949, 103 S.Ct. 2114, 2115 (Mem) (1983) (White dissenting)The American Bar Association and several scholarly writers have also found arguable constitutional infirmity in the exclusionary sanction. See 2 ABA Standards for Criminal Justice § 11-4.7(a), and accompanying commentary (2d ed. 1980).
[38] Morris v. Slappy, 461 U.S. 1, 21,103 S.Ct. 1610, 1621 (1983) (Brennan concurring) f/n 4 The American Bar Association Standards for Criminal Justice state that "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused." ABA Standards for Criminal Justice 4-3.1(a) (2d ed. 1980) (hereinafter ABA Standards). The Standards also suggest that "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." *Id.,* at 4.29 (commentary).
[39] Spalding v. Aiken,460 U.S. 1093, 1097 103 S.Ct. 1795, 1797 (Mem) (1983) (Burger concurring) "One form of abuse said to exist is that of a prisoner, knowing he or she has a valid claim for relief, intentionally forgoing presenting that claim until evidence of guilt has dissipated so that reconviction would be impossible." ABA Standards for Criminal Justice, Postconviction Remedies, § 22-2.4 (2d ed. 1980).
[40] Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 434 102 S.Ct. 2515, 2522 (1982) f/n 11 The New Jersey allocation of responsibility is consistent with § 2.1 of the ABA Standards for Lawyer Discipline and Disability Proceedings (Proposed Draft 1978), which states that the "[u]ltimate and

color of state law subjecting the office to a 1983 action;[41] determining whether counsel should be appointed to indigent parents in a termination proceeding;[42] determining whether a parental notification statute was constitutional;[43] determining whether a conflict of interest existed in counsel representing both employee and employer;[44] determining whether a statute authorizing the government to appeal sentences violated the Double Jeopardy Clause;[45] determining whether representation of multiple defendants

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exclusive responsibility within a state for the structure and administration of the lawyer discipline and disability system and the disposition of individual cases is within the inherent power of the highest court of the state." The rationale for vesting responsibility with the judiciary is that the practice of law "is so directly connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate it naturally and logically belongs to the judicial department." *Id.*, commentary to § 2.1.

f/n 12 The New Jersey Supreme Court has concluded that bar disciplinary proceedings are neither criminal nor civil in nature, but rather are *sui generis.* H*In re Logan*, 70 N.J. 222, 358 A.2d 787 (1976)H. See also ABA Standards for Lawyer Discipline and Disability Proceedings § 1.2 (Proposed Draft 1978). As recognized in H*Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977)H, however, whether the proceeding "is labeled civil, quasi-criminal, or criminal in nature," the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state. H*Id.*, 430 U.S., at 335-336, 97 S.Ct., at 1217H.

[41] Polk County v. Dodson, 454 U.S. 312, 318 102 S.Ct. 445, 449-50 (1981) "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980).

[42] Lassiter v. Department of Social Services of Durham County, N. C.**,** 452 U.S. 18, 34 101 S.Ct. 2153, 2163 (1981) In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well. IJA-ABA Standards for Juvenile Justice, Counsel for Private Parties 2.3(b) (1980). . .

[43] H. L. v. Matheson**,** 450 U.S. 398, 445, 101 S.Ct. 1164, 1190 (1981) (Marshall dissenting) f/n 39 More flexible regulations which defer to the physician's judgment but provide for parental notice in emergencies have been proposed. *E. g.*, IJA-ABA Standards for Juvenile Justice, Rights of Minors 4.2, 4.6, 4.8 (1980) (minor can consent to pregnancy-related medical care; physician should seek to obtain minor's permission to notify parent, and notify parent over minor's objection only if failure to inform "could seriously jeopardize the health of the minor").

[44] Wood v. Georgia,450 U.S. 261, 271 101 S.Ct. 1097, 1103 (1981) f/n 15 As one court has stated: "A conflict of interest inheres in every such situation.... It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." H*In re Abrams*, 56 N.J. 271, 276, 266 A.2d 275, 278 (1970)H. See also H*In re Investigation Before April 1975 Grand Jury*, 174 U.S.App.D.C. 268, 274, n. 11, 531 F.2d 600, 606, n. 11 (1976)H; H*Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896 (1975)H, appeal dism'd and cert. denied, H423 U.S. 1083, 96 S.Ct. 873, 47 L.Ed.2d 94 (1976)H; ABA Model Code of Professional Responsibility DR 5-107(A), (B) (1980); ABA Standards for Criminal Justice 4-3.5(c) (2d ed. 1980); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va.L.Rev. 939, 960-961 (1978).

[45] U.S. v. DiFrancesco,449 U.S. 117, 121, 101 S.Ct. 426,429 (1980) f/n 4 Academic and professional commentary on the general issue is divided. For conclusions that prosecution appeals of sentences do not violate the Double Jeopardy Clause, see Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich.L.Rev. 1001 (1980); Stern, Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences, 18 Am.Crim.L.Rev. 51

in a criminal case violated the defendants right to effective assistance of counsel;[46] determining whether inmates who escaped from prison are entitled to instruction on the defenses of duress or necessity;[47] determining whether the public and the press could be excluded from a pretrial suppression hearing;[48] determining whether a parole procedure complies with due process;[49] determining whether a federal collateral attack of guilty

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(1980); Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J.Crim.L. & Criminology 19 (1978). For conclusions that such appeals are unconstitutional, see Spence, The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?, 37 Md.L.Rev. 739 (1978); Freeman & Earley, *United States v. DiFrancesco*: Government Appeal of Sentences, 18 Am.Crim.L.Rev. 91 (1980); Note, 63 Va.L.Rev. 325 (1977); Report on Government Appeal of Sentences, 35 Bus.Lawyer 617, 624-628 (1980). At least one commentator-witness some time ago regarded the answer to the constitutional issue as "simply unclear." Low, Special Offender Sentencing, 8 Am.Crim.L.Q. 70, 91 (1970) (reprint of statement submitted at Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 184, 197 (1969)).

[46] Cuyler v. Sullivan, 446 U.S. 335, 347, 100 S.Ct. 1708, 1717 (1980) f/n 11 ABA Code of Professional Responsibility, DR 5-105, EC 5-15 (1976); ABA Project on Standards for Criminal Justice, Defense Function § 3.5(b) (App. Draft 1971).

Seventy percent of the public defender offices responding to a recent survey reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation. Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va.L.Rev. 939, 950, and n. 40 (1978). The private bar may be less alert to the importance of avoiding multiple representation in criminal cases. See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. 119, 152-157 (1978); Lowenthal, *supra*, at 961-963.

[47] U.S. v. Bailey**,**444 U.S. 394, 421 100 S.Ct. 624, 640 (1980) (Blackman dissenting) f/n 3 *E. g.*, Weiss & Friar, H*supra*, at 183-184H (youth having epileptic seizure sprayed with tear gas, resulting in severe trauma); G. Mueller, Medical Services in Prison: Lessons from Two Surveys, in CIBA Foundation Symposium 16, Medical Care of Prisoners and Detainees 7, 11-16 (1973); J. Mitford, Kind & Usual Punishment 135 (1973); Univ. of Pa. Law School, Health Care and Conditions in Pennsylvania's State Prisons (1972), reprinted in ABA Comm'n on Correctional Facilities and Services, Standards and Materials on Medical and Health Care in Jails, Prisons, and Other Correctional Facilities 71 (1974); Report of the Medical Advisory Committee on State Prisons to Comm'r of Correction and Sec'y of Human Services, Commonwealth of Mass. (1971), reprinted in ABA Standards and Materials 89.

[48] Gannett Co., Inc. v. DePasquale**,** 443 U.S. 368, 433, 99 S.Ct. 2898,2933 (1979) (Blackman dissenting in part concurring in part) f/n 13 The American Bar Association Standards adopt the view that the public has a strong interest in maintaining the openness of criminal trials, and that the Sixth Amendment protects that interest:

"The sixth amendment speaks in terms of the right of the accused to a public trial, but this right does not belong solely to the accused to assert or forgo as he or she desires. . . . The defendant's interest, primarily, is to ensure fair treatment in his or her particular case. While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system. Thus, the defendant's willingness to waive the right to a public trial in a criminal case cannot be the deciding factor. . . . It is just as important to the public to guard against undue favoritism or leniency as to guard against undue harshness or discrimination." ABA Project on Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-3.2, p. 15 (App. Draft 1978). (Footnotes omitted.)

f/n 15. The ABA Standards take the position that pretrial suppression hearings are within the scope of the Sixth Amendment's public-trial provision. ABA Project on Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-3.2, p. 15, and n. 1 (App. Draft 1978).

[49] Greenholtz v. Inmates of Nebraska Penal and Correctional Complex**,** 442 U.S. 1, 34, 99 S.Ct. 2100, 2118 (1979) (Marshall dissenting in part) f/n 16 See, *e. g.,* HS.Rep. No. 94-369, p. 19 (1975)H ("It is essential, then, that parole has both the fact and appearance of fairness to all. Nothing less is necessary for the maintenance of the integrity of our criminal justice institutions"); H*United States ex rel. Johnson v.*

plea entered in state court is proper;[50] determining whether a prosecutor immune from civil suites brought under 1983.[51]

Evaluation of Defense Counsel Performance in Criminal Cases

Courts are using ABA standards[52] to determine ethical boundaries and as a means to measure lawyer performance in a number of cases. This practice was not envisioned by the drafters of the standards. Both the current prosecution standards and defense standards begin with an admonition by the drafters:

> These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of (prosecutor/defense counsel) to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending on all the circumstances.[53]

In spite of the admonition the Supreme Court refers to the ABA standards as "guidelines" to evaluate counsel's performance. Since the Court's reference lower courts have routinely used the standards as guides in evaluating defense counsels performance.

Failure to Investigate

In 1984 the Supreme Court referred to the ABA standards in formulating the test to determine whether counsel is ineffective.[54] In *Strickland v. Washington*,[55] the court reasoned:

Chairman of New York State Board of Parole, 500 F.2d, at 928;H H*Phillips v. Williams,* 583 P.2d 488, 490 (Okl.1978)H, cert. pending, No. 78-1282; ABA, Standards Relating to the Legal Status of Prisoners (Tent.Draft 1977), in 14 Am.Crim.L.Rev. 377, 598 (1977); K. Davis, Discretionary Justice: A Preliminary Inquiry 126-133 (1969); Official Report of the New York State Special Commission on Attica 97, 98 (Bantam ed. 1972).

[50] Blackledge v. Allison, 431 U.S. 63, 71, 97 S.Ct. 1621, 1628 (1977) HH f/n 2 See generally HSantobello v. New York, 404 U.S. 257, 260-261, 92 S.Ct. 495, 497-498, 30 L.Ed.2d 427;H HBrady v. United States, 397 U.S. 742, 751-752, 90 S.Ct. 1463, 1470-1471, 25 L.Ed.2d 747;H ABA Project on Standards for Criminal Justice, Pleas of Guilty 1-3 (Approved Draft 1968) (hereinafter ABA Standards); ALI Model Code of Pre-Arraignment Procedure s 350.3, Commentary (1975) (hereinafter ALI Code).

[51] Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed. 128 (1976) f/n 24A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages. Cf. American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function s 3.9(c) (Approved Draft 1971).

[52] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Defense Function (3d 1993).

[53] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Defense Function stnd. 3-1.1&4-1.1 (3d 1993).

[54] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[55] Id.

> 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.

In a cautionary tone the court advises courts not to adopt "detailed rules"[56] and give great deference to counsel's performance.[57] The *Strickland* [58]test for ineffective assistance of counsel involves a two step analysis. The first is a determination of whether counsel performance was not "within the range of competence demanded of attorneys in criminal cases."[59] The second is "but for counsel's unprofessional errors the result of the proceeding would have been different."[60] This flexible approach used to address claims of ineffective assistance of counsel has been condemned for allowing substandard performance by defense counsel.[61] The "presumption that counsel's conduct falls within

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[56] Id. at 688-89 No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See HUnited States v. Decoster, 199 U.S.App.D.C., at 371, 624 F.2d, at 208.H Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

[57] Id. at 688-89. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. HEngle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982)H. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See HMichel v. Louisiana, supra, 350 U.S., at 101, 76 S.Ct., at 164.H There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See HGoodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983)H

[58] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[59] Strickland v. Washington, 466 U.S. at 687 citing McMann v. Richardson, 397 U.S. 759, 770 90 S.Ct.1441,1448(1970).

[60] Strickland v. Washington, 466 U.S. at 694.

[61] Adam Hime, Life or Death Mistakes: Cultural Sterotyping, Capitol Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Convictions, 83 U.Det. Mercy L. Rev. 181 (Winter 2005) However as Stephen Bright has suggested, "in [Strickland] the standard of representation in death penalty cases has been brought down to meet the kind of representation that poor people receive." citing Stephen B. Bright, The Politics of Crime and the Death Penalty: Not "Soft on Crime," But hard on the Bill of Rights, 39 St.Louis U.L.J. 479, 497 (1995); Jeffrey L. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement, 75 Neb.L.Rev 425 (1996); See Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, H103 Yale L.J. 1835 (1994)H.

a wide range of reasonable professional assistance"[62] has lead to number of decisions allowing questionable attorney behavior to fall within the range of adequate assistance of counsel. In 1994 Justice Blackman, in a dissenting opinion to the denial of a writ of certiorari, voiced criticism of *Strickland* and cataloged some of the instances of attorney conduct allowed to pass under *Strickland*:

> The practical costs of such ad hoc systems of attorney selection and compensation are well documented. Capital defendants have been sentenced to death when represented by counsel who never bothered to read the state death penalty statute, *e.g., Smith v. State,* 581 So.2d 497 (Ala.Crim.App.1990), slept through or otherwise were not present during trial, or failed to investigate or present any mitigating evidence at the penalty phase, *Mitchell v. Kemp,* 483 U.S. 1026, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987) (Marshall, J., dissenting from denial of certiorari). Other indigent defendants have been represented by attorneys who had been admitted to the bar only six months before and never had conducted a criminal trial. *E.g., Paradis v. Arave,* 954 F.2d 1483, 1490-1491 (CA9 1992), vacated and remanded, 507 U.S. 1026, 113 S.Ct. 1837, 123 L.Ed.2d 463 (1993), relief denied, 20 F.3d 950, 959 (1994). One Louisiana defendant was convicted of capital murder following a 1-day trial and 20-minute penalty phase proceeding, in which his counsel stipulated to the defendant's age at the time of the crime and rested. *State v. Messiah,* 538 So.2d 175, 187 (La.1988), cert. denied, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). When asked to cite the criminal cases he knew, one defense attorney who failed to challenge his client's racially unrepresentative jury pool could name only two cases: *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Dred Scott v. Sandford,* 19 How. 393, 15 L.Ed. 691 (1857). See Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1839, and n. 32 (1994), citing Tr. of Hearing 231 (Apr. 25-27, 1988) in *State v. Birt,* No. 2360 (Super.Ct. Jefferson Cty., Ga.1988).
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> The consequences of such poor trial representation for the capital defendant, of course, can be lethal. Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived. Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than "a person who happens to be a lawyer." *Id.,* at 685, 104 S.Ct., at 2063.
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> The impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective-assistance claims have been denied. John Young, for example, was represented in his capital trial by an attorney who was addicted to drugs and who a few weeks later was incarcerated on federal drug charges. The Court of Appeals for the Eleventh Circuit rejected Young's ineffective-assistance-of-counsel claim on federal habeas, *Young v. Zant,* 727 F.2d 1489 (1984), and this

[62] Strickland v. Washington, 466 U.S. at 689

Court denied review, 470 U.S. 1009, 105 S.Ct. 1371, 84 L.Ed.2d 390 (1985). Young was executed in 1985. John Smith and his codefendant Rebecca Machetti were sentenced to death by juries selected under the same Georgia statute. Machetti's attorneys successfully challenged the statute under a recent Supreme Court decision, *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), winning Machetti a new trial and ultimately a life sentence. *Machetti v. Linahan,* 679 F.2d 236 (CA11 1982). Smith's counsel was unaware of the Supreme Court decision, however, and failed similarly to object at trial. ***2788** *Smith v. Kemp,* 715 F.2d 1459 (CA11 1983). Smith was executed in 1983. Jesus Romero's attorney failed to present any evidence at the penalty phase and delivered a closing argument totaling 29 words. Although the attorney later was suspended on unrelated grounds, Romero's ineffective-assistance claim was rejected by the Court of Appeals for the Fifth Circuit, *Romero v. Lynaugh,* 884 F.2d 871, 875 (1989), and this Court denied certiorari, 494 U.S. 1012, 110 S.Ct. 1311, 108 L.Ed.2d 487 (1990). Romero was executed in 1992. Larry Heath was represented on direct appeal by counsel who filed a 6-page brief before the Alabama Court of Criminal Appeals. The attorney failed to appear for oral argument before the Alabama Supreme Court and filed a brief in that court containing a 1-page argument and citing a single case. The Eleventh Circuit found no prejudice, *Heath v. Jones,* 941 F.2d 1126, 1131 (1991), and this Court denied review, 502 U.S. 1077, 112 S.Ct. 981, 117 L.Ed.2d 144 (1992). Heath was executed in Alabama in 1992.

James Messer, a mentally impaired capital defendant, was represented by an attorney who at the trial's guilt phase presented *no* defense, made no objections, and emphasized the horror of the capital crime in his closing statement. At the penalty phase, the attorney presented no evidence of mental impairment, failed to introduce other substantial mitigating evidence, and again repeatedly suggested in closing that death was the appropriate punishment. The Eleventh Circuit refused to grant relief, *Messer v. Kemp,* 760 F.2d 1080 (1985) (Johnson, J., dissenting), and this Court denied certiorari, 474 U.S. 1088, 106 S.Ct. 864, 88 L.Ed.2d 902 (1986). Messer was executed in 1988. Even the attorney who could name only *Miranda* and *Dred Scott* twice has survived ineffective-assistance challenges. See *Birt v. Montgomery,* 725 F.2d 587, 596-601 (CA11) (en banc), cert. denied, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984); *Williams v. State,* 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 606 (1989).[FN2] None of these cases inspires confidence that the adversarial system functioned properly or “that the trial ca[n] be relied on as having produced a just result.” *Strickland,* 466 U.S., at 686, 104 S.Ct., at 2064. Yet, in none of these cases was counsel's assistance found to be ineffective. (f/n omitted)

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Blackman continues:

> Our system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result. When we execute a capital defendant in

> this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. And when this Court curtails federal oversight of state-court proceedings, it does so in reliance on the proposition that justice has been done at the trial level. My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the failings of our present system of capital representation and the conviction to do what is necessary to improve it.[63]

Ten years prior to Blackman's dissent Justice Marshall used the standards in evaluating a petition for certiorari in *Alvord v. Wainwright*.[64] The question of the trial counsels competence in a death penalty case was sought to be reviewed.[65] Marshall's dissent quotes the ABA standards extensively in one footnote:

> The lower court ruling is therefore premised on a significant misunderstanding of the division of responsibility between counsel and client at trial, and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determining the reasonableness of counsel's assistance. See *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, are especially relevant. That section provides:
> "Standard 4-5.1. Advising the defendant
> "(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.
> "Standard 4-5.2. Control and direction of the case
> "(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
> "(i) what plea to enter;
> "(ii) whether to waive jury trial; and
> "(iii) whether to testify in his or her own behalf.
> "(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA Standards for Criminal Justice 4-5.1, 4-5.2 (2d ed. 1980 and Supp.1982).[66]

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[63] McFarland v. Scott**,** 512 U.S. 1256,1264 114 S.Ct. 2785, 2790 (1994) (Mem) (Blackman dissenting).
[64] 469 U.S. 956, 960, 105 S.Ct. 355, 358 (1984) (Mem).
[65] 469 U.S. 956, 105 S.Ct. 355 (1984) (Mem).
[66] 469 U.S. 956, 960, 105 S.Ct. 355, 358 (1984) (Mem)(Marshall dissenting) f/n 4.

Although the court denied the petition in *Alvord* the court would return to the standards as a basis to evaluate defense counsels performance in three death penalty cases beginning in 2000.

In *Williams v. Taylor* the court found defense counsel ineffective for failure to investigate a client's background in a death penalty case.[67] The court stated:

> But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980).[68]

In *Wiggins v. Smith*[69] the Supreme Court found defense counsel ineffective based on the failure to conduct an adequate investigation into their client's background.[70] The Court stated:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra, at 688, 104 S.Ct. 2052; Williams v. Taylor, supra, at 396, 120 S.Ct. 1495.* The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.,* 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").[71]

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[67] 529 U.S. 362, 395, 120 S.Ct. 1495, 1514 (2000).
[68] Id.
[69] 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).
[70] 539 U.S. 510, 524, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003).
[71] 539 U.S. 510, 524-25, 123 S.Ct. 2527, 2536-37, 156 L.Ed.2d 471 (2003).

In *Rompilla v. Beard*,[72] cited the ABA standard for investigation in criminal cases to reverse a conviction for capital murder.[73] The standard in effect at the time of Rompella's conviction provided:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.[74]

The court noted the standard had been amended in 1993 but found there was no material difference.[75] The court again stated, "[We] long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'"[76] The court also notes with approval the ABA adoption of ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in 1989.[77] In a footnote the court gives a history of the guidelines as applied in death penalty cases. The court states:

> Later, and current, ABA Guidelines relating to death penalty defense are even more explicit:
> "Counsel must ... investigate prior convictions ... that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.7, comment. (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1027 (2003) (footnotes omitted). Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S., at 524, 123 S.Ct. 2527 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor' " (quoting 1989 ABA Guideline 11.4.1.C (emphasis in original))).

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[72] ___ U.S.____, 125 S.Ct. 2456 (2005).
[73] ___ U.S.____, 125 S.Ct. 2456,2465-66 (2005).
[74] Id. at 2466 citing 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).
[75] Id. at 2466 f/n 6 The new version of the Standards now reads that any "investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities" whereas the version in effect at the time of Rompilla's trial provided that the "investigation" should always include such efforts. ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1, (3d ed.1993). We see no material difference between these two phrasings, and in any case cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.
[76] Id. at 2466 citing Wiggins v. Smith, 539 U.S. at 524, 123 S.Ct.2527 (quoting Strickland v. Washington, 466 U.S. at 688 104 S.Ct. 2052).
[77] Id. at 2466 f/n 7.

Effect of Williams, Wiggins and Rompilla

The effect of *Wiggins* is a detailed analysis of trial counsels preparation and investigation, especially in death penalty cases by both state and lower federal courts. The California Supreme Court reversed a capitol murder convicted after appointing a special master to conduct an investigation into trial counsels failure to adequately investigate.[78] Although trial counsel did interview the petitioner's wife, mother and sister counsel did not explore the petitioner's history surrounding his childhood.[79] The California court specifically found:

> In summary, readily discoverable evidence presented at the reference hearing established that petitioner was born in Ohio in 1949, and his mother Margaret, an unwed teenager, gave him up for adoption at birth. He was placed in foster care, but his mother had second thoughts. When he was approximately one and a half years of age, she requested his return to her care but failed to appear to reclaim him. Ultimately, when he was two and a half to three years of age, after he had been in five foster homes, she did reclaim him and brought him to live with her and her new husband, Edward Lucas, in Montgomery County, Ohio. School records indicate that petitioner appeared for school in the first grade, beaten black and blue. When he was seven years of age, petitioner was placed in the care of a facility for abused and neglected children located in Montgomery County, Ohio. Records dating from that time indicate staff doctors who were employed by the county juvenile facilities and treated petitioner believed that he had been subjected to extreme abuse and that he was psychologically very damaged. Petitioner's care and treatment in public facilities for abused and neglected children appeared in public records that were still available at the time of trial. Several doctors and other persons who had treated petitioner as a child also were still available and provided deposition testimony concerning the abuse he had received at the hands of his family as a young child and the resulting damage to his character and personality.
>
> Petitioner's sister, other relatives, and other persons who easily could be traced and had contact with petitioner's family while petitioner was a child testified at the evidentiary hearing and also stated in depositions and declarations that, as a young child, petitioner had been singled out for physical and emotional abuse, both by his parents and by his stepfather's mother, with whom he frequently resided. Between the ages of three and seven years, he was beaten regularly, given inadequate food, dressed in rags during Ohio winters, forced to sleep under the bed, disciplined by being burned with a cigarette and by the administration of chili peppers to his genitals, and excoriated because of the circumstances of his birth. His sister was not subject to abuse; petitioner often was fed solely on her leftovers.
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> Petitioner's trial counsel did not discover this evidence.[80]

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[78] In re Lucas, 33 Cal.4th 682, 16 Cal.Rptr.3d 331(Cal. 2004).
[79] Id. at 699.
[80] Id. at 698.

This detailed finding by the court highlights the fact analysis done by the United States Supreme Court in *Wiggins.*[81] In quoting *Wiggins* the court notes:

> With respect to the question of what constitutes an "objective standard of reasonableness" for attorney performance, the United States Supreme Court recently explained: "We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that '[t]he proper measure of attorney performance remains simply reasonableness *under prevailing professional norms*.' " (*Wiggins, supra,* 539 U.S. at p. 521, 123 S.Ct. at p. 2535, italics added.) But "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Marquez* (1992) 1 Cal.4th 584, 602, 3 Cal.Rptr.2d 727, 822 P.2d 435.)
> Although "a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance" (*Bell v. Cone* (2002) 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914), nonetheless, counsel's alleged tactical decisions must be subjected to "meaningful scrutiny." (*In re Avena* (1996) 12 Cal.4th 694, 722, 49 Cal.Rptr.2d 413, 909 P.2d 1017.) Tactical decisions must be informed, so that before counsel acts, he or she " 'will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation.' " (*Ibid.;* see also *In re Jones* (1996) 13 Cal.4th 552, 564-565, 54 Cal.Rptr.2d 52, 917 P.2d 1175.)
> As the United States Supreme Court has instructed: "strategic 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 the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland, supra,* 466 U.S. at pp. 690-691, 104 S.Ct. 2052.)
> In determining whether counsel's performance in petitioner's case was constitutionally deficient, we are guided principally by the high court's opinion in *Wiggins, supra,* 539 U.S. 510, 123 S.Ct. 2527.[82]

In *Hamblin v. Mitchell*, the sixth circuit court of appeals granted a writ of habeus corpus based on trial counsel's failure to investigate into mitigating circumstances in a death penalty case.[83] The court uses both the 1989 ABA guidelines and the 2003 Guidelines to amplify counsel obligation to conduct an investigation in cases.[84] Central to the courts finding is the premise that:

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[81] 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).
[82] In re Lucas**,** 33 Cal.4th 682, 721-22, 16 Cal.Rptr.3d 331, 361(Cal. 2004).
[83] 354 F.3d 482 (2003)
[84] Id. at 487**.** The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.* They are the same type of longstanding norms referred to in *Strickland* in 1984

as "prevailing professional norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past. The Court in H*Wiggins* clearly holds at 539 U.S. at ----, 123 S.Ct. at 2535,H that it is not making "new law" on the ineffective assistance of counsel either in *Wiggins* or in the earlier case on which it relied for its standards, H*Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)H. . . . .
New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland, Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances. f/n 2

f/n 2. The 2003 ABA Guidelines at section 10.7 contain ten pages of discussion about counsel's "obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The description of counsel's obligation to investigate mitigating evidence for the sentencing phase of the case is as follows (omitting quotation marks and the lengthy footnotes attached to the test):

Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case. Because the sentences in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. In the case of the client, this begins with the moment of conception [*i.e.,* undertaking representation of the capital defendant]. Counsel needs to explore:

(1)Medical history, (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage).
(2)Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (*e.g.,*
failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
(3)Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
(4)Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
(5)Employment and training history (including skills and performance, and barriers to employability);
(6)Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);
The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defense (*e.g.,* by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluation (including competency, mental retardation, or insanity), motion practice, and plea negotiations. ....

> Thus, the *Wiggins* case now stands for the proposition 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. This principle adds clarity, detail and content to the more generalized and indefinite 20-year-old language of *Strickland*. . . . .[85]

The court was not troubled by the fact that the petitioners trial occurred prior to the adoption of the 1989 standards.[86]

Prior to the Wiggins decision the sixth circuit previously reversed a capitol murder conviction in *Coleman v. Mitchell*.[87] Again, the reversal was based on trial counsels lack of investigation into mitigating facts that would be relevant to the penalty phase of the trial.[88] Coleman presented an interesting argument advanced by the government. The petitioner had stated his desire to conduct a mitigation phase proceeding using the petitioners own unsworn statement.[89] The district found that trial counsel had honored the petitioners request and therefore did not provide substandard representation.[90] An analogy was drawn between the limited representation presented in this case with a self representation request.[91] The court of appeals rejects the analogy finding that no colloquy with the defendant advised him of the dangers of his approach to the penalty phase of the case.[92] The court further found that the petitioners request did

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> It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors,
> teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. Records--from courts, government agencies, the military, employers, etc.--can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources--a time-consuming task--is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ¶ 10.7 (2003) at pp. 80-83.

[85] Id. at 486.
[86] Id. ar 488.
[87] 268 F.3d 417 (6th Cir. 2000).
[88] Id. at 445-53.
[89] Id. at 445.
[90] Id. at 445.
[91] Id. at 448-449.
[92] Id. at 449. The *Faretta* decision included a lengthy colloquy between the judge and the unrepresented defendant, discussing defendant's independent legal research on exceptions to the hearsay rule, the grounds for challenging a juror for cause, and trial procedure generally under the California Codes. H*Id.* at 811, 95 S.Ct. 2525H. Defendant in *Faretta,* a high-school educated man who had previously represented himself in a criminal prosecution, reasoned that he did not want to be represented by a public defender because that office was overloaded with cases. H*Id.* at 807, 95 S.Ct. 2525H. Defendant in *Faretta* faced a criminal charge of grand theft.
Applying *Faretta* to a capital case, involving a defendant with low intelligence, limited education and an

not excuse trial counsel duty to conduct an independent investigation. The court of appeal found:

> Further, defendant resistance to disclosure of information does not excuse counsel's duty to independently investigate:[93]

The courts finding is in harmony with the general duty to investigate as stated in the standards:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.[94]

A federal district court in Delaware made similar pre-Wiggins findings regarding a failure by counsel to conduct an investigation in *Stevens v. Delaware Correctional Center.*[95] Stevens was convicted of unlawful sexual intercourse in the first degree and sentenced to life in a Delaware state court proceeding.[96] In reviewing the investigation conducted by trial court the noted:

> At the end of the day, Reardon did little more than contact people Stevens and his mother identified. Yet, Reardon knew that he could not rely on Stevens to recount the events of the night in question. An attorney's performance is deficient when he or she fails to conduct any investigation into exculpatory evidence and has not provided any explanation for not doing so. *See* *United States v. Gray,* 878 F.2d 702, 711 (3d Cir.1989) (stating "[i]neffectiveness is generally clear in the context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he

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unsettling past, whose strongest demand for self-representation consisted of "No, I don't" responses when asked if he wanted a pre-sentence investigation and mental evaluation, hollows the Sixth Amendment. Requiring counsel to independently investigate Petitioner's personal background does not "thrust counsel upon the accused, against his considered wish," H*Faretta,* 422 U.S. at 820, 95 S.Ct. 2525,H especially where, as in this case, the record fails to indicate both Petitioner's mitigation preferences and the informed consideration supporting such preferences. In *Faretta,* "the record affirmatively show[ed] that [defendant] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." H*Faretta,* 422 U.S. at 835, 95 S.Ct. 2525H. There is no such record support in this case. Also under *Faretta,* a defendant "must first be 'made aware of the dangers and disadvantages of self-representation.' " H*Martinez v. Court of Appeal of Calif.,* 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000)H (quoting H*Faretta,* 422 U.S. at 835, 95 S.Ct. 2525).H Again, the record offers no indication that Petitioner was so made aware in this case.

[93] Id. at 449-50.

91 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.) subsequently cited with approval by the Supreme Court in Rompila v. Beard, ___ U.S.____, 125 S.Ct. 2456, 2466 (2005).

[95] 152 F.Supp.2d 561 (U.S.Dist.Ct. Delaware (2001).

[96] Id. at 565.

> has not yet obtained the facts on which a such decision could be made") (citing cases); *Sullivan v. Fairman,* 819 F.2d 1382, 1389 (7th Cir.1987) (stating that complete failure to investigate potentially corroborating witnesses can hardly be considered tactical decision) (quotations and ellipses omitted); *see also* ABA Standards for Crim J. 4-4.1 (3d ed.1993) (citing *Strickland*).(f/n omitted) Since Stevens was facing a life sentence and consent was, in Reardon's words, "the only defense possible," the court concludes that Reardon's efforts fell short of minimally acceptable professional standards. For the reasons discussed above, the court finds that the state courts' conclusion to the contrary was unreasonable.[97]

In a footnote the court quotes the commentary to the ABA standards[98] and continues with a detailed factual analysis of the case, including developing theories of defense.[99]

The invocation of the ABA standard does not automatically mean a reversal of a conviction based on a claim of ineffective assistance of counsel. Courts throughout the country routinely reject claims of ineffective assistance.[100]

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[97] Id. at 576-77.

[98] Id. at 577 f/n 22The commentary to the ABA Standards states:
Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial ···· If there were eyewitnesses, the lawyer needs to know conditions at the scene that may have affected their opportunity as well as their capacity for observation. The effectiveness of advocacy is not to be measured solely by what the lawyer does at trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel. *Id.* at Commentary.

[99] Id. at 577-81

[100] Vinson v. True, _____ F.3d. _____, 2005 WL 3434880 (4th Cir. 2005) Vinson argues that his counsel failed to sufficiently investigate the nature and extent of the perjured testimony of a grand jury witness, Priscilla Turner, prior to deciding not to call her as a witness at trial, and that they failed to object to assertedly erroneous statements made by the prosecutor in closing arguments. The state court examined these allegations, determined that Vinson's counsel made these decisions for strategic reasons, and found that neither decision violated the performance or prejudice prong of *Strickland.* On habeas review, a federal court generally credits "plausible strategic judgments in the trial of a state case."H *Bunch v. Thompson,* 949 F.2d 1354, 1364 (4th Cir.1991)H. Of course, we would not regard as tactical a decision by counsel if it made no sense or was unreasonable "under prevailing professional norms." *See* H*Wiggins v. Smith,* 539 U.S. 510, 521-24, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)H. But that is not the case here. The Virginia court also carefully considered Vinson's claims that his counsel did not adequately present the argument that Vinson lacked the requisite intent to defile, did not provide Vinson's court-appointed psychologist, Dr. Schlichter, with adequate information, and failed to investigate and present evidence of Vinson's background for mitigation purposes. The state court rejected these contentions, finding that presenting evidence as to whether Vinson had the requisite intent to defile would have been inconsistent with Vinson's defense that he did not commit the crime at all. The court further found that counsel responded to Dr. Schlichter's requests for information, secured an additional expert witness at the doctor's request, and spoke with him on numerous occasions.
The record also reveals that, "although requested to supply" mitigation information, Vinson and his family failed to do so, but that nevertheless defense counsel independently discovered mitigation evidence. At sentencing, Vinson's counsel presented a mitigation case that included Vinson's school records and favorable testimony from Vinson's mother, his step-father, two court-appointed expert witnesses, a previous employer, Vinson's high school band leader, a parole officer, and a church leader. The case at hand thus

The evolving use of the ABA standards may have heightened the scrutiny courts use in evaluating counsel's performance over the years but the *Strickland* test is still criticized for setting the "constitutional and ethical safeguards too low."[101] Eliminating

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stands in stark contrast to *Wiggins,* on which Vinson heavily relies. There, the Court found constitutionally ineffective counsel who relied *solely* on three documents and failed to investigate further or present *any* mitigation evidence on the defendant's background despite information in these documents that could have been used to uncover helpful mitigation information. H*Wiggins,* 539 U.S. at 523-26H; Roberts v. Dretke, 381 F.3d 491, 498-99 (5th Cir.2004) To establish a claim of ineffective assistance of counsel a petitioner must establish that his trial counsel provided deficient performance, such that it was below an "objective standard of reasonableness," and that he was prejudiced by that deficient performance, such that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." H*Strickland v. Washington,* 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)H. "[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." H*Id.* at 691, 104 S.Ct. 2052H.
"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." *Id.* Trial counsel provides deficient performance if he fails to investigate a defendant's medical history when he has reason to believe that the defendant suffers from mental health problems. *See H*Bouchillon v. Collins,* 907 F.2d 589, 597 (5th Cir.1990)H ("It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable'***499** after counsel has notice of the client's history of mental health problems."); H*Profitt v. Waldron,* 831 F.2d 1245, 1248-49 (5th Cir.1987)H (holding that counsel has duty to investigate mental health history of defendant who has been committed to a mental institution); H*Beavers v. Balkcom,* 636 F.2d 114, 116 (5th Cir.1981)H (holding that counsel has duty to obtain medical records and speak with treating physicians). Further, seeking the aid of a court-appointed psychiatrist, in some circumstances, does not excuse the absence of further investigation. *See H*Profitt,* 831 F.2d at 1249H (finding that relying on opinion of court-appointed psychiatrist was not sufficient when counsel knew that defendant had escaped from a mental institution). State v. Mathews,133 Idaho 300, 307, 986 P.2d 323, 329(Idaho1999) Mathews's principle contention in arguing that his counsel's performance was deficient is that he failed to properly investigate the circumstances surrounding the signing of the Henry residence warrant. Counsel in a criminal case has a duty to conduct adequate investigation. *See H*Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695;*H* H*Kimmelman v. Morrison,* 477 U.S. 365, 384, 106 S.Ct. 2574, 2587, 91 L.Ed.2d 305, 325 (1986)H. Mathews points out that the *Strickland* Court referred to the "[p]revailing norms of practice as reflected in American Bar Association [ABA] standards and the like" as guides for determining what is reasonable. H*Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065, 80 L.Ed.2d at 694H. The Court also stated that:
[ABA Standards] are guides, ... but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take a[ccount of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.
H*Id.* at 688-89, 104 S.Ct. at 2065, 80 L.Ed.2d at 694H.
The ABA standards require defense counsel to:
conduct a prompt investigation of the circumstances of the case and to explore all avenues.... The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.
ABA STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Rule 4-4.1 (2d ed.1986).
The Supreme Court in *Strickland* also stated that "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 the circumstances, applying a heavy measure of deference to counsel's judgments." H*Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695H.

[101] Myrna S. Raeder, Andrew E. Taslitz, Paul C. Giannelli, Convicting the Guilty, Acquitting the Innocent-Recently Adopted ABA Policies, 20 Crim. Justice 4, 16-18 (Winter 2006).

the Strickland requirement that a "court must indulge a strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance"[102] is one step the court may wish to take in order to focus more closely on counsel's performance. Looking at the language of *Williams,*[103] *Wiggins*[104] and *Rompella*[105] the Court may have defacto abandoned the presumption in favor of a detailed factual analysis of the alleged breach of duty. The abandonment of the presumption is well justified.

Evolving ABA Defense Standards

In 2004 the American Bar Association Standing Committee on Legal Aid and Indigent defense outlined the minimum steps defense counsel should take to adequately represent clients charged with a crime.[106] The Committee found that defense counsel should:

1. Keep abreast of substantive and procedural criminal law in the jurisdiction.[107]
2. Avoid unnecessary delays and control workload to permit the rendering of quality representation.[108]
3. Attempt to secure pretrial release under condition most favorable to the client.[109]
4. Prepare for a pretrial interview with the client.[110]
5. Seek to establish a relationship of confidence and trust form the client and adhere to ethical confidentiality rules.[111]
6. Secure relevant facts and background from the client as soon as possible.[112]
7. Conduct a prompt and thorough investigation of the circumstance of the case and all potentially available legal claims.[113]
8. Avoid conflicts of interest.[114]

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[102] Strickland v. Washington, 466 U.S. at 689.
[103] 529 U.S. 362, 395, 120 S.Ct. 1495, 1514 (2000).
[104] 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).
[105] ___ U.S.____, 125 S.Ct. 2456 (2005).
[106] Gideon's Broken Promise: America's Continuing Quest for Equal Justice, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings. (December 2004).
[107] Gideon's Broken Promise: America's Continuing Quest for Equal Justice, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings, 15 citing Nat'l Legal Aid and Defender Ass'n, Performance Guidelines fro Criminal Defense Representation Guideline 1.2 (1995[hereinafter NLADA, Performance Guidelines; ABA Death Penalty, note 41, Guideline 5.1 (December 2004).
[108] Id. citing ABA, Defense Function, note 130 Standard 4-1.3.
[109] Id. citing NLADA, Performance Guidelines, note 131 Guideline 2.1.
[110] Id. citing NLADA, Performance Guidelines, note 131 Guideline 2.2.
[111] Id. citing ABA, Ten Principles, note 42 Principle 4; ABA Defense Function, note 130 Standard 4-3.1; Nat'l Study Comm'n. note 42, Guideline 5.10.
[112] Id citing ABA Defense Function, supra note 130, Standard 4-3.2; NLADA, Performance Guidelines, supra note 131 Guideline 2.2; ABA Death Penalty, supra note 41 Guideline 10.5.
[113] Id. citing ABA Defense Function, supra note 130, Standard 4-4.1; ABA Death Penalty, supra note 41 Guideline 10.7, 10-8; NLADA, Performance Guidelines, supra note 131 Guideline 4.1; See also Wiggins v. Smith, 539 U.S. 510 (2003).
[114] Id. citing ABA Defense Function, supra note 130, Standard 4-3.5; NLADA, Performance Guidelines, supra note 131 Guideline 4-1.3.

9. Undertake prompt action to protect the rights of the accused at all stages of the case.[115]
10. Keep clients informed of developments and progress in the case.[116]
11. Advise the client on all aspects of the case.[117]
12. Consult with the client on decisions relating to control and direction of the case.[118]
13. Adequately prepare for trial and develop and continually reassess a theory of the case.[119]
14. Explore disposition without trial.[120]
15. Explore sentencing alternatives.[121]
16. Advise the client about the right to appeal.[122]

Most of committee recommendations appear to follow a common sense approach to criminal defense practice. It should be assumed by the judiciary that most lawyers would adhere to these recommendation unfortunately the committee made findings that indicate there are system wide failures throughout the United States.

The committee through various witnesses and documentary evidence that the practice of providing defense counsel fell short in several aspects. The report issued by the committee cited “Meet ‘em and Plead ‘em” Lawyers;[123] Incompetent and Inexperienced Lawyers;[124] Excessive Caseloads;[125] Lack of Contact with Clients and Continuity in Representation;[126] Lack of Investigation, Research, and Zealous Advocacy;[127] Lack of Conflict-Free Representation;[128] and Ethical Violations of Defense Lawyers.[129]

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[115] Id. citing ABA Defense Function, supra note 130, Standard 4-3.6; NLADA, Performance Guidelines, supra note 131 Guideline 5.1, 5.2, 5.3.
[116] Id. citing ABA Defense Function, supra note 130, Standard 4-3.8, 4-6.2; NLADA, Performance Guidelines, supra note 131 Guideline 6.3.
[117] Id. citing ABA Defense Function, supra note 130, Standard 4-5.1; NLADA, Performance Guidelines, supra note 131 Guideline 6.4.
[118] Id. citing ABA Defense Function, supra note 130, Standard 4-5.2; NLADA, Performance Guidelines, supra note 131 Guideline 6.1, 6.3.
[119] Id. citing NLADA, Performance Guidelines, supra note 131 Guideline 4.3, 7.1; ABA Death Penalty, supra note 41 Guideline 10.10.1.
[120] Id. citing ABA Defense Function, supra note 130, Standard 4-6.1; NLADA, Performance Guidelines, supra note 131 Guideline 6.1, 6.2.
[121] Id. citing ABA Defense Function, supra note 130, Standard 4-8.1; NLADA, Performance Guidelines, supra note 131 Guideline 8.1-8.7; ABA Death Penalty, supra note 41 Guideline 10.11-10.12.
[122] Id citing ABA Defense Function, supra note 130, Standard 4-8.2; NLADA, Performance Guidelines, supra note 131 Guideline 9.2; ABA Death Penalty, supra note 41 Guideline 10.14.
[123] Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice, A Report on the American Bar Association’s Hearings on the Right to Counsel in Criminal Proceedings. P. 16 (December 2004).
[124] Id. p-16-17.
[125] Id. p. 17.
[126] Id. p. 18.
[127] Id. p. 19.
[128] Id. p. 19.
[129] Id. p. 20.

After these findings the questions become after these findings why do these problems exist and what can be done? As previously stated the courts are using ABA standards to evaluate defense counsels performance so the problem isn't the lack of standards, it is the bench and the bars lack of enforcement of standards.

Ethics Enforcement

The ABA standards are corollaries to the ABA Model Code of Professional Responsibility. The standards reference the Model Code as a related standard.[130] An example is the Duty to Investigate referred to in the above section [131] that cites the Model Code . Ethical Considerations of the ABA Model Code provides that "a lawyer should act with competence and proper care in representing clients."[132] In addition to the Model Code the Model Disciplinary Rules provide that:

> A lawyer shall not :
> …..
> (2) Handle a legal matter without preparation adequate in the circumstances
> (3) Neglect a matter entrusted to him.[133]

Several jurisdictions have suspended attorneys for neglecting client's criminal cases.

In the case of *In Re Miller* the Indiana Supreme Court suspended an attorney's license for 60 days.[134] The suspension was based on a violation of three findings of misconduct. The first was for neglecting a defendant's case who was charged with armed robbery.[135] On April 6, 1999 the attorney entered an appearance.[136] The defendant was incarcerated but the attorney did not meet with the client until February of 2000 at the client's second court appearance.[137] At the time the attorney promised to meet with the client within two weeks. The visit did not occur.[138] The defendant pled guilty to burglary and robbery and received a nine year sentence, four of which were suspended.[139]

The second incident involved a client who was charged with residential entry.[140] The attorney entered an appearance on October 29, 2000.[141] The client was unable to contact the attorney and the attorney failed to appear at a pretrial conference.[142] At

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131 ABA Defense Function, Standard 4-4.1

132 ABA Compendium of Professional Responsibility Rules and Standards, Cannon 6, EC 6-1 p.239 (2004).

133 ABA Compendium of Professional Responsibility Rules and Standards, Disciplinary Rules, DR 6-101 p.240 (2004).

134 In Re Miller, 759 N.E. 2d 209, 212 (Indiana 2001).

135 Id. at 211.

136 Id.

137 Id.

138 Id.

139 Id.

140 Id.

141 Id.

142 Id.

another hearing on June 6, [2001][143] the client plead guilty to a charge and received credit for time served.[144]

The third violation was that the attorneys never responded to the disciplinary commission.[145]

The Supreme Court of Tennessee upheld the suspension of attorney's license for two years.[146] The court found the attorney, who had never represented anyone who was charged with a felony, accepted a client charge with first degree murder.[147] The court found the attorney did not talk to witnesses, including potential alibi witnesses, and did not attempt to discover the case the state was going to present.[148] The court also concluded the attorney did not understand the rules of criminal procedure.[149] Astonishingly the attorney filed an answer and amended answer to the murder indictment.[150] In the amended answer the attorney detailed the clients version of the offense without determining whether the client had made a previous statement to the police.[151] The court notes that without the statement in the amended answer the state "would have difficulty getting by the 'directed verdict' stage in any trial on the indictment."[152] The court went on describing two other civil cases mishandled by the attorney.[153]

In a variant of the "meet 'em and plead 'em" theme a Wisconsin attorney was retained to represent a client who had been convicted and sentenced on a sexual assault case where the state was seeking to commit the client as sexually violent person.[154] The attorney never had represented clients subject to commitment under the sexually violent person provision of the Wisconsin statutes.[155] The attorney did not explore the factors used by the state to determine who would qualify for commitment pursuant to the statute.[156] Also the attorney did not seek experts who could evaluate the client even thought the statute provided for court appointed experts and the client's mother had offered to pay to retain an expert.[157] What the attorney did do was to appear on the trial

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[143] Id. The court attributes the June 6 hearing to the year 2000. This of course would be impossible giving the attorney's appearance in October of 2000. The author assumes the court meant June 6, 2001.
[144] Id.
[145] Id. at 210.
[146] Office of Disciplinary Counsel v. Henry, 664 S.W.2d 62, 64-65 (Tenn. 1983)
[147] Id. 62-63.
[148] Id. at 63.
[149] Id. The attorney filed motions based on statutes that were superseded by the Rules of Criminal Procedure.
[150] Id.
[151] Id.
[152] Id.
[153] Id. 63-64.
[154] Office of Lawyer Regulation v. Dumke, 635 N.W.2d 594, 595-96 (Wisconsin 2001).
[155] Id. 596-97.
[156] Id.
[157] Id. The explanation tendered by the attorney was that he did not want to retain an expert because he might bolster the states case. This was rejected by the court since the expert would not have disclose unfavorable results unless the expert testified. Id. at 597.

date, waived his right to trial and admitted the allegations by the state.[158] Subsequently the attorney stipulated to being confined to a mental health facility.[159] The Wisconsin Supreme Court suspended the lawyer's license for two years.[160]

The Court of Appeals in Maryland suspended an attorney's license for three years based on various forms of neglect in four cases.[161] In the first case the lawyer represented a client charged with criminal assault and use of handgun.[162] The client was convicted at trial and sentenced to a five year term of incarceration.[163] The conviction was ultimately set aside in Post Conviction Relief hearing where the state conceded the attorney had provided ineffective assistance.[164] The court found trial counsel had failed to:

> "a. Meet with and go over possible defense strategies with his client;
> "b. Pursue a motion to suppress evidence that may have been illegally obtained;
> "c. Present evidence in support of an intoxication defense that may have been available to his client;
> "d. Prepare adequately to cross-examine the State's witnesses;
> "e. Prepare and submit voir dire;
> "f. Prepare and request specific jury instructions applicable to the charges in the case; and
> "g. Object to possibly improper jury instructions prejudicial to his client.[165]

In the subsequent disciplinary proceedings the court found the attorney had violated Maryland's Disciplinary Code by failed to provide competent[166] representation and had "engage[d] in conduct that is prejudicial to the administration of justice."[167]

In the second case cited by the Maryland Court of Appeals the attorney undertook representation of a client charged with first degree rape in October of 1997.[168] In April of 1998 on the day of trial counsel had not filed any discovery requests or pretrial motions and moved for a continuance complaining of a physical ailment.[169] The court

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[158] Id. at 596.
[159] Id.
[160] Id. at 598.
[161] Attorney Grievance Commission of Maryland v. Middleton, 756 A.2d 565, 574 (Maryland 2000).
[162] Id. at 568.
[163] Id.
[164] Id.
[165] Id. These findings were made by a Judge in a Bar Proceeding and subsequently adopted by the Maryland Court of Appeals.
[166] Id. f/n 1Rule 1.1 "Competence," provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
[167] Id. f/n 2. Section (d) of Rule 8.4, "Misconduct," provides: "It is professional misconduct for a lawyer to ··· engage in conduct that is prejudicial to the administration of justice[.]"
[168] Id. at 569
[169] Id.

continued the case but removed the attorney from the case.[170] In the disciplinary proceeding the court found the lawyer failed to act with diligence.[171]

The third case involved a misrepresentation to a judge regarding an appearance in other court in order to obtain a continuance.[172] Upon checking the judge determined the representation was false.[173] This precipitated a Criminal Contempt action being filed that resulted in an 18 month suspended sentence with a number of conditions of probation being imposed including the surrender of the attorney's law license for one year.[174] In the disciplinary case the court concluded the lawyer engaged in misconduct by knowingly making a false statement to the court.[175]

In the fourth case involving a client charged with possession and intent to distribute cocaine the attorney failed to appear for a scheduled trial.[176] Finally the attorney failed to respond to the bar complaints.[177]

By enforcing ethical rules through attorney disciplinary proceedings would send a powerful message to lawyers.

Prosecutorial Non-Disclosure and Misconduct

The case of *Kyles v. Whitley*[178] presented the court with a prosecutorial failure to disclose evidence.[179] In its opinion the court states the constitutional standard for prosecutorial misconduct for non disclosure is lesser than ABA standards.[180] The fact the court cites the ABA standards lends weight to the argument that both prosecutors and defense counsel who practice outside of their parameters do so at their own peril.

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170 Id.

171 Id. f/n 3 Rule 1.3, "Diligence," provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

172 Id. 569-70.

173 Id. 570.

174 Id. 570.

175 Id. f/n 5 Section (a)(1) of Rule 3.3, "Candor toward the tribunal," provides: "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal [.]"

176 Id. 571.

177 Id. 571.

178 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (6th Cir. 1995).

179 514 U.S. 419,432-36, 115 S.Ct. 1555, 131 L.Ed.2d 490 (6th Cir. 1995).

180 Id. at 437. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in H*Bagley*H (and, hence, in H*Brady)*H requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

In *Darden v. Wainwright* a majority of the court condemned the prosecutor's final argument[181] but did not find the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[182] In a dissenting opinion Justice Blackman moves to ABA standards as benchmark to measure the prosecutor's remarks in final argument.[183] The dissent identifies three ABA standards:

1. "A lawyer shall not ... state a personal opinion as to ... the credibility of a witness ... or the guilt or innocence of an accused." Model Rules of Professional Conduct, Rule 3.4(e) (1984); see also Code of Professional Responsibility, DR 7-106(C)(4) (1980); ABA Standards for Criminal Justice: 3-5.8(b) (2d ed. 1980).[184]

2. "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." ABA Standards for Criminal Justice 3-5.8(d) (2d ed. 1980); cf. Model Rules of Professional Conduct, Rule 3.4(e); Code of Professional Responsibility, DR 7- 106(C)(7); ABA Standards for Criminal Justice 3-6.1(c) (2d ed. 1980).[185]

3. "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." ABA Standards for Criminal Justice 3-5.8(c) (2d ed. 1980).[186]

The dissent concludes the prosecutor's argument was a "calculated and sustained attempt to inflame the jury."[187]

In *United States v. Young* the court turned to the ABA guidelines to measure prosecutorial misconduct in evaluating a prosecutor's final argument.[188] The prosecutor

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[181] Darden v. Wainwright,477 U.S. 168, 180-81, 106 S.Ct. 2464,2471(1986)The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred.HH (f/n omitted) Some comments implied that the death penalty would be the only guarantee against a future similar act. (f/n omitted) Others incorporated the defense's use of the word "animal." (f/n omitted)Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case. (f/n omitted) These comments undoubtedly were improper. But as both the District Court and the original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." H*Darden v. Wainwright,* 699 F.2d, at 1036H.

[182] Id. at 81. citing H*Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)H.

[183] Darden v. Wainwright,477 U.S. 168, 189-190, 106 S.Ct. 2464, 2475 (1986) (Blackman dissenting) The following brief comparison of established standards of prosecutorial conduct with the prosecutors' behavior in this case merely illustrates, but hardly exhausts, the scope of the misconduct involved:

[184] Darden v. Wainwright,477 U.S. 168, 191, 106 S.Ct. 2464, 2476 (1986)(Blackman dissenting).

[185] Darden v. Wainwright,477 U.S. 168, 191-92, 106 S.Ct. 2464, 2477 (1986)(Blackman dissenting).

[186] Darden v. Wainwright,477 U.S. 168, 192, 106 S.Ct. 2464, 2477 (1986)(Blackman dissenting).

[187] Darden v. Wainwright,477 U.S. 168, 193, 106 S.Ct. 2464, 2478 (1986)(Blackman dissenting).

[188] 470 U.S. 1,8, 105 S.Ct. 1038, 1042 (1985).

argued in his opinion the defendant was guilty and the jury should do its job.[189] The court states:

> The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, [FN3] and the federal courts, [FN4] have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980). [FN5]
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> FN3. See, *e.g.,* ABA Model Code of Professional Responsibility DR 7- 106(C) (1980), which provides in pertinent part:
> "In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> * * *
>
> "(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
>
> "(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to matters stated herein."
>
> See also ABA Model Rules of Professional Conduct, Rule 3.4(e) (1984).
>
> FN4. See, *e.g., United States v. DiPasquale,* 740 F.2d 1282, 1296 (CA3 1984); *United States v. Maccini,* 721 F.2d 840, 846 (CA1 1983); *United States v. Harrison,* 716 F.2d 1050, 1051 (CA4 1983); *United States v. Bagaric,* 706 F.2d 42, 58-61 (CA2 1983); *United States v. West,* 680 F.2d 652, 655-656 (CA9 1982); *United States v. Garza,* 608 F.2d 659, 665-666 (CA5 1979).
>
> FN5. The remaining text of ABA Standards for Criminal Justice 3-5.8 (2d ed. 1980) provides:
>
> "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> * * *

[189] 470 U.S. 1,5, 105 S.Ct. 1038, 1041 (1985).

"(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

"(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

"(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds."

The accompanying commentary succinctly explains one of the critical policies underlying these proscriptions:

"Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *Id.,* at 3.89.[190]

Iowa has used the ABA standards regarding prosecution final arguments and cross examination. In *State v. Graves*, the Iowa Supreme Court reversed a conviction based in part on the prosecutors cross examination.[191] During the trial the prosecutor asked the defendant whether a prior witness was telling the truth.[192] The court held:

> We also think the use of this tactic--asking the defendant whether another witness is lying--is incompatible with the duties of a prosecutor. Unfairly questioning the defendant simply to make the defendant look bad in front of the jury regardless of the answer given is not consistent with the prosecutor's primary obligation to seek justice, not simply a conviction. Nor is such questioning consistent with the prosecutor's duty to the defendant to ensure a fair trial, including a verdict that rests on the evidence and not on passion or prejudice.(footnote omitted)[193]

The court also condemned the prosecutor’s final argument.

> In addition to the misconduct identified by appellate counsel, we also note other statements made by the prosecutor in his rebuttal argument that exacerbated the situation. *See generally* *Freeman v. State,* 717 So.2d 105, 106 (Fla.Dist.Ct.App.1998) (stating that comment not by itself prejudicial may still contribute to overall effect of prosecutorial misconduct). First, the county attorney referred to defense counsel's argument that there was no proof the scales were used in a drug operation because there was no residue identified on the scales as a "smoke screen." *See* *Sanchez,* 176 F.3d at 1225 (stating "prosecutor committed

[190] 470 U.S. 1,8, 105 S.Ct. 1038, 1042 (1985).
[191] 668 N.W.2d 860, 871-74 (Iowa 2003).
[192] Id. at 873.
[193] Id. at 873.

misconduct in ... denigrating the defense as a sham"). He also impermissibly attempted to enhance Steil's credibility. In discussing "who is telling the truth," the prosecutor stated, "Officer Steil's stake is what? His pride. *He's going to have a job whether he wins this case or loses this case. He will continue to work for the Oskaloosa Police Department.*" (Emphasis added.) These comments went beyond any evidence in the case, implying that the prosecutor knew something the jurors did not. *See* *Boyd,* 54 F.3d at 871 (holding prosecutor improperly vouched for police witnesses when she indicated in closing argument officers would not risk their careers by lying, because this argument relied on evidence not in the record); *Davis v. State,* 663 So.2d 1379, 1381 (Fla.Dist.Ct.App.1995) (holding prosecutor's argument that police officers had nothing to gain by lying because to do so would put their jobs in jeopardy was impermissible attempt to enhance officers' credibility and was not supported by evidence in the record; court reversed defendant's conviction). Similarly, as we have already discussed, the county attorney improperly vouched personally against the credibility of Graves' testimony.[194]

[194] Id. at 879.