Doctoring Up the Capital Defense System: Raising the Standards for Louisiana's Death Penalty Lawyers

Julie Hayes Kilborn
Doctoring Up the Capital Defense System: Raising the Standards for Louisiana’s Death Penalty Lawyers

INTRODUCTION

Serious questions are being raised about whether the death penalty is being fairly administrated in this country. If statistics are any indication, the system may well be allowing some innocent defendants to be executed.

—Supreme Court Justice Sandra Day O’Connor

There are currently ninety-two inmates sitting in silence on death row at Louisiana State Penitentiary, Angola, Louisiana. The majority of those inmates were represented at trial by court-appointed counsel because of their indigency. At least 192 additional indigent capital defendants are awaiting trial in Louisiana. As early as 1932, the United States Supreme Court held that where a criminal defendant stands “in deadly peril” of his life, the notions of due process mandate the appointment of counsel to represent him. Over two decades later, the Court again held that death is different: “[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.” After almost another two decades, the Court reaffirmed this declaration, holding that “the penalty of death is qualitatively different from a sentence of imprisonment, however long.” The Court explained that “[d]eath, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two.” Though the members of the Court have changed through the years, the opinion of the Court that death is different has remained constant. This difference between capital

Copyright 2004, by LOUISIANA LAW REVIEW

5. Reid v. Covert, 354 U.S. 1, 45–46, 77 S. Ct. 1222, 1245 (1957) (on rehearing) (Frankfurter, J., concurring).
7. Id.
punishment and any other criminal sanction commands a "qualitatively" raised standard for the attorneys representing the defendants whose lives are in "deadly peril."

This article will address the woefully inadequate standards of competency currently required of appointed capital defense counsel in Louisiana. Because death is different, different standards are not only appropriate, but mandated. Part I of this article explores the extent of the problems relating to ineffective assistance of counsel in capital cases, including the defendant's burden in proving ineffectiveness. Part II explains the current standards for capital defense counsel as recommended by the American Bar Association and contrasts those with Louisiana's current competency standards. Part III of this article examines the complex responsibilities held by an attorney representing a capital defendant. Part IV explores the specialized training of a surgeon as well as the specialized form of review of medical malpractice claims. Finally, Part V parallels the critical and complex nature of a surgeon's responsibilities to that of capital defense counsel and recommends a completely new scheme for Louisiana in death penalty cases.

I. THE MAGNITUDE AND SCOPE OF THE PROBLEM

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. . . . 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.

—Supreme Court Justice Harry A. Blackmun

8. This article will address only standards of counsel as they apply to indigent defendants. This article will not address issues of funding or counsel compensation in capital cases. But see James S. Liebman et al., A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It 370–71 (2002) [hereinafter Liebman, Broken System] ("The main reason inexperienced, unskilled and untrained lawyers are often the only ones who seek capital trial assignments—the most demanding assignments lawyers can receive—and the main reason the performance of even conscientious appointed capital lawyers is often below par, is the low level of compensation and reimbursement for expenses [investigators, mental health exams, DNA testing and the like] that is available in most states. Because funds for capital trial lawyers and for necessary support services often come out of state court operating budgets, it is not surprising that our aggregate-level analyses reveal a link between financially strapped state courts and high rates of capital error.") (emphasis omitted).

A. The Extensiveness of Ineffectiveness

Every criminal defendant has a constitutional guarantee to the "assistance of counsel for his defence,"\textsuperscript{10} "not for [his] own sake, but because of the effect it has on the ability of the accused to receive a fair trial."\textsuperscript{11} Likewise, the Louisiana Constitution guarantees a fair trial to every person charged with a crime in Louisiana.\textsuperscript{12} These constitutional mandates of the assistance of counsel and a fair trial require that each capital conviction be reviewed before the sentence can be executed. Death sentences take years to carry out. The average capital convict in Louisiana sits on death row for six years before execution.\textsuperscript{13} Delays include direct appeal,\textsuperscript{14} state post-conviction proceedings,\textsuperscript{15} and federal habeas corpus claims.\textsuperscript{16} At some point in this process, the convicted capital defendant almost always raises an ineffective assistance of counsel claim. Much time and judicial resources are expended in reviewing these claims post-trial.\textsuperscript{17} Unfortunately, the defendant's burden of proof in ineffective assistance claims is obscure.\textsuperscript{18}

\textsuperscript{10} U.S. Const. amend. VI.


\textsuperscript{12} La. Const. art. I, § 16 ("Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf.").

\textsuperscript{13} Liebman, Broken System, supra note 8, Figure 17.

\textsuperscript{14} See La. Const. art. 5, § 5(D)(2); La. Code Crim. P. art. 905.9; Louisiana Sup. Ct. R. XXVIII.

\textsuperscript{15} See La. Code Crim. P. art. 924, et seq.

\textsuperscript{16} See 28 U.S.C. § 2254 (2003), et seq.

\textsuperscript{17} Liebman, Broken System, supra note 8, at 173 ("As backlogs of capital verdicts awaiting review increase, the number reviewed—and thus the number available to be and that actually are reversed—decreases sharply. At some point—about where the backlog of unreviewed verdicts reaches 20—the system appears to shut down, with virtually no cases being reviewed or reversed. This suggests that as the number of death verdicts awaiting review increases, they so clog the appellate system that it ceases to function as a means of moving valid death verdicts forward to execution and for diverting flawed verdicts back for retrials. In that event, unclogging the system would require fewer death verdicts, fewer flaws demanding extended review, or both.") (emphasis omitted).

\textsuperscript{18} See Anthony Lewis et al., The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases, 31 Hous. L. Rev. 1105, 1110 (1994) ("With its Strickland decision in 1984, the Court virtually said that anything done by a defense lawyer will be regarded as constitutionally adequate.") (citation omitted).
In *Strickland v. Washington,*\(^{19}\) the United States Supreme Court delineated two requirements for a successful claim of ineffective assistance of counsel. First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel erred so seriously that counsel was not functioning as the "counsel" which the Sixth Amendment guarantees. Second, the defendant must show that the deficient performance prejudiced the defense. Satisfying this second prong requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial—a trial whose result is reliable.\(^{20}\) Thus, *Strickland* requires counsel's assistance to be effective and further holds that assistance which is ineffective in preserving fairness does not meet the constitutional mandate.\(^{21}\) The United States Supreme Court has also recognized that "the right to counsel is the right to the effective assistance of counsel."\(^{22}\) Accordingly, merely having an attorney by the defendant's side during trial fails to satisfy the guarantees of the Sixth Amendment. For a *Strickland* claim to prevail, the defendant must prove that "but for counsel's unprofessional errors, there is a reasonable probability that the sentencer would have weighed the balance of aggravating and mitigating factors to find that the circumstances did not warrant the death penalty."\(^{23}\)

The long line of cases interpreting *Strickland* reflects various attitudes, viewpoints, and ideas about what constitutes ineffective assistance of counsel. All of these various attitudes, viewpoints, and ideas aside, one simple truth remains: ineffectiveness does exist in defense counsel. And regardless of the legal test used, that ineffectiveness prejudices the very defendant that the Sixth Amendment was written to protect. Studies by The Innocence Project reveal that of the first seventy recent DNA exonerations, bad lawyering was a common factor that led to wrongful conviction in twenty-three of those cases,\(^{24}\) or thirty-two percent. Another comprehensive study shows that egregiously incompetent defense lawyering accounts for thirty-seven percent of state post-conviction

reversals.\textsuperscript{25} Other extensive research has found that the reversal rate due to incompetent lawyering is as high as forty percent.\textsuperscript{26}

On ineffectiveness, Justice Johnson of the Texas Court of Criminal Appeals recently described the pitfalls of the criminal justice system by pointing out that before appellate review, neither criminal defendants, trial judges, nor opposing counsel can stop an ineffective performance by defense counsel. He noted that following trial, "even if we as appellate justices believe in good conscience that we have identified an ineffective performance, we are unable to satisfy the standard of review imposed upon us . . . The bar has no effective program to identify, mentor, or eliminate ineffective defense counsel."\textsuperscript{27} The problem lies not just in the competency of trial counsel but also in applying the standard of review at the appellate, post-conviction, and habeas levels. Nonetheless, the problem begins at the trial level. In his June 18, 2002 testimony before the United States Senate Committee on the Judiciary, Barry Scheck, co-founder of The Innocence Project at the Benjamin N. Cardozo School of Law, Yeshiva University, stated, "[N]othing guarantees the conviction of the innocent more than incompetent, ill-trained, or ineffective defense counsel."\textsuperscript{28}

Applying the statistical research of reversals for ineffectiveness to the current number of Louisiana death row inmates, over one-third of those currently sitting on death row will most likely have their convictions overturned because of the ineffectiveness of their counsel. Assuming all 192 currently awaiting trial are convicted and sentenced to death, over two-thirds of those could ultimately be reversed due to bad lawyering.

\textbf{B. Ineffective Assistance of Counsel Claims in Other States}

Not only are the reversal rates high for ineffective assistance of counsel claims, but the statistics reveal even more. The Table in Appendix A shows that in thirty capital case opinions rendered in the previous five years by state and federal courts wherein either a reversal was ordered based upon the ineffective assistance of counsel

\begin{itemize}
\item \textsuperscript{26} Liebman, Broken System, \textit{supra} note 8, at 414.
\item \textsuperscript{28} Protecting the Innocent: Proposals to Reform the Death Penalty: Testimony, United States Senate, Committee on the Judiciary (June 18, 2002) (\textit{statement of Barry Scheck}), \textit{available at} http://judiciary.senate.gov/print_testimony.cfm?id=290&wit_id=663 (last visited Feb. 1, 2004).
\end{itemize}
or a remand for an evidentiary hearing was ordered, in ninety-seven percent of the cases counsels' errors could have been avoided with additional education and training. As reflected by the Chart in Appendix A, twenty-one (or seventy percent) of the thirty cases were reversed or remanded based on trial counsel's failure to investigate or adequately present mitigating evidence in the penalty phase. In each of these twenty-one cases, mitigating evidence was either abundant and available, or counsel simply failed to look for it. Specifically, in Simmons v. Luebbers, evidence existed that the defendant's father had a drinking problem and beat the defendant's mother in front of the defendant. The defendant had an IQ of 83 and would urinate on himself prior to beatings because he was so scared. As a result, he ran away from home at the age of twelve and was assaulted, possibly raped. The defendant also frequently witnessed street violence in his impoverished neighborhood. Rather than presenting any of this evidence, Simmons's counsel merely introduced the testimony of Simmons's mother, who stated that she loved her son and would draw value from a continued relationship with him. It is no wonder, with a presentation such as this, that the jury recommended the death sentence. Even more alarming is the case of Abdur' Rahman v. Bell. There, trial counsel failed to investigate or present any mitigating evidence despite its availability and abundance. Specifically, in addition to family and personal histories of mental illness and voluminous mental health records, evidence adduced at the habeas hearing showed that the defendant suffered severely at the hands of his father who regularly beat the defendant with a leather strap. Defendant's father "made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat." As punishment for smoking, the defendant's father required him to eat a pack of cigarettes, and when defendant vomited, he was made to eat the vomit. The habeas court found that none of this extraordinary abuse, which clearly constitutes relevant

29. This sample of cases was obtained by running the following query on the Westlaw database of all state and federal cases: sy((capital /3 crime punishment offense murder) "death penalty" /p ineffective /5 counsel attorney lawyer).
31. 299 F.3d at 936.
32. Id. at 937.
mitigating evidence, was heard by the jury and that "[t]his was a grave omission by defense counsel." 35

In eight (or twenty-seven percent) of the thirty cases reviewed, counsel failed to investigate or adequately present guilt-phase evidence or made other trial-related legal errors. These errors included failing to read the juror questionnaires until after trial, where one juror's questionnaire indicated an automatic vote for death after conviction, 36 as well as failing to properly advise the defendant about the law regarding a guilty plea. 37 In other cases, counsel advised the defendant based on an erroneous interpretation of the law, 38 failed to investigate the validity of or object to the use of defendant’s prior convictions offered for enhancement purposes, 39 and failed to investigate or present a potential alternative defense despite evidence in counsel’s possession that supported the alternative theory, presenting rather a defense in which counsel had no belief. 40

C. Ineffective Assistance of Counsel Claims in Louisiana

The most recent Louisiana capital case wherein a reversal was granted because the defendant received ineffective assistance of counsel is State v. Hamilton. 41 In the penalty phase of Hamilton’s trial, defense counsel made no opening statement, presented no evidence, and presented no witnesses. While the defendant’s life hung in the balance, trial counsel’s only penalty phase presentation was a 143-word closing argument in which he suggested that the defendant had mental health problems and in which he reminded the jurors of their promise to deliberate in determining a penalty. 42

35. Id. at 1098.
39. Ex parte Patterson, 969 S.W.2d 16 (Tx. Crim. App. 1998).
40. Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001).
41. 699 So. 2d 29 (La. 1997).
42. Defense counsel made the following closing argument:
May it please the Court. Ladies and gentlemen of the jury, Mr. Henry [district attorney] has suggested that you should have your minds made up about the penalty. If you do then I will have failed miserably in the jury selection process. Each of you promised me that you would deliberate and consider again in determining a penalty if the trial went into that phase. I now ask each of you to honor that promise.
William Hamilton has a long history of mental illness, all of his life he’s been sick. Three years in a Texas insane asylum. Two doctors who testified that he is a schizophrenic. He’s certainly laboring under a serious, serious disease. The District Attorney has pointed out his past transgressions. He has suggested that vengeance is a reason for imposing
Hamilton’s trial was in 1992, well before the Louisiana Supreme Court authorized the promulgation and implementation of certification standards for defense counsel in Louisiana capital cases.

Since Hamilton, no Louisiana reviewing court has reversed a capital conviction or sentence because of ineffectiveness of counsel. Although a logical conclusion one could draw from this fact is that the current certification scheme has cured ineffectiveness problems, the author submits that just the opposite has occurred. Ineffectiveness still exists, even in counsel who are “certified” under the current Supreme Court rules. The reviewing courts, however, use Strickland as a scapegoat, holding that either the actions of counsel were strategic and therefore not negligence, or that the complaining defendant failed to make the required showing that the actions or inactions of counsel prejudiced the defendant.

For example, in Haynes v. Cain, defendant’s appointed counsel conceded to the jury in his opening statement that the defendant had kidnapped, raped, and robbed the victim, but that the defendant was guilty of second degree, rather than first degree murder. During the trial, the defendant advised the trial court outside the presence of the jury that he did not agree with his attorneys’ concessions, but the court denied his request that new attorneys be appointed to represent him. In his federal habeas proceedings, the Court held that the defendant’s attorneys’ actions constituted strategy and therefore were not ineffectiveness. A three-judge dissent correctly observed that defense counsel’s concession to the defendant’s guilt to second degree murder was “the functional equivalent to a forced guilty plea over the objection of the defendant,” and that controlling jurisprudence “clearly establish[ed] that the Sixth Amendment is violated when counsel concedes the accused’s guilt to a lesser crime over the accused’s express objection.”

43. See State v. Duncan, 802 So. 2d 533 (La. 2001), cert. denied, 536 U.S. 907, 122 S. Ct. 2362 (2002) (“Defense counsel apparently was aware of [certain] information and decided for strategical reasons not to introduce such evidence . . . .”); State v. Hoffman, 768 So. 2d 542, 579 (La. 2000), cert. denied, 531 U.S. 946, 121 S. Ct. 345 (2000) (“the defendant has not ‘overcome the strong presumption that [counsel’s actions] might be considered sound trial strategy.’”); State v. Snyder, 750 So. 2d 832 (La. 1999) (defendant failed to show that trial counsel’s failure to make a Batson objection to the prosecution’s improper use of peremptory challenges to exclude African Americans from the jury satisfied the prejudice prong of the Strickland test).

44. 298 F.3d 375 (5th Cir. 2002), cert. denied, 537 U.S. 1072, 123 S. Ct. 676 (2002).

45. Id. at 386–87 (5th Cir. 2002).
Similarly, in *State v. Louviere*\(^{46}\) where the defendant was represented by two trial attorneys who were certified under the current Louisiana standards, the defendant argued on direct appeal that he should have been permitted to withdraw his guilty plea to first degree murder because of his lack of understanding of the elements of the crime at the time of his plea. The defendant's penalty phase trial ended in a death sentence and the Louisiana Supreme Court, in an unpublished appendix, essentially considered the plea a strategic maneuver, holding:

It is difficult to conceive two highly skilled defense attorneys, both of whom specialize in capital litigation, would be completely ignorant of the elements which constitute first-degree murder . . . In addition, despite defense counsel’s anticipation of a life sentence in exchange for the defendant’s guilty plea, an unsupported belief, hope, or expectation of a certain sentencing outcome does not provide a basis for withdrawal of a plea.\(^{47}\)

Comparing this holding with Columbia Law School Professor James Liebman’s professional opinion that “not many lawyers are reckless enough to advise clients to plead guilty to capital murder without an agreement or understanding that doing so will avoid the death penalty,”\(^{48}\) the question arises whether the current Louisiana certification standards are sufficient to protect a defendant’s Sixth Amendment right to counsel, or whether Louisiana is merely placing an attorney by the defendant’s side as a pure formality.

II. CURRENT MINIMUM STANDARDS

*[T]he question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in light of all information presently available.*

—Justice Thurgood Marshall\(^{49}\)

---

47. 833 So. 2d 885, app. at 3.
A. American Bar Association's Guidelines for Appointment and Performance of Counsel in Death Penalty Cases

In 1989, the American Bar Association ("Association") adopted national guidelines ("Guidelines") for performance of counsel in capital cases. These Guidelines were revised in 2003 and, although not binding on any jurisdiction, they have been cited approvingly as professional standards by the United States Supreme Court. The Association announced that the objective of providing counsel in capital cases is to ensure high quality legal representation in "all stages of every case in which the jurisdiction may be entitled to seek the death penalty." Official commentary to Guideline 1.1 of the American Bar Association states:

The quality of counsel's "guiding hand" in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must muster. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in appellate reversal of an unfavorable judgment.

Under the standards set out by the Supreme Court for reviewing claims of ineffective assistance of counsel, even seriously deficient performance all too rarely leads to reversal. Hence, jurisdictions that continue to impose the death penalty must commit the substantial resources necessary to ensure effective representation at the trial stage.

Because of the complex and specialized nature of capital defense representation, the American Bar Association recommends that no fewer than two qualified trial attorneys be appointed to represent the defendant on trial for his life. Each of these attorneys must

52. Id. at Guideline 1.1 cmt. (citations omitted).
53. Id. at Guideline 4.1. (This guideline also recommends that every capital defense team include both an investigator and a mitigation specialist in addition to
demonstrate substantial knowledge and understanding of procedural and substantive law and possess specialized skill in trial advocacy, in the use of experts and scientific evidence, and in investigating and presenting mental health and mitigating evidence. The Guidelines recommend that states implement comprehensive training programs for capital defense counsel to equip counsel with the unique knowledge and skill required for providing high quality legal representation. The American Bar Association recommends that the training include legal instruction as well as training in “related substantive areas of mitigation and forensic science,” “practical instruction in advocacy skills,” and “presentations by experienced practitioners.”

B. Louisiana Standards Relating to the Provision of Counsel to Indigents Accused of Capital Crimes

In 1994, the Louisiana Supreme Court adopted Louisiana Supreme Court Rule XXXI, which established the Louisiana Indigent Defender Board, later renamed the Louisiana Indigent Defense Assistance Board (“LIDAB”). The current version of Louisiana Supreme Court Rule XXXI became effective on January 1, 1998,
and provides qualifications for defense counsel of capital indigents in Louisiana. Pursuant to Rule XXXI, LIDAB is charged with certifying defense counsel for capital indigent defendants. Further, Rule XXXI expressly requires the appointment of no less than two attorneys to represent the defendant, both of whom must meet the LIDAB certification requirements, and the court must designate one as lead counsel and the other as associate counsel. The basic standards for attorney certification prescribed by LIDAB include familiarity with the practice and procedure of the criminal courts of Louisiana and membership in good standing of the Louisiana Bar or admission to practice pro hac vice. Additionally, counsel must have familiarity with the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence. Moreover, LIDAB requires capital counsel to complete, within one year of application for certification, a minimum of twelve hours of Board-approved training primarily involving advocacy in the field of capital defense. Counsel must thereafter complete an additional twelve hours per year to maintain their certification.

As for experience, LIDAB’s minimum standards for certification require that lead trial counsel have five years of litigation experience, apparently in any field. In addition, lead trial counsel must have experience as lead counsel in at least nine jury trials tried to completion, but only five of those trials must have been felonies, or two must have involved the charge of murder. Trial associate counsel only needs three years of litigation experience, again apparently in any field, and experience as lead counsel in at least three felony jury trials tried to completion, including service as lead or associate counsel in at least one homicide trial. A close reading of these minimum standards reveals that a commercial litigation attorney who, perhaps as a favor, has tried a few low-grade felonies—maybe a few felony DWIs, drug offenses, or criminal damage to property charges—can qualify under Louisiana’s scheme to represent a capital defendant by merely attending a twelve-hour seminar. Moreover, nothing in these standards requires that counsel

60. Id. at Ch. 7–1.2.
61. Id. at Ch. 7–1.3–4.
62. Id.
63. Id. at Ch. 7–2.1(A).
64. Id. at Ch. 7–2.1(B).
65. Id. at Ch. 7–3.1(A).
66. Id. at Ch. 7–3.1(B).
be successful in any of his prior cases. By merely having tried the requisite number of trials and attending a seminar, counsel may be certified by LIDAB. These minimum requirements will invariably allow minimally qualified counsel to receive “the most demanding assignment” 67 a lawyer can receive.

Unfortunately, the insufficiencies of the minimum standards are only the beginning of the problem for Louisiana indigent capital defendants. Pursuant to Louisiana Code of Criminal Procedure article 512, an attorney assigned in a capital case must have been admitted to the bar for at least five years. This requirement is consistent with the language of Rule XXXI, and both the article and the rule are facially binding on all courts in Louisiana. However, Louisiana Supreme Court Rule XXXI(B) has a built-in escape clause which provides that the rules set forth in Rule XXXI “shall not be construed to confer substantive or procedural rights in favor of any accused.” 68 Thus, the only enforceable minimum standard requirement in Louisiana for capital defense counsel is the requirement that lead counsel have at least five years of litigation experience. None of the other standards set forth by LIDAB accords the defendant a basis for complaining when the trial court appoints an attorney who does not meet the minimum requirements established by LIDAB. A defendant whose appointed counsel does not meet any of the other standards, and thus is appointed in violation of Rule XXXI, has no remedy. Each time this issue has been raised, the Louisiana Supreme Court has fallen back on the language of Rule XXXI(B) and held that no remedy is available.

In State v. Gradley, 69 two attorneys were appointed to represent the defendant who was on trial for first degree murder. Neither attorney was certified to serve in a capital case at the time of trial. Nevertheless, the Louisiana Supreme Court held that “the failure of certification does not constitute a ground for reversal,” 70 since Rule XXXI expressly provides that no substantive or procedural rights are conferred on the defendant by the Rule. Similarly, in State v. Perez, 71 the defendant challenged his conviction of first degree murder on the basis that the trial court allowed a third-year law student to assist lead counsel by making the opening statement, arguing motions during trial, cross-examining two State witnesses, and questioning five medical experts on direct examination. The Louisiana Fourth Circuit Court of Appeal held that the defendant failed to show any prejudice

67. Liebman, Broken System, supra note 8, at 371.
68. Louisiana Sup. Ct. Rule XXXI(B).
69. 745 So. 2d 1160 (La. 1998).
70. Id. at 1165.
71. 745 So. 2d 166 (La. App. 4th Cir. 1999), writ denied, 768 So. 2d 32 (La. 2000).
as a result of the law student's participation and further, that "nothing in the new Rule XXXI bars Rule XX student practitioners from participating in capital cases." The Court simply ignored the requirement that two certified counsel are to be appointed to represent a capital defendant. Likewise, in *State v. Jones*, the Louisiana Supreme Court ruled that an indigent capital defendant has no statutory or recognized right to two attorneys, despite LIDAB's standards. Essentially, the standards provided under Louisiana's current capital defense scheme have no teeth. The minimum standards maintained by LIDAB under the umbrella of Rule XXXI are merely illusory recommendations that fall short of the letter and spirit of the American Bar Association's objective of providing high quality legal representation. Simply stated, Louisiana's standards are too basic and unenforceable, and capital defendants have no remedy when the courts fail to comply.

III. THE COMPLEX NATURE OF CAPITAL DEFENSE LITIGATION

Professor Liebman of Columbia Law School has described the counsel situation in capital cases as worse than those in noncapital cases in two important respects. Specifically, Professor Liebman points out that capital representation is engulfed in a "hugely complicated body of specialized law," the sentencing trials are more "far-ranging, expert-dependent, and factually complex than the guilt phase," and settlement negotiations in a capital case are "harder and more sophisticated than in other kinds of cases." Commentary to the American Bar Association's Guideline 1.1 memorializes the principle that death is different, and warns that counsel representing a client on trial for his life "must make extraordinary efforts on behalf of the accused." The authors of the commentaries, intent on making their point clear, add that "[t]he level of attorney competence that may be tolerable in non-capital cases can be fatally inadequate in capital ones."

The Association's Guidelines set forth, in addition to qualifications, certain minimum tasks that should be performed by all capital defense counsel in every capital case. To begin, counsel should conduct independent investigations for both guilt and penalty phases, beginning immediately upon appointment and regardless of overwhelming evidence of guilt. Sources of the investigation should

72. *Id.* at 179.
73. 707 So. 2d 975 (La. 1998).
75. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 1.1 cmt (citation omitted).
76. *Id.* at Guideline 10.1 and cmt (citation omitted).
include, where available, the charging documents, the accused, potential witnesses, police and prosecution, physical evidence, and the scene. The investigations should prepare counsel for defending the allegations of the State that the defendant is guilty of the crime charged as well as for presentation of the penalty phase and assisting the jury in determining that the defendant should not be sentenced to death. Further, counsel should establish a relationship of trust and maintain close contact with the client and preferably with the client’s closest friends and family members, if possible. Defense counsel should also investigate and consider all legal claims potentially available, evaluating each in light of the uniqueness of the case and death penalty law. Since failure to raise every legal claim may bar later assertion, counsel should file motions that raise issues even if such issues have previously been rejected by the courts. Similarly, the attorneys must explore the possibility of reaching an agreed-upon disposition, considering all legal consequences of any disposition and keeping the client informed of the considerations. Counsel should formulate a theory of defense, aiming to avoid inconsistent guilt and penalty phase assertions, and prepare for the jury selection process in light of: procedures for selection; potential legal bases for challenges; and, techniques for rehabilitation of potential jurors, all with the theory of defense in mind. During pre-trial and trial stages, counsel should preserve all legal error on the record for later review.

77. Id. at Guideline 10.7 and cmt.
78. Id. at Guideline 10.5. See also Guideline 10.5 and cmt. ("Establishing a relationship of trust with the client is essential both to overcome the client’s natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel’s advice on important matters such as whether to testify and the advisability of a plea. Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential to develop a relationship of trust with the client’s family or others on whom the client relies for support and advice.").
79. Id. at Guideline 10.8.
80. Id. at Guideline 10.9.1.
81. Id. at Guideline 10.10.1.
82. Id. at Guideline 10.10.2.
83. Id. at Guideline 10.8. The preservation of error is particularly important in light of the Louisiana Supreme Court’s holdings in State v. Taylor, 669 So. 2d 364 (La. 1996), cert. denied, 519 U.S. 860, 117 S. Ct. 162, reh’g denied, 519 U.S. 1023, 117 S. Ct. 546 (1996) (requiring a contemporaneous objection in the guilt
Moreover, the defense attorney must prepare any and all options for sentencing by investigating issues that support mitigation or rebut the prosecution's case in aggravation, presenting all reasonably available mitigating evidence that is consistent with the defense theory, and developing a plan to seek avoidance of the death penalty. In light of the United States Supreme Court's recent opinion in *Atkins v. Virginia*, counsel must, from the moment of his appointment, begin an evaluation process by a qualified psychology or psychiatry professional to inquire into the defendant's past and present mental health and capacity. This process should include an investigation into any existing mental health records of the defendant as well as information which may be obtained from persons close to the defendant. Counsel must also prepare for the sentencing phase by discussing with the client the sentencing alternatives, legal process, accuracy of information to be presented, consideration of lay and expert witnesses, and the possibility of having the defendant testify. It is extremely important that counsel determine and make any necessary legal response to evidence of aggravating factors to be presented by the prosecution. Further, counsel must present all reasonably available mitigating evidence, including witnesses familiar with the client's life and development, as well as documentation concerning the client's medical, educational, employment, military, and family histories. Any rehabilitative potential of the client, record of prior offenses or lack thereof, and expert testimony should also be presented. Finally, counsel must preserve the defendant's right to post-judgment review of the conviction and sentence as well as cooperate with subsequent counsel regarding trial-level proceedings and strategies.

Hence, it takes skill and expertise to fully carry out all of the duties required of capital defense counsel. This skill and expertise are required for a full understanding of legal issues as well as physical, scientific, psychological, and sociological evidence. Such talent and mastery command the respect of the court, the prosecution, and the jury, all of whom work hand-in-hand with effective advocacy.

---

84. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11.
86. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11.
87. Id.
88. Id.
89. Id. at Guideline 10.13.
Inexperienced, overworked, and inept attorneys simply cannot match the resources and proficiency of the prosecutorial and law enforcement agencies so that the capital defendant receives a constitutionally guaranteed fair trial.

IV. A LOOK AT ANOTHER PROFESSION'S STANDARDS

A. Specialized Training

Like capital defense counsel, medical surgeons shoulder a grave responsibility—saving life or losing to death. Likewise, both capital defense counsel and surgeons must function above a minimum competence level. Unlike capital defense counsel, surgeons must successfully complete a rigorous formal training program before making that first incision. In fact, no other profession or vocation requires more formal training than surgery.90 This advanced, intense training is required of surgeons because of the simple fact that their patients' very lives depend on their expertise.

"General surgery" is a discipline involving knowledge of anatomy, physiology, metabolism, immunology, nutrition, pathology, wound healing, shock and resuscitation, intensive care, and neoplasia, which are common to all surgical specialties.91 Because of the gravity of his work, a general surgeon must complete a rigorous training process before he can operate. First, admission to an accredited medical school requires particular undergraduate studies.92 Also, after graduation from medical school, a minimum of five years of formal residency training is required.93 In residency, surgeon candidates are trained under the supervision of physicians who are recognized as experts in their field.94 The education during residency

92. For example, admission into Tulane School of Medicine requires successful completion of a program which includes at least six semester hours each of English, general (inorganic) chemistry, organic chemistry, general physics, and general biology. Tulane School of Medicine, Office of Admissions, at http://www.som.tulane.edu/admissions/require.html (last visited Jan. 10, 2004). Also, in addition to all other undergraduate requirements, admission into Louisiana State University School of Medicine at New Orleans requires successful completion of eight semester hours each of general (inorganic) chemistry, organic chemistry, physics, biology, and demonstration of a proficiency in written and spoken English. LSU School of Medicine, Office of Admissions, available at http://www.medschool.lsumc.edu/admissions/Requirements/default.htm (last visited Jan. 10, 2004).
93. McLean, supra note 90, at 167 n.38.
94. American Medical Association, available at http://www.ama-
is “highly experiential and is characterized by close tutor/learner relationships, with progression of responsibility for the resident as competencies are developed.”95 Further, “the system has many advantages and, in fact, is held as the gold standard for the education of surgeons worldwide.”96 During this training, candidates who have completed medical school work closely with experienced surgeons to gradually refine their skills until they are capable of performing an entire surgical procedure alone. In addition, board certification is usually required before a healthcare provider will consider hiring or contracting with a surgeon for services. Certification by a surgical board that has been approved by the American Medical Association reveals that a surgeon has completed residency training and has demonstrated knowledge and competency by successfully completing a rigorous examination.97 Further, board certification programs require a minimum level of continued medical education in the area of expertise.98

These raised standards for surgeons are required to ensure competent performance where a life hangs in the balance. Just as not any medical doctor, by virtue of his medical school diploma, is qualified to perform a surgical procedure, not every juris doctor, by virtue of his law school diploma, is qualified to defend a capital client. These complex and serious tasks require more than the minimum training. Just as specialized surgical training beyond medical school is required before a surgeon may operate, specialized capital defense training beyond law school should be required before an attorney may be appointed to litigate a capital case. By way of comparison, many of the errors represented in Appendix A could have been avoided if trial counsel had received specialized training. Specifically, specialized training could have effectively educated the attorneys about the importance of obtaining and presenting the exculpatory and mitigating evidence that was neglected, overlooked, or unappreciated. It would have greatly increased counsel’s understanding of the applicable law so that legal advice would have been correctly interpreted and explained to the client. Likewise, specialized training would have improved counsel’s performance in

96. Id.
98. For example, the American Board of Surgery, Inc. requires diplomates to complete 100 hours of continuing surgical education before the diplomate will be considered for recertification (which is applied for every seven years). See the American Board of Surgery, Inc., available at http://www.absurgery.org/cme_requirements.html (updated Mar. 2002).
voir dire and motions practice. None of these errors should have occurred, and most of them could have been prevented.

B. Specialized Review

By statute, when a patient believes he has a medical malpractice claim against his physician, that claim is first presented to a medical review panel before suit may be instituted. This panel is comprised of one attorney and three licensed health care providers who review evidence and other proof in making a determination of whether the physician has breached his duty of appropriate standards of care. One clear advantage of the medical review panel system is that the review of the defendant physician’s acts or omissions is conducted by other physicians and qualified experts who will recognize a breach in the health professional’s standard of care. The expertise of those conducting the review is invaluable in the determination of the existence of liability. The findings of the medical review panel do not constitute a final judgment but are in the nature of an expert opinion. Nonetheless, the medical review panel’s conclusions are admissible in a subsequent malpractice action.

Similarly, the Louisiana Supreme Court should develop and administer a system of review for capital defendants who make a post-conviction relief claim of ineffective assistance of counsel. An attorney review panel would provide for a review of trial counsel’s actions and inactions by a panel of experienced capital defense counsel who, like members of the medical review panel, will recognize counsel’s errors. If errors are found by the attorney review panel, the court should defer to those findings in its evidentiary hearing on post-conviction relief. The administration of such a panel will expedite the court's process of review of post-conviction relief petitions. The district court’s adjudication of a post-conviction relief claim should include deference to the findings of the attorney review panel inasmuch as the findings will be expert determinations of the existence or nonexistence of ineffectiveness.

103. See State v. Stowe, 635 So. 2d 168 (La. 1994); State v. Deloch, 380 So. 2d 67 (La. 1980) (Generally, the preference for addressing claims of ineffective assistance of counsel is a post-conviction proceeding in the trial court, not on appeal. The rationale behind such procedure is that a full evidentiary hearing may be conducted to explore the issue.).
V. Now Is the Time for the Louisiana Supreme Court to Act

It is my hope and belief that the Nation will soon 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.

—Supreme Court Justice Harry A. Blackmun

Every death row inmate represents a lifetime of reasons to raise the competency standards for attorneys litigating capital cases in Louisiana. In any event, ninety-seven percent of thirty of the past reversals or remands based on ineffectiveness nationwide were for acts or omissions that could have been avoided with additional experience and specialized training. These acts and omissions were not based on strategy. They were pure ineffectiveness in its rawest form. Though Louisiana courts are not as quick to reverse or remand, the same errors are being committed by Louisiana’s trial counsel.

Indeed, certain character traits exist which experience and training cannot cure. An attorney with an overly antagonistic personality probably will not stop making juries angry at him and his client just because he has additional training. Likewise, specialty training will not prevent a drunkard from consuming intoxicants during lunch breaks and other judicial recesses, despite the gravity of his client’s fate. In Burdine v. Johnson, trial counsel slept during the guilt phase of defendant’s capital murder trial. The Federal Fifth Circuit Court of Appeals held that where “defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial” in violation of the Sixth Amendment. Admittedly, specialized training will not cure counsel’s narcolepsy. If these irreparable kinds of errors continue to arise, no specialized training could ever cure the capital defense system. Indeed, no amount of state funding, education, or other assistance would ever provide any assurance to society or capital defendants that their Sixth and Fourteenth Amendment rights to the effective assistance of counsel are being protected. Such an unfair administration of

106. 262 F.3d at 338.
capital punishment would require that the State discontinue the use of the death penalty as a criminal sanction altogether since the Constitutions of both the United States and the State of Louisiana mandate a fair trial.

Nonetheless, just as a surgeon takes his patient’s life in his hands when the first incision is made, a capital defense attorney takes his client’s life in his hands the moment he is appointed or retained to represent him. If the State of Louisiana wants to impose the death penalty for qualified defendants, the State of Louisiana should be responsible for training, and funding such training of, specialized counsel for the grave responsibility that accompanies a capital case. This specialized training should mirror that of a surgeon in several important aspects. Specifically, the State should provide and fund in-depth education programs to train counsel on: 1) the many aspects and importance of fully investigating every angle of their client’s defense, including both guilt- and mitigation-phase issues; 2) the intricacies and elements of ever-evolving physical and forensic evidence; 3) personal relationship skills in dealing with clients, clients’ family members, and other witnesses; and, 4) ever-evolving legal issues as they affect capital representation.

Further, an examination, written or oral, should be administered to ensure that applicants have obtained the minimum necessary expertise from these educational programs. A specialized examination for a specialized field of practice is not a foreign idea to the law. To practice before the United States Patent and Trademark Office, attorneys must fulfill certain undergraduate requirements as well as successfully complete a six-hour examination designed to test the applicant’s knowledge of patent law; procedure, rules, and practice of the United States Patent and Trademark Office; and other specialized issues involved in that field. If courts have accepted the examination requirements in patent law where mere money in the form of royalties is at stake, surely a minimum standards examination should be administered where human lives are at stake.

In addition, inexperienced trial counsel should slowly gain control of the trial reins under the close supervision of a highly qualified and skilled capital defense lawyer who will mentor the inexperienced until his or her skills and expertise are gradually refined similar to the surgeon’s residency requirements. The mentor should educate the mentee in all respects of representing a capital case.

defendant. Once the specialized training and "residency" requirements have been satisfied, then and only then should counsel be certified to represent capital defendants. To maintain that highly specialized certification, however, counsel should be required to attend and successfully complete specialized continuing education programs which focus on the aspects of capital representation. This training should educate counsel on investigatory techniques so that counsel may either effectively obtain all information himself or supervise professional investigating personnel. Likewise, training should prepare counsel to understand the importance of the information obtained through investigation, and how to use the information in negotiations with the prosecution. Also, training should cover both how to obtain additional information, and how to present information to the jury in a cohesive and comprehensive fashion, so that: 1) counsel’s defense theory is advanced; and, 2) the jury, if necessary, may make an informed decision regarding penalty. Similarly, training should provide in-depth analysis of the legal principles specific to capital litigation such as voir dire issues, specialized motions practice, and ethical considerations unique to capital defense. The training should also educate counsel on oral advocacy skills, presentation and rebuttal of scientific and other physical evidence, and skills in building and maintaining a relationship with the client and his family, all of which is paramount to effective representation.

Likewise, the creation of a system of attorney review panels will provide the convicted capital defendant with a qualitative review of his trial counsel’s performance. The review should be conducted by experienced capital defense litigators who are capable of recognizing ineffectiveness at the trial level. Further, this system of review will expeditiously assist the court in determining whether the capital defendant has been denied his constitutional right to the effective assistance of counsel. Indeed, the State of Louisiana must fund each of these steps recommended for improvement of the capital defense system. Providing appropriate education and specialized training will be expensive. Administration of examinations, continued legal education, and maintenance of an attorney review panel may cost exorbitant amounts of money. The current system of direct appeals, post-conviction relief petitions, and federal habeas claims also costs exorbitant amounts of money and time, but it does not work. To fairly and justly administer capital punishment in Louisiana, the changes recommended in this article should be instituted and funded by the state. If the State of Louisiana is unable or unwilling to provide such funding, it cannot constitutionally continue to seek capital sentences.
CONCLUSION

*Enough for my purpose at present that new times and new manners may call for new standards and new rules.*

—Benjamin N. Cardozo108

Under Louisiana’s current standards, inept counsel are appointed to represent capital defendants, whose lives stand in deadly peril. When the defendant is convicted, sentenced to death, and seeks reversal based on counsel’s apparent ineffectiveness, the court merely dismisses the defendant’s claim for failing to meet the *Strickland* burden. Surely the Sixth Amendment means more than that. The proposed certification scheme for capital defense counsel would provide much greater assurance that the defendant’s constitutional rights are being protected and that the criminal justice system is acquitting the innocent while convicting the guilty. Since death, in its finality, is different, all of the judicial resources that are currently expended on reviews of direct appeals, post-conviction relief applications, and petitions for writs of habeas should be used to implement this proposed system. Since death, in its finality, is different, capital counsel should be different. Qualitatively different.

*Julie Hayes Kilborn*


* The author extends special appreciation to Phyllis Mann and Tom Lorenzi for their invaluable insight and support during the creation of this article. Thanks are also due to Professors Christine Corcos, Paul Baier, and James Bowers for their guidance and encouragement during this writing.
## APPENDIX A

<table>
<thead>
<tr>
<th>Case Name &amp; Citation</th>
<th>Type of Proceeding</th>
<th>Ineffective Acts / Omissions of Trial Counsel</th>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brownlee v. Haley</td>
<td>Appeal of denial of federal habeas relief.</td>
<td>Counsel failed to investigate, obtain, or present any evidence of mitigation to sentencing jury.</td>
<td>Death sentence vacated and remanded.</td>
</tr>
<tr>
<td>306 F.3d 1043 (11th Cir. 9/16/02)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Knese v. State</td>
<td>Appeal of denial of post-conviction relief.</td>
<td>Counsel failed to read jury questionnaires until after trial and failed to voir dire as to death qualification, where one juror’s questionnaire response indicated an automatic vote for death after conviction.</td>
<td>Death sentence vacated and remanded for new penalty phase.</td>
</tr>
<tr>
<td>85 S.W.3d 628 (Mo. 8/27/02)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Simmons v. Luebbers, 299 F.3d 929 (11th Cir. 8/14/02)</td>
<td>Appeal of denial of federal habeas relief.</td>
<td>Counsel failed to introduce available mental health information and other mitigating evidence.</td>
<td>Reversed in part and remanded for new penalty phase.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Miller v. Straub 299 F.3d 570 (6th Cir. 8/08/02)</td>
<td>Appeal by state of federal habeas relief (where fifteen year-old defendant received life sentence).</td>
<td>Defendant pled guilty to first degree murder. Trial court imposed juvenile sentence. State appealed wanting adult life sentence. Defendant moved to withdraw plea. Counsel failed to consider the likelihood of and to advise defendant about state’s right to appeal the imposition of a juvenile sentence.</td>
<td>Affirmed.</td>
</tr>
<tr>
<td>Fortenberry v. Haley 297 F.3d 1213 (11th Cir. 7/17/02)</td>
<td>Appeal of denial of federal habeas relief.</td>
<td>Counsel failed to prepare for and present evidence in penalty phase. (Court held there was no constitutional violation because there was no prejudice to the defendant under the Strickland test.)</td>
<td>Affirmed.</td>
</tr>
<tr>
<td>Turner v. Calderon 281 F.3d 851 (9th Cir. 2/12/02)</td>
<td>Appeal of denial of federal habeas relief.</td>
<td>Counsel failed to investigate and present mitigating evidence during penalty phase.</td>
<td>Reversed and remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>----------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>Silva v. Woodford 2779 F.3d 825 (9th Cir. 2/01/02)</td>
<td>Appeal of denial of federal habeas relief.</td>
<td>Counsel failed to investigate and present potentially compelling mitigation evidence during penalty phase.</td>
<td>Death sentence reversed and remanded for new sentencing hearing.</td>
</tr>
<tr>
<td>Phillips v. Woodford 267 F.3d 966 (9th Cir. 10/15/01)</td>
<td>Appeal of denial of federal habeas relief.</td>
<td>Counsel failed to investigate or present a potential alternative defense despite evidence in counsel's possession that supported the alternative theory, but rather counsel presented a defense in which counsel had no belief.</td>
<td>Reversed and remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Coleman v. Mitchell 268 F.3d 417 (6th Cir. 10/10/01)</td>
<td>Appeal of denial of federal habeas relief.</td>
<td>Counsel failed to investigate defendant’s personal history and present evidence of such at the penalty phase, and counsel presented a deficient penalty phase closing argument.</td>
<td>Death sentence reversed and remanded for new sentencing hearing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>----------------------</td>
<td>-------------------</td>
<td>---------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>U.S. ex rel. Erickson v. Schomig 162 F. Supp.2d 1020 (N.D. Ill. 9/28/01)</td>
<td>Petition for writ of habeas.</td>
<td>Counsel failed to investigate and learn that defendant’s sole mitigation witness, who had been hired by defendant’s family, was a fraud.</td>
<td>Death sentence vacated.</td>
</tr>
<tr>
<td>Burdine v. Johnson 262 F.3d 336 (5th Cir. 8/13/01)</td>
<td>Appeal by state of grant of federal habeas relief.</td>
<td>Counsel slept during guilt phase of defendant’s capital murder trial.</td>
<td>Conviction vacated.</td>
</tr>
<tr>
<td>Cook v. Florida 792 So. 2d 1197 (Fla. 6/28/01)</td>
<td>Appeal of denial of post-conviction relief.</td>
<td>Counsel failed to properly investigate the mental mitigators and defendant’s family and personal background. Counsel waited until the day before the penalty phase hearing to seek assistance of a mental health expert.</td>
<td>Reversed and remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Evans v. Nevada 28 P.3d 498 (Nev. 7/24/01)</td>
<td>Appeal of denial of habeas relief.</td>
<td>Counsel failed to object to the prosecutor’s misstatement to jurors of how to employ evidence in the penalty phase.</td>
<td>Death sentence reversed and remanded for new penalty hearing.</td>
</tr>
<tr>
<td>Prowell v. Indiana 741 N.E.2d 704 (Ind. 1/11/01)</td>
<td>Appeal of denial of post-conviction relief.</td>
<td>Counsel advised defendant to plead guilty to two murders because counsel &quot;was afraid to try his case;&quot; counsel was unprepared for the penalty phase; counsel failed to timely retain mental health experts; and counsel presented inconsistent evidence to the court in mitigation.</td>
<td>Remanded for vacate of guilty plea, rescission of death sentence, and new trial.</td>
</tr>
<tr>
<td>Sanford v. Arkansas 25 S.W.3d 414 (Ark. 9/14/00)</td>
<td>Appeal of denial of post-conviction relief.</td>
<td>Counsel failed to investigate and present available mitigating evidence.</td>
<td>Death sentence reversed and remanded for resentencing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>McNair v. Haley</td>
<td>Petition for writ of habeas.</td>
<td>Counsel failed to obtain and present independent expert witnesses in guilt phase; failed to develop adequate theory of mitigation in phase; failed to present independent expert witnesses at penalty phase.</td>
<td>Remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Mayes v. Gibson</td>
<td>Appeal of denial of habeas relief.</td>
<td>Counsel failed to conduct any investigation or present any mitigation evidence except for defendant's own brief testimony during the penalty phase.</td>
<td>Remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>----------------------</td>
<td>-------------------</td>
<td>-----------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Brown v. Mississippi 749 So. 2d 82 (Miss. 11/04/99)</td>
<td>Appeal of denial of post-conviction relief.</td>
<td>Counsel failed to seek an independent medical examination after the state hospital examined defendant but would not produce a report.</td>
<td>Remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Moore v. Johnson</td>
<td>On remand from United States Supreme Court on petition for federal habeas relief.</td>
<td>Counsel failed to properly handle defendant’s confession during the guilt phase; counsel rendered deficient performance by eliciting damaging evidence far beyond the scope of direct examination in the cross examination of the state’s first witness; and counsel failed to investigate, develop, or present available mitigating evidence relating to defendant’s background, contention that the shooting was accidental, and defendant’s prison record during the punishment phase of trial.</td>
<td>Death sentence vacated and remanded for imposition of sentence less than death or for new sentencing hearing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Parker v. Bowersox 188 F.3d 923 (8th Cir. 8/10/99)</td>
<td>Appeal of denial of habeas relief.</td>
<td>Counsel failed to call defendant’s former attorney to testify that defendant was aware prior to date of murder that victim was no longer a potential witness in pending assault and probation violation cases, which testimony would have negated the state’s alleged aggravating circumstance.</td>
<td>Death sentence vacated and remanded for imposition of sentence less than death or for new sentencing hearing.</td>
</tr>
<tr>
<td>Davis v. Mississippi 743 So. 2d 326 (Miss. 7/1/99)</td>
<td>Motion to Vacate Judgment and/or Sentence.</td>
<td>Counsel failed to (1) investigate the existence of character witnesses and adequately prepared and examined the ones presented; (2) move to quash the jury based on improper contact with the state; (3) explain a plea bargain offer to defendant; (4) request a special jury venire prior to the trial date.</td>
<td>Remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Com. v. Williams 732 A.2d 1167 (Pa. 6/04/99)</td>
<td>Appeal of denial of post-conviction relief.</td>
<td>Counsel failed to investigate, develop and present significant mitigating evidence, including a history of mental health treatment, and develop a potential diminished capacity defense.</td>
<td>Remanded for evidentiary hearing.</td>
</tr>
<tr>
<td>Rondon v. Indiana 711 N.E.2d 506 (Ind. 5/25/99)</td>
<td>Appeal of denial of post-conviction relief.</td>
<td>Counsel failed to present mitigating evidence of defendant’s background, childhood, and mental health history, and limited mitigation investigation to the two to three years prior to defendant’s arrest; counsel admitted that they neglected penalty phase preparations until the night before the penalty phase of trial.</td>
<td>Death sentence reversed and remanded for new penalty phase.</td>
</tr>
<tr>
<td>Case Name &amp; Citation</td>
<td>Type of Proceeding</td>
<td>Ineffective Acts / Omissions of Trial Counsel</td>
<td>Holding</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>-----------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------</td>
<td>------------------------------</td>
</tr>
<tr>
<td>U.S. v. Gilmore 35 F. Supp.2d 626 (N.D. Ill. 1/22/99), <strong>reversed</strong> 223 F. 3d 626 (7th Cir. 5/31/00)</td>
<td>Petition for federal habeas relief.</td>
<td>Counsel failed to seek a psychiatric expert until after the guilty verdict, then decided not to call the expert, leaving the defense with no meaningful mitigation evidence.</td>
<td>Petition granted.</td>
</tr>
<tr>
<td>Ex parte Patterson 969 S.W.2d 16 (Tex. Crim. App. 6/10/98)</td>
<td>Petition for writ of habeas.</td>
<td>Counsel failed to investigate the validity of or object to the use of defendant’s prior convictions offered for enhancement purposes.</td>
<td>Remanded for evidentiary hearing.</td>
</tr>
</tbody>
</table>

** See supra note 33.
<table>
<thead>
<tr>
<th>Case Name &amp; Citation</th>
<th>Type of Proceeding</th>
<th>Ineffective Acts / Omissions of Trial Counsel</th>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sheridan v. Arkansas</td>
<td>Appeal of denial of post- conviction relief.</td>
<td>Counsel represented defendant and defendant’s brother, both charged with the same murder, and counsel worked a plea agreement for the brother in exchange for the brother’s testimony against defendant.</td>
<td>Reversed and remanded for new trial.</td>
</tr>
<tr>
<td>959 S.W.2d 29 (Ark. 1/08/98)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Williamson v. Ward</td>
<td>Appeal by state of grant of writ of habeas.</td>
<td>Counsel failed to fully investigate defendant’s history of mental illness, failed to seek a competency determination, failed to challenge the credibility of defendant’s confession, and failed to investigate and present the fact that another man had confessed to the crime.</td>
<td>Writ of habeas granted.</td>
</tr>
<tr>
<td>110 F.3d 1508 (10th Cir. 4/10/97)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>