IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

CHARLES JASON BALDWIN, DEFENDANT/PETITIONER

vs. NO. CR-93-450B

STATE OF ARKANSAS PLAINTIFF/RESPONDENT

PETITIONER CHARLES JASON BALDWIN'S BRIEF ON THE APPLICABILITY OF THE *ABA STANDARDS* AND ABA DEATH PENALTY *GUIDELINES* TO THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

1. **Introduction**

This Court has asked Petitioner for briefing on the applicability of *ABA Standards* and *Guidelines* to the determination of a claim of ineffective assistance of counsel. The Court has expressed the view that the *ABA Standards for Criminal Justice* (hereafter *ABA Standards*), and the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (*"ABA Guidelines"*) were not in effect in Arkansas at the time of the trial of this case. This brief sets forth what Petitioner respectfully submits is the applicable law, which demonstrates that the *ABA Standards* and *ABA Guidelines* should be applied to the claims of ineffective assistance of counsel raised in this case.

2. **Argument and Authorities**

As demonstrated below, the courts of the State of Arkansas have repeatedly looked to the decision of the U.S. Supreme Court in *Strickland v. Washington,* 466 U.S.

668 (1984) for the definition of the test for the determination of an ineffective assistance of counsel claim invoking the Sixth Amendment to the United States Constitution, and the State of Arkansas' parallel provisions. In *Strickland*, the United States Supreme Court stated that "Prevailing norms of practice as reflected in American Bar Association standards and the like... are guides to determining what is reasonable" conduct by criminal defense lawyers in the defense of a criminal case. *Id.* at 688. The court specifically referenced the *ABA Standards for Criminal Justice (ABA Standards)* 4-1.1 to 4-8.6 (2d ed., 1980) as examples of guides to determine the "prevailing norms in the field". *Id.* at 688.

Since *Strickland* was decided approximately 10 years prior to Petitioner's conviction, it stands to reason that its rule would be applicable to this case.

The applicability of *Strickland* as a matter of federal constitutional law cannot be doubted, as subsequent decisions of the U.S. Supreme Court clearly demonstrate. For example, the Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000) involved a crime committed in November of 1985. *Id.* at 367-369. In rendering its ruling, the Court noted that during state post-conviction proceedings the Virginia trial court had correctly applied the *Strickland* ineffective assistance standard, though the Virginia Supreme Court failed to do so. *Id.* at 395-396. The Court noted certain failures of investigation and preparation, concluding that the omissions "... clearly demonstrate that trial counsel did

not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id.* at 396-397, making reference to the *ABA Standards*, Standard 4-4.1, and the Commentary (2d ed., 1980).

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court reviewed a conviction and death sentence involving a 1988 capital crime that was indicted in the State of Maryland. The accused was charged with a capital offense which was tried prior to the commencement of this case. Wiggins began his pursuit of post-conviction remedies in the Maryland courts in 1993. *Id.* at 514-518.

According to the *Wiggins* ruling, notwithstanding information in their file demonstrating the need for a background investigation in mitigation, trial counsel did limited follow-up investigations and presented little evidence in mitigation. The Court characterized the legal claims raised in *Wiggins* as having been brought under the *Strickland v. Washington, supra*, 466 U.S. 668 rule concerning strategic judgments and tactical decisions. In *Wiggins,* the court focused on counsels' decision "... to limit the scope of their investigation...." *Id.* at 521-522. The Court reiterated that under the *Strickland* standard, defense counsel have a duty to make reasonable investigations, or to make reasonable decisions that make particular investigations unnecessary. *Id.* at 690-691. The Court concluded in *Wiggins,* as it had in *Williams v. Taylor, supra*, that strategic and tactical judgments made on less than sufficient investigations are not the

subject of deference. The Court stated specifically: "In highlighting counsel's duty to investigate, and in referring to the *ABA Standards for Criminal Justice* as guides, we applied the same 'clearly established' precedent of *Strickland* as we apply today [citations omitted]." *Wiggins, supra*, at 522-523.

The *Wiggins* Court noted further that: "Counsel's conduct similarly fell short of the standard for capital defense work articulated by the American Bar Association - standards to which we long have referred as "guides to determining what is reasonable [citations omitted]"." *Id.* at 525. The Court then made reference to the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.4(C)(1989). *Id.* at 524-525. Having invoked the *ABA Guidelines*, the Court stated: "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 [citation omitted]" (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, religious and cultural influences). *Id.* at 524-525. The Court then reiterated its reliance on the *ABA Standards*, Standard 4-4.1 as defining the duty to investigate. *Ibid.*

The U.S. Supreme Court also applied the *ABA Guidelines*, and the *Strickland, supra*, standard, to a 1984 Florida capital murder case when it decided *Florida v. Nixon*, 543 U.S. 175 (2004).[1] The Court referred several times to the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (revised edition, 2003) - guidelines that were not in effect at the time of the defense of the capital crime at issue, but that the Court applied retroactively to the case. The Court also referred to standards that were in effect at the time by making reference to Professor Goodpaster's well known article, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299 (1983). *Id.* at 191-193.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the U.S. Supreme Court was considering a death sentence applied to a 1988 capital murder in Pennsylvania. The Court applied the rulings in *Strickland, supra*, and *Wiggins, supra. Id.* at 383-384. It reiterated its reference to the *ABA Standards*, differentiating between the *ABA Standards for Criminal Justice* that were published in 1993 (3d ed.) and the standards in effect at the time. The Court reiterated its adherence to the view that the *ABA Standards* are 'guides to determining what is reasonable'. *Id.* at 387-388. It also discussed the application of the 1989 *ABA Guidelines* (specific to death penalty case preparation and investigation) to *Rompilla*. In passing, the Court noted that the *ABA Guidelines* provided that

[1] The date of the offense is reflected in the opinion at pp. 179-180.

investigation 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 prosecutors' - making reference to the 1989 *ABA Guidelines,* Guideline 11.4.1.C.

Lest there be a doubt as to the applicability of the *ABA Standards* to the litigation of ineffective assistance of counsel cases, the Sixth Circuit reiterated that 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." *Hamblin v. Mitchell*, 354 F.3d 482, 488 (6th Cir. 2003).

The courts of Arkansas have acknowledged the above-described state of the law. In *Howard v. Arkansas,* 367 Ark. 18; 238 S.W.2d (2006) the Arkansas Supreme Court reviewed a case in which claims similar to those raised here were made in a Rule 37 Petition, including ineffectiveness of investigation, and failure of pre-trial preparation related to scientific evidence, as well as specific omissions in the preparation of the case. The Arkansas Supreme Court noted that the Petitioners had raised *Wiggins v. Smith, supra*, 539 U.S. 510 as a basis for their claims. The court cited *Wiggins* on the subject of the failure to investigate and present substantial mitigating evidence during the sentencing phase of a capital case. *Id.* at 45-47. The Arkansas Supreme Court declined

to reach the issue in part because the Petitioner in *Howard* "... did not raise his *Wiggins* argument to the trial court, and we will not consider an argument that is raised for the first time on appeal [citations omitted]." *Id.* at 45-46, fn.9.

Here, Petitioner has made reference to the *ABA Standards* and elicited testimony and engaged in argument referring to the existence of the 1989 and 2003 *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.* Indeed, this brief has been prepared, and is being filed, in response to the Court's question about the applicability of the *ABA Standards* described in *Strickland* (which was specifically pled in Baldwin's Amended Rule 37 Petition), and the *ABA Guidelines* as cited in the cases that have followed *Strickland.*

Attorney Paul Ford, for example, stated that he was asked to review the *Guidelines* just before taking the witness stand. He explained that he had never seen them before, a surprising admission from a lawyer who has been practicing at a time when the U.S. Supreme Court has repeatedly made reference to the *ABA Guidelines*. Investigator Ron Lax testified that he was familiar with both the 1989 and 2003 *ABA Guidelines*, and that he had undergone training pertinent to the effective handling of the preparation of death penalty cases. Attorney Dan Stidham also made reference to the *ABA Guidelines* during his direct examination, noting that he was not aware of them at the time of the trial of the Misskelley case, but that he has become aware of them since the trial.

Baldwin respectfully points out that without referring to the *ABA Standards*, courts would have little clear guidance on how to define what reasonable conduct by a criminal defense lawyer in defending a criminal case consists of - in the absence of expert testimony on that point. A series of cases, cited above, including *Strickland, supra, Wiggins, supra*, and *Rompilla, supra*, clearly establish that the *ABA Standards* and *Guidelines* are to be considered as defining the duties and conduct expected of defense counsel in their preparation and presentation of the defense of capital cases - indeed the *Standards* apply to non-capital cases as well.

Several of the *ABA Standards*, applicable in any criminal case, are at issue here.

In February of 1991, the ABA House of Delegates approved the *Standards* that were in existence during the trial of this case. These were the *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993).[2] The *Standards* call for the defense lawyer to interview the client and "... to determine all relevant facts known to the accused. In doing so, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses." Standard 4-3.2.

[2] www.abanet.org/crimjust/standards/dfunc_toc.html

Standard 4-4.1, which is referred to in several U.S. Supreme Court opinions relied on above, states that:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. Investigation should 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 defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

[Standard 4-4.1, Duty To Investigate]

The 1989 *ABA Guidelines for the Appointment and Performance of Counsel in Death Cases* provided that counsel "... should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital case." (Guideline 11.4.1). One of the duties incumbent on counsel was not only interviewing potential witnesses, but also obtaining "... the assistance of experts where it is necessary or appropriate..." (Guideline 11.4.1, sub-para. 7). The 1989 *Guidelines* also encouraged the development of a jurisdiction-wide legal representation plan that required the appointment of two counsel in capital cases, and the development of a system that would provide "... counsel appointed pursuant to these *Guidelines* with investigative, expert, and other services necessary to prepare and present an adequate defense (Guideline 8.1, Supporting Services)."

The 2003 *ABA Guidelines* are more elaborate, and as is true of the 1989 *Guidelines*, make repeated references to the ABA's *Standards for Criminal Justice*, cited above. For example, the 2003 *Guidelines* provide that staffing of the defense team "... should consist of no fewer than two attorneys qualified [in accordance with Guideline 5.1], an investigator, and a mitigation specialist" (Guideline 4.1(A)(1)). The 2003 *Guidelines* also expand the definition of the duties incumbent on defense counsel in a capital case. As noted, these *Guidelines* have also been applied to cases tried prior to 1994.

A number of the elements contained in the *ABA Standards* and *Guidelines* described here were part of the case law describing the duties of counsel defending capital cases in Arkansas at the time of the trial of this case (according to the United States Court of Appeals for the Eighth Circuit). In deciding *Henderson v. Sargent,* 926 F.2d 706 (8th Cir. 1991), opinion amended on rehearing, 939 F.2d 586 (8th Cir. 1991), the Eighth Circuit discussed the implications of actions by defense counsel that resulted in a failure to investigate and present an alibi defense, where trial counsel also failed to use an investigator, and failed to pursue a series of leads that the federal reviewing court

found to be "... substantial evidence supporting an alternative theory of murder." *Id.* at 714-715.[3] This case law was on the books when Petitioner's case was being prepared.

Nothing in Arkansas case law serves to dispel the view that criminal defense lawyers practicing in Arkansas in 1993 and 1994 would be expected to adhere to the standards announced by the American Bar Association, or to the *ABA Guidelines* specific to the conduct of the defense in death penalty cases.

The United States Supreme Court did nothing to limit the reach of these normative standards, though it indicated that courts could look to other sources to arrive at an understanding of the duties incumbent on criminal defense counsel in specific jurisdictions. Presumably, these would be duties related to the procedural and substantive law in a given jurisdiction, and not variations on the basic theme that a criminal defense lawyer should use a reasonable degree of professionalism and preparation in the defense of a case as defined by the *ABA Standards* and *Guidelines*. Moreover, given the Arkansas courts' reliance on *Strickland* prior to the trial of this case, and decisions of the Eighth Circuit in Arkansas cases relying on *Strickland* (see,

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[3] Ironically, given the question raised about what standards Arkansas defense counsel were guided by in 1993 and 1994 during trial preparation and trial proceedings, it is an Arkansas-based lawyer who has authored one of the lengthy volumes of material describing the duties of criminal defense lawyers. See Hall, *Professional Responsibility in Criminal Defense Practice* (previously published as *Professional Responsibility of the Criminal Defense Lawyer*, 1st ed., 1987; 2d ed., 1996; current ed. and title, 2005).

Henderson, supra, for example), it stands to reason that the professional norms and standards urged on this Court by Baldwin are customary, legally required, and should be applied.

Indeed, the clearest evidence for this proposition are aspects of the proceedings in this case: the State of Arkansas created an independent umbrella defender organization at the time of this case in compliance with suggestions made by the ABA; the Court appointed two lawyers in Baldwin's case as well as in those of his co-defendants in compliance with the 1989 *ABA Guidelines*. The Court also allowed each of the defenses to retain (albeit at less than asking price) the services of various experts, as suggested by the *ABA Guidelines*. All of this was done in accordance with emerging practices nationwide in capital cases as a result of the 1989 *ABA Guidelines*. The problem for Mr. Baldwin is that his lawyers failed to act in accordance with either the *ABA Standards* or the *ABA Guidelines* in their preparation and litigation of this case.

CONCLUSION

For the reasons explained here, Petitioner Charles Jason Baldwin respectfully urges the Court to find that the framework provided by *Strickland v. Washington, supra,* and by the *ABA Standards* (the *Defense Function*) and *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* should apply in this

case.

Dated: November 14, 2008

Respectfully Submitted by

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PROOF OF SERVICE

I, Steven Gray, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102. On today's date, I served the within document entitled:

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(x) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the U.S. Mail at San Francisco, California, addressed as set forth below;

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of November, 2008, at San Francisco, California.

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