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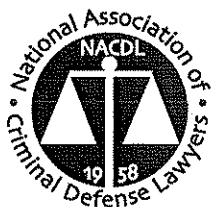
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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 28, 2008

The Honorable John Van de Kamp, Chair  
California Commission on the Fair Administration of Justice  
900 Lafayette Street, Suite 608  
Santa Clara, California 95050

Dear Chairman van De Kamp and Members of the Commission:

I serve as Death Penalty Resource Counsel for the National Association of Criminal Defense Lawyers. In this capacity I provide assistance to lawyers representing defendants charged with capital murder and I represent death sentenced inmates in Georgia and Alabama. I am writing this letter to assist the Commission in addressing the critically important issues concerning the administration of the death penalty in California that will be raised at the hearing scheduled for Friday, March 28, 2008, at 9:30 a.m. In this letter, I will address Question 7 of the Focus Questions using the ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases establish minimum standards for effective representation of capital defendants. The Guidelines apply to all stages of a capital case, from the moment of arrest through post-conviction and clemency. When applied, these Guidelines help to ensure that each capital defendant receives the resources and competent representation necessary for a fair trial.

The Guidelines require a team defense and provides that each member of the team have sufficient time, skills, and resources to provide an effective defense. Underfunded, unskilled, and overworked defense team members provide poor representation to capital defendants and create enormous burdens on the state and the public. Capital jurisdictions that are unwilling or unable to meet the standards established by the ABA Guidelines should, therefore, refrain from charging cases capitally until they can conform to the prevailing norms of capital cases.

## I. Team Defense

The Guidelines make clear that it is impossible for any one attorney, no matter how experienced, to handle even *one* capital case alone. The Guidelines recognize that effective capital representation requires a "defense team." A capital defense team must *minimally* consist of two qualified attorneys, a fact investigator, a mitigation specialist, and the client. (Guideline 4.1 and 10.4)

A diversified, cohesive team is practically important in capital cases for several reasons. First, capital cases require a tremendous amount of work, which simply cannot be done exclusively by one or two attorneys. Practically, it is impossible for one attorney or two attorneys to competently conduct thorough fact and mitigation investigations, review thousands of pages of discovery, perform legal research, draft and litigate dozens of motions, examine evidence, consult with experts, and effectively argue the case in court. A fact investigation or thorough mitigation investigation, alone, must continue for many months, with the duration dependent on the client and the case.

Moreover, capital defense counsel have neither the time nor the qualifications to perform all of the duties that are required in the defense of capital cases. The skills involved in an investigation – factual or mitigation – are different from those of a lawyer. Investigators often have backgrounds in law enforcement and are better able to reconstruct crime scenes, review police reports, and find witnesses. Mitigation investigators frequently have backgrounds in mental health, and can better recognize potential issues in a defendant’s background and review school and medical records that may relate. A team made up exclusively of attorneys would be ill-equipped to efficiently and effectively conduct these aspects of trial preparation.

Additionally, an effective defense team must be able to view the evidence from different perspectives, anticipate the prosecution’s arguments, and develop theories of innocence and mitigation that resonate with a diverse group of people such as potential trial jurors. An array of perspectives and expertise on the defense team ensures that team does not pursue a one-track investigation or theory that eliminates or ignores theories of innocence or potential mitigating evidence before a complete investigation has been accomplished. Finally, a full team makes it possible for at least one member of the team to develop a trusting relationship with the client which can facilitate client cooperation and the client’s active participation in his defense. (Guideline 10.4)

#### **A. The Lawyers**

The Guidelines require that every capital defendant be represented by at least two lawyers. Two lawyers are required because the nature of a capital case prevents one lawyer from being able to do all that is required of effective defense counsel. Trial counsel have ultimate responsibility for the entire case, and this responsibility cannot be delegated.

The requirement that two lawyers be assigned to a capital case does not mean that a case can be neatly divided up between the attorneys, wherein one attorney assumes responsibility for the guilt/innocence phase and the other attorney assumes responsibility for the penalty phase. Both counsel are responsible for preparing the entire case and both attorneys must work together to develop theories of innocence and a persuasive mitigation presentation. The theories at both the guilt/innocence and penalty phases must merge, because inconsistent theories at the guilt/innocence and penalty phases often result in a death verdict. Moreover, should one attorney become ill or incapacitated prior to or during trial the other attorney will only be able to effectively stand in or help a new attorney transition onto the case if the attorney has been actively involved in the development of the defense strategy for both phases of the trial.

Both attorneys assigned must be qualified to handle capital cases. An attorney who has no criminal defense experience and no specialized capital defense training is not qualified to handle a capital case. Even attorneys who have practiced felony criminal defense for many years are not qualified to handle capital cases without completing training specific to capital cases. Capital cases require skills that are unique to capital defense, such as the ability to present a case in mitigation that will be persuasive to jurors. (Guidelines 5.1 and 8.1)

It is common for capital defendants to have suffered sexual or physical abuse as a child. Often, both the defendant and his family are reluctant to admit this to his attorneys. Such clients require countless hours of communication, visits, and other trust-building techniques in order for counsel to obtain such important and painful information. Other clients, due to mental illness, may actively work against the defense by leading counsel off on tangents or by initially refusing to allow the presentation of mitigating evidence. See, e.g., Rompilla v. Beard, 545 U.S. 374 (2005). Still other cases, such as the Zaccarias Moussoui case, may be high profile and garner national and/or international attention. In capital cases, because the complexity varies, counsel must be given discretion as to the number of cases to be handled at one time. (Guideline 6.1)

## **B. The Fact Investigator**

A fact investigator is an indispensable member of any capital defense team. He is responsible for reinvestigating the case in an effort to refute the prosecution's theory of the case and discovering facts that create reasonable doubt about the client's guilt as to the charge of capital murder. To perform these duties effectively, a fact investigator must have a vast understanding of the criminal-justice system, excellent communication and interviewing skills, the ability to decipher police reports, autopsy protocols, and other forensic analyses, and access to search engines and other tools necessary for locating witnesses and conducting necessary investigations of witnesses. He must be familiar with the law and science relating to the collection, preservation, laboratory analysis, and interpretation of scientific evidence. To effectively challenge the prosecution's theory of guilt, the investigator must also be knowledgeable of the common systemic problems that result in the conviction of the innocent, such as eyewitness identification mistakes, false confessions, perjurious testimony from jailhouse informants, and unreliable scientific testimony. (Guideline 4.1)

A fact investigator must become a part of the defense team very soon after the client is arrested and counsel is appointed to the case. Early investigation is critical because, as time passes, crime scenes may be remodeled or destroyed, witnesses' memories may become less reliable, witnesses may relocate or become incapacitated, witnesses may be intimidated, police notes may be lost or destroyed, institutions may change their record-keeping policies and protocols, and other barriers to effective information gathering may arise. (Guidelines 10.4 and 10.7)

A fact investigator must be included as an individual member of the team not only because trial counsel may not have the time or expertise needed to fully investigate the facts of the case, but also because the investigator may need to testify at trial regarding statements made to her by a witness. Additionally, an investigator will be able to identify other experts necessary for a

complete defense, such as a firearms, DNA, or crime scene reconstruction expert. (Guideline 4.1)

### **C. The Mitigation Specialist**

The Guidelines emphasize the necessity of a mitigation specialist, an immediate and thorough mitigation investigation, and the effective presentation of mitigating evidence. The United States Supreme Court has emphasized the importance of mitigation investigation and has found trial counsel ineffective for failing to investigate potential mitigation evidence. See Williams v. Taylor, 529 U.S. 362 (2000), Wiggins v. Smith, 539 U.S. 510 (2003) and Rompilla v. Beard, 545 U.S. 374 (2005). In Wiggins, trial counsel were found to have provided ineffective assistance due to their failure to conduct a thorough social history investigation, notwithstanding the fact that trial counsel had had their client examined by a mental health expert. In Rompilla, counsel were found ineffective for failing to conduct a thorough mitigation investigation despite the client and the client's family's contention that no mitigating evidence existed and despite having consulted with mental health experts.

Mitigation specialists are vital to any capital defense team, because they have the skills necessary to conduct life history investigations; they are able to identify additional experts helpful to the defense; and they are able to create a multigenerational social and psychological history essential to identifying mitigation themes that could save the client's life. Mitigation specialists' unique skills include the ability to identify evidence of symptoms of mental disorders and deficits, exposure to trauma, brain damage, and substance abuse history; the ability to locate and review medical and educational records; the ability to identify and locate other potential documents or witnesses; and the ability to assist the defense team with organizing the gathered evidence into a powerful and compelling presentation to the jurors. Mitigation specialists are also valuable because they are able to conduct the thorough mitigation investigation required of capital defense counsel who may lack the skills or the time to fully conduct the investigation themselves.

The mitigation specialist's social history investigation must include a thorough collection of objective, reliable records about the client and her family. These records include medical, mental health, educational, employment, social service, military, and court records. (Commentary to Guideline 10.7) Such records are inherently credible and may document events which the client and other family members are unable to remember due to youth or other incapacity or are embarrassed or biased to express. Additionally, such records help verify what some jurors may otherwise dismiss as self-interested claims made by the defendant or her family members and friends detailing for example, physical and/or sexual abuse, alcoholism, poverty, or neglect.

A mitigation specialist cannot effectively work on more than a few cases at one time. Hundreds of hours are typically required to conduct a thorough mitigation investigation and create a complete social history. An abbreviated list of tasks that must be performed by a mitigation specialist includes: spending many hours with the client to gain his trust and make him feel comfortable revealing what are often painful memories of his life experiences; developing relationships with the client's family members, friends, and associates, in an effort to create a picture of the client's life that extends beyond the alleged crime; interviewing former teachers,

social workers, employers, and others to gain insight into the client's adaptive behavior skills, history of abuse or neglect, and other critical information relevant to the client's life history; traveling to numerous states and, if necessary, to foreign countries, to locate and interview mitigation witnesses and gather medical, psychological, educational, religious, and other historical records; and working with experts to gain an understanding of mental health, cultural, social or environmental issues essential not only to learning how to most effectively relate to the client, but also to understanding how to present this information to a fact-finder in a way that is understandable and compelling.

The above list of tasks is abbreviated and incomplete. Yet, even this abbreviated list of tasks cannot be completed in a matter of weeks or in a few months. Mitigation investigation is a time-intensive process that requires not just knowledge of a particular subject matter, but also an ability to gain the trust of and obtain information from people of differing racial, ethnic, and social backgrounds.

## **II. The Necessity of Sufficient Funding**

Effective capital defense cannot be conducted on a shoestring budget. Defending capital cases is expensive. Defense counsel are required to invest substantial time and resources into the case. Both fact and mitigation investigations are lengthy and costly. Experts routinely need to be retained. Additionally, counsel and/or other members of the defense team will need to travel to various states and foreign countries to interview witnesses and collect records. (Guideline 9.1)

Capital defense attorneys are required to perform the same duties as the prosecutor and more. In addition to independently investigating the facts of the crime without the assistance and resources of law enforcement, counsel must also investigate the client's entire life history, expanding throughout the generations of the client's family. Prosecutors have substantial financial and investigative resources at their disposal in their efforts to convict capital defendants. Indigent defendants are entitled to funding on par with that of the prosecutor's office. Capital trial counsel must be appropriately compensated for their time at the level of compensation received by the prosecutor. Failure to do so has resulted in qualified capital defense lawyers refusing to accept appointments to capital cases for fear of financial ruin, failure of trial counsel to consult necessary experts, failure of counsel to conduct a thorough investigation, and failure of counsel to otherwise provide effective representation to capital defendants.

## **III. Consequences of Failure to Follow the Guidelines**

Adhering to the Guidelines is in the interest of the public, as well as the interests of the defendant. The purpose of the court system, in capital and other criminal cases, is to determine whether, in fact, the defendant committed the crime and, if so, decide the appropriate punishment. The Guidelines enable the courts to fulfill this purpose effectively and efficiently.

Without an appropriately prepared defense, errors are made. The ever expanding number of exonerations of death row inmates has revealed starkly how common serious errors can be when capital attorneys are over extended and underfunded. When an innocent person is convicted and

sentenced to death, the truly guilty person is allowed to roam free, continuing a pose a threat to the public. Errors do not only jeopardize public safety, they also waste taxpayer money. When errors occur at the trial level, lengthy appeals and habeas petitions inevitably follow. Once the error is recognized in this process, it must be corrected, usually through retrial or resentencing, requiring further expenditures by not only the defense, but also the courts and prosecution. A defendant shown to be innocent has usually been incarcerated, unnecessarily, for years. Further, more resources must be spent to reopen the investigation of a cold case, not to mention defending or settling any civil rights lawsuits resulting from wrongful imprisonment.

The best way to avoid errors is to devote the appropriate resources at the outset to ensure the first trial is fair. Adherence to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases is an essential step toward this end.

Jurisdictions that are unwilling or unable to provide the necessary funding and resources to ensure a fair capital trial in accordance with the Guidelines should refrain from capitally charging defendants. Capital cases cannot be partially investigated, partially defended, or partially funded. Capital defendants are entitled to well-trained, qualified, fully-staffed defense teams and adequate funding for experts and the extensive investigation required in capital cases. Anything less falls short of the minimum standards and ensures that justice will not be served for the defendant, for the decedent, or for the public.

Thank you for your consideration.

Respectfully,



Terrica Redfield  
NACDL Death Penalty Resource Counsel