

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association recommends when attorneys in private practice are appointed to represent defendants in the trial of death penalty cases:

1. Two attorneys shall be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel and shall meet the criteria of paragraph 2. The other shall be assistant defense counsel; and
2. The primary attorney shall have substantial trial experience which includes the trial of serious felony cases.

REPORT

Introduction

It has been over two decades since the Supreme Court of the United States recognized that counsel must be appointed in criminal cases to assist those persons who cannot afford to retain an attorney¹. "... [U]nless the assistance rendered is "effective, however, this guarantee is vacuous. Courts have struggled to find an appropriate standard for determining whether assistance is sufficiently effective" to meet constitutional requirements.²

Various tests have been applied to determine if assistance was "effective." The "farce and mockery"³ test predominated for many years. Recently, other tests have been formulated to articulate the acceptable standard.

For example, in McMann v. Richardson⁴ it was described as being "...within the range of competence demanded of attorneys in criminal cases." In Moore v. United States⁵ it was noted that counsel must render competence that is customary at the time and place. In Scott v. United States⁶ the test for ineffective assistance was described to exist if "gross incompetence blotted out the essence of a substantial defense."

Although these and other tests have been formulated, the courts have been reluctant to flesh out these phrases of generalized language with more specific requirements. In a few instances, however, an effort has been made to define the requirements of effective assistance by delineating the duties of counsel.

For example, the United States Court of Appeals for the Fourth Circuit has formulated a list of duties.⁷ The Wisconsin Supreme Court has adopted the ABA Defense Function Standards as a guideline.⁸ Similarly, the California Supreme Court announced a list of duties in People v. Pope⁹ that is based on the ABA Defense Function Standards. Professor Gary Goodpaster has also suggested a list of duties in his article, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases."¹⁰

A list of specific duties has certain merit in providing more concrete guidance than existing general standards. However, the Supreme Court of the United States in Strickland v. Washington¹¹ made it clear that rigid and inflexible rules for counsel's conduct are not appropriate. The opinion of the Court stated, "A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffective assistance of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."¹² In providing an explanation for the rejection of "mechanical rules," the Court stated, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."¹³ The Court explained further that, "Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."¹⁴

While it rejected a listing of duties, the Court did not turn its back on "guidelines" which are advisory or act as a checklist or reminder of possible actions to be taken by defense counsel, if believed to be appropriate to a particular case.

The Court did not specifically address the question of the minimal requisite qualifications of counsel. However, certain minimal qualifications would be a logical and even required correlation to implement its pronouncements on the duty of counsel. The Court's perspective on this duty is discussed more fully

later in this report. It is, in part, the Court's reference to counsel's duty that leads to this report's recommendation that assurances of effective assistance of counsel in death penalty cases be obtained by establishing certain minimal qualifications for appointed counsel.

Admittedly, quantifying the criteria by which private counsel would be qualified to be appointed as a defense attorney in a death penalty case is not an easy task. In addition, there is no guarantee that a person possessing any specified qualifications would perform his or her duties in a manner to meet the prevailing standard of effective assistance.¹⁵ However, it does provide a modicum of assurances that the attorney possesses the rudimentary ability to provide effective assistance if he or she is inclined to do so and applies these abilities to the task of defending the accused.

It is for the purpose of achieving this minimal degree of assurance that it becomes important to establish certain fundamental qualifications for appointed attorneys in death penalty cases. However, there is a lack of legal literature, case law or other credible sources that attempt to delineate any appropriate specific qualifications. For this reason the Criminal Justice Section's Defense Function Committee decided to undertake to draft these guidelines.

Substantial Criminal Trial Experience

One of the most fundamental qualifications that should be possessed by appointed defense counsel in a death penalty case is criminal trial experience.

The trial of a death penalty case is unique and presents some novel procedural and tactical considerations, even to experienced criminal trial attorneys. Trial tactics involved in a case is not one of those elements that can be adequately defined by a list of duties. "A significant problem with the concept of delineating specific duties for defense counsel is the matter of trial tactics. Any checklist of duties must have enough flexibility to take into account the peculiarities of a particular trial."¹⁶ The Supreme Court of the United States recognized the intangible quality of measuring the elements necessary to effective representation when it stated, "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."¹⁷

Appointing defense counsel from the private bar on the basis of his or her criminal trial experience avoids the shortcoming of defining "effective assistance" through a list of duties. It is a way of reducing the formidable nature of obstacles that appointed defense counsel will encounter, because it assures that at a minimum, counsel will be familiar with criminal trials through his or her past participation in them.

The need to appoint as defense counsel a person with criminal trial experience cannot be over emphasized. "In spite of the myth that all lawyers are generalists, criminal defense is a specialty. It requires a skilled trial advocate who is familiar with the criminal justice system, including not only the criminal code, but also police and prosecutorial practices, the availability of local experts and private crime labs and the informal norms of the criminal courts."¹⁸

It is the need for "skill and knowledge" that the Supreme Court of the United States referred to in the recent Strickland v. Washington decision on effective assistance of counsel in death penalty cases. The Court stated, "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendant's the 'ample opportunity to meet the case of the prosecution' to which they are entitled."¹⁹ Again referring to the required "skill and knowledge" the

court spelled out counsel's obligation by stating. "Counsel... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."²⁰

It is difficult to quantify this experience by specifying any numerical gauge by which a desired level of trial experience is measured (e.g. number of criminal trials conducted, number of years of experience, etc.). Quantifying trial counsel's qualifications for eligibility to handle a death penalty case is largely subjective, and an elusive concept. It is for this reason that these guidelines are couched in broad terms of "substantial trial experience." The measure of what meets the requirement of "substantial trial experience" necessary for a private attorney's appointment to any particular case is best left to the discretion of the appointing authority.

The "substantial trial experience" criteria is not a precise phrase - - but it brings to the issue of "effective assistance" a degree of specific qualifications that has previously been lacking. At a minimum, it will exclude the neophyte from representing defendants in death penalty cases.

The practice of ". . . assigning the most junior members of the bar to criminal appointments . . . is troublesome, as the ABA's Project on Standards for Criminal Justice has recognized. Defense of an indigent is not an extension of law school."²¹

Required Appointment of Two Defense Counsel

The appointment of a co-counsel serves several purposes. First, it lessens the burden on the primary counsel by permitting a portion of the work associated with the defense in a death penalty case to be delegated to the assistant counsel. In addition to serving as a person that makes a substantive contribution to the effort necessary to defend a death penalty case, the assistant counsel is also a resource for primary counsel's emotional support and provides the valuable role of acting as a sounding board upon which primary counsel may rely throughout the case. The defense of a death penalty case is an intense experience for defense counsel because of the potential penalty involved. During this intense experience it is useful to have the availability of another attorney's perspective as a guide in making decisions and maintaining the best possible judgment of situations as they develop.

Second, the assistant counsel provides a different perspective on the case and serves as a resource with whom the primary counsel may consult.

The proper handling of a death penalty case is a complicated matter. The potential sentence alone merits specialized handling and a thorough exploration of all avenues of defense.

In addition, death penalty cases are unique because of the bifurcated procedure involved. Not only is there a trial on the merits, but if the defendant is found guilty, there is a separate proceeding to determine whether a sentence of life imprisonment or death will be imposed. Proper defense of a death penalty case requires the integration of the theory of defense in the trial stage with the theory to be used at the sentencing stage. Assistant counsel can make a valuable contribution toward bringing about the development of the most viable integrated theories that will best serve the interests of the defendant.

It is unrealistic to expect any appointed counsel to shoulder this burden alone. Appointed counsel have obligations to clients other than the indigent defendant in the death penalty case. The attorney must fulfill his or her obligations to those clients, many of whom are "paying" clients providing the income that sustains the attorney's practice.

The result of burdening a single attorney with the responsibility of shouldering the defense in a death penalty case could be very detrimental to the interests of the defendant. As Judge David L. Bazelon has stated,

From the 'regulars' point of view, any trial is uneconomical: it limits their availability for other appointments. The quickest way to turn over a case is to induce a client to plead guilty and up to 90% of criminal cases are disposed of by guilty pleas. A recent Georgia case,²² which I hope is unusual, indicates the potential for abuse. The defense attorney was handling some 5,000 cases a year. He had one 10-15 minute interview with his client before pleading him guilty to a capital charge. His only response to three letters from the client suggesting exculpatory witnesses was a warning that an extra fee would be required if the case went to trial. To make his point, the lawyer informed the defendant that copies of his prior record would be circulated among the jury and that the judge had promised the electric chair if the defendant were found guilty at trial. Fortunately, the plea was held involuntary on collateral attack.²³

Conclusion

This recommendation sets out only what the American Bar Association believes to be minimal guidelines to be considered in appointing attorneys in private practice to represent a person who is charged in a death penalty case. Authorities that appoint counsel in these cases should take the initiative to build on them in a way that greater assurances of competent representation will be achieved.

These fundamental guidelines should not be perceived as a panacea to the existing problem of ineffective assistance of counsel in death penalty cases. The merits and quality of representation in cases will have to be continued to be assessed and monitored by the courts on an individual basis.

However, it is intended that compliance with these guidelines will lead to better representation for defendants in death penalty cases and enhance the quality of justice provided.

Respectfully submitted,

Paul T. Smith
Chairperson

February, 1985

Endnotes

1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. Easton, Criminal Procedure II, I: Habeas Corpus, Annual Survey of American Law 117, 108-109 (1983).
3. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).
4. 397 U.S. 759, 771 (1970).
5. 432 F.2d 730 (3rd Cir. 1970).
6. 427 F.2d 609, 610 (D.C. Cir. 1970).
7. Coles v. Peyton, 389 F.2d 224 (4th Cir.) cert. denied, 393 U.S. 849 (1968).
8. State v. Harper, 57 Wis. 2d 543, 205 N.W. 2d 1, 9 (1973).
9. 23 Col. 3d 412, 590 P 2d 859 (1979).
10. 58 N.Y. Univ. L. Rev. 299 (1983).
11. 104 S.Ct. 2052 (1984).
12. Id. at 2069.
13. Id. at 2065.
14. Id. at 2066.
15. e.g., see McAuliffe v. Rutledge, 231 Ga. 745, 204 SE 2d 141. (1974).
16. Bazelon, The Defective Assistance of Counsel, 42 Crim. L. Rev. 1 (1973).
17. Strickland, 104 S.Ct. at 2067.
18. Bazelon, supra note 16, at 12.
19. Strickland, 104 S.Ct. at 2063.
20. Id. at p.2065.
21. Bazelon, supra note 16, at 13.
22. Colson v. Smith, 315 F. Supp. 179 (N.D. Ga. 1970).
23. Bazelon, supra note 16, at 33.