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# **SENTENCING ADVOCACY AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**

**The Prospects for Sentencing Advocacy  
In Noncapital State Court Sentencing Proceedings**

**David J. Keefe**

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**INTRODUCTION**

In this fortieth year of *Gideon*<sup>1</sup> there is still much to be done to fulfill *Gideon*'s promise of assistance of counsel for indigent persons accused of crime.<sup>2</sup> Part I of this essay will examine the Supreme Court's evolving view of the Sixth Amendment's guarantee of assistance of counsel, from *Powell v. Alabama*<sup>3</sup> to the recent case of *Wiggins v. Smith*.<sup>4</sup> Part II will discuss *Ake v. Oklahoma*<sup>5</sup> and the constitutional right of an indigent defendant to have the assistance of experts necessary to the preparation of a defense. Part III will examine the role which *Wiggins* and other ineffective-assistance-of-counsel cases might play in determining the contours of an indigent defendant's right to have the assistance of experts, particularly insofar as these cases rely on performance standards. In conclusion, Part IV will discuss what all this might mean for the role of sentencing advocacy in noncapital cases.

**I. ASSISTANCE OF COUNSEL**

**A. Generally.** In *Powell v. Alabama* the Supreme Court was confronted with the case of seven young African-Americans, some of them only boys, who had been convicted of rape and sentenced to death in Scottsboro, Alabama, in 1931.<sup>6</sup> Though the record indicated that they had been appointed counsel, no one represented them at the trial, which took place six days after indictment (and only twelve days after the alleged offense).<sup>7</sup> In reversing the petitioners' convictions, Justice Sutherland discussed the importance of counsel in a criminal proceeding:

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>2</sup> *Gideon* held that the Sixth Amendment to the Constitution, providing that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense, is made obligatory on the states by the Fourteenth Amendment, and that an indigent defendant in a noncapital state court prosecution has the right to have counsel appointed for him. *Id.* at 343-344.

<sup>3</sup> 287 U.S. 45 (1932).

<sup>4</sup> 2003 WL 21467222, --- S.Ct. --- (2003).

<sup>5</sup> 470 U.S. 68 (1985).

<sup>6</sup> The case was that of the "Scottsboro Boys." For a fuller discussion of this case see Gerald Horne, *Powell v. Alabama: The Scottsboro Boys and American Justice (Historic Supreme Court Cases)* (1997). There are also numerous Web sites with information about the case, e.g., <http://www.law.umkc.edu/faculty/projects/FTrials/scottsboro/scottsb.htm>

<sup>7</sup> 287 U.S. at 50-53.

If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.<sup>8</sup>

For more than thirty years many courts maintained that the rule of *Powell* applied only in cases involving “special circumstances,” e.g., rape and murder cases.<sup>9</sup> However, in *Gideon v. Wainwright*<sup>10</sup> the Supreme Court took the important step of holding that the Sixth Amendment’s right to counsel was so fundamental that it extended to any case punishable by prison.<sup>11</sup>

**B. Effective Assistance of Counsel.** David Leroy Washington was living with his wife and baby in a Miami slum in September of 1976 when his life fell apart.<sup>12</sup> He lost his job, and a short time later he was approached in a laundromat by a man who identified himself as a minister. When the minister invited David to engage in homosexual acts in exchange for money, he “snapped” and stabbed the minister to death. Within a few days he killed three more times. At trial, Washington’s court-appointed lawyer appears to have given up hope, calling neither character nor mental health witnesses to help the sentencing judge understand how such a crime spree could have occurred and why a sentence less than death would have been appropriate.<sup>13</sup> In seeking relief from his death sentence, Washington argued that his lawyer’s performance had been so deficient as to violate Washington’s Sixth Amendment right to counsel.<sup>14</sup>

The Supreme Court disagreed. By a vote of 7-2 the Court ruled that in reviewing claims of ineffective assistance of counsel, great deference must be paid to the decisions of trial counsel.<sup>15</sup> The Court held that in order to show a denial of effective assistance of counsel a defendant would have to demonstrate both (a) that counsel’s performance fell below a standard of reasonable professional competence and (b) that there was a reasonable probability that, but for counsel’s errors, the outcome would have been different.<sup>16</sup> Writing for the Court, Justice O’Connor commented that in making the determination whether counsel’s performance fell below a standard of reasonableness, “[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4- 1.1 to 4-8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable,

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<sup>8</sup> 287 U.S. at 64.

<sup>9</sup> *Gideon v. Wainwright*, 372 U.S. 335, 350 (1963), (Harlan, J. concurring, citing *Betts v. Brady*, 316 U.S. 455 (1942)).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 345.

<sup>12</sup> This account of the Washington case is taken from David Von Drehle, *Among the Lowest of the Dead*, 134-135 (1995).

<sup>13</sup> *Strickland v. Washington*, 466 U.S. 668, 672-673 (1984).

<sup>14</sup> *Id.* at 675.

<sup>15</sup> *Id.* at 691.

but they are only guides.”<sup>17</sup> David Washington was executed on July 13, 1984.<sup>18</sup> The *Strickland* test is still the law which applies to claims of ineffective assistance of counsel.<sup>19</sup>

Although a defendant’s right to counsel is grounded in the Sixth Amendment,<sup>20</sup> cases from *Powell* on have regarded it not in the abstract, but rather in terms of its role in affecting the outcome of the proceedings.<sup>21</sup> This is essentially a due process analysis.<sup>22</sup> Thus in the passage from *Powell*, quoted above, the Court observed, “If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel. . . such a refusal would be a denial of a hearing, and, therefore, of *due process* in the constitutional sense.”<sup>23</sup>

Sixteen years would pass before the Supreme Court would grant relief on a claim of ineffective assistance of counsel, but when it did so, it gave performance standards fresh vitality. In 2000, the Court reversed a death sentence in the case of *Williams v. Taylor*,<sup>24</sup> finding unreasonable, among trial counsel’s other lapses, their failure to begin the mitigation investigation promptly and their failure to obtain and present evidence of the defendant’s abusive childhood, his cognitive deficits, his exemplary prison record and his other positive achievements.<sup>25</sup> *Williams v. Taylor* is instructive for its adoption of a virtual laundry list of recommendations from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 1989).<sup>26</sup>

In granting relief in *Williams* the Supreme Court showed a greater sensitivity to performance standards than it had in *Strickland*, where relief was denied. Although a thorough analysis of the reasons for this change is beyond the scope of this essay, it would not be farfetched to suppose that the Court’s closer scrutiny of trial counsel’s performance was influenced in part by a growing public awareness that the criminal justice system is not producing fair and accurate results.<sup>27</sup>

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<sup>16</sup> *Id.* at 687.

<sup>17</sup> *Id.* at 688.

<sup>18</sup> Von Drehle, *supra* note 11, at 253.

<sup>19</sup> *Wiggins*, 2003 WL 21467222, slip op. at 7.

<sup>20</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” U.S. CONST. Amend. VI

<sup>21</sup> “The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Strickland*, 466 U.S. at 685. *But see U.S. v. Cronin*, 466 U.S. 648, 659 (1984)(no need to prove prejudice where counsel actually or constructively denied).

<sup>22</sup> *Strickland*, 466 U.S. at 694, citing the test for materiality employed in *United States v. Agurs*, 427 U.S. 97 (1976), a due process case. 427 U.S. at 102.

<sup>23</sup> *Powell*, 287 U.S. at 64.

<sup>24</sup> 529 U.S. 362 (2000).

<sup>25</sup> *Id.* at 396.

<sup>26</sup> *Id.* at 373. See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989), Guideline 11.8.6 and Commentary.

<sup>27</sup> See, e.g., Liebman, *et al.*, Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 Tex. L. Rev. 1839 (2000); see also U.S. Department of Justice, Convicted By Juries, Exonerated By Science, case studies of wrongful convictions discovered through DNA testing, available at <http://www.ncjrs.org/txtfiles/dnaevid.txt>. Each time another innocent person is released from death row it makes national news, and such events have achieved the regularity of a drumbeat, e.g., on January 24, 2003, Florida prosecutors dismissed charges against Rudolph Holton, who had been on death row for sixteen years. See <http://www.deathpenaltyinfo.org/article.php?did=456&scid=1>.

Recently the Supreme Court again addressed the issue of ineffective assistance of counsel at sentencing in the case of *Wiggins v. Smith*.<sup>28</sup> Kevin Wiggins had been convicted of capital murder by a judge and sentenced to death by a jury.<sup>29</sup> After his conviction, and about a month before his sentencing hearing was to be held, Wiggins' attorneys filed a motion to bifurcate the sentencing proceeding.<sup>30</sup> They wished to prove in the first phase that a person other than Wiggins had performed the acts which caused the victim's death, thus making Wiggins ineligible for a death sentence; if that was unsuccessful they intended to present their mitigation case in the proposed second phase.<sup>31</sup> In a memorandum in support of this motion, in opening remarks to the jury, and in an offer of proof during the sentencing proceeding itself (the bifurcation having been denied by the court), counsel referred to evidence of Wiggins' life history which they intended to present.<sup>32</sup> However, no such evidence was actually presented to the jury.<sup>33</sup> There was in fact much compelling evidence of trauma and deprivation in Wiggins' background,<sup>34</sup> some of which counsel had obtained and some of which, owing to their having failed to conduct a thorough social history investigation, they had not obtained.<sup>35</sup>

When Wiggins raised a claim of ineffective assistance of counsel during post-conviction review, his trial attorneys maintained that the decision to limit the investigation of their client's background had been a tactical one based on their decision to challenge his eligibility for a death sentence.<sup>36</sup> Noting that trial counsel had missed significant mitigating evidence, Justice O'Connor, writing for the 7-2 majority, stated that "our principal concern in deciding whether [trial counsel] exercised 'reasonable professional judgment,' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*."<sup>37</sup> For this determination the *Wiggins* Court looked to the "well-defined norms" which were available to counsel at the time, namely, the practices of the Maryland Public Defender's office, the ABA Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989).<sup>38</sup> The Court found that counsel's investigation had not met these established standards:

When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.<sup>39</sup>

Thus the Court found that the performance prong of *Strickland's* two-prong test<sup>40</sup> of ineffective assistance of counsel had been met.<sup>41</sup> The Court then addressed the prejudice prong of the *Strickland*

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<sup>28</sup> 2003 WL 21467222, --- S.Ct. --- (2003).

<sup>29</sup> *Id.* Slip op. at 4.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Slip op. at 5.

<sup>35</sup> *Id.* Slip op. at 9.

<sup>36</sup> *Id.* Slip op. at 5.

<sup>37</sup> *Id.* Slip op. at 8 (emphasis in the original; internal cites omitted).

<sup>38</sup> *Id.* Slip op. at 9.

<sup>39</sup> *Id.* Slip op. at 10.

<sup>40</sup> 466 U.S. at 687.

test.<sup>42</sup> Finding that the mitigating evidence which trial counsel had failed to discover and present was “powerful,”<sup>43</sup> the Court held that “. . . had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.”<sup>44</sup> Accordingly, Wiggins’ death sentence was reversed.<sup>45</sup>

**C. Effective Assistance of Counsel in Noncapital Cases.** The *Strickland* test applies to constitutional claims of ineffective assistance of counsel for both capital and noncapital cases.<sup>46</sup> In capital cases the issue of prejudice is conceptually straightforward, i.e., prejudice has occurred if the defendant received a death sentence where, but for counsel’s errors, there is a reasonable probability that the jury would have returned a sentence less than death.<sup>47</sup> However, the prejudice prong can be more complex in noncapital cases. For example, in *Durrive v. U.S.*<sup>48</sup> the defendant, Durrive, was convicted of various drug offenses.<sup>49</sup> He complained that the sentencing judge erred in calculating the amount of drugs involved, which under the Federal Sentencing Guidelines resulted in a sentence approximately one year greater than what Durrive believed was correct. Since Durrive’s attorney had failed to object, Durrive brought an ineffective assistance of counsel claim in a *habeas corpus* petition.<sup>50</sup> But the Seventh Circuit Court of Appeals affirmed the sentence, holding that, even if Durrive’s calculation were correct, the difference was not sufficiently “significant” to make his sentence unreliable or fundamentally unfair under the prejudice prong of *Strickland*.<sup>51</sup> However, in *Glover v. U.S.*<sup>52</sup> the Supreme Court addressed this question for the first time and ruled that “[a]ny amount of actual jail time has Sixth Amendment significance.”<sup>53</sup> The *Glover* court cited its recent ruling in *Williams v. Taylor*,<sup>54</sup> where it had noted that

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<sup>41</sup> *Wiggins*, 2003 WL 21467222, slip op. at 15.

<sup>42</sup> 466 U.S. at 687.

<sup>43</sup> *Wiggins*, 2003 WL 21467222, Slip op. at 16.

<sup>44</sup> *Id.* Slip op. at 17.

<sup>45</sup> *Id.* Slip op. at 18.

<sup>46</sup> *U.S. v. Acevedo*, 229 F.3d 350 (2d Cir. 2000); *Berryman v. Morton*, 100 F.3d 1089 (3d Cir. 1996); *U.S. v. Mikalajunas*, 186 F.3d 490 (4th Cir. 1999); *U.S. v. Spriggs*, 993 F.2d 85 (5th Cir. 1993); *U.S. v. Stevens*, 851 F.2d 140 (6th Cir. 1988); *Durrive v. U.S.*, 4 F.3d 548 (7th Cir. 1993) overruled on other grounds by *Glover v. United States*, 531 U.S. 198 (2001); *Auman v. U.S.*, 67 F.3d 157 (8th Cir. 1995); *U.S. v. Garcia*, 91 F.3d 156 (Table; text available at 1996 WL 393566 (9th Cir. 1996); *U.S. v. Kissick*, 69 F.3d 1048 (10th Cir. 1995); *Reece v. U.S.*, 119 F.3d 1462 (11th Cir. 1997). Each state, however, may afford criminal defendants greater protection by statute or under the state’s constitution. *See, e.g., State v. Smith*, 712 P.2d 496, 500 (Hawaii 1986) (explaining that the test of ineffective assistance of counsel under the Hawaii constitution is whether counsel committed “specific errors or omissions ... reflecting counsel’s lack of skill, judgment or diligence, and these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense”) (Internal cites omitted.)

<sup>47</sup> *Strickland*, 466 U.S. at 695. This is not to suggest that the *Strickland* test, particularly the prejudice prong, is not controversial. *See, e.g.,* William S. Geimer, A Decade of *Strickland*’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 Wm. & Mary Bill Rts. J. 91, 93 (1995) (arguing that “contrary to its rhetoric in *Strickland*,” the Supreme Court has seriously undermined the right of indigent accused to have reasonable counsel); *see also* Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994).

<sup>48</sup> Note 46 *supra*.

<sup>49</sup> *Id.*, 4 F.3d at 549.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 551.

<sup>52</sup> Note 46 *supra*.

<sup>53</sup> *Id.*, 531 U.S. at 203.

<sup>54</sup> 529 U.S. 362.

*Strickland*'s prejudice prong requires only that counsel's errors ". . .deprive the defendant of a substantive or procedural right to which the law entitles him."<sup>55</sup>

To sum up: *Strickland v. Washington* established a two-part test which later cases, both capital and noncapital, have relied upon in assessing claims of ineffective assistance of trial counsel, i.e., (1) whether counsel's *performance* was deficient and (2) whether counsel's errors *prejudiced* the outcome. The performance prong asks whether counsel's performance fell below a reasonable standard of professional competence.<sup>56</sup> In making this determination reviewing courts must apply "a heavy measure of deference to counsel's judgments."<sup>57</sup> Finally, both *Williams* and *Wiggins* looked to performance guidelines established by the defense bar in assessing trial counsel's decisions. What role will performance standards play in determining an indigent defendant's right to have the assistance of experts in preparing his defense?

## II. ASSISTANCE OF EXPERTS

*Ake v. Oklahoma*<sup>58</sup> is today regarded as the case governing an indigent defendant's right to expert assistance. Glen Burton Ake and his co-defendant, Hatch, murdered a couple and wounded their two children.<sup>59</sup> Ake was subsequently found unfit for trial and remanded to a state mental hospital, where he was "restored" to fitness partly through the administration of 200 mg. of Thorazine three times a day.<sup>60</sup> His attorney notified the court that the defense would be insanity and applied to the court for appointment of a psychiatrist to examine Ake and evaluate his sanity at the time of the offense. The trial court denied this motion.<sup>61</sup> Moreover, the state's doctors had not conducted any tests or evaluations with respect to Ake's sanity at the time of the offense. Consequently, there was no expert testimony for either side on this issue at trial.<sup>62</sup> Ake was convicted and sentenced to death,<sup>63</sup> and the Oklahoma Court of Criminal Appeals affirmed.<sup>64</sup> However, the United States Supreme Court reversed,<sup>65</sup> holding that "...when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."<sup>66</sup>

In *Ake* the Supreme Court identified and weighed three concerns. The first is the defendant's interest in life and liberty, which Justice Marshall, writing for the Court, described as "uniquely compelling."<sup>67</sup> Second is the state's interest in denying the requested services, such as cost savings or efficient administration of justice--provided, however, that the state may not oppose such services to gain

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<sup>55</sup> *Glover*, 531 U.S. at 203 (citing *Williams*; internal cites omitted).

<sup>56</sup> *Strickland*, 466 U.S. at 687.

<sup>57</sup> *Id.* at 690-691.

<sup>58</sup> *Supra* note 5.

<sup>59</sup> *Id.* at 71.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 71.

<sup>62</sup> *Id.* at 72.

<sup>63</sup> *Id.* at 73.

<sup>64</sup> *Id.* at 74.

<sup>65</sup> *Id.* at 87.

<sup>66</sup> *Id.* at 75.

<sup>67</sup> *Id.* at 78.

strategic advantage, since the state must, above all, seek justice.<sup>68</sup> Finally, the trial court must consider the importance of the services sought in avoiding an erroneous outcome to the proceedings.<sup>69</sup> This last inquiry asks what difference the denial of assistance would make in the outcome of the case, and it is worth noting that it resonates with the prejudice prong of the *Strickland* test for ineffective assistance of counsel.<sup>70</sup>

Four issues regarding *Ake* will be of immediate importance to sentencing advocates: (A) whether *Ake*'s authority extends to resources other than psychiatrists, (B) whether *Ake* applies to the sentencing as well as to the guilt-innocence phase of proceedings, (C) whether the defendant must be provided access to an independent expert or whether a “court” or “neutral” expert will suffice, and (D) whether the state's duty to provide expert assistance applies to noncapital cases.

**A. Resources Other than Psychiatrists.** It is now well established that the holding of *Ake* is not confined to psychiatrists or even mental health experts generally, but extends to virtually any type of assistance without which the defendant cannot receive a fair adjudication.<sup>71</sup> For example, in *State v. Burns*<sup>72</sup> Becky Burns was charged in Salt Lake City with the murder of her infant son by starvation and dehydration. She requested a pediatric medical expert to support her defense that the baby's many serious illnesses caused his death.<sup>73</sup> The trial court denied Burns's motion because she was represented by retained counsel (paid for by her father).<sup>74</sup> The Utah Supreme Court ruled that the trial court should have determined whether Burns was indigent instead of conditioning funding for expert assistance on her accepting state-funded counsel. The case was remanded to the trial court to determine whether Burns was indigent and therefore entitled to funds for an expert; if so, she would be entitled to a new trial.<sup>75</sup>

In *State v. Scott*,<sup>76</sup> the defendant, Randall Scott, was charged in Nashville, Tennessee, with the aggravated sexual battery of a nine-year-old child.<sup>77</sup> The prosecution intended to introduce expert testimony concerning DNA tests that had been conducted on various items of evidence, and Scott's attorneys requested funding for their own DNA expert, a request which the trial court denied.<sup>78</sup> Scott was

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<sup>68</sup> *Id.* at 79.

<sup>69</sup> *Id.* at 77.

<sup>70</sup> In *Strickland* Justice O'Connor defined “prejudice” as creating a “reasonable probability” that the outcome would have been different, or “. . . a probability sufficient to undermine confidence in the outcome.” 466 U.S. at 694.

<sup>71</sup> See generally Michael Yaworsky, Annot., Right of Indigent Defendant in State Criminal Case to Assistance of Investigators, 81 ALR 4th 259 (1990); Michael Yaworsky, Annot., Right of Indigent Defendant in State Criminal Case to Assistance of Expert in Social Attitudes, 74 A.L.R.4th 330 (1989); Michael Yaworsky, Annot., Right of Indigent Defendant in State Criminal Case to Assistance of Chemist, Toxicologist, Technician, Narcotics Expert, or Similar Nonmedical Specialist in Substance Analysis, 74 A.L.R.4th 388 (1989); Michael Yaworsky, Annot., Right of Indigent Defendant in State Criminal Case to Assistance of Fingerprint Expert, 72 A.L.R.4th 874 (1989); Michael Yaworsky, Annot., Right of Indigent Defendant in State Criminal Case to Assistance of Ballistics Experts, 71 A.L.R.4th 638 (1989); Gregory Sarno, Annot., Admissibility of Expert Testimony as to Appropriate Punishment for Convicted Defendant, 47 A.L.R.4th 1069 (1986).

<sup>72</sup> 4 P.3d 795 (Utah 2000).

<sup>73</sup> *Id.* at 796.

<sup>74</sup> *Id.* at 797.

<sup>75</sup> *Id.* at 799-803.

<sup>76</sup> 33 S.W.3d 746 (Tenn. 2000).

<sup>77</sup> *Id.* at 748.

<sup>78</sup> *Id.*

convicted and sentenced to a total of thirty-five years in prison.<sup>79</sup> The Tennessee Supreme Court ruled that the applicable test for state-funded expert assistance required the defendant to demonstrate a “particularized need”<sup>80</sup> for the services and that there was a reasonable likelihood that the requested services would assist in the preparation of this defense.<sup>81</sup> Since Scott had met this burden,<sup>82</sup> his conviction was reversed and the case was remanded for a new trial.<sup>83</sup>

Finally, in *People v. Lawson*<sup>84</sup> Carl Lawson was charged in East St. Louis, Illinois, with the murder of an eight-year-old boy.<sup>85</sup> The only evidence of his presence at the crime scene was the testimony of the state’s shoeprint expert,<sup>86</sup> who testified at Lawson’s trial that particular characteristics of five shoeprint impressions, combined with their displayed brand name, “Pro-Wing,” positively identified the impressions as being made by Lawson’s shoes.<sup>87</sup> Lawson was convicted and sentenced to death.<sup>88</sup> On appeal, the Illinois Supreme Court held that it was error for the trial court to have refused Lawson’s request for funds to retain his own shoeprint expert,<sup>89</sup> despite the fact that Lawson had not specified whom he wished to retain or what the cost would be as required by statute.<sup>90</sup> In evaluating the effect of the trial court’s refusal to permit Lawson to hire his own expert, the Illinois Supreme Court noted that “. . .there can also be no question that the opinion of a shoeprint expert is necessary to proving a crucial issue in the case and that defendant was prejudiced without such assistance.”<sup>91</sup>

**B. Sentencing.** The rule of *Ake* applies to sentencing as well as to guilt-innocence. As the *Ake* court held:

We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial.<sup>92</sup>

**C. An Independent Expert.** *Ake* mandates that a defendant who makes the requisite showing be provided access to a defense, expert, and not merely a “neutral” expert.<sup>93</sup> For example, in *Glenn v. Tate*,<sup>94</sup> a capital case, defense counsel submitted to the jury at sentencing a report which had been prepared by state psychiatrists who had evaluated Mr. Glenn for competency to stand trial. One of the

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<sup>79</sup> *Id.* at 751.

<sup>80</sup> *Id.* at 753.

<sup>81</sup> *Id.* at 754.

<sup>82</sup> *Id.* at 755.

<sup>83</sup> *Id.* at 761.

<sup>84</sup> 644 N.E.2d 1172 (Ill. 1994).

<sup>85</sup> *Id.* at 1174.

<sup>86</sup> *Id.* at 1192.

<sup>87</sup> *Id.* at 1191.

<sup>88</sup> *Id.* at 1172.

<sup>89</sup> *Id.* at 1191.

<sup>90</sup> *Id.* at 1188-1189.

<sup>91</sup> *Id.* at 1191.

<sup>92</sup> 470 U.S. at 83-84.

<sup>93</sup> *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1995); *People v. Lawson*, *supra* note 76. See also cases discussed in ALR annotations cited *supra* note 62.

<sup>94</sup> *Id.*

doctors commented in the report, “In summary, within reasonable medical certainty, I do not see any imtigating [sic] circumstances in this particualr [sic] individual.”<sup>95</sup> In fact, post-conviction counsel discovered through evaluation by a competent independent expert that Mr. Glenn suffered from significant brain damage and grossly subnormal cognitive functioning. The court found that, had counsel obtained the assistance of an independent expert, there was a reasonable probability that the jury would not have sentenced Glenn to death.<sup>96</sup>

**D. In Noncapital Cases.** *Ake* governs the state's duty to provide expert assistance in noncapital cases. Although the Supreme Court has not addressed *Ake*'s applicability to noncapital cases, the prevailing view is that there is no principled basis to apply a different test in noncapital cases,<sup>97</sup> and Justice Rehnquist complained in his dissent in *Ake* itself that it would apply to noncapital as well as capital cases.<sup>98</sup>

### III. ACCESS TO EXPERT ASSISTANCE AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

**A. In Capital Cases.** The ineffective-assistance-of-counsel cases not only extend a “heavy measure of deference” to trial counsel’s judgments for purposes of post-conviction review,<sup>99</sup> but they also suggest to trial counsel--and reviewing courts--how those judgments should be made. The recent capital cases of *Williams v. Taylor* and *Wiggins v. Smith* look to established performance standards as the starting point in assessing the reasonableness of counsel’s litigation decisions.<sup>100</sup> What do such standards advise about the need for expert assistance?

On February 10, 2003 the ABA House of Delegates adopted revised death penalty guidelines.<sup>101</sup> The revised ABA guidelines represent two years of work by numerous experts, culminating in the first major revision of the guidelines since 1989.<sup>102</sup> Regarding sentencing, Guideline 10.11, The Defense Case Concerning Penalty, advises:

- A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.

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<sup>95</sup> *Id.* at 1208.

<sup>96</sup> *Id.* at 1210.

<sup>97</sup> See cases discussed in ALR annotations cited *supra* note 63. Some jurisdictions have been slow to acknowledge *Ake*'s applicability to noncapital cases. Compare *Isom v. State*, 488 So.2d 12, 13 (Ala.Crim.App. 1986) (“ . . . it is to be noted that *Ake* does not reach to noncapital cases.”), with *Russell v. State*, 715 So.2d 866, 871 (Ala.Crim.App. 1997) (Assault conviction reversed where trial court abused its discretion in refusing defendant’s *Ake* motion for mental health evaluation).

<sup>98</sup> *Id.* at 87. But see Justice Burger’s concurring opinion in *Ake*: “Nothing in the Court’s opinion reaches non-capital cases.” *Id.* at 87.

<sup>99</sup> *Strickland*, 466 U.S. at 691.

<sup>100</sup> See *supra* notes 24-39 and accompanying text.

<sup>101</sup> American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, (2003) (hereinafter “ABA Guidelines”), Introduction at ii, available at <http://www.abanet.org/deathpenalty>.

<sup>102</sup> *Id.* at ii.

- F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

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2. Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor.

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Guideline 10.7, Investigation, is more general than Guideline 10.11, and tracks the ABA Standards for Criminal Justice: Defense Function, Standard 4-4.1 ("Duty to Investigate"),<sup>104</sup> which are applicable to capital and noncapital cases alike. The commentary to Guideline 10.7 advises that "[c]ounsel's duty to investigate and present mitigating evidence is now well established,"<sup>105</sup> and note 203 to the commentary cites some specific examples:

*e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); *Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective for failing to investigate and present evidence of client's brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining "the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child"), *cert. denied*, 122 S. Ct. 2645 (2002); *Coleman v. Mitchell*, 268 F.3d 417, 449-51 (6th Cir. 2001) (though counsel's duty to investigate mitigating evidence is well established, counsel failed to investigate and present evidence that defendant had been abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother where he was exposed to group sex, bestiality and pedophilia, and suffered from probable brain damage and borderline personality disorder), *cert. denied*, 122 S. Ct. 1639 (2002); *Jermyn v. Horn*, 266 F.3d 257, 307-08 (3d Cir. 2001) (counsel ineffective for failing to investigate and present evidence of defendant's abusive childhood and "psychiatric testimony explaining how Jermyn's development was thwarted by the torture and psychological abuse he suffered as a child"); *supra* note 195.<sup>106</sup>

In light of the importance which *Williams* and *Wiggins* assign to this kind of advice it will be difficult for a trial court to refuse to provide access to expert services in a capital case where trial counsel, relying on the ABA Guidelines and other appropriate norms, clearly spells out the type of service required and the reason the evidence sought is important to an adequate defense.

**B. In Noncapital Cases.** *Glover* and *Williams* teach that a defendant's right to effective assistance of counsel protects him against being deprived, due to counsel's errors, of any substantive or procedural right to which the law entitles him<sup>107</sup>--even, presumably, if the deprivation consists of but one day of

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<sup>103</sup> *Id.* Guideline 10.11.

<sup>104</sup> ABA, Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

<sup>105</sup> ABA Guidelines, Guideline 10.7 Investigation, *Commentary*, Penalty.

<sup>106</sup> *Id.*, Guideline 10.7 Investigation, *Commentary*, n.203.

<sup>107</sup> *Glover*, 531 U.S. at 203; *Williams*, 529 U.S. at 393.

incarceration more than what the law requires.<sup>108</sup> As for the performance prong, *Glover* seemed to take as given that the *Strickland* standard of “professionally competent assistance”<sup>109</sup> applies to noncapital cases as well as to capital cases.<sup>110</sup>

**C. Reality Check.** *Williams* and *Wiggins* looked to applicable performance standards in determining the standard of care under the performance prong of *Strickland*.<sup>111</sup> And, for noncapital cases, we have seen from *Glover* and *Williams* that the deprivation of “any substantive or procedural right” caused by a breach of the standard of care will satisfy *Strickland*’s prejudice prong.<sup>112</sup> It should follow, therefore, that any reasonably competent trial attorney who wishes to be provided the services of an expert for her client in a noncapital case should be able to explain to the trial court<sup>113</sup> (a) that the defense case is at a juncture requiring her to exercise her professional judgment concerning the specific issue under consideration,<sup>114</sup> (b) that, according to relevant performance norms and the preliminary opinion of an expert she has consulted, her obligation to her client requires her to pursue the issue that is the subject of her motion (i.e., the issue is a “significant factor” in her case),<sup>115</sup> (c) that she cannot adequately prepare or present the defense case without the assistance of the aforementioned expert, and therefore (d) she will be unable to provide her indigent client with effective assistance of counsel unless the court orders the state to furnish the funds necessary to retain the expert. Must the trial court approve the desired funds?

In fact, decisions such as *Williams*, *Wiggins*, and *Glover* have probably improved matters for indigent defendants in need of funding for expert assistance in noncapital cases. However, just as reviewing courts may have begun to respond to the ongoing news of wrongful convictions,<sup>116</sup> so too can they be expected to be sensitive to limitations on available funds.<sup>117</sup> Thus, when presented with a request--no matter how elegantly drawn--that the court doesn’t believe will actually make a difference in the case, it should not be surprising that the court, whether trial or reviewing court, may show resourcefulness in devising a reason to deny the request. For example, in *State v. Edwards*<sup>118</sup> the Tennessee Court of Criminal Appeals considered an *Ake* motion for the assistance of a DNA expert. The motion explained that the defendant, Milburn Edwards, was charged with twenty-one counts of criminal sexual assault, that

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<sup>108</sup> *Glover* at 203. However, the *Glover* court distinguished between the case before it, which involved the Federal Sentencing Guidelines, and cases in which the sentencer has wider discretion in sentencing and in which, therefore, prejudice would be more difficult to quantify. See: *Spriggs v. Collins*, *supra* note 46 (requiring a showing that a sentence would have been “significantly less harsh” under the Texas discretionary sentencing scheme), 993 F.2d at 88. (Emphasis in the original.)

<sup>109</sup> *Strickland*, 466 U.S. at 690.

<sup>110</sup> The cases cited in note 46 *supra* have so held.

<sup>111</sup> *Williams*, 529 U.S. at 373; *Wiggins*, 2003 WL 21467222, slip op. at 9.

<sup>112</sup> *Glover*, 531 U.S. at 203.

<sup>113</sup> In most instances in an appropriate *ex parte* proceeding. See *Ake*, 470 U.S. at 82; see also ABA Guidelines, Guideline 10.4, The Defense Team, n.174 and accompanying text.

<sup>114</sup> *Strickland*, 466 U.S. at 686.

<sup>115</sup> *Ake*, 470 U.S. at 74.

<sup>116</sup> Note 27 *supra*.

<sup>117</sup> See, e.g., County Says It’s Too Poor to Defend the Poor, N.Y. Times, April 15, 2003, Late Edition - Final, Sec.A, at 1, Col. 3; As Cities’ Budgets Shrink, Criminal Justice Feels Pinch, N.Y. Times, June 7, 2003, Late Edition - Final, Sec.A, at 11, Col.1; States, Facing Budget Shortfalls, Cut the Major and the Mundane, N.Y. Times, April 21, 2003, Late Edition - Final, Sec.A, at 1, Col.1.

<sup>118</sup> 868 S.W.2d 682 (Tenn.Cr.App. 1993).

the state intended to offer DNA evidence that linked the Mr. Edwards to the crime, and that counsel was not competent to challenge this evidence without the assistance of a defense expert--all accompanied with a memorandum of law.<sup>119</sup> The trial court denied the defendant's motion,<sup>120</sup> and the Court of Criminal Appeals affirmed Edwards' convictions.<sup>121</sup> While the appellate court acknowledged that identification was an "obvious issue" in the case,<sup>122</sup> it nevertheless held that the defendant had failed to make a "particularized showing" of need for expert assistance.<sup>123</sup> What would appear superficially to be surplusage in the court's discussion may in fact be the key to this otherwise mystifying ruling: The court noted that "[t]he state's DNA expert provided helpful but cumulative testimony."<sup>124</sup> From this, one might infer that the Court of Criminal Appeals was convinced, rightly or wrongly, that even if it were to remand the case for re-trial, the defense could not possibly achieve a different result, and so the exercise would have been wasteful.

#### IV. THE PROSPECTS FOR SENTENCING ADVOCACY

**A. What Sentencing Advocates Do.** In the emergent specialty of sentencing advocacy<sup>125</sup> there is not yet an authoritative definition of the role of the sentencing advocate. In practice, however, one can identify two working definitions, depending upon whether the case in question is a capital or noncapital case.

**1. In noncapital cases.** In its Code of Ethics, the National Association of Sentencing Advocates defines "sentencing advocate" as "a person who engages in sentencing advocacy." However, a fuller description of what this entails in a noncapital context may be found in the December issue of *NASA Notes*, the group's newsletter. In an article entitled "Persuading Lawyers to use Sentencing Advocates in Federal Court," James Tibensky describes his work on a noncapital demonstration case which included

. . . interviews with the family, research on important issues, brainstorming the approach to take, writing the report, reviewing the report with lawyers and others, re-writing the report, and preparing a video of the client with her child to show what the court could not otherwise see.<sup>126</sup>

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<sup>119</sup> *Id.* at 697-698.

<sup>120</sup> *Id.* at 698.

<sup>121</sup> *Id.* at 705.

<sup>122</sup> *Id.* at 698.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> As with any emergent field, nomenclature in the field of sentencing advocacy is not yet uniform. Those working in this field may refer to themselves as "forensic social workers," "sentencing specialists," "sentencing advocates," "mitigation specialists" or some similar term. It is to be hoped that persons performing this work, by whatever label, will in many circumstances be accorded the status of "expert," as that term is used in Rule 702 of the Federal Rules of Evidence and comparable state rules. Since the term "sentencing specialist" seems most consonant with expert status, it will be used here to refer to a sentencing advocate in the context of a noncapital case; "mitigation specialist" will refer to sentencing advocates in the capital context, and "sentencing advocate" will be used to denote sentencing advocacy generally. Note, however, that even where a sentencing advocate's expert status is uncertain or denied, this does not mean that he or she should not be allowed to testify and even offer hearsay evidence at a sentencing hearing. *See Green v. Georgia*, 442 U.S. 95, 97 (1979). *See also Wiggins*, 2003 WL 21467222, slip op at 17.

<sup>126</sup> *NASA Notes*, December 2002 at p.3, available at <http://www.sentencingproject.org/NASA>. Because of the unique issues raised by the Federal Sentencing Guidelines, federal sentencing advocacy is beyond the scope of this essay. In his article Mr. Tibensky urges, however, that ". . .the guidelines make [sentencing advocacy] essential," and adds that "[a

Depending on the needs of each case, a sentencing specialist may need to perform other tasks as well, such as assessing the risk of future violence in a juvenile client<sup>127</sup> or addressing the role and/or needs of victims in accordance with principles of restorative justice.<sup>128</sup>

**2. In capital cases.** In most capital cases a community-based sentence is such a remote possibility that for all practical purposes the goal is to help the sentencer understand why a sentence less than death, i.e., a substantial term of imprisonment, is appropriate. According to the affidavit of one recognized mitigation specialist:

The role of the mitigation specialist in a capital murder case is to conduct a detailed biopsychosocial evaluation of the defendant's life history in order to determine which issues or factors in that client's life require additional expert examination. The mitigation specialist is responsible for gathering whatever materials may be needed by such an expert to conduct a thorough examination. The mitigation specialist is responsible for communicating with the attorneys so that they are aware of the result of the investigation, and so that a consistent theory of defense can be developed for the case. The mitigation specialist is also responsible for working with the client and his or her family. Lastly, the mitigation specialist aids in the development of a theory of presentation of the developmental life history information and may or may not be a mitigation witness during the sentencing phase.<sup>129</sup>

**B. Constitutional Status of Sentencing Advocacy.** No case, capital or noncapital, has held that the Constitution requires that a court provide an indigent defendant with funds to hire a sentencing advocate, while several cases have held to the contrary.<sup>130</sup> For the foreseeable future it seems unlikely that there will be a *Gideon*-type legal breakthrough in which due process or the Sixth Amendment will be interpreted to require that a defendant be provided with a sentencing advocate at public expense. To the extent that the benefit which a sentencing advocate confers on the individual defendant is one of advocacy, it is unlikely that this function will any time soon be seen as so technical as to be outside the competence of the attorney.<sup>131</sup>

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report from a sentencing advocate attached to the motion for a downward departure puts life in the motion and structure to the legal foundation." *Id.* at 3-4.

<sup>127</sup> See Lori James-Monroe, Violence Risk Factors, Sentencing Advocacy Resource Manual XI, National Association of Sentencing Advocates, 2003. See also *In the Matter of J.E.H.*, 972 S.W.2d 928, 930 (Texas 1998) (Juvenile entitled to assistance of expert to challenge state's evidence of future dangerousness in transfer proceeding).

<sup>128</sup> See Phyllis Turner Lawrence and Harmon L. Wray, Restorative Justice, Sentencing Advocacy Resource Manual XI, National Association of Sentencing Advocates, 2003.

<sup>129</sup> Affidavit of Jill Miller, MSSW, LICSW, Madison, Wisconsin, on file with the author.

<sup>130</sup> See *Commonwealth v. Reid*, 642 A.2d 453 (Pa. 1994) (upholding trial court's refusal to approve funds for particular psychologist as mitigation expert); *Arthur v. State*, 711 So.2d 1031 (Ala. Crim. App. 1996) (upholding denial to fund expert social worker as mitigation expert where no showing of particularized need); *State v. Lott*, 1994 WL 615012 (Ohio Ct. App. 1994) ("mere assertions" that expert would be useful not enough to require funding); *State v. Langley*, 839 P.2d 692 (1992) (upholding denial where defendant could not show why particular expertise of investigator necessary); *People v. Whitehead*, 662 N.E.2d 1304 (Ill. 1996) (finding that denial of expert to investigate and prepare mitigation evidence did not deny effective assistance of counsel). But see *State v. Davis*, 96 NJ 611, 477 (1984) (upholding the relevance of a defense sociology professor's demographic and statistical testimony, and recognizing a "lowered threshold" for evaluating a tendered expert's competence and other issues bearing on the admissibility of evidence proffered in mitigation of the death penalty at the sentencing phase of a criminal prosecution).

<sup>131</sup> See, e.g., *People v. Burt*, 658 N.E.2d 375, 398 (Ill. 1995) (finding that mitigation expert was not essential to marshal evidence in mitigation because defense counsel could obtain and present).

On the other hand, there is reason for hope concerning the future of sentencing advocacy, on two fronts. First, the broad social-work base of sentencing advocacy is becoming institutionalized without any constitutional compulsion.<sup>132</sup> Secondly, the consequences of the incarceration binge which has gripped our criminal justice system for a generation are coming home to roost,<sup>133</sup> and one might hope that the fiscal pinch will provide the motive for legislatures and executive decision makers to look for alternatives to incarceration. Both of these trends may lead policy makers to the pragmatic (and obvious) conclusion that there is an important role to play for specialists who can reliably assess the needs and prospects of society's deviants and devise dispositional options less expensive than incarceration.

There are countertrends to this hopeful scenario, such as the privatization of prisons, which creates a profit motive for the incarceration option and, through the influence of money, corrupts the political response to the problem of deviance.<sup>134</sup> And there is always the near-term attractiveness of marginalizing (i.e., confining) deviants as a way of ignoring the problems of social structure which they often represent (e.g., racial and economic injustice).<sup>135</sup> If there is reason to anticipate that the sentencing advocacy option will prevail over the incarceration option in noncapital cases, that reason may be found abroad. European countries long ago discovered what the U.S. seemed on the verge of discovering in the early twentieth century, i.e., that incarceration is not much of a solution to most problems of deviance.<sup>136</sup> As it competes with other nations the U.S. may not be able to afford to continue making such widespread use of such an extravagant practice. In that event sentencing advocacy should flourish.

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<sup>132</sup> See, e.g., Cait Clarke, Problem-Solving Defenders in the Community: Expanding the Institutional Boundaries of Providing Defense Counsel to the Poor, 14 *Geo. J. Legal Ethics* 401, 427-58 (2001)(describing neighborhood and community defender organizations which include social workers as integral part of staff); see also Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, Honorable James R. Spencer, Subcommittee Chair, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (1998) (noting that mitigation specialists are integral to defense team in federal capital cases and recommending that federal defender offices retain them on staff), available at <http://www.uscourts.gov/dpenalty/1COVER.htm>.

<sup>133</sup> See, e.g., Margaret Talbot, Catch and Release, *The Atlantic Monthly*, February, 2003 (arguing that the increasing numbers of inmates being released from prisons in need of basic resources and living skills are going to require a rethinking of incarceration policies); see also Sasha Abramsky, When They Get Out, *The Atlantic Monthly*, June, 1999 (Also arguing for reform of incarceration policies).

<sup>134</sup> See Eric Schlosser, The Prison-Industrial Complex, *The Atlantic Monthly*, December, 1998.

<sup>135</sup> See, e.g., Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: or Why the 'War on Drugs' Was a 'War on Blacks,' 6 *J. Gender Race & Just.* 381, (2002) (the title is self-explanatory).

<sup>136</sup> See, e.g., Christian Parenti, *Lockdown America: Police and Prisons in the Age of Crisis*, (2001); Marc Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends* (2003), Sentencing Project report available at <http://www.sentencingproject.org/pdfs/pub9036.pdf>; Elliott Currie, *Crime and Punishment in America* (1998).