

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Supplemental Merit Brief was served upon Timothy J. McGinty, Esq., Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 27 day of March, 2014.



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ARGUMENT

Proposition of Law I:

The failure of defense counsel to fully investigate and present all mitigation to the jury and object to improper evidence and argument during the penalty phase constitutes ineffective assistance of counsel.

The performance of Maxwell's counsel during the penalty phase fell below the professional norm in numerous instances. Counsel failed to develop a mental retardation issue or present what was already developed in that area as a mitigator to the jury. Counsel failed to fully prepare for the penalty phase of the trial and was forced to request a continuance after the first phase verdict, which was denied. Counsel failed to develop a coherent mitigation theme. The defense presented witnesses who testified about Maxwell's good character. As a result, the prosecutor introduced prior felony convictions and prison terms to rebut the character claim. Counsel also failed to object to improper prosecutorial argument, thus allowing improper considerations before the jury. The performance of Maxwell's counsel here was beneath the professional norm and resulted in an unreliable conclusion to the penalty phase proceedings.

Simply stated, there is no defensible strategic basis for not pursuing a defense under Atkins v. Virginia, 536 U.S. 304 (2002) or State v. Lott, 97 Ohio St.3d 303, 2002 Ohio 6625 (2002) or any of the other above failings. The finding of mental retardation would have left Maxwell ineligible for the death penalty. Even had Maxwell not been found to be mentally retarded, the clearly close to ineligibility would have been highly mitigation. This Court found that Maxwell's counsel was not duty bound to present evidence of low intelligence. ¶183. This is incorrect. Where there is no reasonable basis for not presenting such strong evidence in mitigation, counsel is duty bound to present such evidence.

In its opinion, this Court noted its belief that the guidelines are not a mandate but are aspirational. ¶190. State v. Maxwell, Slip Opinion No. 2014 Ohio 1019. However, the ABA guidelines are very relevant in the determination of what constituted the professional norm in capital defense at the time of Maxwell's trial, which was conducted well after the guidelines inception in 1989 and the amendments in 2003.

In finding that Maxwell's counsel was not ineffective in its representation, this Court found the defense counsel had made "strategic" decisions which could not be questioned on review. ¶180. The opinion noted that the presentation of mitigation is simply a matter of trial strategy. ¶189. This is incorrect. It is not a matter of mere trial strategy. The issue is much more complex. Counsel's duty to his client is not simply to make strategic decisions but those decisions must be reasonable and within professional norms.

The standard of review for ineffective assistance of counsel cases is not whether counsel made a strategic decision, but whether counsel's strategic decision was within the professional norm after a full and complete investigation.

When determining whether counsel was ineffective, the reviewing court must:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. *This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.*

Strickland v. Washington, 466 U.S. 668, at 687 (1984). (Emphasis added); Terry Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1515 (2000). The Terry Williams decision, at footnote 17, reemphasized that the "prejudice" component of the Strickland test focuses on the question

whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. Strickland, 466 U.S. at 687.

Basically, a decision may not be deemed strategic if counsel failed to fully investigate and develop all aspects of the case. A particular decision not to investigate must be directly assessed for reasonableness in light of all circumstances. Strickland v. Washington, at 692; Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000). In Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court reaffirmed the principle that a reviewing court must consider the quality and extent of the investigation that underlies a 'strategic decision'. The court stated:

As we established in Strickland, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

Id. at 33.

As noted by Wiggins, "strategic decisions" should not be "*post hoc* rationalizations," rather they should be an "accurate description of [counsel's] deliberations" prior to making their decisions. Id. at 31.

Van Hook Inapplicable to Maxwell's Case

In its decision in Maxwell, this Court relied upon the Supreme Court of the United States decision in Bobby v. Van Hook, 558 U. S. 4 (2009) ¶183. On closer review, this Court's reliance on Van Hook is unfounded. The Supreme Court's opinion in Van Hook does not alter its prior jurisprudence regarding the ABA Guidelines. It merely states what has already been expressed in other cases: defendants are entitled to representation that meets objective standards of reasonableness given the prevailing professional norms of that time. The Court continues to favorably cite prior cases which indicate that the ABA Guidelines reflect these norms.

In 1985 Robert Van Hook was convicted of murder and sentenced to death. In 2007 the United States Court of Appeals for the Sixth Circuit granted Van Hook habeas relief on the grounds that his counsel was ineffective, relying on the American Bar Association's 2003 Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines"). Van Hook v. Anderson, 560 F.3d 523, 525 (6th Cir. 2009). The State of Ohio petitioned the United States Supreme Court for a writ of certiorari. In a *per curiam* opinion, the Court granted the state's petition and reversed the 6th Circuit's decision. Bobby v. Van Hook, No. 09-144, 2009 U.S. Lexis 7976, at *2 (Nov. 9, 2009). Although the Court's opinion is critical of the way in which the Sixth Circuit applied the Guidelines, it *did not* overrule prior precedent that favorably cited the Guidelines as "guides to determining what is reasonable." See Wiggins v. Smith, 539 U.S. 510, 524 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

The Supreme Court of the United States found issue with the Sixth Circuit's application of the 2003 Guidelines to representation that occurred in 1985. The Court emphasized that the Guidelines are useful guides to what reasonableness entails only to the extent they "describe professional norms prevailing when the representation took place." 2009 U.S. Lexis 7976, at *2. The Court did not categorically state that the 2003 Guidelines can never serve as guides to the prevailing norms prior to 2003; rather the Court criticized the Sixth Circuit for "[j]udging counsel's conduct in the 1980's on the basis of these 2003 Guidelines . . . *without even pausing to consider whether they reflected the prevailing professional practice at the time of trial . . .*" *Id.* (emphasis added). It is reasonable to conclude that retroactive application may be permissible, provided there is evidence that the Guidelines reflect prevailing norms at the time of representation.

The Court reversal of the Sixth Circuit's decision based on its assessment that Van Hook's counsel's performance met the ABA Standards for Criminal Justice, which were published in 1989. Notably, the Sixth Circuit relied exclusively on the 2003 Guidelines when granting relief to Van Hook. It is unclear what, if any, difference it would have made if the Sixth Circuit had also relied on the 1989 Guidelines which were published much closer to the time of the representation.

The Court also criticized the Sixth Circuit for treating the 2003 Guidelines as "inexorable commands." Id. Although the Court apparently disfavors this categorical use of the Guidelines, the opinion favorably cites past precedent which has declared that the Guidelines are guides to what is objectively reasonable when assessing claims of ineffective assistance of counsel under the 6th Amendment. Id. at *3 (citing Strickland v. Washington, 466 U.S. at 688 ;Wiggins, 539 U.S. at 524). It reiterated that since Strickland, the Court has viewed the Guidelines as "guides to what reasonableness means." Id. (internal quotations omitted).

The opinion, in its first footnote, the Court specifically warns that the opinion "should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation." In other words, the Guidelines *do* apply to Maxwell's case. Thus, the ABA Guidelines may be looked to for the purpose of developing the professional norm in capital litigation.

The Sixth Circuit Court of Appeals has made it clear that this effective assistance of counsel requires that counsel for defendants in capital cases must fully comply with ABA professional norms, Hamblin v. Mitchell, 354 F.3d 482, 485-88 (6th Cir. 2003) (briefly outlining the historical development of the requirement of effective assistance of counsel in capital cases).

In Hamblin, the court said that in order to satisfy the requirements of the effective assistance of counsel requirement of the Sixth Amendment, ABA Guidelines establish the relevant criteria:

New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances

Id. at 487. Hamblin then quoted the ABA Guidelines that create the required standards of performance for counsel in capital cases regarding the investigation of mitigating circumstances, norms that Maxwell's counsel fell far short of meeting:

Counsel's duty to investigate *and present mitigating evidence* is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile.

(Emphasis added)

The requirement in Hamlin that defense counsel investigate “and *present* mitigating evidence” (emphasis added) specifically rejects the argument set forth by the State. It is constitutionally impermissible for defense counsel to withhold viable mitigation to emphasis other available mitigation evidence.

ABA Guideline 10.7 requires a full and completed investigation. “Because the sentences in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. In the case of the client, this begins with the moment of conception, i.e., undertaking representation of the capital defendant.” Dickerson v. Bagley, 453 F.3d 690, 694 (2006).

Mental Retardation - Potential Atkins Claim

Prior to trial, counsel referred Maxwell for evaluation by the Court Psychiatric Clinic of the Cuyahoga County Common Pleas Court. The report summarizing that evaluation contained ample evidence of mental retardation long before trial. The intelligence test revealed a level of 68. In spite of this, defense counsel failed to investigate or develop this issue. At no point did counsel request an eligibility hearing under Atkins v. Virginia, 536 U.S. 304 (2002) or State v. Lott, 97 Ohio St.3d 303, 2002 Ohio 6625 (2002). Furthermore, even without the Atkins investigation, counsel inexplicably failed to present any evidence of intelligence level at the penalty phase hearing. Counsel's own expert found an intelligence level of 76.

The defense expert apparently tested Maxwell within months of the Court Psychiatric Clinic's test. The second test should have been deemed invalid, because a second test within a short period of time will result in a higher score. Walker v True, 399 F.3d 315 (4th Cir. 2005)

Counsel failed to call the doctor who performed the original testing for the clinic as a witness in the penalty phase hearing. Counsel failed to request instruction which would have allowed an Atkins finding by the jury. Even if Maxwell was not found not to qualify the Atkins/Lott preclusion of death, low intelligence remained a viable mitigation factor. Counsel failed to introduce evidence or argue this factor. There is no imaginable reason for not doing so.

In the October 2, 2006 report to the court, Dr. Michael H. Aronoff, Psy.D., found that Maxwell was of borderline intellectual functioning. Report page 10. This was based upon the testing performed upon the appellant on September 27, 2006.

As the result of this, he obtained a verbal IQ score of 68 (mild retardation range), a performance IQ score of 83 (low average range), yielding a full IQ of 72 (borderline range). The 15 point discrepancy between performance and verbal IQ

scores is statistically significant and suggests that the defendant is more adept at tasks requiring visual-motor rather than verbal skills. *This examiner can state within 95% confidence that the defendant's true full scale IQ score lies within the range of 68-77.*

Id., page 6.

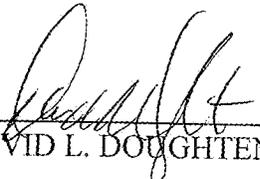
Dr. Aronoff's report was stipulated by the parties. The trial court read into the record the portion of Aronoff's report regarding the intelligence level prior to the February 6, 2007 competency hearing. The court quoted the report, "the defendant's performance on the CAST*MR . . . in which he scored at or below the level of mentally retarded defendants later found incompetent to stand trial, . . . was significantly lower than what would be expected from his attained borderline full scale IQ score or from his prior experience with the legal system." (T. 42)

In Dickerson v. Bagley, *supra*, the Sixth Circuit granted the writ where trial counsel relied on the mitigation of mental health while not investigating or presenting other evidence of mitigation. Among other evidence, counsel failed to present evidence of low intelligence to the jury during the penalty phase. Dickerson's IQ of 77 was very close to the retarded level; *see also United States v. Roane*, 378 F.3d 382, 408 (4th Cir. 2004) ("Johnson exhibited an IQ of 77, which indicated a 'generally impaired intelligence,' placing him 'just above the level of mental retardation.' ") (on remand, Dickerson was given life by the same three-judge panel upon full consideration of all mitigation, No. 85 CR 5931, Lucas County Common Pleas Court, 8/14/08).

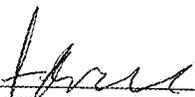
The point is, defense counsel cannot rely upon one piece of mitigation. As Ohio is a weighing state, all mitigation must be provided to mitigate the appropriateness of death for the defendant. It is not a reasonable strategy to provide only the mitigation counsel likes or believes

the jury will consider heavily. As a life sentence is required if only one juror is not convinced that death is appropriate beyond a reasonable doubt, withholding of mitigation evidence is never reasonable. Rompilla v. Beard, supra.

Respectfully submitted,



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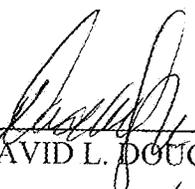
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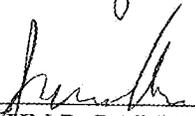
CONCLUSION

Pursuant to the above argument, the defendant-appellant Charles Maxwell respectfully requests that this Honorable Court rehear the above issue and ultimately remand this matter for a new sentencing hearing.

Respectfully submitted,



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