

# NOTES

## ADEQUATE REPRESENTATION: THE DIFFERENCE BETWEEN LIFE AND DEATH

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### INTRODUCTION

The U.S. Supreme Court’s 2017 ruling in *Buck v. Davis* highlights the disturbing consequences of deficient representation in capital cases.<sup>1</sup> Duane Edward Buck was sentenced to death in 1997 after the defense’s own witness testified that “[t]here is an overrepresentation of Blacks among the violent offenders” and the defendant’s race made him more likely to be dangerous in the future.<sup>2</sup> During closing argument, defense counsel failed to object to the State’s reference to this testimony. This improper evidence of race was the only evidence presented on which the jury could base a finding of “future dangerousness”—a necessary finding to sentence a defendant to death, as opposed to life in prison. The jury sentenced Buck to death based on this improper evidence. Thus, in *Buck*, the Supreme Court found ineffective assistance of counsel, holding that Buck’s trial counsel performed deficiently and that Buck was prejudiced by that deficiency.<sup>3</sup>

*Buck v. Davis*, one of today’s clearest violations of a defendant’s constitutional right to a fair trial, went un-reviewed on the merits through countless appeals over the course of twenty-one years and had yet to be rectified when it reached the Supreme Court. Even after the State of Texas recognized a deficiency in Buck’s case, procedural roadblocks continued to deny Buck relief.<sup>4</sup> Perhaps most concern-

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1. *See generally* 137 S. Ct. 759 (2017).

2. *Id.* at 768–69.

3. *See id.* at 775–80. To demonstrate an ineffective assistance of counsel claim under *Strickland*, a defendant “must show both that counsel performed deficiently and that counsel’s deficient performance caused him prejudice.” *Id.* at 775 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The first prong cannot be satisfied so long as counsel’s decisions are considered within the “wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. Lawyer error must fall so outside the bounds of professional competence that it cannot be considered to constitute the “counsel” that is guaranteed by the Sixth Amendment. *Id.* at 687. Second, a defendant must show prejudice, i.e., “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

4. Brief for Petitioner at 3–4, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), 2016 WL 4073689 [hereinafter Petitioner’s Brief]. Texas conceded error in the case and said it would not oppose rehearing petition by Buck. *Id.* at 3. However, the State did not ultimately grant Buck’s application for a Certificate of Appealability. In 2006, a federal district court found Buck’s ineffective assistance of counsel claim unreviewable on the merits because his counsel failed to raise the issue in his first post-conviction proceeding. *Id.* at 3–4; *see* Amy Howe,

ing, though, is the fact that the ineffectiveness of Buck's counsel was foreseeable and, thus, preventable.

The attorney who failed to adequately represent Buck in his initial proceedings carried a track record of deficient representation that today totals twenty former clients sentenced to death.<sup>5</sup> Unfortunately, this pattern of deficient representation by a capital-defense attorney is not unique. Nor is this just a problem in Texas. "Repeat offenders"—attorneys whom courts continue to appoint as defense counsel in capital cases despite demonstrably defective representation in past cases—present a problem across the country.<sup>6</sup> While no single shortcoming renders an attorney's representation deficient, the most common deficiency of repeat-offender attorneys is their failure to zealously advocate on behalf of their client at the sentencing phase of trial. For instance, the representation is considered "ineffective" for purposes of deeming the attorney a "repeat offender" when the defense's case for a life sentence, as opposed to death, is unusually short. Evidence of an inappropriately short case at the sentencing phase may include presenting little-to-no mitigation evidence; calling few, if any, defense witnesses; and failing to interview potential witnesses (either a key witness or a sufficient number of witnesses generally). Failing to zealously advocate at the sentencing phase is often what leads to a death sentence, as opposed to life in prison.<sup>7</sup>

The "repeat" aspect of "repeat offender" points to an issue uniquely problematic in the capital context. Courts continue to appoint repeat offenders because, having tried capital cases previously, repeat offenders project an image of experience. Further, these attorneys' shortcomings are often insufficient to satisfy the high threshold for an ineffective-assistance-of-counsel claim under the Sixth Amendment.<sup>8</sup> These attorneys gain credibility through experience, while the quality of that experience is not often challenged successfully.

Current measures and remedies designed to prevent deficient capital representation are insufficient to guard against the repeat-offender problem. Sixth Amendment ineffective assistance of counsel claims,<sup>9</sup> for example, are only remedial and do not prevent the appointment of inadequate attorneys in the first place. Buck's plight—spending decades on death row before the Supreme Court finally ruled on

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*Argument Preview: Justices to Consider Role of Racial Bias in Death Penalty Case*, SCOTUSBLOG (Sept. 28, 2016, 12:05 PM), <http://www.scotusblog.com/2016/09/argument-preview-justices-to-consider-role-of-racial-bias-in-death-penalty-case/> (noting that "[t]he procedural history of [Mr.] Buck's case is, to put it mildly, complicated").

5. Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES (May 17, 2010), <http://www.nytimes.com/2010/05/18/us/18bar.html>. This attorney has since stopped his capital defense work. *Id.*

6. In this Note, the phrase "repeat offender" denotes ineffective counsel whom courts appoint to defend capital cases in a recurring national trend. Additionally, "ineffectiveness" does not necessarily refer to a finding of a Sixth Amendment violation (ineffective assistance of counsel), though such a finding may indicate that an attorney is a repeat offender. Additional factors may make an attorney sufficiently ineffective to qualify as a repeat offender.

7. See *infra* note 25 and accompanying text.

8. See, e.g., *infra* Section II.B (repeat offenders in Arizona, Florida, Illinois, and Louisiana).

9. See *supra* note 3.

his ineffective assistance of counsel claim—demonstrates the problem with relying on after-the-fact remedial measures to address ineffective counsel. Rather than rely on remedial measures, states should improve procedures for the appointment of counsel to prevent foreseeably deficient attorneys, like the one who represented Buck in his initial trial, from defending capital defendants in the future. Given that so much of a defendant's fate rests in the hands of his or her attorney at the sentencing phase of trial, a defendant may live or die depending on the quality of his or her counsel. This gamble is unacceptable.

Section I will discuss in more detail the deficient representation in the trial that led to the Court's decision in *Buck v. Davis*. Section II will explain why the appointing court should have known that Buck's trial counsel was incompetent and illustrate why it is necessary to institute procedures to guide judges in their appointment of capital defense counsel. It will further reveal that Buck's plight is not unique: the system for appointing capital defense counsel permits conspicuously deficient attorneys to continue to represent capital defendants across the country. This faulty system is due, in part, to the fact that courts often consider only one metric to evaluate a capital defense attorney's qualifications: the number of capital trials in which the attorney has been involved. This standard is an imperfect measure of the quality of a capital defense attorney. Section III will suggest a two-prong approach for eliminating the appointment—and existence—of repeat offenders. States should (1) redefine "experience" for purposes of appointment decisions in capital cases, and (2) institute minimum requirements for offering mitigation evidence at the sentencing phase of trial.

### I. DEFICIENT REPRESENTATION IN *BUCK V. DAVIS*

This Section will demonstrate that the representation of Duane Edward Buck at the trial stage of *Buck v. Davis* was deficient. Deficient representation is the first prong necessary to establish that an attorney is a repeat offender. The second prong is established when that same attorney is repeatedly appointed to capital cases. The attorney who represented Buck at trial was deficient because he (1) introduced problematic evidence that race contributed to future dangerousness, and (2) failed to object appropriately on cross-examination when the prosecution referenced the same problematic evidence.

Duane Edward Buck was not a sympathetic petitioner when the Supreme Court granted certiorari in *Buck v. Davis*. Buck had been romantically involved with victim Debra Gardner, who Buck believed had since become involved with Kenneth Butler. On July 30, 1995, he forced entry into Gardner's home, fought with her, and struck her.<sup>10</sup> Later, he returned and shot and killed Butler. In the process, he also shot at two other individuals in Gardner's home—one of whom

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10. Petitioner's Brief, *supra* note 4, at 4.

was his own step-sister, Phyllis Taylor.<sup>11</sup> Buck chased Gardner onto the street and shot her while her children looked on.<sup>12</sup> After police arrived at the scene, he told them, “[t]he bitch deserved what she got.”<sup>13</sup>

The central issue at Buck’s trial was not his guilt but his “future dangerousness.”<sup>14</sup> Before a defendant may receive the death penalty, a Texas jury must find, unanimously and beyond a reasonable doubt, several “special issues,” including “future dangerousness.”<sup>15</sup> Therefore, if even one juror found a lack of future dangerousness, the death penalty cannot be imposed. To assess whether Buck was likely to commit criminal acts of violence in the future, his defense counsel hired psychologist Dr. Walter Quijano. According to Dr. Quijano, “being ‘Black’ was a ‘statistical factor’ that [‘i]ncreased [the] probability” that Buck would “commit future acts of criminal violence.”<sup>16</sup> Not only was evidence of Buck’s race impermissibly admitted at trial,<sup>17</sup> but Buck’s own attorney was the one who introduced it. This warrants repeating: *Buck’s own counsel* introduced evidence that Buck’s race made him more likely to commit future acts of violence.

Moreover, Buck’s counsel failed to object when the prosecution cross-examined Dr. Quijano on this “evidence.” The prosecution asked Dr. Quijano, “You have determined that . . . a male is more violent than a female because that’s just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?”<sup>18</sup> Dr. Quijano responded in the affirmative.<sup>19</sup> Next, Dr. Quijano’s report was submitted to the jury without objection from Buck’s counsel. In fact, the report was submitted to the jury at *defense* counsel’s request, and over the *prosecution’s* objection. This report was available to the jury during their deliberations. Finally, Buck’s attorney referenced this “expert” testimony during his own closing argument and failed to object to the prosecution doing the same.<sup>20</sup>

As Buck’s petition to the Supreme Court noted, the jury clearly relied on Dr. Quijano’s “expert” testimony in deciding Buck was likely to commit future acts of

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11. *Id.* Taylor survived. The other individual, Harold Ebnezer, was unharmed. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 5.

15. *Id.* (citing TEX. CODE CRIM. P. art. 37.071, § 2 (West 2013)).

16. *Id.*

17. *Id.* at 7. Evidence of a defendant’s race should not be introduced as evidence to prove a defendant’s future dangerousness. See Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMM. PSYCHIATRY 761, 764 (1990) (finding that when controlling for socioeconomic status, correlations between race and violence disappear); see also JOHN MONAHAN ET AL., *RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE* 56–57 (2001) (“[I]ndividual-level associations between racial status and violent behavior may be systematically confounded with levels of disadvantage in the neighborhood contexts of African-Americans.”).

18. Petitioner’s Brief, *supra* note 4, at 7.

19. *Id.* at 8.

20. *Id.*

violence. There was no evidence Buck was violent outside of the context of romantic relationships,<sup>21</sup> nor were any of his prior convictions for crimes of violence.<sup>22</sup> In fact, individuals who knew Buck for “most, if not all, of his life testified that they had never known . . . Buck to be violent.”<sup>23</sup> Lastly, another psychologist, Dr. Patrick Lawrence, testified that Buck was not, in fact, likely to be dangerous in the future.<sup>24</sup> Given the evidence of non-dangerousness and the absence of any compelling evidence of dangerousness, the jury must have relied heavily on the problematic testimony introduced by Buck’s deficient counsel.

Buck’s counsel was ineffective because he introduced “evidence” that Buck’s race made him more likely to be violent in the future, which the jury relied upon in finding future dangerousness—a necessary finding for the imposition of the death penalty.<sup>25</sup> The fact that the defense counsel introduced such evidence, as opposed to failing to object to the prosecution’s offering of such evidence, strengthened the claim of ineffective assistance of counsel.<sup>26</sup> The “expert” testimony presented by the defense was so contrary to Buck’s interests that no competent attorney would put it forward.<sup>27</sup> The incompetence of Buck’s counsel was so great that it effectively allowed Buck to be sentenced to death because of “expert” testimony assenting Buck was more likely to be dangerous in the future *because* he is black. The decision in *Buck v. Davis* serves as a reminder that, while our justice system may eventually address shocking instances of ineffective counsel, that same system continually permits the appointment of foreseeably inadequate representatives.

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21. *Id.* at 5–6 (conceding that Buck did physically abuse Gardner towards the end of their romantic relationship).

22. *Id.* at 6 (citing Tr. 5–28) (noting prior convictions for delivery of cocaine and unlawfully carrying a weapon).

23. *Id.* (testifying on Buck’s behalf were his father, James Buck; stepmother, Sharon Buck; sister, Monique Winn; and friend, Reverend J. C. Neal).

24. *Id.* at 6–7. Dr. Lawrence reasoned that Buck was unlikely to develop a romantic relationship with a woman while in prison, had been held thus far in minimum security custody, and had an IQ of 75 (which is only fourth percentile for intellect when compared with the general population). *Id.* at 7 (citing Tr. 189, 196). At the time he testified for the defense in Buck’s case, Dr. Lawrence had twenty-five years of experience working on both the defense and prosecution sides of litigation, and had evaluated approximately 900 prisoners convicted of homicide. *Id.* at 6 (citing Tr. 177, 182–86, 188–204, 205–06).

25. Transcript of Oral Argument at 23, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No.15-0849) [hereinafter Oral Argument Transcript] (explaining that if the jury did not find future dangerousness, then they necessarily could not find a death sentence) (statement by Christina A. Swarns, Esq., Buck’s counsel).

26. *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

27. *Id.* at 775 (“No competent defense attorney would introduce such evidence about his own client.”); Oral Argument Transcript, *supra* note 25, at 27 (“What competent counsel would put that evidence before a jury[?]”) (statement by Ginsburg, J.); *see also* *Buck v. Thaler*, 565 U.S. 1022, 1025–27 (2011) (Sotomayor, J., dissenting in denial of certiorari) (asserting that Buck’s “death sentence [is] marred by racial overtones” stemming from the introduction of this testimony).

## II. REPEAT OFFENDERS

One would like to think that the inadequacy of Buck's attorney was a unique and rare occurrence, but that is unfortunately not the case. Around the time Texas conceded error in Buck's case, two-thirds of all death penalty convictions in the United States had been overturned, many due to "serious errors by incompetent court-appointed defense attorneys with little experience in trying capital cases."<sup>28</sup> Many of these overturned cases share more than just their outcomes: they often involve the same defense lawyers. Right now, the criminal justice system allows the same attorneys to make the same "mistakes" in capital cases, and courts continue to appoint them to cases where the quality of representation influences whether the defendant lives or dies.

This Section describes the records of defense attorneys whose pattern for defective representation in capital cases, and repeated appointment to such cases, make them "repeat offenders."<sup>29</sup> When examined carefully, these attorneys' track records should dissuade courts from appointing them again. These attorneys often fail to offer the jury much (if any) mitigation evidence to consider in determining whether the defendant should be sentenced to life in prison, as opposed to death. Most commonly, the repeat offenders fail to interview key witnesses who would testify favorably for mitigating the defendant's sentence.

Mitigation evidence—evidence presented by the defense to persuade the jury that the defendant should not receive a death sentence—is central to a capital defendant's case for life. Introducing of mitigating evidence is important because "death sentences are never automatic or inevitable."<sup>30</sup> Mitigating evidence offers the defense an opportunity to make a case for life as opposed to death. The definition of what constitutes "mitigating evidence" is also incredibly broad. It includes evidence of "mental problems, remorse, youth, childhood abuse or neglect, a minor role in the homicide, . . . the absence of a prior criminal record," etc.<sup>31</sup> Thus, it is not a stretch to assume that some form of mitigation evidence is generally available, in a capital case. Given the importance of mitigation evidence and the broad range of potential mitigating evidence available, capital defense attorneys should always present *some* mitigation evidence. The consequence of not doing so—the death penalty—mandates some effort by defense attorneys at the mitigation stage. Failing to present mitigation evidence, presenting very little of

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28. *Innocence Protection Act of 2000: Hearing on H.R. 4167 Before the Subcomm. on Crime of H. Comm. on the Judiciary*, 106th Cong. 14 (2000) (statement of Rep. Conyers).

29. While these attorneys are by no means the only repeat-offender attorneys, their records illustrate the issue posed by the "repeat-offender" problem outlined in Section I.

30. Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 238 (2007) (highlighting high-profile examples of even those "guilty of the most reviled and abhorrent crimes" not receiving a death sentence).

31. *Mitigation in Capital Cases*, CAP. PUNISHMENT IN CONTEXT, <https://capitalpunishmentincontext.org/issues/mitigation> (last visited Feb. 20, 2018).

such evidence, or failing to adequately prepare for the mitigation phase of trial (e.g., not interviewing key witnesses) satisfies the first prong of the repeat-offender definition: deficient representation.

A. *Jerry Guerinot: The Buck v. Davis Attorney*

Buck's trial was not the first capital case Jerry Guerinot had botched. One of Guerinot's more public cases is that of Linda Carty. The state charged Carty, a citizen of Britain, with kidnap and murder.<sup>32</sup> According to the prosecution, Carty murdered her victim in order to claim the victim's newborn son as her own.<sup>33</sup> Putting aside the merits of the prosecution's case, Guerinot's representation of Carty affected both the verdict and sentencing in key ways. Guerinot visited Carty in jail for the first time just one month before her trial,<sup>34</sup> three months after being appointed to represent her.<sup>35</sup> After the trial, Carty reported in an interview that she had only met Guerinot once, and that the meeting lasted a mere fifteen minutes.<sup>36</sup> Guerinot also failed to inform the British Consulate of the proceeding; once the British government found out about it, it was too late in the proceedings for it to get involved.<sup>37</sup>

At the mitigation stage of the trial, Guerinot's mistakes were the kiss of death. Guerinot failed to interview key witnesses, including Carty's husband and a Drug Enforcement Administration ("DEA") officer for whom Carty was an informant. The DEA officer said after the trial that he would have testified on Carty's behalf.<sup>38</sup> The jury would likely have found the testimony of a DEA agent, as a law enforcement official, highly credible, particularly with respect to Carty's future dangerousness. Likewise, Carty's husband said that the defense never asked him to testify on Carty's behalf either.<sup>39</sup> The husband ultimately testified for the prosecution, telling the jury that his wife desperately wanted a baby and thereby bolstering the prosecution's theory of Carty's motive.<sup>40</sup> The husband said he had no idea that he could refuse to testify for the prosecution based on marital privilege.<sup>41</sup>

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32. Ed Pilkington, *British Woman on Texas Death Row May Be Spared as New Evidence Surfaces*, GUARDIAN (July 8, 2016, 5:00 PM), <https://www.theguardian.com/world/2016/jul/08/linda-carty-grandmother-death-row-texas-new-evidence>.

33. Liptak, *supra* note 5.

34. Michael Graczyk, *Houston Lawyer Labeled 'Worst Lawyer in the United States'*, HOUS. CHRON. (Aug. 13, 2016), <http://www.chron.com/news/article/Texas-lawyer-who-lost-all-death-penalty-cases-9140712.php>.

35. Liptak, *supra* note 5.

36. *Id.* (citing Carty's interview with documentary filmmaker Steve Humphries "I met this guy for less than 15 minutes. Once").

37. Graczyk, *supra* note 34. Carty "was a citizen of Britain, where the death penalty is outlawed." *Id.*; Liptak, *supra* note 5.

38. Liptak, *supra* note 5.

39. *Id.*

40. *Id.*

41. *Id.*



The appellate court denied Carty's ineffective assistance of counsel claim. According to the appellate judge, Guerinot made "an imperfect attempt" to avoid the death penalty for his client, but trials need not be perfect.<sup>42</sup> Although the appellate court could not definitively find that the case would have come out differently but for Guerinot's deficient representation, his representation was nonetheless ineffective in a broader sense of the word. If not for Guerinot's failure to interview key witnesses—and meaningfully interview his client herself—it is at least possible that the jury would not have sentenced Carty to death, as there would have been some mitigation evidence presented that cut against the prosecution's assertion that Carty was likely to be dangerous in the future (e.g., the DEA officer's testimony).<sup>43</sup> It is even possible, had Guerinot informed his client or her husband of the availability of marital privilege, that the jury would have found Carty guilty of a lesser crime than first-degree murder. In order to prove murder in the first degree, the government must prove premeditation; Carty's husband's testimony was the only evidence offered to show that Carty had a motive. These possibilities alone, despite being insufficient to establish a Sixth Amendment violation, should put a court on notice that Guerinot is unlikely to be an effective advocate for capital defendants. At the very least, weak advocacy at the mitigation phase of trial makes similarly weak advocacy in future cases foreseeable.

In isolation, Carty's case is not necessarily indicative of Guerinot's general ineffectiveness. However, as one supporting brief in Carty's appeal states, "[i]t is no exaggeration to suggest that Mr. Guerinot has perhaps the worst record of any capital lawyer in the United States."<sup>44</sup> At least twenty of Guerinot's clients in Harris County, Texas were sentenced to death over the course of his career.<sup>45</sup> As of 2016, ten had been executed.<sup>46</sup> It is extremely unusual for a capital defense attorney to have a client sentenced to death.<sup>47</sup> In fact, it is rare for a capital case to proceed to the trial phase at all.<sup>48</sup> In light of these facts, Guerinot's record seems all the more obviously deficient. However, as his record grew, so did his number of

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42. *Id.* ("[T]he Constitution does not require perfection in trial representation.") (quoting Judge Vanessa D. Gilmore, the federal trial judge in Houston who presided over Ms. Carty's case).

43. Alex Hannaford, *Did Death Row Inmate Linda Carty Get a Fair Trial?*, TEX. OBSERVER (Jan. 10, 2012, 9:20 PM), <https://www.texasobserver.org/did-death-row-inmate-linda-carty-get-a-fair-trial/>.

44. Brief for Steve Humphries as Amici Curiae Supporting Petitioner, *Carty v. Thaler*, 559 U.S. 1106 (2010) (No. 09-0900), 2010 WL 673813, at \*18.

45. See Graczyk, *supra* note 34 (twenty-one former clients); Liptak, *supra* note 5 (twenty former clients).

46. Graczyk, *supra* note 34 (as of April 13, 2016). Guerinot has since retired, but execution remains a possibility for those clients still on death row at the time of his retirement.

47. For example, in 2014, only seventy-two death sentences were imposed in the United States. *Death Penalty Statistics*, STATISTIC BRAIN, <https://www.statisticbrain.com/death-penalty-statistics/> (last visited Feb. 20, 2018). In both 2012 and 2013, eighty-three persons were admitted to death row. *Id.* Of those capital-eligible cases that were actually pursued and then actually proceeded to trial, only 32% resulted in a death sentence between 1988 and 2006. *Federal Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/federal-death-penalty> (citing N.Y.L.J. (Aug. 2, 2006)) (last visited Feb. 20, 2018).

48. Since 1988, only 420 prosecutions have been authorized out of over 2500 potentially eligible defendants. *Federal Death Penalty*, *supra* note 47 (citing PITTSBURGH POST-GAZETTE (Oct. 28, 2007), and Marcia Coyle,



appointments to capital cases. Deficient representation at the mitigation phase coupled with repeated appointment to capital cases in the face of such deficiencies makes Guerinot a classic repeat offender.

### *B. Other Repeat Offenders*

Guerinot is not the only repeat offender. Across the country, courts continually appoint attorneys as capital defense counsel despite records demonstrating a history of lackluster advocacy on behalf of their clients' lives. These features—foreseeable deficiencies and continued appointment as capital defense counsel in cases where those foreseeable deficiencies manifest yet again—make these attorneys repeat offenders.

One Maricopa County<sup>49</sup> attorney, like Guerinot, has failed to zealously advocate for his clients to the point of being foreseeably deficient, but courts continue to appoint him to capital cases. In 2009, this attorney represented five pretrial capital defendants at once. According to American Bar Association (“ABA”) Guidelines, several thousand hours are typically required to provide appropriate defense representation in capital cases.<sup>50</sup> This attorney’s caseload materially affected the quality of his representation of those five defendants. For example, in the month before the trial of Fabio Gomez, defense counsel did not file “a single substantive motion . . . .”<sup>51</sup> Gomez’s counsel also had not visited him in over a year.<sup>52</sup>

Like other repeat offenders, Gomez’s counsel has a reputation for short mitigation proceedings.<sup>53</sup> In capital cases in particular, the sentencing phase of the trial often lasts weeks or months,<sup>54</sup> as the defense attorney has the opportunity to introduce various types of evidence about the defendant—much of which is sympathetic—in an attempt to mitigate the defendant’s sentence. In one case, this attorney’s case for mitigation took less than one day.<sup>55</sup> In another the mitigation

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NAT’L L.J., (Apr. 30, 2007)). Out of those capital cases, only 161 went to trial. *Id.* (citing N.Y.L.J. (Aug. 2, 2006)). That means that less than 7% of all capital-eligible cases proceed to trial.

49. Maricopa County, Arizona.

50. See *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, A.B.A. (2003), [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/death\\_penalty\\_representation/2003\\_guidelines.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003_guidelines.authcheckdam.pdf) [hereinafter ABA Guidelines]. ABA Principle 5 on workload further states: “The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea.” *Ten Principles of a Public Defense Delivery System*, A.B.A. (Feb. 2002), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_train\\_ten\\_principles.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_ten_principles.pdf). Because of this, most standards require capital litigation attorneys handle no more than three such cases in a year.

51. Robert J. Smith, *The Worst Lawyers*, SLATE (Nov. 4, 2015, 5:00 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/11/the\\_worst\\_defense\\_lawyers\\_for\\_death\\_penalty\\_cases\\_in\\_arizona\\_florida\\_louisiana.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/11/the_worst_defense_lawyers_for_death_penalty_cases_in_arizona_florida_louisiana.html).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

phase was fewer than two days.<sup>56</sup> And, in the case of Brian Womble, this same attorney presented *no* mitigation evidence.<sup>57</sup>

After Womble's conviction, his new representative discovered mitigating evidence, any piece of which had the potential to elicit a life sentence rather than a death sentence from the jury. Womble was born addicted to heroin because his mother abused the drug while pregnant; his mother also had thrown him down a flight of stairs as a child, beaten him, and emotionally abused him. Womble struggled in school, and even attempted suicide.<sup>58</sup> He "stuttered and suffered from head injuries, neuropsychological impairment, and symptoms of fetal alcohol syndrome."<sup>59</sup> Potentially most relevant for mitigation purposes, however, was the fact that Womble had paranoid delusions and hallucinations about demons.<sup>60</sup> Just "[h]ours before [committing] the crime that landed him on death row, Womble voluntarily entered a mental health treatment facility, saying that he wanted to kill himself and possibly others, and yet was permitted to leave."<sup>61</sup> Still, Womble's counsel presented zero mitigation evidence.<sup>62</sup> After learning this information later, one juror stated: "Knowing all of that, I would have voted for life, no doubt about it."<sup>63</sup> It is not surprising to learn that six of this attorney's former clients are currently on death row.<sup>64</sup> Given this track record, it is foreseeable that this attorney, if appointed again, will be similarly deficient. Unfortunately, further appointments to capital cases are also likely, given that this attorney is clearly experienced in trying capital cases.

Another attorney, this time from Florida, also fits the repeat-offender bill. This attorney has been found ineffective under *Strickland*, which certainly would make him foreseeably deficient, but courts have continued to appoint him to capital cases. From 2008–2015, this Duval County attorney represented eight capital defendants who were sentenced to death.<sup>65</sup> One of those convictions was overturned in November 2015, after the judge found that counsel "failed to conduct a basic factual investigation of the circumstances of the crime, failed to secure the

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56. *Id.*

57. *Id.*

58. *State v. Womble*, 235 P.3d 244, 257 (Ariz. 2010) (en banc) (stating that the record showed Womble contemplated suicide); Smith, *supra* note 51 (stating that Womble tried to kill himself and "had a difficult time in school").

59. Smith, *supra* note 51.

60. *Id.*

61. Smith, *supra* note 51; *see also Womble*, 235 P.3d at 257.

62. *Womble*, 235 P.3d at 257 ("The record does establish that Womble sought counseling the day before the murder and even mentioned his plan to kill someone before killing himself. However, Womble chose not to introduce any additional mental health evidence. Although Womble's attempt to get help before the murder deserves some consideration, the record does not support mental impairment such that it would call for leniency.")

63. Smith, *supra* note 51.

64. *Id.*

65. *Id.* (highlighting that eight is more than any other lawyer in Florida).

testimony of alibi witnesses, and also failed to investigate evidence of [the defendant's] 'organic brain damage and intellectual disability.'"<sup>66</sup> The attorney's representation was found ineffective under *Strickland*—a violation of the Sixth Amendment—in that case. In fact, courts found that this same attorney's representation of capital defendants constituted ineffective assistance of counsel in three separate cases.<sup>67</sup> Finding that an attorney violated the Sixth Amendment is necessarily deficient representation under the first prong of the repeat offender definition. And, despite the attorney's repeated failure to adequately represent capital defendants, courts continued to appoint him to capital cases—satisfying the second prong.

The attorneys described above are examples of the “repeat offenders” of inadequate representation in capital cases: their representation is deficient—they have a track record of death sentences for their clients and are often found ineffective after-the-fact—yet they continue to be appointed as defense counsel in capital cases.

### C. Alternative Explanations

It is possible, of course, that results of these cases and the attorneys' corresponding track records are attributable to explanations other than the deficiencies of counsel. Seemingly deficient representation may appear obvious in hindsight while evading identification in real time. Further, these attorneys' actions may have come to light solely because they are in the business of representing capital defendants specifically; capital cases garner more attention, given the high stakes and intrigue. However, the alternative explanations are not sufficient to justify the inadequacy of these attorneys' representation.

As mentioned in Section II.A, *supra*, Guerinot's representation of Linda Carty was not ultimately found to constitute ineffective assistance of counsel. It is possible that Guerinot's repeated appointment to capital cases, rather than his ineffective representation, is to blame for the fact that a large number of his clients are on death row.

An attorney's experience representing capital defendants makes them appear more qualified to represent capital defendants in the future. In fact, federal law requires that appointees have such experience. At least one attorney appointed to represent a “person indicted in federal court for any death-eligible offense”<sup>68</sup> must be “learned in the law applicable to capital cases.”<sup>69</sup> To be considered “learned,”

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66. *Id.*

67. *Outlier Death Penalty Counties Defined by Ineffective Lawyers*, FAIR PUNISHMENT PROJECT (Mar. 9, 2016), <http://fairpunishment.org/outlierdeathpenaltylawyers/>.

68. *Appointment of Counsel & Role of Federal Defender*, FED. DEATH PENALTY RESOURCE COUNS., <https://fdprc.capdefnet.org/overview/appointment-counsel> (last visited Feb. 20, 2018); *see also* 18 U.S.C. § 3005 (2012).

69. 18 U.S.C. § 3005.

an attorney must have experience “in the trial, appeal, or post-conviction review” of federal or state death penalty cases.<sup>70</sup> As discussed in Section II.A, trying a death penalty case is not only uncommon, it is also generally undesirable. Attorneys who have extensive capital trial experience may, therefore, not be the best representatives available. At the same time, the appointment of at least one of these “experienced” attorneys is required by federal law. Thus, a dismal track record in capital cases may actually work to keep an attorney at the top of the list for capital counsel appointments.

Another potential explanation often offered to excuse the poor records of some capital attorneys is the fact that they are assigned a high number of “losing” cases.<sup>71</sup> While capital cases generally do have extreme sets of facts, the fact that an attorney is assigned to a capital case does not explain a high number of clients on death row.<sup>72</sup> Similarly, whether a case has horrendous or jarring facts has no bearing on the availability of mitigation evidence. Therefore, failure to present mitigating evidence, or a failure to adequately prepare for the sentencing phase of trial (e.g., by failing to interview key witnesses and/or an attorney’s own client), cannot be excused simply because the case is a “losing” one. While the “losing” nature of a capital case may have some effect on an attorney’s record for life or death sentences, it does not explain the behavior generally attributable to repeat-offender attorneys.

It is important to acknowledge that some of the deficiency may actually have to do with some counties’ prosecutors seeking death more often than others.<sup>73</sup> The first attorney discussed in Section I.I.B above practices in Maricopa County, Arizona: the second-deadliest county in America.<sup>74</sup> Similarly, Caddo Parish, Louisiana employed what one public defender described as a bloodthirsty prosecutor, who sought the death penalty regularly.<sup>75</sup> As argued above, though, a high volume of death penalty cases does not fully explain the inadequacy of representation by these attorneys, especially at the mitigation phase of trial. Failure to present a case for a life sentence—or presenting a weak case because of a failure to interview enough and/or key witnesses—is inexcusable.

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70. SUBCOMM. ON FED. DEATH PENALTY CASES, COMM. ON DEF. SERVS., JUDICIAL CONFERENCE OF U.S., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, [http://www.uscourts.gov/sites/default/files/original\\_spencer\\_report.pdf](http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf) (approved September 15, 1998).

71. See Liptak, *supra* note 5 (quoting a capital attorney as claiming that he never got assigned the easy cases).

72. See *supra* notes 47–48 and accompanying text (discussing death-sentence statistics).

73. Caddo Parish, Louisiana, for example. See Robert J. Smith, *America’s Deadliest Prosecutors*, SLATE (May 14, 2015, 3:54 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/05/america\\_s\\_deadliest\\_prosecutors\\_death\\_penalty\\_sentences\\_in\\_louisiana\\_florida.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/america_s_deadliest_prosecutors_death_penalty_sentences_in_louisiana_florida.html).

74. Smith, *supra* note 51. The first is Los Angeles County, California, which has twice the population of Maricopa County. *Id.*

75. Smith, *supra* note 73. Prosecutor Dale Cox is “personally secured half of the death sentences in Louisiana” from 2010 to 2015. *Id.* These numbers are not coincidence either: Cox has been very outspoken in favor of the death penalty, and has even been quoted as saying “I think we need to kill more people.” *Id.* (referencing an interview with Cox).

Further, taking on a disproportionately high number of cases does not excuse poor representation in any case. The facts of cases like those of Carty and Buck suggest that Guerinot had failed to seek out available mitigation evidence. Being assigned a large number of unfavorable capital cases in a county where a prosecutor often seeks the death penalty does not change the fact that mitigation evidence was available, but defense counsel failed to bring it forward. Guerinot said himself, “Somebody’s got to defend—‘defend’ is the wrong word—represent these people.”<sup>76</sup> The repeated appointment of these deficient attorneys makes them repeat offenders—regardless of the possible alternate explanations discussed above.

#### *D. Importance of Eliminating Repeat Offenders from the Pool of Potential Representatives*

Because of the life-or-death nature of capital cases, fairness and consistency in the capital system are of the utmost importance. Yet, capital punishment is not “administered with fairness and justice,” as was originally intended.<sup>77</sup> Today, too many low-quality attorneys represent defendants in capital cases throughout the United States.<sup>78</sup> Perhaps more importantly, even attorneys experienced in trying capital cases may be ineffective, given that getting to the trial stage is not necessarily the mark of a good defense attorney. To the contrary, capital defense attorneys should, at times, seek to avoid trial, given the prejudicial facts that generally distinguish murder trials. In order for capital defendants to receive fair trials (particularly in cases involving an unnerving set of facts like that in Buck’s), they must have diligent, vigorous representation—not just free counsel, and not even just experienced counsel.

Attorneys who fail to provide quality representation in capital cases, like the repeat offenders discussed above, should be barred from defending capital cases in the first place. As Section III will discuss, this restriction should not be limited to just those attorneys whose representation has been found ineffective under the

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76. Graczyk, *supra* note 34.

77. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE FUTURE OF THE DEATH PENALTY IN THE UNITED STATES: A TEXAS-SIZED CRISIS (1994), <https://www.ncjrs.gov/pdffiles1/Photocopy/153841NCJRS.pdf> (citing Justice Thurgood Marshall, Speech at Annual Dinner in Honor of the Judiciary, American Bar Association, 1990, quoted in *The National Law Journal*, Feb. 8, 1993 (noting that the current system of capital punishment was far from what the Supreme Court anticipated when it “gave its seal of approval to capital punishment” in *Gregg v. Georgia*)).

78. Andrea Neal, *Death Row Inmates Point to Poor Quality of Lawyers Who Defend Them*, L.A. TIMES (Oct. 29, 1986), [http://articles.latimes.com/1986-10-29/news/mn-7739\\_1\\_death-row-inmates](http://articles.latimes.com/1986-10-29/news/mn-7739_1_death-row-inmates); see, e.g., Ken Armstrong & Steve Mills, *Part 2: Inept Defenses Cloud Verdict*, CHI. TRIB. (Nov. 15, 1999), <http://www.chicagotribune.com/news/watchdog/chi-991115deathillinois2-story.html>. From the time Illinois reinstated the death penalty in 1977 to 1999, 12% of the “defendants sentenced to death were represented at trial by an attorney who had been, or was later, disbarred or suspended—disciplinary sanctions reserved for conduct so incompetent, unethical or even criminal that the state believes an attorney’s license should be taken away.” *Id.* During the same time period, 9.5% of those defendants sentenced to death were granted “a new trial or sentencing because their attorneys’ incompetence rendered the verdict or sentence unfair.” *Id.*

Sixth Amendment after-the-fact. Instead, it should extend to all repeat offenders. An attorney who fails to interview key witnesses or to introduce mitigating evidence is unfit to represent capital defendants, regardless of whether his or her representation was in fact found to constitute ineffective assistance of counsel under the *Strickland* test for Sixth Amendment violations. A broad prohibition based on an attorney's lack of care and attention at the mitigation phase of trial would reach attorneys like Guerinot—whose representation of Linda Carty was not found ineffective under *Strickland*. Given that so much of a defendant's fate rests in the hands of his or her attorney at the sentencing phase of trial, a defendant may live or die depending on the quality of his or her counsel.<sup>79</sup> This gamble is unacceptable.

### III. THE NEED TO TARGET THE APPOINTMENT OF REPEAT OFFENDERS AND POSSIBLE SAFEGUARDS AGAINST INEFFECTIVE COUNSEL

Society must protect capital defendants from foreseeably deficient attorneys. This Section argues that the assertion of an ineffective assistance of counsel claim is an insufficient and unreliable safety net for capital defendants. Ineffectiveness claims do not prevent low-quality representation from occurring in the first place. To directly influence and improve the quality of counsel in capital cases, some states recently have passed laws governing the assignment and conduct of capital defense counsel.<sup>80</sup> These attempts are often flawed, even when motivated by a genuine desire to provide quality representation to all capital defendants. Still, despite these shortcomings, states should continue their efforts to heighten standards for capital defense representation. Section III.C will argue that, at a minimum, states with capital punishment must protect capital defendants from attorneys who *already* have a track record of poor representation in capital proceedings. States should take prophylactic measures to identify and deem unfit such repeat-offender attorneys *before* they are appointed—not years after a successful ineffective assistance of counsel claim by a former client already on death row. Further, states should set requirements for the mitigation phase of trial to ensure that attorneys make a case for life.

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79. In 1994, Yale Law School Professor Stephen B. Bright wrote that death sentences were given “[n]ot for the [w]orst [c]rime but for the [w]orst [l]awyer.” 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, 1835 (1994); see also Neal, *supra* note 78 (“‘No one who has any money faces the death penalty,’ says South Carolina trial lawyer David Bruck. ‘While there are hundreds of thousands of lawyers in the United States, there is very little competent defense available for the people who need it most, people on trial for their lives.’”). Now, in 2018—with declining death penalty and execution rates, a recognition that the death penalty does not deter future violent crime, and mounting evidence that death sentences are arbitrary and often based on unlawful prejudices—this sentiment still holds true. The effect of counsel on a capital proceeding is great. The representation of Buck in *Buck v. Davis*, as well as the discussion of deficient attorneys as repeat offenders, illustrate this point. To match this great potential for influence, our criminal justice system has a duty to provide capital defendants with competent representation.

80. See *infra* Section III.B.



### A. *Ineffective Assistance Claims: An Incomplete Solution*

Successful ineffective assistance of counsel claims can rectify the harm done by inadequate representation. However, an ineffective assistance of counsel claim is a remedial measure that defendants may only exercise after the jury has already issued a verdict and made a sentencing decision. The fact that an ineffective assistance of counsel claim is a remedial, post-hoc action<sup>81</sup> is problematic, particularly in light of the indigent status of many capital defendants. The Supreme Court has guaranteed a right to counsel for indigent defendants only through the first appeal.<sup>82</sup> After direct appeal, states differ on whether a defendant has a right to counsel for post-conviction proceedings.<sup>83</sup> Many defendants, therefore, find themselves unable to bring ineffective assistance of counsel claims at all.<sup>84</sup> In such cases, the effect of inadequate counsel can be permanent. In a capital case, this means the likelihood that an indigent defendant will successfully overturn a sentence resulting from deficient representation at the mitigation phase of trial is slimmer than that of success for a defendant who can afford the appeals process.

Even if able to raise an ineffectiveness claim, a defendant has an uphill battle ahead. Death sentences are often upheld even when a defendant's representation was clearly inadequate. For example, Georgia executed Robert Wayne Holsey even after learning that Holsey's trial attorney "was a drunk," in and out of hospitals, who drank a quart of liquor every night during the trial.<sup>85</sup> Holsey's attorney was later disbarred and sentenced to prison for stealing from a client.<sup>86</sup> Even in the face of clear lawyer misconduct, it is very difficult to prevail on an ineffective assistance of counsel claim under the Sixth Amendment.<sup>87</sup> In order to prove that counsel is ineffective, the defendant must show not only that his or her counsel was deficient, but also that, but for his or her counsel's deficiency, the trial

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81. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007).

82. The Court in *Murray v. Giarratano* refused to find a constitutional right to legal assistance for post-conviction proceedings. *Representation in Capital Cases*, CAP. PUNISHMENT IN CONTEXT, <http://capitalpunishmentincontext.org/issues/representation> (last visited Feb. 20, 2018) (discussing *Murray v. Giarratano*, 492 U.S. 1, 10 (1989)).

83. Alabama, for instance, "provides no legal assistance to condemned inmates for preparing and filing postconviction claims." *The Crisis of Counsel in Alabama*, EQUAL JUST. INITIATIVE, <http://eji.org/alabama-inadequate-counsel-death-penalty-cases> (last visited Feb. 20, 2018).

84. *Id.*

85. Marc Bookman, *This Man's Alcoholic Lawyer Botched His Case. Georgia Executed Him Anyway*, MOTHER JONES (Apr. 22, 2014, 10:00 AM), <http://www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial>.

86. *Id.*

87. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

result would have been different.<sup>88</sup> In appealing a death sentence in a capital case, a defendant must show that his or her counsel's inadequate representation was the reason for the jury sentencing the defendant to death rather than life in prison.<sup>89</sup> In other words, the defendant must show that without deficient counsel, the jury would not have chosen death. This difficulty is illustrated in the case of Carty, the British woman convicted of kidnap and murder. In that case, the judge ultimately found that, though Carty's lawyer had made an "imperfect attempt" to spare his client the death penalty, there is no requirement that trials be perfect.<sup>90</sup> Given the difficult nature of meeting the *Strickland* requirements to prove ineffective assistance of counsel, defendants need much more than just effective counsel to prevail on this type of claim.<sup>91</sup>

Admittedly, an ineffective assistance of counsel claim may right the wrongs of a repeat offender with respect to a specific defendant. However, many defendants face financial barriers to bringing such claims. Even when they may bring ineffective assistance of counsel claims, prevailing is extremely difficult. Thus, the availability of an ineffective assistance of counsel claim is an incomplete remedy for the problem of repeat offenders.

### *B. States' Varying Success in Guarding Against Repeat Offenders*

The Supreme Court has not specified performance standards for capital-defense attorneys.<sup>92</sup> Instead, states have attempted to set minimum standards for such attorneys. States' Rules of Professional Conduct, for example, govern attorney conduct generally and provide for disciplinary action if the Rules are violated.<sup>93</sup> Like ineffective assistance of counsel claims though, the Rules do not deal directly with the *appointment* of capital defense counsel. Nor do they impose requirements with respect to the introduction of evidence at the mitigation phase of trial. Many states also have in place some sort of legal framework intended to heighten the quality of counsel for capital defendants. Recent efforts by states with high execution rates have had varying levels of success. Virginia, the state with the most success in improving representation of capital defendants, focused on: (1) requirements for appointment of capital defense counsel in the first place, and (2) enhanced mitigation evidence at the sentencing phase of trial. While the

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88. See *supra* note 3; *Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

89. See Petitioner's Brief, *supra* note 4, at 33.

90. See Liptak, *supra* note 5.

91. See Brian Stull, *Good and Bad Lawyers Determine Who Lives and Who Dies*, ACLU: SPEAK FREELY (Mar. 10, 2010, 12:46 PM), <https://www.aclu.org/blog/speakeasy/good-and-bad-lawyers-determine-who-lives-and-who-dies> (stating additionally that, in an attempt to win an appeal for habeas corpus, "not just any lawyer will do").

92. *Representation in Capital Cases*, *supra* note 82.

93. Rule 1.1 of the Rules of Professional Conduct requires that lawyers represent clients competently. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

elimination of representation by repeat-offenders does not require following the Virginia model exactly, any efforts aimed at combatting the repeat-offender problem must focus on improvement in these two areas specifically.

### *1. Piecemeal Approaches by Death Penalty States*

In some states, prosecutors seek<sup>94</sup> and juries impose the death penalty frequently compared with the national average. The country as a whole, however, imposes the death penalty less frequently than in the past,<sup>95</sup> and some of these states have begun addressing the problem of inadequate representation in capital cases. Louisiana, Arizona, and Alabama, for example, updated the standards for and criteria considered for appointing of capital defense attorneys. These efforts are incomplete, however, because they fail to account for the repeat-offender problem.

Beginning with a 2007 legislative directive,<sup>96</sup> Louisiana has heightened its standards for capital-defense attorneys. The Louisiana legislature “directed the Louisiana Public Defender Board to create ‘mandatory statewide public defender standards and guidelines . . . [that are] uniformly fair and consistent throughout the state.’”<sup>97</sup> Over the past decade, the Louisiana Public Defender Board’s (“LPDB”) attempts to comply with the legislative directive resulted in the LPDB Guidelines for Capital Defense, which went into effect on May 20, 2010.<sup>98</sup> The Guidelines require a lead trial counsel to, among other things, have tried at least two murder cases to completion. As discussed in Section II, trial experience may not be the most accurate predictor of attorney competence, particularly in the capital context. Generally, capital-defense attorneys should avoid going to trial.<sup>99</sup> That is because,

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94. See generally Smith, *supra* note 73. Alabama and Arizona, for example, impose 0.956 and 0.474 death sentences per capita. *Death Sentences per Capita by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-sentences-capita-state> (last visited Feb. 20, 2018) (compiling cumulative death sentences in each state from 1977 to 2013). The national average, however, is just 0.271 amongst all death-penalty states (and is just 0.206 across all states, including both death-penalty and non-death-penalty states). *Id.* (math done by author). Louisiana is also above the national average, imposing 0.355 death sentences per capita. *Id.*

95. See *Facts About the Death Penalty 2*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Feb. 20, 2018).

96. *LPDB Guidelines for Capital Defense*, LA. PUB. DEFENDER BOARD, <https://lpdb.la.gov/Supporting%20Practitioners/Capital%20Defense/LPDB%20Guidelines%20for%20Capital%20Defense.php> (last visited Feb. 20, 2018) (quoting LA. STAT. ANN. § 15:148 (2017)).

97. *Id.*

98. *Id.*

99. *Supra* Section II.D; Interview with Daniel Goldman, (Jan. 5, 2017) (explaining that the number of capital cases that an attorney has taken to trial is an imperfect indicator of how good that attorney is at representing capital defendants). While taking a case to trial may be the best decision in some capital cases, there are many reasons why a skilled capital defender may want to avoid trial. For instance, the evidence in a capital murder case might be particularly inflammatory and, therefore, more likely to prompt a jury to convict or grant a death sentence. A plea agreement may also be the best way to ensure one’s client avoids the death penalty. See, e.g., Sarah Kershaw, *In Plea Deal That Spares His Life, Man Admits Killing 48 Women*, N.Y. TIMES (Nov. 6, 2003), <http://www.nytimes.com/2003/11/06/us/in-plea-deal-that-spar-es-his-life-man-admits-killing-48-women.html?mcubz=3> (discussing the “Green River Killer” plea deal, where Gary L. Ridgeway avoided the death penalty by agreeing to plead guilty to the murder of forty-eight women). While trial experience certainly has

particularly in a prolific death-penalty state, taking a capital case to trial is not necessarily in the best interest of a capital defendant.<sup>100</sup>

Thus, Louisiana's two-trial requirement may not necessarily result in the most competent counsel being appointed to death penalty cases in the state. In fact, the requirement may actually perpetuate the appointment of repeat-offenders—those attorneys who, while appearing experienced in capital cases, are in fact deficient in their representation of capital defendants, particularly vis-à-vis insufficient attention to the mitigation phase of trial.<sup>101</sup>

Other states prohibit attorneys from representing a capital defendant if the attorney has been suspended by the state bar within a certain number of years. In Arizona, an attorney must be “a member in good standing of the State Bar of Arizona for at least five years . . . preceding the appointment” to a capital case.<sup>102</sup> Even in states with laws like Arizona's, however, the appointment of repeat-offenders remains a possibility. In fact, the lack of discipline by the bar is what differentiates plainly ineffective counsel from the subtler deficiencies of a repeat-offender. If an attorney is suspended from practice, the appointing judge in a capital case has notice that that attorney's subsequent representation of a capital defendant may be inadequate; in contrast, when a repeat-offender is up for an appointment, his or her potential deficiencies are not so obvious. Despite deficiencies being non-obvious, the repeat-offender attorney is still predictably deficient when their tactics and record—rather than just the volume of their experience with capital cases—is examined. Thus, courts may assign clients potentially deficient counsel in a way that technically complies with the State's Code of Professional Conduct, yet is predictably deficient.

Many states' laws—in addition to Arizona and Louisiana, discussed above—are simply incomplete attempts to guard against predictably deficient representation in capital cases. For example, Alabama law requires that at least one attorney appointed to a capital case have five years of criminal experience.<sup>103</sup> Alabama law also provides, however, that Alabama's trial courts may allow exceptions to the

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value, it may not be the best benchmark by which to measure the quality of a capital defense attorney. By accepting a plea deal (prior to trial) for a sentence less than death, attorneys can avoid placing a defendant's life at risk. Of course, it is always conceivable that a defendant will be acquitted at trial, or found guilty of a lesser offense with less jail-time. However, the takeaway here is not that going to trial has its pros and cons; rather, it is simply important to understand that, in a capital cases, avoiding trial simply means avoiding death. While there are other ways that a death sentence may be avoided, not going to trial will, without a doubt, avoid a death sentence.

100. *See id.*; but *see* *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Feb. 20, 2018) (since executing a single person in 2010, Louisiana has not executed anyone on death row).

101. *See supra* Section II.B.

102. ARIZ. R. CRIM. P. 6.8(a)(1)–(2); *see also* Paul Rubin, *Death-Penalty Lawyers Are Making a Killing Off Maricopa Taxpayers*, PHX. NEW TIMES (July 19, 2012, 4:00 AM), <http://www.phoenixnewtimes.com/news/death-penalty-lawyers-are-making-a-killing-off-maricopa-taxpayers-6454923>.

103. *The Crisis of Counsel in Alabama*, *supra* note 83.

rule.<sup>104</sup> Further, while ABA Guidelines recommend that at least two attorneys represent each capital defendant, Alabama law allows only one defense attorney to represent a defendant in a capital case.<sup>105</sup> Efforts by these states are valid, but they are often incomplete or hindered by loopholes, exceptions, and other problematic laws.

## 2. *Comprehensive Approach in Virginia*

Compared to other death penalty states, Virginia has made perhaps the most progress in recent years<sup>106</sup> towards ensuring quality representation in capital cases—despite few (if any) significant changes to the substantive death-penalty law.<sup>107</sup> In fact, “lawmakers have long installed death-penalty-friendly procedures” in the state of Virginia.<sup>108</sup> This progress is, instead, attributable to the State’s creation of regional capital defenders offices.<sup>109</sup>

In the 1990s and early 2000s, Virginia was one of the leading death penalty states.<sup>110</sup> In response to ABA Guidelines regarding the appointment of counsel and representation of defendants in capital cases, Virginia’s General Assembly passed a law that established four regional capital defender offices in the State.<sup>111</sup> These offices cover all jurisdictions in the State, and the lawyers in these offices specialize in capital criminal defense.<sup>112</sup> In every capital case, at least two lawyers must be appointed, one of whom must be from the regional capital defender

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104. *Id.*

105. *Id.*

106. Florida has also recently changed some of their own state laws because of issues with poor representation. However, Florida has an incredibly active death penalty and is not quite as far along in its efforts to change the quality of capital representation as Virginia is. *Indigent Defense*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Access-and-Fairness/Indigent-Defense/State-Links.aspx?cat=Capital%20Case%20Representation#Florida> (last visited Feb. 20, 2018) (explaining that Florida measures the quality of capital counsel by way of the number of murder cases tried to completion). Thus, the State has yet to see the effects of these changes on the quality of capital representation. *See, e.g., supra* Section II.B (repeat offender’s deficient representation occurred as recently as 2015). Texas has also made strides. In 2001, Texas passed a law requiring that defense attorneys be selected from a list that includes only defense attorneys with sufficient training and expertise. TEX. CODE CRIM. P. § 26.052 (2017); *see also* Graczyk, *supra* note 34. The State has also established regional capital defender offices like those in Virginia. *See Capital Public Defender’s Office Mission Statement*, REGIONAL PUB. DEFENDER FOR CAP. CASES (2012), <http://rpdo.org/php>. However, not all Texas counties are eligible to participate in the regional-defender-offices program—most notably, Harris County. *Id.* Harris County is the most populous Texas County, where Houston is located, and is where Jerry Guerinot practiced. For these reasons, Texas’s reform efforts remain more piecemeal than those of Virginia.

107. Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 665 (2017).

108. *Id.*

109. *Id.* at 682–83.

110. *Id.* at 674; *see also* Virginia, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/virginia-1> (last visited Feb. 20, 2018).

111. VA. CODE ANN. § 19.2-163.04 (West 2017).

112. *See* Garrett, *supra* note 107, at 678.

office.<sup>113</sup> This requirement, combined with the establishment of regional capital defender offices itself, drastically improved the quality of representation of capital defendants in Virginia.<sup>114</sup>

The impact of representation by regional capital defenders (“RCDs”) shows not only in the decrease number of death sentences overall<sup>115</sup> but also in the increased complexity of defendants’ cases. The “complexity” of a defense refers to the number of witnesses called, including expert witnesses, as well as the length of the sentencing hearings. These factors presumably correlate with the amount of mitigating evidence that defense counsel introduces. The complexity particularly reveals the success of the regional public defender offices. The reduced frequency of death sentences could be due to a variety of factors,<sup>116</sup> but the complexity of defendants’ cases-in-chief is directly attributable to individual counsel. More mitigating evidence—found in complex defenses—increases the likelihood of a jury recommending a sentence of life in prison, as opposed to death.<sup>117</sup> Increased complexity thus points to improved representation.

In fact, since the representation by RCDs began, the length of the critical sentencing phase of trial has more than doubled in Virginia.<sup>118</sup> Representation by a RCD means an average of four days of sentencing hearings, as opposed to the average of fewer than two days from 1996 to 2004.<sup>119</sup> The number of defense witnesses called has increased—both relative to the time before RCDs and as compared with representation by non-RCDs.<sup>120</sup>

Virginia also improved the standard used to judge an attorney’s experience level in capital cases. Virginia used to judge a lawyer’s quality by the number of capital cases a given attorney had taken to trial. However, this measure does not necessarily indicate whether an attorney has provided (and will provide) quality representation to capital defendants because going to trial in a capital case is not usually in the client’s best interest. According to Virginia Public Defender Daniel Goldman, the goal in cases where the prosecution is seeking the death penalty should, generally, be to settle with the prosecution for something less than a death

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113. § 19.2-163.7 (West 2017).

114. AM. B. ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT 142 (2013), [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/va\\_complete\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf); see Garrett, *supra* note 107, at 678 (noting that part of the success of these offices is their particular focus on the presentation of mitigation evidence).

115. Since 2011, Virginia has not sentenced a single capital defendant to death. Garrett, *supra* note 107, at 680.

116. Including, but not limited to, zealous advocacy by counsel and the shifting of both prosecutorial priorities and societal views on the death penalty.

117. See *supra* Section II.

118. Garrett, *supra* note 107, at 667.

119. *Id.*

120. *Id.* at 683 (“RCDs also called more defense witnesses on average (averaging nineteen witnesses called for the defense, compared with eleven in non-RCD cases).”).



sentence.<sup>121</sup> Now, it is unusual for a capital case to get to trial in Virginia.<sup>122</sup>

*C. Targeting Repeat Offenders: Appointment Procedures & Minimum Requirements for Mitigation Evidence*

Protecting defendants from attorneys who have a track record of, or reputation for, failing to adequately represent their clients in capital cases requires a comprehensive approach, similar to the one taken by Virginia. The following recommendations would reduce the risk of predictably deficient attorneys representing capital defendants.

Despite the piecemeal efforts made in some states, state-implemented guidelines for the appointment and conduct of capital-defense attorneys remain the best way to avoid the appointment of repeat offenders. Using the Virginia program as a model, states should establish regional capital defender offices.<sup>123</sup> The creation of such offices would provide a centralized, accountable team of attorneys who are genuinely invested in achieving the best outcome possible for their clients (as opposed to being motivated by the financial incentive associated with representing a capital defendant).<sup>124</sup> Studies show that, compared to appointed (i.e., private) counsel, public defenders reduce both the rate of conviction and the length of their clients' sentences.<sup>125</sup> Capital defendants are thus less likely to be sentenced to death if represented by a public defender. Other states should attempt this program by appointing seasoned, defense-minded attorneys to capital cases.

Building on the Virginia model, states could involve regional defender offices in the appointment process even when the offices do not represent a specific capital defendant. States should allow a regional capital defender office to offer input—

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121. Interview with Daniel Goldman, *supra* note 99.

122. See Garrett, *supra* note 107, at 681.

123. States may also consider treating the American Bar Association Guidelines as the floor, and self-imposing additional requirements and restrictions on top of that floor. For example, while the ABA Guidelines do not contain a recommended limit on the number of capital cases an attorney defend in a given year, RCD offices in Virginia often average fewer than three cases per attorney in any given year. See generally ABA Guidelines, *supra* note 50; Interview with Daniel Goldman, *supra* note 121 (explaining that many pretrial capital-defense cases require extensive travel and research, including interviewing anyone who ever knew their client, and that, as a result, sometimes juggling three pretrial capital cases may not allow an attorney to adequately represent a capital defendant); see also *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, AM. B. ASS'N (1989) (previously recommending a caseload of no more than three capital cases in a given year).

124. Many repeat offenders are private attorneys, paid hourly by the state. See, e.g., attorneys discussed in Section II.B. For example, “[o]f 41 judicial circuits in Alabama, just six have a public defender, and not all represent capital defendants.” *The Crisis of Counsel in Alabama*, *supra* note 83. The majority of circuits contract with private attorneys for a monthly fee. The remaining judicial circuits appoint attorneys to represent capital defendants for an hourly fee. *Id.*

125. One study—the Rand study—analyzed the benefit of retaining public as opposed to private counsel, and is well-known in this area. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make?*

The Effect of Defense Counsel on Murder Case Outcomes, 122 YALE L.J. 154 (2012). The Rand study found that “[c]ompared to appointed counsel, public defenders in Philadelphia reduce their clients’ murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%.” *Id.* at 159.

and allow courts to solicit that input—on the appointment of attorneys to all capital cases within its jurisdiction. This advice requirement could be as limited as requiring that a court provide the regional offices with an opportunity to file a brief containing its opinion with respect to a specific attorney. Alternatively, the requirement that regional offices advise courts could be as demanding as actually requiring the regional office to file such a brief—and be heard by the court—prior to the appointment of counsel.

It is not unheard of for judges to appoint their friends to capital cases because of the lucrative nature of capital cases.<sup>126</sup> It is also, in fact, common for judges to appoint an attorney to a capital case because of seniority,<sup>127</sup> rather than because that attorney is the best available representative for the defendant. Giving regional capital defender offices a say in who is appointed to capital cases—outside of those cases in which the office is directly involved—would reduce the likelihood of a judge appointing counsel for solely personal or seniority reasons.

Another proposed solution is to require that capital-defense attorneys present *some* mitigating evidence or else information about the attorney's unsuccessful attempts to discover mitigating evidence. As discussed in Section II, *supra*, there are many ways in which counsel can offer mitigation evidence. The definition of “mitigating evidence” is extremely broad, and the defense's case for a life sentence as opposed to death is subject only to limited restrictions.<sup>128</sup> Thus, defense counsel should be required to present some mitigating evidence at the sentencing phase of trial. And, if counsel presents little to no mitigating evidence, the court should investigate. Essentially, there should be some inquiry by the court into whether counsel adequately prepared to present a case at the sentencing phase of trial (i.e., made reasonable effort to gather relevant mitigating evidence).

#### CONCLUSION

At first glance, the unfortunate circumstances surrounding Duane Edward Buck's deficient representation seem unique and extreme. But, in fact, Buck's fate was quite predictable. His counsel was appointed despite a history of deficient representation in capital cases. Such a history is not unique to Buck's attorney, either: attorneys who repeatedly exhibit ineptitude, particularly in the sentencing phase of a trial, are not precluded from continuing to represent capital defendants. In fact, deficient attorneys are oftentimes ideal candidates for capital appointments, because they appear to have experience, even though such “experience” does not necessarily correlate with competency.

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126. Conflicts of interest are, according to the Rand study, a risk associated with judicial involvement in the appointment of defense counsel. *Id.* at 190–93; see also Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, 27 CRIM. JUST. 46, 47 (2012).

127. Interview with Daniel Goldman, *supra* note 99.

128. See *supra* Section II.

As Justice Ginsburg remarked: “I have yet to see a death case, . . . in which the defendant was well represented at trial.”<sup>129</sup> If the death penalty’s inequitable administration is exacerbated by the varying quality of representation—so much so that many sentences turn on whether a capital defendant was adequately represented—perhaps the only real solution to the problem of repeat offenders is to abolish the death penalty.<sup>130</sup> Yet, as long as the death penalty remains in effect in the United States, states and courts must combat the prevalence of repeat offenders in capital proceedings. Attorneys with reputations for failing to introduce mitigation evidence should be barred from representing capital defendants, or else should be forced to put forth *some* evidence in favor of a life sentence for their client. Neither approach discussed in Section III.C, *supra*, is sufficient on its own, and the approaches may even be insufficient in combination with one another. That said, reform efforts towards a comprehensive approach should continue. Implementing any type of reform aimed at improving the quality of counsel in capital cases is a step towards eliminating repeat offenders from the capital defense system.

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129. Justice Ruth Bader Ginsburg, Joseph L. Rauh Lecture at the University District of Columbia, David A. Clarke School of Law: In Pursuit of the Public Good: Lawyers Who Care (Apr. 9, 2001); *see* Liptak, *supra* note 5.

130. Eliminating the death penalty would likewise eliminate the disproportionate execution of black defendants. The merits of the death penalty itself are discussed at length in much legal and academic scholarship but are not central to this piece.