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The Postville Raid

Federal panel attorneys for the Northern District of Iowa were called to the Federal Courthouse by the United States Attorneys Office of the Northern District and a Federal Judge. At this meeting the panel attorneys were told by the United States Attorney's Office about procedures that were going to be implemented to process detainees who were suspected of being undocumented aliens and were also going to be charged with violations of federal criminal statutes. The panel attorneys were given a procedures manual[1] at the onset of the meeting. The panel attorneys were advised they would be representing groups of detainees rather than individuals. They were also advised of the potential pleas their potential clients would be offered by the United States Attorney's Office. The panel was advised they would have a limited number of days to represent their clients and allow the clients to make decisions. This compressed process put the attorneys in the position of having to advise clients, many of whom have limited language skills with immigration issues layered on the criminal cases, to make decisions in an abbreviated time frame. The plea offers made by the United States Attorney's Office having criminal and immigration law consequences were communicated by the panel attorneys appointed to represent them in rapid fire fashion. Within a few days groups of detainees represented by panel attorneys numbering in the hundreds, appeared in federal court in groups, held at a fair grounds to enter into agreements having far reaching consequences for the detainee's embracing both criminal law and immigration law.

Whether the procedure adopted and implemented in the Postville Raid comport with the constitutional requirement of due process.

The requirement of due process is fundamental to the administration of criminal justice in the United States. The procedures adopted after Postville in the Northern District pose several disturbing questions regarding the process used and its affect on the ability of counsel to provide effective representation. Certain aspects of representation of clients charged with criminal offenses have been reviewed by the Courts and by the American Bar Association within the last 10 years. In the interest of time I will submit some of my writing regarding standards for counsel representing individuals charged with crimes and invite the committee to refer to others who have written in this area. The following is from a law review article published in the Pepperdine Law Review. The title is *The T-Rex without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 Pepperdine L. Rev. 77 (2007). What follows is a discussion of three United States Supreme Court cases and the American Bar Association findings regarding assistance of counsel in criminal cases.

[1] The procedure's manual was taken from any lawyer who did not agree to participate in the process and procedures outlined in the meeting. No procedures manual has been made available for public comment.

The effect of Williams, Wiggins, and Rompilla is a detailed analysis of trial counsel's preparation and investigation, especially in death penalty cases by both state and federal courts.

In Coleman v. Mitchell, one of the early applications of Williams, the Sixth Circuit reversed a capital murder conviction. [FN121] Again, the reversal was based on trial counsel's lack of investigation into mitigating facts that would be relevant to the penalty phase of the trial. [FN122] Coleman presented an interesting argument advanced by the government. The petitioner had stated his desire to conduct a mitigation phase proceeding using the petitioner's own unsworn statement. [FN123] The district court found that trial counsel had honored the petitioner's request and therefore did not provide substandard representation. [FN124] An analogy was drawn between the limited representation presented in this case with a self-representation request. [FN125] The Sixth Circuit rejected the analogy, finding that counsel had never had a colloquy with the defendant that advised him of the dangers of his approach to the penalty phase of the case. [FN126] The court further found that the petitioner's request did not excuse trial counsel's duty to conduct an independent investigation. [FN127]

The court's finding is in harmony with the general duty to investigate as stated in the ABA standards cited by the Supreme Court in Williams v. Taylor:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty. [FN128]

After Wiggins, the Sixth Circuit further articulated a more detailed analysis of defense counsel's duty to investigate mitigating circumstances. In Hamblin v. Mitchell, the Sixth Circuit granted a writ of habeas corpus based on trial counsel's failure to investigate mitigating circumstances in a death penalty case. [FN129] The court used both the 1989 ABA guidelines and the 2003 Guidelines to amplify counsel's obligation to conduct an investigation. [FN130] Central to the court's finding was the premise that:

> [T]he Wiggins case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the “prevailing professional norms” in ineffective assistance cases. This principle adds clarity, detail and content to the more generalized and indefinite 20-year-old language of Strickland . . . . [FN131]

The court was not troubled by the fact that the petitioner's trial occurred prior to the adoption of the 1989 standards. [FN132] Needless to say, state courts seized on the Williams and Wiggins application of ABA standards as well as their detailed factual inquiry into counsel's performance.

An example of this detailed analysis is found in In re Lucas. [FN133] The California Supreme Court vacated a capital murder conviction after appointing a special master to conduct an investigation into trial counsel's failure to adequately investigate. [FN134] Although trial counsel did interview the petitioner's wife, mother and sister, counsel only briefly explored the petitioner's history surrounding his childhood. [FN135] The California court specifically found that the petitioner was in and out of foster homes growing up, and that when his birth mother reclaimed him, there was evidence he had been beaten. [FN136] After the abuse was discovered the petitioner was placed in an abused children's facility where they verified that the petitioner had been severely abused and, as a result, had suffered advanced emotional trauma. [FN137] Records and witnesses of the petitioner's tragic childhood were readily available to trial counsel. [FN138]

This detailed finding by the court highlights the fact analysis done by the United States Supreme Court in Wiggins. [FN139] The court consistently referred to the findings in Wiggins, saying:

> As the United States Supreme Court has instructed: strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. [FN140]

The Court's use of ABA standards [FN141] as a means to measure a lawyer's performance in death penalty cases signifies a change that may subject attorneys to valid claims of ineffective assistance of counsel. This use of the ABA standards was not envisioned by the drafters of the standards. Both the current prosecution standards and defense standards begin with an admonition by the drafters:

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of [prosecutor/defense counsel] to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances. [FN142]

In spite of the cautionary note by the ABA, the Court is using the standards in evaluating counsel's performance. In doing so, the Court has given teeth to the test for ineffective assistance articulated in Strickland.

The invocation of the ABA standards does not automatically mean a reversal of a conviction based on a claim of ineffective assistance of counsel. Courts throughout the country routinely reject claims of ineffective assistance. [FN143] However, the evolving use of the ABA standards has heightened the scrutiny courts use in evaluating counsel's performance over the years. Despite the favorable trend of ineffective assistance cases, the Strickland test is still criticized for setting the constitutional and ethical safeguards too low. [FN144] Eliminating the Strickland requirement that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" [FN145] is one step the Court may wish to take in order to focus more closely on counsel's performance. Looking at the language of Williams, [FN146] Wiggins, [FN147] and Rompilla, [FN148] the Court may have in fact abandoned the presumption in favor of a detailed factual analysis of the alleged breach of duty. If that is the case, then the abandonment of the presumption is well justified and long overdue. Where the Court is headed is, as always, subject to speculation by commentators. However, if the Court continues to follow the principle of adequate investigation fleshed out in Williams, Wiggins, and Rompilla, a look at the American Bar Association's recent studies may serve as a guide for what defense counsel can expect.

V. Evolving ABA Defense Standards

In 2004 the American Bar Association Standing Committee on Legal Aid and Indigent Defendants outlined the minimum steps defense counsel should take to adequately represent clients charged with a crime. [FN149] The Committee found that defense counsel should:

[K]eep abreast of the substantive and procedural criminal law in the jurisdiction; [FN150] avoid unnecessary delays and control workload to permit the rendering of quality representation; [FN151] attempt to secure pretrial release under condition most favorable to the client; [FN152] prepare for a initial interview with the client; [FN153] seek to establish a relationship of confidence and trust with the client and adhere to ethical confidentiality rules; [FN154] secure relevant facts and background from the client as soon as possible; [FN155] conduct a prompt and thorough investigation of the circumstances of the case and all potentially available legal claims; [FN156] avoid conflicts of interest; [FN157] undertake prompt action to protect the rights of the accused at all stages of the case; [FN158] keep the client informed of developments and progress in the case; [FN159] advise the client on all aspects of the case; [FN160] consult with the client on decisions relating to control and direction of the case; [FN161] adequately prepare for trial and develop and continually reassess a theory of the case; [FN162] explore disposition without trial; [FN163] explore sentencing alternatives; [FN164] and advise the client about the right to appeal. [FN165]

Most of the committee recommendations follow a common sense approach to criminal defense practice. Should the judiciary assume most lawyers conform their practice habits to these recommendations? Unfortunately, the committee's findings indicated there are system-wide failures throughout the United States. [FN166]

The committee, through various witnesses and documentary evidence, found the practice of providing defense counsel fell short in several aspects. [FN167] The report issued by the committee cited many troubling issues in criminal defense work, including: "Meet 'em and Plead 'em" lawyers; [FN168] incompetent and inexperienced lawyers; [FN169] excessive caseloads; [FN170] lack of contact with clients and continuity in representation; [FN171] lack of investigation, research, and zealous advocacy; [FN172] lack of conflict-free representation; [FN173] and ethical violations of defense lawyers. [FN174]

After these findings the questions become why do these problems exist and what can be done? As previously stated, the courts are starting to use ABA standards to evaluate defense counsel performance. The problem is not a lack of standards; it is the bench and the bar's lack of enforcement of existing standards. Again the case is made for the abandonment of Strickland's presumption of counsel's effectiveness. [FN175]

Do the procedures adopted in Postville pass muster under the previous analysis?

A strong case can be made that the procedures adopted are flawed for a number of reasons:

I. Lack of Input by the Defense Bar

The criminal defense bar was not consulted prior to the adoption of the procedures implemented after Postville. Without the input of either the Federal Public Defender's Office or the panel attorneys who were going to represent the clients, procedures that were adopted have created serious systemic problems with the system. The limited amount of time the lawyers were given to adequately investigate client cases and perform necessary research associated with criminal cases with immigration issues are just two of them. Some of these criticisms could be avoided with input from the defense bar prior their adoption.

II. Transparency of Process

The procedures manual given to the attorneys agreeing to represent the individuals detained should have been circulated earlier to allow attorneys to consult with one another and develop strategies for representation. This would include formulating objections to the procedures adopted, should the attorneys choose to do so.

III. Individual Representation by Attorneys

Attorneys were appointed to groups of individuals rather than individual clients. This combined with the compressed time line attorneys were given, resulted in lawyers spending an hour or less with clients. In some cases panel attorneys were meeting with multiple clients at the same time. Needless to say, client confidentially took a back seat to processing clients through an abbreviated system. The more compressed the time the greater the need for more lawyers to effectively handle client cases. Group representation invites error into the process.

IV. Compression

The time frame in which several hundred cases were handled by a limited number of defense counsel is astonishing. As previously mentioned, forcing group representation with a very short period of time denies the lawyers the ability to adapt and adjust to the procedures put in place and conduct adequate factual and legal investigation on behalf of each individual they represent. The result may be defective representation by competent lawyers who are put in a situation where they do not have adequate time or resources to prepare or explore the case. Even the best lawyer can be made ineffective without adequate time or resources.

V. Access to Immigration Attorneys by Defense Attorneys and Clients

Because the Postville raid caused the intersection of criminal law and immigration law, panel attorneys should have had additional time to either become more familiar with immigration issues prior to the raid or allowed immigration attorneys into the process as part of a defense

team. Access to immigration attorneys who are experts in the area helps ensure competent overall representation. As it turns out, immigration attorneys were initially denied access to detained clients.

VI. Individual Attention by the Federal Judges

Having groups of clients appearing before judges for the purpose of entering guilty pleas constitutes the appearance of assembly-line justice not associated with the decorum of Federal courts.

Conclusion

The process used to prosecute criminal offenses in the United States is as important as substantive law itself. Great care should be taken to protect the carefully thought out procedures adopted by Congress and tested in the courts in criminal cases. The procedures adopted prior to the Postville raids call into question those procedures and constitutional guarantee of due process. We should take care not to sacrifice effective representation in order to expedite disposition of criminal cases.