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## THE ABA GUIDELINES: THE ARIZONA EXPERIENCE

Larry Hammond\*

Robin M. Maher\*\*

The American Bar Association's ("ABA") *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*<sup>1</sup> were published in 2003 to both acclaim and derision. Criticized in some quarters as mandating an unaffordable "Cadillac" defense undeserved by capital defendants and death-sentenced prisoners,<sup>2</sup> they were also celebrated by a capital defender community whose hard-learned lessons and years of diligent work were reflected in the *Guidelines*.<sup>3</sup>

In Arizona, this much-needed blueprint of effective representation and standard of care for death penalty defense was largely ignored when first published.<sup>4</sup> Today, fifteen years later, quite the opposite is true. This

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1. Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003), 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA Guidelines*].

2. See Robin M. Maher, *Improving State Capital Counsel Systems Through the Use of the ABA Guidelines*, 42 HOFSTRA L. REV. 419, 419-20 (2013).

3. See *id.* at 420-21.

4. In order to overcome this, both authors met starting in 2003 with various stakeholders including members of the Arizona Supreme Court, the Presiding Criminal Judge in Maricopa County, the leaders of several of the public defender offices, and leading members of the Arizona State Bar Board of Governors. This early outreach and dialogue was invaluable in gaining a consensus among all elements of the criminal justice community that implementation of the *Guidelines* would serve all of their interests. See Eric M. Freedman, *Symposium Introduction*, 46 HOFSTRA L. REV. 1097, 1103 (2018). That consensus, in turn was indispensable to the decision of the highly influential Arizona Bar to support the petition to the Arizona Supreme Court described

Article traces the migration of this State from a largely standardless death penalty defense community to one where most defendants have a reasonable expectation of being represented by a defense team with the training and resources necessary for this most challenging aspect of criminal defense. The Arizona story is one of important successes—successes that have helped firmly to establish rules for the performance of capital defenders. It is also a story of instructive mistakes and missed opportunities that have left too many Arizona death row prisoners without the relief they deserve.

First, it may be useful for readers to know a few of the characteristics of Arizona's death penalty system. The Arizona death row population count is over 120 men and women, making it the eighth largest among the States.<sup>5</sup> Year in and year out, the most populous counties in Arizona—Pima County (Tucson) and Maricopa County (Phoenix)—have been among the handful of counties that lead the nation in the numbers of death penalty prosecutions.<sup>6</sup> Possibly most telling is the fact that Arizona is also a state with one of the highest rates of appellate and post-conviction reversals of death penalty convictions and sentences—120 by one recent count.<sup>7</sup> Many of these cases can be traced to the constitutionally ineffective performance of Arizona defense lawyers.<sup>8</sup> Some of the convictions and sentences of those still populating Arizona's death row will be set aside. Many others, however, will see no relief.

Unlike many of its sister states that re-established the death penalty in the 1970s, more than half of the funding for indigent defense in Arizona came from county governments.<sup>9</sup> There was no state funding for

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*infra* text accompanying note 39.

5. See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Oct. 11, 2018).

6. See *American FactFinder: 2017 Population Estimates*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/demo/popest/counties-detail.html#tables> (last visited Nov. 10, 2018); *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, FAIR PUNISHMENT PROJECT (June 2016), [http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report\\_FINAL.pdf](http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf) (noting that Pima County prosecutor Kenneth Peasley obtained ten death sentences, earning him the reputation of the “death-penalty machine,” and that Jeanette Gallagher, the head of the Maricopa County's Capital Case Unit, gained nine death sentences, apparently “more than any other active prosecutor in Arizona in the last decade” (internal quotation marks omitted) (footnote omitted)).

7. TRACY J. SNELL, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES 20 (2014), <https://www.bjs.gov/content/pub/pdf/cp13st.pdf> (count from 1973-2013).

8. See, e.g., *White v. Ryan*, No. 15-99011, slip op. at 11, 55, 60-61 (9th Cir. July 11, 2018); *Vega v. Ryan*, 757 F.3d 960, 974 (9th Cir. 2014).

9. MAREA L. BEEMAN ET AL., RATES OF COMPENSATION FOR COURT-APPOINTED COUNSEL IN CAPITAL CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 7 (1999); cf. *ABA Guidelines, supra*

any aspect of capital defense.<sup>10</sup> And, as a consequence, there were virtually no statewide standards for the selection and performance of lawyers appointed to represent defendants in these cases. That began to change when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>11</sup> That statute afforded states like Arizona the opportunity to shorten and curtail federal habeas corpus review if they were able to demonstrate that defendants convicted and sentenced to death would have competent lawyers at the state post-conviction stage, and those lawyers would have adequate funding to provide assistance in the state level review.<sup>12</sup>

In Arizona, the Legislature’s first efforts to establish a system for the appointment of post-conviction death penalty lawyers occurred in the mid-1990s. As a first step, the Arizona Legislature passed a bill designed to create the first statewide post-conviction capital defense office.<sup>13</sup> It would have been an extraordinary achievement in a state that had never theretofore recognized responsibility for funding capital defense. The historic moment was not to happen. The Governor vetoed the bill.<sup>14</sup> In its place, another bill was passed and signed by the Governor. This law imposed minimal qualification requirements and tasked the Arizona Supreme Court with the responsibility of compiling and administering a system for the appointment of qualified lawyers.<sup>15</sup> The law also authorized the Supreme Court to establish additional qualification requirements.<sup>16</sup> The Court promptly amended Arizona’s criminal rules to add additional requirements for post-conviction capital defense

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note 1, at 941 (Commentary to Guideline 2.1: urging that capital defense be funded on a statewide basis, and noting with extensive citation that “[n]ational professional groups concerned with criminal justice issues have for decades advocated that defender services be organized on a statewide basis.”).

10. BEEMAN ET AL., *supra* note 9, at 7.

11. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

12. See 28 U.S.C. §§ 2261–62, 2263, 2265–66. *But see* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 788 (2002) (“[E]ven though AEDPA permits states to curtail federal habeas corpus review in capital cases by improving the availability of adequately funded, competent counsel for indigent capital defendants in state postconviction proceedings, no state has managed to qualify yet and few states have even sought to qualify.” (footnotes omitted)); *see also* Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1100 n.11 (2003) (listing decided cases).

13. S.B. 1349, 42nd Leg., 2d Reg. Sess. (Ariz. 1996); *see also* John A. Stookey & Larry A. Hammond, *Rethinking Arizona’s System of Indigent Representation*, ARIZ. ATT’Y, Oct. 1996, at 28, 29.

14. Stookey & Hammond, *supra* note 13, at 32.

15. ARIZ. REV. STAT. ANN. § 13-4041(B) (2014); Stookey & Hammond, *supra* note 13, at 32.

16. REV. STAT. § 13-4041(c).

attorneys.<sup>17</sup> Rule 6.8 became the first state rule requiring some level of experience with capital defense.<sup>18</sup>

At the same time, the Arizona Supreme Court established a committee of criminal defense community members to screen applications from lawyers wishing to receive appointments to handle capital post-conviction relief proceedings.<sup>19</sup> That effort also proved to be largely unsuccessful. The Committee received and reviewed with considerable care the applications of sixteen individual attorneys but found most to be either unqualified or qualified only to serve as second chair counsel.<sup>20</sup> Faced with a large number of death row prisoners who were awaiting the appointment of post-conviction counsel, the Supreme Court elected to appoint lawyers who were not approved by the Committee, including some who had been deemed unqualified. Within a very short period of time, the Committee was disbanded, and by 2001, there was no system for screening lawyers before appointing them.<sup>21</sup>

In addition, only very modest state funding was approved. In 1998, an hourly rate not to exceed \$100 an hour was established with a presumptive cap of 200 hours.<sup>22</sup> As a consequence of the combination of minimal qualification requirements and insufficient compensation, the performance of lawyers at the post-conviction stage remained largely unguided and inadequate.

As of the date of the publication of the *ABA Guidelines* in 2003, this was the Arizona story. While the Legislature and the Supreme Court may have wished to allow Arizona to “opt in”<sup>23</sup> to the fast track opportunities afforded by the AEDPA, in reality, there was no seriously viable statute or rule governing the performance of death penalty defenders in a state that had one of the highest rates of death penalty

17. Order Adopting Rule 6.8 at 1, *In re* Petition to Adopt Rule 6.8, Ariz. Rules of Criminal Procedure, No. R-96-0030 (Ariz. June 25, 1997).

18. *Id.*

19. *See id.* at 2; *see also In re* Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases, No. 96-63 (Ariz. 1996).

20. *See* John A. Stookey & Larry A. Hammond, *Arizona's Crisis in Indigent Capital Representation*, ARIZ. ATT'Y, Mar. 1998, at 16, 19.

21. *In re* Disbanding of the Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases, No. 2001-55 (Ariz. May 9, 2001).

22. ARIZ. REV. STAT. ANN. § 13-4041(B) (2012). It is important to note that the language referencing the presumptive cap of 200 hours was removed in 2014. *See* REV. STAT. § 13-4041(B); *cf.* *ABA Guidelines*, *supra* note 1, at 981 (Guideline 9.1.B.1: “Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.”). The accompanying Commentary explains, “[t]he Guideline’s strong disapproval of flat fees, statutory caps, and other arbitrary limitations on attorney compensation is based upon the adverse effect such schemes have upon effective representation.” *ABA Guidelines*, *supra* note 1, at 987.

23. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

prosecutions. While there were minimal appointment requirements and funding for those who accepted appointments, there were virtually no standards to guide or assess the performance of lawyers appointed to these cases.

The need for a clear statement of the standards of capital defense was apparent, and many in this State saw the critical importance of assisting in establishing guidelines. In 1989, the Arizona Capital Representation Project (“ACRP”) was created—the first nonprofit organization devoted to providing training and assistance to lawyers and their capital case staffs.<sup>24</sup> In 1994-95, leaders of the Arizona State Bar joined in creating a task force of lawyers to aid in addressing issues of indigent criminal defense. Represented on that Indigent Defense Task Force (“IDTF”) were the heads of public defender offices and members of the private bar who engaged in death penalty defense. Most prominent among the priorities of that Task Force was the search for qualified lawyers, funding, and standards for their performance.

The challenges of underfunded and underqualified defense counsel were not unique to Arizona, but in one respect Arizona was at an additional disadvantage. Until June of 2002, when the United States Supreme Court decision in *Ring v. Arizona*<sup>25</sup> was announced, Arizona had been one of a few states that left fact-finding in the sentencing phase of death penalty trials to judges.<sup>26</sup> As a consequence, too often defense lawyers devoted little time or attention to the investigation of mitigating circumstances, choosing to postpone that work until after the jury rendered a guilty verdict. Those who chose to defer the necessary mitigation investigation were certainly practicing in a manner well below any objective standard of care;<sup>27</sup> but the daunting reality was that many practitioners had no meaningful idea and no relevant experience to guide them in this highly specialized area of death penalty defense.<sup>28</sup>

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24. *Who We Are*, ARIZ. CAP. REPRESENTATION PROJECT, <http://azcapitalproject.org/about> (last visited Nov. 10, 2018).

25. 536 U.S. 584 (2002) (overruling *Walton v Arizona*, 497 U.S. 639 (1990)).

26. *See id.* at 588.

27. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (noting that although counsel “competently handled the guilt phase of the trial,” failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel “did not fulfill their obligation to conduct a thorough investigation of the defendant’s background”); *Jermyn v. Horn*, 266 F.3d 257, 275, 308 (3d Cir. 2001) (holding that counsel who confirmed that he only engaged in “minimal preparation for capital sentencing before the trial” held ineffective at penalty phase because “he did not begin to prepare for the penalty phase in a timely fashion”); *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991) (“To save the difficult and time consuming task of assembling mitigation witnesses until after the jury’s verdict in the guilt phase almost insures that witnesses will not be available.”).

28. In Arizona, too often it appeared that neither the defense lawyers nor the judges

This, then, was the Arizona death penalty defense environment at the time of the publication of the *ABA Guidelines*. A statewide capital case commission had been created at the behest of Arizona's then-Attorney General (and eventual Governor), Janet Napolitano.<sup>29</sup> That Commission, populated with representatives of the prosecution and defense communities, had recommended that the Arizona Legislature address the need for funding.<sup>30</sup> The Legislature left unaddressed the obvious lack of adequate resources both for counsel and mitigation specialists.<sup>31</sup> Also ignored, as noted above, was the recommendation for the creation of a statewide post-conviction office.<sup>32</sup>

An emerging problem became an instant crisis with the election in 2004 of Andrew Thomas as the County Attorney in Maricopa County.<sup>33</sup> By 2006, in Maricopa County, the prosecution was seeking the death penalty in fully half of all charged first degree homicide cases.<sup>34</sup> Much has been written about the dramatic increase in capital prosecutions inaugurated by his term in office.<sup>35</sup> Thomas's disbarment at that point was years in the future,<sup>36</sup> and in the meantime, the courts were flooded with death penalty cases. His years in office and the sharp increase in death penalty prosecutions resulted in an unprecedented expansion of the death penalty that required solutions at every level of Arizona's criminal courts, including the identification and appointment of post-conviction defense counsel.

The ABA Death Penalty Representation Project ("Project"), observing the chaotic developments in Arizona, chose to include Arizona as one state where its resources might prove helpful.<sup>37</sup> Among

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appreciated the essential role of mitigation. The *Guidelines* were published in the hope that practitioners would understand that mitigation was an essential element of the defense case from the beginning. See *ABA Guidelines*, *supra* note 1, at 1047-48 (Commentary to ABA Guideline 10.10.1). Unmistakably, the development of the mitigation investigation should have commenced immediately. See *id.* at 959 (Commentary to ABA Guideline 4.1).

29. OFFICE OF THE ATTORNEY GEN., STATE OF ARIZ., CAPITAL CASE COMM'N, FINAL REPORT 1 (2002). See generally Jahna Berry, *Death-Penalty Backlog Strains Justice System*, ARIZ. REPUBLIC (Feb. 22, 2007).

30. OFFICE OF THE ATTORNEY GEN., *supra* note 29, at 1, 14.

31. See ARIZ. REV. STAT. ANN. § 13-4041 (2014).

32. See *id.*

33. See Jennifer Steinhauer, *Policy Shift on Death Penalty Overwhelms Arizona Court*, N.Y. TIMES, Mar. 5, 2007, at A15.

34. See generally, e.g., Berry, *supra* note 29; Steinhauer, *supra* note 33.

35. Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 JUDICATURE 216, 217 (2012).

36. See Ray Stern, *Andrew Thomas and Lisa Aubuchon Disbarred – Read Panel's Opinion Here*, PHX. NEW TIMES (Apr. 10, 2012 9:22 AM), <https://www.phoenixnewtimes.com/news/andrew-thomas-and-lisa-aubuchon-disbarred-read-panels-opinion-here-6651303>.

37. *Jurisdiction in Need: Arizona*, AM. BAR ASS'N, <http://americanbar.org/groups/>

other things, the Project encouraged lawyers and law firms to volunteer to undertake capital post-conviction cases.<sup>38</sup> Some of those lawyers were Arizona law firms or criminal defense practitioners, but many others were law firms that had no experience in the State of Arizona or with death penalty jurisprudence and were persuaded by the Project to represent death-sentenced prisoners on a pro bono basis. The Project's greatest single accomplishment, however, was the successful petition, supported by members of the IDTF and the Arizona Bar, to the Arizona Supreme Court to amend the State's Rules of Criminal Procedure by requiring that appointed defense counsel "be familiar with and guided by the performance standards" of the *Guidelines*.<sup>39</sup>

The rule change was an important step forward, but it also reflected the disappointing reluctance of Arizona courts to embrace the standard of care underlying the *Guidelines*. When proposed, the amendment to Arizona's criminal rules would have made compliance with the 2003 *Guidelines* mandatory.<sup>40</sup> The Supreme Court rejected this approach, adopting instead the less demanding requirement of "familiarity."<sup>41</sup> This permitted some Arizona judges to argue that the *Guidelines* were "aspirational" despite the clear statement in the Preface to the *Guidelines* themselves that they were not so intended.<sup>42</sup>

What might have been a signal change in death penalty defense in Arizona failed at least in the short term to achieve the hoped-for results. Some Superior Court judges were unprepared to acknowledge that the *Guidelines* were anything other than best practice suggestions.<sup>43</sup> Disappointingly, Arizona counties continued to appoint lawyers who had neither the training nor the resources to make the *Guidelines* a reality. This continued to be most evident at the post-conviction stage.<sup>44</sup> By the

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committees/death\_penalty\_representation/project\_press/2009/summer/jurisdiction\_in\_needarizona.html (last visited Nov. 10, 2018).

38. *Id.*

39. ARIZ. R. CRIM. P. 6.8(a)(5); see Order Adopting Rule 6.8 at 2, *In re* Petition to Adopt Rule 6.8, Ariz. Rules of Criminal Procedure, No. R-96-0030 (Ariz. June 25, 1997).

40. Comment of State Bar at 2, *In re* Petition to Amend Rule 6.8 of the Ariz. Rules of Criminal Procedure, No. R-05-0031 (Ariz. May 22, 2006).

41. Order Amending Rule 6.8, Ariz. Rules of Criminal Procedure, No. R-05-003, at 1 (Sept. 18, 2006).

42. See, e.g., Comment of Some Maricopa Cty. Superior Court Judges, Joined by the Staff Attorneys for the Ariz. Death Penalty Judicial Assistance Program, at 5, *In re* Petition to Amend Rule 6.8 of the Ariz. Rules of Criminal Procedure, No. R-05-0031 (Ariz. June 2006) [hereinafter *Statement of Dissenting Judges*]; see also Order Denying Post-Conviction Relief, *Arizona v. Adriano*, (No. CR2000096032) (Maricopa Cty. Super. Ct. Nov. 1, 2014). But see *ABA Guidelines*, *supra* note 1, at 920 ("[T]hese Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.").

43. See *Statement of Dissenting Judges*, *supra* note 42, at 5.

44. See CAPITAL CASE OVERSIGHT COMM., JOINT REPORT OF CAPITAL CASE OVERSIGHT



middle of the first decade of this century, substantial numbers of death penalty verdicts had reached the state post-conviction level and lawyers were being appointed by the Supreme Court who had neither the experience nor the resources to test the ineffectiveness of trial-level representation.<sup>45</sup>

Once more the ABA played a key role in advancing reform. It selected Arizona as one of twelve states whose death penalty system was deserving of extended analysis.<sup>46</sup> To that end, researchers worked with senior members of the Arizona Bar to produce an extensive report on the state of the death penalty in Arizona.<sup>47</sup> Published in 2006, this 354-page report traced the core weaknesses of this State's death penalty system.<sup>48</sup> The authors of that report worked hard to treat the review in a fact-based, empirically sound manner. That report stands as a valuable snapshot of Arizona's capital system ten years ago.<sup>49</sup>

For at least a moment, it appeared that leaders in the Legislature had come to embrace the need for at least one statewide capital post-conviction office. In 2006, the first state-funded office came into existence.<sup>50</sup> Ten years had passed since the State had begun to consider the need for a statewide office and ten years since the first recommendation for a statewide post-conviction office had been vetoed by the Governor.<sup>51</sup> But even this promise of serious reform in Arizona proved to be short-lived. This new office was never given the funding or staffing to take on more than a fraction of the pending capital post-conviction cases.<sup>52</sup> Its budget supported hiring no more than three

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COMM. & MARICOPA CTY. SUPERIOR COURT TO THE ARIZ. JUDICIAL COUNCIL 3, 19-20 (2008).

45. See *id.* at 19-20. An extensive list of ineffective lawyers appointed to capital post-conviction cases in Arizona is to be found in Office of the Federal Public Defender for the State of Arizona, Opposition to the State of Arizona's Application for Opt-in Under 28 § 2265(a), Docket No. OLP 166 (filed Feb. 22, 2018).

46. *State Death Penalty Assessments*, AM. BAR ASS'N, [https://www.americanbar.org/groups/crsj/projects/death\\_penalty\\_due\\_process\\_review\\_project/state\\_death\\_penalty\\_assessments](https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments). The other eleven states are Alabama, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. *Id.*

47. AM. BAR ASS'N, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ARIZONA DEATH PENALTY ASSESSMENT REPORT* (2006).

48. See *id. passim*.

49. The Members of the Assessment Team included Dr. Peg Bortner, the Director of the Arizona State University Center for Urban Inquiry ("CUT"), Thomas Zlaket, the former Chief Justice of the Arizona Supreme Court, Kent Cattani, the former head of the Arizona Attorney General's Capital Case Section (now serving on Arizona's Court of Appeals), and the former United States Attorney for the District of Arizona, Jose Rivera. *Id.* at 3-5. The Report focuses in detail on the shortcomings in Arizona's systems for the appointment and compensation of death penalty defense lawyers. *E.g., id.* at 123-60.

50. *Id.* at 125.

51. See Stookey & Hammond, *supra* note 13, at 29.

52. See Steinhauer, *supra* note 33, at A15.

lawyers and a few staff members.<sup>53</sup> As a result, it could take only a miniscule percentage of the then-pending capital post-conviction cases.<sup>54</sup>

As envisioned by the office's proponents, the office would serve an important function in the training of other post-conviction lawyers. But initially, the Legislature opposed allowing the office to perform that important training function. While the office's director was ultimately successful in eliminating that prohibition, the office had neither the staff nor the time to engage meaningfully in the training and educational function. Like other efforts to reform Arizona's capital defense system, this effort came to a disappointing end. The office was disbanded when the Legislature defunded it in 2011.<sup>55</sup> Thus, Arizona's only experiment with statewide support for death penalty defense ended after five years.<sup>56</sup>

Thanks in large measure to the persistent involvement of the ABA Death Penalty Representation Project, however, in 2012 the Maricopa County Superior Court agreed to adopt by Administrative Order the creation of a committee of volunteer lawyers to assist in screening lawyers who wished to represent defendants in trial and direct appeal cases.<sup>57</sup> Therefore, from 2012 forward, trial lawyers in Arizona's most populous county were certainly forced to be intimately familiar with the *ABA Guidelines*. A debt of gratitude is owed to the judges assigned to capital cases in Maricopa County. Had it not been for the determined and persistent effort of those judges, it is doubtful that any progress would have been achieved in the selection and training of death penalty lawyers.<sup>58</sup>

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53. See CAPITAL CASE OVERSIGHT COMM., *supra* note 44, at 11.

54. See *id.*

55. S.B. 1531, 15th Leg., 2d Reg. Sess. (Ariz. 2012).

56. See *id.*

57. *In re Adopting a Plan for Review of Appointed Defense Counsel*, No. 2012-118, at 3-4 (Ariz. Super. Ct. Aug. 10, 2012); see also *In re Adopting a Plan for Review of Appointed Defense Counsel*, No. 2014-101, at 3-4 (Ariz. Super. Ct. Aug. 6, 2014) (this Order governs the Committee's current work).

58. The judge most directly responsible for recommending the creation of this Committee is the Honorable Douglas Rayes. See Dupont & Hammond, *supra* note 35, at 219. Judge Reyes was the Maricopa County Presiding Criminal Judge in 2012. *Id.* at 219 & n.24. He is now a United States District Court Judge for the District of Arizona. Douglas Rayes, BALLOTPEdia, [https://ballotpedia.org/Douglas\\_Rayes](https://ballotpedia.org/Douglas_Rayes) (last visited Nov. 10, 2018). The current Chair of the Committee is the Honorable Judge John Hannah. He has served on this Committee for all six years of the Committee's existence. Both Judge Rayes and Judge Hannah met on several occasions with the authors and with members of the Arizona State Bar's IDTF. The collaborative efforts of these judges, the ABA, and the State Bar's Committee were able to achieve in Maricopa County—Arizona's most populous County—what the State as a whole has yet to accept. The mandatory nature of the Committee's recommendations has very recently been underscored by the promulgation of an Administrative Order barring lawyers who have not been approved by the Committee from being assigned to as capital trial lawyers in Maricopa County. *In re Approving Capital Defense Counsel*, No. 2018-136 (Ariz. Super. Ct. Sept. 28, 2018).

The appointment of lawyers to represent death-sentenced defendants at the post-conviction stage, however, was not directly in the purview of the county. Instead, due to the statute promulgated when the capital case crisis first began in the 1990s,<sup>59</sup> the appointment of post-conviction lawyers remained in the hands of the Arizona Supreme Court.<sup>60</sup> The Maricopa County Committee offered to perform the same review process for lawyers undertaking post-conviction cases as it does for trial lawyers. Yet for reasons never made public, the Supreme Court has repeatedly declined to accept these offers.<sup>61</sup> Likewise, in other counties in Arizona, no system for screening and appointing death penalty lawyers has been adopted.

Habeas corpus has been at points in the history of criminal defense, the important last barrier against convictions born of ineffective trial-level representation.<sup>62</sup> Arizona defendants often found themselves with no remedy short of federal habeas corpus, but in many cases federal courts were barred from reviewing those cases where the *ABA Guidelines* might have been ignored or where the lawyers were patently unqualified.<sup>63</sup> Barred why? Because of the ineffectiveness of the very post-conviction lawyers who failed to contest the performance of trial counsel.<sup>64</sup> This problem, however, was not unique to death-sentenced prisoners. Often, the same problems of under-funded and unqualified counsel in state court felony, noncapital cases at the post-conviction level mirrored the experiences of capital defense counsel.

One of those cases involved an inmate named Luis Martinez.<sup>65</sup> He was represented during state post-conviction proceedings by volunteer lawyers from the Arizona Justice Project.<sup>66</sup> Due to determined efforts on

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59. REV. STAT. § 13-4041; *see supra* text accompanying note 13.

60. REV. STAT. § 13-4041.

61. No official rejection of the Maricopa County Committee's offer has been provided by the Arizona Supreme Court. When this topic has been raised at meetings of the Capital Case Oversight Committee, the unofficial explanation offered by the Court's staff has been that the existing appointment system is working adequately—a conclusion disputed by most capital defense attorneys on the Committee.

62. *See* Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION* 577, 583-84 (James Acker et al., eds. 3d ed. 2014) (listing numerous examples).

63. *See, e.g.,* *Coleman v. Thompson*, 501 U.S. 722, 757 (1991). For an overview *see* generally Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Post-conviction Proceedings*, 91 CORNELL L. REV. 1079 (2006).

64. *See* Freedman, *supra* note 62, at 586 (describing doctrine of procedural default).

65. *Martinez v. Ryan*, 566 U.S. 1, 5 (2012).

66. *See id.* at 4; *ASU Professor Bob Bartels*, ARIZ. JUST. PROJECT, <https://www.azjusticeproject.org/asu-professor-bob-bartels> (last visited Nov. 10, 2018). The Arizona Justice Project is Arizona's statewide nonprofit innocence project. Established in 1998 by

Mr. Martinez's behalf, his case went to the United States Supreme Court in *Martinez v. Ryan*,<sup>67</sup> a case that did not involve Arizona's death penalty.<sup>68</sup> That case resulted in a decision that has opened the door for at least some death row prisoners with claims of ineffective trial and post-conviction counsel.<sup>69</sup> Much of the burden associated with pursuing those cases has fallen to the Capital Habeas Unit ("CHU") of Arizona's Federal Public Defender.<sup>70</sup> Lawyers in that highly respected unit are intimately conversant with the *ABA Guidelines*.<sup>71</sup> Thanks to their leadership, the State Bar recommended that the Arizona Criminal Rules be augmented to now require counsel to "be familiar with and guided by" the *Supplementary Mitigation Guidelines*<sup>72</sup> published in 2008 with the cooperation and approval of the ABA Death Penalty Representation Project.<sup>73</sup> The Arizona Supreme Court approved of that

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Arizona Attorneys for Criminal Justice, the Project recently celebrated its 20th anniversary. *The Arizona Justice Project: We Seek Justice for the Innocent and the Wrongfully Imprisoned*, ARIZ. JUST. PROJECT, <https://www.azjusticeproject.org/project> (last visited Nov. 10, 2018).

67. 566 U.S. 1 (2012).

68. *Id.* at 5-6. Mr. Martinez' claims of ineffective assistance of counsel at trial had been barred from consideration because it was not raised by state post-conviction counsel. *Id.* at 7-8. The Supreme Court's opinion opened the door to consideration of his claims by habeas corpus, finding that the ineffectiveness of state post-conviction counsel in an initial-review collateral proceeding constituted a sufficient cause for relief from the requirement that all claims be fully exhausted at the state court level. *Id.* at 17.

69. A discussion of the implications of the case can be found in Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 591 (2013).

70. The Director of the CHU reports that at present his Office is handling over forty capital habeas corpus cases in which *Martinez v. Ryan* is at issue. See E-mail from Dale Baich, Director of the Capital Habeas Unit ("CHU") of the Arizona Public Defenders Office to Larry Hammond (Nov. 21, 2018, 11:17 AM) (on file with authors).

71. In 2013, the CHU hosted a delegation of Chinese judges and lawyers who traveled to the United States to see of the *ABA Guidelines* worked in practice. Provinces in China later adopted a version of the *Guidelines* for the defense of capital cases in China. See generally Jie Yang, *The Development of China's Death Penalty Representation Guidelines: A Learning Model Based on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 589 (2013).

72. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008) [hereinafter *Supplementary Guidelines*]; see Robin M. Maher, *The ABA And The Supplementary Guidelines For The Mitigation Function Of Defense Teams In Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 770 (2008) (describing the *Supplementary Guidelines* as "spell[ing] out important features of the existing standards of practice").

73. ARIZ. R. CRIM. P. 6.8(a)(5); *Supplementary Guidelines*, *supra* note 72; see also Dupont & Hammond, *supra* note 35, at 219-20.

recommendation.<sup>74</sup> That court has yet, however, to develop statewide standards for the identification and evaluation of death penalty lawyers.

This twenty-year history in Arizona invites the question whether the *ABA Guidelines* and the work of the ABA Death Penalty Representation Project have made a material difference in Arizona. Is the quality of representation better because of these efforts? At some level, the answer is surely and resoundingly yes. At the trial court and direct appeal levels, the *ABA Guidelines* have become a reality. In Maricopa County, we have four strong Public Defender Offices.<sup>75</sup> All four participate in capital cases, and all four are staffed by attorneys for whom the *Guidelines* very much serve as their blueprint for defense. An experienced capital defense lawyer now serves as the coordinator for assuring the consistent application of the *Guidelines* in all four offices.<sup>76</sup> There is now also a training budget and resources to ensure that Arizona's trial and direct appeal lawyers understand national standards of care.<sup>77</sup> And, in those cases where the trial or direct appeal cannot be handled within one of the four offices, the appointment of counsel is guided by the list of qualified attorneys screened and approved by the Committee of practitioners established in 2012.<sup>78</sup>

The second largest County—Pima County—also has a well-staffed Public Defender sensitive to the requirements of death penalty defense.<sup>79</sup> Unlike Maricopa County's prosecutors, however, prosecutors in Pima County have elected to seek the death penalty in only the rarest cases. The most recent count of pending trial level cases charged as death penalty cases shows about 140 in Maricopa County and none in

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74. *In re Ariz. Rules of Criminal Procedure*, No. R-17-0002 (Ariz. Aug. 31, 2017). The most recent Report of the Capital Case Oversight Committee was considered by the Arizona Supreme Court at the end of 2018, and preliminary reports indicate that the responsibility to identify and appoint capital post-conviction counsel will be transferred to the State's Superior Courts where screening committees can aid in the performance of that function.

75. *Advocates & Defenders*, MARICOPA COUNTY, AZ., <https://www.maricopa.gov/570/Advocates-Defenders> (last visited Nov. 10, 2018).

76. John Canby, the director of this program in the Maricopa County Public Defender's Office, has been a practicing death penalty defense lawyer for almost twenty years. He is also a Board Member of the Arizona Justice Project. *John Canby*, ARIZ. JUST. PROJECT, <https://www.azjusticeproject.org/asu-professor-bob-bartels> (last visited Nov. 10, 2018).

77. See *ABA Guidelines*, *supra* note 1, at 976 (Commentary to Guideline 8.1 ("Training"): "Once an attorney has been deemed qualified to accept appointments in capital cases, the standard of practice requires counsel to regularly receive formal training in order to keep abreast of the field.")

78. See *supra* text accompanying notes 57-58.

79. See *Public Defender*, PIMA COUNTY, [https://webcms.pima.gov/government/public\\_defender](https://webcms.pima.gov/government/public_defender) (last visited Nov. 10, 2018).

Pima County.<sup>80</sup> The remaining more rural counties present unique local challenges.

The Arizona Capital Representation Project will be celebrating next year its thirtieth anniversary.<sup>81</sup> The staff in that office remains available to counsel any lawyer or team member in need of assistance and frequently sponsors or assists in capital training programs.<sup>82</sup> The ABA's 2003 *Guidelines* and the 2008 *Mitigation Guidelines* are a frequent focus of those trainings.

The *Guidelines* and the Criminal Rule embracing them in Arizona are also very much serving as the template at the federal habeas corpus level.<sup>83</sup> The Federal Public Defender's Capital Habeas Unit ("CHU") is one of the strongest such offices in the Federal Defender system. Central among the Arizona cases assigned to that office are those cases in which the trial level, direct appeal, and post-conviction representation fell below the standard of care articulated in the *ABA Guidelines*. Thanks to the United States Supreme Court decision in *Martinez v. Ryan*, the ineffectiveness of many of Arizona's post-conviction lawyers may be scrutinized and perhaps remedied by Guidelines-compliant teams of lawyers in the CHU.<sup>84</sup>

Finally, it is worth noting that many Arizona criminal court judges who were unfamiliar with capital cases have also benefited from the *ABA Guidelines*. In addition to performance guidelines for defense lawyers, the Guidelines contain important guidance for decision-makers about the necessary time, resources, and skills in an effective capital defense effort.

The remaining gap, however, is evident. The \$100 per hour rate for capital defense counsel established in the mid-1990s has not been increased.<sup>85</sup> Despite several recommendations, the rate has remained

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80. *Jurisdiction in Need: Arizona*, AM. BAR ASS'N (Oct. 11, 2018), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2009/summer/jurisdiction\\_in\\_need/arizona](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2009/summer/jurisdiction_in_need/arizona) (stating that there are "approximately 140 death penalty cases pending at the trial court in Maricopa County"). *But see* Michael Kiefer, *In Dissent, Arizona Appeals Court Judge Calls Death Penalty Unconstitutional*, ARIZ. REPUBLIC (Aug. 19, 2018, 6:00 AM), <https://www.azcentral.com/story/news/local/arizona/2018/08/19/jason-bush-lawrence-winthrop-death-penalty-arizona-supreme-court-constitutionality/1025124002>. *See generally* *Capital Case Oversight Committee: Draft Minutes*, ARIZ. COURTS (Aug. 17, 2018), <https://www.azcourts.gov/Portals/74/CCOC/Minutes/DraftMinutes081718CCOC.pdf?ver=2018-10-24-125606-713>.

81. *Who We Are*, *supra* note 24.

82. *Id.*

83. ARIZ. R. CRIM. P. 6.8(a)(5).

84. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012); *see* E-mail from Dale Baich, *supra* note 70.

85. *See* ARIZ. REV. STAT. ANN. § 13-4041(F) (2014). The 200 hour limitation has not been enforced in several years, but the rate has remained unchanged.

unchanged for now twenty years.<sup>86</sup> Also unchanged is the process for selecting post-conviction capital counsel. That role remains in the hands of the staff at the Supreme Court, unaided by any selection or review committee.<sup>87</sup> Arizona, even with the significant efforts of the ABA Death Penalty Representation Project, has not been able to assure that those appointed by the Supreme Court to handle capital post-conviction cases will have the training and experience—to say nothing of the resources—to represent clients at this level. Statewide, according to the most recent report of the Supreme Court, there are more than sixty-five pending post-conviction cases.<sup>88</sup> More than half of the State's death row population have cases pending today at this level of review.<sup>89</sup> What these cases have in common are lawyers who are entirely dependent on funding from the counties—dependent on jurisdictions for the appointment of investigators, mitigation specialists, mental health consultants, and experts.<sup>90</sup> The problem is intensified in those cases in which the trial lawyers and sometimes the trial judge did not believe that the ABA's *Guidelines* should have been applied.

Arizona death penalty defendants whose cases have been tried over the twenty years have often come to see the benefits of the *ABA Guidelines* only well after their trials and direct appeals. A hypothetical example might help describe the issue.<sup>91</sup> A defendant was charged with the violent rape and murder of a child. The trial team conducted an inadequate mitigation investigation. They ignored the *Guidelines'* emphasis on securing the assistance of mental health experts. The defendant's participation in the crime was confirmed by biological and

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86. The Capital Case Oversight Commission created by Janet Napolitano became the Arizona Supreme Court's Capital Oversight Committee. See CAPITAL CASE OVERSIGHT COMM., *supra* note 44, at 11; *supra* text accompanying note 29. That Committee, populated with members of the prosecutorial and defense communities as well as by judges from the most populous counties, has received requests for increases in the compensation of capital defenders numerous times, but until very recently the Arizona Supreme Court has never acted on those requests. See CAPITAL CASE OVERSIGHT COMM., *supra* note 44, at 19. It has done so uniformly without an explanation or statement of reasons. The same rate has remained in place now for twenty years. See REV. STAT. § 13-4041(F). That may have changed with the very latest presentation by the Oversight Committee to the Arizona Supreme Court. It now appears that the court is prepared to join others in recommending that the Legislature amend Section 13-4041 to authorize higher hourly rates. (As of the printing of this Issue of the *Hofstra Law Review*, that proposal had yet to be formally confirmed.)

87. See REV. STAT. § 13-4041(B); AM. BAR ASS'N, *supra* note 47, at 171.

88. *Capital Case Oversight Committee: Draft Minutes*, *supra* note 80, at 1-2.

89. *Id.* at 2.

90. As noted *supra* note 8, this model is simply inconsistent with the *ABA Guidelines*.

91. The facts recounted in these final paragraphs are taken from a pending capital post-conviction case. At the request of counsel, the authors have agreed to present this as a hypothetical case. It is certainly illustrative of the history of death penalty litigation in Arizona.

physical evidence. He was convicted and sentenced to death. The direct appeal counsel never met with the client and offered no reasons why he should not be sentenced to death. On direct appeal, the Arizona Supreme Court had little difficulty concluding that the proof of factual guilt, coupled with virtual absence of meaningful mitigation, required affirmance.

Years later, during the post-conviction appeal and only after a thorough mitigation investigation was finally completed, it was discovered that the prisoner was very seriously mentally ill. Ironically, this man's case had been one of the very few assigned to the Statewide Post-Conviction Office during that office's short existence—one of the few places where a Guideline-compliant approach was likely to be pursued. The mitigation investigation that was not undertaken before trial has now been done. The mental health professionals that have now been assembled have joined in what appears to be the unanimous consensus that the death row prisoner was seriously mentally ill at the time of the crime. Is it too late? Will principles of finality and the rules governing preclusion of issues not raised at trial or on direct appeal now prevent a court from righting this wrong?

There is little doubt in this hypothetical case, and in numerous others among Arizona's population of capital cases, that had the *Guidelines* been followed from the outset, this man would not have resided for the last one and a half decades on death row. We are, to be sure, better today for the ABA's involvement in securing the amendment to our criminal rules. We are certainly better in Maricopa County where the ABA's encouragement led to the creation of a system for assuring competent trial and direct appeal lawyers. It is the hope of the authors of this Article that the optimistic spirit that has energized the ABA to do all it has done in Arizona will continue to be a voice for the important work that remains.



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