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## Add Resources and Apply Them Systemically: Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines

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## ADD RESOURCES AND APPLY THEM SYSTEMICALLY: GOVERNMENTS' RESPONSIBILITIES UNDER THE REVISED ABA CAPITAL DEFENSE REPRESENTATION GUIDELINES

*Eric M. Freedman\**

The death penalty is expensive.

For many reasons—including the reality that if the prosecution insists on the death penalty there is essentially no chance of a guilty plea,<sup>1</sup> and the fact that the bifurcation between guilt and penalty that uniquely characterizes capital cases imposes double costs throughout the process of investigation, trial, and appeals<sup>2</sup>—a state's decision to have a criminal justice system in which death is available as a sanction

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1. The overwhelming majority of non-capital murder prosecutions result in a guilty plea, thus saving the government the cost of a trial. In cases being pursued capitally, however, the defendant has little incentive to plead guilty, his lawyer is duty-bound to discourage him from doing so, *see* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), Guideline 10.9.2, commentary [hereinafter GUIDELINES] (“If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client’s trial rights”), and if a guilty plea nonetheless emerges it may well be followed by a collateral attack on its validity. Thus, a state that wishes to implement the death penalty will need to budget for a trial in every case (even though the ultimate outcome of roughly sixty-eight percent of those trials will be a non-death sentence, *see infra* note 10). The state’s budget will also need to take account of the fact that the defense team will devote substantial efforts to persuading the prosecution to make the case a non-capital one. *See id.* at Guideline 10.9.1.

2. The Guidelines are imbued with the concept that at every moment of its work a capital defense team must maintain a dual focus on the guilt and penalty phases. *See, e.g., id.* at Guidelines 10.7 (A), 10.11(A), (L), and text accompanying notes 104, 227-59; *see generally*, John L. Petterson, *Death-penalty cases can strain state, county budgets*, THE KANSAS CITY STAR, June 21, 2003, at 1 (listing reasons in addition to bifurcation for costs of death penalty cases).

necessarily entails substantially higher costs than the contrary decision does.<sup>3</sup>

Specifically, the costs of representing the defendant—costs that the Constitution requires the government to bear<sup>4</sup>—are significantly higher in capital cases than in non-capital ones. Because “death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal

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3. See, e.g., PHILIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 77-78 (1993), at <http://www.pubpol.duke.edu/people/faculty/cook/comnc.pdf> (last visited Aug. 1, 2003) (concluding, in a study funded by the North Carolina Administrative Office of the Courts, that maintaining a capital litigation system costs the state of North Carolina an additional \$163,000 per case, and up to \$2.16 million per execution, beyond the costs of a non-capital system); S.V. D  te, Palm Beach Post Capital Bureau, *The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually*, PALM BEACH POST, Jan. 4, 2000, at 1A (estimating that “\$51 million a year . . . is how much Florida spends each year to enforce the death penalty—above and beyond what it would cost to punish all first degree murderers with life in prison without parole”); Christy Hoppe, *Executions Cost Texas Millions Study Finds It’s Cheaper to Jail Killers for Life*, DALLAS MORNING NEWS, Mar. 8, 1992, at 1A (“The [Dallas Morning News] study shows that [death penalty] trials and appeals take 7.5 years and cost taxpayers an average \$2.3 million per case in Texas. To imprison someone in a single cell at the highest security level for 40 years costs about \$750,000.”); Stephen Magagnini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 12, 1988, at A1 (comparing the per execution costs of \$15,000,000 with the \$930,240 costs of 40 years in prison); Dave von Drehle, *Bottom Line: Life in Prison One-sixth as Expensive*, MIAMI HERALD, July 10, 1988, at 12A (reporting that Florida spends \$3.2 million per execution on its capital punishment system, or approximately six times the cost of life imprisonment); see also James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1862-63 (2000); Eric M. Freedman, *The Case Against The Death Penalty*, U.S.A. TODAY, Mar. 1, 1997 (Magazine), at 48, 49; Pamela Manson, *Matter of Life or Death: Capital Punishment Costly Despite Public Perception, It’s Cheaper to Keep Killers in Prison*, ARIZ. REPUBLIC, Aug. 23, 1993, at A1; see generally Robert Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOYOLA L.A. L. REV. 45 (1989); *infra* note 9.

4. See *Powell v. Alabama*, 287 U.S. 45, 71-73 (1932) (requiring appointment of counsel in a capital case); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), as having “departed from the sound wisdom upon which the Court’s holding in *Powell v. Alabama* rested,” and holding all indigent defendants entitled to appointed counsel). Although the due process holdings of these cases apply only to defendants who are indigent (as most are), the defendant’s Sixth Amendment right to a defense by effective counsel applies equally whether counsel is retained or appointed. See *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980). Thus, even if only in the interests of having any convictions and death sentences that they obtain withstand appeal, the states need to insure competent counsel for all defendants. The new edition of the Guidelines explicitly recognizes this obligation. See GUIDELINES, *supra* note 1, at Guideline 1.1, History of Guideline (“The Guidelines formerly covered only ‘defendants eligible for appointment of counsel.’ Their scope has been revised for this edition to cover ‘all persons facing the possible imposition or execution of a death sentence.’ The purpose of the change is to make clear that the obligations of these Guidelines are applicable in all capital cases, including those in which counsel is retained or representation is provided on a pro bono basis.”).

cases,”<sup>5</sup> representing a capital defendant as competently as a non-capital one requires vastly more resources.<sup>6</sup> And, of course, providing the capital defendant with representation only as good as the non-capital one would receive is just not sufficient in light of the chillingly real chance that an error may have fatal consequences.<sup>7</sup>

Although these propositions are uncontroversial in the criminal justice community,<sup>8</sup> the politicians who control state budgets benefit from pretending that they can deliver voters the claimed benefits of the death penalty without requiring voters to pay the associated costs,<sup>9</sup> or at

5. GUIDELINES, *supra* note 1, at Guideline 1.1, text accompanying note 3. The remainder of the Commentary to Guideline 1.1 documents this proposition at some length. See also Monroe Freedman's commentary, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167 (2003).

6. See *McFarland v. Scott*, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of certiorari) (“The unique, bifurcated nature of capital trials and the special investigation into a defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials.”)

7. See GUIDELINES, *supra* note 1, at Guideline 10.1, text accompanying notes 154-55 (“The level of attorney competence that may be tolerable in noncapital cases can be fatally inadequate in capital ones.”) (footnotes omitted).

8. Perhaps symbolically, the revised Guidelines passed the ABA House of Delegates by a margin of over ninety percent and without a single voice being raised in opposition. See Marcia Coyle, *New Standards in Death Cases; High Court Rules on Effective Assistance of Counsel*, NAT'L L.J., July 14, 2003, at 1. The reasons for this consensus are straightforward. “All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.” Comm'n on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF CITY OF N.Y. 848, 854 (1989). Judges and prosecutors are well aware that the quality of defense counsel “is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence.” GUIDELINES, *supra* note 1, at Guideline 1.1, commentary; see also *id.*, text accompanying notes 29-31 (citing concerns of present Supreme Court Justices that without adequate defense counsel they cannot be sure of the justice of the outcomes they reach); Adam Liptak, *Indiana Death Row Inmate Gets Support for DNA Test from Unlikely Source: His Prosecutor*, N.Y. TIMES, July 24, 2003, at A12 (describing how Indiana capital defendant Darnell Williams' prosecutor, Thomas Vanes, supports his demand for DNA testing in light of subsequent exoneration of a defendant Mr. Vanes had previously prosecuted: “‘I was convinced I was right,’ Mr. Vanes . . . said. ‘DNA proved I was wrong. It's a very sobering, troubling lesson to learn.’”); Kate Wiltrout, *The High Cost of Killing Killers*, SAVANNAH MORNING NEWS, Jan. 14, 2001, at 1 (quoting director of Georgia Prosecuting Attorneys Council as saying that most capital “defense attorneys he faced in court were good lawyers—and he preferred it that way, because it forced him to present a better case”).

9. Some recent evidence suggests that this pretense is becoming more difficult to maintain. See, e.g., Russell Gold, *Counties Struggle With High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1 (summarizing anecdotal and academic evidence from around country that counties with death penalty had higher taxes and fewer services than those without); Wiltrout, *supra* note 8 (“Small counties in South Georgia are going broke prosecuting and defending death penalty cases—even though fewer and fewer murderers are being put to death.”);

worst to pay them later rather than sooner.<sup>10</sup> So, defying the public interests in efficiency and justice, the states simply refuse to allocate sufficient funds to provide competent capital defense representation.<sup>11</sup>

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*The Price of Justice: Kansas May Not Be Able to Afford Capital Punishment*, HUTCHINSON NEWS, June 29, 2003, at B6 (editorial noting that Kansas recently joined Nevada, Illinois, Indiana, North Carolina, and Massachusetts in commissioning studies of costs of capital punishment, and expressing view that Kansas cannot afford it); see generally Ashley Rupp, Note, *Death Penalty Prosecutorial Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735 (2003) (arguing that a state in which a defendant's probability of facing the death penalty depends on budgetary considerations in the prosecuting county in violation of *Furman v. Georgia*, 408 U.S. 238 (1972)).

10. As an overall statistical generalization, there is a lag of about nine years between conviction and ultimate disposition of a capital case, with the outcome being a non-capital one roughly sixty-eight percent of the time. See Liebman, *supra* note 3, at 1862-63. By the time such an outcome comes to public attention—through, for example, an appellate reversal or an exoneration—a voter is not likely to recognize that providing funding for effective defense representation at the outset would have obviated a great deal of the subsequent expenses and suffering. Even if the voter does, the responsible politicians, assuming them to be identifiable, will in all probability have left their original offices and thus escaped accountability.

Nonetheless, as I have previously suggested, from a public policy perspective, “[t]he single most meaningful reform of the capital punishment system, short of its abolition, would be the provision of effective trial counsel . . . . If that happened . . . there would be far fewer convictions and death sentences, but those few would be much more likely to stick. That is an outcome that would be in the best interests of all concerned. When the government attempts to evade costs at the front end, they emerge at the back end—not just in the monetary drain of lengthy appeals, but in such injustices as the irreplaceable years that Earl Washington spent wrongfully imprisoned.” Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089, 1106-07 (2001); cf. GUIDELINES, *supra* note 1, at Guideline 1.1, text accompanying note 38 (“[J]urisdictions that continue to impose the death penalty must commit the substantial resources necessary to ensure effective representation at the trial stage. . . . [A]ny other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.”); *id.* at Guideline 4.1, text accompanying note 99 (“[J]urisdictions should . . . be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.”).

11. See GUIDELINES, *supra* note 1, at Guideline 1.1, n.30 and accompanying text (surveying current research on state of capital defense systems). The states’ constitutional obligations, see *supra* note 4, apply from trial through the end of direct appeals as of right. See *Ross v. Moffitt*, 417 U.S. 600 (1974). At the state post-conviction stage, the states, relying upon *Murray v. Giarratano*, 492 U.S. 1 (1989), do not recognize any such obligations, notwithstanding the suggestion in the controlling opinion of Justice Kennedy in that 4-1-4 decision that they might exist in certain factual circumstances. See *Murray*, 492 U.S. at 14-15 (emphasizing that concurrence is based “on the facts and record of this case,” in which “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief”); cf. GUIDELINES, *supra* note 1, at Guideline 1.1 n.47 (urging that defense counsel continue to test the boundaries of this decision and pursue non-constitutional theories to obtain the right to post-conviction counsel).

The practical result is that many states provide capital prisoners no counsel at all for state post-conviction proceedings and “even in those states that nominally do provide counsel for collateral review, . . . chronic underfunding, lack of standards, and a dearth of qualified lawyers . . . have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance.” *Id.* The correctness of this description has been dramatically

But that does not make the costs disappear. It just shifts them. Specifically, many of the costs that should properly have been borne by the states as part of the policy decision to have a death penalty have been transferred to two groups. The first is capital defendants, who have paid in injustice for the lack of competent defense counsel.<sup>12</sup> The second is pro bono lawyers and other defense professionals, who have to some small degree rescued the states from the consequences of their own irresponsibility.<sup>13</sup> But none of this changes—indeed, it re-emphasizes—

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demonstrated in recent years by the unanimous course of decisions under Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1221-26 (1996) (amending 28 U.S.C. §§ 2244, 2253-55 and adding §§ 2261-66). That statute gives a number of procedural advantages to the states during the federal habeas corpus stage of capital litigation on condition that they provide “a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners [and] . . . provide standards of competency for the appointment of such counsel.” 28 U.S.C. § 2261(b) (2000). Shockingly, no state has been found to meet the condition. *See Spears v. Stewart*, 283 F.3d 992, 1019 (9th Cir. 2002) (holding state’s failure to comply with Arizona’s facially sufficient Chapter 154 mechanism prevented it from benefiting from the opt-in provisions in instant case); *Kreutzer v. Bowersox*, 231 F.3d 460, 462-63 (8th Cir. 2000) (stating Missouri does not qualify under Chapter 154); *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (holding South Carolina’s “mere promulgation of a ‘mechanism’ [was] not sufficient to permit [it] to invoke [Chapter 154’s] provisions[;] . . . those mechanisms and standards must in fact be complied with”); *Ashmus v. Woodford*, 202 F.3d 1160, 1170 (9th Cir. 2000) (California does not qualify under Chapter 154); *Baker v. Corcoran*, 220 F.3d 276, 285-87 (4th Cir. 2000) (Maryland does not qualify under Chapter 154), *cert. denied*, 531 U.S. 1193 (2001); *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997) (Texas does not qualify under Chapter 154); *Brown v. Puckett*, No. 3:01CV197-D, 2003 WL 21018627, at \*2-3 (N.D. Miss. Mar. 12, 2003) (Mississippi does not qualify under Chapter 154); *Kasi v. Angelone*, 200 F. Supp. 2d 585, 592-93 n.2 (E.D. Va. 2002) (stating that “Virginia does not meet the [opt-in provisions]”); *Smith v. Anderson*, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (Ohio does not qualify under Chapter 154); *Ward v. French*, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (North Carolina does not qualify under Chapter 154), *aff’d*, 165 F.3d 22 (4th Cir. 1998); *Williams v. Cain*, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (Louisiana does not qualify under Chapter 154). *Austin v. Bell*, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (finding “Tennessee law [providing] for the appointment of counsel to habeas petitioners did not satisfy prerequisites of § 2261(b)”; *Ryan v. Hopkins*, No. 4:CV95-3391, 1996 WL 539220, \*3-4 (D. Neb. July 31, 1996) (stating “Nebraska’s framework for appointing counsel in post-conviction capital cases [was not] in compliance with subsections (b) and (c) of section 2261”).

12. *See Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 337-38 (1995) (“The failure of the states to provide adequate resources for capital defense . . . is nothing less than a state-created systemic defect tainting most death sentences rendered in the United States. It virtually guarantees that most indigent defendants facing the death penalty will receive severely substandard representation, regardless of the abilities or shortcomings of individual defense lawyers.”).

13. Thus, for example, I have previously described in these pages the case of my client Earl Washington, who, having come within nine days of execution as a result of an utterly inept trial defense, was eventually released on the grounds of innocence—after eighteen years of imprisonment, and after a pro bono team of almost twenty lawyers and non-lawyers expended an estimated \$10 million worth of professional time and other resources on the project. *See Freedman, supra* note 10, at 1089, n.\*; *see also* MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-

the ineluctable fact that the constitutional duty to provide capital defendants with an effective defense belongs to the states. Hence, jurisdictions that wish to have a death penalty must bear the full costs of providing such a defense.<sup>14</sup>

But money alone will not do the job. Consistent effective capital defense representation is not the product of spontaneous generation; it is the result of a system for its provision—a system that involves not only identifying<sup>15</sup> and compensating<sup>16</sup> qualified lawyers, but also equipping the defense team with such fundamental resources as investigative, forensic and related services,<sup>17</sup> and continuing professional education.<sup>18</sup> “Attorney error is often the result of systemic problems, not individual deficiency.”<sup>19</sup> Even a skilled lawyer making best efforts to defend her client competently is probably engaged in a foredoomed project if she is not part of a system that provides her with the back-up necessary to perform effectively. Consequently, the government is not spending its money efficaciously if it recruits hundreds of such lawyers, but does not create that system. Neither the problem of ineffective representation nor

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EXECUTION OF EARL WASHINGTON JR. (2003) (providing fuller account). Reliance on this sort of massive rescue effort to save the state from the consequences of its failure to meet its constitutional obligations is both unrealistic and wrong in principle. See Vick, *supra* note 12, at 427-30.

14. The ABA recognizes that the states may not wish to bear this financial burden; in that case, they should forego the death penalty. Except for opposing execution of persons who are mentally retarded or were under eighteen at the time of their crimes, the ABA “takes no position on the death penalty”; it simply calls upon all jurisdictions wishing to retain capital punishment to comply with a series of policies—including the Guidelines—intended to insure due process and minimize the risk of execution of the innocent. See <http://www.abanet.org/moratorium/resolution.html> (containing ABA resolution of Feb. 3, 1997, embodying this position, with links to relevant policies); Editorial, *Defending Against Death*, COURIER J., Feb. 11, 2003, at 10A (supporting revised Guidelines and arguing that if the states can’t afford to meet them, “then states ought to get out of the execution business unless they’re willing to put innocent people to death”).

15. See Ronald Tabak’s commentary, *Why An Independent Appointing Authority Is Necessary To Choose Counsel for Indigent People In Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105 (2003).

16. See GUIDELINES, *supra* note 1, at Guideline 9.1, text accompanying note 150 (“For better or worse, a system for the provision of defense services in capital cases will get what it pays for.”).

17. See *id.* at Guideline 4.1 (“The Defense Team and Supporting Services”), 10.4 (“The Defense Team”); see, e.g., Michele Nethercott, *Indigent Defense: Faulty forensic evidence*, THE CHAMPION, June 2003, at 61-62 (describing creation of a forensic unit within the Maryland Office of Public Defense to provide “litigation support to the attorneys dealing with complex scientific evidence” in fields ranging from pediatric ophthalmology to epidemiology, including access to experts, analytic software, and demonstrative evidence for courtroom use). See also Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143 (2003) and Jill E. Miller’s, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117 (2003), commentaries.

18. See GUIDELINES, *supra* note 1, at Guideline 8.1 (“Training”).

19. *Id.* at Guideline 1.1, text accompanying note 68.

the solution to it ultimately lies at the level of the individual case—although, to be sure, it is at that level that the problems become visible and the solutions must be implemented.

The mainstream legal community, including the ABA,<sup>20</sup> has long understood the importance of system-building, but the revised Guidelines state the point especially forcefully. In articulating “the current consensus about what is required to provide effective defense representation in capital cases,”<sup>21</sup> they set high performance standards not just for lawyers,<sup>22</sup> but for death penalty jurisdictions.<sup>23</sup> As the problems are systemic, it is “imperative”<sup>24</sup> that the solutions be.

The Guidelines accordingly not only call on governments to deliver capital defense resources that are sufficient in amount,<sup>25</sup> but also furnish the states with a user-friendly blueprint for using those resources wisely to create structures that will function well in the present and evolve effectively over time.<sup>26</sup> This mandate for institution-building is welcome, and the states should lead it. Indeed, they must do so if the Guidelines are to achieve their ameliorative purposes and avoid becoming just a collection of lofty aspirations “that palter with us in a double sense, that keep the word of promise to our ear, and break it to our hope.”<sup>27</sup>

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20. See, e.g., ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES (1990), reprinted in *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 9 (1990) (mandating that “[j]urisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases”).

21. GUIDELINES, *supra* note 1, at Guideline 1.1, History of Guideline.

22. See *id.* (first edition called for “quality legal representation” but “[t]he language has been amended to call for ‘high quality legal representation’ to emphasize that . . . a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case”).

23. See *id.* at Guideline 2.1 (“Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases”).

24. *Id.* at Guideline 1.1, text accompanying notes 68-71.

25. Recognizing that “resources are not unlimited,” *id.* at Guideline 4.1, text accompanying note 99, the Commentary to Guideline 9.1 reiterates existing ABA policy that “[a]s a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and prosecution.” *Id.* at Guideline 9.1, text accompanying notes 134-35. It then goes on to note that, in fact, “[s]tudies indicate that funding for prosecution is, on the average, three times greater than funding that is provided for defense services at both the state and federal levels.” *Id.* at n.135.

26. See *id.* at Guideline 3.1 (“Designation of a Responsible Agency”) and commentary.

27. *Id.* at Guideline 1.1, text accompanying note 67, quoting WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 8; see also *id.*, text accompanying note 71 (“The Guidelines . . . not only detail the elements of quality representation, but mandate the systematic provision of resources to ensure that such representation is achieved in fact . . .”).

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