

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 20-1144

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF
ARIZONA; SAMMANTHA ALLEN; STEVE BOGGS; JOHNATHAN BURNS;
ALAN CHAMPAGNE; MIKE GALLARDO; RODNEY HARDY; ALVIE
KILES; ANDRE LETEVE; BRAD NELSON; STEVEN PARKER; WAYNE
PRINCE; PETE ROGOVICH; & GILBERT MARTINEZ,

Petitioners,

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL; UNITED
STATES OF AMERICA,

Respondents,

STATE OF ARIZONA,

Intervenor.

On Petition for Review of the Attorney General's April 14, 2020
Decision Certifying Arizona's Capital Counsel Mechanism
Under 28 U.S.C. §§ 2261-2266, Docket No. OAG-167

**Brief of *Amici Curiae* The Arizona Capital Representation Project,
Arizona Attorneys for Criminal Justice, Arizona Justice Project, and
Katherine Puzauskas in Support of Petitioners Seeking Reversal**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici curiae* certifies:

A. Parties and Amici

Except for the *amici curiae* listed below, parties, intervenors, and *amici* appearing before the Court are listed in the Brief for Petitioners. Additionally, at present, notices of intent to participate as *amicus curiae* have been filed by Federal Public Defender Capital Habeas Units, the American Bar Association, and Academic Experts in Federal Criminal Procedure and Post-Conviction Practice.

Amici include:

- The Arizona Capital Representation Project
- Arizona Attorneys for Criminal Justice
- Arizona Justice Project
- Katherine Puzuaskas

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners.

C. Related Cases

Amici are not aware of any related cases other than the case identified in the Brief for Petitioners.

Dated: August 20, 2020

/s/ Andrew T. Dufresne
Andrew T. Dufresne

DISCLOSURE STATEMENTS

Counsel for *amicus curiae* The Arizona Capital Representation Project certifies the following under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1:

- The full name of the entity I represent is: The Arizona Capital Representation Project (ACRP).
- ACRP has no parent company, and no publicly held company has a 10% or greater ownership interest.
- ACRP is a statewide non-profit legal services organization that assists indigent persons facing the death penalty in Arizona through direct representation, *pro bono* consulting services, training, and education. ACRP tracks and monitors all capital prosecutions in Arizona.

Dated: August 20, 2020

/s/ Andrew T. Dufresne
Andrew T. Dufresne

Counsel for *amicus curiae* Arizona Attorneys for Criminal Justice certifies the following under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1:

- The full name of the entity I represent is: Arizona Attorneys for Criminal Justice (AACJ).
- AACJ has no parent company, and no publicly held company has a 10% or greater ownership interest.
- AACJ is the Arizona affiliate of the National Association of Criminal Defense Lawyers and operates as a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals. AACJ is dedicated to protecting the rights of the accused in the courts and in the State Legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Dated: August 20, 2020

/s/ Andrew T. Dufresne
Andrew T. Dufresne

Counsel for *amicus curiae* the Arizona Justice Project certifies the following under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1:

- The full name of the entity I represent is: Arizona Justice Project (AJP).
- AJP has no parent company, and no publicly held company has a 10% or greater ownership interest.
- AJP is a non-profit organization that provides *pro bono* legal representation to Arizona indigent defendants in post-conviction proceedings claiming innocence or manifest injustice.

Dated: August 20, 2020

/s/ Andrew T. Dufresne
Andrew T. Dufresne

Counsel for *amicus curiae* Katherine Puzauskas certifies that she is not required to file a disclosure statement under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1.

Dated: August 20, 2020

/s/ Andrew T. Dufresne
Andrew T. Dufresne

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GLOSSARY OF ABBREVIATIONS

AACJ	<i>amicus curiae</i> Arizona Attorneys for Criminal Justice
ABA	American Bar Association
ABA Guidelines	ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003); ABA Supplementary Guidelines for the Mitigation Function, 36 Hofstra L. Rev. 677 (2008)
ACRP	<i>amicus curiae</i> The Arizona Capital Representation Project
ADCRR	Arizona Department of Corrections, Rehabilitation, and Reentry
Add___	Addendum page(s) ___
AJP	<i>amicus curiae</i> Arizona Justice Project
Chapter 154	28 U.S.C. §§ 2261-2266
CJA	Criminal Justice Act, 18 U.S.C. § 3006A
FDO-Arizona	Office of the Federal Public Defender for the District of Arizona
OLA	Maricopa County Office of the Legal Advocate
Rule 6.8	Arizona Rule of Criminal Procedure 6.8
Rule 32	Arizona Rule of Criminal Procedure 32

INTRODUCTION

Arizona has a long history of depriving capital defendants of meaningful collateral review. Charles Rienhardt was sentenced to death in 1996 after several manifest, highly prejudicial errors by his trial counsel. Trial counsel interviewed the State's star witness without a third-party witness or voice recorder, resulting in a devastating conflict of interest that prejudiced Mr. Rienhardt when that witness changed her testimony on the stand. In addition, Mr. Rienhardt's long-time partner and mother of his child possessed exculpatory conviction-phase evidence and compelling mitigating evidence, but counsel never called her to testify because he was pursuing her romantically. Trial counsel spent only 10.8 hours investigating Mr. Rienhardt's social history and preparing for his sentencing.

Mr. Rienhardt's court-appointed post-conviction counsel did next to nothing to address those errors. Over three-and-a-half years of representation, post-conviction counsel spent at *total* of 46.6 hours—just over one traditional work week—on reviewing Mr. Rienhardt's capital case, a process that generally requires over 3,000 hours of attorney-time for competent representation.¹

¹ ABA Guidelines, Commentary to Guideline 6.1, 31 Hofstra L. Rev. 913, 966-69; Robert J. Smith, *Forgetting Furman*, 100 Iowa L. Rev. 1149, 1173 n.130 (2015) (noting that it often takes thousands of hours to complete the extraordinarily difficult and time-consuming task of a capital mitigation investigation).

Post-conviction counsel failed to interview a single witness, including Mr. Rienhardt's parents, siblings, or long-time partner. He failed to undertake the social history investigation required to demonstrate prejudice from the ineffective assistance Mr. Rienhardt received at sentencing. He spent zero hours investigating his client's medical and family history. His entire investigation consisted of gathering some—but not all—school records and obtaining the appointment of a neuropsychologist. He spent a total of 2.1 hours working with the appointed neuropsychologist, provided her woefully insufficient collateral data, and did nothing when she failed to conduct any neuropsychological testing. He failed to obtain the previous files of trial and appellate counsel, except for some trial transcripts and the record on appeal. Counsel's entire file in Mr. Rienhardt's capital case, exclusive of transcripts and the record on appeal, is 156 pages. This includes all correspondence, notes, memos, records, and legal research. During the entire process, counsel did not speak even once, in person or by telephone, to his own client.

Mr. Reinhardt's post-conviction counsel ultimately filed a petition with only three claims particularized to Mr. Rienhardt's case and 13 general challenges to capital punishment. That petition misspelled his client's name throughout. *See State v. Rienhardt*, Pima County Superior Court CR-51263 (Petition, filed Oct. 31, 2000). In Mr. Rienhardt's federal habeas proceedings, the federal court found post-conviction

counsel so lacking in diligence,² it denied almost all investigatory resources, completely denied evidentiary development, found 31 claims procedurally defaulted due to post-conviction counsel's omissions, and denied the three particularized claims due to a lack of evidence of prejudice.³ *Rienhardt v. Shinn*, No. 4:03-cv-00290, ECF No. 80, (D. Ariz. Sept. 28, 2005); *id.* ECF No. 126 (D. Ariz. Nov. 4, 2009).

These failures resulted directly, and predictably, from Arizona inadequate mechanism for appointing qualified post-conviction counsel. As *amici* have observed time and again, such substandard representation at the crucial post-conviction review stage is common in Arizona. Indeed, it is inevitable under Arizona's substandard systems for certifying post-conviction counsel and persistent failure to provide resources necessary for post-conviction counsel to do their jobs effectively. The reality of Arizona's long-broken system for post-conviction review cannot be reconciled with the Attorney General's decision to certify Arizona as having satisfied the standards for appointing competent, adequately funded capital post-conviction counsel necessary to permit restricted federal habeas proceedings under Chapter

² 28 U.S.C. § 2254(e)(2) requires a petitioner to have been diligent with factual development in state court to be entitled to evidentiary development in federal court.

³ These three claims remain pending in the Ninth Circuit while the procedurally defaulted claims have been remanded for a cause and prejudice determination. *See Rienhardt v. Ryan*, No. 10-99000, ECF No. 54 (9th Cir. Dec. 1, 2014).

154. *Amici* urge this court to reject that conclusion in view of the manifest deficiencies—and life-or-death consequences—of Arizona’s approach to post-conviction review.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization founded in 1988 that assists indigent persons facing the death penalty in Arizona through direct representation, *pro bono* consulting services, training, and education. ACRP tracks and monitors all capital prosecutions in Arizona.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the State Legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer.

The Arizona Justice Project (AJP) was established in 1998 and became the fifth organization in the United States created to help inmates overturn wrongful

convictions. AJP is a non-profit organization that provides *pro bono* legal representation to Arizona indigent defendants in post-conviction proceedings claiming innocence or manifest injustice.

Katie Puzauskas is the Supervising Legal Clinic Attorney for the Post-Conviction Clinic at the Sandra Day O'Connor College of Law at Arizona State University. She is also a consultant for the AJP. In both roles, Ms. Puzauskas represents indigent Arizona defendants with claims of wrongful conviction, manifest injustice, and in cases involving terminally ill or incapacitated prisoners. Ms. Puzauskas is appearing in her individual capacity and not as a representative for the law school or AJP.

Amici have particularized interests and informed perspectives on the operation of post-conviction and federal habeas matters in Arizona. Staff for ACRP, members of AACJ, staff and volunteers for AJP, and Ms. Puzauskas routinely represent post-conviction petitioners in Arizona, provide training to the local defense bar on capital and non-capital criminal justice matters, monitor capital cases throughout the state, and serve as *amici* in Arizona state and federal courts on capital and non-capital cases. This brief is desirable because *amici* are uniquely positioned to share insights gained from their considerable on-the-ground experience in Arizona, and their collective observations regarding the longstanding deficiencies of Arizona's post-conviction system are directly relevant to the issue now before this Court—the Attorney

General's misguided certification of Arizona's thoroughly dysfunctional approach to post-conviction review.

STATEMENT REGARDING CONSENT, AUTHORSHIP, AND SEPARATE BRIEFING

The parties have consented to *amici* filing this brief. This brief was authored solely by *amici* and their counsel. No party's counsel authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel contributed money toward preparation or submission of this brief.

Under Circuit Rule 29(d), counsel certifies that this separate brief is necessary to provide the distinct perspectives of *amici* based on their collective years of direct experience representing clients in Arizona's post-conviction system and advocating for improvements to that system. That experience allows *amici* to explain the history and persistent shortcomings of the Arizona system.

ARGUMENT

Arizona's faulty, haphazard approach to appointing and supporting post-conviction counsel cannot support certification under Chapter 154. *Amici* wish to explain and emphasize (1) the crucial role that post-conviction counsel play in the review process for capital cases; (2) Arizona's long history of mismanagement and neglect as to that fundamental aspect of the death-penalty review process; and (3) the

profound consequences of insufficient post-conviction review for Arizona's criminal justice system, particularly if the Attorney General's certification system is allowed to stand.

I. Post-conviction review is critically important in Arizona death-penalty cases

The structure of Arizona's appellate and post-conviction review system makes the State's repeated failures to provide competent post-conviction counsel uniquely devastating. Federal habeas courts may review constitutional violations only if "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Although many states allow, or even require, defendants to raise any and all claims on direct appeal, including claims of ineffective assistance of trial counsel, Arizona limits direct appeals to the existing record. Ariz. R. Crim. P. 31.10(a)(7). Anything that trial counsel omits or overlooks thus becomes unavailable for direct appeal in Arizona courts.

As a result, constitutional violations that depend on facts outside the trial-court record must be presented instead in state post-conviction proceedings under Arizona Rule of Criminal Procedure 32. In Arizona, the post-conviction proceeding thus constitutes "the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial" and many other collateral claims. *Martinez v. Ryan*, 566 U.S. 1, 11 (2012) (holding there is an equitable right to effective assistance of post-conviction counsel, where such proceedings are the first opportunity to raise a

claim of ineffective assistance of trial counsel; post-conviction counsel's ineffectiveness may serve as cause and prejudice to overcome the procedural default of trial ineffectiveness claims).

Accordingly, post-conviction lawyers in Arizona are the first—and often only—counsel ever to perform constitutionally required investigations in cases where trial counsel's performance was constitutionally inadequate. If an Arizona capital post-conviction lawyer fails to investigate, discover, and present constitutional claims for relief supported by facts outside the record, those claims are typically forfeited forever because they are not properly exhausted for federal habeas review. *Coleman v. Thompson*, 501 U.S. 722 (1991). As summarized by two experienced Arizona capital attorneys:

PCR [post-conviction] relief is the linchpin between and among the three types of capital review. It is the only opportunity to review non-record issues from the trial and direct appeal stage and it determines what issues can be further reviewed at the federal habeas stage. This fact, combined with consistent court rulings that there is no constitutional right to effective assistance of counsel at the PCR stage, and, therefore, no right to challenge the quality of representation at that stage, makes PCR representation uniquely significant in the field of capital law.

John A. Stookey & Larry A. Hammond, *Arizona's Crisis in Indigent Capital Representation*, 34 Ariz. Att'y 16, 36-37 (March 1998).⁴ There is no other backstop in

⁴ As explained above, *Martinez v. Ryan* offers a limited exception to this rule.

these cases, so Arizona capital post-conviction litigation demands expert work by high-quality counsel.

The enormous responsibilities of capital post-conviction counsel are matched by the great stakes in these cases. Where counsel fails to adequately investigate and raise the petitioner's claims, clients face having their claims found procedurally defaulted by the federal habeas courts and, ultimately, execution. For example, Richard Stokley was represented in Arizona post-conviction proceedings by a lawyer who filed only a "cursory" post-conviction petition and then withdrew on the client's motion. *Stokley v. Ryan*, 659 F.3d 802, 810 (9th Cir. 2011). After Mr. Stokley's new post-conviction lawyer moved to file a more substantial petition, the state successfully moved the court to reinstate the original lawyer. *Id.* The original lawyer then filed a brief arguing *against* the merits of the claims raised by the second post-conviction lawyer. *Id.* Most of Mr. Stokley's claims of ineffective assistance of counsel were held procedurally barred, and he was executed. *Id.* at 806.

A. Post-conviction counsel face monumental challenges and must have wide expertise to provide effective representation

Arizona post-conviction litigation is procedurally complicated and often highly technical. Indeed, capital post-conviction counsel must be experts in an astonishing array of tasks, including: calculating federal statutes of limitations, collecting and organizing the entire record from multiple sources, reviewing extant records and

evidence, investigating and discovering new evidence, identifying and vetting experts from a wide variety of fields, presenting all potentially meritorious extra-record constitutional violations occurring at trial and on direct appeal, and understanding how to properly federalize and exhaust all claims.

In general, Arizona Rule of Criminal Procedure 32.2(a) precludes post-conviction relief on grounds that could have been raised on direct appeal or in a post-trial motion, or that were finally adjudicated on the merits or waived on direct appeal or in a previous collateral proceeding. But this general rule has numerous exceptions, such as a significant change in the law, newly discovered evidence, or actual innocence of the crime or sentence. Ariz. R. Crim. P. 32.2(b) (discussing, *inter alia*, Rule 32.1(b)-(h)). Competent post-conviction counsel must understand these rules of preclusion, raise all non-precluded claims, and make all potentially meritorious arguments for claims that may appear subject to preclusion on their face.

To make matters even more difficult, competent post-conviction counsel must not simply raise the appropriate claims for relief; they must also understand the often-byzantine workings of federal habeas corpus law. Because 28 U.S.C. § 2254 is so tightly constrained, properly preserving a client's federal habeas claims is critical. Claims to be reviewed on federal habeas must include a basis in federal law. 28 U.S.C. § 2241(c)(3); *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam). An un-

skilled or negligent post-conviction attorney can easily forfeit claims simply by neglecting to include a discussion of federal protections alongside coextensive state-law protections, even within claims they have correctly identified.

The extraordinary demands on capital post-conviction counsel have been summarized in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003). In Arizona, these professional guidelines have been incorporated into Arizona Rule of Criminal Procedure 6.8(a)(5), which requires capital counsel at trial, on direct appeal, and on post-conviction review to “be familiar with and guided by the performance standards” in the ABA Guidelines. The United States Supreme Court has “long ... referred [to the ABA Guidelines] as ‘guides to determining what is reasonable,’” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); see *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th. Cir. 2003) (“[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.”).

On top of the detailed technical knowledge required for the proper presentation and preservation of claims in state post-conviction proceedings, the ABA Guidelines require counsel to be skilled in investigating and presenting mitigating factors that are often central in capital cases. The fact that the client’s life is at stake

“requires extensive and generally unparalleled investigation into personal and family history.” Comment to Guideline 10.7, 31 Hofstra L. Rev. at 1022 (quoting Stetler, “Mitigation Evidence in Death Penalty Cases,” THE CHAMPION, Jan./Feb. 1999, at 35). This requires defense counsel to oversee the gathering of an extensive category of records “concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.” Comment to Guideline 10.7, 31 Hofstra L. Rev. at 1025. That may include school records; social-service and welfare records; juvenile dependency or family court records; medical records; military records; employment records; criminal and correctional records; family birth, marriage, and death records; alcohol and drug-abuse assessment or treatment records; and immigration records. *Id.* Such records may not only corroborate witnesses’ recollections, but, “may also document events that neither the client nor family members remember.” *Id.* at 1025 n.215.

Beyond records, counsel must explore and sift through details and particulars of the client’s life, family, and geographic and cultural history for evidence of factors that, by nature or nurture, influenced the client’s thoughts and behaviors. This work often entails the extraordinarily challenging task of uncovering secrets that families are loath to reveal, such as “physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; pov-

erty, familial instability” *Id.* at 1022. Obtaining such information would be difficult in any case, but can be especially challenging because the client and his family frequently have little in common with the defense team—ethnically, racially, economically or experientially. For good reason, the client and family may distrust outsiders and people they see as part of the “system.” The post-conviction attorney thus must act with sensitivity and make many in-person visits to develop a trusting relationship. *Id.* at 1024.

Because dysfunction is almost always present in the lives of capital defendants, counsel are also required to educate themselves and to keep up with the study of trauma, psychiatry, psychopharmacology, brain function and integrity, toxicology, and related fields. Comment to Guideline 10.11, 31 Hofstra L. Rev. at 1061; Comment to Guideline 10.5, *id.* at 1007, n.178 (*quoting* Kammen & Norton, “Plea Agreements: Working with Capital Defendants,” THE ADVOCATE, Mar. 2000, at 31, *available at* <http://www.dpa.state.ky.us/library/advocate/mar00/plea.html>) (“[T]he prevalence of mental illness and impaired reasoning is so high in the capital defendant population that ‘[i]t must be assumed that the client is emotionally and intellectually impaired.’”); *id.* at 1024. Obtaining a complete and accurate reflection of the client requires counsel “to locate and interview ... virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others.” *Id.* at 1024.

Post-conviction counsel face an even more difficult task in securing the necessary trust and cooperation of the client because “by the time a case reaches this stage, the client will have put his life into the hands of at least one other lawyer and found himself on death row.” Comment to Guideline 10.15.1, 31 Hofstra L. Rev. at 1085. In addition, trial witnesses are often unwilling to volunteer their time and energy when their previous cooperation did not prevent a death sentence. The passage of time makes it more difficult for post-conviction counsel to locate witnesses overlooked by the trial team, and those witnesses’ memories will often have faded. Further, many witnesses will refuse to cooperate upon learning that the client has not only been convicted, but sentenced to death.

The necessary client monitoring is particularly challenging in Arizona, where death-row inmates are kept in a remote location. Visits must be scheduled in advance due to the limited number of confidential visitation rooms. In addition, some death row inmates are housed in Special Management Units that isolate them from human contact and even from natural light. See *Koch v. Lewis*, 216 F.Supp.2d 994, 997-998 (D. Ariz. 2001). These conditions subject “the inmate to heightened psychological stressors and create[] a risk for mental deterioration.” *Id.* at 1001 (citing Haney & Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477 (1997)). Most recently,

because of the COVID-19 pandemic, the Arizona Department of Corrections, Rehabilitation, and Reentry (“ADCRR”) has closed state prisons to all visits from March 13 through at least September 13. COVID-19 Management Strategy, *available at* <https://tinyurl.com/y5sa2xob>.

A competent capital post-conviction lawyer must accordingly possess an extraordinary combination of skills, including knowledge of the complicated technical requirements of both state and federal law and the thorough and sensitive investigation of every difficulty of a client’s life. No other role anywhere in the death-sentencing process requires such diverse abilities. Yet, as discussed below, Arizona has no statewide screening mechanism to ensure that competent post-conviction counsel are being appointed to represent capital petitioners.

B. Arizona’s strict preclusion rules underscore the importance of competent post-conviction counsel

In Arizona, death-sentenced inmates generally have only one chance to present all possible claims for relief. Successive post-conviction petitions are strictly limited to claims that could not have been raised in earlier proceedings. Ariz. R. Crim. P. 32.2(a)-(b). This means if initial post-conviction counsel neglects a possible claim, it is likely forfeited permanently even if another attorney later identifies the omission.

The quintessential post-conviction claims in Arizona arise from ineffective assistance of counsel under the Fifth and Sixth Amendments. *See Strickland*, 466

U.S. 668; *Evitts v. Lucey*, 469 U.S. 387 (1985) (right to effective assistance of counsel on direct appeal). The Arizona Supreme Court has held that such claims may be raised *only* in post-conviction proceedings. *State v. Spreitz*, 39 P.3d 525, 526 (Ariz. 2002). Other critical constitutional violations must also be investigated, presented, and remedied in post-conviction proceedings, including the prosecution's failure to disclose exculpatory material, *e.g.* *Brady v. Maryland*, 373 U.S. 83 (1963); judicial bias, *Tumey v. Ohio*, 273 U.S. 510 (1927); and unconstitutional restraints, *Deck v. Missouri*, 544 U.S. 622 (2005). Other claims may have some basis in the trial record but require further evidentiary development. For example, a prosecutor may have appeared to have elicited false testimony at trial, a constitutional violation under *Napue v. Illinois*, 360 U.S. 264 (1959), but the full extent of the witness's interactions with the prosecutor may not be known until the witness is interviewed by post-conviction counsel.

Federal habeas law underscores the importance of developing a comprehensive factual record in state court. State post-conviction counsel must understand federal statutes of limitations because the timing of filings such as petitions for certiorari after direct appeal and initial post-conviction petitions have direct implications for statutory tolling in federal court. Counsel's ignorance or neglect can result in a petitioner completely losing his opportunity for federal habeas review or can greatly

diminish the one-year timeframe federal habeas counsel have for preparing the petition. Further, a district court may not consider facts that the state post-conviction attorney failed to present. 28 U.S.C. § 2254(e)(2); *Cullen v. Pinholster*, 563 U.S. 170 (2011).

Recent changes to the Arizona Rules of Criminal Procedure and newly imposed limitations on successor post-conviction proceedings have made it more important than ever before for Arizona post-conviction counsel to investigate and raise every available claim for sentencing relief in the initial petition. Rule 32.1(h) previously allowed a capital petitioner who was either innocent of the crime or whose case did not warrant the death penalty to seek relief at any time, even after the resolution of initial post-conviction proceedings. *See State v. Miles*, 414 P.3d 680, 686 (2018) (Pelander, J., concurring). While imposing a demanding clear-or-convincing evidence burden, this provision offered a safety valve as it permitted relief where a death-sentencing proceeding had clear shortcomings related to the mitigation presentation—even if initial post-conviction counsel failed to present the claim. In 2019, however, the Arizona Supreme Court restricted Rule 32.1(h) to actual innocence or cases where the defendant would not have been found “*eligible* for the death penalty in an aggravation phase” (emphasis added). That limits Rule 32.1(h)’s scope to situations where either no valid aggravating factor was proven or the defendant is categorically exempt from the death penalty, where by far the most common failure

of capital sentencing counsel is the failure to adequately investigate and present mitigating evidence. The elimination of this safety valve makes it more incumbent than ever that initial post-conviction counsel investigate and present all potentially meritorious claims related to mitigation.

II. Arizona's appointment mechanism does not provide for competent counsel

A. Arizona's appointment standards are inadequate

Arizona has periodically *appeared* to recognize what would be necessary to ensure adequate capital post-conviction representation, but it has never actually fulfilled those needs. Faced with the inability to meet its own standards, the State has repeatedly lowered those standards rather than ensuring its ability to meet them. The history of this long-running erosion of standards is detailed in FDO-Arizona's final comment on Arizona's opt-in application.

Briefly, in 1996, when the Anti-Terrorism and Effective Death Penalty Act was passed and the possibility of opt-in certification arose, the Arizona Legislature passed a bill that would have created a state-wide capital defense office, but Governor Symington vetoed it. S.B. 1349, 42nd Leg., 2d Reg. Sess. (Ariz. 1996); *see also* Hammond & Maher, *The ABA Guidelines: The Arizona Experience*, 47 Hofstra L. Rev. 137 (2018). As a result, the Arizona Supreme Court was left to administer capital post-conviction appointments. Ariz. Rev. Stat. Ann. § 13-4041(B) (2014). The Arizona Supreme Court initially created minimum standards and a committee of

capital defense experts to screen attorneys seeking capital post-conviction appointments. *In re Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases*, No. 96-63 (Ariz. 1996). When this screening did not yield nearly enough qualified attorneys, the Court abandoned the standards it had identified and appointed attorneys who were not qualified. Stookey & Hammond, at 16, 19; Hammond & Maher at 140. It also disbanded the screening committee. *In re Disbanding of the Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases*, No. 2001-55 (Ariz. May 9, 2001).

Recognizing serious problems with the administration of Arizona's death penalty, the state Attorney General formed a commission to make recommendations. That commission called for the creation of a state-wide public defender office to handle capital post-conviction cases. Office of the Att'y Gen., State of Ariz., Capital Case Comm'n Final Report (2002), at 14. The State Legislature briefly established an Office of the State Capital Post Conviction Defender. But the office was so severely underfunded that it only employed three attorneys—only one of whom was qualified to serve as lead counsel—and accepted only a handful of the growing back-

log of capital post-conviction cases. The Legislature cut the office's budget so severely that it was forced to lay off staff, reduce existing staff salaries, and eliminate all training.⁵ The failed office was closed within five years.

In July 2012, Maricopa County, which includes the Phoenix metro area, absorbed the office, and it now functions as a unit of the Office of the Legal Advocate (OLA) rather than as a statewide office. OLA represents just six out of 33 capital post-conviction petitioners in Maricopa County. The Maricopa County Public Defender has assisted minimally, accepting two post-conviction appointments since 2011. In the remaining cases and in Arizona's other fourteen counties, all post-conviction cases are handled by contract counsel.

B. Arizona's funding for capital post-conviction review is inadequate

As discussed above, effective representation of a post-conviction client requires an extraordinary combination of skills and experience. Nevertheless, capital post-conviction counsel in Arizona are grossly underpaid compared to their colleagues in other jurisdictions. They are also significantly undercompensated relative to appointed capital trial counsel in Arizona, and to private criminal defense lawyers with comparable experience. The rate they are paid—\$100/hour—was set by statute over 20 years ago. Stookey & Hammond, at 16; Ariz. Rev. Stat. § 13-4041(F). At

⁵ During this period, the ABA identified Arizona as a jurisdiction in “dire” need of assistance. ABA Death Penalty Representation Project, Jurisdiction in Need: Arizona (June 1, 2009), available at <https://tinyurl.com/y6avsluz>.

the time, that rate was supposed to make appointment in capital post-conviction cases more attractive, as the statute had previously set a presumptive cap of \$7,500 for such a case. Stookey & Hammond at 18. This enticement was necessary because “no qualified attorneys in Arizona [had] agreed to accept appointment in a state post-conviction relief proceeding” in a death-penalty death case under the existing terms. *Id.* at 17.

In the 22 years since, the Legislature has never increased that designated rate. In 2007, Arizona’s Capital Case Task Force recommended an increase to \$125/hour, recognizing that the hourly rate was far below the then-current federal capital Criminal Justice Act (“CJA”) rate of \$153/hour and that an increase was necessary “to attract more private counsel to represent defendants in capital case post-conviction relief proceedings.” Report of Recommendations to the Arizona Judicial Counsel, at 21 (September 2007), available at <http://www.azcourts.gov/Portals/74/CCTF/FinalRpt092007.pdf>.⁶ Meanwhile, the hourly rate for federal CJA lawyers in capital

⁶ In 2007, the Arizona Supreme Court established the Capital Case Task Force “to address capital cases then awaiting trial in Maricopa County.” The task force reported findings and recommendations to the Arizona Judicial Counsel, including that the Court create a standing committee “to monitor capital caseload reduction efforts.” The court then created the Capital Case Oversight Committee to “continue to study and recommend measures to facilitate capital case reduction efforts, make recommendations for adequate notice to the Supreme Court to assist the Court in making the necessary modifications to its staffing levels and judicial assignments to

cases has continued to rise on a regular basis—the current rate is \$195/hour. *See* Compensation Rates, District of Arizona, *available at* <https://tinyurl.com/y25rcxr7>.

Because the \$100 rate is a ceiling, the Arizona Superior Court has held that the law precludes increasing the hourly rate paid to capital post-conviction counsel in individual cases, regardless of the circumstances.⁷ By contrast, there is no statutory limit on the payment of capital trial lawyers, and in some cases courts have ordered significant increases to their hourly rates.⁸ The discrepancy relative to pay earned by private defense counsel is even more significant. In 2016, the median hourly rate for criminal defense lawyers in private practice in Arizona was \$259, O. Onisile & R. DeBruhl, *Attorney Survey: Arizona Lawyers Report on Economics of Practice*, 53 *Ariz. Att’y* 20, 25 (Sept. 2016), making the prospect of capital post-

ensure the timely processing of appeals, and develop recommendations for any formal policies deemed necessary.” Capital Case Oversight Committee, *available at* <https://tinyurl.com/yxekdpw8>.

⁷ Although funding litigation is sealed, ACRP is aware of such litigation through its direct representation and consulting capacities.

⁸ *See e.g.* Rubin, “Money Pit: Andy Thomas’ Death-Penalty-Laden Years as Maricopa County Attorney,” *Phoenix New Times* (Mar. 15, 2012), *available at* <https://tinyurl.com/y5mv53zs> (\$300/hour for lead counsel and \$250/hour for co-counsel in *State v. Martinson*, Maricopa County No. CR2004-124662); “Kirk Nurmi, Jodi Arias’ Attorney, Could Make Extra \$200,000 for Efforts During Trial,” *Huffington Post* (May 22, 2013), *available at* <https://tinyurl.com/y3jeos6z> (\$225/hour for lead counsel in *State v. Arias*, Maricopa County No. CR2008-031021); *State v. Redondo*, Maricopa County No. CR2010-106178 (Minute Entry, Aug. 17, 2016) (\$200/hour for lead counsel, \$140/hour for co-counsel).

conviction appointment especially unappealing. Arizona's compensation thus violates the ABA Guidelines' requirement that "[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation." Guideline 9.1(B), 31 Hofstra L. Rev. at 981.

In addition to the extremely low rate paid to post-conviction counsel, Arizona's failure to provide adequate compensation for other key defense team members, such as mitigation specialists, investigators, and experts, creates an additional hurdle to providing high quality representation in capital post-conviction proceedings. Contract mitigation specialists appointed in Maricopa County and Pima County—Arizona's two largest jurisdictions that account for the vast majority of capital cases—currently receive \$60/hour, and those jurisdictions currently offer \$40/hour for contract investigators. By contrast, the presumptive federal capital rates in Arizona are \$125/hour for mitigation specialists and \$100/hour for investigators. Available at <https://tinyurl.com/yxdz5a4u> (effective Aug. 15, 2020).

III. Arizona's deficient appointment mechanism routinely results in substandard representation

Arizona's ever-evolving—yet ever-deficient—mechanism for appointing and providing resources for post-conviction counsel has led to a long history of atrocious representation in capital post-conviction cases.

Arizona Rule of Criminal Procedure 6.8(d)(2), as written and as applied, does not guarantee the appointment of competent post-conviction counsel. As a result, Arizona petitioners are *routinely* denied federal habeas review of their claims because post-conviction counsel did not federalize the claim, did not exhaust the claims in their petitions for review to the Arizona Supreme Court, and did not develop the underlying collateral evidence to support their claims. *See, e.g. Gonzalez v. Ryan*, 551 F. App'x 909, 916 (9th Cir. 2014) (three claims were not fairly presented to the state court because the petitioner “did not provide a grounds for relief under federal law”); *Cook v. Schriro*, 538 F.3d 1000, 1029 (9th Cir. 2008) (petitioner waived claim “by failing to fairly present it as a federal claim on direct appeal”); *Wood v. Ryan*, 693 F.3d 1104, 1117 (9th Cir. 2012) (incorporating claims by reference to the post-conviction petition in the petition for review is not sufficient to fairly present the claims); *Rienhardt v. Shinn*, No. 4:03-cv-00290, ECF No. 80 (D. Ariz. Sept. 28, 2005) (finding claims procedurally defaulted for failure to raise in the petition for review); *Detrich v. Shinn*, No. 4:03-cv-00229, ECF No. 93 (D. Ariz. Sept. 23, 2005) (majority of ineffective assistance of counsel allegations defaulted for failure to raise in post-conviction); *Jones v. Stewart*, 4:01-cv-00592, ECF No. 115 (D. Ariz. Sept. 27, 2004) (dismissing significant factual bases of the ineffective assistance of counsel claim, including claims related to counsel’s failure to investigate the guilt or penalty phases of trial, procedurally defaulted for failure to raise in post-conviction);

Salazar v. Shinn, 4:96-cv-00085, ECF No. 121 (D. Ariz. Mar. 31, 2000) (factual bases of ineffective assistance of counsel claim related to trial counsel's failure to investigate procedurally defaulted for failure to raise in post-conviction). Ultimately, post-conviction counsel's failure to develop and present factual support for post-conviction claims has deadly consequences. *Stokley*, 659 F.3d 802, *supra*.

Arizona also does not require the appointment of two counsel in capital post-conviction cases (in contrast to the rule for trial counsel). *Compare* Ariz. R. Crim. P. 6.8(b) (specifying lead and co-counsel for trial proceedings), *with id.* 6.8(d) (specifying a single attorney as post-conviction counsel). This is a fundamental deviation from the professional standard of care that undermines competent representation. ABA Guidelines 1.1, 4.1; Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 Hofstra L. Rev. 775 (2008) (describing the critical need for at least two lawyers, along with larger team of investigators and experts, in order to provide competent representation); Add001-003 (Maher Decl.). Although appointed counsel may seek appointment of co-counsel in Maricopa County Superior Court, such requests are handled on a case-by-case basis, and the Superior Court has treated such requests inconsistently. *Compare, State v. Hampton*, Maricopa County No. CR2001-008991 (Minute Entry, Apr. 10, 2012) (finding "no basis to appoint" co-counsel to assist in preparing for and putting on evidentiary

hearing), *with State v. Velazquez*, Maricopa County No. CR2001-04970 (Minute Entry, Nov. 22, 2016) (appointing co-counsel without discussion of showing required). The result has been disparate resources for Arizona's capital post-conviction petitioners. Post-conviction cases where only one lawyer was appointed frequently result in post-conviction petitions that fail to develop and present extra-record claims and evidence. In *State v. Speer*, Maricopa County No. CR2002-010926, the Arizona Supreme Court appointed post-conviction counsel, who was then removed by the trial court for lacking adequate time to conduct the post-conviction investigation. The replacement lawyer, who had no capital post-conviction experience, did not request the appointment of co-counsel and filed a post-conviction petition that was supported by almost no extra-record evidence. The replacement lawyer has since been suspended for four years due to fraudulent billing in a capital case.⁹

Arizona's ineffective appointment mechanism extends to non-lawyer defense team members as well. Maricopa County is one of the largest death-seeking jurisdictions in the country, Fair Punishment Project, *Too Broken to Fix: Part I, An In-depth Look at America's Outlier Death Penalty Counties* (2016), available at <https://tinyurl.com/y466o3kh>, yet it currently has only nine mitigation specialists on

⁹ Counsel in *Speer* was ordered to associate with counsel pursuant to Arizona Rule of Criminal Procedure 6.8(e). The presiding judge, apparently recognizing the looming problem of counsel's poor representation, ordered the advisory counsel to "stay up to speed with the ongoing investigation and preparation of" the petition. *Speer*, Maricopa County No. CR2002-010926 (Minute Entry, Nov. 13, 2012).

contract, some of whom have never conducted a capital mitigation investigation without direct supervision. These mitigation specialists are badly overworked, assigned to approximately 14 capital trial cases and 27 capital post-conviction cases apiece. In one ongoing post-conviction case, the mitigation specialist was replaced after 18 months, having collected only the client's prison records and contacting only a single witness. Moreover, while there are currently minimum requirements to receive a contract as a mitigation specialist in Maricopa County, there is no oversight committee or other mechanism to review their caseloads or quality of work.

In rare cases, Maricopa and Pima County Superior Courts have appointed mitigation specialists off contract, and at a higher hourly rate, where counsel was able to demonstrate that no one with a contract was qualified and/or available to accept appointment. But in 2017, Maricopa County revised its policy to deny reimbursement of meals and incidental expenses for experts and mitigation specialists who earn greater than \$60 per hour. As a result, the few mitigation specialists who earn more than \$60/hour must cover their own meals and incidental expenses when they travel for investigation, rendering rate increases largely ineffectual. Likewise, expert witnesses who travel to Arizona to conduct evaluations of clients or to testify must cover these costs.

Additionally, both Maricopa and Pima Counties have policies that deny mileage reimbursement to defense team members for travel conducted within county

limits. Maricopa County is one of the largest counties in the United States, with an area greater than 9,000 square miles—larger than New Hampshire.¹⁰ It is not unusual for a post-conviction investigator or mitigation specialist to travel hundreds of miles in a single day within county limits. It is also not unusual for a capital post-conviction attorney to travel extensively within county limits to interview witnesses, especially if preparing for an evidentiary hearing. The loss of compensation for mileage is a substantial burden, further discouraging qualified professionals in the region from accepting Arizona post-conviction cases. The lack of compensation for mileage is also highly problematic under the professional standard of care as it disincentivizes in-person, face-to-face interviewing. ABA Supplementary Guideline 10.11(C), 36 Hofstra L. Rev. 689 (2008).

Further, Arizona counties have in some cases refused to approve expenses for the basic tools of capital post-conviction defense, including mitigation investigation and expert appointments. In 1999, the post-conviction court in *State v. Detrich*, Pima County No. CR-29267, denied *all* funding for investigation into guilt/innocence or mitigation. In 2001 in *State v. Sharp*, Cochise County No. CR-9500271, the State

¹⁰ See United States Census QuickFacts, Maricopa County, Arizona (July 1, 2019), available at <https://tinyurl.com/y3ahspys>.

objected to, and the court denied, all expert funding requests except for the appointment of a neuropsychologist. In 2004 in *State v. White*, Yavapai County No. CR-12855, the court denied expert funding because the petitioner's request did not establish that any mitigation uncovered would be causally connected to the crime.¹¹ In 2005 in *State v. Murdaugh*, Maricopa County No. CR1995-006472, the post-conviction court strictly limited counsel's resources and, two months before the post-conviction petition was filed, ordered that counsel would no longer be compensated for additional time spent on the brief.

In sum, inadequate funding on multiple levels has contributed to the poor quality of representation afforded to Arizona's capital post-conviction petitioners and confirms that the State has no adequate appointment mechanism in place.

¹¹ The Eighth Amendment prohibits limiting mitigation to that causally connected to the crime. *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015). Nevertheless, Arizona has a lengthy history of imposing such a limitation. *Id.* at 802-03.

CONCLUSION

For the reasons explained throughout this brief, Arizona's mechanism for the appointment of counsel in capital post-conviction cases suffers significant flaws on its face and in practice. Rule 6.8 fails to protect capital post-conviction petitioners from representation by unqualified counsel, fails to ensure that counsel is adequately compensated, and does not provide adequate resources to the defense.

Dated: August 20, 2020

Respectfully submitted,

/s/ Andrew T. Dufresne

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, as determined by the word count feature of Microsoft Word[®], it contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: August 20, 2020

Respectfully submitted,

/s/ Andrew T. Dufresne
Andrew T. Dufresne

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I caused the foregoing Brief to be filed electronically with the Clerk of the Court using the CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: August 20, 2020

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ADDENDUM

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MEMORANDUM

To: Amy Armstrong, Director, Arizona Capital Representation Project

From: Robin M. Maher, Director, American Bar Association Death Penalty Representation Project

Date: December 9, 2010

Re: *Whether the ABA Guidelines require two attorneys to be appointed to the defense team during state post-conviction representation?*



Thank you for contacting the American Bar Association Death Penalty Representation Project for an opinion regarding the applicability of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003) in state post conviction proceedings. This memo will provide you with the detail and rationale for the position that two attorneys are required to be appointed to the defense team in state post-conviction proceedings.

A. The Revised Edition of the ABA Guidelines: Background.

In 2003, the American Bar Association published its *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003). I led the project that reviewed and analyzed the prior 1989 version of the Guidelines, which by 2003 were out of date and not reflective of important changes in death penalty jurisprudence (notably, the Anti-Terrorism and Effective Death Penalty Act). I assembled an advisory committee, comprised of experienced capital defenders, academics, and representatives from Sections of the ABA, to discuss necessary revisions and/or additions to the prior version. Along with the Reporter, I incorporated the decisions of the advisory committee into the revised version. A Commentary provided the background and

rationale for each Guideline. I then met with many ABA Members, Sections, and Committees over several months to discuss the changes and recommendations and to obtain co-sponsorship and approval. The revised version of the ABA Guidelines was presented to the House of Delegates in February 2003. It was overwhelmingly adopted without dissent.

Since their publication, the ABA Guidelines have been repeatedly cited by state and federal courts, including the United States Supreme Court, as the most authoritative articulation of the responsibilities of death penalty jurisdictions and defense counsel. They have been adopted by numerous jurisdictions, organizations, courts, and bar associations. The American Bar Association believes that meeting the responsibilities identified in the ABA Guidelines is essential to ensuring justice in capital cases.

B. The ABA Guidelines Apply to State Post-Conviction Proceedings.

Guideline 1.1 provides:

These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, *post-conviction review*, clemency proceedings and any connected litigation.

ABA Guidelines 1.1(B) (*emphasis added*). Definitional Note 5 explains that, “[i]f a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or commentary will so state.” Guideline 1.1, Definitional Note 5.

C. The Defense Team is Critical to the Delivery of High Quality Legal Representation in Post-Conviction Proceedings.

The objective of the Guidelines is to “ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” Guideline 1.1 (A). In furtherance of that objective, the ABA Guidelines (and many other national standards) describe a “team” approach that will ensure the necessary expertise is available for the defense effort. The ABA Guidelines therefore require the appointment of a qualified defense team that has the resources “necessary or appropriate to provide high quality legal representation at every stage of the proceedings.” Guideline 4.1(B).

Guideline 4.1 – The Defense Team and Supporting Services

- A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.
 1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
 2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

- B. The Legal Representation Plan should provide for counsel to receive all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation **at every stage of the proceedings**. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.
1. Counsel should have the right to have such services provided by persons independent of the government.
 2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

Guideline 4.1 (*emphasis added*).

The same skills and resources of the defense team at trial are required in post-conviction proceedings. As the Commentary explains:

Ensuring high quality legal representation in capital trials ... does not diminish the need for equally effective representation ... in state post-conviction proceedings.... [B]ecause of the general tendency of evidence to emerge only at the relatively late stage in capital proceedings, jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines... at all stages of the case.

Guideline 1.1, Commentary.

If you have any questions, please do not hesitate to contact me. Thank you.