IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 6.8 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	)	No. R-05-0031
	)	**PETITIONER'S RESPONSE TO (1) THE COMMENT OF THE ARIZONA ATTORNEY GENERAL'S OFFICE AND (2) THE COMMENT OF SOME MARICOPA COUNTY SUPERIOR COURT JUDGES, JOINED BY THE STAFF ATTORNEYS FOR THE ARIZONA DEATH PENALTY JUDICIAL ASSISTANCE PROGRAM**

I. The Comments Of The Attorney General.

The Arizona Attorney General raises two objections to the Arizona State Bar Indigent Defense Task Force's Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure:

1. that, as currently constituted, Rule 6.8 of the Arizona Rules of Criminal Procedure is adequate because, since November 1, 1996, there have been no reversals or remands resulting from claims of ineffective assistance of counsel; and

2. that the proposed amendment to Rule 6.8 does not constitute a logical extension of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

A. IAC Claims Are Not Ripe In 61 Of The 69 Cases Cited By The AG.

On the first point, the Attorney General notes that "[s]ince the November 1, 1996 effective date of the current version of Rule 6.8, [Ariz. R. Crim. P.], sixty-eight [68] defendants in sixty-nine [69] cases have been sentenced to death in Arizona [and that] . . . [n]one of those cases … have been reversed on the basis of ineffective assistance of counsel." *Comment of the Arizona Attorney General* at 5. At this point, we believe this to be a statistic without meaning.[1]

In Arizona, claims of ineffective assistance of counsel generally may only be brought in post-conviction review proceedings. See, e.g., *Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d 1149 (1995)("We continue to commend the Rule 32 process to resolve claims of ineffective assistance of counsel."); *State v. Geotis*, 187 Ariz. 521, 524, 930 P.2d 1324 (App. 1996) (*review denied*, 189 Ariz. 109, 938 P.2d 1110)(Rule 32 proceedings are the appropriate forum to resolve IAC claims).

---

[1] Our information on the extent of adherence with the Guidelines over the last decade is in some parts anecdotal and in more significant parts based on experience, but it is more than fair to say that the evidence in no way supports the suggestion that the rule change is unnecessary. On the contrary, significant disparities continue to exist in the knowledge base of capital defense attorneys and in their level of commitment to comply with the Guidelines.

1749145.1

This means that in cases that are not yet in post-conviction review proceedings, the issue of ineffective assistance of counsel has not yet been addressed, indeed cannot have been addressed. Of the 69 cases referred to by the Arizona Attorney General, 61 of them have either been resolved with a sentence less than death before post-conviction review or are in a procedural posture in which the effectiveness of counsel has not yet been addressed or determined.[2]

Of the 69 death sentences charted by the Arizona Attorney General in his Comment:

- 13 of the 69 have been resolved with a sentence less than death before PCR proceedings were initiated;

- 18 of the 69 are pending retrial or resentencing, thus, the IAC analysis, which in Arizona is a PCR function, has not yet commenced;

- 19 of the 69 cases are in some phase of the direct appeal process to the Arizona Supreme Court (with one case on Petition of Writ of Certiorari to the United States Supreme Court). Again, the IAC analysis has not and cannot have commenced for any of these cases;

- 2 of the 69 cases have resolved because one man has died of natural causes and one man, Robert Vickers, was executed;

- 10 of the 69 cases are in state post-conviction proceedings (6 of which are awaiting either the appointment of counsel or the

[2] Our numerical analysis is taken directly from the information provided by the Attorney General in his Comment.

filing of a petition for post-conviction relief, 3 of which are in the briefing/hearing phase, and only 1 of which has been completed (a motion for reconsideration is pending); and

- 7of the 69 cases referred to by the Arizona Attorney General are in federal habeas corpus proceedings and are either awaiting rulings on procedural motions or are awaiting evidentiary hearings on claims raised in those petitions.

The point is that only 8 of the 69 cases referred to by the Arizona Attorney General -- 7 in federal habeas corpus and 1 that has all but completed the state PCR process -- have had a state court forum in which the IAC claim was actually litigated and determined. The Attorney General's extrapolations and assurances of effectiveness of counsel from these 69 cases are, at this point, premature.

B. The Guidelines Are Consensus Norms And Are Consistent With A Strickland Analysis.

The Attorney General also argues that Petitioner's proposed amendment to Rule 6.8 "is not a logical extension of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny." *Comment to the Attorney General* at 2. The Attorney General uses terms like "checklist" and "laundry list" as if they had talismanic value. The point the Attorney General is making is that if Rule 6.8 is amended as proposed, the evil to be inflicted is that post-conviction counsel will have ready, concise and identifiable normative principles with which to attack the effectiveness of counsel. The affront of this position is the unstated assumption that trial

counsel, sentencing counsel and appellate counsel will shirk their professional duties and will not utilize the Guidelines to assist them in performing at or in excess of the level that a broad consensus of professionals has determined is the appropriate standard of care in capital cases. Why are we to collectively assume that amended Rule 6.8, which will require defense counsel to swear at the outset of a capital case their knowledge of an intent to adhere to the Guidelines in all but exceptional circumstances[3], will be disregarded by all but post-conviction counsel?

We have previously stated and we agree that the framework for assessing claims of ineffective assistance of counsel is that set forth in *Strickland v. Washington*. That the Guidelines to be incorporated by our Petition set forth a comprehensive and consensus series of best practices for defense counsel to consider and to follow does not detract at all from the courts role in reviewing such claims under the *Strickland* framework nor do they diminish defense counsel's ability to make reasonable tactical decisions. It is true that the Guidelines embody the current consensus about what is necessary to provide effective representation in capital cases in almost all phases of capital defense. It is also true that courts have consistently looked to the Guidelines as norms to resolve issues that have arisen in

---

[3] *See Comment of the State Bar of Arizona*, dated May 22, 2006, at 2 (Rule 6.8 would require "defense counsel to swear/avow, at the outset of the representation, knowledge of and intent to adhere to the [G]uidelines in all but exceptional circumstances supported by reasonable cause."), with which we agree.

capital cases.[4] But it is equally true that the Guidelines are guides – no more, no less – and that the "proper measure of attorney performance remains … reasonableness under prevailing professional norms." 466 U.S. at 688.

C. The Guidelines Are Distilled From Case Law; They Are Not Inconsistent With It.

The Attorney General further argues that "[t]here are provisions in the ABA standards that are in fact inconsistent with controlling United States Supreme Court authority." *Comment of the Arizona Attorney General* at 10. We have addressed this point elsewhere. *See Petitioner's Response to the Comment of the Maricopa County Attorney's Office* at 7-8. The Attorney General, however, buttresses this argument by mischaracterizing the Guidelines, misquoting them, or attempting to marginalize what the Guidelines are intended to accomplish.

For example, Guideline 10.7 very unsurprisingly notes that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. . . . The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." The Attorney General suggests (1) that "[t]his standard does not *necessarily* reflect current case law

---

[4] *Statement of the ABA to the Supreme Court of the State of Arizona on the Subject of the Proposed Amendment to Rule 6.8 of Arizona Rules of Criminal Procedure*, at 3-4 (and cases cited at note 8).

regarding investigation and presentation of mitigation over a defendant's objection" and (2) that although "there is undoubtedly a duty … to investigate mitigation notwithstanding a client's wishes to the contrary", that duty will vary from case to case. *Comment of the Attorney General* at 10 (citation omitted) (emphasis added). In some respects, we do not disagree. It may well be that counsel's investigation will be reasonably and tactically tailored based on the circumstances of the case, but the obligation to investigate information and evidence that bears directly on the appropriateness of the decision to impose death is inviolate.

First, the duty to investigate in a capital case is perhaps among counsel's most significant duties. *Wiggins. v. Smith*, 539 U.S. 510 (2003); *Landrigan v. Schriro*, 441 F.3d 638, 643 (9th Cir. 2006) (Defense counsel in a capital case has an obligation to conduct a thorough investigation of the defendant's background) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000) and *ABA Standards for Criminal Justice* 4-4.1 (2nd Ed. 1980)).

Second, whether or not a death sentence is appropriate is not just a matter left to the proclivities of a capital defendant. We often hear the words that "death

is different."[5] At a minimum this means that the state has at least some interest in ensuring that a sentence of death is only imposed in those cases in which it is truly warranted. Every party in the capital case process has a stake in determining whether a sentence of death is appropriately imposed. The Arizona Supreme Court has embraced this principle as has United States Supreme Court before it.[6]

The investigation by defense counsel as articulated in Guideline 10.7 honors this interest and counsel's professional duty. There is no inconsistency in trumpeting a duty that, at a minimum, helps ensure that if a sentence of death is imposed it is appropriate, constitutional and reliable.

D. The Attorney General Misstates The Guidelines.

Much of what the Attorney General says or implies about the Guidelines, moreover, is incorrect, even if only by overstatement. For example, the Attorney

---

[5] In *Woodson v. North Carolina*, the United States Supreme Court struck down a mandatory death sentence because of the compelling need to ensure that a state imposed sentence of death is the appropriate punishment in any given case. 428 U.S. 280, 305 (1976). At a minimum, *Woodson* stands for the proposition that the State also has an interest in determining that a death sentence is appropriate in a specific case and that it is reliably imposed.

[6] *See State v. Brewer*, 170 Ariz. 486, 826 P.2d 783 (1992). Brewer was a capital defendant who moved to dismiss his mandatory appeal because he wanted to be executed. In refusing to allow Mr. Brewer to voluntarily dismiss his appeal, and in rejecting the State's argument that Mr. Brewer's motion to dismiss somehow limited the Court's jurisdiction, the Court noted that one of the purposes of the processes attendant to the imposition of a death sentence is to ensure that a death sentence is appropriately and reliably imposed in any given case.

General states that Guideline 10.9.1 imposes a duty to seek an agreed upon disposition "at every stage of the case." This is simply incorrect. In fact, the Guideline 10.9.1 requires defense counsel to take "steps that may be appropriate in the exercise of professional judgment" to achieve an agreed upon disposition:

> Counsel at every stage of the case have an obligation to take all *steps that may be appropriate in the exercise of professional judgment* in accordance with these Guidelines to achieve an agreed upon disposition. . . . Counsel at every stage of the counsel should explore what the possibility and desirability of reaching an agreed upon disposition. . . .

Id. (emphasis added). And, in fact, Guideline 10.9.2 specifically states that "[t]he informed decision whether to enter a plea of guilty lies with the client."

Referring to Guideline 10.10.2, the Attorney General paraphrases that "counsel should be familiar with 'techniques' for exposing those respective jurors who would automatically impose the death penalty following a murder conviction." Is it somehow remarkable that we would want defense counsel to be able to conduct an effective and informed voir dire in a capital case or that a Guideline, extrapolated from dozens of cases on this very point, would specifically set forth the areas in which such a voir dire is most important? In context, the Guideline requires no more than that:

> Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors,

> including the procedures surrounding "death qualification" concerning any potential jurors' beliefs about the death penalty. Counsel should be familiar with techniques (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death eligible, regardless of the individual circumstances of the case, (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigation evidence and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

Guideline 10.10.2(B).

Referring to Guideline 10.11(F)(3), the Attorney General states that the Guideline "requires investigation of witnesses who can testify about the applicable alternative to a death sentence or the conditions under which the alternative sentence would be served." This is a well settled and unremarkable mitigation practice. In context, moreover, the Guideline does not make the investigation of such a witness mandatory; it is, rather, something to be considered:

> In deciding which witnesses and evidence to prepare concerning penalty, *the areas counsel should consider* include the following:
>
> * * *
>
>> Witnesses who can testify about the applicable alternatives to a death sentence and/or the conditions under which the alternative sentence would be service . . .

Guideline 10.11(F)(3) (emphasis added).

There are two premises this Court should bear in mind as it considers the Petition to Amend Rule 6.8. As we have previously stated, the ABA Guidelines are founded on "the principle that strategic choices made by counsel are entitled to respect if they are based on an informed professional judgment." *Petitioner's Response to the Comment of the Maricopa County Attorney's Office* at 5 (*citing Strickland*, 466 U.S. at 680).

Second, we do not disagree that the fundamental analytical framework for ineffective assistance of counsel is that set forth in *Strickland v. Washington*. On this point, however, we are steadfast that the Guidelines are the best, most encompassing, and most contemporaneous assessment of prevailing professional norms in the field of capital defense.[7]

II. The Comment Of Some Maricopa County Superior Court Judges (And The Staff Attorney For The Arizona Death Penalty Judicial Assistance Program).

On April 13, 2006, Presiding Criminal Judge of the Maricopa County Superior Court Chambers was provided with a PDF copy of the Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure and the comments of the State Bar's Criminal Justice Section. These documents were requested and

---

[7] Attached as Exhibit A is a Letter from Robin M. Maher, Director ABA Death Penalty Representation Project, dated July 5, 2006, which sets forth the views of the Advisory Committee that compiled the Guidelines on certain of the points raised by the Attorney General

provided so that they could circulated among the 94 sitting judges of the Maricopa County Superior Court. On June 16, 2006, some of those judges – seven to be exact – filed a joint comment with a staff attorney from the Arizona Death Penalty Judicial Consistence Program, Darian Taylor.[8] *See Comment Of Some Maricopa County Superior Court Judges, Joined By The Staff Attorneys For The Arizona Death Penalty Judicial Assistance Program*, dated June 16, 2006.

Before turning to the merits of the *Comment of Some Judges*, we point out three things: (1) without explanation or request for extension, the comment was filed 25 days after the due date set by this Court (May 22, 2006) and 11 days after the only extension granted by this court, that to the Attorney General, to June 5, 2006; (2) the Comment makes no reference to those judges who were in favor of the Petition and who provided their comments to the Presiding Criminal Judge[9]; (3) even among the seven judges who do comment, there are certain Guidelines and aspects of the Guidelines that certain of these judges do think should apply.

---

[8] The *Comment of Some Judges* refers to Staff Attorneys, but Mr. Taylor is both the signer of the comment and the only staff attorney identified.

[9] We initially understood that the judges of the Maricopa County Superior Court would not be filing a comment because, *inter alia*, there was no consensus among the judges on the adoption of the Guidelines – i.e., some of the very few that responded were in favor and some were opposed.

A. The Guidelines Are Not a Checklist.

Let us attempt to kill this unfortunate and misguided shibboleth once and for all. The Guidelines are not a checklist, a grocery list or a laundry list – they are a unanimous and comprehensive consensus of best practices for defense counsel in capital cases. The Guidelines themselves are almost invariably drafted in the parlance of a capital defense lawyer exercising his or her best professional judgment under the circumstances of the case. For example:

Guideline 10.2 ("Counsel *should* provide high-quality legal representation in accordance with these Guidelines….");[10]

Guideline 10.3 ("Counsel…*should* limit their case load to the level needed to provide each client with high-quality legal representation…");

Guideline 10.5 ("Counsel at all stages of the case *should make every appropriate effort* to establish a relationship of trust with the client,….");

Guideline 10.8 ("Counsel at every stage of the case, *exercising professional judgment* in accordance with these Guidelines, should.…");

---

[10] Although the term "should" is referred to in the definitional notes of the Guidelines as a mandatory term, the term is expressly not used, not intended to be used, and not appropriate to be used in the sense that a deviation from a Guideline is *per se* in effective assistance of counsel.

Guideline 10.9.1 ("Counsel at every stage of the case have an obligation to take all steps *that may be appropriate in the exercise of professional judgment….*");

Guideline 10.10.2 ("Counsel *should consider*, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case…, whether any procedures have been instituted for selection of juries in capital cases that present particularly legal basis for challenge."); and

Guideline 10.15.1 ("…Counsel should *make every appropriate effort* to present issues in a manner that will preserve them for subsequent review.").

The Guidelines are exactly what they purport to be – guides; no more, no less. They are not a checklist for effectiveness of counsel, nor are they a trump card if there is a deviation. The touchstone and barometer of ineffective assistance of counsel remains the analysis set forth in *Strickland v. Washington*:

> … [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as

> elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
>
> * * *
>
> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgement. … The purpose of the 6th Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiency in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

466 U.S. at 690-92 (citations omitted).

As we have previously stated, we believe the Guidelines to the best, most encompassing, and most comprehensive assessment of prevailing professional norms in the field of capital defense. But *Strickland* itself provides the framework to assess counsel's conduct as against these norms. The amendments to Rule 6.8 seek no more than that.

B. Some of the Objecting Judges Think Some of the Guidelines Should Apply.

The Judges and the Judicial Clerk refer to certain Guidelines that "present specific concerns." Among them are Guidelines that require counsel (1) to limit their caseloads to a level that allows them to provide "high quality legal

representation"; (2) to have a team member that is familiar with psychological and mental disorders; (3) to expeditiously conduct the initial interview of their client (and if possible to do so within 24 hours); (4) to investigate penalty phase mitigation evidence, notwithstanding a client's statement that such evidence not be collected or presented; and (5) that counsel "consider seeking expert assistance in the jury selection process."

We first note that the seven judges are not in agreement that the Guidelines to which they refer should not be implemented. For example, one judge agrees that case-load limits should be imposed because he or she "believes that the preparation for a capital case should at least equal if not exceed [that of a high dollar civil case] …and that *this level of preparation is generally not apparent in capital cases*." *Comment of Some Judges*, at 6, note 5 (emphasis added). Another judge "supports the appointment of a jury selection consultant in all capital cases. …[because] jury selection is crucial in a capital case, and … *most attorneys do not have this level of expertise*." *Id.* at 9, note 7 (emphasis added). As proposed, the amendment to Rule 6.8 will provide a comprehensive set of Guidelines for counsel, and will prevent the kind of triaging of duties in which these judges have engaged.

C. The Objecting Judges Will Not Be Required to Micromanage Cases.

The concern of the judges and the staff attorney, moreover, seem to stem from the perceived fear that if the Guidelines are adopted as proposed, courts will be obligated to "micro-manage" cases. This is not so. First, in Pima County, lawyers who take capital cases under an indigent defense services contract are obligated to abide by the ABA Guidelines. *See Professional Services Contract: Pima County Department of Office of Court Appointed Counsel (Exhibit A: Scope of Services)*:

> Professional Services Pursuant To This Contract. ATTORNEY shall comply with the Arizona Rules of Professional Conduct, state and local court rules, …*and with the performance standards for defense in capital cases contained in the American Bar Association's Guidelines for the appointment and performance of defense counsel in death penalty cases (revised edition, February 2003).*

Id. (emphasis added). Thus, this duty is already imposed upon lawyers in at least one county in the state of Arizona and it seems to be a duty that the judges have been able to accommodate.

Second, although Maricopa County does notice an inordinately high number of capital cases, in any given year a Superior Court Judge is likely to not have more than two capital cases at any one time. Thus, what appears to be an unstated

assumption, that judges will be overwhelmed by the requirements of presiding over capital cases, should not be the case. Moreover, it is the capital defense attorney's obligation to comply with the Guidelines, not the courts.

In addition, some of the duties the judges now fear are already imposed upon them. *See* A.R.S. § 13-4013, which provides for the appointment of counsel and investigators and which requires the court "in its discretion" to determine compensation for services rendered in a manner it "deems reasonable, considering the services performed." A.R.S. § 13-4013(A). The duty is similar for experts that are not provided under county contract – "the court shall establish a reasonable fee for the expert witness who investigator providing the service." A.R.S. § 13-4013(C).

D. The Request for an Experimental Period Should be Rejected.

Finally, we do not believe that the experimental period requested by these judges and the staff attorney should be adopted. First, this proposed amendment has been in circulation since December 7, 2006. It has been subjected to profound scrutiny and intense debate by lawyers on all sides of the aisle, by multiple committees including this Court's Superior Court Committee, and has been vetted and approved by the State Bar. The process outlined by Rule 28, Rules of the Supreme Court, for the adoption, amendment or repeal of rules has been

fastidiously honored – no experimental period is countenanced by Rule 28 nor is one warranted. Second, seven of ninety-four judges represents less than 10% of the Maricopa County Superior Court Bench; and their comment as filed omits any reference to the judges that were in favor of the petition. That a distinct minority of the bench in Maricopa County, and an even more distinct minority of the bench statewide, should seek to impose a condition not found in the rules seems at a minimum to be inappropriate. As with other rules, if this rule proves unworkable there is a process for its repeal or amendment. We do not expect, however, that this option will ever become necessary.

CONCLUSION

Much thinking, analysis and debate has gone into the process of filing and seeking to implement the amendments sought by this Petition. Neither the process nor the Petition have been found wanting. The Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, as modified as reflected in the May 22, 2006 Comment of the State Bar, should be adopted.

RESPECTFULLY SUBMITTED this 5th day of July, 2006.

ARIZONA STATE BAR INDIGENT
DEFENSE TASK FORCE

By s/Larry A. Hammond
Larry A. Hammond, Chair
Osborn & Maledon, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, AZ 85012
(602) 640-9000

and

By s/James J. Belanger
James J. Belanger (011393)
Lewis and Roca LLP
40 North Central Avenue
Phoenix, AZ 85004-4429
(602) 262-5319

COPY of the foregoing
mailed this 5th day of
July, 2006, to:

Mary O'Grady
Kent E. Cattani
Arizona Attorney General's Office
1275 West Washington
Phoenix, AZ 85007

Darian B. Taylor
Capital Staff Attorney
201 West Jefferson, 4th Floor
Phoenix, AZ 85003

____

EXHIBIT A

AMERICAN BAR ASSOCIATION
Robin M. Maher, Esq.
Director
MAHERR@staff.abanet.org
Website: www.probono.net
www.abanet.org/deathpenalty

Death Penalty Representation Project
740 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-1738
Fax: (202) 662-8649

Shirley Huey, Esq.
Staff Attorney
HUEYS@staff.abanet.org

STEERING COMMITTEE

CHAIR
Terri L. Mascherin
Jenner & Block

SECTION OF BUSINESS LAW
Hugh M. Ray
Andrews & Kurth LLP

CRIMINAL JUSTICE SECTION
David W. DeBruin
Jenner & Block

SECTION OF GENERAL PRACTICE SOLO & SMALL FIRM
Robert Dunham
Philadelphia Defender Association

SECTION OF INDIVIDUAL RIGHTS & RESPONSIBILITIES
Eric M. Freedman
Hofstra University School of Law

Ronald J. Tabak
Skadden, Arps, Slate, Meagher & Flom LLP

SECTION OF INTERNATIONAL LAW & PRACTICE
William H. Allen
Covington & Burling

SECTION OF LITIGATION
Robert L. Rothman
Arnall Golden Gregory LLP

Lawrence J. Fox
Drinker Biddle & Reath

Geoffrey J. Vitt
Vitt & Rattigan, PLC

SENIOR LAWYERS DIVISION
Stephen N. Maskaleris
Maskaleris & Associates

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
Norman Lefstein
Indiana University School of Law

YOUNG LAWYERS DIVISION
Alfreda D. Coward
Coward & Coward, PC

BOARD OF GOVERNORS LIAISON
Keith E. Brown
Brown, Waller & Gibbs

SPECIAL ADVISOR
Stephen F. Hanlon
Holland & Knight, LLP

July 5, 2006

Arizona State Bar Indigent Defense Task Force
Larry A. Hammond, Chair
Osborn & Maledon, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, AZ 85012

James Belanger
40 North Central Avenue
Phoenix, AZ 85004-4429

Dear Messieurs Hammond and Belanger:

This letter is in response to your request to provide you with a brief reply to the concerns expressed by the Arizona Attorney General in its Comment on the Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure.

A. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

As you know, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases were compiled by an Advisory Committee of legal professionals from death penalty jurisdictions around the country, including Arizona. Experienced litigators and academics identified the best practices for the defense of a capital case and also the most common mistakes and errors committed by defense counsel. Our examination of cases often revealed ignorance by defense counsel of fundamental techniques and practices that resulted in reversible error or wrongful convictions. It was clear to us that improving the quality of defense counsel performance would result in fewer case reversals and more reliable results. The Guidelines were drafted with that purpose and overwhelmingly approved by the American Bar Association House of Delegates in Spring 2003.

I led the process that produced the Guidelines. At no point during the Advisory Committee discussions or subsequent to their approval did we

identify the Guidelines as a "checklist" for defense counsel. Indeed, we deliberately drafted each Guideline broadly to allow for the many differences in jurisdictional practice and so that counsel could make individual decision about strategy. The Guidelines were never intended to dictate "required conduct" (*See Comment of the Arizona Attorney General* at 3); rather, they are intended to provide expert guidance so that defense counsel can deliver the high quality legal representation that each capital defendant deserves.

The need for this guidance was obvious. Capital cases are the most complex and time-consuming kind of cases. The conclusion of the Advisory Committee, after conducting many hours of research, was that it was too often an overwhelming task for defense counsel to marshal an effective defense without adequate resources, training and experience. By identifying the essential elements of a competent defense, the Guidelines will greatly assist defense counsel who find themselves intimidated by the many tasks and responsibilities associated with defending a capital defendant. The ABA believes that defense counsel in all death penalty jurisdictions would benefit from use of the ABA Guidelines.

B. Attorney General Comment Regarding "Inconsistency"

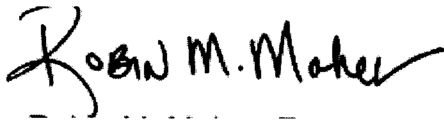
In its comment, the Attorney General expresses concern that the Guidelines are "inconsistent with controlling United States Supreme Court authority." (*Comment of the Arizona Attorney General* at 10). As the most illustrative example of this concern, the Attorney General cites Guideline 10.7, which states that defense counsel should conduct a mitigation investigation "regardless of any statement by the client that evidence bearing upon penalty is not collected or presented." While apparently conceding the requirement to conduct an investigation regardless of the client's wishes, the Attorney General argues that the "level of that investigation" necessary should be different. But the Guidelines never address the "level" of investigation. They only state that an investigation should be "thorough and independent" so that the client can be fully advised about the nature and potential impact of mitigation evidence as it pertains to his sentencing and make a decision that is fully informed about presentation.

The remaining Guidelines cited in passing by the Attorney General as "inconsistent" are premised on the mistaken notion that the Guidelines require militaristic obedience. Nothing in the Guidelines demands such compliance, and nothing in the proposed Rule change would require it. Any sentence of any Guideline abstractly stated can be misinterpreted, so it is perhaps understandable that the Attorney General misunderstands the import and objective of the Guidelines it cites. But there is no mistake that the concern expressed about them is misplaced. The proposed change to Rule 6.8 will not tie the hands of defense counsel or lead to increased litigation. Instead, the Rule change will likely result in a more informed and better prepared defense bar in Arizona.

C. Conclusion

The Guidelines are not a checklist of any kind and do not set forth a required course of conduct. They do encourage careful consideration and evaluation of best practices which have never been substantively challenged. They also will help defense counsel avoid making common errors that will result in reversals, retrials, re-sentencings, and wrongful convictions, none of which serve the interests of justice or victims families.

Very truly yours,



Robin M. Maher
Director, Death Penalty Representation Project