CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

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I.
INTRODUCTION

My testimony will address questions five, seven and nine, but with four preliminary points:

First, I will focus on capital representation at trial and in post-conviction because those are the procedural stages with which I am most familiar. I was admitted to practice in California in 1975. I was a deputy public defender in Solano County from 1975 to 1978. In 1979, I joined Defenders, Inc., in San Diego County, which was the community defender program during the years before the county had a public defender office. Between 1975 and 1980, when I entered private practice, I handled cases ranging from misdemeanors to murder charges.

I was in private practice until 1997. My practice was limited to the defense of criminal cases. I represented clients in state and federal courts, at trial and in post-conviction proceedings, including those facing the death penalty.[2]

In 1997, I became the director of the American Bar Association (ABA) Death Penalty Representation Project in Washington, D.C.[3] In that capacity, I served as a consultant in dozens of death penalty cases, most of which were in post-conviction or clemency proceedings, and most of which had been tried in the South. I co-authored several *amicus curiae* briefs in death penalty cases, which were filed in the United States Supreme Court.

In 2001, I joined the faculty of the University of California, Berkeley School of Law to establish its Death Penalty Clinic. As the Clinic's Director, I am engaged in the representation of clients on death row in California and in the South, and also involved in litigation aimed at addressing system-wide deficiencies in administration of capital punishment.[4]

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[1] Submitted Apr. 9, 2008. Professor Semel's oral testimony was given on Feb. 20, 2008. She is grateful to University of California, Berkeley School of Law Death Penalty Clinic student Armilla Staley-Ngomo for her significant contribution to the preparation of this testimony.

[2] Faculty profile, *available at* http://www.law.berkeley.edu/faculty/profiles/facultyProfile.php?facID=1108, last visited Apr. 8, 2008.

[3] *See http://www.probono.net/deathpenalty/,* last visited Apr. 8, 2008.

[4] A description of the Death Penalty Clinic, including its mission and docket is *available at* http://www.law.berkeley.edu/clinics/dpclinic/, last visited Apr. 8, 2008.

I was president of California Attorneys for Criminal Justice (CACJ)[5] in 1990, and have served on its Board of Directors since 1983. Between 1996 and 2002, I was a member of the Board of Directors of the National Association of Criminal Defense Lawyers.[6]

Second, I was asked by Professor Gerald Uelmen, the Commission's Executive Director, to provide information about whether California is in compliance with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.[7] Inasmuch as the members of the Commission have a copy of the ABA Guidelines, and in the interest of time, I will assume some familiarity with their requirements. The ABA Guidelines were first adopted in 1989.[8] During my tenure with the ABA, I routinely relied upon the Guidelines to assist appointed counsel who, for example, needed authority to support funding requests or to litigate challenges to local policies; to advise pro bono counsel with regard to their duties; and to explain to law firms what their responsibilities would be if they agreed to handle a capital case. In 2000, the ABA Special Committee on Death Penalty Representation Project undertook an extensive review of the 1989 edition of the Guidelines.[9] In 2001, the Project and the ABA Standing Committee on Legal Aid and Indigent Defendants partnered in the ABA Death Penalty Guidelines Revision Project, which produced the current edition, adopted by the ABA in 2003.[10]

Third, I understand the phrase "qualified lawyers" used in questions five and seven to refer to lawyers with the necessary training, skill and experience, who have the resources – support staff, investigators, mitigation specialists, and experts – mandated by the ABA Guidelines. According to the Guidelines, the requirement of "qualified counsel" cannot be decoupled from the provision of necessary resources.[11] However, that is precisely how death penalty representation operates in this state at both the trial and post-conviction stages.

Fourth, the ABA Guidelines were not adopted for the benefit of defense counsel, but to ensure that men and women who may face the death penalty receive "high quality legal representation."[12] They set forth what counsel must do to defend their clients. The

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[5] *See* http://www.cacjweb.org/about/ps13.asp, last visited Apr. 8, 2008.
[6] *See* http://www.nacdl.org/public.nsf/freeform/publicwelcome?opendocument, last visited Apr. 8, 2008.
[7] AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (1989 and 2003 eds.) (hereinafter "ABA Guidelines" or "the Guidelines"). Unless otherwise indicated, all references are to the 2003 edition.
[8] ABA GUIDELINES, Introduction ("[T]he Guidelines…were originally adopted by the ABA House of Delegates in 1989.").
[9] *Id.*
[10] *Id.*
[11] ABA GUIDELINES, Guideline 4.1(A)(1) (The Defense Team and Supporting Services) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.").
[12] *See, e.g.*, ABA GUIDELINES, Guideline 2.1(A) (Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases); Guideline 3.1(A)(1) (Designation of Responsible Agency); Guideline 4.1(B) (The Defense Team and Supporting Services); Guideline 5.1(B)(1)(b) (Qualifications of Defense Counsel); Guideline 5.1(B)(2) (Qualifications of Defense Counsel); Guideline 7.1(A)-(C) (Monitoring: Removal); Guideline 9.1(C) (Funding and Compensation); and Guideline 10.3 (Obligations of Counsel Respecting Workload).

requirements, for example, of two lawyers, a team approach, hourly, market rate compensation for attorneys, and investigators and experts, are intended to serve that singular objective.[13]

From an empirical perspective, it is difficult to obtain the data that would confirm the extent to which capital defense services in California fail to adhere to the ABA Guidelines.[14] But information that is currently available leaves no doubt that most capital clients do not receive "high quality legal representation" at trial or in habeas proceedings. The short answer to the Commission's request for proposals that would improve capital representation in the state is that representation must satisfy the Guidelines. As I will explain, at the trial stage, compliance can only be achieved by overhauling California's county-based mixture of capital defense service providers and, at the habeas stage, by eliminating the gross disparities between the resources available to state agencies and those afforded to appointed counsel.

In July 2007, the American Civil Liberties Union of Northern California (ACLU-NC) sent a request for records, analogous to a Public Records Act Request, to all 58 superior courts seeking written information describing their procedures for the appointment of counsel in death-eligible cases, minimum standards for capital defense counsel, and examples of contracts that are in effect for appointed counsel. Thirty-seven superior courts responded that they had no written information.[15]

The ACLU-NC's request was made four years after the adoption of California Rule of Court Rule 4.117, which established minimum qualifications for the appointment of capital defense counsel.[16] The rule also requires that the superior court and appointed counsel complete and file Judicial Council forms CR-190 and CR-191,[17] verifying that the lawyer is qualified to accept the appointment.

The ACLU-NC followed up with inquiries to public defender and alternate defender offices as well as to conflict panel administrators. Its staff made repeated efforts, by letter, telephone and e-mail, to gather information. The following list highlights the results of the organization's inquiry:

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[13] *Id.* Guideline 4.1 and cmt.

[14] Michael Laurence, the Executive Director of the Habeas Corpus Resource Center, told the Commission that, in California, post-conviction representation is "catastrophic." Summary of CCFAJ Testimony of Michael Laurence, Exec. Dir., HCRC (Laurence Testimony), at 53 (Feb. 20, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/LAPublicHearingMinutes.pdf, last visited Apr. 8, 2008.

[15] Information on file with the ACLU-NC.

[16] The Judicial Council adopted the rule on Nov. 1, 2002. It became effective Jan. 1, 2003. Chief Justice Ronald M. George announced that the rule "recognizes the importance of having statewide rules to guide the trial courts [in death penalty cases]," and that "[t]he minimum standards parallel the efforts of the Supreme Court in providing guidelines for the appointment of counsel in capital appeals and habeas corpus proceedings." News Release Number 80, Statewide Rules Approved for Appointment of Death Penalty Trial Attorneys, Judicial Council of California – Public Information Office (Nov. 1, 2002), *available at http://www.courtinfo.ca.gov/presscenter/newsreleases/NR80-02.HTM*, last visited Feb. 12, 2008.

[17] Both forms are *available at*, last visited Feb. 12, 2008.
http://www.courtinfo.ca.gov/forms/documents/cr190.pdf and
http://www.courtinfo.ca.gov/forms/documents/cr191.pdf

1. Riverside County was among those that failed to respond. Riverside only has 5.3 percent of the state's population, but has accounted for 14.6 percent of the death sentences since 2000.[18]

2. While some agencies and conflict offices replied that they make an effort to follow California Rule of Court Rule 4.117, only a few mentioned the ABA Guidelines.[19]

3. To the extent that public defender offices responded, the majority indicated that they have no written policies regarding counsel qualifications or the assignment of two counsel, and that decisions are made by supervisors on a case-by-case basis.[20]

4. A number of public defender offices rely solely on their budgets to support capital defense, rather than seeking funding through the California Penal Code section 987.9 mechanism.[21] It strains credulity to suggest that their budgets are sufficient to provide each of their capital clients the representation required by the ABA Guidelines.

5. Flat-fee, low bid contracts, which are specifically prohibited by the Guidelines, are becoming the norm for appointed counsel. For example, they are used in the counties of Fresno,[22] Los Angeles,[23] Orange,[24] and San Bernardino.[25]

6. Also, contrary to the Guidelines, and, in keeping with what I will describe as California's presumptive rule, the trend is toward the assignment or appointment of only one attorney to handle these complex cases.[26]

In addition to the substantive deficiencies in Rule 4.117, which I will address, the rule is wholly unenforceable. First, subdivision (g) exempts public defender offices from the rule.[27] Second, the language of subsections (g) and (i)[28] are at best ambiguous as to

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[18] *See California Death Sentences Fact Sheet*, ACLU-NC, *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/California_Death_Sentences_Fact_Sheet.pdf, last visited Feb. 12, 2008.

[19] Only the Private Conflict Counsel in San Diego County replied that it followed the ABA Guidelines in determining which lawyers are qualified for appointment in capital cases (information on file with the ACLU-NC).

[20] Information on file with the ACLU-NC.

[21] *Id*.

[22] SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO POLICY ON SPECIAL CIRCUMSTANCES CASE APPOINTMENTS (Fresno County Policy) (on file with the ACLU-NC).

[23] AMENDMENT TO MEMORANDUM OF UNDERSTANDING REGARDING CENTRAL DISTRICT CAPITAL CASE APPOINTMENTS (Los Angeles County Memorandum) (on file with the ACLU-NC).

[24] SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE PROCEDURES FOR APPOINTMENT OF CONFLICT ATTORNEYS (Orange County Procedures) (May 15, 2007) (on file with the ACLU-NC).

[25] SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO FEE SCHEDULE AGREEMENT FOR CAPITAL/LWOP CASE APPOINTMENTS (San Bernardino County Agreement) (Apr. 5, 1997, revised Jul. 2005) (on file with the ACLU-NC).

[26] *Id.*

[27] California Rules of Court, Rule 4.117(g) provides: "Public defender appointments: When the court appoints the Public Defender under California Penal Code section 987.2, the Public Defender should assign an attorney from that office or agency as lead counsel who meets the qualifications described in (d) or assign an attorney that he or she determines would qualify under (f). If associate counsel is designated, the

whether, when the court appoints the public defender, the judge is required to complete form CR-190, and the assigned defense counsel must complete form CR-191.[29] An informal inquiry of deputy public defenders in one of the largest county offices in the state revealed that none had ever completed a CR-190 declaration. Finally, the forms and orders are not transmitted to the Judicial Council, so there is no mechanism in place to assess, much less, enforce compliance with Rule 4.117.[30]

In sum, the lack of responses, the content of the responses provided to the ACLU-NC, anecdotal information, and my own experience as counsel and as a consultant in death penalty cases lead to the conclusion that, at the trial level, compliance with the Guidelines is the exception, not the rule.[31] I concur with John Philipsborn's assessment: "The often-stated view that California's capital case process is 'better' than that in other states is a myth."[32]

The Larry Lucas case exemplifies much about what is wrong with capital defense at the trial stage in California and what it takes to rectify constitutional errors in habeas proceedings. The case also illustrates the type of representation required by the ABA Guidelines.

In a rare reversal in 2004, the California Supreme Court granted penalty phase relief to Mr. Lucas in the context of state habeas corpus proceedings.[33] Mr. Lucas was represented by the law firm of Cooley Godward Kronish LLP[34] in his automatic appeal and state habeas corpus proceedings. The Cooley firm has about 650 attorneys.[35] Its

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Public Defender should assign and attorney from that office or agency who meets the qualifications described in (e) or assign an attorney he or she determines would qualify under (f)." In recommending adoption of Rule 4.117, the Criminal Law Advisory Committee concluded that "a mandatory rule would not be appropriate" for two reasons. First, "the committee was sensitive to concerns that the courts should have limited involvement in internal agency decisions such as attorney assignments." Report of the California Criminal Law Advisory Committee to the Judicial Council of California (CCLAC Report), at 3 (Aug. 19, 2002) (copy on file with witness). Second, citing Penal Code section 987.2, the committee expressed doubts that a mandatory rule would be within the scope of the Judicial Council's authority. *Id*. & n.2.

[28] California Rules of Court, Rule 4.117(i) provides: "Order appointing counsel: When the court appoints counsel to a capital case, the court must complete *Order Appointing Counsel in Capital Case* (form CR-190), and counsel must complete *Declaration of Counsel for Appointment in Capital Case* (form CR-191)."

[29] The Report of the Criminal Law Advisory Committee strongly suggests that subdivision (i) does not when a public defender office is appointed because Penal Code section 987.2 "does not appear to contemplate any role for the court in determining which attorney handles the case." CCLAC Report, at n.2.

[30] Information reported by Judicial Council staff to the ACLU-NC (on file with the ACLU-NC).

[31] For example, in all cases that resulted in a death sentence in the past two years, the defendant was represented by the public defender or appointed counsel with the exception of one defendant who proceeded to trial pro per. (Database of last two years of death sentences and counsel on file with ACLU-NC.)

[32] Letter of John T. Philipsborn to Gerald F. Uelmen (Philipsborn Letter), at 4 (Feb. 12, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/Phillipsborn.pdf, last visited Apr. 8, 2008.

[33] *In re Lucas*, 33 Cal.4th 682 (2004). The California Supreme Court's reversal rate in capital post-conviction cases is less than five percent. Laurence Testimony, *supra*, note 14, at 54.

[34] At the time of the habeas proceedings and the Supreme Court opinion, the firm's name was Cooley Godward, LLP. It changed when the firm merged with a New York firm in Oct. 2006.

[35] *See* http://www.cooley.com/about/about.aspx, last visited Feb. 12, 2008.

clients are primarily large public and commercial entities.[36] The firm's appellate representation in the Lucas case was entirely pro bono.[37]

The California Supreme Court described the evidence that the Cooley team amassed to prove that Mr. Lucas's counsel performed ineffectively at trial and that counsel's deficiencies prejudiced the outcome of the penalty phase: the live testimony of 18 witnesses, "a large volume of documentary evidence relating to petitioner's trial, his childhood, and his institutionalization as an abandoned and neglected child," and "deposition testimony of 13 additional witnesses."[38] Some ten pages[39] of the Court's opinion are devoted to a detailed exposition of the mitigating evidence that the firm uncovered during its habeas investigation, which the California Supreme Court found should have been developed through "a reasonably adequate investigation" at trial.[40] The firm's case in mitigation mapped the Guidelines. It included the presentation of an "extended, multigenerational [social] history," and the testimony of "experts who are tailored specifically to the needs of the case."[41]

Charles M. Schaible, Special Counsel to the Cooley firm and one of Mr. Lucas's attorneys, provided information about the cost of representing Mr. Lucas in state habeas proceedings from March 1994 through June 2005, when the petition was granted. Cooley attorneys spent 8,236 hours working on the habeas proceedings. The firm's paralegal time amounted to 7,546 hours. At the rates then permitted by the California Supreme Court, the firm's total legal fees were approximately $1 million, which, of course, is substantially less than the total fees would have been at prevailing hourly rates. During its 11 years of work on behalf of Mr. Lucas, the firm spent approximately $328,000 in costs for necessary services such as investigators and expert witnesses.

I note here that between 1997 and 2001, when I recruited major law firms to accept capital habeas cases in state courts on a pro bono basis, I found that law firms' biggest concern was not attorney hours, but out-of-pocket expenses. And, invariably, before agreeing to represent a client, partners wanted to know the impossible: what would it cost the law firm? My practice was to tell the partners that, in addition to attorney and paralegal time, unless the firm was prepared to spend a minimum of $250,000.00, it should not accept a case.

According to Mr. Schaible, "the resources of a major law firm that was willing to undertake this enormous pro bono commitment were necessary to fully investigate and present Mr. Lucas's case."[42] In his view, the law firm's ability to devote thousands of hours and spend hundreds of thousands of dollars was "crucial" to their penalty phase investigation and presentation.[43] The Cooley firm retained

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[36] *Id.*
[37] Information on file with witness.
[38] 33 Cal.4th at 693-94.
[39] *Id*. at 708-18.
[40] *Id*. at 708.
[41] ABA GUIDELINES, Guideline 10.11 and cmt. (The Defense Case Concerning Penalty). *See generally* Guideline 10.4 (The Defense Team); Guideline 10.7 (Investigation) and cmts.
[42] Comments on file with witness.
[43] *Id.*

investigators, mitigation specialists, mental health professionals, two *Strickland* experts,[44] and other expert witnesses at prevailing rates.[45]

By way of illustrating the internal resources on which he and his colleagues were able to draw, Mr. Schaible reported that the firm's vast litigation support services allowed its paralegals to devote thousands of hours to collecting the records that documented Mr. Lucas's life history.[46] Similarly, it was able to rely on its paralegals and associates to perform other critical investigative tasks, often involving cross-country travel, which a solo practitioner or a lawyer at a small firm could not undertake under the present ancillary expense cap.[47] The firm's actual costs were far greater than $300,000.00, because the availability of these internal resources significantly reduced the firm's out-of-pocket expenses.[48]

According to Paul Renne, a partner at the firm and counsel for Mr. Lucas, while the trial court provided Mr. Lucas's appointed lawyers with resources, those expenses were significantly less than the firm was required to spend to prove that counsel performed deficiently and to demonstrate what evidence would have been presented at "a closer approximation of a fair trial."[49]

At the capital habeas stage, rather than 58 counties, each with its own appointment procedures (or lack thereof),[50] we have a statutorily sanctioned, judicially administered system of inequality. A minority of death-sentenced individuals receive representation that most likely complies with the Guidelines, while the majority do not receive such representation in the trial court.

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[44] *See Strickland v. Washingto*n, 466 U.S. 668, 692, 694 (1984) (holding that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution" and establishing a two-part test to make that determination). When habeas counsel present the testimony of an experienced capital defense attorney for purposes of eliciting his or her opinion about the performance of trial counsel, the witness is often referred to as a "*Strickland* expert." In *Lucas*, the California Supreme Court relied upon the testimony of "a supervising attorney for the death penalty unit in the San Francisco Public Defender's office, [who] outlined standards in effect for defense of capital defendants at the time of trial, including a general duty to perform a thorough social history of the accused from various sources well in advance off the penalty phase of the trial." 33 Cal.4th at 703-04, 707-08. *See e.g., Hendricks v. Calderon*, 864 F.Supp. 929 (N.D. Cal. 1994), *aff'd* 70 F.3d 1032 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111 (1996) (testimony of "capital case legal expert" regarding trial counsel's performance admitted in district court); *Siripongs v. Calderon*, 35 F.3d 1308, 1313 (9th Cir. 1994) (relying upon information provided by attorney experts in the form of declarations to conclude than an evidentiary hearing was warranted).

[45] Comments on file with witness.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id*. According to Michael Laurence, there are "dozens of cases in the [HCRC] office alone where less than $20,000.00 was spent at the trial court level to investigate the case." Laurence Testimony, *supra*, note 14, at 55. In his view, "[t]he single characteristic that differentiates "the cases that end up in LWOP and those that end up in death verdicts is the amount of money spent on investigation at the trial court level." *Id*.

[50] Of the 58 counties, 32 have not returned a death sentence in ten years. Since 2000, ten counties produced 80 percent of the state's death judgments. Those ten counties also accounted for 73 percent of death judgments during the years prior to 2000. *See California Death Sentences Fact Sheet*, ACLU-NC, *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/California_Death_Sentences_Fact_Sheet.pdf, last visited Feb. 12, 2008.

At the post-conviction stage, a gross disparity in resources exists between the 63 individuals who are represented by state agencies and the 142 men and women whose cases are handled by appointed counsel.[51] Moreover, insofar as collateral relief for persons sentenced to death is concerned, state proceedings now occupy center stage.[52] Taken together, the Supreme Court's "abuse of the writ," "exhaustion" and "default" doctrines,[53] the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[54] and the Court's interpretation of that statute require that all "possible claims and their factual bases [be] researched and identified" before the inmate's first state post-conviction petition is filed, and that the "first petition adequately set forth all of a state prisoner's colorable grounds for relief."[55] While some provisions of the AEDPA have been interpreted to afford a narrow margin of flexibility in the time constraints and parameters of federal habeas review,[56] they unquestionably telescope the period within which counsel must investigate and file state post-conviction petitions and, perhaps more important, they increase the risk that the client will be executed if a lawyer fails to fully investigate and present all possible meritorious claims in the first state post-conviction proceedings.[57]

II.
THE ABA GUIDELINES ARE PREMISED ON THE PRINCIPLE THAT CAPITAL DEFENSE DIFFERS IN KIND FROM ANY OTHER LEGAL REPRESENTATION

Representation of clients facing the death penalty is *sui generis*. Because "death is different,"[58] the nature of the responsibility and the manner and means by which counsel defend clients facing this ultimate punishment is – as a constitutional proposition — unlike any other kind of representation.[59] This is the Guidelines' defining principle. The black-letter Guidelines repeatedly and consistently employ phrases such as "zealous advocacy in accordance with professional standards" and "high quality legal

[51] Information provided by the California Appellate Project (CAP) (on file with witness).
[52] *See, e.g.*, Letter of Robert D. Bacon to John K. Van de Kamp, Esq., at 2 (Mar. 19, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/Bacon%20Letter.pdf, last visited Apr. 8, 2008.
[53] *See, e.g.*, Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 544-45 (2006); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 (2002); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).
[54] Pub. L. 104-132, 110 Stat. 124 (1996).
[55] *McFarland v. Scott*, 512 U.S. 849, 855, 860 (1994).
[56] For an overview of the federal court cases construing the AEDPA, *see* HERTZ & LEIBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 3.2, at 113-31 (5th ed. 2005).
[57] *See generally*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002).
[58] *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 322 (1976); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion) (stating that ". . .the five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country").
[59] ABA GUIDELINES, Guideline 1.1 cmt. (Objective and Scope of Guidelines) (observing that the "extraordinary and irrevocable nature of the penalty" requires "'extraordinary efforts'" by defense counsel at "every stage of the proceedings").

representation."[60] The commentaries to the black-letter Guidelines not only elaborate on the specific responsibilities imposed by the standards of performance, they explain why these duties are mandatory.[61]

If one begins, as the ABA did, with the premise that defense counsel shoulder unique and extraordinary obligations at each stage of a death penalty case, the specific guidelines – *e.g.*, the mandate that each client be represented by no fewer than two qualified lawyers, the components of the defense team, the requirements for hourly fees at prevailing rates for retained counsel, and for funding of ancillary services – are the logical, reasonable and necessary mechanisms to ensure that counsel can discharge these responsibilities. Similarly, one cannot understand the breadth, depth and implications of California's deficiencies vis-à-vis the ABA Guidelines without a full grasp of "the national standard of practice for the defense of capital cases."[62]

III.
THE ABA GUIDELINES ARE A NATIONAL STANDARD OF PRACTICE THAT APPLY TO ALL STAGES OF CAPITAL PROCEEDINGS

Based upon decisions of the United States and the California Supreme Courts, the ABA Guidelines now carry the weight of constitutional authority. In *Wiggins v. Smith,*[63] the United States Supreme Court characterized the ABA Guidelines as "the standards for capital defense work."[64] The following year, the California Supreme Court relied extensively on *Wiggins*, acknowledging that the ABA Guidelines are the "'guides to determining what is reasonable'" and the "'well-defined norms'" with regard to trial counsel's performance.[65] In *Rompilla v. Beard,*[66] the U.S. Supreme Court cited the ABA Standards for Criminal Justice and the ABA Guidelines as the measures by which it assessed trial counsel's penalty phase performance and found it to have been constitutionally deficient. The Court has also pointed to the Commentary to the ABA Guidelines as authority for the standard of practice.[67]

In the view of the ABA, "[u]nless legal representation *at each stage* of a capital case reflects current standards of practice, there is an unacceptable 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' Accordingly, any jurisdiction wishing to impose a death sentence must *at minimum*

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[60] *See, e.g.*, ABA GUIDELINES, Guideline 2.1(C); Guideline 3.1(A)(1); Guideline 4.1(B); Guideline 5.1(B)(1)(b); Guideline 5.1(B)(2); Guideline 7.1(A)-(C); Guideline 9.1(C); and Guideline 10.3.
[61] The black-letter Guidelines and the commentaries describe counsel's obligations and explain why those "duties and functions [are] definably different from those of counsel in ordinary criminal cases." ABA GUIDELINES, Guideline 1.1 cmt. (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-1.2(c), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993)).
[62] ABA GUIDELINES, Guideline 1.1(A); *See also Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 & nn.6 & 7 (2005); *In re Lucas*, 33 Cal.4th at 723.
[63] *Wiggins v. Smith*, 539 U.S. at 524.
[64] *Id.*
[65] *In re Lucas*, 33 Cal.4th at 723 (quoting *Wiggins v. Smith*, 539 U.S. at 523, 524); *Rompilla v. Beard*, 545 U.S. 374, 387 & nn.6 & 7.
[66] *Rompilla v. Beard*, 545 U.S. at 387 & nn.6 & 7.
[67] *See Florida v. Nixon*, 543 U.S. 175, 191 & n.6 (2004).

provide representation that comports with these Guidelines."[68] The ABA Guidelines "set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence."[69] They are "*not aspirational"* but instead "embody the current consensus about what is required to provide effective defense representation in capital cases."[70] The word "should," which is employed throughout the ABA Guidelines, "is used as a mandatory term."[71] The Guidelines "apply from the moment the client is taken into custody" and govern appointment and performance of counsel at every stage at which death is a possible outcome.[72]

At the risk of precipitating a debate about whether the ABA Guidelines carry the force of federal constitutional authority with regard to state habeas review, there are two points to be made. First, to the extent the United States Supreme Court's decision in *Murray v. Giarratano,* 492 U.S. 1 (1989), has been read to hold that petitioners do not have the right to the assistance of counsel at the capital state post-conviction stage, and, therefore, no right to effective representation in these proceedings, the case was wrongly decided, cannot stand in light of subsequent Supreme Court opinions, and should be overruled.[73] Second, and more important in the context of the Commission's inquiry, California statutory authority and judicial precedent strongly support the view that the right to effective representation in this state's capital habeas corpus proceedings is protected under the Fourteenth Amendment.[74]

According to the California Supreme Court, the "state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus."[75] While there is no state constitutional right to the appointment of

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[68] ABA GUIDELINES, Guideline 1.1 cmt. (emphasis added) (quoting *Lockett v. Ohio,* 438 U.S. 586, 605 (1978)).

[69] *Id.* Guideline 1.1(A).

[70] *Id.* Guideline 1.1 (emphasis added) (*see* History of Guideline). *See also Hamblin v. Mitchell,* 354 F.3d 482, 487 (6th Cir. 2003) ("The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.* They are the same type of longstanding norms referred to in *Strickland* in 1984. . .").

[71] *Id.* Guideline 1.1 (*see* Definitional Notes for Guideline 1.1, note 1); *See, e.g*., Guideline 2.1 (A) ("Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines. . ."); Guideline 4.1(A)(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."); Guideline 9.1(B) ("Counsel 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.").

[72] ABA GUIDELINES, Guideline 1.1(B).

[73] *See generally*, Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in Capital State Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006). The California Supreme Court is of the view that the federal constitution does not guarantee a right to counsel in capital habeas proceedings in state court. *See In re Barnett*, 31 Cal.4th 466, 474-75 (2003).

[74] *See Hicks v. Oklahoma*, 447 U.S. 343 (1980) (holding that a State cannot, without running afoul of the Fourteenth Amendment, provide its citizens a fundamental right such as the right to petition for habeas corpus relief, and then deprive them of that right in an arbitrary manner).

[75] *People v. Duvall,* 9 Cal.4th 464, 474 (1995) (citing CAL. CONST., art. I, § 11); *In re Clark*, 5 Cal.4th 750, 764 & n.2 (1993). "Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion." CAL. CONST., art I, § 11. California Penal Code section 1473(a) provides: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

counsel for capital post-conviction review,[76] under California statutory law, a capital defendant has the right to appointment of counsel for state collateral proceedings.[77] The state supreme court agrees that the appointment process "promotes the state's interest in the fair and efficient administration of justice and, at the same time, *protects the interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present* [] *their habeas corpus claims*."[78] The Court's rules and policies require that appointed counsel "must demonstrate the commitment, knowledge, and skills necessary to represent the inmate *competently*," and that appointed counsel are "charged with the *duty* to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus."[79]

The reasons that led the U.S. Supreme Court in *Wiggins* and *Rompilla*, and the California Supreme Court in *Lucas* to acknowledge that the ABA Guidelines are the "'guides to determining what is reasonable'" and the "'well-defined norms'" for trial counsel's performance apply equally to the responsibilities of lawyers who represent clients in capital post-conviction proceedings.[80]

The Commission should also take note that, with increasing frequency and consistent with the holdings in *Wiggins* and *Rompilla*, state and federal appellate courts across the country employ the ABA Guidelines as the "the standards for capital defense work"[81] against which trial counsel's performance is measured.[82]

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[76] *See, e.g., In re Barnett*, 31 Cal.4th at 475*; In re Sanders*, 21 Cal.4th 697, 717 (1999)*; In re Anderson*, 69 Cal.2d 613, 633 (1968).

[77] California Government Code section 68662 provides: "The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state post-conviction proceedings." *See In re Sanders*, 21 Cal.4th at 717-19 (explaining that a "capital defendant's right, under state law, to appointment of counsel for state collateral proceedings" is based upon: "(i) *In re Anderson*, 69 Cal.2d 613, (ii) this court's own Internal Operating Practices, (iii) policy 3 of the Supreme Court Policies, and now (iv) Government Code section 68662").

[78] *In re Barnett*, 31 Cal.4th at 475 (emphasis added).

[79] *Id*. at 475 n.5 (citations and quotations omitted; emphasis added).

[80] *Wiggins v. Smith*, 539 U.S. at 524.

[81] *Id.* at 523.

[82] A partial list of opinions citing the ABA Guidelines can be downloaded from the ABA Death Penalty Representation website, *available at* http://www.probono.net/deathpenalty/, last visited, Feb. 12, 2008. For example, in *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007), the Seventh Circuit relied upon Guideline 11.4.1(C) (1989 ed.) for its determination that trial counsel in an Indiana capital case unreasonably failed to "investigate and present mitigation evidence on [the defendant's] mental state" at the time of the murder. *Id*. at 895-96 & n.1. The Third Circuit, in *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006), discussed the ABA Guidelines pertaining to "independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial." *Id*. at 417-18. Quoting *Wiggins*, the case also concluded that the trial attorney had "'abandoned their investigation of [Outten's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources.'" *Id.* at 418 (internal citation omitted). In federal habeas proceedings, the Tenth Circuit reversed the Oklahoma death sentence of Glenn Douglas Anderson, finding that "trial counsel simply did not undertake an investigation into potential evidence in mitigation sufficient to satisfy the prevailing norms in the profession as set out in the 1989 or 2003 Guidelines." *Anderson v. Sirmons*, 476 F.3d 1131, 1145 (10th Cir. 2007). The South Carolina Supreme Court reversed Joseph Lee Ard's capital conviction and death sentence based upon trial counsel's failure to investigate and challenge the prosecution's gunshot residue evidence. *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). In reaching its decision, the state supreme court quoted from the ABA Guidelines' requirement that counsel "'conduct thorough and independent investigations relating to the issues of both guilt and penalty.'" *Id*. at 597 (internal citation omitted).

IV.
LEGAL REPRESENTATION PLAN AND INDEPENDENT APPOINTING AUTHORITY

A. The ABA Guidelines

ABA Guideline 2.1 requires that each capital punishment jurisdiction "adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines. . ."[83] By "jurisdiction," the ABA means a state-wide system because such "organization and funding can best ameliorate locate disparities in resources and quality of representation, and insulate the administration of defense services from local political pressures."[84]

The plan must be structured "to ensure" that capital defense counsel can represent their clients "free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards."[85] According to the Guidelines, the agency or agencies responsible for selection of defense counsel, at all stages, shall not be the judiciary or elected officials.[86]

B. California Does Not Have a Legal Representation Plan

In California, there is no "system" for appointment of capital defense counsel at the trial level. The appointment process in the state's 58 counties can best be described as a patchwork quilt of public and alternate public defender offices, conflict offices, contract firms, a handful of county agencies that administer appointments but do not provide direct services, lawyers who have been approved by judges or committees to accept capital appointments, and ad hoc appointments by the local bench. Rather than a hallmark of the representation required by the ABA Guidelines, "independence" exists only in relative terms, depending upon political and financial circumstances specific to each county. This unsystematic approach leads to a disturbingly varied range of representation.[87]

The terms of Penal Code sections 987(d)[88] and 987.9[89] also run afoul of the Guidelines' requirement for independence in the provision of capital defense services

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[83] ABA GUIDELINES, Guideline 2.1(A).
[84] *Id.* Guideline 2.1 cmt.
[85] *Id*. Guideline 2.1(C); *See also* ABA GUIDELINES, Guideline 2.1 cmt. (stating that defense lawyers – whether public defenders or appointed counsel – must "'be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. . . . [i.e., with] the same freedom of action as the lawyer whom the person with sufficient means can afford to retain.'") (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, STANDARD 5-1.3 cmt. (3d ed. 1992)).
[86] ABA GUIDELINES, Guideline 3.1(B).
[87] *See* Philipsborn Letter, *supra*, note 32; Letter of John Philipsborn to Gerald F. Uelmen and Chris Boscia (Philipsborn Addendum), at 4-5 (Feb. 22, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/Phillipsborn%20addendum.pdf, last visited Apr. 8, 2008.
[88] California Penal Code section 987(d) permits the superior court to appoint co-counsel in capital cases "upon a written request of the first attorney appointed," but only when the court "is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation."

because they give the judicial branch veto power over the appointment of second counsel and ancillary expenses. I will elaborate on the conflict between these statutes and the Guidelines when I discuss other sections of the Guidelines.

At the automatic appeal and habeas stages, California has a state-wide system because death-sentenced individuals are represented by private attorneys appointed by the California Supreme Court[90] or one of two state agencies, the Office of the State Public Defender ("OSPD")[91] or the Habeas Corpus Resource Center ("HCRC").[92] Through its policies and standards, the Court is solely responsible for counsel qualifications, appointment, retention, and compensation.[93] In this critical regard, the state lacks an independent appointing authority. Death-sentenced individuals whose counsel are employed by one of the state agencies arguably have independence in their day-to-day management of the cases akin to that of lawyers in county public defender offices. However, the fact that HCRC is an agency of the judicial branch violates the letter of Guideline 3.1.[94]

V.
THE DEFENSE TEAM MUST INCLUDE "NO FEWER THAN TWO" "QUALIFIED" COUNSEL

A. The Trial Stage

ABA Guideline 5.1 lists the minimum qualifications for lead and second counsel in capital cases.[95] Similar to Rule 4.117, the first edition of the ABA Guidelines also emphasized quantitative measures of attorney experience such as years in practice and number of jury trials as the basis for qualifying counsel to represent indigent clients in death penalty cases.[96] The 2003 edition of the Guidelines shifted the focus to a qualitative assessment of defense counsel's skill level. Rule 4.117 also includes one qualitative measure.[97] However, the rule has no provision for determining how or even whether counties are engaging in an assessment of counsel's "proficiency, diligence and quality of representation."[98]

The revised edition of Guideline 5.1 focuses on defense counsel's ability to provide a "high quality of legal representation," rather than the quantitative measures of an attorney's experience such as years in practice or number of jury trials.[99] The ABA

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[89] California Penal Code section 987.9 permits counsel for an indigent capital defendant to apply to a judge, other than the trial judge, for funds that "are reasonably necessary for the preparation or presentation of the defense."
[90] *See* CAL. GOV. CODE § 68662.
[91] *See* CAL. GOV. CODE §§ 15400-15404, 15420-15425; CAL. PENAL CODE §§ 1026.5, 1240.
[92] CAL. GOV. CODE §§ 68660-68665. The HCRC was created as an agency in the judicial branch of the State of California, effective Jan. 1, 1998, by Senate Bill (SB) 513 (Ch. 869, 1998 Stats.).
[93] *See* CAL. GOV. CODE § 68665.
[94] ABA GUIDELINES, Guideline 3.1.
[95] *Id.* Guideline 5.1 (Qualifications of Defense Counsel).
[96] *Id.* Guideline 5.1 and cmt. (*see also* History of Guideline).
[97] CAL. RULES OF COURT R. 4.117(d)(7) and (e)(7).
[98] *Id.*
[99] ABA GUIDELINE 5.1 and cmt.

Guidelines state that quantitative measures of experience are not a sufficient basis to determine an attorney's ability to provide high quality legal representation in a death penalty case.[100] For example, the commentary to ABA Guideline 5.1 notes that an attorney with substantial prior experience in the representation of death penalty cases may have a past performance history that does not represent the level of proficiency and commitment necessary for the high quality of legal representation of a capital client.[101] Conversely, attorneys who do not possess substantial prior experience may provide high quality legal representation in death penalty cases because they have specialized training or experience in the field or substantial experience in civil practice.[102]

The adoption of a state-wide rule concerning trial level capital counsel qualifications in 2003, was a theoretical step forward. However, without a mechanism for monitoring whether counties are in compliance, much less enforcing compliance, the utility of the rule is questionable. For example, the two attorneys who have a contract for indigent defense in San Luis Obispo County have no standards or procedures for the appointment of counsel in death penalty cases.[103] They assign lawyers based upon a "best fit." analysis.[104] Requests for second counsel are made by application under Penal Code section 987(d). The office has one in-house investigator for its all is indigent defense cases. The lawyers rely upon section 987.9 to obtain expenses for their capital cases. The attorneys did not work with mitigation specialists or penalty phase investigators in the five or six capital cases that they handled over the past 20 years.[105]

The lack of consistency regarding the minimum qualifications for the appointment of defense counsel in each of the 58 California counties is evident from the materials that were submitted to the ACLU-NC. There is no oversight of public agency practices. While some contract offices purport to be guided by Rule 4.117, others resemble Imperial County, which has no standard for number of years in practice, requires that lead counsel complete only five felony trials, including one capital, and that that associate counsel need only complete four felony trials, one involving a murder charge.[106]

California's presumption against the prompt appointment of two qualified counsel squarely conflicts with ABA Guidelines 4.1, 5.1, and 10.4. This presumption goes beyond the deficiency in Rule 4.117 and is embedded in California Penal Code section 987(d), as well as California Supreme Court opinions. It is perpetuated by internal policies in many county defender agencies and by the contractual terms for private counsel in most counties.[107] An informal survey of some of the lawyers at the state appellate and habeas agencies suggests that the number of cases in which there was only one counsel at trial is on the rise.[108]

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[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Correspondence on file with the ACLU-NC.
[104] *Id.*
[105] *Id. See* Philipsborn Letter, *supra*, note 32, for a description capital representation under the contract that has been given to one individual in Tulare County.
[106] SUPERIOR COURT OF CALIFORNIA, COUNTY OF IMPERIAL, ADMINISTRATIVE POLICY MEMORANDUM, at 1 (May 22, 2005) (on file with the ACLU-NC).
[107] *See, e.g.*, Philipsborn Letter, *supra*, note 32, at 6-7.
[108] Information on file with witness. *See also* Philipsborn Letter, *supra*, note 32, at 6.

California Penal Code section 987(d) permits the appointment of second counsel only after the first attorney files an affidavit that details why the appointment is "necessary to provide the defendant with effective representation."[109] In *Keenan v. Superior Court*, [110] the state supreme court held that appointment of second chair "is not an absolute right," but may be based upon a showing "of a genuine need."[111] Subsequent decisions have taken a very narrow view of what constitutes "a genuine need."[112] For example, contrary to the Guidelines, the California Supreme Court has held that, even if two counsel have been appointed, there is no authority for the proposition that a capital defendant has the right to the courtroom presence of both attorneys.[113]

With regard to county agencies, the dominant view of county defender agency administrators is that they should be permitted unfettered discretion with regard to the number and the timing of the assignment of lawyers within their offices. In practice,[114] the following frequently occurs:

1. The second lawyer is not assigned until after death is formally noticed.

2. If approved, the second lawyer is limited to performing discrete assignments such as drafting pretrial motions.

3. The lawyers are carrying caseloads that prevent one or both from devoting adequate time to the duties mandated by the Guidelines.[115]

4. Despite the disparity of resources between county defender agencies and the private bar, many defender administrators refuse to support private counsel's efforts to require that counties appoint two lawyers in every death-eligible case.

Understandably, county agencies value the internal discretion that they exercise in assigning lawyers within their agencies and managing the allocation of office resources. There is, however, a fine line between resisting oversight in the name of independence and shielding management decisions, which are driven by budgetary considerations and are adverse to the clients' interests. The ABA explicitly advocates "the imperative of a systemic approach," which recognizes, for example, that "[a]lthough defender offices generally have the experience and dedication to provide high quality legal representation in capital cases, they are commonly overworked and inadequately funded."[116] For this reason, the Guidelines "detail the elements of quality representation" and "mandate the

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[109] CAL. PENAL CODE § 987(d).
[110] 31 Cal.3d 424 (1982).
[111] *Id.* at 429, 435.
[112] *See, e.g.*, *People v. Roldan*, 35 Cal.4th 646, 686, 687 (2005); *People v. Staten*, 24 Cal.4th 434, 447 (2000); *People v. Lucky*, 45 Cal.3d 259, 279-80 (1988); *People v. Burgener*, 41 Cal.3d 505, 524 (1986).
[113] *See People v. Montiel*, 5 Cal.4th 877, 906-07, 906 n.5 (1993).
[114] Information based upon the witness's familiarity with public defender practices and provided to the witness by members of public defender offices.
[115] *See* ABA Guidelines, Guideline 6.1 (Workload) (requiring the implementation of "effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation").
[116] *Id*. Guideline 1.1 cmt.

systematic provision of resources" irrespective of the circumstances of counsel's employment or appointment.[117]

During the public comment period prior to the adoption of Rule 4.117, California Attorneys for Criminal Justice (CACJ)[118] submitted a letter to the Judicial Council requesting that the proposed rule be revised to comply with the ABA Guidelines.[119] For example, CACJ objected that the proposed rule did not require the appointment of two trial counsel in all potentially capital cases from time of detention forward.[120] The Criminal Law Advisory Committee's response to this recommendation was that a "[r]ule requiring two counsel would be inconsistent with [the] statute allowing[the] court to appoint one counsel."[121]

Superior courts need only comply with Rule 4.117 "[i]n cases in which the death penalty is sought."[122] The California Law Advisory Committee Report, acknowledged, that, often, prosecutors do not notice a case as capital at arraignment.[123] It assumed that, "as a practical matter, the rule would apply to all special circumstances cases, unless there has been an explicit statement by the District Attorney that the death penalty will not be sought."[124] The Committee made this assumption based upon the assertion – unsubstantiated in its report – that this was "the current practice in counties with local standards."[125] Whatever the practices may have been in the few counties that had standards in 2003, there is no empirical basis upon which to conclude that the rule is presently applied at arraignment in all potentially capital cases.[126] The language of subdivision (b) therefore allows a death-eligible defendant to be represented by *one attorney who does not meet the rule's minimum for appointment* for an extended period of time, during which, according to the Guidelines, a full defense team should have been investigating the case with the objective, *inter alia,* of persuading the prosecution not to seek death.[127]

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[117] *See People v. Montiel*, 5 Cal.4th at 906-07, 906 n.5.
[118] CACJ members consist of private and public defense attorneys who routinely furnish the Judicial Council and the California Supreme Court with recommendations concerning proposed rules effecting criminal cases. *See generally*, http://www.cacjweb.org/about/ps13.asp. For CACJ policy statements on funding for court-appointed counsel and the ABA Guidelines, *see http://www.cacjweb.org/about/ps1.asp* and *http://www.cacjweb.org/about/ps13.asp*, both last visited Feb. 12, 2008.
[119] Letter on file with witness.
[120] *Id.*
[121] CCLAC Report, *supra*, note 27, at 31.
[122] CAL. R. CT. 4.117(b).
[123] CCLAC Report, *supra*, note 27, at 3.
[124] *Id.*
[125] *Id.*
[126] *See, e.g.,* Philipsborn Addendum, *supra*, note 87, at 5.
[127] ABA GUIDELINES, Guideline 1.1 (*see* History of Guideline) (recognizing that the period between arrest and a death notice "is often critically important," the ABA revised the 2003 edition of the Guidelines making them applicable from detention forward. Because "effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty," "it is imperative" that the defense team be mobilized and begin its investigation "as early as possible.").

B. The Habeas Stage

In post-conviction, the problematic aspects of California Rule of Court Rule 8.605, which governs counsel qualifications, are the inadequacy of the quantitative standards – too few years of experience and too little experience in complex, serious felony cases – and the fact that these standards are administered by the California Supreme Court. The latter runs afoul of the Guidelines' independent appointing authority requirement.[128]

The Commission would be well-served to inquire of the state agencies – CAP, OSPD, and HCRC – about cases in which appointed counsel are unable to provide minimally competent habeas representation, either because they are fundamentally unqualified to represent a capital client or have simply failed to discharge their responsibilities. In these situations, CAP intervenes in an attempt to carry counsel through the filing of the habeas petition or requests that the Supreme Court relieve the attorneys. If counsel is relieved, OSP, or, more typically, HCRC may be appointed to undertake emergency surgery.[129]

The Habeas Corpus Resource Center does its upmost to comply with the ABA Guidelines, and, routinely, assigns two attorneys to each case.[130] However, there are currently 106 individuals represented by appointed counsel have only one attorney handling their state habeas proceedings.[131] This situation is intolerable under the Guidelines.

VI.
THE DEFENSE TEAM AND NECESSSARY, ANCILLARY EXPENSES

ABA Guideline 10.7(A) provides that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."[132] The Commentary to Guideline 10.7 explains that a thorough guilt phase investigation must be done as to the following: the charging documents; all potential witnesses; information and evidence possessed by the police and prosecution; physical evidence; and the crime scene.[133]

As for the penalty phase, "[c]ounsel's duty to investigate and present mitigating evidence is now well established."[134] Thus, "counsel at *every stage of the case* have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation."[135] The California Supreme Court has held that "established norms prevailing in California [] directed []

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[128] ABA GUIDELINES, Guideline 3.1(C)(2).
[129] Information provided by CAP (on file with witness).
[130] Laurence Testimony, *supra*, note 14, at 56.
[131] Information provided by CAP (on file with the witness).
[132] ABA GUIDELINES, Guideline 10.7(A).
[133] ABA GUIDELINES, Guideline 10.7 cmt.
[134] *Id.*
[135] *Id.* Guideline 10.11(A) (emphasis added).

counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history."[136]

In *Rompilla*, the U.S. Supreme Court reiterated its holding in *Wiggins* that the ABA Guidelines define "the obligations of defense counsel in death penalty cases" in the context of counsel's duty "to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[137] Counsel is required to undertake "a multi-generational investigation extending as far as possible vertically and horizontally."[138]

To full these duties, ABA Guideline 4.1(A) directs that counsel assemble a defense team that will enable them to "provide high quality legal representation." The defense team must include "an investigator [] and a mitigation specialist," as well as "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."[139] Moreover, capital counsel must be afforded "the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings."[140] Importantly, all members of the defense team must be fully compensated and funded by the State.[141]

"*Quality representation* in both state and federal [habeas proceedings] is *essential* if legally flawed convictions and sentences are to be corrected. [] Counsel's obligations in state collateral review proceedings are demanding. Counsel must be prepared to thoroughly *reinvestigate the entire case* to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law."[142]

"[Habeas corpus] counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."[143] Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. The former involves an examination of the facts underlying the conviction and sentence, as

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[136] *In re Lucas*, 33 Cal.4th at 725 (citing ABA GUIDELINES); *see also In re Scott*, 29 Cal.4th 783, 831 (2003) (Kennard, J., concurring & dissenting) (explaining that "a reasonably thorough life history investigation is an essential component of defense preparation in any death penalty case"). During the Rule 4.177 comment period, CACJ requested that subdivision (i) of Rule 4.117 be amended to include a requirement for the investigation and development of mitigation evidence and sustained client communications consistent with the requirements of the ABA Guidelines (1989 ed.). The Criminal Law Advisory Committee rejected this proposal because the "[r]ule is not designed to set minimum standards for effective assistance of counsel; rather it is to assist [the] court in the administrative function of appointing counsel." CCLAC Report, *supra*, note 27, at 35.

[137] *Rompilla v. Beard*, 545 U.S. at 387 n.7 (quoting ABA GUIDELINES (1989 ed.), Guideline 11.4.1.C. (original emphasis)).

[138] ABA GUIDELINES, Guideline 10.7 cmt. This guideline is based upon Guideline 11.4.1 in the 1989 edition.

[139] *Id*. Guideline 4.1(A)(1) & (A)(2).

[140] *Id*. Guideline 4.1(B).

[141] *Id*. Guideline 9.1.

[142] *Id*. Guideline 1.1 cmt. (emphasis added).

[143] *Id*. Guideline 10.15.1 cmt. (Duties of Post-Conviction Counsel).

well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. The latter entails the development a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.[144]

VI.
LOW-BID, FLAT FEE CONTRACTS, WHICH ARE BECOMING THE NORM IN CALIFORNIA, VIOLATE THE GUIDELINES

A. The ABA Guidelines

The ABA Guidelines are emphatic that "[f]lat fees caps on compensation, and lump-sun contracts are improper in death penalty cases"[145] because "they impact adversely upon vigorous defense."[146]

ABA Guideline 10.1 requires that appointed counsel be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in and out of court."[147] These provisions flow ineluctably from the rules of professional responsibility, requiring that an attorney zealously represent his client and not participate in any fee or expense arrangement that creates a conflict of interest between the lawyer's own financial interest and his duty of loyalty to the client.[148] In California, none of the appointment models at the trial and habeas stages satisfies the Guidelines.

B. The Trial Stage

An important, bright spot in the California trial picture is the financial status of lawyers employed by public defender and alternate defender offices. Parity with District Attorney Offices is increasingly the norm, which satisfies ABA Guideline 9.1.

On the other hand, the following features, which are common to many of the flat-fee, low bid county contracts run afoul of the Guidelines:[149]

1. Flat fee categories are set by judges and approved by them in conflict with the Guidelines' independent appointing authority requirement.[150]

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[144] *Id.*
[145] *Id.* Guideline 9.1(B)(1).
[146] *Id.* Guideline 10.1 cmt. (Establishment of Performance Standards).
[147] *Id.* Guideline 9.1(B)(3).
[148] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3; MODEL RULES OF PROF'L CONDUCT R. 1.7.
[149] *See also*, Philipsborn Letter, *supra*, note 32, at 6.
[150] ABA GUIDELINES, Guideline 3.1(C)(2). *See, e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 2; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 4, 6-7.

2. Counsel must provide a flat fee bid within days of the tentative appointment.[151] It is unreasonable and unrealistic to expect that, even an experienced lawyer, can assess a capital case within a few weeks of the defendant's arrest. As every prosecutor on the Commission knows, during this period, discovery with regard to the alleged crime is limited. Discovery with regard to potential evidence in aggravation, except for that obviously related to the charged offense, is all but non-existent, and counsel have no idea how many hours it will take to develop the case in mitigation.

3. If counsel bids at the lowest fee category, "that attorney shall be appointed."[152] If counsel's flat fee bid is rejected, the lawyer has the option of accepting the case at the lower flat fee offered by the judicial panel or the administrator. If the attorney declines so, his or her name moves down the list.[153] Predictably, the next attorney on the list will find out, before bidding, what fee the judicial panel or the court is willing to accept. This system rewards lawyers who underbid and punishes those who attempt to fairly assess the complexity and demands of a case.

4. Incremental payments of the flat fee[154] create a conflict of interest because the longer the lawyer works – not on an hourly basis but according to a list of benchmarks – determines what counsel earns. For example, settlement of the case may be – and very often is – in the client's best interests. However, the attorney's financial interest may favor late resolution or trial.

5. The presumption against the appointment of second counsel is clear from the contractual terms.[155] Appointment of second counsel is prohibited until the district attorney files a death penalty notice.[156]

6. Second counsel's flat fee is limited to a fraction, typically 15 percent, of the flat fee approved for lead counsel, and only for purposes of performing specific tasks.[157]

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[151] *See e.g.*, FRESNO COUNTY AGREEMENT, *supra*, note 22, at 4; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 8. Both county agreements, similar to others, give counsel 15 hours to evaluate a case prior to making a bid. *Id.* Lawyers seeking appointment in Los Angeles must submit their bid within ten court days of appointment. LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 4.

[152] *See, e.g.*, SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 8; LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 15.

[153] In Fresno County, the attorney's name is moved to the end of the appointment list. *See, e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 4. In Los Angeles and Bernardino counties, the attorney's name is moved to third position on the list. LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 16; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 8. In the latter county, a lawyer's refusal to accept an appointment is referred to as a "strike." *Id*. at 3.

[154] *See, e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 6; LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 20-21; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 10-11.

[155] *See, e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 5; LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 17-18; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 9.

[156] *See, e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 5; LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 23; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 9.

[157] LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 23; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 8.

7. California Penal Code section 987.9 expenses are calculated initially as a percentage of the flat fee, for example 20 percent,[158] or a maximum of $25,000 for the highest category case.[159] Counsel may make application for additional funds. These sums bear no rational relation to the actual costs required to defend a capital case.

8. The contracts often provide that "associate counsel fees shall include any expenses and costs."[160] Inasmuch as associate counsel's role is increasingly limited to the preparation of the complex legal pleadings that must be filed in capital cases, paralegal support is vital. However, most private criminal defense lawyers are in solo or small firm practices and cannot afford paralegal services, which are considerably more costly than secretarial support. By contrast, paralegals are on staff in most county agencies and work routinely on death penalty cases.

9. The contracts include a "pro bono publico services" section, which conflicts with the Guidelines prohibit contracts that explicitly compensate lawyers below prevailing hourly rates."[161] These contracts provides that, by accepting the appointment, counsel agrees that the fees "constitute reasonable compensation for a competent and quality defense for the defendant and for the services required."[162] The same clause specifies that if counsel's time or services, when compared to the total contract compensation, "would suggest an hourly rate for such services below the market rate," counsel agree that the services were provided pro bono.[163]

Most, if not all contracts, allow for exceptions to the provisions that violate the Guidelines.[164] Empirically, we know little about the frequency with which exceptions are made. Anecdotally, exceptions not only appear to be unusual, but lawyers report a reluctance to seek additional attorney fees or ancillary expenses for fear that it will jeopardize the likelihood of future appointments.

The financial security guaranteed to capital defenders in the public sector in California contrasts dramatically with the enormous financial risk private counsel assume and the financial disaster they often encounter if they accept a trial or, as I will discuss, habeas appointment *and* attempt to provide the "high qualify representation" demanded by the Guidelines. The adoption by many counties of a flat fee, low bid contract appointment system not only means that counsel who accept these cases are doing so under terms that deny their clients adequate resources, the system has led many qualified lawyers to remove themselves from the panels. Even during the years when hourly

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[158] *See e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 6.
[159] *See, e.g.*, LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 24.
[160] *See e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 5.
[161] ABA GUIDELINES, Guideline 9.1(B).
[162] *See, e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 9; LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 26; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 14-15.
[163] *See, e.g.*, FRESNO COUNTY POLICY, *supra*, note 22, at 9; LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 26; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 14-15.
[164] For example, San Bernardino Country permits lead counsel to apply for fees for second counsel that exceed the 15 percent limit. SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 8. The Fresno County contract permits counsel to seek "additional compensation beyond the category level." FRESNO COUNTY POLICY, *supra*, note 22, at 6-7. Lawyers in Los Angeles County can apply for an increase in the initial section 987.9 allocation. LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 21.

compensation was the norm, and there was routine appointment of second chair and reasonable availability of 987.9 funding, "high quality" capital defense counsel were handling cases at rates far below those of retained counsel.

As a result of the adoption of flat fee, low bid contracts, a sizeable pool of experienced trial attorneys no longer accept appointments. Some simply reviewed the county policy or memorandum of understanding and recognized that they could not provide adequate representation because they could not afford the size of the pro bono contribution in fees and expenses. Others accepted one case and learned through experience that it was financially prohibitive to represent clients effectively under the terms of the contract. The increase in federal capital prosecutions – the opportunity to work at a higher hourly fee with second chair, and with more reasonable rates for investigators and expert witnesses – has drawn many to federal capital representation.[165]

Jack Earley of Newport Beach, one of the state's most experienced capital trial attorneys, no longer accepts county appointments.[166] He described the Orange County contract system as one in which requests for second counsel are made to the contract administrator whose view is that second chair need not have a seat in the courtroom, but can be hired to do piecework. Requests for ancillary expenses, which go first to the administrator, are cut so routinely and access to judicial review is so difficult that lawyers often make applications – knowing the applications will be denied or decreased – with the view that they are simply covering themselves for appellate or habeas review.[167]

Marcia Morrissey[168] of Los Angeles, another one of the state's most experienced capital trial attorneys, stopped accepting death penalty cases in her county when the flat fee contract system was instituted. She stated that the move from hourly compensation was done purely to save money.[169] With regard to expenses, Ms. Morrissey said that because the county's hourly rate for guilt phase investigators was and still is $28.00, to hire someone competent, attorneys have to pay the difference between the county rate and a reasonable hourly fee. She cited the incremental payment system as another example of the way in which the Los Angeles flat fee contract system creates a conflict between the lawyer's financial interests and the client's rights. For example, counsel

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[165] For example, a person charged in federal court with any death-eligible crime is entitled to the appointment of two attorneys. *See* 18 U.S.C. § 3605. More than two attorneys can be appointed. *See* 21 U.S.C. § 848(q)(4). Compensation is made on an hourly basis with fees not to exceed $170.00. This rate, which applies to capital trials and capital post-conviction proceedings, was set by Congress under the Consolidated Appropriations Act of 2008. James C. Duff, MEMORANDUM RE: IMPLEMENTATION OF HOURLY RATE INCREASES FOR CRIMINAL JUSTICE ACT PANEL ATTORNEYS, at 1 (Dec. 28, 2007) (on file with witness).

[166] Comments on file with witness.

[167] *See also*, Philipsborn Letter, *supra*, note 32, at 3 (regarding the Tulare contract system).

[168] *Id.*

[169] For example, San Bernardino County pays contract counsel an additional flat fee of $2,500.00 if the court orders a competency hearing. SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 14. This figure has no rational relationship to the complexity of competency proceedings or the central role that the issue of competency often play in a death penalty case. *See e.g.*, John T. Philipsborn, *Dealing with Experts on Competence to Stand Trial (Part One)*, THE CHAMPION, at 12 (Jan./Feb. 2008); John T. Philipsborn, *Dealing with Experts on Competence to Stand Trial: Suggestions and Approaches (Part Two)*, THE CHAMPION, at 42 (Mar. 2008).

who go through preliminary examination and those who waive preliminary examination are both paid the same lump sum after reaching its post-hearing procedural benchmark.[170]

Christopher Plourd,[171] a defense attorney with more than 20 years of capital defense experience, agreed to co-counsel a San Diego death penalty case[172] on a contract basis, noting that Donald Levine, the first lawyer who was appointed had to bid for Mr. Plourd's services under the county's flat fee system. He described this as the first and last time that he will be involved in a for-bid contract in a capital case. He believes that the terms of the contract put the lawyer in an "unethical" position of choosing between financial solvency and the client's right to effective representation.

Mr. Plourd and Mr. Levine challenged San Diego's $35.00 hourly rate for investigators, arguing that they could not retain a qualified capital case investigator at that rate. After more than eight months of litigation – all under the flat-fee contract – they prevailed in the appellate court. In an unpublished decision in Mark Jeffrey Brown v. Superior Court, No.D045137, the Court of Appeal for the Fourth Appellate District characterized the question as "one of marketplace economics" and held that "the legal error is clear."[173]

After the Brown case was remanded to the San Diego Superior Court for further evidence on defense counsel's inability to obtain investigative services for $35.00 an hour, the superior court agreed to the increased fee. Mr. Brown's case demonstrates the type of litigation that contract lawyers must bring to obtain reasonable fees for ancillary service providers.[174] However, flat fee contracts create a financial disincentive for counsel to raise these challenges. The result is that, in many cases, clients do not receive the services of qualified investigators and experts.

Mr. Plourd and Mr. Levine are now engaged in protracted litigation challenging the composition of San Diego County juries.[175] They were able to negotiate an hourly fee of $125.00 for this aspect of the case. However, it is my understanding that the firm initially hired by the California Administrative Office to oppose them was retained at the rate of $400.00 per hour.[176]

Mr. Plourd formerly accepted appointments in Imperial County, which pays $80.00 per hour, a rate that has been in effect for well over a decade. In fact, 20 years ago, he was appointed at the hourly rate of $75.00. He decided that he cannot afford to accept cases at that rate any longer. According to Mr. Plourd, Imperial County is in the process of moving to a flat fee, low bid contract system.

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[170] *See* FRESNO COUNTY POLICY, *supra*, note 22, at 6; LOS ANGELES COUNTY MEMORANDUM, *supra*, note 23, at 20-21; SAN BERNARDINO COUNTY AGREEMENT, *supra*, note 25, at 10-11.
[171] Comments on file with witness.
[172] People v. Mark Jeffrey Brown, San Diego Superior Court Case No. SCD 174976 (Oct. 18, 2004) (unpublished opinion on file with witness).
[173] *Id.*
[174] *See* Philipsborn letter, *supra*, note 32, at 3, 6.
[175] *See* Greg Moran, *DA Says Jury Pools Fall Short of Latinos; Office Offers Plan to Boost Numbers*, SAN DIEGO UNION-TRIBUNE, Mar. 24, 2008, *available at* http://www.signonsandiego.com/news/metro/20080324-9999-1m24jury.html, last visited Apr. 8, 2008.
[176] Comments on file with witness.

C. The Habeas Stage

Compensation for attorneys and support staff in the three state capital defense agencies, while not uniform, appears to satisfy Guideline 9.1 (Funding and Compensation). The California Supreme Court gives appointed counsel the option of accepting a habeas case on an hourly basis or by submitting a proposal for a flat fee appointed under one of several categories established by the Court.[177] While habeas counsel is not compelled to bid with the court's capital case administrator on a flat fee contract, many do because, in their experience, the flat fees are based upon the Court's calculation of how many hours it should take to complete a case, assuming the high likelihood that there will not be an evidentiary hearing. Experience tells counsel that once their hourly bills equal the flat fee, the Court will simply decline any further billing.[178]

Until the end of 2005, [179] the Court used record size as the primary basis for setting flat fee categories in habeas cases. This approach had some logical application to appellate review, which is record-bound. However, post-conviction representation is, at its core, the investigation of evidence that was never presented at trial. More often than not, the smaller the record the larger the habeas investigation. Therefore, until recently, the Court's flat fee amounts were premised on an assumption that, at best, bore little relation to a fair assessment of the amount of work required to investigate and prepare the petition.

Presently, there are at least 200 California death row inmates whose cases are pending in federal court.[180] With the exception of the clients represented by state agencies, all completed state post-conviction without the availability of ancillary services required by the Guidelines.

Effective January 1, 2008, the ancillary costs cap was raised to $50,000.00[181] The California Supreme Court's policies reflect this change.[182] However, the new cap "is a

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[177] GUIDELINES FOR FIXED FEE APPOINTMENTS, ON OPTIONAL BASIS, TO AUTOMATIC APPEALS AND RELATED HABEAS CORPUS PROCEEDINGS IN THE CALIFORNIA SUPREME COURT (Jan. 2008) (GUIDELINES TO FIXED FEES), Guidelines 1; 1.1; 1.2; 1.3, *available at* http://www.courtinfo.ca.gov/courts/supreme/aa02d.pdf, last visited Feb. 12, 2008.

[178] Post-conviction counsel fees "represent a fraction of the amount of time that lawyers spend on these cases." Laurence Testimony, *supra*, note 14 at 54. California Appellate Project Executive Director Michael Millman testified that, in the Court's view, it takes somewhere in the range of 400-500 hours to investigate and prepare a state habeas petition. However, he said that most experience lawyers would estimate that it takes in the range of 1500-3000 "to do a habeas petition properly." Summary of CCFAJ Testimony of Michael Millman (Millman Testimony), at 62 (Feb. 20, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/LAPublicHearingMinutes.pdf, last visited Apr. 8, 2008

[179] GUIDELINES FOR FIXED FEES APPOINTMENTS, Guideline 1.3 (Factors Affecting Fees).(specifying four factors – complexity, difficulty, extraordinary costs and time intensiveness – that the Court considers, and listing "case issues that influence the applicability of these factors").

[180] Information provided by CAP (on file with witness).

[181] Assembly Bill 1248 was passed and amended as California Government Code section 68666(b) to provide: "The Supreme Court may raise the guideline limitation on investigative and other expenses allowable for counsel to adequately investigate and present collateral claims to up to fifty thousand dollars ($50,000) without an order to show cause."

fraction of what needs to be spent"[183] and is a "one-size-fits-all" rule that fails to take into account any of the specific circumstances of a case.[184] The only petitioners whose counsel have the financial capacity to circumvent this limitation and its potentially disastrous consequences – the inability to develop constitutional claims and the factual support for those claims in state court – are those represented by state agencies or by major law firms.

The mission statements and budgets of agencies such as HCRC elucidate the inequities that have been created in the representation of capital petitioners in California. For example, the Supreme Court's website states that HCRC's "mission is to provide timely, high-quality legal representation for indigent petitioners in death penalty habeas corpus proceedings before the Supreme Court of California and the federal courts."[185] Members of the Commission need only review the job announcements that are posted periodically on the HCRC website to appreciate the fact that the Court funds an agency with a well-paid, full-time staff, including attorneys, investigators, mitigation specialists, paralegals, litigation support, clerical assistants, that has the capacity to provide the "high quality counsel" required by the ABA Guidelines. In his testimony, HCRC Executive Director and Commissioner Michael Laurence expressed his view that his agency aims to comply with the Guidelines and that, under present funding and caseload levels, it is able to do so.[186]

Overwhelmingly, private counsel who accept appointments in capital habeas cases are solo practitioners. Beyond secretarial assistance, few employ paralegals and none employ the litigation support staff required to manage a capital case. They do not have "in-house" investigators or mitigation specialists. In short, all the services that are immediately available to counsel in the state agencies must be obtained by appointed counsel by hiring providers – all of them – within the ancillary services cap.

CAP, HCRC, and OSPD all provide training to private attorneys who are handling capital habeas cases by offering a variety of educational seminars and materials. They instruct appointed counsel that they must perform the investigative tasks required by the ABA Guidelines, which, in fact, can be done only by state agencies and major law firms.

There are 284 men and women on California's death row who have no counsel for their state post-conviction proceedings.[187] Notwithstanding a downturn in capital sentences over the past six years[188] and the growth of HCRC's caseload, the number

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[182] *See* standard 2.2-1 of policy 3, SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH and guideline 2 of GUIDELINES FOR FIXED FEE APPOINTMENTS, both *available at* http://www.courtinfo.ca.gov/courts/supreme/dpenalty/htm, last visited Feb. 12, 2008.
[183] Laurence Testimony, *supra*, note 14, at 54-55.
[184] Millman Testimony, *supra*, note 191, at 64.
[185] California Supreme Court, Appointments in Capital Cases in the California Supreme Court, at 27 (Jan. 2007), *available at* http://www.courtinfo.ca.gov/courts/supreme/documents/SupremeCourtBrochure.2007.pdf, last visited Feb. 12, 2008.
[186] Laurence testimony, *supra*, note 14, at 56.
[187] *Id*. at 53.
[188] "Between 2002 and 2006, there were half as many death sentences as in the preceding 5 years." *See California Death Sentences Fact Sheet*, ACLU-NC, *available at*

individuals in this position has been steadily increasing. The average wait for appointment of habeas counsel is close to seven and a half years.[189]

The testimony of other witnesses at this hearing,[190] Judge Alarcon's recent law review article,[191] and examples such as the Lucas case leave no doubt that private counsel, faced with the impossibility of investigating and preparing a habeas corpus petition with the allotted $50,000, are refusing to accept habeas corpus appointments.

VIII.
CONCLUSION

Throughout the Commissions hearings on the state's capital punishment system, witnesses have lamented the lack of data available to answer many of the Commission's focus questions.[192] Oversight of public expenditures is the norm in virtually every other area of government, which is effectuated by a wealth of statutes and regulations. County, state, and federal governments spend millions of dollars to have well-defined accountability systems in place. Those systems were created not simply to account for the expenditure of taxpayers' monies, but because, as a matter of public policy, we value these services – education and healthcare, for example - and want to ensure that they are delivered to Californians who are entitled to receive them.

In the health care arena, for example, the State Children's Health Insurance Program (SCHIP) was created in 1997, and represented the largest expansion in health insurance coverage for children in the United States since Medicaid began in the 1960s.[193] It is a federal government program that gives funds to states in order to provide health

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http://www.aclunc.org/docs/criminal_justice/death_penalty/California_Death_Sentences_Fact_Sheet.pdf, last visited Feb. 12, 2008.

[189] Information provided by CAP (on file with witness).

[190] *See, e.g.*, Summary of CCFAJ Testimony of Cliff Gardner (explaining the inequity between prosecutors who claim that "money is not an issue" in decision-making and appointed habeas counsel who are required to make decisions based upon what they "can afford" to do for a client, and noting that clients are likely to get better representation from a state agency, simply because of "access to resources, paralegals, experts, etc."), at 82 (Feb. 20, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/LAPublicHearingMinutes.pdf, last visited Apr. 8, 2008.

[191] *See generally*, Judge Arthur A. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697 (2007).

[192] *See, e.g.*, Susan S. Everingham (RAND Corporation), *Investigating the Costs of the Death Penalty*, *available at* http://www.rand.org/pubs/testimonies/2008/RAND_CT300.pdfH; Mitchell Caldwell, Carol A. Chase, Christine Chambers Goodman, *Structure and Administration of the Exercise of Discretion by California District Attorneys in Prosecuting Homicides as Death Cases*, *available at* http://www.ccfaj.org/documents/reports/dp/expert/Pepperdine-Caldwell%20Research.pdf; Ellen Kreitzberg, Michael Radelet, Steven Shatz, Response to Questions on Proportionality Review and Data Collection, *available at* http://www.ccfaj.org/documents/reports/dp/expert/Response%20on%20Proportionality.pdf; Ellen Kreitzberg, *A Review of Special Circumstances in California Death Penalty Cases: Special Report to the California Commission on the Fair Administration of Justice*, *available at* http://www.ccfaj.org/documents/reports/dp/expert/Kreitzberg.pdf, all last visited Apr. 8, 2008).

[193] Title XXI of the Social Security Act. Title XXI appears in the United States Code as §§ 1397aa-1397jj, subchapter XXI, chapter 7, Title 42.

insurance to families and children.[194] The program was designed to cover uninsured children in low-income families with incomes that are too high to qualify for Medicaid.[195] Each state, including California, is given flexibility in designing their SCHIP eligibility requirements and policies within the broad federal guidelines provided by the statutory authority. SCHIP covered 6.6 million children and 672,000 adults during fiscal year 2006.[196] Similar to Medicaid, SCHIP is a partnership between federal and state governments, and is operated by the individual states according to the requirements that are set by the federal government, such as the Centers for Medicare and Medicaid Services.

In the field of education, California has mandatory testing, monitoring, and reporting requirements. The Public Schools Accountability Act (PSAA) of 1999 was passed in California to develop a comprehensive system to hold students, schools, and districts accountable for improving student performance.[197] The Act includes the Standardized Testing and Reporting system (STAR), the California Achievement Test (CAT) for elementary students, the California High School Exit Exam (CAHSEE), and an Academic Performance Index (API). The Academic Performance Index (API) measures the performance of California schools and helps establish programs that are known as the Immediate Intervention/Underperforming Schools Program and High Achieving/Improving Schools Program. PSAA was largely proposed to position California to meet the provisions of the 2001 federal law known as "No Child Left Behind." The comprehensive accountability standards of the Act are used by the state of California to measure the Adequate Yearly Progress (AYP) that is required under the federal law.

These two examples underscore the extent to which, as a matter of public policy, society grossly undervalues the rights of persons facing the death penalty. A systematic assessment of where the state stands in the delivery of capital defense services – rather than the current ad hoc collection of limited data and informal inquiries – would, as others have testified, be quite useful. However, there is ample information from which to conclude that California does not afford defendants, appellants or petitioners with the "high level of legal representation," which the ABA Guidelines mandate.

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[194] *Id.*
[195] *Id.*
[196] The State Children's Health Insurance Program (SCHIP), *available at* http://www.cbo.gov/ftpdocs/80xx/doc8092/05-10-SCHIP.pdf, last visited Feb. 12, 2008.
[197] California Department of Education, Public Schools Accountability Act of 1999, Chapter 3, Statutes of 1999; codified at California Education Code §§ 52050-52050.5.