

# ARIZONA'S CRISIS IN Indigent Capital Representation

by John A. Stookey and Larry A. Hammond

*In a recent letter, Prescott attorney John Sears told Arizona Supreme Court Staff Attorney Lloyd Anderson: "Please add my name to the growing list of experienced criminal practitioners who believe that it would be unethical for any attorney in this state to accept appointment in a state post-conviction proceeding in a death case on the terms and conditions set forth in A.R.S. § 13-4041."*

*In fact, there now appear to be no qualified attorneys in Arizona who have agreed to accept appointment in a state post-conviction relief proceeding ("PCR") in a death case under the terms of this newly enacted statute. Almost unnoticed, Arizona's death penalty system may soon come to a grinding halt, because: (1) when the Arizona legislature passed § 13-4041 it provided that statute would be the only means to appoint PCR counsel for indigent capital defendants; (2) PCR is a necessary part of a capital case in Arizona; and (3) there are currently at least 20 indigent capital defendants awaiting appointment of PCR counsel in Arizona and no attorneys prepared to accept appointment to these cases under the terms of the statute.*

*Although the current crisis lacks visibility, it is not unexpected. The authors pointed out in their February 1997 Arizona Attorney article that the provisions of § 13-4041 posed serious ethical questions for Arizona attorneys asked to accept capital PCR representation under the terms of that statute. This article follows on that earlier discussion and considers the origins of the statute, how and why attorneys have in fact declined to accept capital PCR representation under the statute, and options available to get out of the current impasse.*

## The Origins of a Crisis

A.R.S. § 13-4041 provides that:

Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state post-conviction relief proceedings shall be paid a flat fee of \$7,500 for the first post-conviction relief proceeding, whether or not a petition is filed.

• • •

On a showing of good cause, the trial court may compensate appointed counsel in addition to the per case compensation by paying a reasonable hourly rate in an amount that does not exceed the rate paid to appointed counsel representing capital defendants at trial...

This provision must be read against the level of work and commitment necessary to ethically undertake a PCR capital case. The Arizona Supreme Court's Indigent Representation Committee described the juxtaposition of the work required and the funding available in this way:

...for counsel to represent adequately a defendant sentenced to death in a first post-conviction proceeding counsel must review every document, item of evidence, transcript and order in the case,

beginning with the earliest police report and ending with the last order entered by the Arizona Supreme Court. Counsel must carefully investigate every possible issue, including the possibility of ineffective assistance of counsel at both guilt and penalty phases of the trial, as well as on direct appeal. It is unimaginable that the presumed “flat fee of \$7,500” will ever adequately compensate defense counsel who takes seriously these responsibilities.<sup>1</sup>

In our earlier article we concluded that this reality:

places a substantial ethical burden on an attorney either not to take such cases or to obtain an “up front” agreement from the judge that additional funds will be made available to cover adequate pursuit of the representation.

Many Arizona criminal defense attorneys apparently share this belief: now virtually every qualified attorney has declined to accept such representation. In our opinion, solving this dilemma requires another look at how and why Arizona came to this point. That story begins with the passage of the Federal Effective Death Penalty Act in 1996 and Arizona’s subsequent attempt to “opt-in” to that statute.

### ***The Federal Background***

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) seeks, among other things, to limit the amount of time available to those convicted of capital crimes to file federal habeas corpus petitions, and thereby seeks to reduce the amount of time between conviction and penalty. Specifically, the AEDPA provides that in an opt-in state an application for habeas corpus relief must be filed with an appropriate federal district court “no later than 180 days after final State court affirmation of the conviction and sentence on direct review or the expiration of time for seeking such review.” (A one-year statute of limitations applies in non-opt-in states. This time is tolled during a period of United States Supreme Court review and state post-conviction relief proceedings.

Before, however, a state may take advantage of this time limitation:

a state must establish by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and *payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings* brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the state or have otherwise become final for state law purposes.<sup>2</sup>

Congress passed this act and it was signed into law in April of 1996. Arizona promptly addressed the subject in a Special Session in July of that year. A.R.S. § 13-4041 was swiftly enacted in an attempt by our legislature to meet the competent-counsel, adequately funded requirement and thereby permit Arizona to “opt-in” to the time restrictions of the AEDPA.

### ***Arizona’s Attempt to Opt-In***

A.R.S. § 13-4041: (1) establishes minimal standards of competency for lawyers in PCR representation; and (2) sets \$7,500 as the presumptive fee for each PCR case, with the money coming from the state’s general fund, instead of the county court budgets. The statute continues to leave some issues to the counties. For example, while the statute provides for the possibility of attorneys’ fees over and above the \$7,500, those additional fees would apparently have to come from a county’s budget. Similarly, while the statute calls for the payment of costs and expert fees, these too appear to have no state funding and fall, as they traditionally have, on the counties.

The statute also left to the Arizona Supreme Court two important implementing tasks: (1) to set any additional and stricter eligibility standards for those who accept PCR representation in capital cases; and (2) to compile and administer a list of qualified attorneys by January 1997, from which PCR attorneys will be appointed to particular cases. The Supreme Court has adopted additional competency rules and established the Indigent Defense Standards Committee to screen applicants for appointment to PCR representations.<sup>3</sup>

Under these new rules, any person accepting representation in a capital post-conviction relief proceeding must:

- (1) be a member in good standing of the State Bar for at least five years;
- (2) have practiced state criminal defense litigation for three years immediately preceding the appointment;
- (3) have demonstrated proficiency and commitment which exemplify the quality of representation appropriate to capital cases;
- (4) within three years immediately preceding the appointment have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of a least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing;<sup>4</sup> and
- (5) have attended and successfully completed, within one year of appointment, at least twelve hours of relevant training or educational programs in the area of capital defense.<sup>5</sup>

The Indigent Defense Standards Committee, appointed by the Supreme Court, was chaired by Court of Appeals Judge Michael Ryan and charged with the responsibility of recommending to the Court those applicants that met the statutory and rule requirements for appointment. The crisis in indigent capital PCR representation first became evident in this Committee. More than 200 letters were sent to attorneys by the Court's staff inviting them to apply for appointment as PCR counsel. In addition, advertisements were published in various legal publications. These solicitations generated only 16 applicants. Of those applicants, the Committee found that four met the statutory and rule requirements. The Court added two additional names. Of those six, all have now apparently declined to accept appointments for one reason or another.

As a result, there are currently at least 16 indigent death row inmates in Arizona, who are awaiting the appointment of PCR counsel and there are none available. Thus, the irony is that Arizona passed § 13-4041 in the hope of speeding up the death penalty review process, but in fact that very statute has brought the review process to a stop.

### ***Who's to Blame?***

Who is responsible for this crisis? As to be expected, fingers may point in many directions. One could point to the legislature for its failure to appropriate adequate funding. Others might say that this is merely a ploy of anti-death penalty defense attorneys to shut down the death penalty system in Arizona, or by defense lawyers seizing an opportunity to make more money handling death cases. Still others might point to former Governor Symington who vetoed the establishment of a state appellate public defenders office, which may very well have solved or prevented the problem.

To try to understand the current crisis, however, from the perspective of "who's to blame" seems to us totally unproductive. We believe that the crisis arises not from ill motives; instead we see this as the foreseeable consequence of a collision of priorities between individuals acting with understandable objectives. The legislature's goal to opt-in to the AEDPA and to do so in the most efficient manner possible is understandable and probably supported by Arizona public opinion. However, this does not mean that the defense bar is the cause of the crisis either. We believe, in fact, that from the moment § 13-4041 was passed, the defense bar had but one ethical choice: to decline to accept appointment as PCR counsel. By understanding why this is true, we can move beyond issues of blame and determine how to proceed.

### ***Why an ethical attorney should reject appointment under A.R.S. § 13-4041.***

An attorney's first ethical duty is the obligation imposed by Ethical Rule 1.1 to act competently. What ethical dilemma arises from under-funded PCR appointments? The ethical concerns about accepting representation under 4041 emerge from the confluence of the unique significance of the first PCR proceeding and the amount of work necessary to carry out competent PCR representation. Review of a capital conviction and death penalty sentence occurs in three stages: (1) direct appellate review; (2) state PCR review; and (3) federal habeas review. Direct appellate review encompasses in Arizona the automatic direct appeal of a capital conviction and sentence to the Arizona Supreme Court and any petition for a writ of certiorari to the United States Supreme Court from that state court ruling. Such review is generally limited to a consideration of issues evident on the record at the trial court proceedings.

PCR review is filed immediately after the conclusion of direct appeal. The decision of the trial court on PCR can be appealed through the state system to the United States Supreme Court. PCR is a different kind of review than direct appeal. At PCR, a defendant has the opportunity to raise issues which are not usually reviewable on direct review, because they were not part of the trial court record. Most notably this is usually the first opportunity for a defendant to challenge the competency of his attorney and the adequacy of resources for consultants, investigators and experts at the trial and sentencing stages. This review also entails the opportunity to allege that certain evidence that may not have been presented to the trial court should have been and that such evidence would likely have resulted in a different outcome.

A second reason underscores the significance of the "first-stage" PCR. Statutory and case law have evolved in recent years to make it nearly impossible for defendants to obtain federal court consideration of most issues at habeas review, unless those issues had been previously brought up at PCR. In other words, the failure to do a thorough job of representation at the PCR level not only forecloses adequate review at that level, but precludes review at the defendant's last review opportunity, federal habeas. A habeas petition, which is initially filed in the appropriate federal district court and can be appealed through the federal system to the United States Supreme Court, is a totally meaningless process, if the failure of PCR counsel prevents the federal courts from hearing key issues.

In short, PCR relief is the linchpin between and among the three types of capital review. It is the only opportunity to review non-record issues from the trial and direct appeal stage and it determines what issues can be further reviewed at the federal habeas stage. This fact, combined with consistent court rulings that

there is no constitutional right to effective assistance of counsel at the PCR stage<sup>6</sup>, and, therefore, no right to challenge the quality of representation at that stage, makes PCR representation uniquely significant in the field of capital law.

What does it take to do an adequate job of PCR representation? In addition to the obvious need for skill and expertise, it requires time. The full PCR review of a case mandates a unique and extensive expenditure of time. For example, one study indicates that the median number of hours for a defense attorney in a capital PCR proceeding is: (1) 400 hours at the trial court level; (2) 200 hours at the state appellate level; and (3) 65 hours at the United States Supreme Court level.<sup>7</sup> Another study found that on the average 582 attorney hours and 257 hours of support staff time was required for only the trial court level in a state post-conviction relief proceeding.<sup>8</sup> Thus, even based on these limited data, it seems safe to say that a full PCR proceeding (trial court, state appellate court, U.S. Supreme Court) takes, on average, a minimum of 665 hours of attorney time and 257 hours of staff time.

Under the \$7,500 presumptive fee of A.R.S. § 13-4041, therefore, if we assume these minimum averages and also assume that support staff will be paid a minimum of \$10 per hour, an attorney would be paid approximately \$7 per hour for handling a PCR case. If an attorney draws one of those cases that takes more than the average time, the rate of pay is even less. When an attorney's overhead is factored in, it is clear that to accept a PCR case under the current statutory scheme is in essence to take the case *pro bono*. For attorneys who can afford to devote time to such a *pro bono* effort, we commend the choice. However, for those who cannot, we ask whether attorneys will realistically be able to devote the time and effort that the case deserves or whether inevitably there would be a need to cut corners on the "fixed fee" PCR case, in order to work on additional income generating cases.<sup>9</sup>

This is the ethical dilemma. Can an attorney ethically take on a capital PCR case knowing the amount of time that will be necessary, the minimal amount that will be paid, and the demands for income necessary to keep that attorney's office in operation? The criminal defense bar of Arizona has clearly answered these questions. As John Sears succinctly put it, it would be unethical to take such a case under these circumstances. We believe the criminal defense bar is correct.

#### Options for Ending the Crisis

There appears to us to be only three options to solve this problem. First, Arizona could decide not to opt-in to the federal statute, repeal § 13-4041 and return the PCR funding problem to the counties. Second, the state could provide sufficient funding to make the system work under the current plan. Third, some type of capital PCR public defender office could be established to handle these cases.<sup>10</sup>

#### ***The Case for Not Opting-in***

We believe there are several compelling reasons that the Arizona Legislature should consider simply backing out of this crisis it has gotten the state into and repeal § 13-4041, thereby giving up any attempt to opt in to the federal statute. A broader look at the implications of the federal statute provides the most convincing reason for rejecting what at first glance appears an attractive option for Arizona.

As discussed above, the federal statute permits those states that have opted in to impose a strict time limitation on the period between completion of direct appeals and the filing of a federal habeas corpus petition. Specifically, it provides that from the point a last direct appeal has been rejected until the first habeas corpus petition must be filed is limited to 180 days. This is the period during which any state PCR proceedings are to take place and such proceedings toll the running of this 180-day period.<sup>11</sup>

Playing out the implications of this time limit, however, demonstrates that its actual implication may be to eliminate the right to federal habeas relief. This is because a PCR proceeding may not toll the time period until an initial PCR petition is filed. As we have also discussed earlier the process of researching and writing a PCR petition is a major enterprise. This is the first opportunity to allege potentially relevant and reversible error that was not a part of the record. This most often means looking into whether evidence that was never gathered or presented should have been or into whether the attorney at trial or appeal provided ineffective representation.

Although not free from doubt, the state argues and may prevail on the proposition that during these investigations, the 180-day period is not tolled. This means that if it takes an attorney six months to gather the necessary information and to write a first PCR, the 180-day period has run and there is absolutely no right to federal habeas review. The implications of this result are profound. The federal courts would, as a result, never have the opportunity to review any of these non-record issues. Those who are knowledgeable and experienced in death penalty litigation find these implications unacceptable. So should everyone concerned about adequate and full review of death cases.<sup>12</sup>

Interestingly, another major negative impact of the federal statute is not upon the defendants, but upon

federal judges. If a state opts in and if a federal habeas petition is filed, the statute specifically provides that a federal district court must rule on the petition within 180 days.<sup>13</sup> Similarly, it provides that appellate court review of a habeas petition must also be completed within 120 days.<sup>14</sup> Not only does this limitation restrict in substantial ways the prerogatives of the federal judiciary,<sup>15</sup> but also restricts the extent to which these courts may engage in a thoughtful and thorough review of habeas petitions.

These concerns lead us to ask why we would want to opt-in to a procedure that appears to be designed to reduce the effectiveness of judicial review in these most important of cases. Whatever the outcome of a debate about opting-in, we think that the current crisis should be used to ensure that there is in fact an informed debate. As far as we can tell, when § 13-4041 was considered and passed, there was never any serious consideration given to the implications of opting-in, other than the surface appearance of speeding up the process. Before deciding how to handle this crisis, we as attorneys (whatever our position on opting-in) must ensure that Arizona's decision makers understand "all" of the implications of such an effort.

### *If Arizona Does Continue Its Attempt to Opt-in*

The death penalty is a reality in Arizona, and well-trained and appropriately financed PCR counsel are necessary to ensure that capital cases are resolved fairly and justly. Turning PCR representation back to the counties will merely give the impression of fixing the problem because attorneys will be assigned, but the problems of competence and compensation will continue. Therefore, we believe whether Arizona wishes to opt-in or not, effective and appropriately financed PCR counsel is necessary and that this can only be done with state funding.<sup>16</sup>

The political reality in Arizona, however, is that state level PCR funding only reached the political agenda because of the desire of death penalty proponents to opt-in to the AEDPA. Similarly, that same political reality means that enhanced funding for PCR representation will not happen unless the state legislature believes that such additional funding is necessary to opting in. Case law from around the country certainly would support such a conclusion. For example, it is clear that the current backlog of defendants seeking representation negates any argument Arizona can make that it has already opted-in.<sup>17</sup> Even if enough attorneys were willing to accept cases under § 13-4041 to keep the system going, the level of funding provided by that statute would, we believe, cause the federal courts to conclude that opt-in had failed.<sup>18</sup> Therefore, for those who wish to opt-in to the AEDPA, enhanced funding of PCR representation is a necessary condition.

This goal may be accomplished either by maintaining the current private lawyer framework, but with enhanced funding, or by establishing a state post-conviction capital defender. On balance, we support the capital defender approach. The idea of some form of capital public defender's office has been debated in the State Legislature at least twice in recent years. The first time the bill passed in 1996 (Senate Bill 1349), but was vetoed by then-Governor Symington. The second time in 1997, House Bill 2135 failed to reach the floor in either house. The reasons for the failure of this approach have been twofold: (1) the amount of money necessary to finance the system; and (2) the method of selecting the public defender. The fear of the financial consequences of setting up a new state agency is easy to understand and certainly not unfounded. As to control over the public defender, former-Governor Symington demanded control over the selection and removal of the defender, while the defense bar insisted upon a politically independent defender's office.

### *Issues of Cost*

If we assume that the state wishes to have a system of effective PCR capital representation, either to opt-in or simply for the sake of fairness, the defender's office actually provides the most effective and cost efficient manner of doing so. PCR representation is an extremely specialized field, which is most efficiently and competently performed, we believe, by those who work in that area day in and day out. Only a defender's office provides such expertise and the concomitant economies of scale that go along with specialization. It is ultimately those economies that may also make the defenders office the most politically acceptable approach to this problem.

The cost of effectively funding the private lawyer framework can be seen by looking to recent changes made in such a system in California. The California Supreme Court announced in late 1997 an increase in compensation for counsel appointed to represent indigent defendants in death penalty appeals, including post conviction relief. This increase was ordered to implement legislation signed by the California Governor in October 1997. California began paying \$125 per allowable hour on January 1998. There is no cap or presumptive level for the total fee in a case.<sup>19</sup>

We believe that these are realistic figures that would be necessary to obtain and conduct effective representation under any private attorney framework. As discussed earlier, on average, a minimum of 665

hours of attorney time and 257 hours of staff time is necessary to pursue a full PCR review. If this is correct, it would mean that on the average a PCR attorney would be compensated approximately \$83,125 per case (665 hours X \$125 per hour). If these figures are compared with a hypothetical post-conviction defenders office, where each attorney could handle three to four cases per year for a salary of (for example) \$50,000, the economies of and desirability of such an office become clear.<sup>20</sup>

### *Issues of Control*

As to how such a defender should be selected and retained, we believe as a matter of principle that the selection of a public defender should be independent of the executive branch, which is also the prosecuting arm of the government. One might fairly question whether there is any role for the governor in selecting or removing the defender. Last session's attempt to set up an appellate public defender office to address this potential conflict of interest may have struck the right balance, first, by requiring extensive "defense" experience for any appointee, and second, by limiting the governor's ability to remove the public defender for any reasons other than actual malfeasance.

As a matter of fairness and political reality such a selection and removal system may provide the basis of a workable compromise. However, again we urge that any debate on this topic be informed and one aspect of that information is to look at the experience of other states. The history of a similar office in Florida is particularly instructive, as indicated the following recent National Public Radio story.

• • •

*Cheryl Devall, NPR Reporter:* For the last 12 years, Florida has paid about three dozen lawyers to file post-sentencing appeals for death row inmates. This state agency became the focus of controversy last spring when its director resigned, saying the legislature had allocated too small a budget and too large a workload.

State legislators, for their part, accused the agency of delaying executions for as long as possible, by concentrating on appeals that had nothing to do with the guilt or innocence of convicted murders.

In recent months, Florida has restructured the agency. There are now three regional districts to take the place of a single office which, in the view of many Florida lawmakers, was unshakably and inappropriately opposed to the death penalty.

Al Guttman (ph), chairman of the State Senate Criminal Justice Committee, says that under the old structure, state-employed lawyers abused the appeals process.

*Senator Al Guttman, Chairman, Criminal Justice Committee, Florida State Senate:* Which is not something that taxpayers need to be paying for. When a court of competent jurisdiction takes someone and finds them guilty and sentences them to death, we want that justice to be carried out for that person.

*Devall:* Until a fiery electrocution in March, Florida had carried out capital punishment at a rate similar to Texas and Virginia, the states with the highest number of executions. Executions are now on hold while the state supreme court determines whether the use of the electric chair, Florida's only capital punishment device, constitutes cruel and unusual punishment.

That challenge was first posed by a state-employed attorney for a condemned inmate. That attorney was one of several with death row appeals experience, who critics say Governor Lawton Chiles passed over for the new appointment.

The governor's General Counsel, J. Hardin Peterson (ph), says Chiles was just looking for good lawyers.

*J. Hardin Peterson, General Counsel to Florida Governor Lawton Chiles:* Somebody who was qualified, somebody who was ethical; somebody who had experience in trial and appellate practice and maybe some experience in death cases.

*Devall:* Two of the new regional directors have been state or county prosecutors. One wrote Florida's brief arguing against appeals for serial killer Ted Bundy. The third spent

four years as a public defender before going into private practice a decade ago. And for about six months, he supervised first-degree murder cases for the state.

But what they don't have, some defense lawyers note, is hands-on experience with death row appeals. Tanya Green (ph), Death Penalty Resource Counsel for the National Association of Criminal Defense Lawyers, says the representation of death row inmates requires special skills.

*Tanya Green, Death Penalty Resource Counsel, National Association of Criminal Defense Lawyers:* If you don't deal with your client as a human being, I don't think you'll be able to effectively represent him or her all the way through the trial and appeals process. You have to be familiar with every change in capital laws. You have to be able to identify and attack constitutional violations at every turn.

*Devall:* In published interviews, the attorneys charged with administering appeals for the 380 inmates on Florida's death row have said their first obligation will be to their clients. But Tanya Green wonders whether former prosecutors, appointed by the same man responsible for signing execution orders, can truly take that obligation to heart.

*Green:* The people whose job it is to seek the death penalty are the prosecutors and district attorneys in various counties. And those very same people have been now appointed to defend the same people that maybe yesterday, maybe a year ago, they sought to execute. That presents a problem.

If the Florida experience is any indication, providing a state "solution" to the PCR problem may be not providing any solution at all. It may simply provide a means for faster execution because of the opt-in, but not more effective representation because of political pressure against performing the defense role adequately. The implications are again clear. If Arizona wants to seriously consider setting up a state capital public defenders office, it must also seriously debate how to ensure that such an office can adequately and effectively perform its job.

The concerns about setting up a new "bureaucracy" and about issues of cost and independence have led some, including apparently the Attorney General's Office, to argue that the simplest and quickest way to opt-in and solve the crisis is to increase the amount of funding provided for PCR representation. This might include raising the presumptive \$7,500 fee to a higher level or switching to an hourly rate approach. As we have already said, however, we believe this approach is wrongheaded for two reasons. First, we think that in the long run a public defender's office would be considerably more economically efficient than such an approach. Second, in this most complicated area of law, it seems to us necessary that those who are handling these cases must be experts in what they are doing, not merely "weekend warriors" who handle one or two cases in a career.

### **Recommendation**

Putting this all together, we recommend that, if the public debate concludes that Arizona should seek further to opt-in, the best way to accomplish this is the reintroduction of a version of bills that have been introduced over the last few years. The relevant parts of a new bill should include:

- (a) Establishment of State Capital Post-Conviction Public Defenders Office, funded fully by the state, with the primary function of that office to provide PCR representation to indigent capital defendants.<sup>21</sup>
- (b) Gubernatorial appointment of the Public Defender for a five-year term, subject to removal from office only for good cause, including malfeasance, misfeasance and nonfeasance. To further ensure competence and independence, we also recommend that appointments would be from a list submitted by a committee that includes defense attorney representation.
- (c) Qualifications for Public Defender, including having practiced a minimum of five years immediately preceding appointment in the representation of accused or convicted persons in criminal or juvenile proceedings in the state, as well as the qualifications required of any PCR attorney.
- (d) The State Capital Appellate Public Defender may employ deputies and other employees and may establish and operate any offices as needed.

We believe that only such a system of state funded PCR defense can provide effective representation in capital cases.<sup>22</sup>

### **Conclusion**

Arizona is at a crossroads in its capital punishment system. That crossroad permits, in fact mandates, serious consideration of the representation that we as a state provide to capital defendants. That debate

must consider whether we as a state want to opt-in to a federal system which appears on its face to be designed to short cut justice and limit the rights of defendants and to crimp the responsibilities and resources of the federal judiciary. If the political answer is that Arizona does want to opt-in, we believe the only effective, fair and cost efficient way to do so is through the establishment of a state post-conviction public defender, which has the independence and the resources to perform its job adequately. We urge the attorneys of Arizona to make their feelings known on this issue. We as a profession have no higher mission than seeking to focus and inform this debate on how our state should treat the most reviled and lowest of the damned in our society.

#### Postscript

After this article was completed, a bill was introduced in the Arizona Legislature to address the problem of capital PCR representation. HB 2210 would amend A.R.S. §13-4041 by providing that PCR counsel in capital cases may be paid up to \$100 per hour by counties, with half of that amount reimbursed by the State. Although not totally clear at this writing, the bill also appears to establish a presumption that 200 hours is sufficient to file a PCR petition. This presumption is enforced by requiring a heightened burden on an attorney to justify compensation for more than 200 hours. The bill further reduces the number of days within which a PCR petition must be filed and allows the State Supreme Court to appoint PCR counsel who do not meet all of the current competency requirements, if no qualified attorneys are willing to serve.

This bill is clearly designed to break the current impasse in PCR representation. By increasing the potential pay for such representation and by permitting a de facto decrease in competency standards, the bill's authors obviously hope that sufficient numbers of PCR counsel can be retained. Referring back to our analysis in this article, we are concerned whether such an approach will truly provide competent representation. We still believe that a capital PCR defender's office to handle PCR petitions would be more economically efficient and better suited to provide competent representation. Interestingly, also introduced at the Arizona Legislature was HB 2235 that would set up a Capital Appellate Public Defender's Office, but only for direct appeals. Although we have always advocated the concept of a statewide appellate public defender office, we don't understand why this model was introduced to handle a perceived direct appeal problem but rejected to handle the clear problem of PCR representation.<sup>23</sup>

**John Stookey and Larry Hammond** are lawyers with *Osborn Maledon*. This is the third article on this topic authored by them and appearing in *Arizona Attorney*. See 32 *Arizona Attorney* 28 (October 1996); 33 *Arizona Attorney* 20 (February 1997). The views expressed in this article are those of the authors and do not represent the views of the State Bar of Arizona.

#### ENDNOTES:

1. Comments of The Indigent Representation Committee (co-author Larry Hammond served on this Committee. The views expressed in this article are those of the authors and do not necessarily reflect the views of members of the Committee).
2. See 28 U.S.C. §§ 2261-66 (1996). (*emphasis added*)
3. Ariz. R. Crim. P., 6.8.
4. Alternatively, an attorney must have been lead counsel in appeal of at least six felony convictions, at least two of which were appeals from first- or second-degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings.
5. The Indigent Defense Standards Committee has interpreted this CLE requirement to allow otherwise qualified applicants to complete their programs within one year after appointment if they have not completed 12 hours before appointment. There have also been other rule changes passed recently by the Supreme Court, which relate to trial court counsel, but do not directly impact PCR representation. These include the requirement of two trial attorneys in capital cases and the establishment of additional qualification requirements for the acceptance of lead or second trial counsel positions. Rule 6.2 of the Arizona Rules of Criminal Procedure.
6. Courts routinely so hold. See e.g. *Giarnatano v. Murray*, 492 U.S.1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). 131 F.3d 442 (4th Cir. 1997). *Mackall v. Murray*.
7. Richard J. Wilson and Robert L. Spangenberg, *State Post-Conviction Representation of Defendant Sentenced to Death*; 72 *Judicature* 331, 336 (1989).
8. Douglas W. Vick, *Poorhouse Justice Under-funded Indigent Defense Services and Arbitrary Death Sentences*, 43 *Buff. 2. Rev* 329, 373, 374 (1995).
9. Some have argued that this is not a real problem because the counties can and will provide the additional funds necessary to compensate attorneys for those cases where the \$7500 fee is inadequate. Judges, administrators and attorneys with whom we have spoken have expressed skepticism that the counties have either the will or the ability substantially to augment State funding of capital-case PCRs.
10. Under the terms of the AEDPA, such an office could not represent a defendant at both the direct appeal and PCR stages. See 28 U.S.C. § 2261(b).
11. 28 U.S.C. § 2263.
12. For a further discussion of the unrealistic nature of this 180 day limit, See e.g. Timothy J. Foley, *THE NEW FEDERAL HABEAS: AN OVERVIEW*, CACJ/Forum, No. 2, 1996, at 48.
13. 28 U.S.C. § 2266(b)(1)(A).
14. *Id.* at § 2266(c)(1)(A).
15. Not surprisingly, federal judges can be expected to be unanimous in their distaste for the time strictures imposed by the AEDPA. Anyone familiar with the existing federal court backlogs will appreciate the reaction of judges when asked to augment their dockets with these time sensitive habeas death cases. Especially in Arizona, where the federal bench sustains an already burdensome drug and immigration case laden weight, the addition of these cases would be to impose unrealistic demands that can only serve to disserve the accused, the prosecution and the system of habeas corpus review.
16. This position is also supported by the recently proposed moratorium on the imposition of the death penalty recommended by the American Bar Association. That recommendation was based in part on the view that inadequate representation was being provided at all levels of the capital system and that this resulted in unfair and unequal application of the death penalty. At its extreme that unfairness, the ABA said, resulted in innocent individuals being convicted of capital crimes and sentenced to death. Ensuring adequately trained and financed PCR counsel is one way to prevent such injustices. Therefore, while setting up a state funded PCR representation system alone will not solve the problem, it is a necessary step in the right direction. This is true whether the goal is to opt-in to the AEDPA or not.
17. For example, see *Hill v. Butterworth*, 941 F. Supp. 1129, 1140-47 (N.D. Fla. 1996) [Motion for Temporary Restraining Order]; *Hill v. Butterworth*, 170 F.R.D. 509, 523 (N.D. Fla. 1997)[Motion for Class Certification and Permanent Injunction]. If a state statutory scheme results in large backlogs of defendants who have asked for PCR counsel, but have not received one promptly, that statutory scheme does not accomplish an opt-in to the AEDPA. Specifically the court found that in order to opt-in a state's offer of PCR counsel must be meaningful and that once a qualified capital defendant accepts the statutory offer of counsel, that counsel must be appointed immediately. Arizona's § 13-4041 clear has not accomplished this.
18. However, in *Mata v. Johnson*, 99 F.3d 1261, 1266-67 (5th Cir. 1996), the Fifth Circuit refused to find that a flat fee of \$7500 for PCR representation in Texas necessarily prevented Texas from opting-in, because the defendant did not establish any circumstances that would prove the limit inadequate in his case. [The Court did find that Texas did not opt-in for other reasons.] We continue to believe, however, that it will be proved in most cases that such a limit is inadequate to provide effective representation and,

therefore, the intent and requirements of the AEDPA are not met by such a funding limitation.

19. The legislation also provides funding for an increase in PCR investigative expense up to \$25,000. Additional expenses may be reimbursed, but only after the issuance of an order to show cause.
20. This new legislation is discussed in *California Attorneys for Criminal Justice Newsletter*, October /November 1997.
21. Failed HB 2135 from last session was ambiguous as to the exact scope of the Capital Appellate Public Defenders Office. It apparently provided for representation in both direct appeal and PCR proceedings. Although a worthy goal, any such attempt to combine functions must consider the potential conflict between the two roles and the AEDPA prohibits combining such roles. Because our focus has been on PCR representation, and its issue of capital representation, we recommend the creation of an office for that purpose. This does not mean that we do not support other forms of state support for capital representation. We, in fact, enthusiastically support such funding if there is sufficient political support and if the conflict between direct appeal and PCR representation is resolved.
22. The Board of Governors of the State Bar of Arizona in October, 1997, accepted the report of the Special Indigent Defense Task Force Committee, which recommended establishment of a State Capital Appellate Public Defenders Office. Such acceptance does not necessarily indicate an endorsement of the contents of the Report.
23. It is important to reiterate, however, that any thought of trying to combine direct appeal and PCR representation in a single office would immediately run into the AEDPA prohibition against such dual representation and in fact would potentially implicate ethical concerns about conflict of interest. This potential conflict arises because one of the tasks of PCR counsel is to evaluate the adequacy of trial and direct appeal representation. We also note that as with any legislation of this importance, there remain many issues that would require close attention, such as the manner of selecting the head of the office and the appointment of persons to participate in the nomination process.