

Rethinking Arizona's System of Indigent Representation
by John A. Stookey and Larry A. Hammond

The oral argument in the recently decided Arizona Supreme Court Special Action, *Zarabia v. Bradshaw*,¹ contained the following exchange on the evolving character of indigent representation:

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Justice Zlaket: Let me ask you one more question. Some of us here are old enough to remember when judges routinely appointed lawyers in criminal cases without regard for qualifications. They just simply got a phone call saying that you were going to represent a certain person. You were given the name and told to go to jail and start your presentation... Were we violating the constitutional rights of those defendants when we were doing that? And just nobody ever raised it?

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Larry Hammond: ... I think the short answer to your question is yes, when we appointed people who did not have competence or capacity to take criminal cases, we were violating the constitutional rights of those people.

Justice Zlaket: Historically, too, there has been a real shift. Before *Gideon*, appointments were sporadic, maybe capital cases, but not across the board systematic and regular. Now that *Gideon* has been fully implemented, we have full blown indigent defense requirements and the old rule about a judge just sporadically calling upon volunteers among members of the bar isn't a very good fit for the sheer demands required.

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Chief Justice Feldman: The difference is that, and I was one of those people who got those phone calls, but when I was given, so to speak, to some defendant charged with a felony, he was getting something to which at that time he was not entitled to obtain because there was no constitutional right to counsel before *Gideon*. The Judge was doing him a favor so to speak and was ... promoting the ends of justice by giving an untried, inexperienced lawyer to this defendant. But after *Gideon*, when they have a constitutional right to counsel, even though they can't afford one, then we have to be more careful.

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Justice Zlaket: I was going to say the Chief Justice says we were doing them a favor, not much of a favor.

As the Justices' comments reflect, *Gideon* ushered in a new era of legal requirements for indigent representation. *Gideon* also indirectly resulted in a new era of political debate about how to administer and pay for such representation. The first half of 1996 saw significant debate on indigent defense in Arizona on both the legal and political fronts. In addition to the *Zarabia* decision, the Arizona legislature passed and the governor vetoed a potentially significant piece of legislation concerning funding and organization of indigent representation in Arizona ("Senate Bill 1349"). Finally, during a special session in the summer of 1996, the state legislature did pass and the governor did sign Senate Bill 1003, which provided state funding for indigent representation in a narrow range of situations, namely in a first post conviction relief proceedings in capital cases.

Arizona has historically been among a small minority of states that have sidestepped the political questions associated with indigent representation by shifting the funding and delivery of such representation to the county level.² *Zarabia*, however, both reaffirmed and enlarged legal and ethical constraints upon county systems of indigent representation. Additionally, the passage of Senate Bill 1349, even though vetoed by Governor Symington, seems to demonstrate an emerging political recognition that indigent representation can no longer be considered just a county issue. *Zarabia* and Senate Bill 1349, therefore, provide a useful foundation for a discussion of indigent representation in Arizona and of the viability of the historic assumption that such representation should be a county, rather than a state, responsibility.

Before *Zarabia*: Arizona's Standard for Evaluating County Systems of Indigent Representation

Under Arizona law, a county has considerable latitude in deciding how to provide indigent representation. Currently six of Arizona's counties rely solely on contract attorneys. The other counties employ a public defender system.³

***Current County Approaches to
Provision of Indigent
Representation in Arizona***

Private Contract

| <u>Attorneys</u> | <u>Public Defender</u> |
|-------------------------|-------------------------------|
| Apache | Cochise Navajo |
| Gila | Coconino Pima |
| Greenlee | Graham Pinal |
| Santa Cruz | La Paz |
| Yavapai | Maricopa |
| Yuma | Mohave |

Until *Zarabia*, the Arizona Supreme Court's only major ruling evaluating a county indigent representation system was *State v. Joe U. Smith*, 140 Ariz. 355 (1984). In that case, the Court reviewed the Mohave contract system in place at that time:

In May of each year a bid letter goes out from the presiding judge of Mohave County to all attorney in the county. It calls for sealed bids to be opened at a given hour and rate. No limitation is suggested on caseload or hours, nor is there any criteria for evaluating ability or experience of potential applicants. The successful bidders are assigned all indigent cases in the superior courts, justice of the peace courts, juvenile courts, all appeals in Mohave County, and all mental evaluations.⁴

The Court struck down this system in response to a criminal defendant's claim that he was being denied effective assistance of counsel because his appointed contract attorney had also been assigned 149 felony cases, 160 misdemeanor cases, 21 juvenile cases, and 33 other types of cases in the previous eleven month period.⁵ In addition the same attorney was permitted to handle all Kingman city appointed cases and to maintain a private civil practice.⁶

The Court found that the Mohave system was flawed in at least four ways. The system did not take into account (1) the time the attorney is expected to spend in representing his share of indigent defendants; (2) support costs, such as investigators, paralegals, or law clerks; (3) the competency of the attorney; and (4) the complexity of the case.⁷

In addition to finding that these procedures violated "the right of a defendant to due process and right to counsel as guaranteed by the Arizona and United States Constitutions," the Court also cautioned attorneys of their ethical responsibility not to accept cases they cannot competently handle.⁸ The Court established a bright line rule for caseload maximums for all providers of indigent representation, be they contract attorneys or public defenders:

Under no circumstances should maximum allowable caseloads for each full-time attorney exceed the following:

- a. 150 felonies per attorney per year; or
- b. 300 misdemeanors per attorney per year; or
- c. 200 juvenile cases per attorney per year; or
- d. 200 mental commitment cases per attorney per year; or
- e. 25 appeals to appellate court hearing a case on the record and briefs per attorney per year.⁹

Attorneys employed less than full-time or handling a mix of cases should handle a proportional caseload. These requirements, commonly called the "*Joe U. Smith* guidelines," are now well known to every Arizona indigent defense attorney.

Zarabia v. Bradshaw

In the Fall of 1995, faced with Yuma County's failure to establish a public defender's office and a decline in the number of private attorneys willing and available to represent indigent defendants, Presiding Superior Court Judge Bradshaw put into effect a new system for providing indigent representation. Indigent criminal defendants were to be represented by a mix of attorneys who contracted to represent such defendants and attorneys appointed on a rotational basis from the private county bar as a whole.¹⁰

Late last year petitioners from Yuma County filed a special action with the Arizona Supreme Court challenging of this system.

Petitioner Jesus Manuel Zarabia was a defendant charged with importation of marijuana, a class 2 felony. He faced a potential 18.5 year prison sentence if convicted. Zarabia challenged the constitutionality of Judge Bradshaw's appointment of Petitioner Lawrence L. Deason to represent him. Deason was randomly selected and appointed without his consent. Deason, who is a well respected estate planning attorney in Yuma, had no experience in criminal law and in fact had never tried a jury case of any kind. Deason himself had unsuccessfully sought to withdraw as Zarabia's attorney citing his ethical obligation to

refrain from any representation in which he was not competent to provide effective assistance.

Petitioner Nebra Evans Porter, a criminal contract attorney, was a petitioner claiming that she had requested the superior court to withhold additional appointments because her current case load exceeded her ability to provide competent representation. Without holding a hearing, Judge Bradshaw had denied her request and instead assigned her additional cases.

Petitioner Steve Morgan is also a civil attorney in Yuma County who had also been appointed to represent criminal clients. Morgan challenged the appointment system because the fees paid to him were half his normal fee and did not even cover his overhead expenses.

In commenting on the rotational system of appointment that led to the selection of Deason and Morgan, the Supreme Court found that such an appointment system violated statutory and regulatory provisions by failing to take “into account the skill likely to be required in handling a particular case.”¹¹ Further commenting on the appointment of Deason as Zarabia’s attorney, the Court reaffirmed that “[a]ssigning an attorney incapable, for whatever reason, of providing effective assistance at these stages [trial and on appeal] violates a defendant’s constitutional rights” and that an attorney has the ethical obligation not to accept such an appointment.¹²

The Court also found with regard to Petitioner Morgan’s claim that:

A compensation scheme that allows lawyers significantly less than their overhead expense is obviously unreasonable... It is impermissible for the presiding judge, in wholesale fashion, to transfer the public’s constitutional obligation to pay the financial cost of indigent representation to the county’s private lawyers.¹³

Finally, the Court ruled that Judge Bradshaw must conduct a hearing as to Petitioner Porter’s claims, saying that:

It is sufficient for the present to say that Porter has raised colorable questions concerning her ability to provide adequate representation, and her request for a hiatus in appointments should not have been summarily denied.

Implications of Zarabia

The immediate implications of the *Zarabia* decision for the Yuma County system of indigent representation will not be realized, thanks to the Yuma County Commissioners’ decision during the pendency of this case to authorize the establishment of a public defender system.¹⁴

The implications for the petitioners are less ambiguous. Deason and Morgan were permitted to withdraw from their assigned criminal cases. At the time of this writing, Morgan had filed a petition to receive adequate compensation for the time he had spent on the cases assigned to him. Because of an illness that took her away temporarily from her practice and away from assignment of new cases, Nebra Porter did not seek a hearing on her caseload. Mr. Zarabia was assigned Eve Prietz, one of the Yuma County criminal contract attorneys as his new attorney. In mid-April, Zarabia and his new attorney reached a plea agreement calling for a sentence of 6.5 years in prison.

Whatever the particular implications for Yuma County and for the petitioners, it is now clear that the Arizona Supreme Court is prepared to superintend actively the indigent defense system in this State.¹⁵ Taken together, *Zarabia* and *Joe U. Smith* mandate at least these conclusions:

1. Every attorney has an ethical duty to reject the appointment or assignment of any criminal case when that attorney believes that his/her workload or competency will prevent adequate representation. (*Joe U. Smith* and *Zarabia*).
2. Indigent criminal defendants in Arizona have a right to an attorney who has been appointed pursuant to a system which reasonably assures that the attorney is competent and not so overworked as to preclude effective representation. (*Joe U. Smith* and *Zarabia*).
3. Criminal courts have a clear burden to appoint attorneys to indigent criminal defendants only after individually reviewing both the qualifications of the attorney and the requirements and complexity of the case. (*Joe U. Smith* and *Zarabia*).
4. Criminal courts have a clear obligation to hold a hearing to evaluate any colorable assertion by a defense attorney who claims that he/she has inappropriately been appointed to a case because the appointing judge failed adequately to review the Attorney’s competence or workload. (*Zarabia*).
5. At least with regard to the conscriptive appointment of private attorneys to criminal cases, the court must insure a fee which is reasonable in light of the attorney’s normal rate and overhead expenses. (*Zarabia*).
6. Courts must provide sufficient support staff and experts to facilitate a competent defense by indigent

counsel. (*Joe U. Smith*).

Joe U. Smith and Zarabia and Beyond: The Passage and Veto of Senate Bill 1349

Determining the impact of *Joe U. Smith* and *Zarabia* requires an understanding of the operation of the fifteen county indigent representation systems around Arizona. To what extent are these mandates already adhered to? To what extent are there resources available to bring counties into greater compliance? To what extent are the mandates of *Zarabia* and *Joe U. Smith* beyond the financial ability and experience pools of some counties?

We have some idea about the answers to these questions from the accumulated knowledge of the lawyers, judges, and county officials who deal with these systems on a daily basis. The Yuma County debate on indigent representation also provided some more quantitative data on the topic. In the process of evaluating whether a public defender system was the appropriate solution to the problems in Yuma County, the Superior Court conducted a survey of how all of the other counties in the state provide indigent representation. Although the scope of the study is limited, it does suggest some concerns about how Arizona goes about providing representation for its indigent defendants and whether the counties are adhering to the mandates of *Joe U. Smith* and *Zarabia*.

The survey revealed, for example, that four of Arizona's counties could not even estimate the average caseload for their criminal contract attorneys or public defenders. (Apache, Gila, Greenlee, Santa Cruz).¹⁶ Six additional counties estimated that each of their indigent defense attorneys was handling more than 200 combined criminal and misdemeanor cases per year. (Cochise, Coconino, La Paz, Mohave, Navajo, Yuma.) Maricopa, Pima, and Pinal counties reported that their average caseload per indigent defense attorney was in the area of 200 per year. Only Graham and Yavapai Counties reported a caseload substantially less than 200.

What do these figures demonstrate? It's difficult to say, but it would certainly appear that some, if not many of Arizona's counties are flirting with appointment numbers which are beyond those judged by the Arizona Supreme Court in *Joe U. Smith* to be necessary for adequate representation. Such a perception is shared by many of the criminal justice professionals who work in these systems on a daily basis.

With regard to the *Joe U. Smith/Zarabia* mandate that attorneys be appointed to represent indigent defendants by an individualized process that weighs attorney competence and case characteristics, only one county indicated that successful bidders for a criminal contract need have any criminal experience. All other counties either had no expressed standards for bidders, or the standard was merely "in good standing with the Arizona Bar Association."

The study revealed nothing about how often lawyers asked to be removed from cases because of overwork or lack of competence. More fundamentally, it did not address how often such requests should have been made. Similarly, the study does not cover how such requests are reviewed and how often they are granted.

In short, even with the help of the Yuma Study, we have very little systematic information on how the various county indigent representation systems work and whether they adhere to *Joe U. Smith* and *Zarabia* mandates. Based solely on anecdotal information, however, it may be fair to observe that many defense attorneys — public defenders and contract lawyers alike — have complained in recent years that the *Joe U. Smith* guidelines have regularly been breached. Where does that leave us? Some may say that this is not a problem and that we can simply rely upon the type of individual litigation seen in *Zarabia* to monitor the systems. There are, however, obvious disincentives for overworked public defenders and attorneys beholden to the counties for contractual opportunities to challenge in court the particular circumstances of their case. Few lawyers may feel comfortable doing what the *Zarabia* lawyers found it necessary to do — essentially pleading their own incompetence. The possible crisis in indigent representation may well call for a more broadly founded solution.

Senate Bill 1349 provided a potentially important step in that direction by creating "A Commission on Indigent Representation,"¹⁷ which would be responsible for evaluating:

- the delivery of Indigent Services
- determination of indigency and eligibility for legal representation.
- standards and training for public defenders and prosecutors
- statewide standards for caseloads and workloads
- a uniform system for case counting and reporting of costs involved in indigent representation

With regard to capital indigent representation, 1349 went beyond these research and standard setting functions by providing for various forms of financial aid to the counties for capital cases and establishment

of a State Capital Appellate Public Defender (SCAPD), which would handle all appellate indigent representation in the State.

For the first time, therefore, the legislature appeared to have recognized that indigent representation may not be something that can be handled totally at the county level and that only with state level assistance, needs analysis and standards can indigent representation be effectively provided in Arizona. While the Governor vetoed the Bill, that veto in no way challenges these underlying assumptions.¹⁸

The debate about indigent representation continued further during a summer special legislative session, where consideration was given to legislation concerning indigent representation in capital cases. Rather than motivated by a general concern for the adequacy of representation, however, Senate Bill 1003 was introduced with the specific intent to permit Arizona to opt into recently passed federal legislation. President Clinton, in April, signed federal legislation that shortened the length of the federal habeas corpus proceedings. However, in order for states to partake in this expedited process, they must have in place statutes that: 1) provide a funding mechanisms for the payment for post-conviction relief (PCR) representation in capital cases; and 2) standards for competency for lawyers in such PCR representation. Senate Bill 1003 was written by the Attorney General's Office to meet these twin opt in requirements.

As passed by the legislature and as signed by the governor, Senate Bill 1003 includes the following provisions:

1. a PCR attorney in a capital case will be paid \$7500, with the money coming from the state's general fund instead of the counties' or court's budget.
2. there will be judicial discretion for additional attorney's fees with "good cause," but the counties will pay that amount.
3. minimal standards of attorney competency were established for attorneys in capital PCR cases, with the Supreme Court left with the ability to set additional and stricter standards.¹⁹
4. a requirement that the Supreme Court compile and administer a list of qualified attorneys by January 1997 from which PCR attorneys will be appointed to particular cases.

Without addressing the merits or demerits of this recently passed legislation, it is clear that it continues the growing recognition that indigent representation is not something that can any longer be merely considered a county responsibility.

We believe that the current confluence of: (1) the mandates of *Zarabia/Joe U. Smith*, (2) the lack of systematic knowledge to evaluate compliance with those decisions, and (3) concerns about the adequacy and financial viability of the present county based indigent representation systems mandates immediate consideration of additional legislation. That legislation needs to address at the state level the continuing problem of indigent representation generally. We urge the State Bar and Arizona attorneys generally to facilitate the passage of such a bill.²⁰

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ENDNOTES

1. Supreme Court of the State of Arizona (En Banc) No. CV-95-0517-SA, Decided February 13, 1996.
2. ARS § 13-4013 provides that:
When counsel is appointed by the court and represents the defendant in either a criminal proceeding or insanity hearing, he shall be paid by the county in which the court presides, ...
3. These counties often also use a contract system for overflow cases or for ones in which the Public Defender's Office has a conflict.
4. *State v. Joe U. Smith* 355, P.2d at 360.
5. *Id.* at 361.
6. *Id.*
7. *Id.* at 362.
8. *Id.* at 362, 363.
9. *Id.* at 361.
10. Compensation for an attorney selected on the rotational basis was a total of \$375 for up to twenty hours' work on a case (\$17.50 per hour), and \$50 an hour if more than twenty hours was required.
11. Ariz. R. Crim. P. 6.5(a)." Opinion and Order, at 5. In doing so the Court rejected respondent's contention that while he had not matched case necessity with attorney competence and skills, a mentor system would correct any inadequacy. The Supreme Court ruled: "We do not share Respondent's optimism that an attorney like Deason, who has no trial or criminal experience, can become reasonably competent to represent a defendant, like Zarabia, charged with a very serious crime, simply by having a mentor with whom to consult as the need may be perceived and the occasion arise. Indeed, one wonders whether even a very able probate and estate planning lawyer will know when or on what issue to seek help and advice." Cite
12. *Id.* The Court never fully reached the Constitutional, statutory or rule violations associated with the Deason appointment, because after the Court took the case under consideration, Bradshaw removed Deason from Zarabia's case and reassigned the case to another attorney. Opinion and Order, at n. 1. But the Court nonetheless reached the merits of the issue because the matter was capable of repetition. *Id.*
13. *Id.* at 6.
14. At the time of this writing, the authors were told that Yuma County had selected a Public Defender and established a summer start-up date for the Defender's Office.
15. It is also clear, however, that the Supreme Court is not willing to actively criticize Superior Court Judges such as Bradshaw for their impermissible but apparently good faith attempts to deal with indigent representation problem. For example, on the day after the *Zarabia* decision was handed down, Judge Bradshaw tendered his resignation as Presiding Judge of Yuma County. February 14, 1996 Letter from H. Stewart Bradshaw to Chief Justice Stanley G. Feldman. Two days later, Chief Justice Feldman rejected Bradshaw's resignation, saying:
"This court fully understands the exigencies that led to your adoption of the appointment system described in *Zarabia* and appreciate your efforts to address the problems of providing counsel for indigent criminal defendants. We also appreciate the efforts of the many Yuma County lawyers who accepted cases assigned to them under the system you adopted. The fact that the system could not be upheld under the law does not in any way diminish the efforts and contributions made by you, your fellow judges, and the

members of the bar.

Your tender of resignation is rejected because we have confidence in your performance and believe you are the best person to be Presiding Judge in Yuma County. We are also confident that the members of the bar will help you until the county's public defenders office is established." February 16, 1996, Letter from Chief Justice Stanley G. Feldman to Presiding Judge H. Stewart Bradshaw.

16. Copies of the Study can be obtained from the authors of this article at Osborn Maledon. These authors, however, merely report the results of the study and have no independent knowledge of the study's validity and reliability.
17. This Commission will include representatives from the legislature, Attorney General Office, County Supervisors' Association, League of Cities and Towns, Arizona State Bar, public defenders, county and city prosecutors, judge sand court administrators.
18. The Governor's veto message focuses on: (1) the method of selecting the Capital Appellate Public Defender; (2) ambiguity in the bill as to whether the SCAPD could or must handle more than just capital cases; and (3) the funding of the SCAPD. May 2, 1996, Veto Message directed to Jane Dee Hull, by Fife Symington. Significantly, the Governor did not object to the proposed study of indigent representation and endorsed that portion of the bill that called for the establishment of a system for statewide assistance to counties for trial level capital indigent representation. *Id.*
19. At the time of this writing, the Supreme Court has appointed a special committee as a result of this legislation to address the issue of formulating new rules concerning stricter standards for PCR representation in capital case.
20. Senate Bill 1349 and Senate Bill 1349 focused primarily on the issue of capital indigent representation. In light of the recent federal defunding of Arizona's Capital Representation Project and the unique time, skill, and financial requirements of capital cases, we believe that capital cases was a logical and significant place to begin state level involvement in the indigent representation system. *Zarabia/Joe U. Smith*, however, demonstrated that statewide review, data collection, and coordination also should be explored for non-capital cases as well. Governor Symington rightfully points out in his veto message that there is some confusion in Senate Bill 1349 between issues of capital indigent representation and indigent representation generally. In order to remedy that confusion, as well as to address both issues, two bills, or a single bill with two separate parts, may be appropriate. The first would address the issue of a state wide assessment of indigent representation generally. The second would focus on the unique and special issues associated with indigent capital representation both at the trial and appellate levels.