MEMORANDUM

To: Judge Joseph C. Welty, Presiding Criminal Judge
   Maricopa County Superior Court

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

RE: Duty to Investigate During Post-Conviction Proceedings

DATE: June 4, 2014

Thank you for the opportunity to provide you with an opinion regarding defense counsel’s obligations during state post-conviction proceedings in death penalty cases. This memo will explain why the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require that counsel conduct a new, independent investigation in every case.

A. Brief Background of ABA Guidelines and Adoption in Arizona

The ABA Guidelines are the national standard of care for the capital defense effort, and compliance is required in Arizona pursuant to Rule 6.8.

In 2003, the American Bar Association published its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (“ABA Guidelines”). I led the project to update and expand the prior 1989 version of the Guidelines to reflect current law and jurisprudence. We incorporated the lessons that defense counsel had learned in the intervening years about the skills, strategies, and techniques that were necessary for an effective defense in capital cases. We also noted the common mistakes that led to injustices. The result was a compendium of best practices that are today recognized as the national standard of care for the defense effort in death penalty cases.

More than that, however, the American Bar Association believes that meeting the responsibilities identified in the ABA Guidelines is essential to ensuring justice in capital cases. The Guidelines have been cited in hundreds of decisions by state and federal courts, including the U.S. Supreme Court, and adopted by numerous jurisdictions, including Arizona. In 2006, the Arizona Supreme Court amended Arizona Criminal Procedure Rule 6.8 to require that death penalty counsel in trial, appellate, and post-conviction proceedings “be familiar with and guided by” the performance standards of the ABA Guidelines. Six years later, in 2012, the Maricopa County Superior Court adopted a Plan for Review of Appointed Defense Counsel that requires counsel who wish to be appointed to capital trials meet the qualifications of ABA Guideline 5.1. They must also have “a demonstrated history of practice, and [be] expected to continue to practice, in accordance with the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines.”
B. The Duty to Investigate Required by the ABA Guidelines Applies to State Post-Conviction Proceedings.

The revised ABA Guidelines placed special emphasis on the duty to investigate at all stages of capital proceedings because doing so ensures fairness, due process, and accuracy of the result.

Guideline 1.1, “Objective and Scope of Guidelines,” provides:

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

ABA Guidelines 1.1(B) (emphasis added).

Guideline 10.7, “Investigation,” also explicitly applies to every stage of proceedings, including post-conviction. It provides:

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

The Guidelines contemplate the review of trial counsel’s performance and files as part of the necessary investigation:

B. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

ABA Guidelines 10.7 (emphasis added).
The Commentary following Guideline 10.7 provides detailed guidance on the elements of an appropriate investigation, which include an examination of the charging documents, physical evidence, information in the custody of the police and prosecution, and the crime scene, as well as interviews with potential lay and expert witnesses. The Commentary also sets forth areas that should be investigated for potential mitigating evidence, including the defendant’s medical history, family and social history, educational history, military service, employment and training history, and prior juvenile and adult correctional experience. Providing a detailed Commentary and a list of potentially fruitful areas to be investigated was part of an intensive effort to underscore the importance of the investigation function.

The revised Guideline placed special emphasis on the duty to investigate because the failure to do so was identified as one of the most common and grievous mistakes by defense counsel. Upon review of many trial and appellate cases, it became clear that lawyers who did not conduct thorough and independent investigations -- relying on the government’s evidence or predecessor counsel’s work -- missed critical evidence that could have affected the outcome of the proceedings.

The fruits of a thorough investigation can substantiate claims of ineffective assistance of counsel that cannot be otherwise proved when relying on the trial transcript alone. It is not enough to simply present evidence that the trial lawyer was unqualified or unprepared. Post-conviction counsel must find and present the missing evidence in order to persuade the court that introducing it at trial would have made a difference. An investigation is the only way to demonstrate the significance of that evidence and satisfy the prejudice prong in Strickland. Investigations also reveal evidence of government misconduct that would substantiate Brady and Batson claims, similarly not provable without a new investigation in state post-conviction proceedings.

C. The Importance of New, Independent Investigations in Post-Conviction Proceedings

A new and independent investigation is required in state post-conviction proceedings because the law now places tremendous emphasis on state court proceedings and limits the opportunity to introduce new evidence in federal courts.

Post-conviction proceedings are increasingly the only opportunity to present evidence that establishes a violation of the defendant’s Constitutional rights. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) requires federal courts to strictly defer to state court findings, making it critically important that a complete evidentiary record is developed during post-conviction proceedings. Investigations at this stage expand the record beyond the four corners of the trial transcript, to include evidence that some trial lawyers miss: for example, the witnesses that were never interviewed, the documents that were never examined, and the expert who was never consulted. This evidence will not be contained in trial counsel’s file, nor the file of direct appeal counsel. It must be developed for the first time in state post-conviction proceedings.
The Supreme Court has recently clarified its view that state court proceedings should be the beginning and end of death penalty appeals, absent extraordinary circumstances. In 2011, in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), the Court further restricted the ability of federal courts to hear evidence that was not previously introduced in state court. Other decisions have made clear that the scope of federal review and the ability of federal courts to set aside state court determinations are becoming vanishingly small. See also *Harrington v. Richter*, 131 S.Ct. 770 (2011) (holding that AEDPA deference applies even where a state court does not issue an opinion explaining the reasoning of its decision); *Burt v. Titlow*, 134 S. Ct. 10 (2013) (reversing grant of habeas relief because the Sixth Circuit failed to apply the “doubly deferential” standard of review when it refused to credit the state court's reasonable factual finding); and *White v. Woodall*, No. 12-794, 2014 WL 1612424 (Apr. 23, 2014) (reversing circuit court’s grant of habeas corpus relief because the state court adjudication of a Fifth Amendment claim was not “objectively unreasonable.”).

The importance of conducting an investigation in post-conviction proceedings has been acknowledged in Maricopa County. In May, 2012, the Superior Court struck a post-conviction petition and removed appointed counsel from the case precisely because counsel had failed to conduct a “through, independent investigation in accordance with [ABA] Guideline 10.7.” *State v. Hargrave*, CR 2002-009759 (Maricopa County Sup. Ct. May 2, 2012) (order striking defendant’s Petition for Post-Conviction Relief). The defendant was appointed new counsel and provided with a second opportunity to challenge his conviction and death sentence in state court. Other state courts have also recognized the necessity of an investigation, in part by relying on the ABA Guidelines but also in recognition of the practical aspects of the proceeding. For example, the Colorado Supreme Court identified some of the reasons that post-conviction counsel must undertake a substantial investigation:

Post-conviction counsel in a death penalty case must “continue an aggressive investigation of all aspects of the case”. Post-conviction counsel cannot rely on the record because: (1) trial counsel may not have conducted an adequate investigation; (2) the prosecution may have concealed evidence; (3) witnesses may have falsely testified; (4) and the forensic evidence may have been inadequate. Therefore, post-conviction counsel must reinvestigate the facts underlying the conviction and sentence, the mitigating evidence, and trial counsel's performance.

*People v. Ray*, 252 P.3d 1042, 1049 (Colo. 2011) (internal citations omitted). The Utah Supreme Court, citing to the ABA Guidelines, similarly stated:

As the commentary to guideline 10.7 notes, counsel has a “duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.” The duty to investigate extends to the penalty phase, and counsel has a “duty to investigate and present mitigating evidence.” These “parallel tracks” of investigation also apply in post-conviction proceedings, where post-conviction counsel has a duty to investigate “the facts underlying the conviction and sentence, as well as such items as trial counsel's
performance.” Counsel also has a duty to investigate the client in order “to discover mitigation that was not presented previously [and] also to identify mental health claims.”


Finally, it is important to note that investigations in state post-conviction proceedings can and do reveal injustices that would have not otherwise been discovered. For example, in 2012, Damon Thibodeaux became the 300th prisoner exonerated by DNA evidence *only* because a pro bono law firm complying with the ABA Guidelines conducted a new investigation of his case in state post-conviction proceedings and discovered that none of the 81 pieces of DNA evidence recovered at the crime scene contained his DNA.¹ Similarly, an Alabama circuit court recently granted William Ziegler a new trial after an investigation by post-conviction counsel identified myriad examples of trial counsel’s “woefully deficient” performance and prosecutorial misconduct.² Neither of these prisoners would have obtained relief without the occurrence of new investigations in post-conviction proceedings.

For these reasons, and consistent with the ABA Guidelines, it is the policy of the American Bar Association that conducting a new, through and independent investigation is a necessary and critical duty for all counsel representing death-sentenced prisoners in state post-conviction proceedings.

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Thank you again for the opportunity to provide you with this opinion. Please do not hesitate to contact me if you have questions or if I can be of further assistance.

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² The court noted numerous deficiencies in trial counsel’s performance, including: failure to consult with a police procedures expert, which would have revealed evidence of flawed police investigation; failure to investigate evidence that implicated the other defendants; failure to obtain available impeachment evidence against the State's key witnesses; and failure to challenge the police interrogation of Mr. Ziegler, which was done in violation of the department's own procedures. *State v. Ziegler*, No. CC-2000-002891.60, slip op. at 210 (Mobile County Cir. Ct. Oct. 29, 2012); *see also* Brendan Kirby, *How the system failed William Ziegler: Perjured testimony, trashed evidence, lying jurors*, Birmingham News, Feb. 1, 2013.