

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
May 16, 2011**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Douglas Rayes
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
Daniel Patterson

Guests:

Bob James	Rachelle Resnick
Kristine Fox	Natman Schaye
Dale Baich	Jennifer Garcia
Diane Alessi	Patti Starr
Elizabeth Walker	Vince Imbordino
Tony Novitsky	Chris DuPont
Bruce Peterson	Paul Julien
Theresa Barrett	

Members not present:

Hon. Ronald Reinstein
William Montgomery

Staff: Mark Meltzer, Julie Graber

1. Call to Order; approval of the meeting minutes. The meeting was called to order at 12:05 p.m. The first item of business was consideration of the draft minutes of the January 18, 2011 Committee meeting. A motion was made to approve those minutes, the motion was seconded, and the January meeting minutes were unanimously approved.

2. Electronic filing of capital appeals. Rachelle Resnick, Clerk of the Arizona Supreme Court, updated the Committee on electronic filing of documents in capital appeals. Ms. Resnick advised that e-filing in the Supreme Court began in 2008 with an in-house product known as “ACE”. Administrative Order 2010-107, entered in October 2010, authorized a pilot program for e-filing briefs and other attorney-prepared documents through AZ TurboCourt, and AZ TurboCourt has already been utilized in three death penalty cases. If the pilot successfully concludes later this year, it will permanently replace the ACE system. The Clerk’s Office is working with the Maricopa County Superior Court on a program called “Court 2 Court” that would permit electronic filing of the trial court’s record on appeal. The electronic record would include reporters’ transcripts, and photographs would be scanned and electronically accessible; the electronic record would not initially include videotapes, audiotapes, or oversized exhibits. The AZTurboCourt pilot program encompasses e-filing of special actions as well as direct appeals. Ms. Resnick explained that an advantage of e-filing is round-the-clock access for filers. Electronic filing also reduces the volume of paper and creates efficiencies for the Clerk in maintaining the record. Ms. Resnick noted that having documents in electronic format allows individuals at different locations, such as users in multiple judicial chambers, to review the same case document simultaneously.

3a. Status reports: Maricopa County Superior Court. Judge Rayes outlined procedures for status conferences in capital cases. An initial status conference is set when the prosecutor files a

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notice of intent to seek the death penalty. Judge Rayes determines at this initial conference whether appointed counsel has sufficient time to devote to a new capital case. The case is then assigned to one of six judges dedicated to presiding over capital cases, and status conferences are set every sixty days thereafter. As the trial date approaches, these conferences may be set every thirty days. The parties are required to submit joint status conference memos before each conference. Defense counsel and the mitigation specialist may also be required to provide the court with statements of their hours expended to substantiate that progress is being made in preparing the case for trial.

In the past twelve months, 56 cases have been resolved and 27 notices have been filed. There are currently 67 capital cases pending disposition in the Maricopa County Superior Court. Additional details concerning these cases include the following:

- In the past three months, seven cases have been resolved and five new notices have been filed.
- Thirteen capital cases have been tried during the past six months.
- Four of the pending cases are set for trial in May.
- Twenty cases are scheduled to proceed to trial through September.

Because the number of new death penalty cases has been decreasing, most defendants in new capital cases over the past year have received appointed counsel from one of the three staffed public defender agencies. However, eight private attorneys have been appointed during that time; four were appointed because of three-way agency conflicts, and four were appointed because of capacity issues. At the present time, all three staffed agencies are available for new appointments.

The Office of Public Defense Services assesses the case load of an attorney who is interested in an appointment before the appointment is made. The current hourly rate of \$125 for private attorney appointments is less than the federal rate of \$178, and this disparity may discourage some well-qualified lawyers from seeking appointments on state capital cases. An effort is underway to determine the increased cost to the county if a higher hourly rate was established.

3b. Status reports: appeals and PCRs. There are 26 capital appeals pending before the Arizona Supreme Court. Ten of these appeals were filed in 2010. Three notices of appeal have been filed in 2011, and the notice of appeal in a fourth case is anticipated.

There are eleven capital defendants without counsel for an initial PCR petition. One of these cases is from Yuma County, and the others are from Maricopa County. The oldest of these eleven cases involves a July 2009 opinion on direct appeal.

In February 2011, the Maricopa County Public Defender accepted appointments on two capital PCRs. Two private attorneys were appointed on PCRs in 2011, and eleven private attorneys were appointed in 2010. There are sixteen private attorneys on the list of PCR qualified counsel, and each of them has a case.

Three alternatives were suggested for reducing the number of capital defendants who lack PCR counsel. These alternatives are: (1) adding new attorneys to the list of qualified PCR counsel; (2) requesting that attorneys who are currently on the list assume additional appointments; and (3) increasing the number of assignments to the State Capital PCR Public Defender. The Arizona Public Defenders Association has a conference in June, which may provide an opportunity to publicize the need for additional capital PCR counsel.

Rule 6.8(d) permits the appointment of an attorney in exceptional circumstances who is not qualified under subsections (a), (b), or (c) of the rule, if the appointed attorney associates with another lawyer who is qualified under the rule. A member raised a question about the standards for associating a qualified attorney. Ms Hallam advised that associating another attorney is not the equivalent of having co-counsel, because the attorney who is associated (a so-called “resource counsel”) is not paid and does not file a notice of appearance in the case. Although resource counsel provides legal guidance, reviews written documents prior to filing, and provides general supervision of the 6.8(d) attorney, resource counsel in Arizona performs as a volunteer. Ms. Hallam noted that resource counsel is informally identified to her, but there is no process in place for verifying that the resource counsel has agreed to serve in that role, nor is resource counsel’s performance monitored by the Court. Judge Rayes added that resource counsel typically is not identified on the trial court record, and he may not know whether a PCR attorney has been appointed under Rule 6.8(c) or 6.8(d).

Mr. Logan noted that the number of capital PCRs in the Maricopa County Superior Court has increased from a single digit several years ago to twenty-two cases currently. This increase has been commensurate with a decrease in the number of new death notices, and in light of the decreased need for trial attorneys, a number of experienced trial attorneys who are qualified under Rule 6.8(b) are seeking appointment on a capital PCR under Rule 6.8(d).

Because appointments pursuant to Rule 6.8(d) are a relatively new phenomenon, it is too early to assess the quality of the lawyers who have been appointed under that provision. A member suggested that no appointments should be made under Rule 6.8(d). Another suggestion was to provide compensation to resource counsel, which would require resource counsel to submit bills that could be audited for performance. One member offered an opinion that the standard of care mandated that two attorneys be appointed on every capital PCR, and that at least one of the attorneys must be qualified under Rule 6.8(c). Another member suggested that the Oversight Committee make recommendations to the Supreme Court on this issue, and presented as a possible remedy that the State Capital PCR Public Defender be designated as resource counsel on PCR appointments of private counsel under Rule 6.8(d).

A member commented that Rule 6.8 was intended in part to improve the quality of attorneys at trial and on appeal so there would be fewer residual issues for a PCR proceeding. The Chair noted that because most of the cases involving appointments for a three-phase trial are still pending in state courts, it may be too early to quantify counsels’ effectiveness. A member responded that following the conclusion of proceedings in state court, an evaluation of the performance of counsel that would include details such as the amount of time spent on a case, or the number of experts who were called, might be informative. Another member replied that with

regard to PCRs, it is often not the quality of what has been done by counsel that becomes significant, but rather, what counsel has failed to do.

4. Search for a new Capital Post-conviction Public Defender. The members were advised that decisions have been made on some of the appointments to the Nomination Commission, but these have not yet been publically announced.

Mr. Lieberman advised that when he left the office ten weeks ago, a plan was in place for each of his five cases. Four of the cases are in Maricopa County; one of these involves a Rule 11 issue. The fifth case is in Mohave County, and an evidentiary hearing is pending. Court proceedings in all five cases have been stayed until the appointment of the new Public Defender.

5. Discussion concerning the effective assistance of counsel at the PCR stage. The *Maples*, *Cook*, and *Foster* petitions that are pending in the U.S. Supreme Court were briefly discussed. Mr. Cattani will provide an update on any action taken in these cases at the Oversight Committee's next meeting.

Mr. Lieberman stated that the concept of a committee that would screen applications to be appointed as PCR counsel in a capital case, or that would review the performance of appointed PCR counsel, remains worthwhile. Judge Rayes, Mr. Cattani, and the Chair agreed. The Chair and these three members will meet as a workgroup to further discuss this potential committee.

6. Capital case data collection. On behalf of the Oversight Committee's data collection workgroup, Mr. Cattani advised that an update on the data contained in the Capital Case Commission's 2002 report should focus on two areas. One area would be cases in which a death sentence has been imposed since the 2002 report; Mr. Cattani stated that there are 72 cases in this category, and he will take the lead in compiling outcomes on these cases. The other area involves cases where a death notice was filed but the case did not conclude with a death sentence in the trial court. Mr. Montgomery will take the lead on this data set. Mr. Lieberman advised that Peg Bortner, who compiled the data in the 2002 report, is still on the faculty at ASU; the Chair and Mr. Cattani will attempt to re-establish contact with her to discuss the current data initiative.

7. Capital case training. Paul Julien, the AOC's judicial education officer, informed the Committee that additional funding was available as a consequence of the earlier grant award from the Bureau of Justice Assistance, which was used for last spring's capital case conference. Justice Ryan is chairing a design team that includes judges, prosecutors, and defense counsel to develop a plan for using these additional funds. A bench book, a manual, or additional training to address recurring issues in capital cases have been mentioned as possible plan objectives.

8. Call to the public; adjourn. There was no response to a call to the public. The meeting was adjourned at 1:20 p.m.