

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
January 18, 2011**

Members Present:

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

Guests:

Hon. Warren Granville	Bob James
Kristine Fox	Natman Schaye
John P. Todd	Jennifer Garcia
Diane Alessi	Patti Starr
Jeremy Mussman	Robert Shutts
Tony Novitsky	Gabe Goltz
Kristin Pruszynski	Chris DuPont
Kim MacEachern	

(All members present.)

Staff: Mark Meltzer, Lorraine Nevarez

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**1. Call to Order; Approval of the Meeting Minutes.** The meeting was called to order at 12:05 p.m. After introductory remarks, the Chair asked the members to consider the draft minutes of the October 19, 2010 Committee meeting. A motion was made to approve those minutes, the motion was seconded, and the October meeting minutes were unanimously approved.

The members then heard a telephonic presentation from Professor Jon Gould and Ms. Lisa Greenman, co-authors of the *“Report to the Committee on Defender Services, Judicial Conference of the United States - Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases (September 2010)”*

**2. Presentation by Prof. Gould and Ms. Greenman.** The 2010 report updated cost and other data in the 1998 *“Spencer Report”*, which had been prepared when the federal death penalty was relatively new. In preparing the 2010 report, the authors conducted extensive interviews with federal judges and counsel who had, respectively, presided over or tried capital cases. Their 2010 report also examined other issues in light of the capital case experience of an intervening decade, including the matter of resource counsel.

The presenters explained that resource counsel were intended to enhance the efficiency of the court in processing a capital case, and to improve the quality of representation of a capital defendant. One way the quality of representation is improved is by resource counsel offering their expertise in capital cases, so that appointed counsel don’t have to “reinvent the wheel” for every death penalty issue. Resource counsel also help with locating necessary experts, and by discussing case strategy with appointed counsel. There are currently three sets of resource counsel: one for the trial level, another for appeals, and a third for post-conviction proceedings

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under section 2255. Although the budget for resource counsel was not available, it was noted that some resource counsel are salaried employees of federal defender offices, while others are attorneys in private practice who are compensated on an hourly rate.

Federal judges are required by statute to consult with resource counsel or the administrative office of the courts prior to appointment of a defense attorney in a capital case. Federal judges do not simply choose a name from an attorney appointment list. The presenters explained that while a list might provide the names of attorneys who had met minimum standards, a careful and deliberate evaluation is done to match the characteristics of each case with a particular lawyer in an effort to provide superior representation for every individual defendant. An attorney's skills are based not only on their quantitative experience, but also on whether that prior experience has been "distinguished." Individual assessments are also made at the PCR level to find well-qualified counsel for this specialized subset of cases.

The authors found that about 26 percent of the authorized federal death penalty cases that proceeded to trial ultimately result in a death sentence. It was noted by comparison that in Maricopa County, over sixty percent of death-noticed cases that go to trial conclude in a death sentence. Prof. Gould expressed concern that this local figure may raise an issue about whether adequate time and resources had been devoted to these cases. He stated that federal courts endeavor to provide sufficient time and resources for defense counsel, including an adequate hourly rate of compensation for appointed private counsel. The September 2010 report found that federal defendants whose cases were in the lower one-third of the range of costs were twice as likely to be sentenced to death. However, quality representation is not simply a matter of spending more hours or more money on a case. Professor Gould concluded that quality representation affects not just the outcome of the case, but it also contributes to the integrity of the death penalty process.

In response to questions, Ms. Greenman noted that on those occasions when an attorney with no post-conviction experience was appointed on a federal post-conviction proceeding, the case did not proceed well, and issues were missed or were inadequately developed. Although the applicable federal statute is not explicit, she said that because of the complexity of capital cases, the statute is interpreted to provide for the appointment of two defense attorneys rather than one on a capital appeal or post-conviction proceeding. She added that trial attorneys are not appointed for post-judgment matters because attorneys who handle appeals or collateral proceedings must have different skill sets.

Prof. Gould and Ms. Greenman were thanked for their presentation. The Chair then asked for reports from members.

**3. Reports from members.** Judge Rayes reported that as of July 2009, there were 118 pending capital cases in Maricopa County. By comparison, in July of 2010, there were 83 pending cases, and at the present time there are 68 pending cases. During fiscal year 2010, there were 29 new filings, one remand, and 63 case resolutions. Judge Rayes also stated that during FY 2010, 17 cases proceeded to trial, and 11 of these (about 65%) resulted in a death sentence. For FY 2011 to date, a period of about six months, 15 death notices were filed, there have been two remands, and 31 cases have been resolved. Nine cases have proceeded to trial in FY 2011 to date,

resulting in four death sentences (about 44%). Judge Rayes noted that there are six judges on the criminal bench who are dedicated to the trial of capital cases.

Judge Rayes also stated that for FY 2010, there were 9 PCRs with counsel, and 11 were awaiting the appointment of counsel. In FY 2011 to date, there are 20 PCRs with counsel, and six are awaiting the appointment of counsel. Judge Rayes added that the time allowed under Rule 32 for filing a petition or response to a petition in a capital case is often insufficient, and he requires that counsel file a written motion every thirty days as needed to extend these deadlines.

Mr. Logan reported that at this time, and with the current capital case inventory, the staffed defender offices have been available for capital appointments. No capital cases have been assigned to a contract attorney within the past six months unless there has been a three-way conflict in the staffed offices. There was one report of a delay in a capital proceeding because the defense attorney had several assigned capital cases, but Mr. Logan indicated that this was an isolated occurrence involving older cases.

Mr. Montgomery stated that the decision to file a death notice in his office is factually driven. His office considers whether aggravating circumstances can be proven, and whether the death penalty is appropriate in a particular case. He seeks the advice of his capital review team before making the final decision about a death notice. It was noted by a member that death sentences had been obtained over the past few years in less than twenty percent of the cases in which death notices had been filed, and Mr. Montgomery was asked if he thought that this was a good allocation of capital case resources. Mr. Montgomery responded that he is aware of the resource commitment required for a capital case, and that going forward, his office will assess the appropriateness of a death notice in each individual case, including changes that may develop with the state of the evidence or any other circumstances as a case evolves. The overall number of homicides committed in Maricopa County could impact the number of death notices that are filed. He does not have a predetermined number of capital cases that should be filed during any given period of time.

Ms. Hallam advised that there are currently 27 capital appeals pending in the Arizona Supreme Court. Fourteen of these cases are from calendar year 2009, and ten are from calendar year 2010. There are eleven unrepresented defendants on capital PCRs, the oldest of which involves a July 24, 2009 opinion on direct appeal. There are eleven attorneys who have a capital PCR, or who may be able to take one.

The State Capital PCR Public Defender has five cases: one is pending a hearing, one is pending a conference, a response to a petition is pending in one case, and two cases are being investigated. A sponsor for a bill to extend the office beyond its July 1, 2011 sunset date has been found in the Senate, and another sponsor for this bill may be found in the House. He expects that the Executive Department will lobby in support of the extension for the office, but the office would welcome support from all stakeholders.

These other comments were made by those present:

- The number of death notices filed in Maricopa County during recent years may have been due to unique circumstances.
- The average number of hours a defense attorney devotes to a capital case may be increasing because attorneys now have fewer capital cases that require their time.
- There have been no reports of defense attorneys in Maricopa being denied reasonable requests for resources in a capital case.
- Defense attorneys now have greater experience with investigating mitigating circumstances than they did several years ago. Attorneys have become more sophisticated in presenting mitigation evidence to trial juries.

**4. Proposed amendment to A.R.S. § 13-4041.** Mr. Lieberman presented a proposed amendment to this statute that would allow a county to bill the State for half the expense of a capital PCR that might be incurred by a county defender agency; the current statute permits reimbursement to the county only for expenses that were incurred by a private attorney. The rationale for this proposal is that although a county would save money if the county used a staffed defender agency on a PCR rather than a private attorney, this economy would exist only if the county could recover a portion of its costs for the defender agency, as it does now with a private attorney. No formal action was taken on the proposal. It was noted that the Pima County Public Defender does not support the appointment of the public defender on capital PCRs.

**5. Workgroups.** As a follow up to the Oversight Committee's November 2010 report to the Arizona Judicial Council, the Chair established workgroups for two of the four issues that the report noted were currently under study.

- Workgroup #1: The Chair, Mr. Cattani, and Mr. Lieberman will address whether a screening committee should be established to make qualitative assessments of applications by private counsel for appointment on capital PCRs.
- Workgroup #2: The Chair, Mr. Montgomery, and Mr. Cattani will address whether a mechanism should be established for compiling statewide capital case data, and if so, further particulars of data collection, such as who would collect the data, what data would be collected, and the cost of collection. Mr. Cattani noted the value of having this data.

A workgroup on the issue concerning appointment of public agencies on capital PCRs will be on hold pending developments in the current session of the Legislature. The issue of establishing a law school capital case clinic is tabled at this time.

**6. Call to the public; adjourn.** There was no response to a call to the public.

Mr. Lieberman announced that his office along with defender agencies is planning annual capital case training. They may also offer quarterly training on capital appeals and PCRs.

There being no further business before the Committee, the meeting was adjourned at 1:20 p.m.

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