

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
February 29, 2012**

Members Present:

Hon. Ronald Reinstein, Chair
Hon. Douglas Rayes
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
William Montgomery, by proxy,
 Anthony Novitsky
Daniel Patterson

Guests:

Hon. Paul McMurdie
Robert Shutts
John Todd
Jennifer Garcia
Bruce Peterson
Kristine Fox
Paul Rubin
Diane Alessi
Elizabeth Walker
Theresa Barrett
Dale Baich
Charles Babbitt III
Paul Julien

Staff:

Mark Meltzer
Tama Reily

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1. Call to Order; approval of the meeting minutes. The meeting was called to order at 12:05 p.m. The Chair expressed his respect for Justice Ryan, and conveyed the enjoyment Justice Ryan had described to him about working with members of this Committee.

The Chair then asked the members to review the draft minutes of the October 5, 2011 meeting.

Motion: A member moved to approve those minutes, followed by a second, and the members unanimously approved the October 5 Oversight Committee meeting minutes.

2a. Status reports: Maricopa County Superior Court. The Chair invited Judge Rayes to report on the status of capital cases in Maricopa County. Judge Rayes advised that there were currently seventy-one pending cases. There have been nine death notices filed in the past two months. A jury trial commenced this morning, and other trials are set for March and April. There have been eight jury trials and three death sentences in fiscal year 2012 to date. Fifteen cases concluded during that time. Judge Rayes also noted that there are thirty capital petitions for post-conviction relief pending in Maricopa County; twenty-five of these are in the briefing stage. Usually the defendant files a petition within two years following the appointment of counsel. There are occasionally issues involving delay in the transfer of a defendant's file to PCR counsel. The court has stayed four cases assigned to the State Capital Post-conviction Public Defender.

Judge Rayes reported that three capital cases judges will rotate with the next judicial assignments. Twenty-seven capital cases are assigned to these judges. Three judges who have completed training with the National Judicial College will rotate on to the capital case bench. A member expressed his concern about the rotation of experienced capital case judges, but was also

mindful that the presiding judge considered this factor when making assignments. Capital case judges meet in conference every two weeks. Judge Rayes added that he conducts a conference following the filing of each new death notice to assure that the capital case is compatible with counsels' caseloads.

Mr. Novitsky reported that his office is maintaining a consistent approach to capital cases. Mr. Patterson noted that the new county attorney has been more receptive to utilizing bench trials and other alternative dispute resolution procedures for capital cases. Mr. Logan added that his list of capital cases is longer than the court's because he tracks potential capital cases, and that several of his potential capital cases were resolved without the filing of a death notice because of increased early-stage disclosure of information. The Maricopa County stakeholders believe that the recent spike in the number of death notices is probably circumstantial rather than a trend, but a wait-and-see approach is advisable. The public defender's office can take three new capital cases. Private counsel are appointed only when the staffed offices are full, or if there is a three-way conflict of interest, and consequently only one capital case has been assigned recently to private counsel.

With regard to the thirty pending capital PCRs, a member noted that several years ago, the number was in the single digits. The office of public defense services now operates near its budget allocation, but the increased number of capital PCRs could place a considerable strain on county resources. The volume of pending PCRs is an extension of the 2007-2008 crisis and the higher number of capital cases that were pending trial in Maricopa County at that time. On a related matter, a member raised an issue concerning the difficulty PCR counsel have in scheduling prison visits with death row inmates. The Department of Corrections reportedly permits a maximum of two, two-hour attorney visits weekly with a death row inmate, and because of high demand for visitation, counsel must schedule visits at least a month in advance. These restrictions also affect the scheduling of expert witness examinations of these inmates. The situation appears to be a matter of DOC resource limitations, and Mr. Cattani advised he would speak with DOC officials concerning this issue.

2b. Status reports: appeals and PCRs. Ms. Hallam advised that there are twenty-eight pending capital appeals. Eleven of these cases are in chambers. There were eight notices of capital appeals filed in 2011; there were no notices filed during the first two months of 2012.

There are at most four defendants, and possibly none, awaiting the appointment of counsel on petitions for post-conviction relief. A large local firm may take two of these cases, although the firm may have recently uncovered a conflict of interest that would preclude accepting them. An out-of-state firm might take one case, and a local attorney has been located to associate with pro hac vice counsel. An attorney has also agreed to take the fourth case upon conclusion of any certiorari proceedings. In sum, there is no longer a backlog in the appointment of counsel for the first PCR petition in a capital case.

Ms. Hallam also reported that two motions for execution warrants are pending.

3. Maricopa County Administrative Order 2012-008. The Maricopa County presiding judge entered this administrative order on January 11, 2012. Judge Rayes explained that this AO is a

quality assurance plan for appointed private attorneys; it does not apply to counsel in staffed defender agencies. There are two committees under this plan, one for capital cases and the other for felony cases. The capital case committee is composed of the director of the Office of Public Defense Services, the presiding criminal judge or a designated judge, the heads of the three defender agencies, and four members of the criminal defense bar. Every year the capital committee will evaluate all new applicants for capital case appointments and one-third of the attorneys already eligible for appointment. The attorney must submit specified information to the committee, including a list of representative cases, recommendations, writing samples, and a summary of relevant CLE, and the committee will interview the attorney. The committee may request case logs, final disposition records, and time sheets. The committee will make recommendations to the presiding criminal judge, who will make final decisions on whether an attorney should receive capital case assignments.

Although a less formal evaluation process had been in place, attorneys' professional and personal issues sometimes resulted in motions to withdraw at a late stage of a capital case, and the impact of those events on capital case management contributed to the need for this more formalized procedure. The court expects that AO 2012-008 will help to avoid such delays in the future.

4. Update on the State Capital Post-Conviction Public Defender. Judge Rayes serves on the commission responsible for nominating a new director of this state office. He advised that the commission sent its list of nominations to the Governor earlier this month. At the time of the Oversight Committee's meeting, a legislative appropriation proposal for the FY 2013 budget is pending that does not fund the office.

The Attorney General is considering introduction of legislation that would require the counties to pay the full cost of capital PCR defenders, including services rendered by the state defender's office and services provided by appointed private counsel. Several members questioned whether it was fair to require that the counties provide funding for a state agency. The Attorney General's office believes that this proposed structure will provide a fiscal incentive for counties to provide capital PCR defender services "in-house," and that the counties will use their resources more efficiently by appointing staffed county defender agencies in capital PCR proceedings. The proposed legislation would also provide for the appointment of PCR counsel in a capital case concurrently with the appointment of counsel for a direct appeal. The Attorney General believes this would expedite the post-sentencing process and, as a possible side-benefit, minimize the loss of documents during the transfer of a file after an appeal. Discussion ensued.

- If PCR counsel and appellate counsel were appointed at the same time, and the conviction was reversed on direct appeal, wouldn't the expense of PCR counsel be a waste of resources? An alternative view was that in the event of a reversal, PCR counsel might have developed information that could be useful at defendant's re-trial or re-sentencing.
- Are there enough qualified attorneys to allow for the concurrent appointment of appellate and PCR counsel in capital cases? Inherent in the proposal is a notion that when the county decides to seek the death penalty, the county will be responsible for providing sufficient resources for the case, including available and qualified attorneys at all stages

of the proceedings. A member commented that the availability and expense of PCR defenders is probably a remote consideration when the county attorney decides whether to file a death notice.

- The Attorney General's office provides prosecution services following conviction, and it does not require reimbursement from the counties. Why shouldn't the state also provide defense services? The Attorney General believes that until the 1990's, the counties bore the cost of capital post-conviction defense, and that this was a better model than the current one. In addition, a statute requires the attorney general to represent the state on appeals, although a member noted that changing statutory descriptions of duties is at the heart of this discussion and that the attorney general's duties might be similarly changed.

The Chair concluded that the Oversight Committee would remain neutral on the Attorney General's proposal. A member noted in closing that pending legislation would further reduce the state's obligation to reimburse counties for capital PCR expenses. Although a statute now provides that the state will reimburse a county fifty percent of the cost of a capital PCR defender, as a practical matter, for this year and the prior one, the counties have received only about twelve percent of their fifty percent reimbursement requests.

5. SCOTUS update. Mr. Cattani updated the members on two post-conviction cases before the United States Supreme Court, one of which, *Martinez vs. Ryan*, he argued on October 5, 2011. Argument in the other case, *Maples vs. Thomas*, occurred on the same day, and the high court's opinion followed in January. Mr. Cattani believes that *Maples* will have minimal impact on Arizona because its limited holding was that good cause to overcome a procedural default could arise from counsel's complete abandonment of his client, which is an uncommon situation. On the other hand, if *Martinez* broadly concludes that there is a constitutional right to an effective lawyer in a post-conviction proceeding, the impact on Arizona could be significant. Would a second PCR be required to challenge the effectiveness of counsel in the first proceeding? Mr. Cattani expects an opinion in *Martinez* this spring.

6. Screening committee. The Oversight Committee considered two written proposals developed by the "screening committee" workgroup concerning attorneys' applications for appointments on capital PCRs. One proposal contemplated a screening committee with judge and attorney members, including the state PCR defender, appointed by the Chief Justice. The screening committee would submit a memorandum with its recommendations concerning applicants to the Chief Justice. The second proposal suggested a more informal advisory panel composed of judges and attorneys, including the state PCR defender, who would serve at the invitation and pleasure of the Chief Justice or a designee. Both proposals included requirements for due diligence evaluations of applicants for capital PCR appointments, but the second proposal envisioned a panel that would, without a required memorandum, make recommendations to the Court's staff attorneys, who would in turn transmit the recommendations to the Court. This second proposal included many of the elements of the first, but suggested a different structure designed to promote candid and protected discussions of these applicants. The second proposal also contained a provision for periodic review of attorneys who remain on the appointment list.

Motion: Mr. Lieberman moved that the Oversight Committee recommend that the Court adopt the advisory panel proposal. The motion was seconded. The motion carried unanimously.

7. Jury instructions in capital cases. The Chief Justice had requested the Oversight Committee's comments on the ABA's proposed model instructions for the penalty phase of a capital case. The Oversight Committee invited Maricopa County Superior Court Judge Paul McMurdie, chair of the State Bar Committee on Criminal Jury Instructions, to offer his views. Judge McMurdie advised that the State Bar committee reviews recommended Arizona capital case instructions annually to assure that they remain current with changes in the law. These instructions were updated in 2011. He explained that the Bar committee does not create criminal law policy, and it is strictly bound by existing law when preparing recommended instructions. He believes that the ABA's proposed model instructions may contain provisions that are inconsistent with Arizona law, and he therefore does not support Arizona's adoption of the model instructions. No member of the Oversight Committee expressed disagreement with his viewpoint, or had other comments or recommendations for him.

Judge McMurdie added that the Bar committee is receptive to making the capital instructions more "user friendly" for jurors, as proposed by the ABA, as long as the instructions are compliant with Arizona law. For example, he has received comments from jurors about a lack of clarity on instructions dealing with lesser included offenses and felony murder, but he added that the Arizona Supreme Court has required the giving of specific instructions in these circumstances, and although these instructions increase complexity, the Bar committee adheres to the Court's requirements. Other comments from jurors and judges for making instructions more comprehensible have been well taken by the Bar committee, and revisions have been made accordingly.

Judge McMurdie concluded with a comment that judges and attorneys occasionally have difficulty finding the current version of applicable instructions. The State Bar webpage and the Court's Wendell webpage may not have the most recent instructions. He is working with the State Bar to address this, and he suggested that anyone with a question about the latest version of instructions should contact Ted Campagnolo, an assistant Attorney General and a member of the State Bar Criminal Jury Instructions Committee.

8. Call to the public; adjourn. In response to a call to the public, a comment was made concerning the time at which an attorney may last visit with a condemned inmate on the day of execution, suggesting that a final meeting should be allowed that is closer to the hour the execution starts.

Paul Julien, Judicial Education Officer, expressed his appreciation to Oversight Committee members and others for their assistance with video training broadcasts concerning capital cases. Mr. Julien welcomed suggestions about topics for future broadcasts. The Chair commended a recent broadcast of Indiana University School of Law Professor Joseph Hoffman presented by the Education Services Division.

The meeting adjourned at 1:25 p.m.

*Meeting Minutes: February 29, 2012
Capital Case Oversight Committee*