

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
April 28, 2010**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Douglas Rayes
Hon. Ronald Reinstein
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
Paul Prato

Guests:

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| Hon. Gary Donahoe | Paul Ahler |
| Hon. Warren Granville | Bruce Peterson |
| Hon. Murray Snow | Daniel Patterson |
| Bob James | Theresa Barrett |
| Jeremy Mussman | Jennifer Liewer |
| Brent Graham | Theresa Barrett |
| Kristine Fox | Jennifer Garcia |
| Patti Nigro Starr | John P. Todd |
| Dane Gillette | Tony Novitsky |

Not present:

Phil MacDonnell

Present by telephone:

Robert Reichman
Bill Jennings
Neal Dupree

Staff: Mark Meltzer, Lorraine Nevarez

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1. Call to Order; Approval of the Meeting Minutes; Review of Administrative Order 2009-

125. The meeting was called to order at 12:00 p.m. The minutes of the October 30, 2009 Committee meeting were approved without objection. The Chair reviewed Administrative Order number 2009-125, which extended the term of this Committee to December 31, 2010. The administrative order also included a requirement that the Oversight Committee submit a report to the Arizona Judicial Council by December 2010.

2. Presentations by Counsel from California and Florida on Post-Conviction Proceedings.

Mr. Robert Reichman, Automatic Appeals Monitor for the California Supreme Court, and Mr. Bill Jennings and Mr. Neal Dupree, Capital Collateral Regional Counsel for the Middle and South Regions of the State of Florida, appeared by telephone to share information regarding the appointment of counsel in their respective states in post-sentencing capital proceedings.

Appointed post-sentencing counsel for capital proceedings in California can be either private attorneys or agency attorneys from the Habeas Corpus Research Center. Mr. Reichman addressed his recruitment of private attorneys for capital cases. While attorney applicants must have the necessary case experience, the requisite experience is qualitative and not quantitative. Writing samples must be submitted by the applicants, and the applicant's ability to "weave a story" as well as the legal analysis in the samples is carefully reviewed. References are also required, and they are contacted. There is no list maintained by the Supreme Court for appointments; each appointment must be preceded by a new application that will be further reviewed by the Court. Mr. Reichman noted that on occasion, previously appointed attorneys

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have “life-changing experiences” that cause them to become unsuitable for appointment, or they did not perform as well as expected, or they relied on the work product of subordinates rather than doing the work themselves, and these applicants are declined. The Supreme Court typically avoids appointing busy trial attorneys on capital cases because these appointments are time-consuming and they require appointed counsel’s full attention. Up to two-thirds of applicants are not accepted.

Mr. Reichman noted that the applications are carefully scrutinized by the Supreme Court notwithstanding a high demand for attorneys in these cases. There are currently 93 inmates on California’s death row who have no counsel for their automatic appeals. In addition, hundreds of death row inmates have no counsel for their state habeas (post-conviction) proceedings. Because of the shortage of qualified attorneys, the Supreme Court at this time is appointing appellate counsel for cases in which a judgment of death was entered in 2006.

Appointed attorneys are required to submit periodic progress reports to the Supreme Court. Mr. Reichman added that appointed habeas counsel must receive the assistance of the California Appellate Project (“CAP”), or in the event of a conflict, of another experienced capital counsel. “Unfocused investigations” by appointed habeas counsel are discouraged by self-enforcing mechanisms: by the relatively limited time available for filing a petition; and by a \$50,000 cap on expenses. CAP advisors would probably also dissuade appointed counsel from pursuing a meritless investigation.

Mr. Jennings and Mr. Neal compared the effectiveness of Florida’s two resources for appointment of post-conviction counsel. One resource is the Capital Collateral Regional Counsel (“CCRC”), a state-funded agency, and the other resource is a registry of private attorneys. They commented that the CCRC office has a considerably higher success rate (i.e., obtaining relief from the court) than private counsel; the rate of success may be as much as five times higher for the CCRC. They attributed this to the facts that CCRC attorneys represent capital inmates on a full-time basis, and that they have more experience in capital cases than registry attorneys. The Florida Auditor General’s data has shown that CCRC attorneys on average spend more hours on each capital case, and that they interview a greater number of witnesses per case, than registry counsel. Mr. Jennings and Mr. Neal stated that budget cuts are a matter of continuing concern to the CCRC, although the agency has been able to maintain about ten investigators on staff. The rate of compensation for registry attorneys is \$100 per hour.

Mr. Neal stated that the qualifications for registry counsel are “barebones”. He noted that federal filing deadlines were missed by registry counsel on over twenty cases. He stressed the need for all counsel to obtain increased amounts of continuing education and training.

Appointed counsel in Florida are required to accept or reject an appointment within thirty days after receiving a notice of appointment. The record for a capital case is maintained in a repository by the Florida Secretary of State. Records are provided to post-conviction counsel on a disc, which facilitates counsel’s review.

The Chair thanked counsel from California and Florida for their informative presentations to the Committee.

3. Remarks by the Chief Deputy of the Maricopa County Attorney. The Chair invited Mr. Paul Ahler to address the Committee. Mr. Ahler is the chief deputy of the newly appointed Maricopa County Attorney.

Mr. Ahler stated that he had previously worked for the Maricopa County Attorney's Office from 1984 to 2007, and that for twelve of those years he had been the chief deputy. He has tried capital cases pre-and-post *Ring*. He noted that capital cases require considerable resources, and that cases being considered for a notice of intent to seek the death penalty should undergo a rigorous review by prosecutors. Mr. Ahler assured the Chair that an internal committee of prosecutors in the Maricopa County Attorney's Office will review potential capital cases and will make recommendations concerning the filing of a death notice. He anticipated that the standard would be whether there is a reasonable likelihood of obtaining a death sentence, but this standard will also be discussed by the committee and the standard will be refined if it is appropriate.

4. Update from the Maricopa County Superior Court. Judge Rayes and Judge Granville were introduced as the new presiding criminal judge and the new associate presiding criminal judge for the Maricopa County Superior Court. Judge Rayes has succeeded Judge Donahoe as a member of the Oversight Committee.

Judge Donahoe reviewed capital case data during his service as presiding criminal judge from January 2009 to March 2010. During that time 31 notices of intent to seek the death penalty were filed (26 were filed in 2009, and five were filed in 2010.) During that same time 79 capital cases were resolved (60 in 2009, and 19 in 2010.) An additional eight defendants are awaiting sentencing, for a total of 87 capital case resolutions. Death sentences were given in 15 cases, and non-death sentences were (or will be) imposed in the other 72 cases. Five cases were in trial as of April 27, 2010, and there were 91 pending active cases.

In response to an inquiry from the Chair, Mr. Logan advised that capital cases in Maricopa County are being timely staffed by a defense team. Mr. Logan stated that there are now additional lead counsel for capital cases in Maricopa County's staffed defender offices, and that these offices have the capacity to take appointments on new cases because of the reduction in the case inventory reported by Judge Donahoe. Mr. Logan cautioned, however, that a first degree murder case cannot be staffed if it appears unlikely that it will become a capital case. He stated that a requirement that every first degree murder case be staffed as if it would become a capital case, without regard to the unlikelihood of a death notice ever being filed in a particular case, could lead to a staffing crisis.

5. Update on Capital Appeals and Petitions for Post-Conviction Relief. Ms. Hallam advised that there are 29 capital appeals pending before the Arizona Supreme Court. Fifteen direct appeals were filed in 2009, and four have been filed in 2010. There are seventeen petitions for post-conviction relief in capital cases in which defendants are unrepresented by counsel. The oldest among these seventeen cases was decided by the Supreme Court in June 2007. Ms. Hallam added that the new rules for admission on motion may yield additional counsel for PCR appointments.

Mr. Lieberman advised that the State Capital PCR Defender currently has five cases. Although this office now employs two attorneys who assist him, the attorneys are relatively inexperienced and he must be the lead counsel on all five cases. He noted that his budget has been reduced by one-third, and that he's only able to employ one of these attorneys because he has received grant funding from the Arizona Criminal Justice Commission ("ACJC"). If the ACJC grant is not extended, he anticipates the loss of the grant funded attorney as well as a part-time legal assistant. He has only a part-time investigator, and he has no funds remaining for expert witnesses. If Proposition 100 is not approved by the voters next month, legislation provides that the budget for his office will be reduced by an additional five per cent.

Mr. Lieberman also discussed two bills that were recently signed by the Governor.

Senate Bill 1204 removed the training restriction that the existing statute placed on his office. The removal of this restriction had been recommended by the Capital Case Task Force and by the Oversight Committee.

Mr. Lieberman had asked that the Legislature establish an additional non-lapsing account for his office. The Legislature eventually adopted a provision in House Bill 2006 that created the Capital Post-Conviction Public Defender Office Fund. Under this law, his office will be able to bill counties for re-imbusement of fifty percent of its fees and costs without the existing limitation of \$30,000, and re-imburements that are paid by the counties will be deposited into this new fund. However, the fund is subject to legislative appropriation, and while his office must administer the fund, his office has no authority to use or spend funds in this account. Mr. Logan added that consideration was being given to the Maricopa County defender agencies adding staff for capital PCRs, but that idea is on hold because funding for that project might be diverted to re-imburements the county would be required to pay under HB 2006. Ms. Hallam also advised that the Supreme Court's fifty percent re-imbusement fund has been quickly depleted.

6. Pending Rule Petitions. Ms. Hallam noted that rule petition number R-10-0010 would add Rule 32.10 to the Rules of Criminal Procedure. This rule would clarify that in a capital proceeding for post-conviction relief, if a party seeks review of the trial court's determination of the defendant's mental retardation status, a special action petition must be filed in the court of appeals, which "shall" exercise jurisdiction and decide the issue that's been raised. The proposed rule follows existing case law.

Rule petition number R-10-0012 would extend the speedy trial limit in capital cases that is provided in Rule 8.2(a)(4) of the Rules of Criminal Procedure. This petition was filed on behalf of the Oversight Committee following action taken by the Committee at its October 2009 meeting. The comment deadline for this petition is May 20, 2010, and as of April 27, no comments had been filed. Staff advised that an informal question had been raised about which speedy trial limit would apply if the notice of intent to seek the death penalty was withdrawn in a pending case; would the capital or non-capital time limit apply? Members noted that a death notice was rarely withdrawn without also having a plea agreement in place, and the question is most often moot. In those rare instances in which there was no plea agreement, the notice would

probably be withdrawn only on the eve of trial. No member expressed a need to further clarify the proposed rule to account for the possibility of withdrawal of the death notice.

The discussion of pending rule petitions also included rule petition number R-09-0033, which was filed by the Court's staff attorneys, and rule petition number R-09-0037, which was filed by the Maricopa County Public Defender. Rule petition number R-09-0033, a proposed amendment to Rule 6.8(c) of the Rules of Criminal Procedure, would eliminate the requirement that appellate counsel representing a defendant in a direct appeal have prior experience as counsel in post-conviction relief proceedings. Rule petition number R-09-0037 would allow a party in a capital case to request a change of judge when the case is administratively reassigned to a new trial judge.

7. Call to the Public; Adjournment. Judge Reinstein noted prior to the conclusion of the meeting that a two-day training session for capital cases will be conducted at the Marriott Buttes in Tempe on May 6-7, 2010. The training is open to members of the judiciary as well as to prosecutors and defenders. There are currently about 175 registrants for this training, including a sizeable number of judges. Additional funding has been secured from the Department of Justice that will permit follow-up training on capital case issues.

The Chair concluded the meeting by announcing that the next meeting will be scheduled after the new Maricopa County Attorney has had an opportunity to review his pending capital cases and to review his policies and standards concerning the filing of notices of intent to seek the death penalty. Mr. Ahler agreed to notify the Chair or staff when this has been done, and Mr. Ahler will report any developments to the Oversight Committee at the next meeting.

There was no response to the Chair's call to the public.

There being no further business before the Committee, the meeting was adjourned at 1:30 p.m.