

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
September 23, 2010**

Members Present:

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

Guests:

Bob James	Michael Terrible
Bruce Peterson	Natman Schaye
John P. Todd	Emily Skinner
Dale Baich	Jennifer Garcia
Theresa Barrett	Jennifer Greene
Diane Alessi	Patti Starr
Treasure VanDreumel	

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. The minutes of the August 30, 2010 Committee meeting were reviewed. A motion was made to approve the August meeting minutes, the motion was seconded, and the August meeting minutes were unanimously approved.

The Chair then invited Mr. Cattani to present follow-up information concerning action items from the August 30 meeting.

2. Action items from the August 30 meeting. Mr. Cattani summarized his recommendations in a two-page memorandum, and he elaborated on the four points in that memorandum.

State PCR Defender: Mr. Cattani's first recommendation was to increase funding for the State Post-Conviction Public Defender's Office. The Chair and Mr. Lieberman fully concurred in this recommendation, although Mr. Cattani acknowledged that this did not appear to be a viable recommendation given the State's budget concerns.

Assign PCRs to defender agencies in the same county: Mr. Cattani's second recommendation was to assign capital PCR cases in Maricopa County to public defender agencies in that county. He believes that this is the simplest solution for finding more attorneys for capital PCRs, provided that the assigned agency has no conflicts of interest. He noted that this would be a cost savings to the State, because while the State partially reimburses the counties for the expense of private counsel who are appointed on capital PCRs, the State does not reimburse public attorneys.

Members commented on the effect this recommendation would have on billing practices that are required by existing statutes. Counties now bill the State for fifty percent of the cost of private PCR counsel (although the State still has not paid about \$270,000 in bills from FY 2010, and

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some counties have reported arrearages going back several years). What financial incentive would the county have for the appointment of agency counsel? If private counsel was appointed on a capital PCR, the county would only have to pay half the cost because the State would pay the other half; but if agency counsel was appointed, the county would have to pay the full cost. The State Post-Conviction Public Defender's Office also bills the counties for its expenses, and if the counties stop paying those bills to offset the State not paying the counties, it would cause serious financial problems for that office. Another member noted that the language of A.R.S. § 13-4041 subsections (F) and (H) may be inconsistent or ambiguous.

Assign PCRs to defender agencies in another county: Mr. Cattani proceeded to his third recommendation: that Maricopa County capital PCRs could be assigned to public defender offices in another county, with a corresponding assignment of cases from those counties to a Maricopa County defender agency. He noted that of the fifteen pending capital PCRs that require the appointment of counsel, twelve are from Maricopa County, two are from Pima County, and one is from Yuma County. Under his proposal, Maricopa would take two Pima cases, and Pima would take two Maricopa cases; and Yuma and Maricopa would each take one capital PCR from the other. This would result in the appointment of attorneys on six of the fifteen PCR cases currently without counsel. Additional comments concerning this and the prior recommendation followed:

- Can a public defender agency be appointed on a capital PCR rather than a specific attorney? Does A.R.S. § 13-4041(C) address this? If an agency is appointed, how does the court assure that the attorney working on the case is qualified under Rule 6.8? Some public defender agencies have filed requests that the court approve the qualifications of attorneys who are added to a capital case unit. But if an agency has multiple capital units or teams, is it sufficient that one attorney in the agency is capital case qualified, or must each separate unit have a capital qualified lawyer?
- This proposal would require that a unit be established within an agency that is dedicated to capital PCRs. An attorney assigned to a capital PCR could not also carry a trial or appellate caseload. Attorneys in a PCR unit would need to be compensated commensurate with other capital attorneys in the office, and this could present a budgeting issue. A related issue is the limited number of mitigation specialists, and whether one would be available for every capital PCR unit.
- The three defender agencies in Maricopa County have a full load of slightly under 40 capital cases. Capital cases are usually assigned to private attorneys only after the staffed offices have reached their caseload capacity. A decline in inventory would only impact the number of private attorney appointments. A decline in the capital case inventory in Maricopa County would not free up an agency's trial attorneys to work on capital PCRs unless the inventory fell below 40 cases, which is improbable.
- There are no agency attorneys handling capital PCRs at this time. If the agencies did accept capital PCRs, A.R.S. § 13-4041 should be modified to permit the agencies to also seek reimbursement from the State for half of their related expenses. The Board of Supervisors would also need to see that the savings to the county from not using private

lawyers on PCRs exceeds the increased cost to the county defender agencies of establishing PCR units.

- Every capital PCR does not require an equal amount of attorney hours or expenses. There would need to be a system of time credits on swapped cases that could be carried over to other cases to account for this disparity.

Law school clinic: Mr. Cattani reported that there are obstacles to establishing a capital case clinic at a law school. The professor heading the clinic should be capital case qualified under Rule 6.8, and there may be none who are. It may also be politically unpopular to have a capital case clinic at a state-supported law school. The law school contacted by Mr. Cattani was not enthusiastic about the concept. Mr. Lieberman also noted that continuity of staff was important in capital PCR cases, and law students coming and going every few months might result in only marginal assistance to lead counsel.

3. Sunset provision for the State Capital Post-conviction Public Defender Office. The State Capital Post-conviction Public Defender Office has an atypically short (four years from creation) “sunset” date of July 1, 2011 under A.R.S. §41-3011.13. Mr. Lieberman noted that the sunset review process for this agency is pending, and it would be helpful if the reviewer knew the Oversight Committee’s recommendation concerning the continuation of this office. After a brief discussion, the members unanimously supported an extension of the State Capital Post-conviction Public Defender Office.

The Chair then turned to other recommendations contained in a first draft of the Oversight Committee’s 2010 report to the Arizona Judicial Council.

4. Use of Court of Appeals judges on direct appeals. Ms. Hallam reported that there are currently twenty-five pending capital appeals. She added that this was the largest number in recent memory. The draft report recommended that Court of Appeals judges be assigned to handle the increased caseload of direct appeals.

The Chair noted that each justice usually has two capital cases assigned prior to the case becoming at-issue. A Court of Appeals judge is typically assigned only after a case is at-issue. If a Court of Appeals judge is assigned to a capital case, it should be done prior to the case becoming at-issue so that the judge and his or her staff can get an early start working on the case. This is especially true because Court of Appeals judges already have substantial case loads. The Chair also suggested that the presiding judges of Division One and Division Two should be consulted prior to Court of Appeals judges being assigned to capital cases.

On this subject, the Chair also noted that because of a lack of funds, there is no Supreme Court law clerk or staff attorney dedicated solely to capital cases. By comparison, the federal defender advised that there are four permanent law clerks in the district court’s habeas unit. The Chair suggested that the need for a dedicated clerk or attorney should be incorporated in the Committee’s recommendation, and that grant funding for this position should be sought if it’s available.

5. Assignments of capital PCRs to defender agencies. The draft report included a recommendation that capital PCRs be assigned to defender agencies outside the county of origin pursuant to intergovernmental agreements.

One member indicated that an IGA might not be legally required, but that county managers should be consulted before implementing this option. A capital qualified attorney who is already with an agency could be assigned to a capital case if funding for even a less experienced attorney could be provided by the county to that agency. It's unlikely that all three defender agencies in Maricopa County would have a conflict on a capital case, but the issues with this proposal involve workload and funding.

Concerning funding, it was reiterated that there's no incentive for a county to accept an agency appointment on a capital PCR if the county would forego the right to bill the State for half the cost under A.R.S. § 13-4041. A member suggested that this anomaly should be legislatively corrected to allow reimbursement for a public attorney on a capital PCR. Another member countered that while there may have been a rationale for the State paying half the cost when the statute was amended more than ten years ago, that rationale no longer exists today. The fifty percent reimbursement provision was enacted because the State imposed requirements regarding the qualifications of capital PCR attorneys. The situation has evolved so that the county is now responsible for providing capital-qualified counsel even in the absence of a partial reimbursement provision. Moreover, it is the county rather than the State which files notices of intent to seek the death penalty, and therefore the counties should bear the full cost of a capital proceeding in the superior court. Another member commented that this discussion would be moot if the State Capital Post-conviction Public Defenders Office was fully funded and could accept every capital PCR.

The members nevertheless agreed to leave this recommendation in the next draft of the Committee's report. The unresolved issues of finding qualified capital attorneys and a source of funding should be noted in that draft.

6. Other recommendations. The members agreed that the following recommendations contained in the first draft report should go forward:

1. The cap on hours under A.R.S. § 13-4041 should be removed, and the hourly rate of compensation provided by that statute should be increased.
2. An ongoing mechanism for collecting and compiling accurate and relevant data on the death penalty process in Arizona should be established.
3. The term of the Oversight Committee should be extended.

A phrase in the first draft regarding a lack of funding for second chairs on a PCR should be stricken due to lack of substantiation for the statement.

7. Establish a screening committee for capital counsel appointed by the Supreme Court. The Chair reminded the members that a screening committee for attorneys interested in an

appointment by the Supreme Court on a capital case had been tried previously without success, and was thereafter disbanded. The application form developed by that committee is still being used. Currently, an applicant submits an application, along with a resume, cover letter, and writing sample, to the Court. This package is reviewed by a staff attorney to assure that the applicant is capital case qualified under Rule 6.8, and the staff attorney's findings are summarized in a memo. The memo and the application package are then sent to each justice for review, following which the Court makes a decision about placing the applicant on the appointment list.

Mr. Lieberman proposed that the screening committee be reconstituted. He noted that there are now more applications from out-of-state attorneys who may be unknown to the Court. He suggested that thorough qualitative assessments of applicants may not be done. He said that a screening committee could do a "due diligence" report to the Court concerning new applicants, with a qualitative assessment that would include input from judges. The work of attorneys who were previously appointed on a case could also be reviewed to assure that the attorney's work reflected high standards, and the committee would be able to make a recommendation to the Court concerning a subsequent appointment of counsel.

The Chair stated that such a committee should not work to slow the appointment process, or to discourage attorneys from applying. A discussion ensued about the "opt in" requirements of the AEDPA, and whether there were issues under that law, including statutes of limitation, that should cause attorneys to be cautious in seeking appointments on state capital PCRs.

A written framework for a screening committee was provided in notes that Mr. Lieberman prepared for the members, and the discussion on this proposal will continue at the next meeting.

8. Maricopa County case status. Mr. Ahler advised that the Maricopa County Attorney is continuing to review capital cases that were previously filed. He should be able to provide an update at the October meeting. Whoever is elected as the new county attorney in November will probably retain the capital review committee.

Judge Rayes noted that three capital cases were currently in trial, and trials in several more cases are set for October. Most of these are older cases; it takes about three years for a capital case to go to trial. The impact of the amendments to Rule 8.2(a)(4) concerning the speedy trial limit in capital cases, which goes into effect in January 2011, won't be known for a while.

Mr. Logan noted that all capital cases are currently fully staffed, but uncertainty remains in the picture. There are now close to ten "potential" capital cases that his office has staffed. Some of the private attorneys may be able to take additional capital cases if they are filed. There would need to be fewer than fifty capital cases to have them completely staffed by county defender agencies, assuming there were no three-way conflicts.

9. Call to the Public; Adjournment. There was no response to a call to the public. The Chair suggested that the Committee meet in mid-October to discuss a second draft of the 2010 report.

There being no further business before the Committee, the meeting was adjourned at 1:45 p.m.

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