

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
August 30, 2010**

Members Present:

Hon. Michael D. Ryan, Chair  
Hon. Douglas Rayes  
Hon. Ronald Reinstein  
Paul Ahler  
Kent Cattani  
Dan Levey  
Donna Hallam  
Marty Lieberman  
James Logan by a proxy, Brent Graham  
Paul Prato

Guests:

Bob James Gary Grado  
Bruce Peterson Mark Armstrong  
John P. Todd Paul Julien  
Tony Novitsky Robert Shutts  
Theresa Barrett Jennifer Garcia  
Diane Alessi Patti Starr  
Christopher DuPont Allison Preston

Present by telephone:

Amy Armstrong

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 introductions by the Chair, the minutes of the April 28, 2010 Committee meeting were reviewed. A motion was made to approve the April meeting minutes. The motion was seconded and the April meeting minutes were unanimously approved.

**2. Capital Case Update from the Maricopa County Attorney.** Maricopa County Attorney Chief Deputy Paul Ahler used two handouts to update the Committee on the status of capital cases in Maricopa County. One handout was a list of cases showing deviations from notices of intent to seek the death penalty subsequent to April 2010. The other handout was a spreadsheet that listed 76 capital cases pending as of last week. If cases in trial and cases in which pleas are likely are subtracted from the number of pending cases, the total falls below 70. Also included in the spreadsheet were 22 cases that the county attorney intends to review further concerning the appropriateness of the death notice; therefore additional deviations are anticipated. This review of existing capital cases should conclude by early November.

A question was raised about whether capital cases that are on appeal or in PCR proceedings are similarly reviewed regarding the likelihood of a death penalty surviving post-conviction challenges, and whether consideration is given during those stages to a stipulated disposition. In practice this issue has not come up; if it did arise in a specific case, the attorney general would consult with the county attorney.

**3. Update from the Maricopa County Superior Court.** Judge Rayes advised that there are 22 petitions for post-conviction relief pending in the Maricopa County Superior Court. Three of these cases have been assigned to a judicial officer for ruling, five cases are awaiting the appointment of counsel, and the other fourteen cases are assigned to the PCR unit. The presiding criminal judge oversees the PCR unit, with assistance from the capital case staff attorneys.

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Judicial management by the PCR unit includes informal conferences to monitor case status and the establishment of a briefing schedule. The first informal conference is generally conducted within 60 days after appointment of counsel. Judge Rayes observed that the 120 day time limit required by Rule 32.4 for filing the petition is usually insufficient, and that more than one year is typically required. The case is assigned to a judicial officer for further proceedings after it is fully briefed.

Mr. Lieberman noted that occasionally delays in PCR proceedings have occurred because the file of the predecessor attorney, who is typically private counsel, is not expediently delivered to PCR counsel. He added that while this continues to be a problem, he is hopeful that recent amendments to Rule 6.3 will make this an uncommon one.

The discussion turned to the possibility of appointing public defender agencies on capital PCRs. Members noted that this could be counter-productive. If a defender agency was appointed, a conflict of interest may not become apparent until the PCR was in the discovery stage, and at that point it would be expensive for the agency to withdraw and for the court to appoint new defense counsel. Mr. Cattani suggested that a public defender office might avoid conflicts if one from a different county was appointed. He proposed, for example, that Maricopa County could appoint the Pima County Public Defender on a Maricopa County PCR, and Pima County could appoint a Maricopa County defender agency on a Pima County PCR. This proposed solution would require an Intergovernmental Agreement, and may be fiscally complex and politically challenging.

**4. Update on Capital Appeals and Petitions for Post-Conviction Relief.** Ms. Hallam informed the members that there are currently 24 direct appeals pending. Fifteen of these appeals were filed in 2009, which is a high number compared to prior years. Six more notices of appeal were filed during 2010; a seventh notice is forthcoming, which would increase the number of pending capital appeals to 25. The majority of these cases are still in the briefing stage.

Regarding capital PCRs, Ms. Hallam stated that fifteen capital defendants are awaiting appointment of counsel. In the oldest of these cases, an opinion on the direct appeal was filed in April 2008. Defense counsel have been appointed on seven capital PCRs during calendar year 2010, and on another capital PCR this year counsel appeared pro bono (i.e., without a court appointment.) By comparison, during calendar year 2009, private attorneys were appointed on four PCRs, and the State PCR Defender was appointed on one case. The decreased likelihood of Arizona becoming an “opt-in” state under the AEDPA may be encouraging applications. Out-of-state attorneys who apply for appointment must in addition move for admission to the Arizona bar.

Ms. Hallam noted that under Arizona Revised Statutes § 13-4041, the State is required to reimburse counties for fifty percent of the cost of defense counsel on capital PCRs. For fiscal year 2010, \$110,085 was available to pay reimbursement to counties pursuant to this statute. However, Ms. Hallam advised that \$382,536 in reimbursement requests were received by the State for FY 2010, leaving a balance of \$272,451 owed to the counties. It will be up to the Legislature to do a supplemental appropriation later this year to cover this FY 2010 shortfall.

**5. Rule Petition R-09-0033.** Ms. Hallam also gave an update on Rule Petition R-09-0033. The original R-09-0033 petition differentiated the requirements that capital defense counsel must meet for an appointment on an appeal versus appointment on a PCR proceeding. An amendment to the rule petition proposed alternate qualifications of PCR counsel based on trial experience.

Mr. Lieberman noted his objections in a comment to the rule petition that he filed after the April 28, 2010 meeting of this Committee. He summarized his objections for the Committee. He first stated that under the proposed language of Rule 6.8(c)(2), an attorney must have been lead counsel in a trial “in which a death sentence was imposed.” This proposed text would render an attorney not qualified if he or she was lead counsel in a capital case who succeeded in avoiding the imposition of a death sentence. This was probably not intended and should be corrected.

Mr. Lieberman also proposed that qualification of an applicant should not be simply a matter of the number of cases an attorney has handled, but that a qualitative assessment should be done. A qualitative analysis would assess an attorney’s knowledge of subjects such as capital procedures, federal habeas corpus, and complex mental health issues, as well as the applicant’s ability to conduct a capital mitigation investigation. Mr. Lieberman recalled the presentation by the California Supreme Court’s appeals monitor at the April 2010 meeting: that the California court, among other things, contacts references provided by applicants, and evaluates writing samples for the applicant’s ability to analyze complex issues. Mr. Lieberman also noted that court’s disinclination to appoint a busy trial lawyer on a capital PCR because that attorney may not have the available time required for a capital PCR. Mr. Lieberman added that California monitors the attorney’s performance after appointment by requiring reports to the court, and by requiring consultation with another experienced attorney during the PCR proceedings. Mr. Lieberman suggested that Arizona should adopt similar mechanisms to screen and to monitor the panel of appointed attorneys to assure that high quality legal services are provided. He stated that the need to find counsel can’t be superseded by the need to find qualified counsel.

Ms. Armstrong, an attorney with the Arizona Capital Representation Project, supported Mr. Lieberman’s comments and the need to assure the quality of appointments. She believes that a pairing of attorneys with complementary skills on a case also increases effectiveness. For example, one attorney may have more knowledge of capital procedures, while the other might have better evidentiary skills. Mr. Lieberman added that only one of these attorneys would need to be Rule 6.8 qualified, but that lead counsel would benefit from the assistance of co-counsel. Concern was expressed by committee members about a source of funding if two attorneys were appointed on a capital PCR, and there was disagreement about whether two lawyers were required under the ABA Guidelines. However, there was general agreement that if there is only one counsel, that attorney should have the necessary qualifications.

The Chair noted that a screening committee had been tried, unsuccessfully, several years ago, and that the requirements of Rule 6.8(c) were used by the Supreme Court instead of requiring screening by a committee. However, the Chair suggested that further consideration be given to a screening committee for monitoring the quality of counsel appointed in capital cases.

Returning to the proposed text to Rule 6.8(c)(2), Mr. Lieberman suggested that the requirement of “two trials” should instead be trials “of class one and class two felonies.” Members noted in

response that there is a wide variety of class two felonies, and that some of these (e.g., drug sales or fraudulent schemes) may do little to qualify counsel to handle a capital case. The members reviewed the definition of “serious offenses” provided in A.R.S. § 13-751(I), and determined that experience in the defense of certain of the enumerated “serious offenses” did not reach the level required to defend capital cases. A suggestion that the rule require experience in “serious violent offenses” was also discussed, but this too was felt to be an inadequate standard.

Ms. Hallam explained that when an attorney applies to the Arizona Supreme Court to be placed on the list for appointment in a capital case, other items, including references, are required in addition to a list of case experience. The members of the Court thereafter make a qualitative assessment of an applicant’s qualifications when deciding if that applicant should be included on the appointment list.

After further discussion, the Chair on behalf of the Oversight Committee recommended to the Court’s staff attorney, who was present during this meeting, that the following two modifications be made to the text of proposed Rule 6.8(c)(2):

- that an attorney have lead counsel experience in a trial in which the death penalty “was sought” rather than in which the death penalty “was imposed;” and
- for the alternate method of qualification, that an attorney have lead counsel experience in the trial of “two felony trials” rather than “two trials.”

Action: The Chair also proposed that the Oversight Committee further consider the matters of screening and recruitment of post-conviction capital defense counsel at its next meeting.

**6. Oversight Committee Recommendations and Report.** The Chair then turned to the item of the Committee’s report to the Arizona Judicial Council later this year, and specific recommendations that should be included in the report.

One suggested recommendation was the establishment of a law school clinic for capital cases. The ASU Sandra Day O’Connor School of Law currently has a criminal defense clinic, but it does not cover capital cases. Establishing a clinic at the Phoenix School of Law could also be considered.

Action: Mr. Cattani will check with ASU and the Chair will contact Phoenix School of Law regarding the schools’ interest in establishing a capital case clinic.

The subject of county public defender agencies handling capital PCRs, which was discussed earlier as well as at the April 24, 2010 meeting (see page 4 of the minutes of that meeting), was again suggested. It was noted that any such arrangement would require the agreement of the boards of supervisors of the participating counties through an Intergovernmental Agreement. The benefits and drawbacks of such an agreement were discussed. Members noted that not every defender agency is adequately staffed with capital qualified PCR counsel. Even if there are qualified lawyers, unlike non-capital PCRs, a capital team that included mitigation specialists and investigators would be required. The resources and time needed for a capital case surpasses

what is required for a non-capital one and may be too burdensome for certain defender agencies. On the other hand, by sending a case to a different county, conflicts of interest are reduced. Furthermore, money has already been appropriated for some of these agencies to handle PCRs, and it's a matter of prioritizing capital PCRs ahead of non-capital ones. It was suggested that it is incongruous that capital offenses, which are the most serious criminal cases, are delayed due to lack of counsel, while lesser non-capital cases proceed forward with appointed attorneys.

Action: The Chair requested that Mr. Cattani look into the feasibility of an IGA between counties for representing each other's defendants on capital PCRs.

**7. Call to the Public; Adjournment.** Mr. Paul Julien, who is the Judicial Education Officer for the AOC, responded to a call to the public. Mr. Julien informed the members that there are some funds remaining from the grant that was used for the capital case conference held in May of this year, and these remaining funds can be used through September 2011. Mr. Julien suggested that the funds could be allocated for additional training on capital case issues such as those that arise in post-conviction proceedings.

The Chair concluded the meeting by announcing that the next meeting will be set in October. Items for that meeting will include screening of appointed post-conviction counsel, a law school clinic on capital cases, and the feasibility of an IGA agreement.

There being no further business before the Committee, the meeting was adjourned at 1:40 p.m.