

PROGRESS REPORT
OF THE
CAPITAL CASE
OVERSIGHT COMMITTEE
TO THE
ARIZONA JUDICIAL COUNCIL

NOVEMBER 2010



Justice 20|20

Capital Case Oversight Committee

November 2010

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I. Executive Summary.

The impetus for the creation of the Capital Case Task Force in February 2007 was an “unprecedented number of capital cases then awaiting trial in Maricopa County.”¹ The Task Force reported that at as of February 2007 there were 133 pending “active” capital cases in Maricopa County.² The Task Force’s report to the Arizona Judicial Council in October 2007 noted that “the number of capital cases that were pending in February has not diminished.”³

Pursuant to a recommendation of the Task Force, the Capital Case Oversight Committee was established in December 2007 “to monitor capital caseload reduction efforts in Maricopa County.”⁴ By September 2008, the number of pending capital cases in Maricopa County had grown to 139 “active” cases and “remanded” cases.⁵

The Maricopa County Superior Court adopted a new approach for capital case management in March 2009.⁶ From that point and continuing to the present, the capital case inventory in Maricopa County has been decreasing. As of the end of September 2010, there were 79 pending capital cases in Maricopa County. Section II of this report contains capital case data from the trial courts.

The resolution of more capital cases by jury trial has contributed to a reduction in the case inventory. However, additional death verdicts in the superior court have resulted in an increased volume of appeals to the Arizona Supreme Court. There are currently twenty-seven capital cases on direct appeal, a higher number than any recent year. These cases will place increased demands on the Supreme Court, and subsequently, those cases in which the

¹ Administrative Order 2007-18.

² See the Report of the Capital Case Task Force (September 2007) at page 3. A web link to this report is in footnote 5, *infra*.

³ See Administrative Order 2007-92.

⁴ *Id.*

⁵ See the chart at the top of page 7 of the November 2008 Oversight Committee report. (Prior reports to the Arizona Judicial Council from the Capital Case Task Force and the Capital Case Oversight Committee are available on the website of the Arizona Judicial Branch, at <http://www.azcourts.gov/cscommittees/CapitalCaseOversightCommittee.aspx>). A revised capital case counting protocol adopted by the Oversight Committee in 2009 eliminated the distinctions between “active,” “inactive,” and “remanded” cases; all cases awaiting trial other than *Ring* remands under the revised protocol were simply categorized as “pending” cases. See footnote 7 and Appendix B of the Oversight Committee’s November 2009 report.

⁶ See further the Oversight Committee’s November 2009 report, at page 7.

conviction and death sentence are affirmed will require a greater number of attorneys willing and qualified to accept appointments on petitions for post conviction relief. Although the Oversight Committee expressed in its 2009 report an expectation that the number of unrepresented capital defendants on petitions for post conviction relief would increase, it has to the contrary gone down, but this may not be a long-term trend. Capital cases in the Supreme Court are discussed in Section III of this report.

Section IV contains the Committee's recommendations. The Oversight Committee has attempted to make recommendations that will have minimal budget impacts, but certain recommendations have unavoidable fiscal implications. The death penalty is an expensive process; it requires funding to move forward. Capital cases will not proceed efficiently through the appellate and post-conviction stages, which are both required by law, unless adequate funding is available.

The Committee discussed several other potential recommendations, but the members did not reach agreement on whether these items should be adopted. The issues that are still being studied are identified in Section V of this report.

Finally, Arizona's first Capital Case Litigation Conference was held on May 6-7, 2010 in Phoenix. The conference was funded by a grant from the Bureau of Justice Assistance and the National Judicial College; the grant was administered by the Education Services Division of the Administrative Office of the Courts. Chief Justice Berch and Justice Ryan were among the presenters. More than 170 individuals attended the conference. This conference was remarkable for its inclusion of judges, prosecutors, and defense attorneys at a single venue for collaborative education on the death penalty in this state. An additional full day of training is available under this grant and is scheduled for February 2011.

II. Capital Cases in the Superior Court

Maricopa County. Maricopa County has about eighty percent of the capital cases in Arizona, and the focus of the Oversight Committee has been on the Maricopa County cases. The previously mentioned turnaround in Maricopa County's capital case volume is shown by comparing past and present figures for new death penalty filings, and the number of capital cases that have been resolved and that are still pending.

New death penalty cases. This Committee's 2009 report stated that eighteen death notices⁷ were filed from October 2008 to September 2009. The 2009 report noted that this was "below the norm,"⁸ because from 2004 to 2008, the numbers of new capital cases filed annually ranged from thirty-one to forty-six.

The number of new capital cases in Maricopa County during the most recent twelve months has returned to the historical average. From October 2009 through September 2010, **thirty-two** new death penalty cases were initiated in Maricopa County.⁹ Although this number is at the lower end of the long term historical range, it is nonetheless more than seventy percent higher than the number of new capital cases received by the court during the preceding twelve month period. The number of new filings is significant because the trial court will have to resolve an equivalent number of older cases to keep the capital case inventory from growing as a result of these incoming cases.

Case resolutions. The addition of new cases during the past year has been offset by a steadily increasing number, compared to prior periods, of capital case dispositions.

- Previously, thirty-five (FY 2007 and FY 2008) or thirty-six (CY 2007) cases were resolved for an entire year. (See pages 7-8 of the 2009 report.)

⁷ Under Rule 15.1(i), Ariz. R. Crim. P., the prosecutor is required to provide to the defendant timely notice of whether the prosecutor intends to seek the death penalty. The notice is customarily filed with the court.

⁸ The filing of eighteen notices during that twelve month period might have been a random deviation from the norm, because there may only have been eighteen cases that year that warranted a death notice. However, and as noted in footnote 5 of the Oversight Committee's 2009 report, in October 2009 there were an additional sixteen first degree murder cases under consideration by the county attorney for filing a death penalty notice.

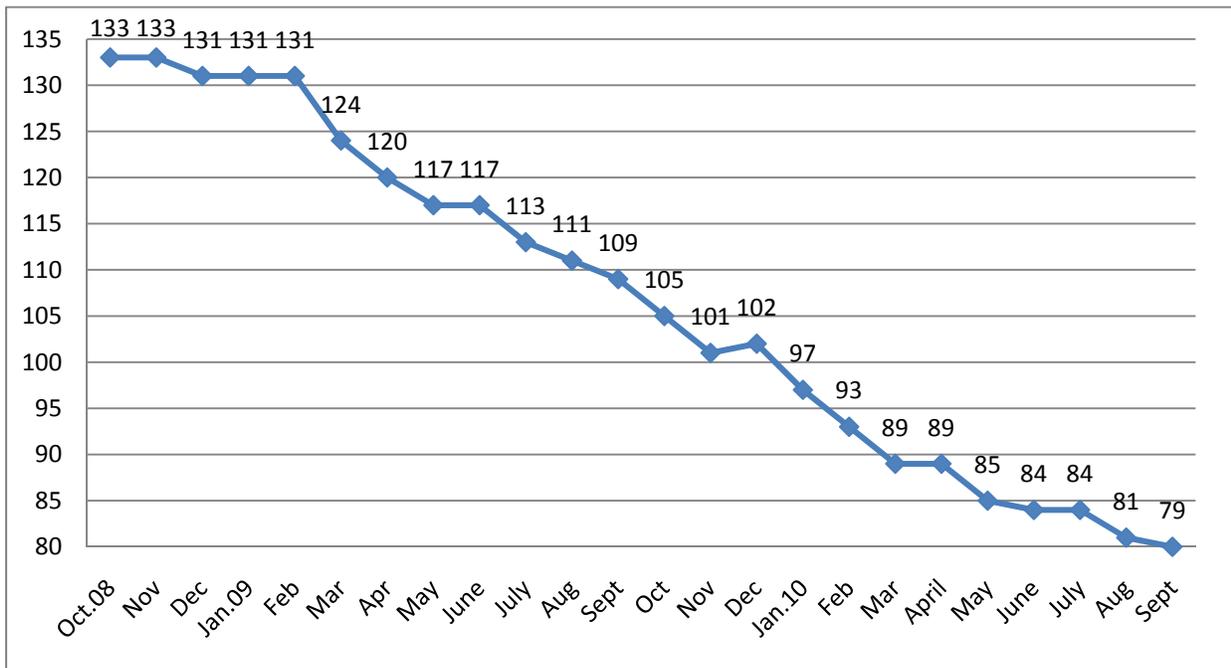
⁹ This figure includes cases remanded to the superior court from the Arizona Supreme Court and from federal courts. See the case counting protocol referred to in footnote 5, *supra*.

- By comparison, the Oversight Committee’s 2009 report noted that *in the seven month interval* between March 2009, when the new case management approach was initiated, and September 2009, thirty-three capital cases were resolved.
- *The seven months* between January and July 2010, were even more productive: thirty-five capital cases were terminated in the Maricopa County Superior Court.

Total number of pending cases. In January 2009, there were 131 pending capital cases in Maricopa County. This court adopted its new case management approach in March 2009, and as noted in the Oversight Committee’s 2009 report, the number of cases had declined to 109 by September. The decline continued for the remainder of the year; the number of pending capital cases at the end of December 2009 stood at 102. The trial court reduced its existing capital case inventory by twenty-two per cent between January and December 2009.

The reduction in the capital case inventory has continued during 2010. At the end of September 2010, there were 79 capital cases in the Maricopa County Superior Court. This is a forty percent reduction from the number of capital cases pending in January 2009. The ongoing reduction in the capital case inventory is shown in the following graph:

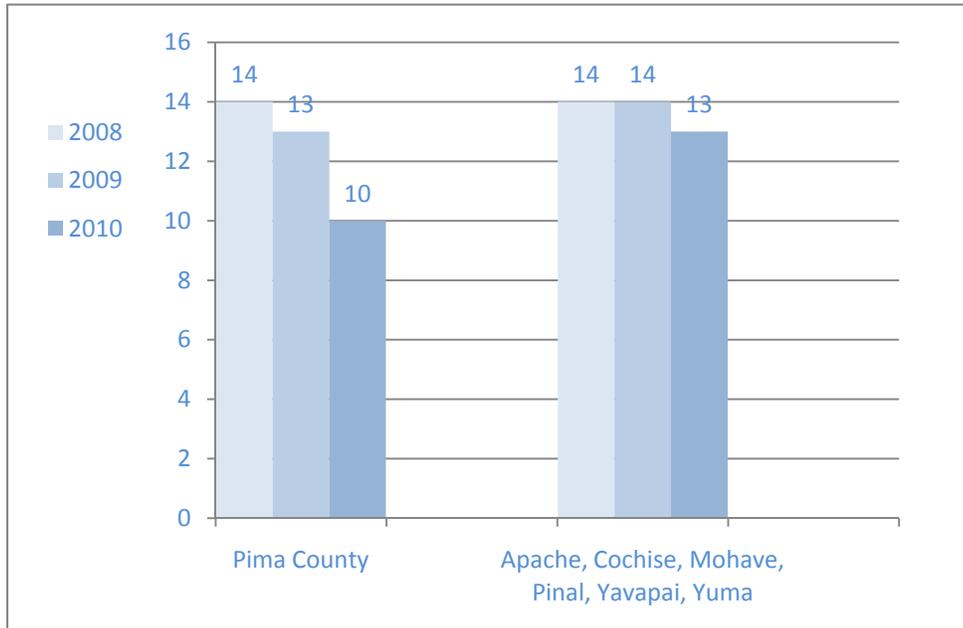
Pending Capital Cases in Maricopa County



Statewide. The Oversight Committee has surveyed county attorneys in the remaining fourteen counties concerning the number of their pending capital cases for each of the past three years. Seven counties (Coconino, Gila, Graham, Greenlee, La Paz, Navajo, and Santa Cruz) have had no

capital cases during that period.¹⁰ The number of capital cases pending in the remaining seven counties during 2008, 2009, and 2010 is summarized in the following chart:

Pending Capital Cases Outside Maricopa County



Although there have been modest variations in the number of pending capital cases in counties other than Maricopa, the figures are relatively stable. However, with the inclusion of Maricopa County, there has been a significant downward trend in the number of capital cases pending statewide, as shown in the table below:

Capital Cases Pending Statewide

<u>Date</u>	<u># of Cases</u>
July 2008	155
Sept 2009	136
Sept 2010	102

Death sentences. The total number of pending capital cases is significant for assessing the resources required for the administration of these cases in the trial courts. However, it is the sub-set number of death sentences ultimately imposed by the trial courts that will have the greatest impact on the resources of the Arizona Supreme Court.

¹⁰ Cochise County had no capital cases in 2008 or 2009; however, a death penalty in *State v Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999), was vacated this year with resentencing scheduled for next year. This matter is therefore included in the pending case totals shown on this page.

For calendar year 2009, an atypical number of death sentences were imposed. During 2009, **fifteen** death sentences were imposed statewide (eleven from Maricopa County, three from Pima County, and one from Mohave County).¹¹

For the first ten months of 2010, **nine** death sentences, all arising in Maricopa County, have been imposed.

III. Capital Cases in the Supreme Court

Direct appeals. The higher number of capital case resolutions by death verdicts in the trial courts has led to an increased number of direct appeals to the Arizona Supreme Court.¹² The December 2008 Oversight Committee report, which had been submitted before adoption of the new case management approach in the Maricopa County Superior Court, noted that there were seventeen capital appeals pending. By the time of the November 2009 report, there were twenty-three capital appeals. The number has increased to **twenty-seven capital appeals** at the present time. This represents about a fifty percent increase in the number of direct appeals in only two years.

Fifteen of the appeals that are currently pending were filed during 2009, and nine more appeals were filed in 2010. It takes approximately two years from the filing of a notice of appeal in a capital case to the filing of an opinion by the Arizona Supreme Court. Of the twenty-seven pending appeals, almost all are still in the briefing stage. There are currently only three appeals pending that are more than twenty-two months old and that are ready or nearly ready for oral argument. A “bubble” of 2009 capital appeals will begin to appear on the Court’s calendar in 2011.

Petitions for Post-Conviction Relief (“PCRs”). If a death sentence is affirmed on direct appeal (and if a writ of certiorari is denied by the United States Supreme Court), the next concern is whether a sufficient number of attorneys will be available to accept appointments by the Arizona Supreme Court on capital case petitions for post-conviction relief.

The January 2008 minutes of the Oversight Committee noted that there were thirteen defendants who were awaiting the appointment of counsel on petitions for post-conviction relief. By the time of the December 2008 report of the Oversight Committee that number had

¹¹ Three Maricopa County defendants were sentenced to death in 2009 following penalty phase retrials required by *Ring v. Arizona*, 536 U.S. 584 (2002). The AOC data books have figures for fiscal year 2004: eight death sentences; for fiscal year 2005: nine death sentences; for fiscal year 2006: sixteen death sentences; for fiscal year 2007: eight death sentences; and for fiscal year 2008: nine death sentences.

¹² The Supreme Court reviews all death sentences. See A.R.S. §§ 13-755, 13-756, and 13-4031.

grown to seventeen defendants, and in the Committee's November 2009 report the number had reached eighteen defendants.

During this period, there were too few attorneys willing to accept appointments on PCRs, and it appeared that the number of unrepresented defendants on capital PCRs would continue to grow and would soon surpass twenty. This is significant because during the time a defendant is awaiting appointment of counsel, no investigation is occurring on his or her behalf, and the case is procedurally stagnant in the courts. The Oversight Committee requested in its 2009 report that its term be extended to address this looming issue of defendants on capital PCRs without court-appointed counsel.¹³

The number of unrepresented defendants on capital case PCRs did not reach twenty during this past year. To the contrary, the number has been reduced to **fourteen defendants**. In calendar year 2009, private attorneys were appointed on four PCRs, and the State PCR Defender was appointed on one case. By comparison, during calendar year 2010 to date, defense counsel were appointed on eight capital PCRs, and pro bono counsel accepted one case. The Oversight Committee has theorized that factors contributing to the greater number of appointments on capital PCRs include the decreased likelihood of Arizona becoming an "opt-in" state under the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), and the opportunity for out-of-state attorneys to apply for admission to the Arizona bar on motion under newly adopted Supreme Court Rule 38(h).

Nonetheless, just as there is an increase of capital cases proceeding through the process of direct appeal at the present time, an increase of PCR cases is anticipated two or three years from now. During its study of the PCR issue this year, the Committee heard a presentation by the Automatic Appeals Monitor of the California Supreme Court. Almost 45% of the 704 inmates on California's death row - that is, more than 300 defendants who have been sentenced to death - do not have appointed counsel for a collateral post-conviction proceeding. Arizona should take steps now to avoid a similar predicament in its future.

IV. Recommendations.

Trial courts. This Committee was established to monitor what was considered to be a "crisis level" of capital cases in the Maricopa County Superior Court. To the extent that the crisis is defined by the number of cases that are pending in the trial courts, the crisis has been mitigated by a substantial reduction in the capital case inventory. However, given the resources that are required for each case, the Oversight Committee does not believe the

¹³ Administrative Order 2009-125 extended the term of the Committee to December 31, 2010. This Order stated in part: "The Committee shall continue with its duties, as set forth in Administrative Order No. 2007-92, and in addition, shall study and make recommendations concerning the availability and appointment of counsel to represent defendants on capital case petitions for post-conviction relief."

number of capital cases in Maricopa County is at an optimal level.¹⁴ The current number of cases still represents a strain on the system and on judges, prosecutors, and defense teams who are assigned to each of these cases. In addition, a new Maricopa County Attorney was elected in November 2010, and his proposed policy for seeking the death penalty is currently unknown.

The Oversight Committee has no recommendations concerning the trial courts at this time. However, the Committee offers these observations:

- *Ring* remands¹⁵ contributed to the “unprecedented” number of capital cases that were pending in Maricopa County’s trial courts in 2007. During 2010, the last of the *Ring* cases was concluded in the Maricopa County Superior Court.
- While the number of capital cases that are filed annually can be roughly estimated based on long term trends, the actual figures for capital cases filed within a single year will vary. The number of notices of intent to seek the death penalty that may be filed in any future year will be to some degree circumstantial and cannot be forecasted.
- The number of death penalty cases may also be dependent on the policies of a local prosecutor. In the span of eight months, Maricopa County will have had three county attorneys, and the charging philosophies of each regarding what constitutes a capital crime may differ, leading to a greater or lesser number of notices of intent to seek the death penalty.¹⁶
- On January 1, 2011, the amendments to Rule 8.2(a)(4), Ariz. R. Crim. P., will become effective. These amendments, which had been recommended by the Oversight Committee in 2009, will extend the speedy trial time limit in a capital case from eighteen months from the date of arraignment, to twenty-four months from the date that the notice of intent to seek the death penalty is filed. The rule change is intended to allow defense counsel the opportunity to take additional cases, and to fully prepare

¹⁴ A recommendation to the Capital Case Task Force in 2007 from the Maricopa County Office of Management and Budget indicated that an “acceptable” inventory was less than sixty-five capital cases.

¹⁵ See footnote 11, *supra*.

¹⁶ The elected Maricopa County Attorney resigned in April 2010 to run for statewide office. An interim county attorney was appointed that same month, and death penalty notices in several cases were thereafter withdrawn, but the interim appointee was defeated in a primary election in September. A new county attorney was elected in November 2010.

each case for trial. Whether this will also result in a different rate of pre-trial dispositions -- either higher or lower -- remains to be seen.¹⁷

Appeals. The fifteen capital appeals filed in 2009 will begin to appear on the oral argument calendar sometime in 2011.¹⁸ Generally, the Supreme Court processes about ten capital cases annually, i.e., two cases per justice per year.

Recommendation #1. *Consider assigning Court of Appeals judges, as necessary, to handle an anticipated increase of capital appeals.*¹⁹

This increase of appeals was anticipated in prior reports of the Task Force and Oversight Committee. Both of these reports recommended that Court of Appeals judges be assigned to these cases, if necessary, to handle the increased volume.

The Oversight Committee reaffirms the prior recommendation, with a few additional suggestions.

- Court of Appeals judges already have substantial case loads. Therefore, the presiding judge of Division One or Division Two should be consulted before the assignment of a capital case to their court.

¹⁷ Whether this rule amendment will reduce the time to disposition also remains unknown. Notwithstanding the current speedy trial limit in Rule 8.2(a)(4), which requires that capital cases must proceed to trial within eighteen months from arraignment, most cases that go to trial start considerably later, and even many pre-trial guilty pleas occur beyond the existing speedy trial time limitation.

¹⁸ Rule 31.13(f), Ariz. R. Crim. P., was suspended in February 2009 by Administrative Order 2009-20 pending the submission of a rule petition. Rule petition number 09-0032 was thereafter filed, and the rule amendments that were proposed in the petition were adopted effective January 1, 2011. The rule amendments expand the briefing times in a capital case. This should contribute to the efficient management of capital appeals.

¹⁹ The following quote from the November 2008 Oversight Committee report was incorporated in the Committee's November 2009 report, at page 13:

Having Court of Appeals judges assist appears to be the most cost-effective solution for a situation that may be only temporary. This solution would not require appointment of additional judges or hiring of clerical staff, or the creation of a new court structure, or any constitutional or legislative change. The process is already authorized under Article 6, Section 3, of the Arizona Constitution. It is a flexible solution, and it can be used as frequently as needed.

- If a Court of Appeals judge is assigned to a capital case, the assignment should occur sufficiently early to allow adequate time for the judge's review and workup. A Supreme Court justice is assigned to a capital case after the record is complete and the opening and answering briefs have been filed; an assignment of a capital case to a Court of Appeals judge should be similarly timed.
- Neither the Court of Appeals nor the Supreme Court currently has a staff attorney or law clerk who is dedicated to capital cases. Such a position should be established and funded, through a grant or by other means, as a resource for the Supreme Court as well as for any Court of Appeals judge who is assigned to a capital case.

Petitions for Post-Conviction Relief. With regard to capital case petitions for post-conviction relief, the Oversight Committee has two recommendations: one recommendation concerns revisions to A.R.S. § 13-4041, and the other is about an extension of the sunset date for the State Capital Post-conviction Public Defenders Office.

Recommendation #2: *Remove the presumptive limitation on hours under A.R.S. § 13-4041, and increase the hourly rate under that statute.*²⁰

The Capital Case Task Force recommended (1) removing the limit on hours for appointed private counsel contained in A.R.S. § 13-4041, and (2) increasing the hourly rate for counsel provided by this statute.²¹

These recommendations were presented to the Arizona Judicial Council in 2007 but they were not approved. The Oversight Committee renewed the recommendations in its December 2008 report but no action was taken thereafter. As noted in that report, the statute permits counsel to seek compensation for time expended in excess of 200 hours by filing an application with the court, and those requests are routinely granted; but a disservice is done to the extent that this statutory limit dissuades an attorney from accepting an appointment on a PCR.²² The Oversight Committee continues to believe that these statutory changes would help to attract high quality counsel for PCR appointments.²³

²⁰ The Task Force's proposed amendments to A.R.S. § 13-4041 are in Appendix 3, *infra*.

²¹ See the Task Force report at page 20. Section 13-4041(F) provides in part: "counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour for up to two hundred hours of work."

²² See the December 2008 report at page 21.

²³ The rate of compensation for private counsel in Florida is \$100 per hour. Counsel who are appointed by the California Supreme Court on a capital case are compensated on either a time-and-costs or a fixed fee basis. The compensation for a time-and-costs appointment is

Recommendation #3: *Support the extension of the State Capital Post-Conviction Public Defender Office beyond its July 1, 2011 sunset date.*

The State Capital Post-Conviction Public Defender Office was established in 2007 following the enactment of Chapter 42 of Title 41 (A.R.S. §§ 41-4301-4303 (2010).) Notwithstanding the fiscal difficulties encountered by this office from its inception, primarily caused by budget cuts, staff reductions and furloughs, this office has developed into a valuable resource for capital PCR proceedings in Arizona.²⁴

Section 41-3011.13 is a sunset provision adopted concurrently with the enabling legislation for this office. The statute terminates this office on July 1, 2011, and repeals Title 41, chapter 42 on January 1, 2012.

Without this office there would be no statewide public agency available for appointments on petitions for post-conviction relief in capital cases, and this valuable resource and an experienced capital PCR defender would be lost.²⁵

Administrative recommendation. This ad hoc Oversight Committee was created three years ago, and its term has been extended twice. Pursuant to Administrative Order No. 2009-125, entered on December 23, 2009, the current term of the Oversight Committee will expire on December 31, 2010.²⁶

\$145 per allowable hour plus specified incidental expenses. The compensation for a fixed fee appointment is determined by case length and complexity. There are five fixed fee categories for appeal and dual appointments, and three fixed fee categories for habeas corpus appointments. Dual fixed fee categories range from \$160,000 for the least complex cases to a \$368,000 base fee for the most complex cases, and contain eleven junctures for progress payments.

²⁴ SB 1204, which was signed by the Governor earlier this year, removed the training restriction that A.R.S. § 41-4301 had placed on the State Capital Post-Conviction Public Defender Office. The removal of this restriction had been recommended by the Task Force and by the Oversight Committee.

²⁵ A presentation to the Oversight Committee by Florida's Capital Collateral Regional Counsel ("CCRC") noted that its office has a considerably higher success rate (i.e., obtaining relief from the court) than private counsel, perhaps as much as five times higher for the CCRC. Counsel attributed this to the fact that CCRC attorneys represent capital inmates on a full time basis, and that they have more experience in capital cases than private attorneys. See Oversight Committee minutes of April 28, 2010, at page 2.

²⁶ The Oversight Committee was established by A.O. 2007-92 on December 7, 2007, with a term expiration of December 31, 2008. A.O. 2008-93, entered on November 26, 2008, extended the term of the Oversight Committee until December 31, 2009.

Recommendation #4: *Extend the term of the Capital Case Oversight Committee for one year.*

The Oversight Committee members believe that the Committee should continue its duties until the capital case inventory in Maricopa County is at an optimal level. Even if the number of pending capital cases in the trial courts quickly reaches that level, there are ongoing issues concerning capital appeals and PCRs, as detailed in Sections III and V, which warrant the continued existence of the Oversight Committee. The Committee also compiles useful data on capital cases, and it serves as a valuable forum for capital case stakeholders. The Committee therefore recommends that its term be extended for one year.

V. Issues under study.

The Committee had ongoing discussions this past year on the issues in this section, most of which concern PCRs, but the members have not yet reached consensus on how they should be resolved, and these issues require further study.

Issue #1. *Should a screening committee be established to make a qualitative assessment of applications by private counsel for appointment on capital case petitions for post-conviction relief?*

There will continue to be a need for additional counsel to represent defendants on petitions for post-conviction relief in capital cases. However, as a member of the Oversight Committee noted during a recent meeting, the need to find counsel cannot supersede the need to find qualified counsel.

During his presentation to the Oversight Committee, the California Supreme Court's Automatic Appeals Monitor discussed that court's mechanisms for finding qualified counsel. Among other things: California requires the applicant to submit writing samples that demonstrate an ability to analyze complex legal issues; it requires the submission of references, and it contacts those references; it declines to appoint busy trial lawyers on a capital PCR because that attorney, while qualified, may not have the time that is required for a capital PCR; it requires that appointed counsel submit progress reports to the court during the pendency of a PCR; and it requires that appointed counsel consult with another experienced attorney during the course of the collateral proceeding.

Years ago, the Arizona Supreme Court used a screening committee on applications for appointment of capital counsel to assure that each appointee would provide high quality legal services. The Court subsequently disbanded the screening committee.

Members of the Oversight Committee are now concerned that the quantitative requisites of Rule 6.8 may overlook qualitative attributes.²⁷ An applicant may be qualified under Rule 6.8 based on the number of prior proceedings he or she has handled, but counsel may not be sufficiently knowledgeable on subjects such as capital case procedures, federal habeas corpus, mental health issues, or how to conduct a mitigation investigation, and knowledge of these subjects is essential for effective representation on a death penalty case. A presentation to the Oversight Committee by Florida's Capital Collateral Regional Counsel, for example, noted that the qualifications for private counsel on capital post-conviction appointments in that state are "barebones," and that federal filing deadlines were missed by private counsel in more than twenty cases.

Especially on applications for appointment that are received from out-of-state attorneys who are unknown to the Court, but for local applicants as well, thorough qualitative assessments may not be done before an attorney is added to the appointment list. A screening committee could prepare a "due diligence" report to the Court concerning any new applicant; this report could include input from judges before whom the applicant had appeared. The screening committee would function as an adjunct to, and not as a substitute for, Rule 6.8 of the Arizona Rules of Criminal Procedure. The written product of attorneys who were previously appointed on a case could be reviewed to assure that counsel's documents reflected the high standards required for capital representation. The committee would also be able to make recommendations to the Court about whether an attorney should be appointed on another capital case.²⁸

The Oversight Committee recognizes that the selection of members for any screening committee, and the procedures it may chose to utilize, must be judicious. A screening committee must not slow the appointment process, or discourage attorneys from applying for appointment. A suggested proposal the Oversight Committee would like to discuss further is a screening committee that would be composed of retired superior court judges. This alternative has the advantages of using unbiased jurists who would also have extensive knowledge of post-conviction proceedings in the trial court.

²⁷ Amendments for appointment of PCR counsel under Rule 6.8 were adopted by the Supreme Court this year and will become effective on January 1, 2011. The Oversight Committee made two suggestions to the proposed rule (see the Oversight Committee minutes of August 30, 2010) that were incorporated in the rule as adopted. These amendments nonetheless emphasize a quantitative rather than a qualitative approach to qualification.

²⁸ California's Automatic Appeals Monitor advised the Oversight Committee that on occasion, previously appointed attorneys have "life-changing experiences" that cause them to become unsuitable for subsequent appointments, or they don't perform as well as expected, or they have relied on the work product of subordinates rather than doing the work themselves.

Issue #2: *Should county public defenders be appointed on capital case petitions for post-conviction relief?*

The Oversight Committee considered the appointment of county public defenders to represent defendants on capital PCRs. This recommendation has two alternatives. With the first alternative, a defender agency in the same county would be appointed on a PCR. In the second, a public defender agency in one county would accept an appointment on a capital PCR from another county, in exchange for which the accepting county would send one of its capital PCRs to a defender agency in the other county.

Underlying this issue is a belief that death penalty proceedings, which are the most serious criminal cases, are often delayed due to lack of counsel for a PCR, while PCRs on non-capital offenses move forward more quickly with appointed agency counsel. Some members of the Oversight Committee believe that this is incongruous and unacceptable. Money has already been appropriated by several counties for defender agencies to handle PCRs, and capital PCRs should receive a higher priority from these defender agencies than non-capital PCRs.

The possibility of defense counsel having a conflict-of-interest would be minimized under the second alternative, which would appoint a defender agency in a different county on a capital PCR. There are currently fourteen capital PCRs that require the appointment of counsel; eleven are from Maricopa County, two are from Pima County, and one is from Yuma County. Under this variation, 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 fourteen PCR cases currently without counsel. That would be a significant reduction in the number of capital defendants waiting for the appointment of an attorney on a PCR.

Under A.R.S. § 13-4041, counties can bill the State for fifty percent of the cost of private PCR counsel, but the counties cannot bill the State for public defenders on the PCRs. The counties may therefore have little financial incentive to agree to the appointment of a public defender, unless this statute was amended to allow the counties to seek partial reimbursement from the State for the expense of a county public defender on a capital PCR.²⁹ Realistically, a county's board of supervisors would probably be reluctant to fund this potential recommendation unless the increased cost of establishing PCR units in county defender offices was offset by savings to the county from not using private lawyers on capital PCRs.

²⁹ Some Committee members believe to the contrary that a State subsidy to support the appointment of either public or private PCR counsel is unwarranted, and that the historical antecedents of A.R.S. § 13-4041 are outdated. These members believe that the provisions of A.R.S. § 13-4041 concerning reimbursement to the counties for the cost of PCR counsel should be repealed.

Parenthetically, it would not be necessary for the Oversight Committee to address this issue if the State Capital Post-conviction Public Defender Office was fully funded and could accept every capital PCR, but this office is underfunded and it can take only a fraction of the capital PCRs that require appointed counsel. On balance, therefore, the members of the Oversight Committee would like to further explore whether county public defender agencies could accept appointments on capital PCRs.³⁰

Issue #3: *Should an ongoing mechanism be established for collecting and compiling accurate and relevant data on the death penalty process in Arizona?*

Perhaps the most thorough report on capital cases in Arizona was one done by the Arizona Attorney General's Capital Case Commission.³¹ At the inception of the Capital Case Commission, a "Data/Research Subcommittee" was established to work in consultation with the Center for Urban Inquiry, College of Public Programs at Arizona State University to compile empirical data about the death penalty process in Arizona. The Subcommittee designed a three stage process for compiling data, and the data became the basis for the findings and conclusions in the report. However, the data in that report, which was released in final form in December 2002, is now outdated as a result of *Ring v Arizona* and other changes to Arizona's capital case sentencing procedure that also occurred in 2002 as a result of the *Ring* decision. No comprehensive capital case data has been subsequently collected.³²

Much of what is in the three reports that have been submitted by the Oversight Committee to the AJC is data driven. Accurate and comprehensive data is essential to appreciate the resources that must be committed to capital cases, and to evaluate the effectiveness of capital case management and procedures that might enhance capital case administration. Data is also important for prosecutors and defense counsel.

³⁰ One item that might require clarification is whether a county defender agency rather than a specific attorney within the agency may be appointed on a capital case. If an agency is appointed, the court must be satisfied that the responsible agency attorney is capital case qualified. See A.R.S. § 13-4041 and Rule 6.8 of the Rules of Criminal Procedure.

³¹ The report can be found online at: <http://www.azag.gov/CCC/FinalReport.html>. Members of the Commission included one sitting Supreme Court justice (Justice Feldman), one retired justice (Justice Moeller), and several court of appeals judges (including then Judge Ryan, who later became a member of the Court).

³² Since October 2008, the Oversight Committee has collected a limited amount of data in connection with a duty specified in Administrative Order 2007-92 to monitor capital cases in Maricopa County. The Committee has also compiled some very general capital case information from other counties; see Appendix 2.

The Oversight Committee would like to further study data collection, including issues such as what data fields should be included, how to assure the integrity of the data, who should compile the data, and what funding sources would be available for gathering and maintaining this information.

Issue #4: *Should a capital case clinic be established at a law school to provide law student assistance to appointed counsel on capital PCR proceedings?*

Some Oversight Committee members believe that co-counsel should be appointed on PCRs, but it is debatable whether co-counsel is required under the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.³³

An alternative to the appointment of co-counsel that would require no funding is providing appointed counsel with the assistance of law students. A number of law schools have or had capital case clinics that students could take for course credit.³⁴ Not only could such a course provide an immediate source of assistance for PCR counsel in Arizona; it would also give law students real-world exposure to complex capital cases.

Establishment of a clinic in Arizona would be dependent on the support of and funding from a law school, yet a school may find it unpopular for political or other reasons to support a capital case clinic, particularly at a school that receives state funding. The professor heading a clinic should be capital case qualified under Rule 6.8, yet there may be none at local law schools. Continuity of the defense team is also important in capital cases, and law students coming and going every semester might provide only marginal assistance to PCR counsel.

The Oversight Committee would like to further study the feasibility of a capital case clinic in Arizona, and further discuss the potential benefits and disadvantages of a clinic.

³³ See Rule 6.8(c)(3), Ariz. R. Crim. P.

³⁴ Capital case clinics are operating, or previously existed, at the University of California at Berkeley, Boalt Hall; Cornell University Law School; University of Texas at Austin School of Law; University of Nevada, Las Vegas, Boyd School of Law; University of Alabama School of Law; UCLA School of Law; Texas Tech University School of Law; Northeastern University School of Law; DePaul University College of Law; Duke University Law School; and Golden Gate University School of Law. Some clinics focus on specific areas, such as capital trials, appeals, or collateral proceedings. Northeastern University has a Certiorari Clinic; see the law review article by the clinic director at http://moritzlaw.osu.edu/osicl/Articles/Volume3_1/Commentary/Givelber_3-1.pdf

VI. Conclusion.

Significant progress has been made in reducing the capital case inventory in the Maricopa County Superior Court. However, for the reasons discussed in this report, the work of the Oversight Committee has not yet been completed. The Committee respectfully requests that its term be extended, and that it be allowed to report back to the Arizona Judicial Council in December 2011.

Appendix 1

Maricopa County capital case recap: October 2008 to September 2010

<u>MONTH</u>	<u># OF NEW CASES</u>	<u># ACTIVE CASES TERMINATED</u>	<u>DEFENDANTS SENTENCED TO DEATH</u>
October 2008	3	1	0
November	2	2	0
December	1	3	0
3 month 2008 sub-total	6	6	0
January 2009	1	2	1: Prince [<i>Ring</i>]
February	2	2	0
March	0	7	1: Hausner
April	2	5	1: Lehr [<i>Ring</i>]
May	0	4	1: Delahanty
June	0	3	1: Gallardo
July	3	4	1: Grell [<i>Ring</i>]
August	3	5	2: Cota, Hardy
September	1	5	1: Manuel
October	3	7	0
November	1	5	1: Van Winkle
December	7	6	1: Patterson
12 month 2009 sub-total	23	55	11
January 2010	1	6	1: Medina
February	0	5	2: Boyston, Ovante
March	1	5	0
April	2	2	2: Joseph, Martinez
May	2	6	1: Parker
June	5	6	0
July	5	5	0
August	3	6	1: Fitzgerald
September	2	4	0
9 month 2010 sub-total	21	45	7
24 month total	50	106	18
October 2010	Data not available ³⁵	Data not available	2: Gomez, Rose
10 month 2010 sub-total	n.a.	n.a.	9
25 month total	n.a.	n.a.	20

³⁵ Complete Maricopa County Superior Court data for October 2010 will not be available until after the date of submission of this report. However, minute entries confirm the imposition of two death sentences during the month of October.

Appendix 2

Pending capital cases in Arizona by county: 2008 to 2010

<u>County</u>	<u>July 2008</u>	<u>Sept. 2009</u>	<u>Sept. 2010</u>
Apache	1	1	0
Cochise	0	0	1
Coconino	0	0	0
Gila	0	0	0
Graham	0	0	0
Greenlee	0	0	0
La Paz	0	0	0
Maricopa	127	109	79 ³⁶
Mohave	2	3	2
Navajo	0	0	0
Pima	14	13	10
Pinal	3	4	5
Santa Cruz	0	0	0
Yavapai	3	2	2
Yuma	5	4	3
TOTAL	155	136	102

³⁶ The 2010 statewide survey was initiated on September 1. As of August 31, there were 81 capital cases pending in the Maricopa County Superior Court. As of September 30, there were 79 pending cases.

Appendix 3

Appendix C from the September 2007 Report of the Capital Case Task Force regarding suggested changes to A.R.S. § 13-4041

PROPOSED A.R.S. § 13-4041. Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in postconviction relief proceedings; reimbursement.

A. through E [no changes]

F. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid FROM COUNTY FUNDS an hourly rate of not to exceed one hundred TWENTY-FIVE dollars per hour ~~for up to two hundred hours of work~~, whether or not a petition is filed. Monies shall not be paid to court appointed counsel unless either:

1. A petition is timely filed.
2. If a petition is not filed, a notice is timely filed stating that counsel has reviewed the record and found no meritorious claim.

~~G. On a showing of good cause, the trial court shall compensate appointed counsel from county funds in addition to the amount of compensation prescribed by subsection F of this section by paying an hourly rate in an amount that does not exceed one hundred dollars per hour. The attorney may establish good cause for additional fees by demonstrating that the attorney spent over two hundred hours representing the defendant in the proceedings. The court shall review and approve additional reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent over the two hundred hour threshold are unreasonable, the attorney may file a special action with the Arizona Supreme Court. If counsel is appointed in successive postconviction relief proceedings, compensation shall be paid pursuant to section 13-4013, subsection A.~~

H. The county shall request reimbursement for fees it incurs pursuant to subsections F, G and I of this section arising out of the appointment of counsel to represent an indigent capital defendant in a state postconviction relief proceeding. The state shall pay fifty per cent of the fees incurred by the county out of monies appropriated to the Supreme Court for these purposes. The Supreme Court shall approve county requests for reimbursement after certification that the amount requested is owed.

I. The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by section 13-4232.