

**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:

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.

**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.

**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.

*Meeting Minutes: Sept. 23, 2010
Capital Case Oversight Committee*

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
October 19, 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
Paul Prato

Guests:

Hon. Warren Granville	Bob James
Kristine Fox	Natman Schaye
John P. Todd	Emily Skinner
Jerry Landau	Jennifer Garcia
Theresa Barrett	Patti Starr
Diane Alessi	

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 September 23, 2010 Committee meeting were reviewed. A motion was made to approve these minutes, the motion was seconded, and the September meeting minutes were unanimously approved.

The Chair then invited Mr. Jerry Landau, Government Affairs Director for the Administrative Office of the Court, to offer his perspectives on § 13-4041 and state funding of defense counsel on capital case petitions for post-conviction relief.

2. Remarks by Mr. Landau. Mr. Landau noted that he was one of the individuals who initiated a discussion with legislators a number of years ago that led to the establishment of the State Capital Post-Conviction Public Defenders Office. The office was supported by a variety of stakeholders, including the defense bar, prosecutors, victim advocates, and the judiciary, and the office was intended to benefit the criminal justice system as a whole.

The office was created by the Legislature when the budget was not as tight as it is today. The budget situation now is more critical, and it's difficult for many state agencies to obtain funding from the Legislature. The Legislature is asking that counties bear an even larger share of fiscal responsibility.

Theoretically, county public defenders might take capital PCR cases, but if this was to occur, the counties and the State must discuss how those offices would be funded. A simple request for money would be inadequate. Funding requirements would need to be clearly defined, including how many cases would go to the public defender, in which counties, and similar details. Any request should also demonstrate a benefit to the entire criminal justice system rather than to only a single agency or interest group. A broad view of the problem is required. Political

subdivisions and other stakeholders would need to collaborate on and jointly support any proposal, including the identification of funding sources.

Mr. Landau answered questions from the members, and stated that if this Committee had additional questions about possible recommendations that he is agreeable to returning and answering them.

A comment was made that the death penalty is an expensive process, and that it does not move forward without the required funding. Appeals and PCRs in capital cases are not options; they are essential and they are required by law. While the Legislature has chosen to adopt a death penalty, the Oversight Committee should emphasize that Arizona's capital cases will not continue through the judicial process if there is not adequate funding for defense attorneys for these proceedings.

3. Data. In response to the Chair's request for current data, staff reported that as of the end of September, there were 79 pending capital cases in the Maricopa County Superior Court. Two death notices were filed during the month, and four cases were resolved (two by sentencing after jury verdicts, one by sentencing following a plea, and one by the prosecutor's withdrawal of the death notice.) There were four cases that were in trial during September. The figure of 79 pending capital cases represents a 28 percent reduction from the number of cases in September 2009, and a 40 percent reduction in the number of cases that were pending in January 2009.

Mr. Ahler reported that as of October 15, 2010, there were 78 cases, some of which were pending sentencing following a plea. He expects that the new county attorney will rely, at least initially, on the recommendations of experienced prosecutors on the capital review committee. This committee currently has fourteen new or existing cases under review. Mr. Ahler is optimistic that the review will be completed by the time election results are certified in late November. Mr. Logan added that he has identified six murder cases as potential capital cases.

There has been no change since the Oversight Committee's September meeting in the number of pending appeals or PCR defendants awaiting the appointment of counsel.

4. Draft Report #2. The members next considered revisions to the Committee's draft report #2 to the Arizona Judicial Council. The Chair asked the members for comments on several recommendations in this draft.

a) *Establish a screening committee to review applications for PCR counsel.* It was suggested that a Capital Oversight subcommittee be established to further study this proposal. It was noted that it was important that a screening committee not delay the appointment process and not deter attorneys from applying for appointments. The subcommittee should also evaluate the prudence of a screening committee in light of the Court's prior experience with a similar screening committee following the adoption of A.R.S. § 13-4041. In response to an advertisement for applicants, the previous screening committee received a number of applications from attorneys who did not meet the criteria of Rule 6.8, it received only a few applications from attorneys who were probably qualified under Rule 6.8, and it received a dwindling number of applications as time went on. While there may have been concerns then about whether Arizona would qualify

as an “opt-in” state under the AEDPA, those issues have for the most part disappeared. The concern now is to get qualified attorneys to apply for appointment.

The members agreed that the draft recommendation for creation of a screening committee be changed to a recommendation that a subcommittee be established to study this proposal further. It was noted that as a follow up to the capital case conference held in May 2010, an additional day of training is planned for February 2011, and this upcoming training date may provide a venue to encourage attorneys to apply for PCR appointments. Public defender agencies are also sponsoring training in November 2010 on capital appeals and PCRs, and this may also present an opportunity to promote applications for PCR appointments.

b) *Remove the cap on hours and increase the hourly rate under A.R.S. § 13-4041.* The members concurred that the word “cap” should be changed to something more accurate, such as “over the 200 hour presumptive limit.” A discussion ensued over who reviews the PCR attorneys’ bills for reasonableness. The Office of Public Defense Services (“OPDS”) currently reviews the bills of private counsel, which is advantageous because that office can informally dialogue with counsel if there are questions concerning a bill. It was noted that the federal court uses a bursar to review bills and to advise the court concerning their approval. The OPDS does not make recommendations to the court about payment, and with an increasing number of capital PCRs, the OPDS workload of reviewing bills will increase; but a bursar or special master might be appointed by the court to perform these functions if it becomes necessary in the future. It was further noted that at the present time, there’s not enough data to determine what constitutes a “typical” number of hours for a capital PCR, but after more PCRs have been concluded this figure might be determinable.

The members also agreed, notwithstanding the current budget situation, to keep in the report the recommendation about increasing the \$100 hourly rate for PCR counsel. Lead trial attorneys receive \$125 an hour, and lead attorneys on federal habeas receive \$163 an hour. PCR counsel should at least receive a rate commensurate with lead trial counsel.

c) *Appoint county public defenders on capital PCRs.* In consideration of Mr. Landau’s comments, the members agreed that a workgroup of stakeholders be established to further study this proposal, rather than including it in the report at this time as a firm recommendation. One member stated that the county public defenders may not have either the staff or the experience to do capital PCRs (neither the Maricopa nor the Pima public defenders currently handle capital PCRs), and suggested that going forward, this proposal should be carried by the counties. The proposal may be supported by stakeholders if doing capital PCRs “in house” is in fact a cost-savings for the counties, although the extent of cost savings may be contingent on reimbursement arrangements with the State. Ms. Hallam noted that of the fourteen PCRs currently awaiting the appointment of counsel, the next two PCRs in line for appointment are Pima County cases, and the balance of cases, with the exception of one case from Yuma County, originated in Maricopa County.

5. Other proposals. The Chair inquired if there were other proposals for consideration, and members responded as follows:

*Meeting Minutes: October 19, 2010
Capital Case Oversight Committee*

- PCR defense counsel should be compensated from the county attorney's budget because this would encourage prosecutors to be circumspect about the filing of death notices. A reasonable allocation should be made to the county attorneys' budgets for this purpose, and the OPDS or another agency could administer the fund to avoid conflicts of interest.
- It would be a better model for counties to pay the entire cost of PCR counsel, just as counties currently pay the entire cost of trial and appellate counsel for capital cases. In rural counties, cost is taken into account before filing a death notice because of the enormous cost of a capital case to the county, but in a large county the amount of this cost per death notice may not be fully appreciated.
- The Committee's report should not characterize the idea about a law school clinic as a "recommendation", because it was not recommended. Rather, it should be shown as a possibility to be explored further.
- The attorney appointed on a state PCR should continue to handle the federal habeas corpus because counsel is already familiar with the case. The attorney would receive compensation from the federal court for working on the habeas. Guests noted that the federal public defender presently handles almost all habeas corpus proceedings involving the death penalty, and private counsel are rarely appointed in the district court in Arizona on these cases; but a joint office that would handle state as well as federal collateral proceedings is an active discussion topic in California because of the anticipated efficiency of such an arrangement. A member recalled that the Florida presenters advised the Committee in April that counsel in that state are appointed for proceedings in both courts.

6. Call to the public; finalizing the Committee's report; adjourn. There was no response to a call to the public.

The members agreed that after the next draft of the report was circulated to the members, the members could submit comments to staff; and that the Chair was authorized to review those comments and use his discretion in making further revisions before submitting the final report to the AJC. If necessary, the Chair will convene another in-person or telephonic meeting to resolve any issues.

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