

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
January 18, 2011**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Douglas Rayes
Hon. Ronald Reinstein
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
William Montgomery
Daniel Patterson

Guests:

Hon. Warren Granville	Bob James
Kristine Fox	Natman Schaye
John P. Todd	Jennifer Garcia
Diane Alessi	Patti Starr
Jeremy Mussman	Robert Shutts
Tony Novitsky	Gabe Goltz
Kristin Pruszynski	Chris DuPont
Kim MacEachern	

(All members present.)

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 introductory remarks, the Chair asked the members to consider the draft minutes of the October 19, 2010 Committee meeting. A motion was made to approve those minutes, the motion was seconded, and the October meeting minutes were unanimously approved.

The members then heard a telephonic presentation from Professor Jon Gould and Ms. Lisa Greenman, co-authors of the “*Report to the Committee on Defender Services, Judicial Conference of the United States - Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases (September 2010)*”

2. Presentation by Prof. Gould and Ms. Greenman. The 2010 report updated cost and other data in the 1998 “*Spencer Report*”, which had been prepared when the federal death penalty was relatively new. In preparing the 2010 report, the authors conducted extensive interviews with federal judges and counsel who had, respectively, presided over or tried capital cases. Their 2010 report also examined other issues in light of the capital case experience of an intervening decade, including the matter of resource counsel.

The presenters explained that resource counsel were intended to enhance the efficiency of the court in processing a capital case, and to improve the quality of representation of a capital defendant. One way the quality of representation is improved is by resource counsel offering their expertise in capital cases, so that appointed counsel don’t have to “reinvent the wheel” for every death penalty issue. Resource counsel also help with locating necessary experts, and by discussing case strategy with appointed counsel. There are currently three sets of resource counsel: one for the trial level, another for appeals, and a third for post-conviction proceedings

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under section 2255. Although the budget for resource counsel was not available, it was noted that some resource counsel are salaried employees of federal defender offices, while others are attorneys in private practice who are compensated on an hourly rate.

Federal judges are required by statute to consult with resource counsel or the administrative office of the courts prior to appointment of a defense attorney in a capital case. Federal judges do not simply choose a name from an attorney appointment list. The presenters explained that while a list might provide the names of attorneys who had met minimum standards, a careful and deliberate evaluation is done to match the characteristics of each case with a particular lawyer in an effort to provide superior representation for every individual defendant. An attorney's skills are based not only on their quantitative experience, but also on whether that prior experience has been "distinguished." Individual assessments are also made at the PCR level to find well-qualified counsel for this specialized subset of cases.

The authors found that about 26 percent of the authorized federal death penalty cases that proceeded to trial ultimately result in a death sentence. It was noted by comparison that in Maricopa County, over sixty percent of death-noticed cases that go to trial conclude in a death sentence. Prof. Gould expressed concern that this local figure may raise an issue about whether adequate time and resources had been devoted to these cases. He stated that federal courts endeavor to provide sufficient time and resources for defense counsel, including an adequate hourly rate of compensation for appointed private counsel. The September 2010 report found that federal defendants whose cases were in the lower one-third of the range of costs were twice as likely to be sentenced to death. However, quality representation is not simply a matter of spending more hours or more money on a case. Professor Gould concluded that quality representation affects not just the outcome of the case, but it also contributes to the integrity of the death penalty process.

In response to questions, Ms. Greenman noted that on those occasions when an attorney with no post-conviction experience was appointed on a federal post-conviction proceeding, the case did not proceed well, and issues were missed or were inadequately developed. Although the applicable federal statute is not explicit, she said that because of the complexity of capital cases, the statute is interpreted to provide for the appointment of two defense attorneys rather than one on a capital appeal or post-conviction proceeding. She added that trial attorneys are not appointed for post-judgment matters because attorneys who handle appeals or collateral proceedings must have different skill sets.

Prof. Gould and Ms. Greenman were thanked for their presentation. The Chair then asked for reports from members.

3. Reports from members. Judge Rayes reported that as of July 2009, there were 118 pending capital cases in Maricopa County. By comparison, in July of 2010, there were 83 pending cases, and at the present time there are 68 pending cases. During fiscal year 2010, there were 29 new filings, one remand, and 63 case resolutions. Judge Rayes also stated that during FY 2010, 17 cases proceeded to trial, and 11 of these (about 65%) resulted in a death sentence. For FY 2011 to date, a period of about six months, 15 death notices were filed, there have been two remands, and 31 cases have been resolved. Nine cases have proceeded to trial in FY 2011 to date,

resulting in four death sentences (about 44%). Judge Rayes noted that there are six judges on the criminal bench who are dedicated to the trial of capital cases.

Judge Rayes also stated that for FY 2010, there were 9 PCRs with counsel, and 11 were awaiting the appointment of counsel. In FY 2011 to date, there are 20 PCRs with counsel, and six are awaiting the appointment of counsel. Judge Rayes added that the time allowed under Rule 32 for filing a petition or response to a petition in a capital case is often insufficient, and he requires that counsel file a written motion every thirty days as needed to extend these deadlines.

Mr. Logan reported that at this time, and with the current capital case inventory, the staffed defender offices have been available for capital appointments. No capital cases have been assigned to a contract attorney within the past six months unless there has been a three-way conflict in the staffed offices. There was one report of a delay in a capital proceeding because the defense attorney had several assigned capital cases, but Mr. Logan indicated that this was an isolated occurrence involving older cases.

Mr. Montgomery stated that the decision to file a death notice in his office is factually driven. His office considers whether aggravating circumstances can be proven, and whether the death penalty is appropriate in a particular case. He seeks the advice of his capital review team before making the final decision about a death notice. It was noted by a member that death sentences had been obtained over the past few years in less than twenty percent of the cases in which death notices had been filed, and Mr. Montgomery was asked if he thought that this was a good allocation of capital case resources. Mr. Montgomery responded that he is aware of the resource commitment required for a capital case, and that going forward, his office will assess the appropriateness of a death notice in each individual case, including changes that may develop with the state of the evidence or any other circumstances as a case evolves. The overall number of homicides committed in Maricopa County could impact the number of death notices that are filed. He does not have a predetermined number of capital cases that should be filed during any given period of time.

Ms. Hallam advised that there are currently 27 capital appeals pending in the Arizona Supreme Court. Fourteen of these cases are from calendar year 2009, and ten are from calendar year 2010. There are eleven unrepresented defendants on capital PCRs, the oldest of which involves a July 24, 2009 opinion on direct appeal. There are eleven attorneys who have a capital PCR, or who may be able to take one.

The State Capital PCR Public Defender has five cases: one is pending a hearing, one is pending a conference, a response to a petition is pending in one case, and two cases are being investigated. A sponsor for a bill to extend the office beyond its July 1, 2011 sunset date has been found in the Senate, and another sponsor for this bill may be found in the House. He expects that the Executive Department will lobby in support of the extension for the office, but the office would welcome support from all stakeholders.

These other comments were made by those present:

- The number of death notices filed in Maricopa County during recent years may have been due to unique circumstances.
- The average number of hours a defense attorney devotes to a capital case may be increasing because attorneys now have fewer capital cases that require their time.
- There have been no reports of defense attorneys in Maricopa being denied reasonable requests for resources in a capital case.
- Defense attorneys now have greater experience with investigating mitigating circumstances than they did several years ago. Attorneys have become more sophisticated in presenting mitigation evidence to trial juries.

4. Proposed amendment to A.R.S. § 13-4041. Mr. Lieberman presented a proposed amendment to this statute that would allow a county to bill the State for half the expense of a capital PCR that might be incurred by a county defender agency; the current statute permits reimbursement to the county only for expenses that were incurred by a private attorney. The rationale for this proposal is that although a county would save money if the county used a staffed defender agency on a PCR rather than a private attorney, this economy would exist only if the county could recover a portion of its costs for the defender agency, as it does now with a private attorney. No formal action was taken on the proposal. It was noted that the Pima County Public Defender does not support the appointment of the public defender on capital PCRs.

5. Workgroups. As a follow up to the Oversight Committee's November 2010 report to the Arizona Judicial Council, the Chair established workgroups for two of the four issues that the report noted were currently under study.

- Workgroup #1: The Chair, Mr. Cattani, and Mr. Lieberman will address whether a screening committee should be established to make qualitative assessments of applications by private counsel for appointment on capital PCRs.
- Workgroup #2: The Chair, Mr. Montgomery, and Mr. Cattani will address whether a mechanism should be established for compiling statewide capital case data, and if so, further particulars of data collection, such as who would collect the data, what data would be collected, and the cost of collection. Mr. Cattani noted the value of having this data.

A workgroup on the issue concerning appointment of public agencies on capital PCRs will be on hold pending developments in the current session of the Legislature. The issue of establishing a law school capital case clinic is tabled at this time.

6. Call to the public; adjourn. There was no response to a call to the public.

Mr. Lieberman announced that his office along with defender agencies is planning annual capital case training. They may also offer quarterly training on capital appeals and PCRs.

There being no further business before the Committee, the meeting was adjourned at 1:20 p.m.

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Capital Case Oversight Committee

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
May 16, 2011**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Douglas Rayes
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
Daniel Patterson

Guests:

Bob James	Rachelle Resnick
Kristine Fox	Natman Schaye
Dale Baich	Jennifer Garcia
Diane Alessi	Patti Starr
Elizabeth Walker	Vince Imbordino
Tony Novitsky	Chris DuPont
Bruce Peterson	Paul Julien
Theresa Barrett	

Members not present:

Hon. Ronald Reinstein
William Montgomery

Staff: Mark Meltzer, Julie Graber

1. Call to Order; approval of the meeting minutes. The meeting was called to order at 12:05 p.m. The first item of business was consideration of the draft minutes of the January 18, 2011 Committee meeting. A motion was made to approve those minutes, the motion was seconded, and the January meeting minutes were unanimously approved.

2. Electronic filing of capital appeals. Rachelle Resnick, Clerk of the Arizona Supreme Court, updated the Committee on electronic filing of documents in capital appeals. Ms. Resnick advised that e-filing in the Supreme Court began in 2008 with an in-house product known as “ACE”. Administrative Order 2010-107, entered in October 2010, authorized a pilot program for e-filing briefs and other attorney-prepared documents through AZ TurboCourt, and AZ TurboCourt has already been utilized in three death penalty cases. If the pilot successfully concludes later this year, it will permanently replace the ACE system. The Clerk’s Office is working with the Maricopa County Superior Court on a program called “Court 2 Court” that would permit electronic filing of the trial court’s record on appeal. The electronic record would include reporters’ transcripts, and photographs would be scanned and electronically accessible; the electronic record would not initially include videotapes, audiotapes, or oversized exhibits. The AZTurboCourt pilot program encompasses e-filing of special actions as well as direct appeals. Ms. Resnick explained that an advantage of e-filing is round-the-clock access for filers. Electronic filing also reduces the volume of paper and creates efficiencies for the Clerk in maintaining the record. Ms. Resnick noted that having documents in electronic format allows individuals at different locations, such as users in multiple judicial chambers, to review the same case document simultaneously.

3a. Status reports: Maricopa County Superior Court. Judge Rayes outlined procedures for status conferences in capital cases. An initial status conference is set when the prosecutor files a

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notice of intent to seek the death penalty. Judge Rayes determines at this initial conference whether appointed counsel has sufficient time to devote to a new capital case. The case is then assigned to one of six judges dedicated to presiding over capital cases, and status conferences are set every sixty days thereafter. As the trial date approaches, these conferences may be set every thirty days. The parties are required to submit joint status conference memos before each conference. Defense counsel and the mitigation specialist may also be required to provide the court with statements of their hours expended to substantiate that progress is being made in preparing the case for trial.

In the past twelve months, 56 cases have been resolved and 27 notices have been filed. There are currently 67 capital cases pending disposition in the Maricopa County Superior Court. Additional details concerning these cases include the following:

- In the past three months, seven cases have been resolved and five new notices have been filed.
- Thirteen capital cases have been tried during the past six months.
- Four of the pending cases are set for trial in May.
- Twenty cases are scheduled to proceed to trial through September.

Because the number of new death penalty cases has been decreasing, most defendants in new capital cases over the past year have received appointed counsel from one of the three staffed public defender agencies. However, eight private attorneys have been appointed during that time; four were appointed because of three-way agency conflicts, and four were appointed because of capacity issues. At the present time, all three staffed agencies are available for new appointments.

The Office of Public Defense Services assesses the case load of an attorney who is interested in an appointment before the appointment is made. The current hourly rate of \$125 for private attorney appointments is less than the federal rate of \$178, and this disparity may discourage some well-qualified lawyers from seeking appointments on state capital cases. An effort is underway to determine the increased cost to the county if a higher hourly rate was established.

3b. Status reports: appeals and PCRs. There are 26 capital appeals pending before the Arizona Supreme Court. Ten of these appeals were filed in 2010. Three notices of appeal have been filed in 2011, and the notice of appeal in a fourth case is anticipated.

There are eleven capital defendants without counsel for an initial PCR petition. One of these cases is from Yuma County, and the others are from Maricopa County. The oldest of these eleven cases involves a July 2009 opinion on direct appeal.

In February 2011, the Maricopa County Public Defender accepted appointments on two capital PCRs. Two private attorneys were appointed on PCRs in 2011, and eleven private attorneys were appointed in 2010. There are sixteen private attorneys on the list of PCR qualified counsel, and each of them has a case.

Three alternatives were suggested for reducing the number of capital defendants who lack PCR counsel. These alternatives are: (1) adding new attorneys to the list of qualified PCR counsel; (2) requesting that attorneys who are currently on the list assume additional appointments; and (3) increasing the number of assignments to the State Capital PCR Public Defender. The Arizona Public Defenders Association has a conference in June, which may provide an opportunity to publicize the need for additional capital PCR counsel.

Rule 6.8(d) permits the appointment of an attorney in exceptional circumstances who is not qualified under subsections (a), (b), or (c) of the rule, if the appointed attorney associates with another lawyer who is qualified under the rule. A member raised a question about the standards for associating a qualified attorney. Ms Hallam advised that associating another attorney is not the equivalent of having co-counsel, because the attorney who is associated (a so-called “resource counsel”) is not paid and does not file a notice of appearance in the case. Although resource counsel provides legal guidance, reviews written documents prior to filing, and provides general supervision of the 6.8(d) attorney, resource counsel in Arizona performs as a volunteer. Ms. Hallam noted that resource counsel is informally identified to her, but there is no process in place for verifying that the resource counsel has agreed to serve in that role, nor is resource counsel’s performance monitored by the Court. Judge Rayes added that resource counsel typically is not identified on the trial court record, and he may not know whether a PCR attorney has been appointed under Rule 6.8(c) or 6.8(d).

Mr. Logan noted that the number of capital PCRs in the Maricopa County Superior Court has increased from a single digit several years ago to twenty-two cases currently. This increase has been commensurate with a decrease in the number of new death notices, and in light of the decreased need for trial attorneys, a number of experienced trial attorneys who are qualified under Rule 6.8(b) are seeking appointment on a capital PCR under Rule 6.8(d).

Because appointments pursuant to Rule 6.8(d) are a relatively new phenomenon, it is too early to assess the quality of the lawyers who have been appointed under that provision. A member suggested that no appointments should be made under Rule 6.8(d). Another suggestion was to provide compensation to resource counsel, which would require resource counsel to submit bills that could be audited for performance. One member offered an opinion that the standard of care mandated that two attorneys be appointed on every capital PCR, and that at least one of the attorneys must be qualified under Rule 6.8(c). Another member suggested that the Oversight Committee make recommendations to the Supreme Court on this issue, and presented as a possible remedy that the State Capital PCR Public Defender be designated as resource counsel on PCR appointments of private counsel under Rule 6.8(d).

A member commented that Rule 6.8 was intended in part to improve the quality of attorneys at trial and on appeal so there would be fewer residual issues for a PCR proceeding. The Chair noted that because most of the cases involving appointments for a three-phase trial are still pending in state courts, it may be too early to quantify counsels’ effectiveness. A member responded that following the conclusion of proceedings in state court, an evaluation of the performance of counsel that would include details such as the amount of time spent on a case, or the number of experts who were called, might be informative. Another member replied that with

regard to PCRs, it is often not the quality of what has been done by counsel that becomes significant, but rather, what counsel has failed to do.

4. Search for a new Capital Post-conviction Public Defender. The members were advised that decisions have been made on some of the appointments to the Nomination Commission, but these have not yet been publically announced.

Mr. Lieberman advised that when he left the office ten weeks ago, a plan was in place for each of his five cases. Four of the cases are in Maricopa County; one of these involves a Rule 11 issue. The fifth case is in Mohave County, and an evidentiary hearing is pending. Court proceedings in all five cases have been stayed until the appointment of the new Public Defender.

5. Discussion concerning the effective assistance of counsel at the PCR stage. The *Maples*, *Cook*, and *Foster* petitions that are pending in the U.S. Supreme Court were briefly discussed. Mr. Cattani will provide an update on any action taken in these cases at the Oversight Committee's next meeting.

Mr. Lieberman stated that the concept of a committee that would screen applications to be appointed as PCR counsel in a capital case, or that would review the performance of appointed PCR counsel, remains worthwhile. Judge Rayes, Mr. Cattani, and the Chair agreed. The Chair and these three members will meet as a workgroup to further discuss this potential committee.

6. Capital case data collection. On behalf of the Oversight Committee's data collection workgroup, Mr. Cattani advised that an update on the data contained in the Capital Case Commission's 2002 report should focus on two areas. One area would be cases in which a death sentence has been imposed since the 2002 report; Mr. Cattani stated that there are 72 cases in this category, and he will take the lead in compiling outcomes on these cases. The other area involves cases where a death notice was filed but the case did not conclude with a death sentence in the trial court. Mr. Montgomery will take the lead on this data set. Mr. Lieberman advised that Peg Bortner, who compiled the data in the 2002 report, is still on the faculty at ASU; the Chair and Mr. Cattani will attempt to re-establish contact with her to discuss the current data initiative.

7. Capital case training. Paul Julien, the AOC's judicial education officer, informed the Committee that additional funding was available as a consequence of the earlier grant award from the Bureau of Justice Assistance, which was used for last spring's capital case conference. Justice Ryan is chairing a design team that includes judges, prosecutors, and defense counsel to develop a plan for using these additional funds. A bench book, a manual, or additional training to address recurring issues in capital cases have been mentioned as possible plan objectives.

8. Call to the public; adjourn. There was no response to a call to the public. The meeting was adjourned at 1:20 p.m.

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
October 05, 2011**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Douglas Rayes
Kent Cattani, by proxy, John Todd
Donna Hallam
Dan Levey, by proxy, Amy Bocks
Marty Lieberman
James Logan
Daniel Patterson
Hon. Ronald Reinstein

Guests:

Natman Schaye
Elizabeth Walker
Jennifer Garcia
Molly Weinstein
Bruce Peterson
Larry Hammond
Paul Julien
Theresa Barrett

Members not present:

William Montgomery

Staff:

Mark Meltzer
Julie Graber

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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 Chair introduced proxies for Mr. Cattani and Mr. Levey, respectively Mr. Todd and Ms. Bocks. The Chair then asked the members to review the draft minutes of the May 16, 2011 Committee meeting. A member moved to approve those minutes, followed by a second, and the members unanimously approved the May meeting minutes.

2a. Status reports: Maricopa County Superior Court. The Chair invited Judge Rayes to report on the status of capital cases in Maricopa County. Judge Rayes advised that there were sixty-six cases pending as of this week; three of those cases are remands. Five cases are currently in trial. Eight death notices have filed since June 1, and nine capital cases have been resolved in that period. In calendar year 2011 to date, the county attorney filed twenty death notices, and twenty-two capital cases have concluded. Judge Rayes also advised that he and Mr. Logan are working on a quality assurance plan for contract counsel.

Mr. Logan's figures for the number of pending cases varied from those provided by Judge Rayes. Mr. Logan included six cases that are "potential" capital cases in which the time to file a notice has not yet run, and seven cases in which the time to file a death notice has been extended. He also included three cases in which the notice has been withdrawn, but that are still fully staffed with a capital team. One capital case was assigned recently to contract counsel because of the existence of a three-way conflict with the staffed agencies, but those agencies accepted assignments on all the other new cases. Mr. Logan observed that the number of pending cases appears to be leveling off, but because the new county attorney has been in office for less than a year, he cautioned members that it would take additional time to determine what the new "normal" for pending cases will be. Mr. Logan reported that he presently has adequate operating funds.

2b. Status reports: appeals and PCRs. Ms. Hallam advised that there are twenty-seven pending appeals. Fifteen notices of appeal were filed in 2009, ten were filed in 2010, and six have been filed so far in 2011. The Court issued seven opinions in capital cases in 2007, nine opinions in 2008, five in 2009, eleven in 2010, and five so far this year.

There are ten defendants awaiting the appointment of counsel on petitions for post-conviction relief. The oldest case involves a March 2010 opinion on direct appeal. Ms. Hallam surmises that to accommodate the current backlog of PCR cases needing counsel and future PCR cases resulting from the current number of appeals, there should be about fifteen to twenty active counsel. An “active” counsel would be able to take a new PCR every two or three years. About fifteen attorneys have accepted appointments on PCRs from 2009 to the present. This figure does not include two cases that went to the Maricopa County Public Defender.

There are three pending PCRs with lawyers appointed under Rule 6.8(d). These lawyers must associate with other attorneys who are fully qualified under Rule 6.8. The Court does not currently identify the associate attorneys in the appointment orders for these cases. Counsel appointed under Rule 6.8(d) must notify the Supreme Court’s staff attorneys with whom they have associated, and staff can verify that associated counsel is qualified, but staff does not currently contact associated counsel to confirm that they have agreed to render pro bono services in the case, or to confirm their duties.

A discussion of the current appointment process ensued, and members posed the following questions. If Rule 6.8(d) lawyers are required to associate with a Rule 6.8 qualified attorney, should the court appoint a fully qualified attorney on the case instead? Would it be feasible for the county to appoint and to compensate associated counsel on capital PCRs? Mr. Logan said that the county is already spending more money on PCR counsel than previously because of the increased number of post-conviction proceedings, and the county would be reluctant to pay the additional cost of associated counsel without a mandate that it do so.

The discussion then turned to the subject of training for Rule 6.8(d) counsel. Jennifer Garcia, who is with the Federal Public Defender, organizes two full days of training on post-conviction relief in the fall, with supplemental training throughout the year, because of the increasing number of post-conviction proceedings. This training is specifically on capital post-conviction matters, such as PCR procedures, competency, and recent Supreme Court opinions. Attorneys who attend the training are typically from staffed defender offices rather than contract counsel. Questions were asked whether an amendment to Rule 6.8(d) should require this training, or if the appointment order should require that counsel obtain this training. The consensus of the members was that improvements are needed in the appointment and training of Rule 6.8(d) counsel.

3. Search for a new Capital Post-conviction Public Defender. Staff reported that all members of the Nomination Commission have been appointed. The Governor’s office will staff the Commission. The administration has received applications, and the Commission may meet later this month to review them.

4. Discussion concerning the effective assistance of counsel at the PCR stage. Mr. Cattani argued before the United States Supreme Court yesterday in *Martinez vs. Ryan*. The Court also heard argument yesterday in *Maples vs. Thomas*, an Alabama case. Mr. Todd explained that each of these cases involved a procedural default and the loss of an opportunity to raise a constitutional challenge to a conviction because of ineffective counsel. Mr. Hammond said he had reviewed transcripts of these oral arguments, and he believes these reveal an inclination of the Court to require a constitutionally effective lawyer in a post-conviction proceeding.

5. Screening committee. If the Court reaches the holding suggested by Mr. Hammond, applications for PCR counsel may require careful screening. Should the creation of a screening committee abide the opinions in *Martinez* and *Maples*?

Mr. Lieberman, who provided a written proposal for a screening committee, held the view that the Arizona Supreme Court should establish a committee as soon as possible. While the SCOTUS opinions could affect how the committee operates, Mr. Lieberman stated that a committee is required regardless of the outcome in those cases.

The Chair noted that a death penalty project representative of the American Bar Association had recently visited Phoenix, and advised that Ohio has established within the past year a committee that screens capital appointments at all court levels. The screeners also monitor the performance of counsel, and the screeners receive compensation. The following questions were raised: Would such a committee work in Arizona, when the county appoints trial and appellate counsel, and the Supreme Court appoints PCR counsel? How would the committee obtain funding? How would the counties and the Legislature view the creation of a screening committee?

Maricopa County has an ad hoc committee with members from the staffed defender offices whose purpose is to evaluate applicants for appointments on criminal cases. The committee reviews multi-page applications that include a list of references and cases, and it discusses each applicant. The county has various contracts, such as capital appeals, capital trials, and major felonies, and an applicant receives a contract only if they have the appropriate skill level. The award of a contract to an applicant is no assurance that the applicant will get appointments on any case. Mr. Logan would support Mr. Lieberman's proposal, with a few administrative changes, because he believes it will provide the Court with more information before making appointments.

A member suggested that judges who have not practiced criminal law might not have the requisite experience to evaluate applicants, but other members believe that judicial officers should be on the committee, even if they are not voting members. Judge Rayes reminded the members that he and Mr. Logan have a plan for a screening committee for trial counsel in Maricopa County, and that this plan would not be a cost to the county. Mr. Lieberman does not know how many attorneys in Arizona may be qualified to represent defendants on capital PCRs; he added that being qualified means more than the mere number of cases an attorney has handled. Currently in Arizona, no large law firms are engaging in pro bono representation of defendants on capital PCRs, and few if any of those firms employ Rule 6.8 qualified attorneys.

The Chair concluded this discussion by referring the matter to the workgroup consisting of Judge Rayes, Mr. Lieberman, and Mr. Cattani. Ms. Hallam was added to the workgroup.

6. Report to the Arizona Judicial Council. The Chair stated that the topic of a screening committee for trial and appellate appointments, in additions to appointments on PCRs, will require further study, and that it might be premature to report to the Arizona Judicial Council in December 2011. There are also unknown outcomes that could affect the December report, including the Nomination Commission's appointment of a new statewide capital PCR defender, and the impact of the *Martinez* and *Maples* decisions. The Chair suggested that a request to extend the time to report to the AJC would be appropriate, and the members unanimously concurred. If the Committee obtains an extension to 2012, all of the members present agreed to continue to serve.

It was also noted that based on the leveling off of the number of cases in the Maricopa County Superior Court, the crisis in that court which gave rise to this Committee may be abating. However, the crisis may be transferring to the appellate courts as cases work their way through the judicial system, and the Committee should continue to monitor case volumes.

7. Proposed amendments to A.R.S. § 13-4041. Mr. Todd presented proposed amendments to A.R.S. § 13-4041, which were developed with Mr. Cattani. The proposed amendments would:

- Authorize the appointment of a PCR defender upon certification that the record on appeal is complete, thereby allowing development of the PCR before the appeal is completed;
- Require the appointment of the State Capital PCR PD, or a public defender agency, unless a conflict exists that requires the appointment of private counsel;
- Raise the hourly rate from \$100 to \$175, and the allowable number of hours from 200 to 300, if a case did go to private counsel; and
- Delete sub-section (H), i.e., the provision that allows the county to seek reimbursement from the State for fifty percent of the cost incurred by the county.

Member comments included the following:

- The presentation of mitigation evidence at a PCR hearing while an appeal is pending could be problematic.
- If counsel is appointed on the PCR while the appeal is pending, and the appeal is successful, considerable resources that were spent on the PCR would be wasted;
- Why should a state statute set the hourly rate if the county is going to bear the cost of compensation? The State currently does not set the rate for trial or appellate counsel appointed by the county, and it should not set the rate for PCR counsel either.

Based on the discussion, there was no interest in supporting this proposal.

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Capital Case Oversight Committee*

8. Call to the public; adjourn. In response to a call to the public, Mr. Schaye advised that the problem of screening lawyers for capital cases in Pima County is a serious one. The county's list combines trial and appellate counsel. There is a low rate of compensation and a lack of qualified applicants. He encouraged the members to look beyond PCRs and beyond Maricopa County when considering the establishment of a screening committee.

The meeting was adjourned at 1:35 p.m.