

**CAPITAL CASE OVERSIGHT COMMITTEE**

***MEETING AGENDA***

**Thursday, May 5, 2016**

12:00 to 1:30 PM

State Courts Building \* 1501 W. Washington \* Conference Room 119 \* Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 6443

Item no. 1	<b>Call to Order</b>  <b>Review of Administrative Order number 2016-11</b>	<i>Judge Reinstein</i>
Item no. 2	<b>Approval of the October 29, 2015 meeting minutes</b>	<i>Judge Reinstein</i>
Item no. 3	<b>Status reports:</b>  <b>Superior Court</b>    <b>Appeals and PCRs</b>	<i>Judge Myers</i> <i>Mr. Novitsky</i> <i>Mr. Logan</i> <i>Ms. Johnson</i> <i>Mr. Rodriquez</i>  <i>Ms. Gard</i> <i>Ms. Hallam</i>
Item no. 4	<b>Update on the Criminal Rules Task Force (Administrative Orders numbers 2015-123 and 2016-03)</b>	<i>Judge Cattani</i> <i>Ms. Johnson</i> <i>Mr. Schaye</i>
Item no. 5	<b>Matters of interest:</b> <ul style="list-style-type: none"><li>- <b>Availability of mitigation specialists</b></li><li>- <b>Jury issues</b></li> <li>- <b>Appointment of counsel on capital PCRs</b></li></ul>	<i>Mr. Schaye</i>  <i>Mr. Schaye</i> <i>Mr. Lieberman</i>
Item no. 6	<b>Other member comments and concerns</b>	<i>All</i>
Item no. 7	<b>Call to the Public</b>  <b>Adjourn</b>	<i>Judge Reinstein</i>

*The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.*

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Requests should be made as early as possible to allow time to arrange accommodations.



IN THE SUPREME COURT OF THE STATE OF ARIZONA

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In the Matter of: )  
 )  
EXTENSION OF THE TERM OF THE ) Administrative Order  
CAPITAL CASE OVERSIGHT ) No. 2016 - 11  
COMMITTEE ) (Amending Administrative  
 ) Order No. 2013-115)  
 )  
\_\_\_\_\_ )

On December 6, 2007, this Court entered Administrative Order No. 2007-92, which established the Capital Case Oversight Committee. The purposes of this advisory committee included monitoring and facilitating efforts to reduce the number of capital cases in the Maricopa County Superior Court, which had reached a crisis level in 2007, and making policy recommendations to improve the judicial administration of capital cases in Arizona.

On December 18, 2013, this Court entered Administrative Order No. 2013-115, which extended the term of the Capital Case Oversight Committee to December 31, 2015.

The December 2015 Report of the Oversight Committee recommended an extension of the Committee's term, and that it continue to monitor capital case data. Therefore, after due consideration of the Oversight Committee's request and pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the term of the Capital Case Oversight Committee is extended from December 31, 2015 to December 31, 2018, as follows:

1. **Purpose.** The Oversight Committee shall continue to identify issues affecting the administration of capital cases and to propose recommendations to improve the judicial administration of these cases.
2. **Membership.** The Committee members are set forth in Appendix A. Terms of Committee members shall expire on December 31, 2018.
3. **Meetings.** The Oversight Committee shall meet only as necessary, and meetings may be scheduled, cancelled, or moved at the discretion of the Committee chair. All meetings shall comply with the public meeting policy of the Arizona Judicial Branch, Arizona Code of Judicial Administration § 1-202.
4. **Reports.** The Committee shall submit progress reports to the Arizona Judicial Council in October 2017 and December 2018.

5. **Administrative Support.** The Administrative Office of the Courts shall provide administrative support and staff for the Committee, who may, as feasible, conduct or coordinate research as requested by the Committee.

Dated this 24th day of February, 2016

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SCOTT BALES  
Chief Justice

## Appendix A

### Members of the Capital Case Oversight Committee

Hon. Ronald Reinstein (ret.), Chair  
Arizona Supreme Court Special Projects

Hon Kent Cattani  
Court of Appeals, Division One

Ms. Donna Hallam  
Arizona Supreme Court Staff Attorney

Ms. Lacey Stover Gard or the Capital Litigation Section Chief  
Office of the Arizona Attorney General

Ms. Kellie Johnson  
Pima County Attorney's Office

Ms. Michele Lawson  
Maricopa County Office of the Public Advocate

Mr. Dan Levey  
Parents of Murdered Children

Mr. Martin Lieberman  
Maricopa County Legal Defender

Mr. James Logan  
Maricopa Office of Public Defense Services

Mr. William Montgomery  
Maricopa County Attorney

Hon. Samuel Myers or the presiding criminal judge of the  
Superior Court of Maricopa County

Mr. Daniel Patterson  
Office of the Maricopa Legal Advocate

Mr. David Rodriguez  
Pinal County Attorney's Office

Mr. Natman Schaye  
Arizona Capital Representation Project



**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE MINUTES  
October 29, 2015**

Members Present:

Hon. Ronald Reinstein, Chair  
Hon. Sam Myers for Hon. Joseph Welty  
Hon. Kent Cattani  
Donna Hallam  
Kellie Johnson  
Dan Levey  
Marty Lieberman  
James Logan  
William Montgomery  
Daniel Patterson  
Natman Schaye

Not present:

James Belanger  
Sheila Polk

Guests:

Lori Lefferts  
Michele Lawson  
Jennifer Garcia  
David Rodriguez  
Bob James  
John Todd  
Diane Alessi  
Carolyn Edlund  
Lacey Gard  
Jeff Sparks  
Kim MacEachern  
Heather Murphy  
Colleen Clase (telephonic)  
Nick Olm

Staff: Mark Meltzer, Sabrina Nash

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**1. Call to order; approval of meeting minutes.** The Chair called the meeting to order at 12:05 p.m. Members and guests were introduced. The Chair then asked members to review draft minutes of the March 31, 2014 meeting. The members had no corrections to those minutes.

**Motion:** A member made a motion to approve the March 31, 2014 draft minutes, the motion received a second, and it passed unanimously.

**2. Status reports.** The Chair asked members for status reports.

Judge Myers reported that there are currently sixty-seven capital cases pending resolution in the Maricopa County Superior Court. Two of these cases are pending non-capital sentencing, and trials are in progress in four of the cases. (At the March 31, 2014 Oversight Committee meeting, there were sixty-six cases pending resolution.) There are additionally twenty-nine pending capital proceedings for post-conviction relief (“PCR”) (compared to thirty-nine pending in March 2014). Twenty of the current post-conviction cases are pending the filing of a petition, six are pending the filing of a response or reply, and three are pending an evidentiary hearing or a ruling on the petition. Judge Myers added that of the twenty-seven judges assigned to the criminal division, about ten of these judges are assigned capital cases.

Mr. Montgomery reported that his numbers are consistent with Judge Myers’ figures, and in-line with recent averages. He advised that his deputies are authorized to stipulate to extensions of time to file notices of intent to seek the death penalty if the defense has viable mitigation evidence. Mr.

Logan includes potential cases in his statistics, and his numbers are therefore somewhat higher than, but consistent with, those reported by Judge Myers and Mr. Montgomery. Mr. Logan's eighty-six case-total includes fourteen cases where the parties stipulated to extend the time for filing a notice of intent, and five other cases that are potentially capital. Mr. Logan has been tabulating cases in which the parties stipulated to extend the time to file a notice, yet which did not actually result in the filing of a notice. He has recorded thirty such cases, but that number might vary if notices are eventually filed in some of those cases, and he needs additional time to validate his data. Mr. Montgomery added that he requests his capital case deputies to affirmatively reach out to defense counsel for any mitigation evidence before, as well as after, a case is considered by his capital review committee. He prefers to learn of this evidence sooner rather than later.

Ms. Johnson reported that Pima County has five pending capital cases. There has been one new case since her 2014 report. A case included in the 2014 report involving three co-defendants has been resolved against two of the defendants. Judge Reinstein on behalf of Ms. Polk noted that three capital cases are pending in Yavapai County, compared to seven at about this time last year. Judge Reinstein is scheduled to serve as a settlement judge in two of those three pending Yavapai cases. Mohave County has two pending cases; one is a remand of a conviction that was reversed on appeal. Mr. Rodriquez, chief deputy Pinal County Attorney, reported fourteen capital cases currently pending, compared to seventeen a year ago. One of the three concluded cases was resolved by trial. Mr. Rodriquez does not currently anticipate filing any new notices of intent to seek the death penalty. He is not aware of any capital PCR proceedings in Pinal County. Ms. Gard, chief of the Attorney General's capital litigation section, advised that her office is handling several PCR's in Pima County, and one in Mohave County.

Ms. Hallam reported that there are ten pending capital appeals in the Arizona Supreme Court. The Court received three notices of appeal during the current calendar year. As a practical matter, there is no backlog in the appointment of counsel for capital PCRs. (In two cases, an order has not yet been entered formally appointing PCR counsel, but arrangements have been made for appointment of counsel in those cases.) She added that attorneys in Pima County have accepted appointments on PCR proceedings that are pending in Maricopa County. Ms. Lefferts, director of the Pima County Office of Court Appointed Counsel, advised that Pima County customarily utilizes Pima County lawyers for appointments on Pima County capital cases. Pinal County often appoints Maricopa County lawyers in its capital cases.

Ms. Garcia, counsel with the Federal Public Defender's Capital Habeas Unit, noted that recently and atypically, Arizona cases coming into her office for habeas proceedings have not had post-conviction evidentiary hearings in state court. She advised that more than a dozen capital cases were remanded by the Ninth Circuit to the Arizona District Court as a result of *Martinez v. Ryan*. She stated that a hearing is pending in the Ninth Circuit on whether the scope of allowable mitigation evidence in several older cases was impermissibly limited by a former requirement that the evidence have a causal relationship with the offense. Ms. Garcia added that in December, in *HCRC v. DOJ*, the Ninth Circuit will hear argument regarding "opting in." (See the March 31, 2014 Oversight Committee minutes, item 5.)

**3. Discussion of a draft report to the Arizona Judicial Council.** Administrative Order number 2013-115, which extended the term of the Oversight Committee to December 31, 2015, requires

the Oversight Committee to submit a report to the Arizona Judicial Council (“AJC”) in December 2015. Staff prepared a draft report for the members’ consideration. The Chair gave an overview of the draft report, including its recommendations and appendices, and he advised that the draft was subject to revisions as agreed to by the members.

With regard to the recommendation to increase the compensation of defendants’ PCR counsel, the Chair noted that he has, without success, previously presented this recommendation to the AJC. He again posed the question of whether an increase in compensation would actually increase the quality, or the quantity, of private counsel who are willing to accept capital case appointments. Mr. Logan noted that the report incorrectly stated that statutes set the rate of compensation for capital defense counsel. The statutes only set the rate for compensation on capital PCR appointments; the rate of compensation for other appointments in capital cases is set by the county where the case was filed. No one could recall when the last increase in local rates had occurred. One member observed that if higher rates attract more applicants for appointment, those higher rates would also provide an incentive for counties to appoint counsel from staffed defender agencies, which typically provide services at a lower cost to the county.

The issue of attorney compensation led to a discussion concerning mitigation specialists. The consensus was that there was “always” a shortage of qualified people for appointment as mitigation specialists. One member stated that there were no degrees that mitigation specialists are required to have, nor standards or other qualifications that mitigation specialists were required to meet. Mr. Logan can contract with any mitigation specialist who has an order appointing them in a particular case, and he is typically not consulted by judges about those appointments. Pinal County typically obtains its mitigation specialists from Maricopa or Pima County, usually based on word-of-mouth. One member characterized the shortage of qualified mitigation specialists as a “serious problem.” In addition, a mitigation specialist can effectively handle only a limited number of cases at any time. Judge Myers stated that a need to prepare mitigation is commonly cited in defense motions to continue, but he was unaware if a specialist having too much work was the underlying basis of any such motion. In Pima County, judges are reluctant to set a trial date unless the mitigation specialist has an estimated time for completing the mitigation investigation.

Other comments concerning the draft report included the following:

- Prosecutors and defense counsel customarily have separate training under the auspices of their respective organizations, and they prefer not to conduct training jointly.
- All stakeholders should receive training regarding victims’ rights.
- The current governor has already made sixteen appointments to the superior court, and some of those new judges will eventually receive capital case assignments and require training.
- Those who collaborated with Dr. Bortner regarding data for the 2002 Attorney General’s Capital Case Commission report intended that data would be collected on an ongoing basis thereafter, but no one had the time or the funding to do this after 2002.

- The Oversight Committee has been keeping some data since 2008. If the Committee was disbanded, transferring the responsibility for data collection could be challenging.
- The report should recognize that a contributing factor in the reduction of capital cases in 2010 was the efforts of the interim county attorney to review the merits of every death noticed case that was then-pending.
- The Maricopa County Superior Court's 2010 change to capital case management might have resulted in the resolution of more cases, but it also may have had the effect of bringing some cases to trial before they were fully ready.
- Although jury sentencing contributed to the length of time required to prepare a capital case for trial, potential claims concerning the ineffective assistance of trial counsel also encouraged counsel to do more thorough trial preparation.
- The appointment of two defense attorneys did not lengthen pretrial proceedings because that requirement became effective in 1996.
- The Public Advocate's office was not formed to fill the void resulting from termination of the State Capital Post-Conviction Public Defender. The Public Advocate's office preexisted that event and was performing other functions, albeit under a different name.
- The number of capital cases may be lower now than it was a few years ago, but it's still higher than other comparable jurisdictions in the United States that have the death penalty.

Members also observed that the draft report has too much subjectivity. For example, the draft refers to a reduction in case volumes because of effective case management, but the Oversight Committee has no objective basis for knowing that case management was effective, or whether it was a causal factor that resulted in fewer cases. The report should be more objective and bipartisan. At the very least, the report should reflect, for example, that some members believe "x," but others believe "y."

Two members also believe that the Oversight Committee does not need to be extended, that its members can meet informally, and that courts can track their own case data. One member said that merely collecting data is no justification for extending the Committee. Another stated that a Committee that meets once a year, as this Committee has done for the past two years, has only marginal value. If this Committee merits an extension, it should meet at least a few times annually.

A majority of members felt that the Committee has continuing relevance. First, these members believe there are continuing issues. There appears to be a shortage of qualified mitigation specialists. The Attorney General's office has not prepared a bill or a rule petition that would require capital post-conviction proceedings to precede direct appeals, as it has done during the past two years, but the office is discussing a reintroduction of such changes. The Chair also noted that the Court anticipates a restyling of the Arizona Rules of Criminal Procedure, and the Oversight Committee may want to review and comment on the associated rule petition.

Second, the Oversight Committee offers what appears to be the only statewide forum for a cross-section of stakeholders to discuss issues associated with capital litigation. When this Committee discussed its existence in 2013, one member stated that the Oversight Committee should continue as long as Arizona has a death penalty. A judge member commented today that extending the term of the Oversight Committee will enable it to look at new capital case issues as they arise, even if there are no particular issues before it now.

The Chair advised that staff would revise the draft report by incorporating the members' comments, and by reducing the extent of subjective text. The Chair advised the members that he will present the report to the Arizona Judicial Council on December 10, but the final version of the report needs to be submitted for distribution to the AJC before Thanksgiving. The Chair accordingly asked the members to authorize him to finalize the report.

**Motion:** A member moved to authorize the Chair to revise and to finalize the Committee's report to the AJC, in his discretion but consistently with today's discussion. The motion received a second and it passed unanimously.

**Motion:** At the request of the Chair, and because it's possible that the Committee might not meet again, a member also moved to authorize the Chair to finalize today's draft minutes. The motion also received a second and it too passed unanimously.

**8. Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 1:25 p.m.



IN THE SUPREME COURT OF THE STATE OF ARIZONA

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In the Matter of: )  
 )  
ESTABLISHMENT OF THE ) Administrative Order  
TASK FORCE ON THE ARIZONA ) No. 2015 – 123  
RULES OF CRIMINAL PROCEDURE )  
AND APPOINTMENT OF MEMBERS )  
\_\_\_\_\_ )

This Court’s Strategic Agenda, *Advancing Justice Together: Courts and Communities*, includes the review of certain Arizona court rules to restyle, simplify, and clarify the rules. This Court has recently adopted restyled Rules of Civil Appellate Procedure, Rules of Evidence, Justice Court Rules of Civil Procedure, and Rules of Protective Order Procedure.

Work is now underway by this Court’s Task Force on the Arizona Rules of Civil Procedure. In establishing that task force, Administrative Order No. 2014-116 noted that “Language in long-established court rules may be archaic, and modernizing the style and format of rules can make them more comprehensible and user-friendly for litigants, judges, and attorneys.” That Order also noted that court rules require periodic review and revision to keep pace with technology and to accommodate changing case management systems. Similar principles apply to the criminal rules.

The current set of the Arizona Rules of Criminal Procedure were promulgated in 1973. Although they have been amended at various times since their adoption more than four decades ago, a comprehensive review of those rules would now be beneficial.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that:

1. ESTABLISHMENT: The Task Force on the Arizona Rules of Criminal Procedure is hereby established.
2. PURPOSE: The Task Force shall review the Arizona Rules of Criminal Procedure to identify possible changes to conform to modern usage and to clarify and simplify language. These changes should promote the just resolution of cases without unnecessary delay or complexity. The Task Force shall seek input from various interested persons and entities with the goal of submitting a rule petition by January 2017, with respect to any proposed rule changes.

3. MEMBERSHIP: The individuals listed in Appendix A are appointed as members of the Task Force beginning January 1, 2016, and ending on December 31, 2017. The Chief Justice may appoint additional members as may be necessary.

4. MEETINGS: Task Force meetings shall be scheduled at the discretion of the Chair. The Task Force shall hold its initial meeting at a time determined by its Chair but no later than March 1, 2016. All meetings shall comply with the Arizona Code of Judicial Administration § 1-202: Public Meetings.

5. STAFF: The Administrative Office of the Courts shall provide staff for the Task Force and shall assist the Task Force in developing recommendations and preparing any necessary reports and petitions.

Dated this 16th day of December, 2015.

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SCOTT BALES  
Chief Justice

Appendix A

Task Force on the Arizona Rules of Criminal Procedure

***Chair***

Hon. Joseph Welty  
Superior Court in Maricopa County

***Members***

Paul Ahler  
Arizona Attorney General's Office

Hon. Kent Cattani  
Arizona Court of Appeals, Division One

Tim Eckstein  
Osborn Maledon, Phoenix

David Euchner  
Pima County Public Defender

Hon. Maria Felix  
Pima County Consolidated Justice Court

Hon. Richard Fields  
Superior Court in Pima County

Hon. Pamela Gates  
Superior Court in Maricopa County

Bill Hughes  
Yavapai County Attorney's Office

Hon. Eric Jeffery  
Phoenix Municipal Court

Kellie Johnson  
Pima County Attorney's Office

Amy Kalman  
Maricopa County Public Defender

Jason Kreag  
James E. Rogers College of Law  
University of Arizona

Jerry Landau  
Administrative Office of the Courts

Hon. Mark Moran  
Superior Court in Coconino County

Natman Schaye  
Arizona Capital Representation Project

Hon. Paul Tang  
Superior Court in Pima County

Ken Vick  
Maricopa County Attorney's Office



IN THE SUPREME COURT OF THE STATE OF ARIZONA

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In the Matter of: )  
 )  
APPOINTMENT OF MEMBERS TO ) Administrative Order  
THE TASK FORCE ON THE ARIZONA ) No. 2016 - 03  
RULES OF CRIMINAL PROCEDURE ) (Affecting Administrative  
 ) Order No. 2015-123)  
 )  
\_\_\_\_\_ )

Administrative Order No. 2015-123 established the Task Force on the Arizona Rules of Criminal Procedure. The Order provides that the Chief Justice may appoint additional members as may be necessary. Therefore, after due consideration,

IT IS ORDERED that the following members are appointed to the Task Force on the Arizona Rules of Criminal Procedure effective upon signature of this Order, and ending on December 31, 2017:

Hon. Sally Schneider Duncan  
Superior Court in Maricopa County

Aaron Nash  
Special Counsel and Public Information Officer  
Clerk of Superior Court in Maricopa County

Dated this 6th day of January, 2016.

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SCOTT BALES  
Chief Justice



**From:** Natman Schaye [<mailto:natman@azcapitalproject.org>]  
**Sent:** Wednesday, December 9, 2015 7:24 PM  
**To:** Reinstein, Ron <[RReinstein@courts.az.gov](mailto:RReinstein@courts.az.gov)>  
**Subject:** Capital Oversight Committee Report

In speaking with numerous members of the capital defense community, important issues for the Committee to address include:

1. Ongoing monitoring of the availability of an adequate number of qualified core defense team members to handle all cases statewide at trial, on appeal and in post-conviction proceedings. Of particular concern currently is the lack of competent mitigation specialists in comparison to the number of cases. Further, it is important to maintain focus on the lawyers being appointed in capital cases. The Maricopa County screening committee has unquestionably improved the quality of private lawyers accepting appointments for capital trials and appeals there, but lawyers who did not apply or who were rejected by that committee are being appointed to trial cases in other counties or receiving appointments on post-conviction cases.
2. Since jury sentencing began a dozen years ago, significant issues have arisen that have not been addressed by a coalition of interested parties like the Oversight Committee. Of particular import is the vast difference in which jury selection is conducted from courtroom to courtroom not only across the state, but also within individual counties. Jury selection in one courtroom may take a few days, while the same procedure lasts for more than a month in a courtroom down the hall. It is particularly difficult for appellate or post-conviction courts to review voir dire issues: no one can tell what answers a venire person would have given if different questions were asked. There is also an important balance to be struck between the interests of the parties and the privacy of jurors. The Oversight Committee could assist in ensuring that capital juries operate fairly with a minimum of trauma to the jurors.
3. It would also be naïve to assume that capital jury trials in Arizona are immune from the serious deficiencies found in other states by the Capital Jury Project (“CJP”). CJP’s in depth interviews with jurors who sat on capital trials in 14 other states revealed that most jurors labored under egregious misunderstandings of their role and their instructions. These issues cannot adequately be addressed by other existing committees that have more discrete responsibilities, such as jury instructions or criminal rules.

The Oversight Committee is uniquely qualified to undertake critically important tasks in the coming years. I assure you that I will be proactive in working to ensure that members’ time spent on Committee issues is well spent.

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## CAPITAL CASE OVERSIGHT COMMITTEE

<b>Date of Meeting:</b>  <b>May 5, 2016</b>	<b>This agenda item is for:</b>  <input checked="" type="checkbox"/> Formal Action/Request  <input type="checkbox"/> Information Only  <input checked="" type="checkbox"/> Other	<b>Subject:</b>  <b>Proposal for a review committee for PCR counsel in capital cases</b>
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**Presenter:**

Mr. Lieberman

**Discussion:**

The proposal is as follows:

The Maricopa County Defense Review Committee should evaluate private attorneys who practice in Maricopa County and who represent, or want to represent, capital PCR defendants in Maricopa County. The Committee should then make recommendations to the Court.

Attached are:

1. A draft Supreme Court administrative order
2. Maricopa County Administrative Order number 2014-101

IN THE SUPREME COURT OF THE STATE OF ARIZONA

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In the Matter of: )  
)  
EVALUATIONS OF APPOINTED )  
PRIVATE DEFENSE COUNSEL ON ) Administrative Order  
CAPITAL CASE PETITIONS FOR ) No. 2016 - \_\_\_\_\_  
POST CONVICTION RELIEF )  
\_\_\_\_\_ )

Maricopa County Superior Court Administrative Order 2014-101, which supersedes Administrative Order 2012-118, adopted a plan for evaluating private defense attorneys who request appointment on a capital trial or direct appeal. A.O. 2014-101 does not presently provide for evaluations of attorneys on capital case petitions for post-conviction relief, who are appointed by this Court as provided by Arizona Revised Statutes § 13-4041.

This Court wishes to assure that the attorneys appointed by this Court on capital case petitions for post-conviction relief have the skill, knowledge, experience, and conscientiousness that is commensurate with the gravity and consequences of a capital conviction. This Court has accordingly requested that the Capital Defense Review Committee established by A.O. 2014-101 evaluate the qualifications of attorneys who represent, and who apply to represent, capital defendants in post-conviction proceedings. That committee has agreed to this request.

Therefore, after due consideration,

IT IS ORDERED that the Maricopa County Capital Defense Review Committee conduct evaluations of private attorneys who practice in Maricopa County, and who represent, or who have applied to represent, capital defendants in state post-conviction proceedings. The Maricopa committee shall follow the confidentiality provisions of A.O. 2014-101, the standards and procedures set forth in A.O. 2014-101, and such performance standards as the committee may adopt for attorneys on post-conviction proceedings. The committee shall report its recommendations to the Arizona Supreme Court in writing, and in a reasonable and timely manner.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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SCOTT BALES  
Chief Justice

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

IN THE MATTER OF ADOPTING A PLAN )  
FOR REVIEW OF APPOINTED DEFENSE )  
COUNSEL )  
\_\_\_\_\_ )

ADMINISTRATIVE ORDER  
NO. 2014-101

WHEREAS, Rule 6.2 of the Arizona Rules of Criminal Procedure requires the Presiding Judge to establish procedures for appointment of counsel; and

WHEREAS, Rule 6.5 of the Arizona Rules of Criminal Procedure provides that appointments shall take into account “the skill likely to be required in handling a particular case;” and

WHEREAS, Rule 6.8 of the Arizona Rules of Criminal Procedure sets standards for appointment and performance of defense counsel in capital cases,

**IT IS ORDERED** adopting the Plan for Review of Appointed Defense Counsel, attached as Exhibit A.

**IT IS FURTHER ORDERED** this Administrative Order supersedes Administrative Order No. 2012-118.

Dated this 6th day of August, 2014.

/s/ Norman J. Davis

\_\_\_\_\_  
Norman J. Davis  
Presiding Judge

Original: Clerk of the Superior Court

Copies: Hon. Joseph C. Welty, Criminal Presiding Judge  
Superior Court Judges and Commissioners – Criminal Department  
Hon. Thomas Horne, Attorney General  
Hon. William Montgomery, County Attorney  
James Logan, Public Defense Services  
James Haas, Public Defender  
Marty Lieberman, Legal Defender  
Bruce F. Peterson, Legal Advocate  
Raymond L. Billotte, Judicial Branch Administrator  
Phil Knox, Deputy Court Administrator  
Bob James, Criminal Court Administrator

## **PLAN FOR REVIEW OF APPOINTED DEFENSE COUNSEL**

### **AUTHORITY**

This “Plan for Review of Appointed Defense Counsel Criminal” (the “Plan”) is created pursuant to the Arizona Rules of Criminal Procedure. The Rules of Criminal Procedure assign certain judicial functions to the Presiding Judge in relation to the appointment of counsel in criminal cases. Rule 6.2 provides that the Presiding Judge shall establish procedures for appointment of counsel. Rule 6.5(c) provides that appointments shall take into account “the skill likely to be required in handing a particular case.” Rule 6.8 sets standards for appointment and performance of defense counsel in capital cases. The persons implementing and carrying out this Plan, specifically including the members of the two review committees, are acting under the authority of the Presiding Judge of the Superior Court of Arizona in Maricopa County to assist the Presiding Judge in carrying out his or her judicial responsibilities.

### **PURPOSE OF PLAN**

This Plan is intended to further the goals articulated in the “Resolution on Indigent Defense Services Provided by the Court to Juveniles and Adults” adopted by the Maricopa County Board of Supervisors and approved by the Superior Court of Arizona in Maricopa County in 1992. The Plan establishes “performance requirements” and “a system which allows for regular evaluation of contract attorneys . . . including provisions leading to contract termination when performance is below standard.” It creates “Review Committee[s]” to assist in “reviewing, selecting and monitoring indigent legal services contracts.” These mechanisms are “consistent with . . . applicable standards of the National Legal Aid and Defenders Association (NLADA) and the American Bar Association (ABA),” which require institutionalized quality control for indigent defense services.

The Plan is intended to ensure, to the extent possible, that attorneys appointed to represent indigent defendants in the Superior Court of Arizona in Maricopa County provide skilled, knowledgeable and conscientious legal representation to their clients. That representation should be commensurate with the gravity of the charges and the severity of the potential consequences for the defendant. These principles shall inform the operation and administration of the Plan. With respect to capital cases, the Plan is intended to serve as a “Legal Representation Plan” as described in Guideline 2.1 of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the “ABA Guidelines”). The Capital Defense Review Committee is intended to perform some of the duties of a “Responsible Agency” as provided in Guideline 3.1 of the ABA Guidelines.

The Plan will at all times be administered in a manner consistent with and in furtherance of an attorney’s ethical and professional obligations under Supreme Court Rule Rules 41 (obligations of lawyers including respect for courts and professionalism) and 42 (Arizona Rules of Professional Conduct). Nothing in this Plan is intended to confer on any attorney any right to

enter into or continue under or renew a contract for indigent defense services, or any right or benefit of any kind not provided for by such a contract.

## **REVIEW COMMITTEES**

### **Capital Defense Review Committee**

A Capital Defense Review Committee shall be established. That committee shall be composed of:

The director of OPDS and the heads of the three Maricopa County adult indigent criminal defense offices, or their designees;

The Presiding Criminal Judge or a Maricopa County Superior Court Judge designated by the Presiding Criminal Judge; and

Four members of the criminal defense bar, appointed by the Presiding Criminal Judge, who do not hold a current OPDS contract or have a contract application currently pending and who are not currently employed by a Maricopa County indigent defense agency.

All members of the Capital Defense Review Committee must have substantial experience in the defense of capital cases or experience presiding over capital trials. Current active membership in the Bar is not required.

### **Felony Defense Review Committee**

A separate Felony Defense Review Committee also shall be established. That committee shall be composed of:

The director of OPDS and the heads of the three Maricopa County adult indigent criminal defense offices, or their designees;

The Presiding Criminal Judge or a Maricopa County Superior Court Judge designated by the Presiding Criminal Judge; and

Four members of the criminal defense bar, appointed by the Presiding Criminal Judge, who do not hold a current OPDS contract or have a contract application currently pending and who are not currently employed by a Maricopa County indigent defense agency.

All members of the Felony Defense Review Committee must have substantial experience in the defense of felony cases or experience presiding over felony trials. Current active membership in the Bar is not required.

Where this Plan refers to “the Committee,” the reference is intended to apply to both the Capital Defense Review Committee and the Felony Defense Review Committee unless the context requires otherwise.

## **Committee Procedures**

The Committee chairs and vice-chairs shall be appointed by the Presiding Criminal Judge from among the current Committee members for a term of one year which can be renewed for up to three consecutive years

Upon the establishment of each Committee, the Presiding Criminal Judge shall appoint one of the criminal defense bar members for a one-year term, another for a two-year term, and the other two for three-year terms. All subsequent appointments or re-appointments shall be for three-year terms.

Each Committee shall establish guidelines for its operation, with the approval of the Presiding Criminal Judge. Operating guidelines may be reviewed and revised from time to time at the discretion of the Chair. Proposed guidelines shall be submitted to the Director of OPDS before adoption, to ensure compliance with applicable laws, rules and contract provisions.

## **FUNCTION OF THE COMMITTEE**

The Capital Defense Review Committee and the Felony Defense Review Committee shall determine whether attorneys holding contracts to provide indigent defense services in Maricopa County are qualified for appointment under the criteria established in this Plan. Based on those determinations, the Committee shall make recommendations to the Criminal Presiding Judge concerning the assignment of contract holders to the types of cases provided for in their respective contracts.

### **Review of Qualifications**

The Capital Defense Review Committee shall review the qualifications of each attorney listed on the OPDS Attorney Services Registry as to whom OPDS requests evaluation for assignment to capital cases. The Capital Defense Review Committee shall determine, based on the Committee's review of qualifications, what type of cases (if any) the attorney may be assigned from the following categories:

- Capital – Lead counsel
- Capital – Co-counsel
- Capital Direct Appeal

The Felony Defense Review Committee shall review the qualifications of each attorney listed on the OPDS Attorney Services Registry as to whom OPDS requests evaluation for assignment to non-capital felony cases. The Felony Defense Review Committee shall determine, based on the Committee's review of qualifications, what type of cases (if any) the attorney may be assigned from the following categories:

- Major Felony
- Felony

To be deemed qualified for assignment to felony cases, the attorney must demonstrate that he or she meets the following criteria:

The attorney is a member in good standing of the State Bar of Arizona.

The attorney meets, and can be expected to continue to meet, the minimum qualifications established by the Arizona Rules of Criminal Procedure.

The attorney complies with, and can be expected to continue to comply with, Arizona Supreme Court Rule 41 (obligations of lawyers including respect for courts and professionalism), Rule 42 (Rules of Professional Conduct) and Rule 45 (continuing legal education); and OPDS contract obligations.

The attorney provides, and can be expected to continue to provide, skilled, knowledgeable, thorough and conscientious representation to his or her clients, commensurate with the gravity of the charges and the severity of the potential consequences for the defendant.

The attorney meets, and can be expected to continue to meet, the performance and practice standards of the profession and this Plan

Each calendar year, OPDS shall forward to the Felony Defense Review Committee the names of one-sixth of the attorneys currently receiving assignments to non-capital felony cases and the names of all attorneys as to whom OPDS requests evaluation for assignment to non-capital felony cases, along with copies of each attorney's most recent contract application and the additional information called for in this Plan. Effective six years from the date of adoption of this Plan, an attorney shall not be eligible for assignment to non-capital felony cases pursuant to a Maricopa County Adult Criminal Contract unless that attorney has completed the required review of qualifications and has been approved for assignment by the Presiding Criminal Judge.

To be deemed qualified for assignment to capital cases, the attorney must demonstrate that he or she meets all of the above criteria, and also the following additional criteria.

The attorney meets, and can be expected to continue to meet, the minimum eligibility requirements of Criminal Rule 6.8.

The attorney possesses the qualifications set forth in Guideline 5.1 of the ABA Guidelines.

The attorney has a demonstrated history of practice, and can be expected to continue to practice, in accordance with the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines.

Each calendar year, OPDS shall forward to the Capital Defense Review Committee the names of one-sixth of the attorneys currently receiving assignments to capital cases and the names of all attorneys as to whom OPDS requests evaluation for assignment to capital cases, along with copies of those attorneys' most recent contract application and the additional information called for in this Plan. Effective six years from the date of adoption of this Plan, an attorney shall not be eligible for assignment to capital cases pursuant to a Maricopa County Adult Criminal Contract unless that attorney has completed the required review of qualifications and has been approved for assignment by the Presiding Criminal Judge.

## **Evaluation Process**

When OPDS forwards the name of an attorney to the Committee, the Committee shall initiate a review of the attorney's qualifications to determine whether the attorney meets the criteria established by this Plan and therefore should be recommended for case assignment.

The Committee shall require an attorney undergoing review of qualifications to complete a written application separate from the contract application. The application form shall be created by the Committee and revised from time to time as necessary. The application shall require the attorney to provide, at a minimum, a list of representative cases handled by the attorney; references from judges and co-counsel; writing samples; and a summary of relevant continuing legal education for at least the three years immediately preceding the application. The Capital Defense Review application also shall require a complete list of capital cases in which the attorney has participated in the ten years immediately preceding the application, including case name and number; assigned judge; names, business addresses and telephone numbers of all attorneys in the case; and names, business addresses, and telephone numbers of all non-attorney defense team members. An attorney seeking assignment to capital cases also must identify a comprehensive training program in the defense of capital cases that the attorney will complete within one year of approval for assignment, unless the attorney can demonstrate that he or she has completed such a program within the two years immediately preceding the application.

The Committee shall review applications, check references, evaluate work product, and conduct additional inquiry to determine whether an attorney applicant possesses the qualifications required by this Plan. The Committee may solicit input or comments from judges, attorneys, and others. The inquiry by the Capital Defense Review Committee shall include, and the inquiry by the Felony Defense Review Committee may include, interviews of persons not listed as references who are familiar with the applicant's work.

Upon completion of its inquiry, the Committee shall meet and discuss each attorney applicant. The Capital Defense Review Committee shall interview an attorney applicant before recommending the attorney for assignment to capital cases. The Felony Defense Review Committee may interview attorney applicants at its discretion.

The Committee shall recommend whether an attorney applicant should receive assignments in each category of cases for which assignment is authorized under the attorney's Maricopa County Adult Criminal Contract. An attorney whom the Committee has tentatively decided not to recommend for assignment, in one or more of the categories of cases for which the attorney is eligible under his or her contract, shall be notified in writing of the tentative adverse recommendation and given an opportunity to be heard as to his or her qualifications either in writing or by in-person meeting with the Committee or both, before the Committee makes a final recommendation.

The Committee shall issue a final recommendation as to whether an attorney should receive case assignments within 180 days of receipt of the attorney's written application, unless the circumstances make action within 180 days impracticable. The Committee chair shall transmit

the Committee's final recommendations to the Presiding Criminal Judge in writing. The Presiding Criminal Judge may meet with the Committee chair to discuss the recommendations, at the Presiding Criminal Judge's discretion.

When the Committee recommends to the Criminal Presiding Judge that an attorney should not receive case assignments, in one or more of the categories of cases for which the attorney is eligible under his or her contract, the Criminal Presiding Judge shall give the attorney an opportunity to submit a written statement or other written information concerning his or her qualifications before making a final decision.

After reviewing and considering the Committee's recommendations and any attorney submissions, the Presiding Criminal Judge shall provide to the Director of OPDS a list of attorneys currently approved for the assignment of cases and the category or categories of cases to which each attorney may be assigned. OPDS shall notify attorney applicants in writing of the Presiding Criminal Judge's final decision.

### **Re-evaluation**

The Committee shall periodically re-evaluate the attorneys approved for case assignments under this Plan, to ensure that each attorney continues to meet the criteria established by the Plan. The Capital Defense Review Committee shall re-evaluate attorneys at intervals of not more than six years. The Felony Defense Review Committee shall re-evaluate attorneys at intervals of not more than six years.

The Committee may re-evaluate an attorney at any time, at the request of the Presiding Criminal Judge or at the Committee's discretion, when there is reason to believe that the attorney has not met or may not continue to meet the applicable criteria. Grounds for non-routine re-evaluation may include (but are not limited to) Bar discipline; sanctions imposed by a court; a complaint from a judge, a member of the bar or a client; misconduct or gross negligence in the representation of a client, or a pattern of inadequate representation of clients; excessive caseload; failure to comply with training requirements; or violations of contract terms. An attorney being re-evaluated on other than a routine basis shall be notified in writing and given an opportunity to submit a written statement or other written information to the Committee, before the Committee meets to discuss the attorney.

The Committee shall require an attorney undergoing re-evaluation to update the attorney's prior written application. The attorney also shall provide a list of representative court-appointed cases since the prior application, a summary of recent continuing legal education and certification of compliance with training and professional development requirements. The Capital Defense Review application shall require the attorney to provide a complete list of capital cases in which the attorney has participated since the prior application, including case name and number; assigned judge; names, business addresses, telephone numbers of all attorneys in the case; and names, business addresses, and telephone numbers of all non-attorney defense team members.

When re-evaluating an attorney's qualifications, the Committee shall utilize the information that the Maricopa County Adult Criminal Contract requires the attorney to submit to OPDS, such as case logs, final disposition records, time sheets and requests for approval of expenditures. The Committee also shall review complaints about the attorney and requests for a different attorney, if any, received by OPDS or the Committee from any source. The Committee may review any records and accounts, relating to the work performed or the services provided by an attorney in a particular case, that OPDS is authorized to review pursuant to the contract.

The process for re-evaluating attorney qualifications, and the right of an attorney to be heard during the process, shall be the same as the initial review of qualifications. When the Presiding Criminal Judge makes a final decision as to whether an attorney should continue to receive case assignments, the Presiding Criminal Judge shall revise the list of approved attorneys accordingly and provide the revised list to the Director of OPDS. OPDS shall notify each attorney in writing of the Presiding Criminal Judge's final decision.

### **Records**

Committee operating guidelines, final and approved meeting minutes (if any) and final written recommendations to the Criminal Presiding Judge shall be open to the public and available for inspection upon appropriate public records request. These records shall be maintained for seven years by the Court Administrator as custodian of the records.

All other records relating to the attorney review process shall remain confidential except as otherwise specifically provided in this Plan. In order for the evaluation process to be effective and fair, the Committee must obtain complete, reliable and accurate information from the attorneys being evaluated and the judges, attorneys and others from whom information is sought. The Committee then must evaluate the information thoroughly and discuss it candidly. The potential for public disclosure would chill the flow of reliable information and discourage candid discussion. Moreover, both the attorney applicants and the third party information providers have legitimate confidentiality and privacy interests, some of which derive from their professional obligations to others.

### **PERFORMANCE AND PRACTICE STANDARDS**

For purposes of determining whether a trial attorney possesses "the skill likely to be required" in handling the cases to which the attorney will be appointed, as required by Rule 6.5(c), the Committee shall apply the following performance and practice standards.

- I. Attorney represents clients in accordance with applicable ethical rules and standards of professional conduct, including but not limited to:
  - a. Contacting and conferring with the client concerning the representation within a maximum of 48 hours of notice of assignment;

- b. Maintaining reasonable contact and adequately communicating with the client until the representation is terminated;
- c. Using reasonable diligence in notifying the client of necessary court appearances including any court action that arises out of the client's non-appearance;
- d. Conducting all out-of-court preparation required for competent representation of the client, including a prompt and thorough client interview and such additional interviews and investigation as may be appropriate;
- e. Appearing in court on time and prepared for scheduled proceedings;
- f. Displaying appropriate respectful professional demeanor and conduct in all dealings with the court, opposing counsel, victims and witnesses, and the client.

II. Attorney demonstrates and maintains proficiency in all applicable aspects of substantive law, procedural rules, and trial advocacy, including but not limited to the following:

- a. Recognition of legal issues;
- b. Effective legal research and use of pretrial motions;
- c. Effective case development including thorough client interviews, appropriate use of investigators and timely and comprehensive witness interviews;
- d. Effectiveness in plea negotiations;
- e. Effective use of experts when necessary;
- f. Thorough and effective trial preparation including anticipation of key legal issues, evaluation of admissibility of evidence, discussion of the defendant's role including possible testimony, and preparation of witnesses including the defendant if necessary;
- g. Willingness to try cases;
- h. Advocacy skills;
- i. Effective sentencing presentation.

III. Attorney manages law practice efficiently and effectively in relation to assigned clients and complies with OPDS contract obligations.

For purposes of determining whether an appellate attorney possesses "the skill likely to be required" in handling the cases to which the attorney will be appointed, as required by Rule 6.5(c), the Committee shall apply the following performance and practice standards.

I. Attorney represents clients in accordance with applicable ethical rules and standards of professional conduct, including but not limited to:

- a. Notifying the client concerning the representation within 48 hours of notice of assignment and conferring with the client promptly thereafter;

- b. Maintaining reasonable contact including in-person communication and adequately communicating with the client until the representation is terminated;
  - c. Using reasonable diligence in notifying the client of all court actions, deadlines and orders;
  - d. Conducting all out-of-court preparation required for competent representation of the client, including a prompt and thorough review of the trial record and such additional development or supplementation of the record as may be appropriate;
  - e. Appearing in court on time and prepared for scheduled proceedings;
  - f. Displaying appropriate respectful professional demeanor and conduct in all dealings with the court, opposing counsel, victims and witnesses, and the client.
- II. Attorney demonstrates and maintains proficiency in all applicable aspects of substantive law, procedural rules, and appellate advocacy, including but not limited to the following:
- a. Recognition of legal issues;
  - b. Effective legal research, briefing and motion practice;
  - c. Familiarity with the practice and procedure of the Arizona Supreme Court in the appeal of capital cases, the practice and procedure of the United States Supreme Court in the application for writs of certiorari in capital cases, and the law controlling the scope of and entitlement to state post-conviction and federal habeas corpus review;
  - d. Effectiveness in plea negotiations;
  - e. Advocacy skills.
- III. Attorney manages law practice efficiently and effectively in relation to assigned clients and complies with OPDS contract obligations.

The Capital Defense Review Committee shall apply, in addition to the foregoing performance and practice standards, the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines.

## **OTHER ASPECTS OF INDIGENT DEFENSE REVIEW**

### **Training and Professional Development**

An attorney seeking assignment to capital cases must attend and successfully complete a comprehensive training program in the defense of capital cases within one year of the attorney's initial approval for assignment, unless the attorney has completed such a program within the two years immediately preceding approval. In order to maintain eligibility for assignment to capital cases, the attorney must attend and successfully complete, at least once every two years, at least twenty-four hours of continuing legal education specifically relating to the defense of criminal cases, at least twelve hours of which shall consist of specialized training in the defense of capital cases.

An attorney seeking assignment to non-capital cases felony must attend and successfully complete twelve hours of continuing legal education specifically relating to the defense of criminal cases within one year of the attorney's initial approval for assignment, unless the attorney has completed such training within the two years immediately preceding approval. In order to maintain eligibility for assignment to non-capital felony cases, the attorney must attend and successfully complete, at least once every two years, at least twelve hours of continuing legal education specifically relating to the defense of criminal cases.

An attorney receiving case assignments under this Plan shall maintain records demonstrating compliance with training requirements. The Committee may require an attorney to show satisfactory evidence of compliance at any time.

Although each Committee (or the two of them together) may present or facilitate relevant continuing legal education and training, each attorney is responsible for his or her own compliance with training requirements. It is not anticipated that the Committees will underwrite or subsidize attorney training.

### **Collection and Reporting of Information**

An attorney receiving case assignments under this Plan shall create and maintain all records required by the Maricopa County Adult Criminal Contract, including detailed and accurate case logs, final disposition records and time sheets relating to client representation. The attorney also shall comply with contract requirements relating to OPDS approval of case-related expenditures (for expert witness fees, travel expenses, investigators, mitigation specialists in capital cases, service of process, court transcript fees and other reasonable and necessary expenditures) and notice to OPDS of requests for judicial approval of expenditures or additional compensation. Copies of required records and documentation shall be retained by the attorney and provided to the Committee on request.

The Presiding Criminal Judge shall work with the Clerk of the Court to create a process by which OPDS and the appropriate Committee routinely receive notice that a defendant has asked to terminate an assigned OPDS attorney's representation, and the result of that request.

## **Complaints**

Upon receipt by OPDS of a complaint about an attorney, from any person, OPDS shall forward or refer the complaint to the appropriate Committee.

The Committee may forward a complaint about an attorney to that attorney, with or without a request for response. Before considering a complaint in the evaluation or re-evaluation of an attorney, the Committee shall forward the complaint to the attorney and ask for a response. When asked to respond to a complaint, the attorney must do so in writing within 10 days as required by the Maricopa County Adult Criminal Contract.

If the Committee receives a written complaint or communication from a defendant specifically asking to terminate an ongoing representation, the Committee shall immediately forward the communication to the assigned judicial officer unless OPDS has already done so.