

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

December 2012



Justice 20|20

Capital Case Oversight Committee

December 2012

Chair: Hon. Ronald Reinstein, Judge of the Maricopa County Superior Court (retired)

Hon. Douglas Rayes, Presiding Criminal Judge, Maricopa County Superior Court

Bill Montgomery, Maricopa County Attorney

Kent Cattani, Chief Counsel for Capital Litigation, Arizona Attorney General

Donna Hallam, Staff Attorney, Arizona Supreme Court

Dan Levey, Executive Director, Parents of Murdered Children

Marty Lieberman, Maricopa County Legal Defender

James Logan, Director, Maricopa County Office of Public Defense Services

Daniel Patterson, Capital Unit Supervisor, Maricopa County Public Defender

Committee Staff: Mark Meltzer, Kymberly Lopez, Administrative Office of the Courts

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*Capital Case Oversight Committee
Report to the AJC: Dec 13 2012*

I. Executive summary

The Capital Case Oversight Committee submitted reports to the Arizona Judicial Council at the end of 2008, 2009, and 2010. The Supreme Court deferred the 2011 report to allow the Committee additional time to study ongoing issues.

The Supreme Court established the Committee's predecessor, the Capital Case Task Force, in February 2007 because of an "*unprecedented number of capital cases then awaiting trial in Maricopa County.*" The Court created the Oversight Committee in December 2007 pursuant to a Task Force recommendation that this new committee "*monitor capital caseload reduction efforts in Maricopa County.*" At that time, Maricopa County was approaching one hundred-forty capital cases pending trial. This caused a severe strain of Maricopa County's resources. The Arizona Supreme Court anticipated that Maricopa County's caseload might lead to an inundation of capital appeals.

The Maricopa County Superior Court adopted a new capital case management approach in March 2009. The court's new approach included rigorously enforcing its policy concerning postponement of trial dates; conducting meaningful and productive pretrial conferences; and assuring that courtrooms and experienced judges were available for capital case trials. The number of pending capital cases has steadily decreased since that time. The Oversight Committee's 2010 report noted that seventy-nine capital cases were pending in September 2010, and since then, the number of pending capital cases in Maricopa County has continued to decline. As of the end of September 2012, there were sixty-six capital cases pending trial, which represents an extraordinary decrease in the number of Maricopa County's capital cases during the existence of this Committee.

Notwithstanding the resolution of scores of cases in the trial court, a corresponding surge in pending capital cases before the Arizona Supreme Court appears to have subsided. There were seventeen capital appeals pending in December 2008, and the number increased to twenty-seven appeals in November 2010. There were fifteen capital appeals filed in 2009 alone. However, the Court has already issued opinions in thirteen of the 2009 appeals. There are now nineteen capital cases on direct appeal, a figure comparable to the number pending in 2008.

The Oversight Committee's 2010 report also addressed the number of unrepresented defendants on petitions for post-conviction relief. In November 2009, the Committee reported there were eighteen defendants whose direct appeals had concluded and who were awaiting appointment of PCR counsel, and the Committee voiced concern that the number of unrepresented defendants would soon surpass twenty. However, by November 2010, the number had fallen to fourteen defendants. More recently, all but seven capital defendants had an attorney for a post-conviction proceeding.

Several issues discussed in the Committee's 2010 report require no further consideration; they are now moot. The remaining issues are remedial rather than critical. The capital case crisis that gave rise to this Committee's creation has passed.

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Justice Michael D. Ryan was chair of the Capital Case Task Force and the Capital Case Oversight Committee until his death in January 2012. Justice Ryan provided consistent leadership during this crisis and a firm determination to solve the problems it presented. The capital case crisis was resolved under Justice Ryan's watch. The members of the Oversight Committee remember Justice Ryan and his dedicated service with heartfelt gratitude and respect.

II. Capital Cases in the Superior Court and the Supreme Court

In September 2008, the Oversight Committee began compiling capital case data from Maricopa County and, to a lesser extent, statewide data. The accumulation of years of data affords the Committee a longer perspective. Charts and tables, which appear in the appendix, summarize the data.

Superior Court, Maricopa County: The Oversight Committee offers the following observations concerning the Maricopa County data:

1. *Notices of intent to seek the death penalty:* A case becomes “*capital*” upon the filing under Ariz. R. Crim. P., Rule 15.1(i), of a notice of intent to seek the death penalty. Between 2004 and 2008, the number of new capital filings annually was in a range of thirty-one to forty-six cases.¹ By comparison, during successive twelve-month periods between October 2008 and September 2012, the respective numbers of new filings were eighteen, thirty-two, twenty-six, and twenty-four. Usually there were no more than two filings per month during this four-year period, although there were occasional variations; for example, in December 2009 there were seven new cases.

2. *Ratio of filings to terminations:* Early in the period between 2009 and 2012, the number of capital case terminations was about twice the number of new filings. The high number of terminations reflected the hard work of the superior court, prosecutors, and defense counsel to implement the new court policy and reduce the number of capital cases. Later in the four-year period, however, the ratio became closer to even; that is, there were roughly an equivalent number of case terminations and new case filings.

3. *Number of pending cases:* Almost without exception, the number of pending capital cases declined every month during 2009 and 2010. During calendar year 2011, however, the number stabilized between sixty-four and sixty-eight cases, and the number of pending cases has continued in about this range during calendar year 2012. This range is significant because a 2007 letter from the Maricopa County Office of Management and Budget indicated that an “*acceptable*” capital number was less than sixty-five cases.²

¹ Figures for capital cases filings in the Oversight Committee’s 2008 report were as follows: FY 04, 31 cases; FY 05, 32 cases; FY 06, 46 cases, and FY 07, 32 cases. The Maricopa County Superior Court statistician provided those figures. A slightly different set of figures were in an August 10, 2007 letter from Thomas K. Irvine, counsel for the Maricopa County Office of Management and Budget, to Justice Ryan as Chair of the Capital Case Task Force, as follows: FY 04, 33 cases; FY 05, 30 cases; FY 06, 41 cases; and FY 07, 32 cases. Regardless of which set of FY 04 to FY 07 figures are used, they are still generally higher than the annual numbers from October 2008 to September 2012.

² The letter from Mr. Irvine to Justice Ryan referred to in the preceding footnote indicated in a chart that this was an “*acceptable level*” of capital cases.

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Superior Court, Statewide: The Oversight Committee’s data collection also includes a survey of county attorneys statewide, other than Maricopa’s, concerning their pending capital cases for each of the past four years. While the data continues to reflect modest local and annual variations, the numbers from these fourteen counties are relatively stable. However, with the inclusion of Maricopa County, the number of pending capital cases statewide has decreased substantially. The statewide number has dropped from one-hundred fifty-five cases in July 2008 to eighty-three cases in September 2012.

Supreme Court, Direct Appeals: As noted in the Committee’s 2010 report, the number of pending capital cases awaiting trial has a significant impact on the resources required for the administration of those cases in the trial courts. Nonetheless, defendants historically receive a death sentence in only a fraction of the cases in which prosecutors file a death notice. This subset of cases, where a jury and judge have imposed a death sentence and where there is a direct, automatic appeal to the Supreme Court, has the greatest impact on the resources of the Arizona Supreme Court.

The number of death sentences has steadily decreased since 2009. There were fifteen death sentences imposed statewide during calendar year 2009. By comparison, there were ten death sentences statewide in 2010, eight in 2011, and three during the first nine months of 2012.

Supreme Court, Petitions for Post-Conviction Relief: A looming issue in the Committee’s 2009 report was the number of capital defendants in whose cases the Supreme Court Clerk had filed pro forma notices for post-conviction relief, and for whom there were no available counsel for appointment. In 2009 there were eighteen defendants lacking counsel for their PCR petition. However, that number declined to fourteen in 2010, and after a further drop to one, it stood at seven in September 2012.³

What is most surprising about this development is that the State Capital Post-Conviction Public Defender, a state office created by the Legislature in 2007 to accept appointments on capital PCRs, no longer exists. The Legislature passed a budget (SB 1531) for fiscal year 2013, and the budget included a repeal of the statutes establishing this office.⁴

³ An eighth defendant, Hausner, whose conviction was affirmed on direct appeal, has requested that counsel not be appointed for a PCR proceeding. Litigation concerning his request is ongoing.

⁴ The SB 1531 fact sheet dated May 2, 2012, for the bill as transmitted to the Governor stated: “*Eliminates the Capital Postconviction Public Defender Office (SCPPD) and removes the office from the recipients of funds from the Public Defender Training Fund. It also removes the mandate that the court appoint counsel from the SCPPD for those defendants whose conviction and sentence in a capital case has been affirmed.*”

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Maricopa County's Office of the Public Advocate absorbed the majority of the State Defender's five pending cases, as well as most of its staff. The Maricopa County Public Defender accepted Supreme Court appointments on two capital post-conviction petitions in 2011, and private attorneys accepted several new appointments on capital PCRs this year. These circumstances have allowed more capital defendants to have counsel appointed by the Court closer in time to the Clerk's filing of a post-conviction notice, but the issue of timely appointment of PCR counsel is one of continuing concern to the Oversight Committee.

There are about three dozen petitions for post-conviction relief pending in the superior court throughout Arizona. About thirty of these proceedings are in Maricopa County. As reported above, there are seven defendants whose direct appeals are final, and the number of pending PCR proceedings in Maricopa County and statewide will increase when counsel are appointed for these seven defendants. Similar to capital cases pending trial, capital PCR cases require substantial county resources, among them the cost of defense counsel, mitigation specialists, investigators, and experts.⁵ The large volume of pending capital PCRs in the superior court will continue to place stress on county budgets.⁶

III. Recommendations

Recommendation #1: Support an amendment to A.R.S. § 13-4041. A.R.S. § 13-4041 concerns the fee of counsel appointed on a petition for post-conviction relief in a capital case. The statute provides for a one-hundred dollar hourly fee. The Committee recommends, as it has recommended over the past several years, that the hourly rate in A.R.S. § 13-4041 be increased

⁵ The issue of effectiveness of counsel at the PCR stage might be the subject of future litigation in light of *Martinez v Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (March 20, 2012.) The Court ruled in that case that there is no constitutional right to the effective assistance of counsel in state post-conviction proceedings. However, the Court further held that an inmate who files a federal petition for writ of habeas corpus may assert ineffective assistance of post-conviction counsel as "cause" to excuse his failure to properly assert an ineffective assistance of trial counsel claim in state court. Ordinarily, an inmate who does not properly assert an ineffective assistance claim in state court is precluded from raising the claim in federal court. Yet under *Martinez*, there may be instances in which the federal courts will allow the inmate to litigate the effectiveness of post-conviction counsel to attempt to demonstrate why the inmate should be allowed to raise an ineffective assistance of trial counsel claim. On August 22, 2012, the United States Supreme Court issued a stay of execution in *Balentine v Thaler*, to consider whether *Martinez v Ryan* had application to this Texas capital case. *Balentine* is pending at this time.

⁶ The Legislature's fact sheet referred to in footnote 4 also contained the following summary: "As session law, continues to suspend the requirement of 50% reimbursement to counties for grand jury expenses and for state-funded representation of indigent defendants in first-time capital conviction relief proceedings and reimburse only the amount provided in the General Appropriation Act." The net effect is that the cost of a capital defendant's PCR rests with the county.

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to at least one-hundred twenty-five dollars. The Oversight Committee believes that an hourly rate of one-hundred seventy-five dollars, which is comparable to the federal rate in a capital case, would encourage more qualified attorneys to apply for capital PCR appointments.

Recommendation #2: Establish a process to evaluate applications for appointment on capital PCR petitions. This recommendation appeared in the committee's 2010 report.

In 1996, the Arizona Supreme Court by administrative order established an “*advisory committee*” to screen applications by private counsel for appointment on capital PCR petitions. The Court disbanded the advisory committee in 2001. The Oversight Committee considered proposals to reestablish an advisory committee because of a belief that the current screening process was not adequate “*due diligence*.”

Coincidentally, in January 2012, the Maricopa County Superior Court entered Administrative Order 2012-008, superseded by Administrative Order 2012-118 entered on August 10, 2012; see Appendix 9. The Order requires a formal evaluation by a “*Capital Defense Review Committee*” of applications for appointment of capital case counsel by the trial court, that is, on appointments as a capital defendant's lead trial counsel, trial co-counsel, and appellate counsel. A.O. 2012-118 provides that all capital counsel eligible for appointment through the Maricopa County Office of Public Defense Services receive an evaluation every three years of his or her qualifications, and have approval of the presiding criminal judge for appointment on a capital case. However, this Maricopa County Administrative Order does not require the Maricopa committee to screen applications for appointment on capital PCRs, because attorneys submit those applications to the Arizona Supreme Court rather than to Maricopa County.

A workgroup led by Justice Ryan considered proposals that would allow the Supreme Court to more rigorously evaluate applications for appointment on a capital PCR petition. At first, the workgroup discussed a formal “*screening committee*,” which would be established by an administrative order, and which would be similar to the screening committee established by the Court in 1996. Later, however, the workgroup focused on a proposal, shown in Appendix 10, for an “*advisory panel*.” The advisory panel would not be created by an administrative order. Rather, panel members would serve at the invitation and pleasure of the Chief Justice or a designee. The advisory panel would be composed of five members; at least one member would be a judge, and at least two members would be experienced defense counsel. The advisory panel would conduct a due diligence evaluation of an applicant. The advisory panel thereafter would make a recommendation to a Supreme Court staff attorney about whether the applicant should be placed on the appointment list, and the staff attorney would in turn transmit the recommendation to the Court. The advisory panel proposal envisions an informal and flexible information-gathering and evaluation process that would provide relevant information for the panel members, and which would allow the advisory panel to have candid and confidential discussions about each applicant. The advisory panel would also conduct periodic evaluations of attorneys who are already on the Court's appointment list. At their February 29, 2012 meeting, the Oversight Committee members unanimously recommended that the Supreme Court adopt the advisory panel proposal.

Recommendation #3: Encourage continuing training and education for judges, prosecutors, defense attorneys, and others who handle capital cases. Arizona's first Capital Case Litigation

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Conference convened in Phoenix in May 2010. This three-day conference, attended by more than 170 judges, prosecutors, and defense counsel, was remarkable for its collaborative education on the death penalty. Chief Justice Berch and Justice Ryan were among the speakers at this conference. The Bureau of Justice Assistance and the National Judicial College provided grant funding for this event, and the Education Services Division of the Administrative Office of the Courts (“AOC”) administered the grant. The grant also made possible through the AOC in December 2011 eight additional hours of video instruction on capital cases.

Continuing legal education for attorneys and judges who handle capital cases is not optional; it is a necessity. The Committee ardently supports capital case training, grant-funded or otherwise, through the Federal Public Defender, the Arizona Public Defenders Association, the Arizona Prosecuting Attorneys Advisory Council, the AOC, or other organizations. It is essential that everyone in the capital case arena – not just defense counsel but also prosecutors, judges, mitigation specialists, and others – be diligent, competent, and effective in performing their duties in capital cases.

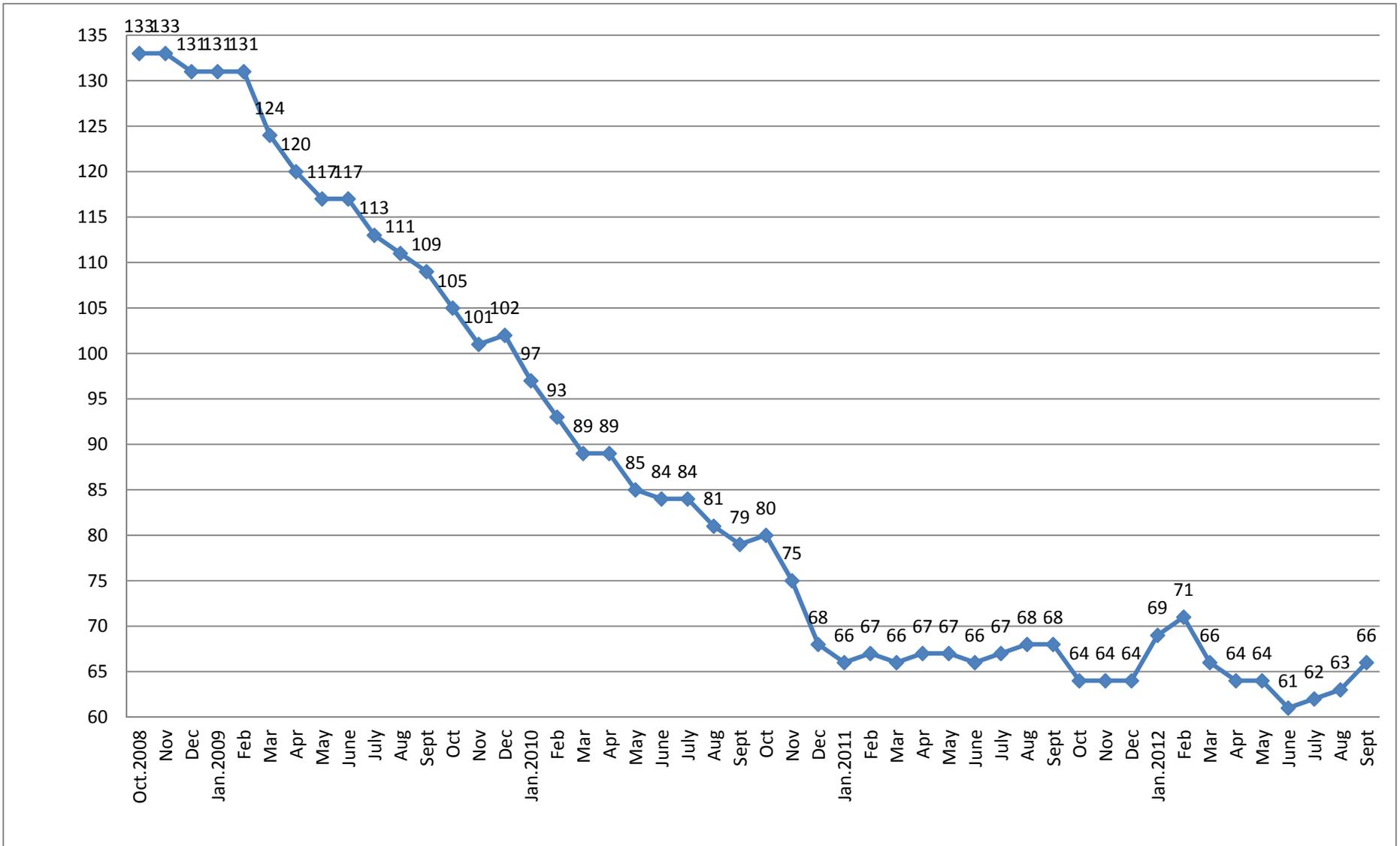
Recommendation #4: Extend the term of the Oversight Committee. The objective of the Oversight Committee was to monitor efforts to reduce the volume of capital cases in Maricopa County. In light of that court’s substantial reduction in its number of capital cases, Oversight Committee staff believed this objective was achieved, and staff proposed at the Committee’s most recent meeting a recommendation that the Supreme Court disband the Committee.

The members, however, unanimously opposed disbanding the Oversight Committee. The members believe that the Court should not disband the Committee because there are ongoing issues, and one member commented that as long as there is a death penalty in Arizona, new issues would continue to arise. The members of the Committee have a valuable historical perspective that has developed over the past several years, and they believe that this group should remain intact. The members therefore recommend that the Court extend the Committee for a year; or suspend the Committee until reactivation is necessary; or make this a permanent committee rather than a temporary one. Because the issues are statewide, the members also recommended the addition of a Pima County member.

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#1: Number of Capital Cases Pending Trial in the Maricopa County Superior Court: October 2008 through September 2012



Maricopa County
Four-year capital case recap

#2: Maricopa County Capital Case Recap: October 2008 to September 2012 (4 years)

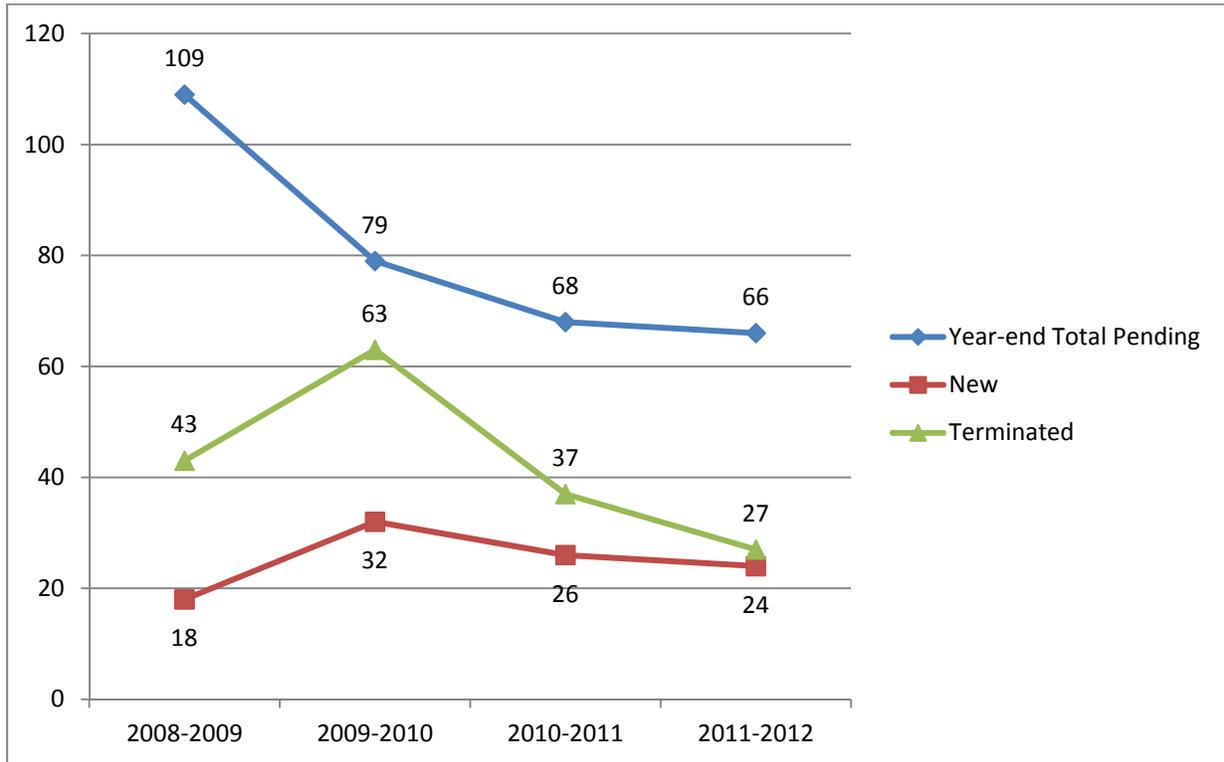
<u>MONTH</u>	<u># OF NEW CASES</u>	<u># OF ACTIVE CASES TERMINATED</u>	<u>DEFENDANTS SENTENCED TO DEATH</u>
October 2008	3	1	0
November	2	2	0
December	1	3	0
January 2009	1	2	1: Prince [<i>Ring</i>]
February	2	2	0
March	0	7	1: Hausner
April	2	5	1: Lehr [<i>Ring</i>]
May	0	4	1: Delahanty
June	0	3	1: Gallardo
July	3	4	1: Grell [<i>Ring</i>]
August	3	5	2: Cota, Hardy
September	1	5	1: Manuel
12 month sub-total	18	43	9
October	3	7	0
November	1	5	1: Van Winkle
December	7	6	1: Patterson
CY 2009 sub-total	23	55	11
January 2010	1	6	1: Medina
February	0	5	2: Boyston, Ovante
March	1	5	0
April	2	2	2: Joseph, Martinez
May	2	6	1: Parker
June	5	6	0
July	5	5	0
August	3	6	1: Fitzgerald
September	2	4	0
12 month sub-total	32	63	9
October 2010	4	3	2: Gomez, Rose
November	1	6	0
December	1	8	1: Hernandez
CY 2010 sub-total	27	62	10
January 2011	3	5	0
February	3	2	1: Burns
March	2	3	0
April	1	0	0
May	3	3	2: Naranjo, Reeves
June	1	2	0
July	1	0	0
August	4	3	0
September	2	2	1: Miller
12 month sub-total	26	37	7
36 month total	76	143	25

*Maricopa County
Four-year capital case recap*

Maricopa County Capital Case Recap: Continuation

<u>MONTH</u>	<u># OF NEW CASES</u>	<u># ACTIVE CASES TERMINATED</u>	<u>DEFENDANTS SENTENCED TO DEATH</u>
October 2011	2	6	1: Benson
November	2	2	1: Goudeau
December	1	1	0
CY 2011 sub-total	25	29	6
January 2012	6	1	0
February	3	1	0
March	1	6	0
April	0	2	0
May	1	1	0
June	0	3	0
July	2	1	0
August	2	1	1: Lynch
September	4	2	1: Anthony
12 month sub-total	24	27	4
48 month total	100	170	29

#3: Maricopa: Combined data summary for twelve month periods

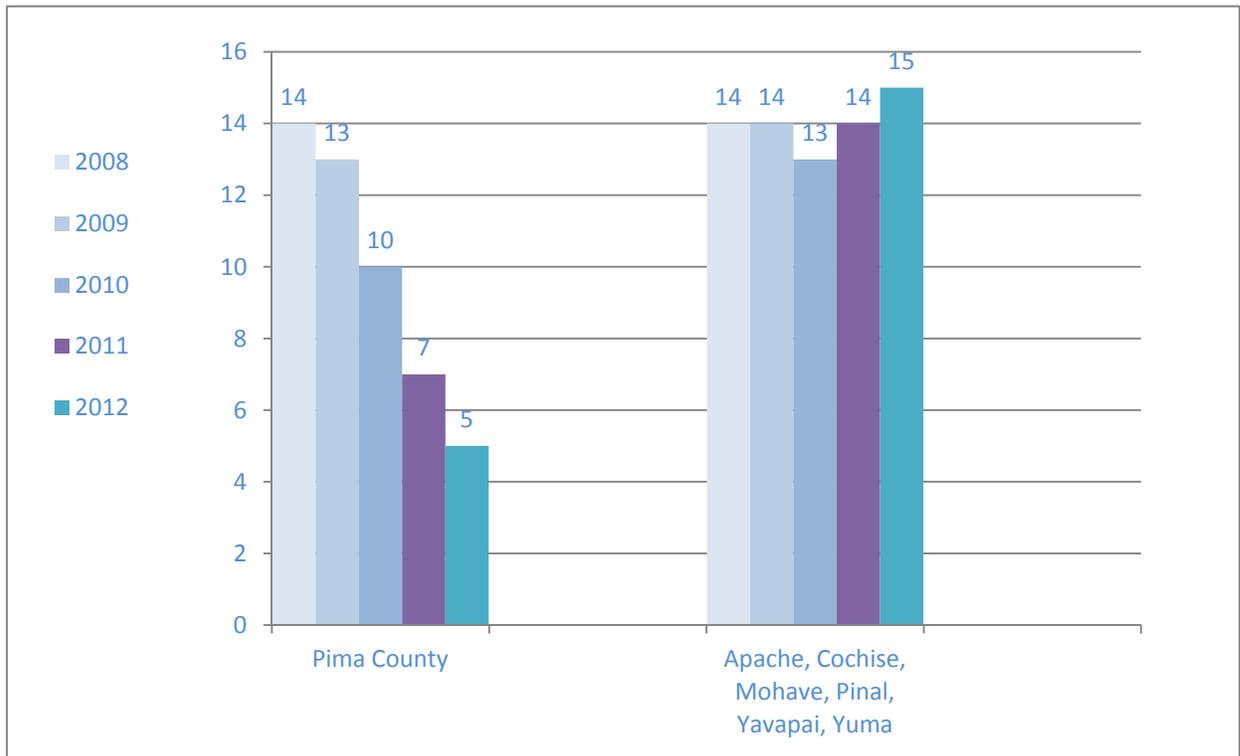


#4: Capital cases pending trial in Arizona by county: 2008 to 2012

<u>County</u>	<u>July 2008</u>	<u>Sept. 2009</u>	<u>Sept. 2010</u>	<u>Sept. 2011</u>	<u>Sept. 2012ⁱ</u>
Apache	1	1	0	0	0
Cochise	0	0	1	3	3
Coconino	0	0	0	0	0
Gila	0	0	0	0	0
Graham	0	0	0	0	0
Greenlee	0	0	0	0	0
La Paz	0	0	0	0	0
Maricopa	127	109	79	68	63
Mohave	2	3	2	1	1
Navajo	0	0	0	0	0
Pima	14	13	10	7	5
Pinal	3	4	5	5	5
Santa Cruz	0	0	0	0	0
Yavapai	3	2	2	2	5
Yuma	5	4	3	3	1
TOTAL	155	136	102	89	83

ⁱ The 2012 survey started on August 30, 2012 and concluded on September 18. The August ending number, 63 cases, is therefore used for Maricopa County rather than the end of September number of 66 cases. The reported numbers in this table may include cases in which a defendant has entered a plea with a non-death sentence, and pronouncement of judgment is pending.

#5: Number of Capital Cases Pending Trial Outside Maricopa County



#6: Number of Capital Cases Pending Trial Statewide

<u>Date</u>	<u># of Cases</u>
July 2008	155
Sept 2009	136
Sept 2010	102
Sept 2011	89
Sept 2012	83

#7: Number of Defendants Sentenced to Death Statewide

<u>Year</u>	<u># of Defts</u>	<u>Source by County</u>
2008	5	Maricopa (5)
2009	15	Maricopa (11), Pima (3), Mohave (1)
2010	10	Maricopa (10)
2011	8	Maricopa (6), Pima (2)
2012: 9 mos.	3	Maricopa (2), Pima (1)

#8: Number of Executions in Arizona

<u>Year</u>	<u># of Executions</u>
2001-2006	0
2007	1
2008	0
2009	0
2010	1
2011	4
2012	5

#9: Maricopa County Superior Court Administrative Order 2012-118

and

#10: Capital PCR Advisory Panel Proposal

Please see the following pages.

**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. 2012-118

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 expires automatically without further Order on a date ten (10) years from the date of issuance in accordance with Arizona Code of Judicial Administration, Section 3-402(C), unless sooner modified, amended or replaced.

IT IS FURTHER ORDERED terminating Administrative Order No. 2012-008.

Dated this 10th day of August, 2012.

Norman J. Davis
Presiding Judge

Original: Clerk of the Superior Court

Copies: Hon. Douglas Rayes, Criminal Presiding Judge
Superior Court Judges and Commissioners – Criminal Department
Hon. Tom Horne, Attorney General
Hon. Bill Montgomery, County Attorney
James Logan, Public Defense Services
Jim Haas, Public Defender
Marty Lieberman, Legal Defender
Bruce F. Peterson, Legal Advocate
Phil Knox, General Jurisdiction Courts Administrator
Bob James, Criminal Court Administrator

Exhibit A

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-third 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 three 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 three 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.

#10: Capital PCR Advisory Panel Proposal

Note: On February 29, 2012, the Capital Case Oversight Committee unanimously passed a motion recommending that the Court adopt the following Capital PCR Advisory Panel proposal.

Capital PCR Advisory Panel

1. [A.R.S. § 13-4041\(C\)](#) provides in part that "...the supreme court shall establish and maintain a list of persons who are qualified to represent capital defendants in those cases in which the court does not appoint counsel from the state capital post conviction public defender office."
2. The Supreme Court's staff attorneys currently maintain a list of persons pursuant to the foregoing statute.
3. The staff attorneys currently receive applications for appointment on capital PCRs, review and investigate the applications, and submit applications, materials, and recommendations for appointment to the Supreme Court. The Supreme Court then decides whether an applicant is qualified and if the attorney should be included on the list maintained by its staff attorneys.
4. The Supreme Court believes that its staff attorneys would benefit from the assistance of judges and defense counsel to recruit qualified candidates for appointment on capital PCRs, and to review and investigate applications for appointment, and that a capital PCR advisory panel ("advisory panel") may informally provide this assistance to its staff attorneys.
5. The advisory panel will consist of five members, including one or more judges and two or more criminal defense attorneys. One of the defense attorneys must be the director of the State Capital Post-conviction Public Defender's Office. The other attorney or attorneys should have significant experience in the defense of capital cases. The members will serve at the invitation and pleasure of the Chief Justice, or his or her designee, for a period of one year, and may serve successive terms.
6. The advisory panel will meet as often as necessary. The staff attorneys' office will staff the advisory panel.
7. Staff will make available to the members of the advisory panel every application of an attorney who seeks to be added to the appointment list, and any related materials. The advisory panel members will then conduct a due diligence investigation concerning the applicant's proficiency and commitment that is required for the defense of a capital case. The due diligence investigation of the advisory panel members must include reviewing and discussing written materials submitted or prepared by the applicant; contacting references provided by the applicant; and contacting people who have interacted with the applicant in relevant matters, including judges, but who were not identified as references. The advisory panel may interview the applicant at the discretion of the panel.

Capital Case Oversight Committee

Draft: Feb 29 2012

8. After the advisory panel's due diligence investigation is completed, the panel or a majority of its members will make a recommendation to staff concerning whether the applicant should be added to the appointment list, and staff will transmit the recommendation to the Supreme Court. Staff will note and convey to the Supreme Court any disagreement by a member of the advisory panel with the majority's recommendation, or any conditions of the recommendation.

9. The advisory panel must also conduct periodic reviews of attorneys on the list of qualified persons to assure that each attorney continues to have the necessary proficiency and commitment. An attorney on the list must be reviewed (a) when information is brought to the panel's attention that warrants a review; (b) when the attorney requests appointment to another case; or (c) every five years, whichever first occurs. The periodic review need not include the full investigation required by paragraph 7, and the panel may determine what is appropriate and sufficient diligence for a periodic review. The panel's recommendations following a periodic review will be communicated to staff as provided in paragraph 8.

10. The notes and other records of the advisory panel are judicial work product and closed records under Supreme Court Rule 123(e)(9).

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