OFFICE OF THE STATE CAPITAL POST CONVICTION DEFENDER
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To: OSPB
From: Marty Lieberman
Re: Request for 15% Reduction Plan
Date: October 9, 2009

Attached to this memorandum are the materials you have requested detailing the effects of, and how this office would manage, a 15% budget reduction for FY10, beginning January 1, 2010, and a 15% reduction for FY11, beginning July 1, 2010. This memorandum addresses, in part, the hardships created by any reduction, the inability to realize reductions based on cutting functions, and describes certain assumptions that were made in providing the requested information. We also provide a partial solution. It should be noted that our FY10 appropriation is 80% of our initial FY09 appropriation.

A.R.S. §13-4041(B) contemplates that the Office will represent the majority of capital defendants in post conviction proceedings. The prior and current funding levels do not allow us to represent but a handful of clients. The needs of the office are unique because representing capital defendants is a complex and highly specialized task. The current reduction projection obviously makes matters worse.

The office must be guided by the performance standards of the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases pursuant to Rule 6.8(c), Arizona Rules of Criminal Procedure. The guidelines mandate a team approach to capital defense. Therefore, two lawyers, one investigator and one mitigation specialist are assigned to each case. The projected reduction will leave us with less than two lawyers working full time as counsel because the Director's administrative responsibilities consume half his time.

The FY08 and FY09 appropriations resulted in an office which could only provide minimal services to the State of Arizona. The FY09 reduction worsened our situation and the FY10 appropriation (even less than the post-FY09 reduction) would have been disastrous but for the award of a grant. The projected reduction for FY10, will make a bad situation worse. The current 15% reduction projection will mean that the few cases we are able to handle will take longer to resolve and that we will not be able to add to our caseload as

quickly as we hoped. Although we only have four cases at the current time, each of those cases are in an active investigation stage which is very time consuming. We had hoped, prior to the FY09 reduction to have one and possibly two case investigations completed by the end of the fiscal year. The mid year reduction made that impossible. Planning, therefore, in FY10, we had hoped to be able to file one petition in court by the end of October, and the second by the end of the calendar year, enabling us to take on one, or possibly two, additional cases by January, 2010. However, the projected mid year FY10 reduction will cause the loss of a lawyer and will make it difficult to take on additional cases because the other 1½ lawyers will have to spend time "getting up to speed" on the departing lawyer's matters, meaning they will not be able to spend that time working on a new case.

This office is unable to accept the number of cases it should be handling. While this would be true even without a budget reduction, the projection only worsens if there are additional cuts to our funding. There are currently eighteen inmates on death row awaiting appointment of counsel in post-conviction proceedings. Some of them have been waiting for two years or more. I included a letter from Justice Ryan of the Arizona Supreme Court (who also serves as the chair of the Arizona Supreme Court's Capital Case Oversight Committee (www.supreme.state.az.us/cctf/)), which provides additional information with our FY11 budget submission (since the time he wrote the letter, three new cases were added to the list). Since 2005, the Supreme Court has decided, on average, seven death penalty appeals per year. Eighty percent of the death sentences are affirmed. Assuming this trend continues, we can expect an additional five or six new cases will be ready for post-conviction review each year. This office could not previously assume that weight and will suffer even more should additional cuts be made.

We can also expect a large number of death penalty cases coming through the system in the next few years due to an aggressive capital punishment policy in Maricopa County. As of September, 2009, there were approximately 111 pending capital cases in the Maricopa County Superior Court. The office should be more fully staffed in order to meet current and future needs.

But for the award of a one year grant ($136,600) by the Arizona Criminal Justice Commission (ACJC), we already would have eliminated one of the two attorney positions in this office as a result of the 20% reduction suffered this fiscal year.[1] As discussed with our budget analyst, and described in our FY11 budget submission, ACJC's five year plan

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[1]Our FY09 pre-reduction appropriation was $870,900. Our FY10 (pre-reduction) appropriation is $699,500 (it was, initially, 680,600; the increase accounts for an $18,900 increase in the insurance sweep which is unavailable for another use).

does not contemplate grants in FY11 out of the fund from which our FY10 grant was awarded. Although we will apply for the grant next year from another fund, we have no assurances that ACJC will be able to, or will, fund that position again.

In addition to my assessment, I met with the supervising attorney for the Capital Habeas Unit of the Federal Public Defender's Office (the federal counterpart to our office), and the director of the Maricopa County Public Defender's Office, to obtain "fresh eyes" and perhaps a different way of solving the problem. Neither were able to offer any viable alternatives, noting that we were especially lean for our function.

As made known previously to OSPB, there is a crisis in post-conviction representation of prisoners on death row. They typically wait more than two years for the appointment of counsel. Due to staffing, budgetary, and other limitations, we can only handle a small portion of those cases. This reduction will have the effect of delaying the processing of these cases through the courts. Victims are especially distressed by the amount of time that these cases take, even without budget created delays, and this reduction (along with the expert witness fee reduction) will cause even further delay.

The Director of this office sits on the Capital Case Oversight Committee which was created by the Arizona Supreme Court to seek ways to reduce delay in the processing of capital cases. The Oversight Committee grew out of the previous year's Capital Case Task Force which sought ways to reduce delay in Maricopa County (resulting from an aggressive capital punishment policy), on appeal, and in post-conviction proceedings. One of the recommendations was to remove the staffing limitations of this office, and to increase funding, so the office can handle more cases. "Report of Recommendations to the Arizona Judicial Council," pp. 21-22. (http://www.supreme.state.as.us/cctf/FinalRpt092007.pdf). This budget reduction moves us in a contrary direction and will serve to add to the delay in the processing of capital post-conviction cases.

I have submitted one budget reduction plan for the remainder of FY10 (beginning January 1, 2010) and another plan for FY11. A 15% annual budget reduction beginning January 1, 2010 requires a 30% reduction for the final two quarters of the fiscal year. Accordingly, the effect on the office will be twice as great as a 15% reduction realized over the course of a full year and the plan for FY10 is different than for FY11. Moreover, our plan for FY11 does not include the grant funds received for FY10.

FY10: The plan requires the elimination of one attorney position, a reduction in travel and expert witness expenses, and furloughs. I tried to develop a solution without furloughs due to the morale issues resulting from last year's implementation of furloughs.

I was unable to. I am concerned that the re-introduction of furloughs may cause staff to look for other employment. This is an especially difficult problem because our staff is, for the most part, highly specialized and hard to replace, especially with the uncertainty of future budgets.

Just as importantly, the FY09 reduction (furloughs and reductions in expert witness funds) created an inability to process our cases in the courts because we could not fund the necessary experts. We started, again, with the expert assistance in the beginning of the current fiscal year and hope to be able to file one petition before the end of the second quarter and a second early next year. If we are required to reduce expert witness expenditures again, these filings may be delayed further.

FY11: We would eliminate one of the two attorney positions and create an office which works four days per week. We would also reduce travel and expert witnesses. We will become a part-time office. This would likely lead each of the professionals to seek employment elsewhere and significantly reduce, further, our ability to carry out our function.

Functional Reductions: Ms. Klein's letter of September 18, 2009, acknowledges that the target reduction goal cannot be met by enacting across-the-board reductions, especially in light of previous reductions, and asks agencies to assess what functions (programs) should be cut to reduce spending.

This small office has only one function, to represent inmates on death row in post conviction proceedings. Therefore, it is impossible for us to consider program or function cuts. The only way to realize the reduction is to enact further across-the-board reductions which, quite frankly, may neuter us. The effects of the reductions are generally described above and in more detail in the work sheets.

Compounding the problem, one of our attorneys is scheduled to retire on December 31, 2009. But for the current request to present a budget reduction plan, we would be recruiting to fill this position now because of the difficulty in filling such a highly specialized position. I cannot actively recruit for this position when I do not know if the funds will be available to fund it in January. Accordingly, we ask that any decisions about this agency be made as quickly as possible. A delay in the decision making, even if the decision is favorable to our office, will impede our ability to replace the retiring lawyer and add further delay in our cases.

Partial Solution: I had previously communicated to OSPB a potential statutory change that could, in a small way, help the Office. **A.R.S. §41-4301(H)** requires us to bill the County from which the conviction arose for half of the expenses of representation, but only to a maximum of $30,000. The costs and fees in each case will easily exceed this amount. These funds are deposited in the general treasury and are not credited to this office. We have, to date, caused $60,000 to be deposited into the treasury and have prepared the next $30,000 invoice. Our budgetary issues could be partially relieved if those funds were directed to this office. Although it is difficult to predict, at current resource levels, I expect to be able to invoice between one and one and ½ cases per year. That number would increase if we were properly funded and staffed because we would be able to assume responsibility for more cases. The funds should be deposited into a non-lapsing account and made available to this office for the payment of expert witness fees. An increase in the amount of reimbursement from the counties could also be considered. Of course, this would require a statutory change.

As always, I am available for questions or consultation.

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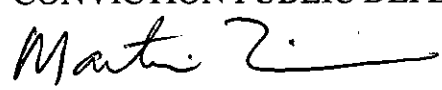

Martin Lieberman
Director

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FY 2010 BUDGET REDUCTIONS - SUMMARY OF ISSUES
CAPITAL POST-CONVICTION PUBLIC DEFENDER

GENERAL FUND

FY 2010 General Fund Budget **699,500**

AGENCY REDUCTION TARGET - GENERAL FUND $104,900

Priority	Issue Title[1]	Reductions Amount
1	Eliminate One Attorney Position	$72,000
2	Reduce Expert Witness Fund	$11,800
3	Reduce Travel Fund	$5,300
4	Furloughs and Pay Reduction	$15,800
	Issue Total	**$104,900**

Fund Total as a Percentage of General Fund Reduction Target 100%

[1] Please complete the attached Description and Impact Statement for each issue.

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STATE OF ARIZONA
FY 2010 BUDGET REDUCTIONS - ISSUE DESCRIPTIONS

Capital Post Conviction Public Defender

Issue Title: FY10 – Eliminate Attorney Position

Issue Priority: 1

Reduction Amounts:
General Fund: $ 72,000

Total: $ 72,000

Issue Description and Statement of Effects

One of our attorneys is retiring December 31, 2009. He would not be replaced if funding reductions are ordered for our office.

In addition to the Director, who is an attorney who spends about ½ his time on administrative tasks, the office currently employs only two lawyers. This reduction therefore significantly impairs our ability to carry out our function by reducing lawyer resources by forty (40) per cent. This will mean we will not be able to take on new cases and the cases we currently have will take signficantly longer to process.

This position is currently funded from a one year grant from the Arizona Criminal Justice Commission (ACJC). But for this grant, this position would have been eliminated as a result of the 20% budget reduction suffered in FY10 (compared to FY09, initial). ACJC has agreed to allow us to transfer these funds to fund our other attorney position should our budget be reduced to the point of eliminating this position.

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STATE OF ARIZONA
FY 2010 BUDGET REDUCTIONS - ISSUE DESCRIPTIONS

Capital Post Conviction Public Defender

Issue Title: FY10 – Reduce Expert Witness Fund

Issue Priority: 2

Reduction Amounts:
General Fund: $11,800

Total: $11,800

Issue Description and Statement of Effects

This funding reduction would cause us to run out of funds for expert witnesses sooner than anticipated. Due to the 20% FY10 reduction, we reduced the availability of funds for experts (from $75,000 to $59,000). As a result of this reduction, we anticipate that, even without a further reduction, we will likely run out of money to pay for experts before the end of the fiscal year. The instant reduction further impedes our ability to utilize expert witness services even more, and we will run out of funds sooner than previously anticipated.

The use of experts is especially important in capital representation. We are obligated to employ expert witnesses to provide medical, psychological, psychiatric, sociological, cultural and other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s), to give a favorable opinion as the client's capacity for rehabilitation, or adaptation to prison, to explain possible treatment programs, or otherwise support a sentence other than death, and to rebut or explain evidence presented by the prosecutor.

Expert witnesses often explain the consequences of the client's life history. For example, expert testimony may explain the permanent neurological damage caused by child abuse, the hereditary nature of mental illness, the effects of childhood sexual abuse, and the effects of these conditions / impairments on impulse control. As another example, studies show that juries are always concerned with 'future dangerousness.' Experts who can review prison, jail and/or other records must be consulted in order to effectively present a case to the trier of the fact.

We simply cannot do our job without expert witnesses. Should we run out of funds for experts, we will be forced to seek Court stays until we can continue to

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effectively represent our client. If granted, this will delay the processing of the cases. If denied, and we are otherwise unable to secure the funds, we will have no choice but to move to withdraw from representation pursuant to the ethical rules governing the performance of counsel.

This reduction will significantly impair the purpose of the office and significantly increase the amount of time it will take to process a capital PCR case.

We ran out of funds for expert witnesses last year as a result of the mid-fiscal year reductions. As a result, we were unable to complete our preparation for the filing of our first two cases. We asked the Maricopa County Office of Public Defense Services whether the county would agree to pay expert witness funds. They said no. We then filed a motion with the Maricopa County Superior Court seeking an order that Maricopa County pay for the needed services. It was denied. We also filed a similar motion with the Mohave County Superior Court seeking funds for our Mohave County case but, due to a change in judges, the motion was not ruled upon by the start of the new fiscal year and it was withdrawn as moot. Accordingly, we are unaware of any solutions for this problem except as stated in the cover memorandum.

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STATE OF ARIZONA
FY 2010 BUDGET REDUCTIONS - ISSUE DESCRIPTIONS

Capital Post Conviction Public Defender

Issue Title: FY10 – Reduce Travel Funds

Issue Priority: 3

Reduction Amounts:
General Fund: $ 5,300

Total: $ 5,300

Issue Description and Statement of Effects

We are based in Maricopa County but we are a state wide office and therefore, from time to time, we need to travel to other counties and out of state. Fortunately, only one of our cases now, and in the foreseeable future, will be outside of Maricopa County and therefore, our in state travel to Mohave County will be limited. However, we are often required to travel for 1) client conferences and 2) investigation.

Client conferences: Our clients are housed at the State Prison in Florence, Arizona which is about seventy miles from our office. One round trip to Florence, at current mileage rates, is about $62.

Client conferences are extremely important for a number of reasons and both assigned counsel and the mitigation specialist are required to meet with the client on a regular and continuous basis. This is especially true because the client is our best source of information and, for purposes of learning the client's life history, sometimes our only source. Moreover, the conditions on death row are extremely onerous and our clients are prone to mental and physical decompensation. We are required to remain ever vigilant in these areas.

The ABA Guidelines which govern our work require us to establish a relationship of trust with the client, and should maintain close contact with the client. We are required to engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as, the progress of and prospects for the factual investigation, and what assistance the client might provide to it; current or potential legal issues; the development of a defense theory; presentation of the defense case; potential agreed-upon dispositions of the case; litigation deadlines and the projected schedule of case-

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related events; and relevant aspects of the client's relationship with correctional, parole, or other governmental agents (*e.g.*, prison medical providers or state psychiatrists).

Many capital defendants are severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that we must assume that the client is emotionally and intellectually impaired. There will also often be significant cultural and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters. Client contact must be ongoing. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare the case. Similarly, a client will not – with good reason – trust a lawyer who visits only a few times, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls.

Repeated, regular and frequent visits are required to achieve these goals.

Investigations: Both in state travel and out of state travel are required to investigate our cases. We must complete a re-investigation of each of our cases. Much of the investigation, especially the mitigation investigation, will involve out of state travel, and there is a good deal of in-state travel involved as well. Among other things, investigators must travel to various courts and other agencies to receive documents, travel to different parts of the State to interview witnesses, and to view crime scenes or other areas where relevant events occurred. We are obligated to pay mileage for these trips. Use of the State motor pool is not a viable option due to proximity but, more importantly, because the ultimate cost of using a motor pool vehicle is greater than paying mileage. Fortunately, none of our staff object to using their own vehicles so long as mileage is reimbursed.

Out of State travel is an essential part of our office's function. The ABA Guidelines state that capital counsel has an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty. At the post-conviction stage, we also have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case.

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Between 1973 and 2002 some 100 people were freed from death row in the United States on the grounds of innocence. Unfortunately, inadequate investigation by defense attorneys – as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony, flawed or false forensic evidence, and the special vulnerability of juvenile suspects – have contributed to wrongful convictions in both capital and noncapital cases. In capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities for error. This underscores the importance our duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.

In this regard, the elements of an appropriate investigation include, among other things, the need to seek out and interview potential witnesses, including, but not limited to eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself; potential alibi witness; witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), the degree of culpability for the offense. We must also investigate all sources of possible impeachment of defense and prosecution witnesses. We should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, and lighting conditions).

We must also investigate penalty issues. Our duty to investigate and present mitigating evidence is well established. Because the sentencer in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. In the case of the client, this begins with the moment of conception. Counsel needs to explore medical history; family and social history; educational history; military service; employment and training history; and prior juvenile and adult correctional experience.

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. Moreover, a multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment.

All of this requires travel, sometimes in state, largely out of state, depending on the client's background. To date, most of our clients have lived at least a portion of their lives in California, and one has lived in virtually every state in the nation.

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Interviews by telephone, in most cases, do not provide the information needed to properly investigation the client's background. There are many reasons for this. The following quote is taken from materials submitted by Mary Durand, our previous mitigation specialist, and the longest serving mitigation specialist in the State of Arizona, to the Arizona Supreme Court's Capital Task Force:

> A common misconception in the performance of mitigation investigation is that interviews can be done on the phone. While I understand that travel to visit family members, friends, teachers, coaches, neighbors and other key informants who often live all over our country and, sometimes, other countries is time consuming and expensive, it is critical to do these interviews face to face, and, often, more than one interview is required. One has to see the witnesses, their demeanor, their dress, their body language, their environment and their community. If the interview is done over the phone, how can the mitigation specialist know if the person being interviewed has a facial tic consistent with Tourette's, a grimace consistent with medication use, rotten teeth consistent with malnutrition or addiction? How would the mitigation specialist know the condition of the home, the community, the availability of services in the area, if there are telling photographs on the walls, or not, or the condition of family pets, etc.? One can hide shame and embarrassment on the phone, but not in person. Police officers do not investigate telephonically; medical doctors do not diagnose telephonically-and for good reason: To truly understand the individual and family dynamics, an interpersonal relationship must be established. Simply put, telephone Interviews cripple the mitigation specialist's effort to complete a reliable social history that will be used by those experts selected to assist counsel.

As Ms. Durand notes elsewhere, often times informants (people with information about the client and his social history) do not want to reveal embarrassing information (*e.g.* sex abuse, domestic violence, family mental illness, etc.). A competent mitigation specialist, with the ability to meet with the informant as opposed to telephone contact, is much more likely to obtain that information which is critical to an assessment of why the client ended up on death row.

Because face-to-face interviews are so important to properly represent our clients, we cannot eliminate the travel necessary to meet with these people. The current budget reduction will impair our ability to represent our clients and, should funds be exhausted by the end of the fiscal year, cause delay.

A reduction of travel funds will have the likely effect of delaying the investigation portion of our work. Until the investigation is done, we cannot begin serious work with our expert nor prepare or file the pleadings to present the case in court. This will delay the processing of the case in court.

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STATE OF ARIZONA
FY 2010 BUDGET REDUCTIONS - ISSUE DESCRIPTIONS

Capital Post Conviction Public Defender

Issue Title: FY10 – Furloughs and Pay Reduction

Issue Priority: 4

Reduction Amounts:
General Fund: $ 15,800

Total: $ 15,800

Issue Description and Statement of Effects

There is simply not enough to cut from our budget without across the board furloughs / cuts. Direct Personnel costs (salary, ERE, and insurance) constitute over 80% of our budget. Using furloughs allows the office to limp forward even though case progress is impeded. Assuming the reduction of one attorney and our part time administrative assistant (see Issue 1), we would have the following staff:

Director	Full time
1 attorney	Full time
1 mitigation specialist	Full time
1 Legal Assistant	Full time
1 Investigator	Part time (20 hours)

The part time investigator's hours cannot be reduced without affecting his benefit eligibility; therefore, his pay would be reduced. The following reductions are contemplated:

Director	12 days of furlough from 1/1 – 6/25
Attorney	12 days of furlough from 1/1 – 6/25
Mitigation specialist	5 days of furlough from 1/1 – 6/25
Legal Assistant	3 days of furlough from 1/1 – 6/25
Reduce investigator pay	savings of $520 from 1/1 – 6/25

The Director and Attorney will suffer the greatest reduction based on the nature of the work within the office. The Director and Attorney share overall responsibility for each of the cases and direct the work of the others. However, we have only one mitigation specialist, one legal assistant and one investigator. Moreover, our legal assistant serves as the office manager as well and she is the "glue" that holds the

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office together. This furlough schedule therefore is designed to cause the least amount of damage while realizing the savings. These cuts will, like the other reductions, cause a delay in the processing of cases.

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