

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
April 4, 2013**

Members Present:

Hon. Ronald Reinstein, Chair  
 Hon. Joseph Welty  
 Hon. Kent Cattani  
 James Belanger  
 Donna Hallam  
 Kellie Johnson  
 Dan Levey  
 Marty Lieberman, by proxy,  
     Michele Lawson  
 James Logan  
 William Montgomery, by proxy,  
     Anthony Novitsky  
 Daniel Patterson  
 Sheila Polk  
 Natman Schaye

Guests:

Kristine Fox  
 Lori Ash  
 John Todd  
 Bruce Peterson  
 Chris DuPont  
 Fernanda Santos  
 Jerry Landau  
 Scott O'Connell  
 Dale Baich  
 Jennifer Garcia  
 Diane Alessi  
 Carolyn Edlund  
 Robert Shutts  
 Jeff Zick  
 David Darby

Staff:

Mark Meltzer  
 Kymberly Lopez

By telephone:

Robert Hirsh  
 Paul Julien

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**1. Call to Order; approval of the meeting minutes.** The Chair called the meeting to order at 12:05 p.m. He congratulated Judge Cattani on his recent appointment to the Court of Appeals. He introduced new members on the Oversight Committee: Judge Welty, Ms. Johnson, Ms. Polk, Mr. Belanger, and Mr. Schaye. The Chair then reviewed Administrative Order 2013-15, and specifically noted that members outside Maricopa County are sitting on the Oversight Committee for the first time. This expanded membership is significant in assuring that the Oversight Committee identifies and addresses capital case issues of statewide concern. The Chair further noted that the Order directs this Committee to submit a report to the Arizona Judicial Council ("AJC") in December 2013; the Committee therefore needs to finalize the report by November.

The Chair then asked the members to review draft minutes of the September 24, 2012 meeting.

**Motion:** A member moved to approve those minutes, and following a second, the members unanimously approved the September 24, 2012 meeting minutes.

**2. Senate Bill 1413.** The Chair asked Judge Cattani, who helped draft this bill while he was in the Attorney General's office, and Mr. Landau, the AOC's government affairs director, to discuss SB 1413, which was introduced during the current session of the Legislature. Mr. Logan reminded the members that the subject matter of this legislation had been before the Oversight

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Committee previously, and for that reason, he suggested that this item was improvidently on today's meeting agenda. The Chair agreed that the members had discussed this topic at prior meetings; he added that although the bill failed this session, issues raised by the bill might be the subject of future legislation or rule petitions, and that it therefore remained timely.

Judge Cattani stated that SB 1413 had two objectives. The first objective was to address the 2012 U.S. Supreme Court decision in *Martinez v Ryan*, an Arizona non-capital case. In Arizona, a direct appeal may not raise issues of ineffective assistance of trial counsel. *Martinez* provided that the defendant could avoid a procedural default by showing that post-conviction counsel was deficient in failing to raise the trial lawyer's ineffectiveness. Judge Cattani noted that the pending Supreme Court case of *Trevino v Thaler* might address this issue in the context of a capital case. The second objective of SB 1413 was to require the post-conviction hearing closer in time to the trial; Judge Cattani believed that would result in witnesses having a fresher and more reliable recollection; he also anticipated that a consequence of an earlier PCR proceeding would be the loss of fewer records from counsels' files. Mr. Zick added that the Attorney General would consider filing a rule petition to accomplish objectives similar to SB 1413.

Mr. Logan responded that the Supreme Court reverses some capital cases on direct appeal, and that requiring a post-conviction proceeding in those cases would be "like pouring money down the drain." He said that PCRs are incredibly expensive, and a petition that was required in a case that the Court would currently reverse on direct appeal would constitute an unnecessary expense of about half-a-million dollars. Although neither the Arizona Prosecuting Attorneys Advisory Council nor the Arizona Judicial Council took a position on SB 1413, county governments bear most of the cost of a PCR, and they generally opposed the legislation. Judge Cattani responded that when taking a longer-term view of a capital case, it is more expensive to incur a reversal ten or more years into the post-conviction process; having the PCR early may require additional costs sooner but avoid even greater costs later. He added that most states have a process where a defendant can raise ineffective assistance of trial counsel on direct appeal, and that the proposed changes would align Arizona's procedures with those used in a majority of death-penalty states.

Mr. Landau advised that the Arizona Judicial Council was unable to take a position on the bill because SB 1413 failed prior to an upcoming Council meeting. Although Mr. Landau took a neutral position on the legislation, he had recommended that it have a delayed effective date to allow for the adoption of appropriate procedural rules by the Supreme Court. He added that there remains a possibility of revival of the legislation during the current session, although he is not aware of any attempt to do so at this time. Mr. Landau also mentioned that HB 2307 is pending in the current session; that bill would streamline the process for court approval of attorney fee billings.

On the subject of statutes, Ms. Hallam brought up A.R.S. § 13-759, and noted that so-called "push warrants" designed to "push" a defendant's case into federal court for a habeas proceeding are no longer necessary in light of the provisions of the Anti-Terrorism and Effective Death Penalty Act. Federal stakeholders who were present at today's meeting shared this view, and they added that the process of issuing "push warrants" creates an administrative burden on the federal courts. Ms. Hallam is considering filing a petition to amend Rule 31.17(c) that would

allow the Supreme Court to issue an execution warrant some time after it has denied a petition for review, rather than contemporaneously with the denial.

**2a. Status reports: Maricopa County Superior Court.** The Chair asked for status reports.

Judge Welty reported that there are currently sixty-nine capital cases pending in the Maricopa County Superior Court. Five of these cases are pending non-capital sentencing. Two of the cases are in trial, and five more cases have firm dates for trials by June. There are also thirty-seven pending petitions for post-conviction relief, although several of the cases are stayed pending appointment of new counsel, determinations of competency, or waiver requests. Judge Welty added that the court makes early determinations to assure that appointed trial counsel will be able to get a new case to trial within two years. The presiding criminal judge hears all motions to continue a capital case, or for counsel to withdraw.

Mr. Novitsky advised that thirteen first-degree murder cases are currently under review by the Maricopa County Attorney for consideration of a death notice. He confirmed that the number of capital cases has been in the sixties for a couple years. Mr. Logan's number of pending cases is somewhat higher because he staffs cases in which the filing of a death notice is possible. Four cases are on extensions under Rule 15.1. Mr. Patterson noted that all county defender agencies are now at capacity, and new cases are referred to Mr. Logan for appointment of contract counsel. During the current fiscal year (since July 1, 2012), contract counsel have been appointed in four cases.

Ms. Johnson noted that Pima County has six pending cases. Two of these cases are set for trial, two have Rule 11 issues, and one is in the appellate court on special action. She added that after the Pima County Attorney files a death notice, the case likely goes to trial. She said that her office is very selective about its capital cases, and that it files few death notices. The defense is afforded an opportunity to present mitigating evidence prior to filing. Ms. Polk advised that Yavapai County currently has five capital cases. Her process is similar to that in Pima County; the defense is invited to provide mitigation prior to filing a notice, and she will agree to extend the time for filing a notice to allow the defendant to do so. The Chair noted Oversight Committee data for counties other than Maricopa and Pima that shows there have been more than a dozen death notices filed, but one death sentence, during the past five years. He also noted that in fewer than twenty percent of the cases in which the Maricopa County Attorney filed a notice over the past several years did the case terminate with a death sentence. Mr. Novitsky pointed out that a capital case can present a fluid situation, and what is seen at the beginning of a case can change over time. He stated that defense counsel might provide very little information to his office prior to the filing of a notice, and in addition, a new Maricopa County Attorney was elected in November 2010. One member added that elected county attorneys have discretion concerning which first-degree murder cases warrant the filing of a death notice, and that each county attorney is cognizant of his or her cost issues associated with the filing of a notice.

**2b. Status reports: appeals and PCRs.** Ms. Hallam advised that there are seventeen pending capital appeals. Ten of these cases are still in the briefing or transcript-gathering stages. She noted a continuously decreasing number of notices of appeal that were filed annually over the past few years. She has worked diligently to appoint counsel for a PCR fairly soon after the

Court affirms a conviction on direct appeal. She added that counsel withdrew in a couple older PCRs and she is looking for new counsel on those cases now.

**3. Recruitment of capital PCR counsel.** Mr. Schaye and Mr. Hirsh reported limited success in Pima County in recruitment of attorneys for capital PCRs. The Chair advised that he is also reaching out to attorneys and judges to recruit PCR counsel, and at the same time he is awaiting information concerning Maricopa County's screening committee. Mr. Belanger noted that a few large national law firms do capital PCRs on a pro bono basis, and that these firms absorb the cost of mitigation and case investigations as well. Arizona's \$100 hourly rate of compensation may not even cover the cost of an attorney's office overhead. The Chair noted that the AJC tabled the Oversight Committee's recommendation that the hourly rate be increased to \$175 because of its concern with the impact this rate increase could have on the counties, which pay this cost. The Chair feels that an hourly increase to \$125 would not be sufficient incentive to attract new, qualified counsel to PCR work. Mr. Logan advised that the hourly rate for trial counsel is now \$125, that an increase in the PCR rate would probably result in trial counsel's rate also going up, and that the added cost to the counties could be millions of dollars. Mr. Belanger asked whether anyone has calculated the cost savings for counties if there were fewer death notices filed. He believes that the system will work better with fewer cases and with attorneys who are better qualified, and that financial issues concerning capital cases would be addressed best by cost savings from filing fewer of them.

Judge Welty provided an update on Maricopa County's screening committee. One-third of the trial lawyers are currently under review by the committee, and the committee is functioning as envisioned by the local administrative order that established it. Mr. Logan added that evaluations of the initial group of attorneys took longer than anticipated because the committee needed first to establish its policies and procedures, but that the process is moving faster now. The screening committee offered to review capital PCR attorneys who are residents of Maricopa County, regardless of where the case is pending, and while the offer is still open, it has not been accepted. The members also discussed the likelihood that attorneys in future PCRs may more likely be from staffed defender agencies, especially if the hourly rate for private counsel is increased. Mr. Logan added that while a statute sets counsel's hourly rate for a capital appeal, in very exceptional circumstances the court might increase the rate for trial counsel. The incentive for a higher-than-usual hourly rate typically relates to timeliness in getting the case to trial, rather than from issues involving complexity of the case.

**4. Rule petitions.** The Chair requested Judge Welty to summarize two rule petitions that he filed in the current rules cycle.

R-13-0010 would amend Rule 32.4 and extend the time to file a capital case petition for post-conviction relief from the current time of 120 days from the date of filing the notice, to eighteen months. Judge Welty explained that the current rule requires successive motions to extend time every sixty days, and with thirty-seven pending capital PCRs in Maricopa County, this results in a large volume of motions.

R-13-0014 was filed because of the 2012 Supreme Court decision of *Missouri v Frye*. The proposed amendment to Rule 17.4 would provide a record concerning claims of ineffective

assistance during the plea bargaining process. Members made the following comments concerning R-13-0014:

- Some jurisdictions do not put a plea offer in writing unless the defendant is considering the offer; but if defendant has no interest, the prosecutor does not reduce it to writing. Would the petition, if adopted, change this practice?
- Would this proposal duplicate *Donald* hearings? Judge Welty believes that it may in some but not all circumstances.
- Judge Welty added that he intends to file an amended petition excluding limited jurisdiction courts from this proposed requirement.

The Oversight Committee took no action on R-13-0014.

The members engaged in further discussion regarding R-13-0010, including these comments:

- Enlarging the time from 120 days to eighteen months is a long leap
- Eighteen months is still short of reality
- Victims will view an eighteen month period as further delay, and it is likely that defendants will request even further extensions thereafter
- It is easier to enforce a deadline when it is a realistic one; advising victims that a petition will be filed in 120 days is not realistic
- In cases where the issues are narrow, a petition can be filed in less than eighteen months
- A federal habeas petition can be filed in less than eighteen months
- The current time limit requires defendants to file multiple requests for extension, which wastes resources
- The 120-day limit may be a carryover from pre-*Ring* trials
- Should judges and practitioners consider eighteen months as the minimum time for filing a petition, or as the maximum time allowed?
- It is better to have a rule with a deadline everyone knows is unrealistic than to have one with a longer but firm deadline

The members had diverse views on what would be a realistic time requirement for filing a petition; members suggested one year, eighteen months, and two years as options. Because there was no agreement on a new time limit, victims, prosecutors, and defense counsel should file individual comments to R-13-0010 stating their respective views. A member then made the following motion:

**Motion:** That the Oversight Committee should file a formal comment in R-13-0010 to express that the 120-day time in the current rule is unrealistic, and that the Committee supports a change to Rule 32.4(c) for capital cases but that it does not support any new and specific time deadline. Further, that the Oversight Committee authorizes the Chair to draft and to file the comment. The motion passed: seven in favor and four opposed.

**5. Capital case training.** The Chair reminded the members that recommendation #3 of the Oversight Committee's 2012 Report to the Arizona Judicial Council was to encourage

continuing training and education for judges, prosecutors, defense attorneys, and others who handle capital cases. The Chair then invited remarks from Paul Julien, the Supreme Court's judicial education officer. Mr. Julien commented that the Education Services Division is ready to assist capital case judges and lawyers with additional training needs. The Education Services Division could meet those needs by in-person or on-line training, bench books, or other educational delivery methods. He recalled that the 170 participants who attended the May 2010 Capital Case Litigation Conference for judges, prosecutors, and defense counsel, which was facilitated by the Education Services Division, gave the two-day program a very high rating. The Chair then opened the topic for discussion. A number of members stated that they preferred targeted, separate training for defenders and prosecutors, rather than a combined session, and the Committee took no further action on Mr. Julien's offer of assistance.

**6. Next steps.** The Chair inquired if there were other areas that the Committee should explore and include in its report to the Arizona Judicial Council later this year. Mr. Schaye would like to see Pima County use a screening committee similar to the one established in Maricopa County. He will circulate a proposal prior to the next Committee meeting. The Chair requested that members send ideas concerning other areas to him or to staff. The Committee will meet next in autumn 2013.

**7. Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 2:00 p.m.