

Capital Case Oversight Committee
State Courts Building, Phoenix
Meeting Minutes: April 18, 2019

Members attending: Hon. Ronald Reinstein (Chair), Jon Canby, Hon. Kent Cattani, Lacey Gard, Donna Hallam, Hon. Kellie Johnson, Dan Levey, Marty Lieberman, Rosemarie Peña Lynch, William Montgomery by his proxy Jon Eliason, Hon. Sam Myers, Christina Phillis, David Rodriguez (late arrival), Natman Schaye, Rick Unklesbay

Guests: Jimmy Jenkins, Ellie Hoecker, Jennifer Garcia, Rebecca Huerta, Jeff Kirchler, Chris Bleuenstein, Patty Stevens, Tim Geiger, John Todd, Jeff Sparks, Jana Sutton, Michele Lawson, Aaron Nash

Staff: Mark Meltzer, Angela Pennington

1. Call to order, introductory remarks, and approval of meeting minutes. The Chair called the meeting to order at 12:02 p.m. The Chair welcomed three new members, and members and guests introduced themselves. The Chair then referred members to the October 31, 2018 draft meeting minutes.

Motion: A member moved to approve those minutes, the motion received a second, and it passed unanimously.

The Chair summarized his presentation of the Oversight Committee's 2018 Report to the Arizona Judicial Council ("AJC") on December 13, 2018, and the AJC's action on the Committee's recommendations.

- The AJC approved a Committee recommendation concerning judicial training for capital case jury selection and establishing a workgroup to review capital case jury instructions. (See further section 7 of these minutes.)
- The AJC also approved a recommendation to increase the statutory rate of compensation for capital post-conviction counsel. Unlike the current statute, the recommendation would place a floor, or minimum amount, on that rate, but not a cap, allowing a county to pay more than the prescribed minimum. However, implementation of this recommendation requires someone to sponsor the legislative change and there currently is no sponsor, so there will be no action on the recommendation until at least the next legislative session.
- The AJC authorized the Oversight Committee to file a rule petition concerning the post-judgment appointment of counsel in a capital case, and the Committee filed this petition in January, number R-19-0006. (See further section 4 of these minutes.)
- The AJC did not approve a recommendation regarding an amendment to Criminal Rule 6.8(e) that would add the word "meaningfully" before the words "associate with a lawyer," but the Chair suggested that the Oversight Committee

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consider filing a petition in the next rules cycle that would propose a comment to the rule to clarify the role and responsibilities of associated counsel.

Finally, the Chair reviewed with members Administrative Order No. 2019-29, which extended the term of the Oversight Committee until December 31, 2021. The Order directs the Committee to “continue to identify issues affecting the administration of capital cases and propose recommendations to improve the judicial administration of these cases.” The Order requires the Committee to submit two progress reports to the AJC, with the first report due by October 2020.

2. Status reports. The Chair provided a status report concerning pending capital cases in four counties. Gila and Santa Cruz counties recently filed their first death notices in decades. The Gila case is a triple homicide, and the Santa Cruz case involves the death of a law enforcement officer. The Chair reported that there are two capital cases pending in Yavapai County, and 8 pending capital cases in Pinal County. Several of the Pinal cases are homicides involving prison inmates. A Yavapai jury recently returned a death verdict, the first such verdict in that county in more than 10 years.

Judge Myers reported 48 capital cases pending trial in Maricopa County, and trials in progress in 3 cases. In addition, a judge ordered resentencing in a capital petition for postconviction relief; that order is the subject of a petition for review. There are 28 pending petitions for post-conviction relief in capital cases; 2 are pending evidentiary hearings, 9 have been fully briefed, and 17 are in the briefing stage. Judge Myers added that Judge Patricia Starr will become the presiding criminal judge in Maricopa County at the midyear judicial rotation. Mr. Eliason noted that his figures are generally compatible with the data presented by Judge Myers. Ms. Phillis reported that her office has fully staffed capital teams in 10 cases where the State might file a death notice, as well as 4 cases in which the notice was withdrawn. Mr. Unklesbay advised that Pima County now has 3 pending capital cases; his office filed a death notice earlier this year on a prison homicide, and another in a case involving a double homicide of minors.

Ms. Gard advised that there are 9 pending capital appeals in the Arizona Supreme Court, and Ms. Hallam concurred with this figure. There are 36 cases pending in federal district court; 24 are on initial habeas review, and 12 are remands from the Ninth Circuit based on *Martinez*, *McKinney*, or both. There are 16 pending cases in the Ninth Circuit, and 12 cases where inmates have exhausted their post-judgment remedies. Ms. Hallam added that there are 16 petitions for review of capital cases pending in the Arizona Supreme Court, although some of these are successive petitions.

Members proceeded to a discussion of pending rule petitions affecting capital cases.

3. Discussion of petition R-18-0038. Mr. Lieberman filed this petition to amend Rule 17.4. The petition’s objective was to promote plea discussions in capital cases because of a concern among Maricopa County prosecutors that if they make non-death plea offers, the defendant will introduce those offers as mitigation evidence. The Arizona

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Prosecuting Attorneys Advisory Council filed a comment supporting the proposed amendment. However, Mr. Lieberman withdrew the petition yesterday, and in that filing said, "Upon vetting with the capital defense bar, it is clear that the rule has too many potential unintended consequences which could affect the constitutional rights of capital defendants." He noted that while stakeholders did not oppose the goals of the petition, they could not fashion a rule to achieve them.

The defense bar concluded that defendants have a constitutional right to introduce mitigation evidence, which could include plea offers, and court rules cannot limit this right. Although a Maricopa prosecutor supported R-18-0038, a Pima prosecutor advised that the issue the petition sought to address is not problematic in Pima county, and that Pima County prosecutors and defense counsel routinely engage in plea discussions without the need for the proposed rule amendment's evidentiary limitation. Before Mr. Lieberman withdrew the petition, he made inquiries to various jurisdictions within the Ninth Circuit and concluded that this is a Maricopa-centric issue. The Chair thought that using a settlement judge as an intermediary could diffuse the issue for Maricopa County prosecutors, but members did not otherwise address the matter.

4. Discussion of petition R-19-0006. The Oversight Committee filed this petition. The proposed amendment to Rule 31.5 would permit the Supreme Court to appoint counsel on a direct capital appeal. Existing authority already authorizes the Court to delegate the appointment of counsel on a capital petition for post-conviction relief to a superior court presiding judge.

No comments have been filed yet on the Court Rules Forum. However, if the Court adopts the petition, a member asked about the source of the Supreme Court's pool of appellate counsel. The Chair anticipated that the Court would utilize Maricopa County's existing list of vetted attorneys and consult further with the County's Office of Public Defense Services. Ms. Hallam noted that she would discuss the process for Supreme Court appointment of appellate counsel with the Chief Justice, and that she might need to prepare an application form for appellate applicants (she already has a form for capital PCR applicants). Ms. Hallam also explained that defender agencies are sometimes selected as appellate counsel, and she would need to establish a process for confirming when those appointments are made to avoid the Court redundantly appointing counsel upon receipt of a capital notice of appeal. Finally, although the Maricopa Review Committee is apparently willing to continue vetting attorney applicants for capital appeals, its process is geared for Maricopa County, and there will be capital appeals from other counties, so a vetting process for attorneys outside Maricopa County will require further consideration.

5. Discussion of petition R-19-0008. The Maricopa County Attorney filed this rule petition, and Ms. Stevens joined Mr. Eliason in making the presentation. Anecdotally, that office, as well as the superior court, occasionally receive concerns from former jurors who have been contacted by investigators, yet these jurors do not want to answer investigators' questions but simply want to forget a traumatic experience and leave the

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case in the past. The petition seeks to enhance juror privacy by three rule amendments. It would amend Rule 18.5 by prohibiting a party or the party's representative from contacting a prospective or seated juror who has not been discharged. An amendment to Rule 22.5 would require the court to inquire of empaneled jurors upon their discharge whether they wished to refuse—or opt-out—of speaking with anyone about the case in the future. And an amendment to Rule 32.1 would provide a process for a party to obtain a court order requiring jurors who opted-out to discuss their previous jury service. A parallel bill, SB 1313, was introduced in the current legislative session but was recently the subject of a “strike-everything” amendment and is no longer moving forward.

Although no one objected to the principle expressed in the proposed amendment to Rule 18.5, some members thought this principle was universally understood and that a rule amendment was unnecessary. One member, citing previous and similar rule petitions and bills, characterized the entire petition as recycled. The member contended that recommendations made in the Power of Twelve report more than 20 years ago did an adequate job of protecting juror privacy, and that new issues had not surfaced since then that needed to be addressed by rule amendments. The member suggested that a juror who does not want to speak with an investigator can simply refuse to do so. Moreover, this member believes that the court should encourage former jurors to speak with investigators. On occasion, a defendant will need a declaration from a former juror to support a colorable claim of juror misconduct. And a defendant cannot determine if there was jury misconduct without speaking to jurors. The member also suggested that affording an opt-out option when discharging the jury was poorly timed because the underlying claim of misconduct might not be raised until years into the future. The member intends to file a comment opposing the rule petition.

A judge member observed that jurors who have been contacted by investigators after they've been discharged have well-grounded concerns that the defendant knows where they live. It is disingenuous to identify jurors by number rather than by name to preserve their anonymity during the trial, when that anonymity might cease to exist after the trial. Moreover, a few investigators have reportedly misled former jurors about their identity, e.g., saying “I'm from the government” or “I'm from the county” rather than “I'm from the public defender's office” or “I am here for the defendant.” Another member emphasized that professionalism is essential when anyone contacts former jurors. Members concurred that these were statewide concerns.

One member suggested that giving jurors the alternative to opt-out was like a victim's right to decline an interview, but another member thought that giving former jurors that option could result in every juror declining an interview. The judge member proposed that the court send a letter to the former juror advising that the defendant had requested an interview and requesting the juror's cooperation, but another member thought a juror might construe this as official permission to decline an interview. Rather, the member would prefer the court to encourage former jurors to speak about the case. Another member thought that the draft rule was so broad that it might impair the ability

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of federal investigators to speak with jurors during habeas proceedings and could lead to additional litigation in the district court concerning post-judgment interviews.

The Chair observed that years ago, jurors appeared comfortable speaking as a group with counsel in the courtroom after a trial, even after the trial of a death penalty case. However, these conversations might be insufficient for defendants who later seek information for post-conviction relief. The Chair suggested that if the petition goes forward, the proposed amendment to Rule 32.1 would be more appropriately located in Rule 18 or Rule 22, because the proposal would also impact motions for new trial under Rule 24, and because Rules 18 and 22 are specifically about jurors. Ms. Stevens agreed with that suggestion. But after considering the members' varying viewpoints on this petition, the Chair declined to file a comment on the Committee's behalf.

6. Discussion of petition R-19-0012. The Rule 32 Task Force filed this petition, and because several members of that Task Force are also members of the Oversight Committee, those members had previously presented draft Rule 32 provisions to this Committee. Today's agenda only asked the Oversight Committee to review proposed Rule 32.1(h). Ms. Hoecker, who had prepared an analysis of Rule 32.1(h) in support of the majority view, cited a concurring opinion in *State v. Miles* that noted the standard for relief in the current rule might require clarification. Ms. Hoecker explained that the Task Force had carefully considered Rule 32.1(h) and agreed to amend it by clarifying that the standard is an objective one. She added that a minority proposal would do more than simply clarify the standard; it would make a substantive change to the rule and would eliminate the narrow avenue of relief the rule currently affords. Ms. Gard spoke for the minority view. She said that *Miles* presented what appeared to be an ineffective assistance of counsel claim characterized as an (h) claim. She contended that actual innocence for the death penalty can be objectively established only by showing actual innocence of any aggravating factors.

The Chair concluded that Oversight Committee members would probably be as divided on this issue as the Task Force members, who were almost evenly split. Because that division and the respective positions were fully discussed in R-19-0012, the Chair saw no need for a vote by the Oversight Committee on which view it preferred, and members agreed.

7. Judicial training; jury instructions. The superior court in Maricopa County, in conjunction with the Education Services Division of the Administrative Office of the Courts, will conduct a seminar on capital cases for judges statewide on May 30 and 31. Judge Myers reviewed the seminar agenda, which was in the meeting materials and that included sessions on jury selection. Although the training is designed for judges, several attorneys, including members of the Oversight Committee, will serve as panelists for selected items on the two-day agenda. Some of the attorneys had requested permission to attend other sessions that are related to their panel topics. The initial reaction was that having attorneys attend those other sessions might inhibit discussions among judges attending the program, but after further consideration, members concurred that attorney

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participants should have the opportunity to listen to presentations by related panelists. This might also help these attorneys to avoid repeating matters that judge panelists had already presented. Judge Myers will attempt to modify the agenda to facilitate the attorneys' broader participation.

At its December meeting, the AJC considered the subject of judicial training on jury selection in conjunction with the topic of jury instructions in capital cases. The Chair proposed establishing a workgroup that would suggest improvements to penalty phase instructions. The workgroup would make recommendations to the State Bar, because jury instructions in Arizona are promulgated by the State Bar. Judge Myers, who currently serves as chair of the State Bar's criminal jury instructions committee, observed that although no new capital case jury instructions are pending, attorneys who do not practice capital litigation have previously offered constructive suggestions concerning those instructions. The Chair acknowledged this observation and added that members of this new workgroup need not be Oversight Committee members. Anyone who is interested in serving on this workgroup should contact Oversight Committee staff.

7. Call to the public; adjourn. There was no response to a call to the public. The meeting adjourned at 1:23 p.m.

**Capital Case Oversight Committee
State Courts Building, Phoenix
Meeting Minutes: December 3, 2019**

Members attending: Hon. Ronald Reinstein (Chair), Jon Canby, Hon. Kent Cattani, Lacey Gard, Hon. Kellie Johnson, Dan Levey, Marty Lieberman, Rosemarie Peña Lynch, Allister Adel as successor Maricopa County Attorney, Hon. Patricia Starr, Christina Phillis, David Rodriguez, Natman Schaye, Rick Unklesbay

Absent: Donna Hallam

Guests: Jennifer Garcia, Charlotte Merrill, John Todd, Jeff Kirchler, Patty Stevens, Jon Eliason, Jennifer Liewer, Vince Goddard, Shawn Haught, Tim Geiger, Jason Easterly, Colleen Clase

Staff: Mark Meltzer, Angela Pennington

1. Call to order, introductions, and approval of meeting minutes. The Chair called the meeting to order at 12:02 p.m. The Chair welcomed Allister Adel, who the Board of Supervisors recently appointed as the Maricopa County Attorney, and members and guests introduced themselves. The Chair then asked members to review the April 18, 2019 draft meeting minutes. There were no corrections.

Motion: A member moved to approve those minutes, the motion received a second, and it passed unanimously.

2. Status reports. Ms. Adel reported that there are 42 pending capital cases in Maricopa County. Ms. Stevens, her Capital Litigation Bureau Chief, provided additional information. A half dozen pending capital cases were recently resolved with pleas. In addition, 3 potential capital cases were resolved by pleas before the filing of a notice of intent to seek the death penalty. In six other cases, the County Attorney moved to dismiss previously filed notices. Judge Starr reported 39 pending cases; the discrepancy between her figure and the County Attorney's number stems from the manner of counting cases that were resolved by plea or are pending sentencing. Judge Starr also reported that one of the 39 pending cases is in the penalty phase of a trial. She added that there are 30 capital cases in which notices requesting post-conviction relief have been filed. That figure includes two cases that are still pending on certiorari following a direct appeal. For the other 28 PCRs, 14 are in the initial briefing stage, 8 have been fully briefed and are assigned for ruling, 4 are pending an evidentiary hearing, and the remainder are pending before the Arizona Supreme Court on petitions for review. Ms. Phillis reported that the Office of Public Defense Services has staffed 43 pending capital cases. She has about a dozen additional cases in which a capital team is assigned pending the County Attorney's decision to file a notice of intent, or that remain fully staffed after the withdrawal of a notice. She also has staffed 25 capital cases that are in the post-conviction stage, and 5 capital cases that are on appeal.

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Mr. Rodriguez reported that Pinal County has 7 pending capital cases. His office also has assumed responsibility for a capital post-conviction action because of a conflict in Pima County. Mr. Unklesbay advised that since his April 2019 status report, a plea with a natural life sentence was entered in one Pima County case, and a death notice was filed in another case, so Pima now has 3 pending capital cases. The Chair noted that Yavapai and Gila each have one pending capital case. Santa Cruz had a capital case involving the killing of a police officer, which recently resolved with a plea to a natural life sentence.

The Chair provided data from Ms. Hallam. There are 8 direct appeals pending in the Arizona Supreme Court. No notice of appeal has been filed in a Maricopa County capital case in calendar year 2019 to-date, but one was filed this year in a Yavapai County case. There are 16 pending petitions for review of post-conviction rulings by the superior court; this number includes first and successive petitions. The Supreme Court delegated to the superior court in Maricopa County the appointment of capital PCR counsel in two cases. The Chair observed that the superior court in Maricopa County has an available pool of attorneys for PCR appointments because it has established a Capital Defense Review Committee that reviews the attorneys' applications and assesses their qualifications. But the Chair asked whether other counties will have a similar mechanism when they need to make appointments. Because of the current dearth of capital cases in Pima County, the need to establish a process there is not urgent. But the Chair suggested that if the Supreme Court in the future delegates appointment authority in capital PCR actions to other counties, those counties might request Maricopa's committee to review the qualifications of potential appointees.

Ms. Gard reported on the Attorney General's capital cases. Her office has 27 pending capital post-conviction proceedings in the superior court: 23 in Maricopa, 2 in Mohave, and 2 in Pima. She counts 9 cases on direct appeal to the Arizona Supreme Court. In the federal system, her office has 24 cases in the district court on initial review, 9 cases in the district court on remand from the Ninth Circuit, and 17 cases in the Ninth Circuit. There are also 14 cases in which appeals have been exhausted (including one case in which the defendant waived further Rule 32 proceedings), and 4 more cases where the appellate review process is nearing conclusion.

3. Discussion of a draft comment to Rule 6.8. During the April 18, 2019 meeting, the Chair advised that the Arizona Judicial Council ("AJC") did not approve a recommendation regarding an amendment to Criminal Rule 6.8(e) that would have added the word "meaningfully" before the words "associate with a lawyer." However, the Chair suggested at the April meeting that the Committee might consider filing a petition proposing a comment to Rule 6.8 that would clarify the role and responsibilities of associated counsel. Staff prepared a draft comment for the members' discussion today. The draft says,

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An appointed attorney under Rule 6.8(e) must associate with a lawyer who meets the qualifications of Rule 6.8. The amount of time expended in the association, and the nature of the relationship between the appointed attorney and the associated lawyer, will vary based on the facts and issues of each case, but the time must not be perfunctory, and the relationship must not be superficial. The association between the appointed attorney and the associated lawyer must be meaningful, purposeful, significant, and ongoing.

The draft included an optional last sentence that said, “The court may require the associated lawyer to appear and participate in any pre-trial, trial, or post-trial proceeding.”

The Chair recently shared the draft comment with Ms. Phillis and her counterpart in Pima County, Dean Brault, who agreed the comment was helpful in describing the nature of the relationship, but who also believed that the optional sentence was overreaching and unnecessary. Moreover, Ms. Phillis and Mr. Brault have developed written expectations for associated counsel that they anticipate circulating next month. Committee members at today’s meeting generally agreed that the proposed comment would provide some guidance, although by itself it would not prevent 6.8(e) counsel from failing to have a meaningful relationship.

One member asked whether this proposed comment would affect Arizona’s efforts to opt-in under the federal Anti-terrorism and Effective Death Penalty Act. Although no one could say with certainty, members believed it would not, especially because this would be proposed as a comment rather than a rule. One member observed that the failure to have a meaningful association is a recurring issue in post-conviction proceedings, and whatever guidance the comment could provide might be useful in assuring for opt-in purposes that counsel has been effective. Another member liked that the comment mentioned that the relationship “will vary based on the facts and issues of each case,” which embeds desirable flexibility.

One other member thought the experience of the Rule 6.8(e) attorney should be included in the text of the comment (i.e., “...will vary based on the facts, the issues, and the level and subject matter experience of appointed counsel...”) The member believed that experience, such as previous experience with DNA evidence or a lack of that experience, could affect the nature of the relationship and the need for supervision. As another example, an attorney might have successfully litigated pretrial motions in a capital case or obtained an acquittal during the guilt phase of a jury trial, which together could indicate that the attorney had solid capital case experience notwithstanding that the prior cases did not provide the attorney with the experience of a penalty phase trial. At least two members also supported inclusion of the optional sentence, and even changing the word “may” to “should,” to remind the trial court of its authority to order the associated lawyer to appear and participate, and to assure that the defendant has fully qualified counsel at each substantive court proceeding.

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The Chair advised that just as the AJC considered the Committee's previous proposal to amend Rule 6.8(e), it also would need to consider the Committee's proposal to add a comment to the rule. Because the Committee won't report to the AJC until October 2020, members have time to further consider the text of the draft comment and the views expressed during today's discussion.

4. Jury workgroups. Members had previously discussed a workgroup that would consider revisions to the penalty phase instructions. See, for example, pages 1 and 6 of the April 18, 2019 Committee minutes. Penalty phase instructions can be difficult for jurors to understand, and the current jury instructions might even be internally contradictory. A member added that the moral issue inherent in a penalty phase is inadequately explained and might get lost amid other lengthy instructions.

The Chair advised that although members had also contemplated a second workgroup that would consider the jury selection process, both groups might involve overlapping membership, so the instructions workgroup will proceed first. Judge Starr, who serves as chair of the State Bar's Criminal Jury Instructions Committee, will lead the jury instructions workgroup. Mr. Schaye, who was an early proponent of both workgroups (see his article, "Revisiting the Power of Twelve: Fairness and Capital Case Juries" in the July/August 2019 issue of the *Arizona Attorney*) has arranged for two subject matter experts to assist the workgroups. One of the experts, Dr. Robert Leonard, is a professor of linguistics at Hofstra University and has extensive forensic experience, including the analysis of language evidence in capital cases. The other, Scott Sundby, is an author and a law professor at the University of Miami and has done research for the Capital Jury Project. Links to the biographies and backgrounds of both experts were in today's meeting materials.

The Chair reviewed a list of individuals who have already volunteered to serve on these workgroups, and he invited others who might be interested to contact him. The workgroups should balance prosecution and defense perspectives. Mr. Schaye suggested that former jurors should be included as workgroup members, but the Chair will defer that suggestion to the workgroups. The Chair reminded members that the State Bar rather than the Supreme Court promulgates the Recommended Arizona Jury Instructions ("RAJIs"). Accordingly, the jury instructions workgroup will report its recommendations to the Oversight Committee, which in turn will transmit them to the State Bar for consideration.

5. Call to the public; roadmap; adjourn. There was no response to a call to the public. The Chair advised that the Committee will meet again in the spring of 2020. He reminded members and guests that the new rules on post-conviction relief become effective on January 1, 2020.

The meeting adjourned at 12:49 p.m.