

**Capital Case Oversight Committee
State Courts Building, Phoenix
Meeting Minutes: October 27, 2021**

Members attending: Hon. Ronald Reinstein (Chair), Allister Adel by her proxy *Kirsten Valenzuela, John Canby, *Hon. Kent Cattani, *Lacey Gard, Donna Hallam, Hon. Kellie Johnson, Dan Levey, Rosemarie Peña Lynch, Hon. Patricia Starr, David Rodriguez, *Natman Schaye, Rick Unklesbay

Absent: Marty Lieberman, Christina Phillis

Guests: Hon. Pamela Gates, Ryan Green, Tim Agan, Jeff Kirchler, Gary Beren, Tim Geiger, *Jennifer Garcia, *Colleen Clase, Jeff Sparks, Jennifer Albright, *Carlos Carrion, *Amanda Martin, *Ellie Knowles, *Joshua Spears, *Nicholas Chapman-Hushek, *Brian Gold

Staff: Mark Meltzer, Angela Pennington

(An asterisk before a name above indicates virtual attendance)

1. Call to order, introductions, and approval of meeting minutes. The Chair called the meeting to order at 12:09 p.m. Inasmuch as there were no capital jury trials during the ascendancy of the pandemic in 2020 and its continuation into 2021, this is the first Oversight Committee meeting since December 2019. The Chair announced the recent or pending transitions of several committee members to new positions. Ms. Gard will take the bench in the Pinal County superior court next week; Mr. Sparks will be her successor in the Attorney General’s capital litigation section. Ms. Valenzuela has become the capital bureau chief for the Maricopa County Attorney. Ms. Peña Lynch left Maricopa County’s Office of the Legal Advocate (“OLA”) and is now director of the county’s Office of Public Defense Services (“OPDS”). The county is interviewing for a new OLA director. Ms. Phillis, who was formerly the director of OPDS, is now working in Pinal County’s juvenile court system. Mr. Lieberman retired as director of the Maricopa Office of the Legal Defender. In addition, Mr. Geiger, who was a capital staff attorney for the superior court, is now a Supreme Court staff attorney. The Chair also recognized Mr. Levey for recently receiving a national honor—the John Gillis Leadership Award—from the Parents of Murdered Children. A round of introductions of committee members and guests followed these announcements.

Later, the Chair asked members to review the December 3, 2019 draft meeting minutes. There were no suggested corrections.

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

2. R-21-0020 and amendments to Criminal Rules 18.4 and 18.5. On August 30, 2021, the Court entered an Order in rule petition number R-21-0020 that amended

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Criminal Rules 18.4 and 18.5 to effectively eliminate the right to peremptory challenges of potential jurors in a criminal trial. These rule changes are effective January 1, 2022 and apply to all cases in which the first day of jury selection occurs after that date. The Court's rules agenda minutes requested an existing ad hoc Court committee, the Task Force on Jury Data Collection, Practices, and Procedures ("Task Force") to consider whether the for-cause provisions in Rules 18.5(d) ("voir dire examination") and 18.5(e) ("scope of examination") should be expanded or otherwise modified to accommodate the abolition of peremptory strikes. The Chair invited Judge Gates, chair of that Task Force, along with a prosecutor, Ryan Green, and a defense attorney, Tim Agan, to present on the anticipated effect of these rule changes, including the impact of these changes on death penalty jury trials.

Judge Gates explained that the Court had initially established the Task Force to study matters such as summoning juries, juror lists, and barriers to service, to ensure that a jury was a representative cross-section of the community. The Court by administrative order temporarily reduced the number of peremptory challenges during the pandemic. After the Court entered the R-21-0020 Order and made the elimination of peremptory challenges permanent, it referred to the Task Force for further study the expansion of challenges for cause and judicial training under the amended rules. To respond to the Supreme Court's directive, a subgroup of members of the Task Force agreed to participate on the Statewide Jury Selection Workgroup ("SJSW"). Additional members were added to the SJSW to ensure representation from various stakeholder groups, including lawyers with diverse practice areas in urban and rural counties, lawyers with civil and criminal experience, as well as individuals with practice area specialization.

Judge Gates advised that the rule amendments will continue to permit trial judges to conduct voir dire, but the SJSW will recommend the complementary use of written questionnaires for jury selection. These questionnaires will make the process of obtaining information about potential jurors more productive, because the questionnaires will allow jurors to candidly provide written answers to questions that jurors might otherwise be uncomfortable answering orally in open court. The questionnaires will also facilitate prescreening jurors for such things as medical or other hardships, thereby avoiding the need for those individuals to travel to the courthouse, only to be excused quickly after arrival.

The SJSW is developing template questionnaires, which will be available online, as well as Excel spreadsheets for organizing the jurors' responses to questions, so the process also will be more efficient. The initial templates will be supplemented and improved as the court gains more experience with the written questions. Revised questionnaires might actually be shorter and the questions more focused on issues in the case at hand. Mr. Green added that capital litigation attorneys are already familiar with juror questionnaires, but in the future, they will become more commonplace in non-capital trials. Mr. Agan believes that written questionnaires might front-load information for counsel and therefore reduce the time to acquire this information during oral

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examination. He also proposed adding to the questionnaire a short and neutral statement of the case, which might help jurors understand the context of the issues and the reasons for mitigating juror bias. Judge Gates noted that although oral voir dire might require more time in order to develop a basis for a challenge for cause, the elimination of peremptory challenges will also eliminate the time that attorneys would otherwise need to contemplate and exercise their peremptory strikes. An increased amount of time might therefore be offset by a reduction in time.

The SJSW recommendations also will discourage attempts to rehabilitate a potential juror by asking leading questions, e.g., “can you be fair?” that elicit yes-no responses. The SJSW believes that rehabilitation in this manner is conclusory and ineffective in overcoming a potential juror’s long-held biases and life experiences. The SJSW also intends to develop scripts for judicial officers to use during voir dire that emphasize the need for jurors to be candid. References in the scripts to “bias” will explain what that means so that jurors can self-identify their biases in a more insightful manner. Although the rules eliminate peremptory challenges, a new rule amendment nevertheless allows the parties to stipulate that the court excuse a potential juror.

Will potential jurors who have limited writing abilities be able to adequately express their feelings or biases in a written questionnaire? Judge Gates responded that in addition to open-ended questions, the questionnaire will also allow multiple choice answers or selections from a list, as well as narrative responses. Another question asked whether the elimination of peremptory challenges will reduce the number of summoned jurors or shorten the length of trials. These questions and other issues will be considered by academic researchers, who also will collect pertinent data. One member observed that even with peremptory challenges, counsel still does not have a sufficient number of challenges to strike all the jurors that counsel would like to strike in a capital case, so what effect will the complete elimination of peremptory challenges have in a capital case? The presenters concurred that it’s too early to know the effect the new process will have on capital case jury trials. Judge Gates added that judicial training will encourage trial judges to be patient and thoughtful in considering for cause challenges under the new rules. Judicial training will include best practices and the use of new technology and tools. The superior court in Maricopa County has a separate work group that is currently preparing to implement the new processes.

The Chair noted that Arizona’s new approach to trial jurors has received national attention, and he thanked Judge Gates, Mr. Green, and Mr. Agan for their presentations.

3. Status reports. The Chair observed that there had been little movement in the number of new death notices or dispositions since the onset of the pandemic. He then requested reports on the current status of capital cases.

Judge Starr reported that 40 capital cases in Maricopa County are pending trial; trial commenced in one of those cases this week. This is the first capital case trial since the pandemic began. Maricopa also has 29 pending capital post-conviction cases: 13 are

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pending briefing, 5 are pending an evidentiary hearing, and one is pending an initial ruling. There are also 10 successive petitions at various stages, but many of those are stayed pending an opinion from the Arizona Supreme Court in *State vs. Greene*. PCR dispositions have been delayed during the pandemic because of travel restrictions and the inability to interview witnesses. The Maricopa County Attorney generally concurred with Judge Starr's numbers, and added that in the past six months, two defendants pled, and the County Attorney withdrew a notice of intent in two cases. The office currently has 28 new first degree murder cases under review for potential filing of death notices. Ms. Peña Lynch noted that the Maricopa's Office of Public Defense Services has staffed 40 pending capital cases. There are extensions to file a notice in an additional 14 cases, which are also staffed. Altogether, that office has assigned defense teams to 67 cases.

Pima County currently has no capital cases; it had two pending cases in 2020 but the County Attorney withdrew both notices. Pinal County had 7 cases, but it recently resolved on by plea and it now has 6 cases. The Chair noted that Yuma County now has one capital case, and Yavapai County has two cases. Santa Cruz and Gila counties both resolved their respective single capital cases, so there are now 4 counties (Maricopa, Pinal, Yavapai, and Yuma) that have pending cases.

Ms. Hallam reported that Supreme Court currently has 6 capital cases on direct appeal. One notice of appeal was filed in 2020, and none have been filed in 2021. The Supreme Court has 7 pending capital case petitions for review. Mr. Sparks reported that the Arizona Attorney General has 31 pending initial petitions for post-conviction relief and 11 successive petitions in state courts. He also noted 32 initial habeas proceedings in federal district court and 26 cases in the Ninth Circuit, 5 of which are on remand to the district court. Mr. Sparks further noted that there are 22 cases in which the defendant has exhausted appeals. He added that the Department of Corrections is testing its drugs and resolving drug protocol issues and when that is completed, the Attorney General will request warrants in two cases.

4. Capital jury instructions workgroup. There are two Oversight Committee workgroups, one on capital case jury instructions and the other on capital case jury selection. The instructions workgroup is proceeding first, which is fortunate because it might take some time to determine the impact of R-21-0020, discussed in item 2 above, on jury selection.

Judge Starr leads the instructions workgroup. The workgroup's first meeting was delayed due to the pandemic, but it held its initial meeting on October 8, 2021. Today's meeting materials include a written summary of that workgroup meeting. The workgroup's primary objective is to revise the aggravation and penalty instructions to make them more understandable to lay jurors, while also correctly articulating legal requirements. Dr. Robert Leonard, a professor of linguistics at Hofstra University, joined the first meeting. Judge Starr is attempting to locate questions jurors may have raised in previous capital trials regarding their instructions, which might be illuminating. The workgroup will consider initial draft revisions to the instructions at its second meeting.

5. Report and recommendations to the Arizona Judicial Council. Administrative Order No. 2019-29 extended the term of the Oversight Committee to December 31, 2021. The Chair presented an interim report to the Arizona Judicial Council in December 2020, as required by that Order, and he will present the second required report to the Council on December 9, 2021. The Chair asked members for their suggestions concerning the content of that report, and in particular, whether the members would recommend another extension of the Committee's term. The Chair anticipates that if the Court extends the term, it could allow the Committee to meet on an as-needed basis rather than on a regular schedule. One member expressed reservations, but the remaining members, each of whom spoke on this subject, supported an extension of the term. Their comments noted that the Oversight Committee should exist for as long as Arizona has the death penalty; and that the Committee offers a forum for communicating and discussing issues regarding death penalty litigation and "keeps a finger on the pulse of capital litigation." One member observed that the Oversight Committee might be valuable in ways we cannot fully appreciate now.

The report will accordingly include a recommendation to extend the Committee's term. The Chair will discuss with the Chief Justice the composition of the members because although the current members are agreeable to reappointment, the transitions noted in agenda item 1 might require a reconfiguration of membership. Also, because the Chair will need to draft and submit the 2021 report before the Committee meets again, a member made, the following motion:

Motion: The Chair has the members' authority to draft, finalize, submit, and present the Oversight Committee's December 2021 report to the Arizona Judicial Council. The motion passed with one member abstaining.

Finally, the Chair noted that an article by Judge Cattani and Judge McMurdie, about an alternative way a decision to seek the death penalty is made in Arizona, will be published in a forthcoming issue of the Arizona State University Law Review. See the October 31, 2018 Oversight Committee meeting minutes, item 4, for a summary of the initial proposal.

6. Call to the public; adjourn. There was no response to a call to the public.

The meeting adjourned at 1:23 p.m.