

Capital Case Oversight Committee

State Courts Building, Phoenix

Meeting Minutes: May 5, 2016

Members attending: Hon. Ronald Reinstein (Chair), Hon. Kent Cattani, Lacey Gard, Donna Hallam, Kellie Johnson, Michele Lawson, Dan Levey, Marty Lieberman, James Logan, Hon. Sam Myers, William Montgomery by his proxy Tony Novitsky, Daniel Patterson, David Rodriguez by his proxy Lando Voyles, Natman Schaye (All committee members are present personally or by proxy.)

Guests: John Canby, Chris Bleuenstein, Dale Baich, Jennifer Garcia, Diane Alessi, Larry Hammond, Elizabeth Ortiz, Lori Lefferts, Charlotte Merrill, Ellie Hoecker, Carolyn Edlund, Jeff Sparks, Colleen Clase

Staff: Mark Meltzer, Sabrina Nash

1. Call to order, introductions, introductory remarks, and approval of meeting minutes: The Chair called the meeting to order at 12:04 p.m., followed by introductions of members and guests. The Chair then summarized his presentation at the December 2015 meeting of the Arizona Judicial Council (“AJC”). He noted that this is the committee’s first meeting since entry of Administrative Order 2016-11, which extended the committee’s term to December 31, 2018. The Chair reviewed that Order, including its expressed purpose that the committee should continue “to identify issues affecting the administration of capital cases and to propose recommendations to improve the judicial administration of those cases.” The Chair encourages and welcomes the members’ ideas to improve capital case administration. He would like the committee to meet at least twice a year. The Chair then directed the members to draft minutes of the October 29, 2015 meeting that were included in the packet of meeting materials.

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

2. Status reports: The Chair asked members for status reports.

Judge Myers reported that Maricopa County has 66 pending capital cases; 62 of those cases are pending trial. He observed that parties more frequently are filing motions to extend the deadline for filing a death notice. This allows the defendant to develop mitigation evidence and it encourages the resolution of cases on a non-capital basis. Mr. Novitsky added that his office shows 65 pending cases. An additional 7 cases are pending internal review, including some in which a notice to extend the deadline has been filed and prosecutors are awaiting the submission of mitigation evidence. He noted that prosecutors and defense counsel have had productive dialogues concerning possible dispositions on these cases. Mr. Logan advised that his office has provided capital-level

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staffing for 80 cases, 72 of which are active and the balance of which are on deadline extensions. Mr. Logan has been tracking cases in which the County Attorney did not file death notices following deadline extensions; that number is currently 40 cases. Mr. Logan's office has adeptly identified cases that are potentially capital, and the number of those cases has ranged over the last year from the high 70's to the low 80's. He is able to find attorneys for these cases within a day of the defendant's initial appearance.

In Pima County, Ms. Johnson reported that there are 3 pending capital cases, down from 5 pending in October 2015. Mr. Voyles noted that Pinal County now has 15 pending capital cases, but he does not see any new cases in the immediate future, and he expects a few of the current cases will resolve later this year. He added that his office has recently added a new prosecutor with capital case experience. Mr. Logan advised that some private counsel in Maricopa County have appointments on Pinal cases. If there is a potential bottleneck in Pinal County, it would involve the limited number of available defense counsel.

Ms. Hallam said that there were 3 notices of appeal in capital cases in calendar year 2015, but none so far in 2016. There are now 10 capital cases pending in the Arizona Supreme Court. All capital defendants in post-conviction proceedings now have appointed counsel; there is no longer a backlog. Several petitions for review in capital post-conviction proceedings are pending disposition. Ms. Gard reported that the Ninth Circuit stayed some Arizona cases pending the parties' briefing of *McKinney v Ryan* issues. In addition, there are about 18 Arizona cases in various stages of briefing on *Martinez* issues. Ms. Garcia noted that due to a lack of standing, the federal defenders' office did not prevail in a March 2016 decision by the Ninth Circuit in *HCRC v DOJ*, but the office will be asking for a rehearing *en banc*.

3. Related issues: The Chair mentioned the Court's December 2015 opinion in *State v Busso-Estopellan*, which allows admission of a capital defendant's offer to plead guilty with a life sentence in the mitigation phase of the case. The Chair inquired whether the case was having an impact on plea negotiations in capital cases. None of the members indicated that it was.

The Chair also summarized a recent dialogue he had with Mr. Hammond concerning the Oversight Committee's perennial recommendations about increasing the statutory rate of compensation for PCR counsel. The AJC approved this recommendation in 2015, but given the status of the State of Arizona's budget, the Court did not introduce this as part of its current legislative package. The Chair added that if the statutory rate is increased, the counties would be responsible for paying the increased amount. Mr. Logan's office has been working on general changes in Maricopa County's fee structure for appointed counsel. Mr. Logan added that rather than trying to change the dollar amount for the statutory rate of compensation, it might be more productive simply to

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add the three words “not less than” immediately before the dollar figure in the statute. The Chair asked rhetorically whether a \$25 per hour increase in the statutory rate of compensation would improve the quality of appointed counsel. A guest noted that the current federal rate of compensation for appointed counsel is \$165 per hour for non-capital felonies, and \$183 for capital cases.

The Chair expressed his appreciation for presentations Mr. Baich has made throughout Arizona concerning the day-to-day differences of an inmate incarcerated on a life sentence, compared to serving time on death row. Mr. Baich’s presentations have facilitated a number of settlement conferences.

4. Criminal Rules Task Force (“CRTF”): The Court entered Administrative Order number 2015-123 in December 2015. This Order established a task force to review, modernize, and restyle the Arizona Rules of Criminal Procedure. Judge Welty chairs that task force. Oversight Committee members Kent Cattani, Kellie Johnson, and Natman Schaye also serve on the task force. These members advised that although the task force is looking primarily at restyling, it would note any recommended substantive changes for the Court’s consideration. Provisions that might be of particular interest to the Oversight Committee include Rules 6.8, 31, and 32. These members will present an update concerning proposed changes to those rules at the Oversight Committee’s next meeting. The Order directed the task force to file a rule petition by January 2017.

5. Other matters of interest: Mr. Schaye led a discussion of three issues concerning capital cases: first, screening of mitigation specialists; second, screening of private defense counsel; and third, jury selection.

Mitigation specialists: There are special qualities a mitigation specialist must have, among them a solid education, a mental health background, and good communication skills. Mr. Schaye would like the Oversight Committee to consider ideas that would assure not only that mitigation specialists possess these qualities, but also that they are able to do stressful work in a timely fashion.

Members indicated that Maricopa County pays private mitigation specialists \$55 per hour, and the county pays those in staffed defender offices between \$50-60 thousand annually. Pima County pays somewhat less. Some experienced mitigation specialists recently left the Pima County Public Defender’s Office, and now the office has less experienced specialists. Pinal County obtains specialists from Maricopa and Pima counties, although Mr. Logan noted that appointed attorneys customarily have preferences for particular specialists and the specialists “travel” with counsel’s caseload. Mr. Logan typically does not assign a specialist. Rather, more often an attorney tells him which specialist they want assigned on a case.

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Maricopa County's Capital Defense Review Committee ("Review Committee") reviews the qualifications of defense attorneys, but it does not have a corresponding function for reviewing the qualifications of mitigation specialists. There is only sporadic training for specialists, and usually it is not mandatory. Because the county pays for the specialists, it might make sense for the Review Committee to review them. On the other hand, if standards are too high, it could reduce the pool of available specialists. A specialist can take only two or perhaps three capital cases. There have been very few new specialists in Maricopa County over the past several years, and a major issue is finding more of them.

Defense counsel: Mr. Schaye also observed that while the Review Committee screens Maricopa's capital counsel, it should also review trial and appellate counsel statewide. This matter primarily affects Pima, Pinal, Yavapai, and Mohave counties. Because those counties already appoint Maricopa attorneys on capital cases, the Review Committee probably would not need to screen an incrementally large number of non-Maricopa attorneys. Ms. Lefferts stated that she has assigned only attorneys from staffed agencies and has not yet assigned any private attorneys on capital cases; this is because of the reduction in the number of filings in Pima County. However, she supports Mr. Schaye's idea. Pinal has an informal process that assists the presiding judge with screening capital defense counsel.

Juries: Mr. Schaye's third item dealt with best practices for selecting a jury in a capital case and reducing the length of time for jury selection. There is now considerable variation among judges, and even judges in the same county, concerning the process of selecting a jury. One member thought that taking time for selection was a necessary ingredient for learning enough about individual jurors. Mr. Canby said it was not so much a matter of the method, e.g., voir dire of an individual juror versus voir dire of a panel, but was more a matter of how far questions could go. He suggested that the depth of permissible questions should not be contingent on the judge assigned to the case.

Several members agreed that there should be consistency in this area. Unlike most criminal cases, a capital jury renders a moral decision concerning life or death. On the other hand, individual judges have their own preferences concerning jury selection, and no one in Arizona has carefully studied the matter since Judge Dann's work two decades ago. Mr. Schaye said the matter requires systematic research and review rather than anecdotal information. He believes older studies indicate that capital case jurors have issues with regard to race, identification, and the process of decision-making. Judges need more guidance on how to voir dire regarding these issues. The Chair suggested that judges would benefit from training that includes prosecutors and defense counsel as faculty. Mr. Schaye thought it also would be informative to have a social scientist at the

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training. One member noted that Texas has a commissioner dedicated to selecting juries in capital cases, and having a single person doing this removes any disparity.

6. Appointment of counsel on capital PCRs. Mr. Lieberman presented this item. He noted the Oversight Committee's history of discussions regarding screening attorneys for capital petitions for post-conviction relief ("PCRs"). A statute requires the Supreme Court to appoint capital PCR counsel. Several years ago, a workgroup composed of Justice Ryan, Judge Cattani, Ms. Hallam, and Mr. Lieberman recommended that the Court establish an advisory panel to screen counsel, which became the unanimous recommendation of the Oversight Committee, but there was no implementation. He suggested that the Oversight Committee revisit this matter.

Mr. Lieberman noted that over the past few years, the Maricopa Review Committee completed its review of trial and appellate attorneys pursuant to its original charge. He recommended that it now review PCR attorneys and that the Review Committee forward its recommendations to the Supreme Court. He drafted an administrative order, which was included in the meeting materials. His proposal envisioned a review of any attorney who applied for appointment in a capital PCR that was pending in Maricopa County, including an out-of-county attorney. Judge Myers, who noted a wide disparity in the quality of PCR counsel, supported the proposal. Another member thought the Review Committee could ferret out any history of issues such as lost files, failure to turn over a file in a timely way, and missed deadlines. One member felt that the Review Committee should do its due diligence, but not beyond what Rule 6.8 requires. Mr. Logan said that Rule 6.8 should be the starting point for review, because an attorney should not even apply unless he or she first meets the Rule 6.8 requirements. He also noted that the Review Committee should have the time available for reviewing PCR applicants because of an overall reduction in the number of pending capital cases and new filings. Mr. Lieberman added that the review should be both quantitative and qualitative, and include such items as the frequency of jail visits, the accuracy of billing records, and records of any bar discipline. The Chair said that the Oversight Committee could address the scope of review before making its final recommendation to the Court concerning Mr. Lieberman's proposal. Mr. Lieberman noted that in addition to the draft Supreme Court administrative order, Maricopa County would need to enter a corresponding order.

Mr. Schaye suggested the Maricopa Review Committee should review defense counsel seeking appointment on a capital PCR that is pending in any Arizona county. The Chair asked Mr. Schaye to devise an alternative if the Supreme Court and Maricopa County declined to do such broad screening.

7. Call to the public; adjourn. Ms. Clase spoke in response to a call to the public. She expressed concern with capital PCR counsels' difficulties in obtaining the complete

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file from trial and appellate counsel, notwithstanding the requirements of Rules 6.3(d) and (e). Ms. Lawson agreed this was an ongoing issue, and she will provide more information at the next Oversight Committee meeting.

The Chair stated that the next meeting would be in late summer or early fall. He requested members to let him or staff know if there are any issues in the interim. The meeting adjourned at 1:43 p.m.

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State Courts Building, Phoenix

Meeting Minutes: November 29, 2016

Members attending: Hon. Ronald Reinstein (Chair), Hon. Kent Cattani, Lacey Gard, Donna Hallam, Kellie Johnson, Michele Lawson, Marty Lieberman, Hon. Sam Myers, William Montgomery by his proxy Tony Novitsky, Daniel Patterson, Christina Phillis, Natman Schaye

Absent: Dan Levey, David Rodriguez

Guests: Jennifer Garcia, Ellie Hoecker, Diane Alessi, John Todd, Jeff Sparks, Paul Julian, Theresa Barrett

Staff: Mark Meltzer, Sabrina Nash

1. Call to order, introductory remarks, and approval of meeting minutes: The Chair called the meeting to order at 12:03 p.m. He introduced Christina Phillis from Maricopa's Office of Public Defense Services as a new committee member who replaces Mr. Logan. The Chair reminded the members that Administrative Order 2016-11, which extended the committee's term to December 31, 2018, does not require the committee to submit a report in 2016. The committee's next report to the Arizona Judicial Council is due in October 2017. The Chair directed the members to draft minutes of the May 5, 2016 meeting, which were included in the packet of meeting materials.

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

2. Status reports: The Chair then asked members for status reports. Judge Myers reported that Maricopa County has 66 pending capital cases; this is same the number he reported to the committee in May 2016. In addition, 34 petitions for post-conviction relief in capital cases are currently pending; 26 of these are in the pleading stage. Mr. Novitsky noted that the Maricopa County Attorney's Office shows 65 pending capital cases. There are 8 first-degree murder cases pending internal office review, which is a significant reduction from the number pending review earlier this year. His data also showed 5 cases that are proceeding under Rule 11. Ms. Phillis reported that her office has staffed 80 cases. There are 64 pending capital cases, and an additional 16 cases that are potential death cases with capital teams assigned to them. Staffed defender agencies have 49 of the 80 cases, and contract attorneys have the other 31 cases.

In Pima County, Ms. Johnson reported that there are 2 pending capital cases; both are set for trial in 2017. One capital case went to trial in 2016, but a mistrial occurred during the aggravation phase. The State then withdrew the death notice and the case resolved. The Chair noted that he would be conducting a settlement conference for one

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of the two pending capital cases in Yavapai County. Mohave County also has two pending cases, and there is one case pending in Yuma County. At last count, Pinal County had 12 pending cases, which is a reduction from last year. A newly elected Pinal County Attorney intends to review the currently pending cases for potential dispositions.

Statewide, Ms. Gard noted that the Attorney General's Office is handling 4 pending capital post-conviction cases in Pima County, and 1 each in Mohave and Yuma counties. The office also has 42 capital cases in the Ninth Circuit, which remanded 15 cases to the district court pursuant to *Martinez v Ryan*. (Ms. Garcia reported that her office has prepared briefs on those remands.) The district court also has 9 cases for initial *habeas* review. Ms. Hallam reported that there are 10 direct appeals before the Arizona Supreme Court. There has been one new notice of direct appeal filed in 2016 to-date. The Court has appointed counsel for all defendants in capital post-conviction proceedings. There are about 10 pending petitions for review of capital post-conviction dispositions.

3. Criminal Rules Task Force ("CRTF"): Judge Cattani, Ms. Johnson, and Mr. Schaye, who are members of the CRTF, updated their May 5, 2016 presentation to the Oversight Committee. Today's meeting materials included recent CRTF drafts of 5 rules: Rule 6 ("attorneys, appointment of counsel"); Rule 11 ("incompetence and mental examinations"); Rule 15 ("disclosure"); Rule 31 ("appeal from the superior court"); and Rule 32 ("post-conviction relief"). Judge Cattani noted that these are nearly final versions of those rules, and the CRTF will file its rule petition in early January 2017. The following were among the changes noted by Judge Cattani, Ms. Johnson, and Mr. Schaye:

- Draft Rule 6.3 modifies the process for counsel to withdraw from a case. Former Rule 6.8 (renumbered as draft Rule 6.7) requires appellate counsel to have merits briefing experience (*Anders* briefing alone is insufficient.) The Task Force modified the comment to Rule 6.8. Judge Cattani noted the comment clarifies that counsel must demonstrate to the court why additional resources are necessary in a particular case; a mere reference to the *Guidelines* would be insufficient.

- There is a new draft Rule 11.8 specifically regarding an examination of the defendant's mental status at the time of the offense. This differentiates exams concerning competence at the time of trial under other provisions of Rule 11.

- Draft Rule 32.1 deviates from Task Force restyling conventions in order to retain the current section designations. In draft Rule 32.4(d), the duty of counsel who finds no colorable claims includes the responsibility to include in the notice a summary of the facts and procedural history of a case, similar to an *Anders* brief. In a revision to draft Rule 32.6(d), a judge would have 60 days rather than 20 days to determine if there are material issues of fact or law. If the court makes that determination, it would have 30 days to set a hearing or a "status conference." Rule 32.9 added word limits for attorney pleadings,

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but retained page limits for pleadings filed by self-represented defendants. The Task Force modified the title of draft Rule 32.10 to clarify that it applies only to capital cases. In draft Rule 32.12, the court is required to find that evidence still exists, but would no longer need to find that the evidence is in a condition to allow DNA testing; the testing lab would determine the latter. Judge Cattani noted that some Task Force members would like to suggest that the Court authorize a future project to make further substantive changes to Rule 32.

Although the sentiment of Oversight Committee members was supportive of the Task Force drafts, particularly the revisions to Rule 6.8, they did not endorse any specific draft rule or draft language, pending their opportunity to review the versions that the Task Force will submit with its rule petition.

4. Capital jury selection: This is a follow-up to an item on the May 5, 2016 meeting agenda. Mr. Schaye advised that he had prepared an article for publication in *The Champion* law journal concerning jury selection, and that he would send the article to staff for distribution to Oversight Committee members. The article deals with jury selection from the perspective of judges, particularly the manner of jury selection in capital cases. The article builds on a presentation that he, Judge Myers, and Mr. Julian made to Arizona judges two years ago.

The Chair noted that the presiding Maricopa judge recently addressed the practice of calling an excessive number of jurors, for example, 60 jurors for a three-day trial. The presiding judge did not expressly ask judges to do anything differently, but she reminded them of the expense of calling jurors and asked them to consider the prudent use of taxpayer funds. Judge Myers added that with an upcoming judge rotation in June 2017, the criminal bench would have several newer judges who would benefit from training on jury selection and other subjects. Mr. Julian advised that the AOC's Education Services Division ("the ESD") has presented past programs for judges on criminal law subjects, and the ESD is interested in providing further training to these judges prior to the pending rotation, which coincides with the annual Judicial Conference. The anticipated training would be open to judges statewide. Mr. Julian added that pursuant to goals of the Court's Strategic Agenda, the ESD is also enhancing training for appellate judges. The Chair noted that many judges prefer "live" training rather than video broadcasts or computer based delivery. Mr. Schaye offered to assist with planning programs involving criminal law subjects, and suggested that the jury selection faculty include a social scientist to address what juries perceive and how they process information.

5. Other matters of interest: The Chair then noted two additional issues concerning capital cases: first, screening of private defense counsel for capital post-conviction proceedings; and second, an update on *HCRC v DOJ* and the AEDPA.

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Screening: Mr. Lieberman and Mr. Schaye advised that the Maricopa County Capital Defense Review Committee (“Review Committee”) had offered to screen applicants for appointment in capital cases statewide, and not just in Maricopa County; and that it had offered to screen applicants for appointment in capital post-conviction proceedings as well. The Supreme Court by statute appoints counsel in capital PCRs. The Chair and Ms. Hallam currently do the initial screening of PCR applicants and make recommendations for the Court’s consideration. Earlier this year, Mr. Lieberman submitted a proposed administrative order that would allow the Review Committee to screen PCR applicants who practice in Maricopa County, but there was no action on that proposed order.

There are a few reasons why some counties might oppose the proposed administrative order. In Pima County, for example, there are too few capital cases to warrant implementation of this change in process, although some suggested that it might be appropriate to implement this process before the need arises. Other counties might prefer to do their own screening, because they are more familiar with the local applicants. Some judges were concerned about the implications of a Review Committee recommendation against appointment of a particular applicant and the court’s subsequent appointment of that applicant notwithstanding the recommendation. Members suggested modifying the proposal to allow the presiding judge of a county the option of utilizing the Review Committee rather than making its use mandatory. The Chair and Ms. Hallam will discuss this further with the Court.

HCRC v DOJ: Ms. Gard and Ms. Garcia provided an update. The AEDPA would permit “fast track” federal review of a capital conviction in a state court. Arizona’s Attorney General corresponded with the United States Attorney in 2013 requesting fast track status, but at that time, there were no regulations to implement a fast track program. Proposed regulations appeared later that year, and the HCRC filed suit to enjoin implementation of those regulations. The federal district court entered the requested injunction, which the Ninth Circuit reversed, but the injunction remains in effect until the Ninth Circuit issues a mandate. Ms. Garcia noted that the lawsuit did not challenge the substance of the regulations, but rather it challenged whether the regulations met the process required by the Administrative Procedures Act. It is difficult to determine when the mandate will issue. Meanwhile, the Arizona application remains pending.

7. Call to the public; adjourn. The Chair announced an outstanding program on forensic sciences in Tempe in December. He stated that the next Oversight Committee meeting would probably be during the comment period for the criminal rules petition. There was no response to a call to the public. The meeting adjourned at 1:23 p.m.