

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
March 31, 2014**

Members Present:

Hon. Ronald Reinstein, Chair
 Hon. Joseph Welty
 James Belanger, by proxy, Dale Baich
 Donna Hallam
 Kellie Johnson
 Dan Levey
 Marty Lieberman
 James Logan
 William Montgomery
 Daniel Patterson
 Sheila Polk, by proxy,
 Kim MacEachern
 Natman Schaye

Not present:

Hon. Kent Cattani

Guests:

Hon. Rebecca Berch
 Colleen Clase
 Jennifer Garcia
 Jeff Zick
 Kristine Fox (telephonic)
 John Todd
 Diane Alessi
 Robert Shutts
 Anthony Novitsky
 Aaron Moskowitz
 Theresa Barrett
 Larry Hammond (telephonic)
 Carolyn Evans
 Charlotte Merrill
 Ellie Hoecker
 Jeff Sparks

Staff: Mark Meltzer, Sabrina Nash

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1. Call to order; remarks by the Chief Justice. The Chair called the meeting to order at 12:03 p.m. and introduced Chief Justice Rebecca Berch as she entered the room. Justice Berch informed the members that her term as Chief Justice would conclude this June. She expressed her appreciation for the service of Oversight Committee members and their assistance to the Court during her tenure as Chief Justice.

After the Chief Justice left the meeting, the Chair briefly reviewed Supreme Court Administrative Order 2013-115. This Order extended the terms of the Oversight Committee and its members until December 31, 2015. The Order requires the committee to submit two progress reports to the Arizona Judicial Council: one in December 2014, and the second in December 2015.

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

Judge Welty reported that there are currently sixty-six capital cases pending resolution in the Maricopa County Superior Court. Four of these cases are pending non-capital sentencing, and one of the cases is in trial. There are additionally thirty-nine pending capital proceedings for post-conviction relief (“PCR”). Twenty-six of these post-conviction cases are pending the filing of a petition, four are pending the filing of a response or reply, and nine are pending an evidentiary hearing. Judge Welty said that these figures are approximately the same as those he reported at the October 30, 2013 Oversight Committee meeting.

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Mr. Montgomery concurred with Judge Welty's numbers, and added that fifteen cases are currently under initial consideration by the County Attorney's capital case review committee. Seven cases are pending Mr. Montgomery's own review. Four cases are pending deviation requests. Mr. Logan includes potential cases in his figures, and these are therefore somewhat higher than, but consistent with, those reported by Judge Welty and Mr. Montgomery. Mr. Logan's seventy-nine case-total includes nine cases where the parties stipulated to extend the time for filing a notice of intent to seek the death penalty, four other potential capital cases, and one case in which a death notice was withdrawn but that he still must fully staff. Mr. Patterson advised that capital caseloads at Maricopa County's defender agencies are at capacity.

Ms. MacEachern on behalf of Ms. Polk noted that seven capital cases are pending in Yavapai County. One of these cases is set for trial next January. Another case was set for trial last month, but the court appointed new counsel and the case was continued. Ms. Johnson reported that Pima County has eight pending capital cases; two of these will probably go to trial later this year.

Ms. Hallam advised that there are ten pending capital appeals in the Arizona Supreme Court. The Court received four notices of appeal during calendar year 2013, and none in 2014 to-date. There are four post-conviction proceedings requiring appointments of counsel. The Chair and Ms. Hallam have reviewed one new application for appointment as PCR counsel.

The Chair advised that this past December, the Arizona Judicial Council considered the recommendation in the Oversight Committee's 2013 Report regarding an increase in the rate of compensation for PCR counsel. The Council deferred a vote on this recommendation. Mr. Schaye noted that Pima County is considering a raise in its lead counsel rate to \$125. Mr. Logan confirmed that Maricopa County's rate remains at \$100.

3. Approval of October 30, 2013 meeting minutes. The Chair requested the members to review the draft minutes of the October 30 meeting. Judge Welty noted corrections in the draft to the total number of then-pending capital proceedings for post-conviction relief in Maricopa County (the number should be thirty-seven) and to the number of those cases pending the filing of a PCR petition (the number should be twenty-four.)

Motion: A member made a motion to approve the draft October 30, 2013 minutes, with the corrections as noted by Judge Welty, and following a second, the members unanimously approved those minutes.

4. Comment regarding rule petition R-13-0050 and amendments to Rule 31.17(c). At the October 30 meeting, Ms. Hallam introduced a rule petition concerning amendments to Rule 31.17(c), Ariz. R. Crim. P. The Court's current practice is to issue an execution warrant on the day it denies a petition for review of a petition for post-conviction relief. The defendant usually initiates a federal habeas proceeding within a matter of days thereafter. This invariably results in a federal court's stay of the execution, and the stay requires immediate cancellation of execution notices previously sent to multiple agencies, organizations, and officials. Members of the Oversight Committee supported the draft petition, which would allow the defendant fifteen days to file a habeas proceeding and require the Supreme Court to issue a warrant only upon notice from

the prosecution that defendant did not seek habeas relief during that time. Ms. Hallam subsequently filed the petition, R-13-0050. At the March 31, 2014 meeting, Ms. Hallam offered a brief formal comment in support of the petition that memorialized the October 30 discussion.

Since the petition would not require automatic issuance of an execution warrant, Mr. Montgomery asked whether it was possible that the prosecutor might overlook a case in which the defendant failed to apply for timely federal habeas relief. He suggested that the rule amendment include a triggering mechanism to prompt the prosecutor to request a warrant. Mr. Zick, Ms. Fox, and Mr. Baich could not envision as a practical matter that the prosecutor would overlook making such a request, but Mr. Montgomery may nonetheless file a separate comment.

Motion: A member then moved to authorize the Chair to file the proposed formal comment in R-13-0050, subject to the Maricopa County Attorney filing a separate comment. Following a second, the members passed the motion unanimously.

5. HCRC and FPDA versus DOJ lawsuit. Ms. Hallam followed up on an item that the members considered at the October 30 meeting: a lawsuit in the United States District Court (Northern District of California) to enjoin the enforcement of the Department of Justice’s “opt-in” regulations. Ms. Hallam provided an updated case docket, and noted that District Court Judge Claudia Wirken granted a preliminary injunction on December 4, 2013. Mr. Baich added that the government has appealed the district court’s order to the Ninth Circuit Court of Appeals, and the parties are briefing other claims on cross-motions for summary judgment.

6. Discussion of R-14-0010 concerning the timing of capital petitions for post-conviction relief. Jeff Zick, Chief Counsel for the Arizona Attorney General, advised the members at the October 30, 2013 meeting that the Attorney General was considering a rule petition as an alternative approach to SB 1413, which failed to pass during the 2013 legislative session. Mr. Zick filed that rule petition, R-14-0010, in January 2014. The petition would amend Rules 31 and 32 and require a post-conviction relief proceeding in a capital case prior to a direct appeal.

The Chair noted that in light of the Oversight Committee’s charge as set forth in A.O. 2013-115, the Court might benefit from an Oversight Committee comment on this rule petition, even if the members did not reach consensus. He informed the members that Ms. Hallam had prepared and provided Mr. Zick with informal comments concerning R-14-0010, and that staff had prepared but had not yet provided a separate set of informal comments. Mr. Zick responded that he welcomed comments, and that he would incorporate Ms. Hallam’s suggestions to clarify his proposed rules. The Chair added that he could establish a workgroup to discuss the petition and to recommend revisions to the proposed amendments if today’s discussion indicated that a workgroup would be beneficial. The Chair then invited Mr. Zick to introduce his rule petition.

Mr. Zick stated that at many status conferences in capital PCR proceedings, defense counsel request additional time to investigate the facts, conduct interviews, and locate missing portions of the file. He observed that generally, the efforts of PCR counsel are to develop facts that are not part of the trial court record. The trial court’s record on appeal is static and it is not going to change with the passage of time. Therefore, Mr. Zick believes that it makes more sense to do the PCR investigation as soon as possible following a defendant’s conviction, rather than waiting several

years for the appeal to conclude before initiating PCR proceedings. He said that while the United States Supreme Court's opinion in *Martinez v. Ryan* provided impetus for this rule petition, the real focus of the petition is to make the PCR process more reliable. Having a PCR proceeding earlier rather than later in the process would help avoid fading witness memories and lost evidence. Items that are not in the trial court record can be lost, such as documents or objects in trial counsel's file, and recollection of events by trial counsel and other witnesses frequently worsen over time. Under his proposal, the court would appoint PCR as well as appellate counsel immediately after sentencing, and PCR counsel would have six to nine months to begin an investigation of matters outside the record pending completion of the trial court transcripts. The proposed rules would require PCR counsel to file a petition for post-conviction relief nine months after completion of the record on appeal, so PCR counsel would have adequate time to review that record before filing a PCR petition.

Mr. Zick advised that a State Bar subcommittee reviewed his proposal, and discussed its constitutionality because it does not include a provision for raising issues about ineffective assistance of appellate counsel. Mr. Zick acknowledged that defense counsel could not raise such an issue in state court under his proposal. However, he believes the proposal does not foreclose a claim of the appellate attorney's ineffective assistance. Defense counsel could make this claim in federal court, and because the claim is record-based, the federal court would review the claim *de novo*.

The Chair asked Mr. Logan whether he would support Mr. Zick's petition if funding were not an issue. Mr. Logan replied that from his perspective, funding is always an issue. He explained that the cost to the county of a capital appeal is typically no more than thirty to fifty thousand dollars over two years. If a PCR attorney worked on the case for two years after sentencing, the county's cost could be about ten times that amount; this would become a large and unnecessary expense if the Supreme Court subsequently reversed the case on direct appeal. The counties view this simply as an issue of cost. Mr. Logan added that over the past few years, the number of defendants on death row without PCR counsel has sharply declined. The Court appoints PCR counsel more expeditiously than in the past, so the length of delay prior to the filing of a PCR petition, if any, is substantially shorter.

Judge Welty advised that the superior court might file a comment to this rule petition; the matter is under discussion. He does not believe that PCR counsel's assembly of the record subsequent to a direct appeal constitutes a significant source of delay. However, there is an exception when another court orders resentencing after a long interval of time. Ms. MacEachern added that the Arizona Prosecuting Attorneys Advisory Council ("APAAC") supported the 2013 legislation, and it is now reviewing R-14-0010. Ms. Hallam said that the informal comments she provided to Mr. Zick were technical in nature rather than substantive. Other comments made during the Oversight Committee's discussion of this rule petition included the following:

- The proposed requirement that trial counsel provide a complete file to PCR counsel within seven days of sentencing is unrealistic.

- Would Mr. Zick's proposal eliminate the prospect of a "*Martinez*" hearing (avoiding preclusion of an ineffective assistance of trial counsel claim in a habeas proceeding because of the ineffectiveness of PCR counsel)?
- Could the appellate attorney raise an issue on direct appeal if PCR counsel failed to raise it? Mr. Zick would welcome comments on this point. He noted that PCR counsel would prepare the petition for review on the PCR, and the proposed rules would consolidate this petition for review with the direct appeal. Mr. Lieberman thought that if appellate counsel believed that further post-conviction proceedings in the trial court were necessary and moved to stay the appeal, there could be a procedural morass. He also questioned what would occur if there were conflicts between the appellate lawyer and the PCR attorney, which he felt were inevitable.
- What is the experience of other states in conducting a capital PCR prior to the appeal? Colorado, for example, does this. Some members believe the Colorado process is "workable" and other members expressed doubts.
- The doctrine of comity might require a state court to address issues of ineffective assistance of appellate counsel prior to federal review. A state court could not simply defer these issues to a federal court.
- The 2002 Arizona Supreme Court opinion in *State v. Spreitz*, which requires counsel to raise ineffective assistance of counsel claims in a Rule 32 proceeding rather than on direct appeal, did not cite delay as a factor in its decision. Moreover, the current and previous criminal presiding judges in Maricopa County have effectively reduced delays in capital PCR proceedings.
- The proposed rules micro-manage PCR counsel. For example, these rules would require counsel to begin a fact investigation without the opportunity to first review trial court transcripts. The trial court record is necessary for PCR counsel to acquire meaningful context of the issues in the case, and PCR counsel's work on the case prior to receipt of the trial transcripts would be a wasted effort. Mr. Zick responded that his proposal would allow PCR counsel access to the complete record prior to filing a PCR petition. If his proposed timing of events is unrealistic, an amended rule petition could adjust the times.
- The 2013 amendments to Ethical Rule 3.8, which became effective on January 1, 2014, require prosecutors to act promptly upon receipt of evidence that a defendant might be innocent of the crime for which defendant was convicted. Initiating a PCR sooner would allow the prosecutor, when necessary and appropriate, to confer with law enforcement about issues that might require additional review and investigation.
- Crime victims deserve a reasonably speedy resolution of a case. While the process may not involve as much delay as previously, delays still exist and victims would support rule amendments that reduce these delays. It should be possible to conduct the entire capital case process efficiently while still respecting everyone's rights, and without the need for a remand decades after a conviction.

- Everyone in the system wants a just result. Does the passage of time following a capital conviction afford the advantage of an arms-length perspective of the case and the chance to evaluate prior proceedings more thoughtfully? Mr. Zick believes that the proposed rules do contemplate some space of time, but he contends that simply letting years pass by misses the opportunity to conduct a prompt post-conviction investigation. After a capital sentence, the appeal should be secondary because the appellate record will not change during those years, but the timely development of relevant post-conviction facts should be primary and undertaken prior to the appeal.
- Everyone wants the process to work correctly, but there is disagreement over whether the process can be quick as well as correct. Mr. Zick agreed that the issue is not expediency for its own sake. He noted that the court does not delay trials indefinitely, and a similar principle should be applicable to PCR proceedings.
- Mr. Todd inquired whether anyone had done a cost analysis. Mr. Logan responded that PCR costs would rarely be comparable to appellate costs. Appellate costs are relatively certain. PCR proceedings require a mitigation specialist, expert witnesses, and travel, among other expenses, and these costs are open-ended. While the focus of the appeal is on what occurred, the PCR addresses what did not occur. Whether PCR counsel conducts an investigation immediately after sentencing or following the appeal, PCR counsel will invariably need to re-examine the entirety of the case, and the cost of a PCR will be equivalent in both instances.
- An appeal can resolve issues that might avoid the need for a post-conviction proceeding. Mr. Zick responded that the cost of an appeal is not money well spent if the dispositive issues in the case require a post-conviction evidentiary hearing.

Following the discussion, the Chair inquired if any members supported the formation of a workgroup. There was no affirmative response. The Chair agreed that establishment of a workgroup to recommend formal Oversight Committee comments to the petition would not be practical in the absence of consensus. However, he urged individuals to send comments directly to Mr. Zick, or to post comments on the Rules Forum. R-14-0010 has a modified comment period. Initial comments are due by April 15, 2014. Mr. Zick may file an amended petition before May 20, 2014, and the Oversight Committee might file comments concerning any of those amendments. Comments to the amended petition are due by June 13, 2014.

8. Call to the public; adjourn. Responding to a call to the public, Mr. Schaye said that he and David Euchner, president of the Arizona Attorneys for Criminal Justice, met last month with the presiding judge of Pima County concerning his screening proposal for capital case counsel. Thereafter, Mr. Schaye sent the proposal to presiding judges in thirteen other counties, and he is awaiting their responses.

The meeting adjourned at 1:20 p.m.