

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE MINUTES  
October 29, 2015**

Members Present:

Hon. Ronald Reinstein, Chair  
 Hon. Sam Myers for Hon. Joseph Welty  
 Hon. Kent Cattani  
 Donna Hallam  
 Kellie Johnson  
 Dan Levey  
 Marty Lieberman  
 James Logan  
 William Montgomery  
 Daniel Patterson  
 Natman Schaye

Not present:

James Belanger  
 Sheila Polk

Guests:

Lori Lefferts  
 Michele Lawson  
 Jennifer Garcia  
 David Rodriguez  
 Bob James  
 John Todd  
 Diane Alessi  
 Carolyn Edlund  
 Lacey Gard  
 Jeff Sparks  
 Kim MacEachern  
 Heather Murphy  
 Colleen Clase (telephonic)  
 Nick Olm

Staff: Mark Meltzer, Sabrina Nash

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**1. Call to order; approval of meeting minutes.** The Chair called the meeting to order at 12:05 p.m. Members and guests were introduced. The Chair then asked members to review draft minutes of the March 31, 2014 meeting. The members had no corrections to those minutes.

**Motion:** A member made a motion to approve the March 31, 2014 draft minutes, the motion received a second, and it passed unanimously.

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

Judge Myers reported that there are currently sixty-seven capital cases pending resolution in the Maricopa County Superior Court. Two of these cases are pending non-capital sentencing, and trials are in progress in four of the cases. (At the March 31, 2014 Oversight Committee meeting, there were sixty-six cases pending resolution.) There are additionally twenty-nine pending capital proceedings for post-conviction relief (“PCR”) (compared to thirty-nine pending in March 2014). Twenty of the current post-conviction cases are pending the filing of a petition, six are pending the filing of a response or reply, and three are pending an evidentiary hearing or a ruling on the petition. Judge Myers added that of the twenty-seven judges assigned to the criminal division, about ten of these judges are assigned capital cases.

Mr. Montgomery reported that his numbers are consistent with Judge Myers’ figures, and in-line with recent averages. He advised that his deputies are authorized to stipulate to extensions of time to file notices of intent to seek the death penalty if the defense has viable mitigation evidence. Mr.

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Logan includes potential cases in his statistics, and his numbers are therefore somewhat higher than, but consistent with, those reported by Judge Myers and Mr. Montgomery. Mr. Logan's eighty-six case-total includes fourteen cases where the parties stipulated to extend the time for filing a notice of intent, and five other cases that are potentially capital. Mr. Logan has been tabulating cases in which the parties stipulated to extend the time to file a notice, yet which did not actually result in the filing of a notice. He has recorded thirty such cases, but that number might vary if notices are eventually filed in some of those cases, and he needs additional time to validate his data. Mr. Montgomery added that he requests his capital case deputies to affirmatively reach out to defense counsel for any mitigation evidence before, as well as after, a case is considered by his capital review committee. He prefers to learn of this evidence sooner rather than later.

Ms. Johnson reported that Pima County has five pending capital cases. There has been one new case since her 2014 report. A case included in the 2014 report involving three co-defendants has been resolved against two of the defendants. Judge Reinstein on behalf of Ms. Polk noted that three capital cases are pending in Yavapai County, compared to seven at about this time last year. Judge Reinstein is scheduled to serve as a settlement judge in two of those three pending Yavapai cases. Mohave County has two pending cases; one is a remand of a conviction that was reversed on appeal. Mr. Rodriquez, chief deputy Pinal County Attorney, reported fourteen capital cases currently pending, compared to seventeen a year ago. One of the three concluded cases was resolved by trial. Mr. Rodriquez does not currently anticipate filing any new notices of intent to seek the death penalty. He is not aware of any capital PCR proceedings in Pinal County. Ms. Gard, chief of the Attorney General's capital litigation section, advised that her office is handling several PCR's in Pima County, and one in Mohave County.

Ms. Hallam reported that there are ten pending capital appeals in the Arizona Supreme Court. The Court received three notices of appeal during the current calendar year. As a practical matter, there is no backlog in the appointment of counsel for capital PCRs. (In two cases, an order has not yet been entered formally appointing PCR counsel, but arrangements have been made for appointment of counsel in those cases.) She added that attorneys in Pima County have accepted appointments on PCR proceedings that are pending in Maricopa County. Ms. Lefferts, director of the Pima County Office of Court Appointed Counsel, advised that Pima County customarily utilizes Pima County lawyers for appointments on Pima County capital cases. Pinal County often appoints Maricopa County lawyers in its capital cases.

Ms. Garcia, counsel with the Federal Public Defender's Capital Habeas Unit, noted that recently and atypically, Arizona cases coming into her office for habeas proceedings have not had post-conviction evidentiary hearings in state court. She advised that more than a dozen capital cases were remanded by the Ninth Circuit to the Arizona District Court as a result of *Martinez v. Ryan*. She stated that a hearing is pending in the Ninth Circuit on whether the scope of allowable mitigation evidence in several older cases was impermissibly limited by a former requirement that the evidence have a causal relationship with the offense. Ms. Garcia added that in December, in *HCRC v. DOJ*, the Ninth Circuit will hear argument regarding "opting in." (See the March 31, 2014 Oversight Committee minutes, item 5.)

**3. Discussion of a draft report to the Arizona Judicial Council.** Administrative Order number 2013-115, which extended the term of the Oversight Committee to December 31, 2015, requires

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the Oversight Committee to submit a report to the Arizona Judicial Council (“AJC”) in December 2015. Staff prepared a draft report for the members’ consideration. The Chair gave an overview of the draft report, including its recommendations and appendices, and he advised that the draft was subject to revisions as agreed to by the members.

With regard to the recommendation to increase the compensation of defendants’ PCR counsel, the Chair noted that he has, without success, previously presented this recommendation to the AJC. He again posed the question of whether an increase in compensation would actually increase the quality, or the quantity, of private counsel who are willing to accept capital case appointments. Mr. Logan noted that the report incorrectly stated that statutes set the rate of compensation for capital defense counsel. The statutes only set the rate for compensation on capital PCR appointments; the rate of compensation for other appointments in capital cases is set by the county where the case was filed. No one could recall when the last increase in local rates had occurred. One member observed that if higher rates attract more applicants for appointment, those higher rates would also provide an incentive for counties to appoint counsel from staffed defender agencies, which typically provide services at a lower cost to the county.

The issue of attorney compensation led to a discussion concerning mitigation specialists. The consensus was that there was “always” a shortage of qualified people for appointment as mitigation specialists. One member stated that there were no degrees that mitigation specialists are required to have, nor standards or other qualifications that mitigation specialists were required to meet. Mr. Logan can contract with any mitigation specialist who has an order appointing them in a particular case, and he is typically not consulted by judges about those appointments. Pinal County typically obtains its mitigation specialists from Maricopa or Pima County, usually based on word-of-mouth. One member characterized the shortage of qualified mitigation specialists as a “serious problem.” In addition, a mitigation specialist can effectively handle only a limited number of cases at any time. Judge Myers stated that a need to prepare mitigation is commonly cited in defense motions to continue, but he was unaware if a specialist having too much work was the underlying basis of any such motion. In Pima County, judges are reluctant to set a trial date unless the mitigation specialist has an estimated time for completing the mitigation investigation.

Other comments concerning the draft report included the following:

- Prosecutors and defense counsel customarily have separate training under the auspices of their respective organizations, and they prefer not to conduct training jointly.
- All stakeholders should receive training regarding victims’ rights.
- The current governor has already made sixteen appointments to the superior court, and some of those new judges will eventually receive capital case assignments and require training.
- Those who collaborated with Dr. Bortner regarding data for the 2002 Attorney General’s Capital Case Commission report intended that data would be collected on an ongoing basis thereafter, but no one had the time or the funding to do this after 2002.

- The Oversight Committee has been keeping some data since 2008. If the Committee was disbanded, transferring the responsibility for data collection could be challenging.
- The report should recognize that a contributing factor in the reduction of capital cases in 2010 was the efforts of the interim county attorney to review the merits of every death noticed case that was then-pending.
- The Maricopa County Superior Court's 2010 change to capital case management might have resulted in the resolution of more cases, but it also may have had the effect of bringing some cases to trial before they were fully ready.
- Although jury sentencing contributed to the length of time required to prepare a capital case for trial, potential claims concerning the ineffective assistance of trial counsel also encouraged counsel to do more thorough trial preparation.
- The appointment of two defense attorneys did not lengthen pretrial proceedings because that requirement became effective in 1996.
- The Public Advocate's office was not formed to fill the void resulting from termination of the State Capital Post-Conviction Public Defender. The Public Advocate's office preexisted that event and was performing other functions, albeit under a different name.
- The number of capital cases may be lower now than it was a few years ago, but it's still higher than other comparable jurisdictions in the United States that have the death penalty.

Members also observed that the draft report has too much subjectivity. For example, the draft refers to a reduction in case volumes because of effective case management, but the Oversight Committee has no objective basis for knowing that case management was effective, or whether it was a causal factor that resulted in fewer cases. The report should be more objective and bipartisan. At the very least, the report should reflect, for example, that some members believe "x," but others believe "y."

Two members also believe that the Oversight Committee does not need to be extended, that its members can meet informally, and that courts can track their own case data. One member said that merely collecting data is no justification for extending the Committee. Another stated that a Committee that meets once a year, as this Committee has done for the past two years, has only marginal value. If this Committee merits an extension, it should meet at least a few times annually.

A majority of members felt that the Committee has continuing relevance. First, these members believe there are continuing issues. There appears to be a shortage of qualified mitigation specialists. The Attorney General's office has not prepared a bill or a rule petition that would require capital post-conviction proceedings to precede direct appeals, as it has done during the past two years, but the office is discussing a reintroduction of such changes. The Chair also noted that the Court anticipates a restyling of the Arizona Rules of Criminal Procedure, and the Oversight Committee may want to review and comment on the associated rule petition.

Second, the Oversight Committee offers what appears to be the only statewide forum for a cross-section of stakeholders to discuss issues associated with capital litigation. When this Committee discussed its existence in 2013, one member stated that the Oversight Committee should continue as long as Arizona has a death penalty. A judge member commented today that extending the term of the Oversight Committee will enable it to look at new capital case issues as they arise, even if there are no particular issues before it now.

The Chair advised that staff would revise the draft report by incorporating the members' comments, and by reducing the extent of subjective text. The Chair advised the members that he will present the report to the Arizona Judicial Council on December 10, but the final version of the report needs to be submitted for distribution to the AJC before Thanksgiving. The Chair accordingly asked the members to authorize him to finalize the report.

**Motion:** A member moved to authorize the Chair to revise and to finalize the Committee's report to the AJC, in his discretion but consistently with today's discussion. The motion received a second and it passed unanimously.

**Motion:** At the request of the Chair, and because it's possible that the Committee might not meet again, a member also moved to authorize the Chair to finalize today's draft minutes. The motion also received a second and it too passed unanimously.

**8. Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 1:25 p.m.