

Capital Case Oversight Committee

State Courts Building, Phoenix

Meeting Minutes: June 30, 2017

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

Absent: Dan Levey

Guests: Jennifer Garcia, Ellie Hoecker, Jeff Sparks, Jonathan Mosher, Michael Gottfried, Anna Gadberry, Carolyn Edlund, Mitch Rand, Amy Kalman, Sam Meltzer, Larry Hammond, Theresa Barrett

Staff: Mark Meltzer, Karla Williams

1. Call to order, introductory remarks, and approval of meeting minutes: The Chair called the meeting to order at 12:03 p.m. This is the Committee's first meeting of 2017. The Chair would like the Committee to meet again in the fall to discuss the Committee's report to the Arizona Judicial Council, which will be presented in December.

The Chair noted the retirement of Diane Alessi, who regularly attended Committee meetings, and he expressed appreciation for her many years of service to the trial court. He also announced that the Governor had recently appointed Kellie Johnson to the Superior Court in Pima County. The Chair invited Ms. Johnson to remain a member of the Oversight Committee. The Chair introduced Jonathan Mosher, chief trial counsel for the Pima County Attorney's Office, and requested Mr. Mosher to address future matters concerning capital cases in Pima County.

The Chair directed the members to draft minutes of the November 9, 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 63 capital cases pending resolution; this is toward the lower end of the range during his term as presiding criminal judge. Of those 63 cases, 57 are pending trial, 3 are currently in trial, and 3 are pending sentencing. In addition, 31 petitions for post-conviction relief in capital cases are currently pending in Maricopa County, which is a reduction from the 34 petitions he reported at the last Committee meeting. The majority of those petitions are in the pleading stage, but 7 of them have been fully briefed. Mr. Montgomery concurred with Judge Myers' numbers, and added

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that his Capital Review Committee has no first-degree murder cases currently pending review. Although they may no longer be pending review by the Maricopa County Attorney, Ms. Phillis has an additional 24 “potential” cases to which she has assigned a capital defense team. Ms. Lawson reported her office has 4 pending capital post-conviction cases.

Mr. Rodriguez stated that there are 6 pending capital cases in Pinal County; 3 other cases were assumed by new prosecutors because of conflicts (one was assumed by the Attorney General, and two were assumed by the Navajo County Attorney.) The number of pending cases in Pinal County has continued to decline from the high teens two years ago. There are no pending capital PCRs in Pinal County. In Pima County, Ms. Johnson reported that there are no pending capital cases. One of the two cases she reported at the last Committee meeting concluded with a plea to natural life, and in the other, the State withdrew the death notice. The Chair believes there are two pending capital cases in Yavapai County, and two in Mohave County.

Ms. Gard’s number for capital PCRs pending in Maricopa County is consistent with the one reported by Judge Myers; in addition, her office has 4 pending capital PCR cases in Pima County, and one pending in Mohave County. There are 13 capital PCR petitions for review pending in the Arizona Supreme Court. One of those cases involves an appeal by the State from the granting of post-conviction relief. In another case arising from Pima County, the defendant was granted a new sentencing proceeding, but is seeking review of guilt-phase issues. There are 52 Arizona capital cases pending in federal court. Of these, 19 are on first habeas review (i.e., they have not been to the Ninth Circuit), 18 are pending in the Ninth Circuit, and 15 are on Ninth Circuit remand to the District Court on issues involving *Martinez v Ryan*, *McKinney v Ryan*, or both. Ms. Hallam said there are 10 capital appeals pending in the Arizona Supreme Court. One notice of direct appeal, involving a Yuma County case, has been filed in 2017. All capital PCR cases have appointed counsel, but there are fewer pending PCRs because of the historic decline in the number of capital appeals.

3. Reports from the Chair. The Chair then requested or provided updates on three topics.

(a) *“Potential” capital cases.* The Chair summarized an issue that concerned a disruption of communication between the MCAO and OPDS about which first degree murder cases are “potential” death penalty cases that require enhanced staffing, and which are not. The custom and practice of the MCAO was to provide notice of “potential” cases to OPDS, but apparently the practice is not always followed at the current time. This results in an expense to the County for staffing first degree murder cases that will not become capital. It also can result in a shortage of individuals who are available for appointment in capital cases. Ms. Phillis responded that she had discussed this matter

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with Mr. Montgomery, and that small groups from their respective offices were having ongoing meetings to improve the communications and to reduce the number of potential cases, or to shorten the time that a case remains “potential.”

(b) *PCR counsel screening.* The Chair and Ms. Hallam discussed with the Chief Justice a proposal from Mr. Lieberman and Mr. Schaye. They proposed that the Maricopa County Review Committee assume responsibility for screening applications for appointment as capital PCR counsel in Maricopa County cases. The Chief Justice discussed the proposal with the other justices, and they concluded that for the time being, the Chair and Ms. Hallam should continue to do the screening. Among other things, there are fewer applications now because of a decline in the number of new PCRs, and some judges in other counties favor doing their own screening. On the other hand, the Chair is open to informing other (non-Maricopa) counties that the Maricopa County Review Committee has offered to assist with screening attorneys for trial and appellate representation.

(c) *Life with the possibility of parole.* Parole was statutorily abolished in 1994. Nonetheless, the Chair said a journalist reported in a March 2017 newspaper article that this journalist had reviewed hundreds of post-1994 minute entries in Arizona murder cases, and that more than 200 defendants had been sentenced to “life with the possibility of parole after 25 years.” Most of these cases were in Maricopa County. The journalist suggested these sentences were unlawful because there was no longer a parole system. The Chair believes many of these sentencing minute entries were prepared using an outdated minute entry template that included the “possibility of parole” language. The journalist apparently did not review plea agreements or transcripts of change of plea or sentencing proceedings, but the trial courts will do this to determine if those documents indicate that “a possibility of parole” was a consideration for a guilty plea. The Chair surmised that in many if not most of those cases, the possibility of parole was neither an inducement for a plea nor a term of the sentence pronounced in open court. And if a “possibility of parole” sentence was imposed following a trial, there would have been no representations to the defendant concerning parole.

Some of these cases are 20 years old, and it may be challenging to recover all of the relevant documents; the “FTR” recording system, which is used today, was not used then. Also, these cases did not resolve with a death sentence (accordingly, they are not capital cases), and records in those cases may not have been retained as meticulously as records in a capital case. The State Clemency Board is aware of this matter, and although a few cases have already raised this issue in court filings, for the earliest of these cases the issue will not be ripe until 2019, that is, 25 years after 1994. At or before that time, there may be decisions about whether courts should consider the issue on a case-by-case basis, or whether there might be a legislative solution.

3. Criminal Rules Task Force (“CRTF”): Judge Cattani, Ms. Johnson, and Mr. Schaye, who are members of the CRTF, updated their previous presentations to the Oversight Committee. Judge Cattani reminded the members that although this was primarily a restyling project, the CRTF made some substantive changes. The Arizona Voice for Crime Victims (“AVCV”) requested during the comment periods to restate the victims’ rights provisions of Rule 39 in other rules, but the CRTF declined that request. Recently, however, and in response to AVCV concerns, the CRTF inserted in the time extension provisions of Rules 31 and 32 new language requiring the court to consider the victim’s rights before granting requests for additional time. The Court will consider the CRTF petition in late August. The CRTF did not request a delay in implementation of these rules, and a more substantive review of Rule 32 might be appropriate in the future.

4. *Nordstrom v Ryan*: The Chair noted that Dale Baich had previously spoken about how life on death row is different than confinement for a non-death sentence, and this distinction is significant during capital case settlement negotiations. Until this year, Arizona Department of Corrections (“ADOC”) regulations classified death row inmates as “maximum” custody. That will change as a result of the March 2017 settlement in the United States District Court case of *Nordstrom v Ryan* (Arizona District number CV-15-02176-PHX-DGC). The settlement furthers a previous settlement in *Parsons v Ryan*, which reduced the solitary confinement of death row inmates and increased their privileges. The *Nordstrom* settlement will result in reclassification of most death row inmates from “maximum” to “close” custody. (Apparently ADOC had begun the reclassification process before the *Nordstrom* settlement was finalized; by the end of July, almost all death row inmates will be in “close” custody.) The *Nordstrom* settlement will permit inmates to have meals together, and to have recreation privileges with one another rather than solitary recreation. It will also expand visitation for death row inmates and increase their educational privileges. There are concerns remaining that involve inmates in protective custody, inmates who are sex offenders or have ADA issues, the extent of contact visits with family members, and similar issues. It was unknown whether this settlement was publicly announced and vetted. The Chair thanked Ms. Garcia and Mr. Gottfried for presenting this matter to the Committee.

5. Call to the Public: The Chair made a call to the public and these issues were mentioned by Committee members and guests.

Out-of-state PCR counsel: Ms. Phillis mentioned situations where out-of-state counsel, mitigation specialists, investigators, and experts are appointed on a capital defendant’s PCR petition. Not only do these out-of-state appointments increase travel expenses, they also seem unnecessary when there are qualified defense teams in Arizona. Ms. Phillis also believes it is beneficial to have the defense team geographically proximate to the client rather than in another state. She added that the court, not her, appoints these

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individuals, and it is difficult for her to assess the workloads of team members when they are outside Arizona. On the other hand, Mr. Schaye observed that trial court judges adequately question counsel, both in-state and out-of-state, on their workloads; and judges typically inquire why appointed counsel are not utilizing Arizona resources when making a request for an out-of-state resource. Mr. Hammond added that several years ago, Arizona began looking for out-of-state PCR counsel at the behest of the American Bar Association, and because there were insufficient PCR counsel in Arizona. He further noted that some out-of-state counsel took Arizona PCR appointments on a pro bono basis, and in his experience, these counsel usually utilize Arizona individuals on their defense team. Ms. Hallam will bring this matter to the attention of the justices.

Jury selection: Mr. Schaye renewed his request for judge training on selecting a capital case jury. Although Justice Gould and several Maricopa County capital case judges instructed during a two-day judge training program earlier this year, which included jury selection, Mr. Schaye would like a future training faculty to include social scientists, and permit prosecutors and defense counsel to attend judicial officer training programs.

Execution drug protocol: A settlement in a U.S. District Court case last week resulted in modifications to the State's procedures for carrying out lethal injections. As a term of the settlement, Judge Wake dismissed the lawsuit. It does not appear that the State currently has execution drugs, and there are no outstanding execution warrants, but 10 inmates have exhausted their appeals.

PCR page limits; judge rotations: Judge Myers noted a recent trend of counsel filing lengthy PCR petitions along with motions to exceed the page limits. He would like to get the word out about the page limits provided in Rule 32. Judge Myers added that several judges rotated into a criminal assignment in June, but all of these new judges won't immediately be receiving capital case training. No judge on the criminal bench currently has more than 10 assigned capital cases.

Mr. Hammond spoke about *Furman v Georgia* during the call to the public.

7. Roadmap; adjourn. The Chair reminded members that the Committee would have another meeting later this year to discuss its report to the Arizona Judicial Council. The meeting adjourned at 1:12 p.m.

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State Courts Building, Phoenix

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Members attending: Hon. Ronald Reinstein (Chair), Hon. Kent Cattani, Lacey Gard by her proxy Jeff Sparks, Donna Hallam, Kellie Johnson (by telephone), Michele Lawson, Marty Lieberman, Hon. Sam Myers, William Montgomery by his proxy Michael McVey, Daniel Patterson, Christina Phillis, David Rodriquez, Natman Schaye [all members present]

Guests: Jonathan Mosher, Jennifer Garcia, Michael Gottfried, Ellie Hoecker, Carolyn Edlund, Amy Kalman, Larry Hammond, Aaron Aiken, Jon Canby, Michael Kiefer, Jon Eliason, Chris Bleuenstein, Jeff Kirchler, Jennifer Rock

Staff: Mark Meltzer, Theresa Barrett, Sabrina Nash, Jodi Jerich

1. Call to order, introductory remarks, and approval of meeting minutes: The Chair called the meeting to order at 12:01 p.m., followed by introduction of members, proxies, and guests. The Chair then directed the members to draft minutes of the June 30, 2017 meeting minutes, which were included in the packet of meeting materials. Ms. Phillis requested a clarification of a sentence at page 2 of the minutes. The sentence currently says, "Although they may no longer be pending review by the Maricopa County Attorney, Ms. Phillis has an additional 24 'potential' capital cases to which she has assigned a capital defense team." Her requested correction would say, "Although they may not yet be ready for review by the Capital Review Committee, Ms. Phillis has an additional 24 'potential' cases to which she has assigned a capital defense team." Mr. Lieberman noted a phrase at page 3 of the draft minutes that said, "...and some judges in other counties favor doing their own [PCR applicant] screening." He did not believe this was accurate; Ms. Hallam concurred and she recommended deletion of that phrase.

Motion: With the changes noted above, 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 56 capital cases pending resolution, including one that is in trial and another that is pending sentencing. There are 20 capital case petitions for post-conviction relief in the pleading stage. Six capital PCRs have been assigned to trial judges and are pending summary review, an evidentiary hearing, or a motion for rehearing. The foregoing petitions are first petitions. There are also several pending successive petitions. Mr. McVey concurred with Judge Myers' numbers, and added that two trials are set to begin in the next two months. There have been 6 capital trials during 2017 to-date, compared to 4 and 6, respectively, in calendar years 2016 and 2015. Four capital defendants are now involved in Rule 11 proceedings. Mr. McVey stated that

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during the first ten months of 2017, the Maricopa County Attorney has filed 8 notices of intent to seek the death penalty, compared to 11 and 13, respectively, in calendar years 2016 and 2015. Ms. Phillis' numbers agree with those presented by Judge Myers, although she also has 26 cases where she is awaiting the Maricopa County Attorney's determination concerning the filing of a death notice. Mr. McVey noted that his office encourages defense counsel to submit mitigation evidence before a case goes to Capital Review Committee, and some but not all attorneys provide this information. It may take several months, or longer, before his office decides whether to file a death notice.

Mr. Rodriguez stated that there are 8 pending capital cases in Pinal County, 6 of which are handled by his office and 2 of which, because of conflicts, are being prosecuted by the Navajo County Attorney. The current number of pending cases is about half of what it was in 2014. In Pima County, Mr. Mosher reported that there are no pending capital cases, but one case will go to a review panel later this month.

Mr. Spark's number of pending capital PCRs in Maricopa County is consistent with Judge Myers' report. His office also has 2 pending capital PCR cases in Pima County and 4 pending in Mohave County. There are 55 capital cases in various stages of habeas review, including 18 remands pursuant to *Martinez v Ryan*. Ms. Hallam reported that in the Arizona Supreme Court there are now 12 direct appeals and 8 capital PCR petitions for review pending. Three notices of appeal from death sentences were filed in 2017.

3. Update on the revised Criminal Rules. The Chair then requested Judge Cattani to provide an update on the Criminal Rules Task Force. Judge Cattani began by noting the January 1, 2018 general effective date of the revised rules. Most of the changes to these rules are stylistic, but there are some substantive changes. For example, Rule 6.8 now includes a reference to the 2008 supplementary guidelines for the mitigation function of the defense team. Ms. Kalman, who was a member of the Task Force, noted that revised Rule 11 separates procedures concerning competence from those that concern the defendant's mental state at the time of the offense. The Chair added that the Arizona Voice for Crime Victims may petition the Court to intersperse victims' rights throughout the rules; these rights are currently aggregated in Rule 39. Judge Cattani referred anyone interested in the recent criminal rule revisions to an article written by Task Force staff that is available on the Supreme Court's website. Judge Cattani also noted that the Chief Justice may establish another group to address substantive issues under Rule 32. He noted two such issues: when defense counsel in an of-right PCR proceeding finds no colorable claims to present, whether there should nonetheless be judicial review of the record for fundamental error; and whether the actual innocence provision of Rule 32.1(h) should encompass imposition of a death sentence.

4. Microscopic hair analysis. The Chair also invited Judge Cattani to summarize ongoing work on a project concerning hair microscopy. Judge Cattani advised that the

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Federal Bureau of Investigation determined that hair analysis is not as accurate as originally thought, and that conclusions in this area are often overstated. The FBI brought these issues to the attention of every state governor. In Arizona, this information resulted in a review by the Department of Public Safety of about 1500 cases (none of which were capital) involving hair analysis. This led the Arizona project to request and obtain grant funding from the National Institute for Justice, which will allow more intensive study during the upcoming 18 months of Arizona cases involving hair analysis. Like comparable work regarding DNA, there is a possibility the project might lead to exonerations of wrongfully convicted defendants.

5. *Nordstrom v Ryan*: The Chair asked Mr. Gottfried and Ms. Garcia for an update on the implementation of a settlement agreement they had presented to the Oversight Committee in June 2017. This matter recently came to the Chair's attention because a victim who is a member of COVIC had learned that a death row inmate was no longer housed on death row (the Browning Unit), but had been moved to the Central Unit. Mr. Gottfried confirmed that these moves were within the parameters of the settlement. Although he indicated that the moves were proceeding without issues, Ms. Garcia noted that during this transition, it has been difficult for attorneys and professionals, such as psychologists and other experts, to reserve conference rooms for visiting with inmates under a death sentence, and that it might take weeks to secure a conference room. She added that several of the inmates remaining in the more onerous conditions of the death row unit are subject to the Americans with Disabilities Act, and there has been unexplained delay in relocating those inmates. Mr. Gottfried responded that the Department of Corrections is working to address both issues. Mr. Levey inquired whether the Department had notified victims of these moves. The Department apparently does not notify victims of routine moves of inmates within the facility. However, it might be appropriate to do so under the circumstances due to the limited number of inmates under a death sentence and the nature of this settlement agreement.

6. Jury selection in capital cases. Mr. Schaye renewed his request for additional training of judges regarding the selection of a jury in a capital case. The Chair advised that a two-day capital case training program for judges in May, which was sponsored by the Administrative Office of the Courts, included two 50-minute sessions led by 3 judges and a Supreme Court justice. The Chair nonetheless acknowledged differences among judges in the methods used, and time spent, for jury selection in capital cases. Mr. Schaye envisions training performed not only by judges, but also by prosecutors, defense attorneys, and social scientists to more comprehensively discuss the process, how to improve it, and assure that jurors understand their role in a capital case. Mr. Canby commented that the current training materials might contain erroneous statements of caselaw, and he has mentioned this to Judge Myers. The Chair believes this issue is within the Oversight Committee's charge in A.O. number 2016-11 to "identify issues

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affecting the administration of capital cases and to propose recommendations,” and he will seek additional input on how this issue should be addressed by Judicial Education Services.

7. Oversight Committee’s 2017 report to the Arizona Judicial Council. The Chair will present a progress report to the Arizona Judicial Council (“AJC”) at its December 14, 2017 meeting. A draft report was included in the meeting materials. The Chair noted that because this is an interim report, it contains no recommendations; recommendations will be reserved for the 2018 report. The Chair then requested comments on the draft.

Mr. Lieberman observed that while page 2 of the report says that the Chair and Ms. Hallam evaluate applicants for appointment as PCR counsel, he has no objective basis to conclude, as the draft says, that those evaluations are done “carefully,” or that the approved applicants are “competent,” and he requested those two words be struck. The Chair agreed to eliminate these two words. The Chair added that the committee should consider in the future a recommendation to modify the applicable statute so that the Supreme Court appoints appellate counsel and the trial court appoints PCR counsel, rather than vice versa as currently required.

Judge Myers corrected the numerical reference to a Maricopa County Superior Court Administrative Order, which was recited in two places at page 2 of the draft.

Ms. Phillis requested that the report include information concerning the number of “potential” capital cases in Maricopa County, which require staffing by her office. Mr. McVey and Mr. Mosher requested an opportunity to update their data by November 15 for inclusion in the report, and thereafter informally but before the AJC meeting, to reflect the most recent developments in their caseloads. There were no objections to these requests.

Mr. Schaye asked the report to recommend to the Court that it establish a committee or other group to study jury selection in capital cases. Mr. Lieberman would like to have a written proposal before the report includes this recommendation, and members agreed to defer this recommendation pending a presentation of that proposal.

A member then made this motion:

Motion: To authorize the Chair to finalize the Oversight Committee’s 2017 report to the AJC, in his discretion and consistently with the discussions at today’s meeting, and to make additional revisions as appropriate. The motion received a second and passed unanimously.

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

The meeting adjourned at 1:19 p.m.