

**Capital Case Oversight Committee**  
**State Courts Building, Phoenix**  
**Meeting Minutes: August 17, 2018**

**Members attending:** Hon. Ronald Reinstein (Chair), Hon. Kent Cattani, Lacey Gard, Donna Hallam, Hon. Kellie Johnson (by telephone), Michele Lawson, Dan Levey, Marty Lieberman by his proxy Jennifer Garcia, William Montgomery by his proxy Jon Eliason, Hon. Sam Myers, Daniel Patterson, Christina Phillis, David Rodriguez, Natman Schaye

**Guests:** Rosemarie Peña Lynch, Ellie Hoecker, Charlotte Merrill, Carolyn Edlund, John P. Todd, Rebecca Huerta, Jana Sutton, Hon. Paul McMurdie, Jon Canby, Jeff Kirchler, Michael Kiefer, Chris Bleuenstein, Madeline Mayer, Tim Geiger

**Staff:** Mark Meltzer, Theresa Barrett, Angela Pennington

**1. Call to order, introductory remarks, and approval of meeting minutes:** The Chair called the meeting to order at 12:03 p.m., followed by introduction of members, proxies, and guests. The Chair then directed members to draft minutes of the November 1, 2017 meeting that were included in the meeting materials packet. Judge Cattani noted that a reference at page 2 of the draft to Rule 32.1(8) should instead be to Rule 32.1(h).

**Motion:** With the change 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, which had 56 capital cases pending resolution when the Oversight Committee met in November, now has 47 pending cases. There are a couple cases involving restoration to competency, and the County Attorney has recently filed two death notices that are not yet reflected in his data. There were 20 capital case petitions for post-conviction relief in the pleading stage in November; now there are 17 cases. In addition, seven PCRs have been fully briefed and are pending judicial action. He announced the pending retirement of Carolyn Edlund, who has been a resource on capital cases for judges statewide. Mr. Eliason concurred with Judge Myers' numbers. The Maricopa County Attorney has filed six new death notices this year, and it received one additional capital case on remand. Four capital cases have gone to trial so far this year; two juries returned with death verdicts, one hung in the penalty phase, and there was one mistrial. Three cases previously remanded for resentencing have been resolved. Including cases now pending sentencing, the County Attorney has dropped the death notice in six cases. Ms. Phillis advised that the Office of Public Defense Services has staffed 54 active capital cases, which includes cases pending sentencing or

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competence determinations. Her office has also staffed 15 first degree murder cases in which there is a potential for a death notice. She concurred with Judge Myers on the number of pending capital PCRs.

Mr. Rodriguez stated that there are 8 pending capital cases in Pinal County, the same number as his November 2017 report. His office dropped the notice in two pending cases and filed a notice in two other cases. Mr. Mosher sent an email advising that there are no pending capital cases in Pima County, although the County Attorney is reviewing a couple cases where a notice is possible. Mr. Schaye noted that the Santa Cruz County Attorney has a case where it is considering a death notice. The Chair added that Yuma County has no pending capital cases, and that Yavapai County has two. Mohave County dropped a death notice in two cases and might not file notices in future cases because of the associated cost and time to resolution.

Ms. Gard reported 12 capital cases on direct appeal, two of which were *McKinney* remands from the Ninth Circuit. There is a pending petition for certiorari in another case. Her number of pending capital PCRs in Maricopa County, 24 cases, is the same as reported by Judge Myers. She also has two pending capital PCRs in Mohave County and one in Pima County. She has petitions for review pending in the Supreme Court in 11 first PCRs, seven from Maricopa County and four from Pima. In the federal district court, she has 35 cases: 23 on initial habeas petitions, and others involving remands under *Martinez* and *McKinney*. She has 16 pending capital cases in the Ninth Circuit and two in the U.S. Supreme Court. Appeals have been completed this year in ten cases and two more will probably be completed by year's end. Ms. Hallam's number of 12 pending direct appeals in the Arizona Supreme Court is consistent with Ms. Gard's. A pending motion in an older Mohave County case (*State v Poyson*, Supreme Court No. CR-98-0510) is requesting a new independent review of the death sentences. Ms. Hallam reported that the Arizona Supreme Court has 15 pending petitions for review in capital cases, which includes a few successive petitions.

**3. Update on the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure.** Earlier this year, by entry of Administrative Order No. 2018-07, the Supreme Court established a task force to review and propose substantive changes to Criminal Rule 32: "post-conviction relief." Six Oversight Committee members were appointed to serve on the Rule 32 Task Force. Three of those members – Judge Cattani, Judge Johnson, and Ms. Gard – presented issues the Rule 32 Task Force is addressing that affect capital cases.

One issue involves the appointment of a defense team, including co-counsel and a mitigation specialist, in a capital PCR. The Task Force will recommend an amendment to Rule 32.4 that will allow the trial court to appoint a defense team on a showing of reasonable necessity, the same showing that is required for pre-trial appointments under

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Rule 6.7. Upon such a showing, the rule requires the appointment of co-counsel in a capital case, but appointment of other members of the defense team is discretionary. The proposed rule codifies current practices of the Superior Court in Maricopa and Pima Counties. The Task Force concluded that if the trial court appoints co-counsel in a capital case, that person does not need to be qualified under Rule 6.8 because co-counsel may have another skill set or special knowledge that would benefit the defense. Task Force members discussed compensation of appointed counsel in a capital case but did not believe the amount of compensation was a proper subject of a Rule 32 provision.

Ms. Gard presented an issue to the Task Force regarding Rule 32.1(h). The issue was prompted by the Arizona Supreme Court's recent opinion in *State v. Miles*. The current rule affords relief if the court determines that "no reasonable fact-finder" would have imposed the death penalty. Ms. Gard suggested that because mitigation evidence is subjective, Rule 32.1(h) is deficient because it lacks an objective standard. She proposed revisions to Rule 32.1(h) that would add an aggravation phase verdict to its scope but remove consideration of a death penalty verdict. She added that her revisions would still permit a defendant sentenced to death to seek relief under other sections of Rule 32.1, such as on grounds of newly discovered evidence or ineffective assistance of counsel. Ms. Merrill, who served as Ms. Garcia's proxy at a recent Task Force meeting, contended that the Task Force should clarify the standard for relief from a death penalty verdict under Rule 32.1(h), but it should not abrogate its substance. She added that there are only a handful of Rule 32 petitions that request relief under current Rule 32.1(h), and she does not expect the *Miles* opinion to open a floodgate of petitions seeking relief under that rule. Judge Cattani briefly noted a separation of powers issue that the Task Force had discussed; the other sections of Rule 32.1 have a statutory analog, but Rule 32.1(h) does not. He invited those present to provide their comments on Rule 32.1(h) to the Task Force before it considers this issue again at its August 31 meeting.

Judge Johnson noted that the Task Force was considering revisions to the "of right" language in Rule 32.1, and Ms. Gard advised that the Task Force had discussed, but had not concluded, its consideration of competence issues in a post-conviction proceeding.

**4. Capital case juries.** Included in the materials for today's meeting is an article Mr. Schaye recently submitted for publication in the *Arizona Attorney* titled "Revisiting the Power of Twelve: Fairness and Capital Juries." (See further a related discussion of this topic in the November 1, 2017 Oversight Committee meeting minutes, section 6.) The Chair invited Mr. Schaye to summarize his article. Mr. Schaye responded that a "power of twelve" study was done in Arizona about 25 years ago, which resulted in dozens of recommendations, some of them cutting-edge, for civil and criminal case juries.

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However, these innovations preceded *Ring* and jury sentencing in the penalty phase of a capital trial, and they have not recently been reviewed or revised.

Mr. Schaye emphasized that the penalty phase in a capital case is subjective in nature. Jurors are asked to make a personal, moral decision, which is neither objectively right or wrong. This implicates several aspects of capital case juries, including instructions that are often difficult to comprehend. He noted disparities in the selection process for capital case juries. And jurors often proceed through a capital case without an understanding of what is expected of them. Mr. Schaye submitted that these aspects are not well-studied or researched. He would like the Supreme Court to establish a committee with a goal of mitigating the subjectivity of the process. He would like to see lawyers, judges, social scientists, linguistic experts, and psychologists as members of that committee. Mr. Schaye requested the Oversight Committee's support for his proposal. The members' comments that followed included the following.

- Jury instructions in capital cases are constrained by statutory language and decades of court opinions parsing words and phrases.
- Instructions to capital case juries could probably be improved. But capital case jury selection is difficult to script, and different judges have different styles.
- Mr. Schaye has some recommendations that could result in rule changes, such as increasing the number of peremptory challenges and changing the timing of motions for new trial.
- There could be improved guidance concerning the selection of a capital case jury, including how to conduct the selection of jurors (in a large group, a small group, individually) and the length of time jury selection should take.
- Perhaps Arizona should return to judge sentencing in capital cases.
- We should first identify the specific problem being solved. If there are inconsistent practices in different courtrooms, is that a problem? Will a lack of flexibility create new problems?

**5. Oversight Committee's 2018 recommendations to the Arizona Judicial Council.** Administrative Order No. 2016-11, which extended the Oversight Committee's term to December 31, 2018, required the Committee to submit two reports to the Arizona Judicial Council. The first report, which was included in the meeting materials and that the Committee submitted in December 2017, contained no recommendations. The Chair solicited the members' recommendations for the 2018 report, which the Chair will present at the Council's December 2018 meeting.

Mr. Schaye then made a motion that the Arizona Supreme Court establish a committee to study jury issues in capital cases. The Chair observed that the Supreme Court might consider establishing such a committee even without review of this issue by the Council, i.e., without a formal recommendation in the Oversight Committee's 2018

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report to the Council, but members nonetheless proceed to discuss and vote on the motion.

**Motion:** To recommend that the Court establish a committee to study jury issues in capital cases. The motion received a second and passed unanimously.

Mr. Schaye said he would prepare a detailed written proposal for the members to review at the next Oversight Committee meeting.

The Chair proposed that the 2018 report include a recommendation to increase the rate of compensation for court-appointed counsel in capital PCRs, which is currently set by statute at \$100. He thought an increase to \$125 per hour would be inadequate to attract well-qualified counsel, and he recommended an increased hourly rate of \$150. The federal rate for court-appointed counsel is \$187 per hour. For first-chair counsel in Maricopa County, the rate is \$145 per hour. For capital case appeals in Maricopa County, and for capital cases in Pinal County, the rate is \$100 per hour. The Attorney General's office, among others, supports a higher amount than currently prescribed to encourage competent counsel to apply for appointments on capital cases. Members discussed but rejected a proposal to include a cost-of-living adjustment in the hourly rate. Members also discussed but declined to recommend an amendment to the statute to refer to compensation generically but without referring to a dollar amount. A member then made the following proposal by motion.

**Motion:** To recommend an amendment to the statute that would provide a floor for the hourly rate but not a cap, thereby allowing a county to pay more than the minimum hourly rate. After a second and discussion, the motion passed on a unanimous vote.

The Chair also proposed reversing the current structure of post-judgment appointments in capital cases. Under the current structure, the trial court appoints counsel for an appeal, and the Supreme Court appoints counsel to appear in the trial court for post-conviction proceedings. This rationale for the Chair's proposal is that the appellate court is more knowledgeable about the qualifications of attorneys on appeals, and the trial court correlatively so on attorneys who appear in that court. The applicable statute already allows the Supreme Court to delegate appointments on capital PCRs to the presiding trial court judges, but even in that circumstance, the statute seems to require the Court to retain a list of qualified capital PCR counsel. The Chair will research this further, and members will revisit the issue at their next meeting.

The Chair noted that when the Oversight Committee was established, there were about 140 pending capital cases in Maricopa County. Currently, there is a fraction of that number pending, and the Chair asked whether the 2018 report should recommend disbanding the Committee or extending its term. Members had different views. One

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member noted that the number of pending cases has decreased over the years. but not because of anything this Committee has done. The member said that because the number is lower, the Committee no longer needs to monitor a high volume of capital cases. Another member noted the usefulness of having this Committee continue to exist as a forum for discussing capital case issues that are of statewide concern. And a guest observed that although the number of capital cases in Maricopa County has declined considerably, it continues to be one of the top counties in the nation on per capita death penalty cases. Mr. Eliason responded that Maricopa County prosecutors have an excellent relationship with the defense bar, they invite the early submission of mitigation material, and they are working to further reduce the volume of capital cases. However, there are cases where a death penalty is appropriate, and their office will continue to file notices in those cases. Mr. Rodriguez noted that it still takes a long time to get a capital case to trial in Pinal County. The Chair tabled further discussion of this issue to the next Committee meeting. It's possible that the Committee's 2018 report won't make a recommendation on this topic and the Council will make its own determination about extending the Oversight Committee's term.

**6. Call to the public; adjourn.** There was no response to a call to the public. For the good of the order, Judge Cattani provided an update on his November 2017 presentation on hair microscopy. His update included information about law enforcement's effort to narrow the universe of cases involved in the study.

The Chair requested staff to follow up with members about establishing a date for a Committee meeting this fall. The meeting adjourned at 1:19 p.m.

**Capital Case Oversight Committee  
State Courts Building, Phoenix  
Meeting Minutes: October 31, 2018**

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

**Members absent:** Dan Levey

**Guests:** Rosemarie Peña Lynch, Ellie Hoecker, Carolyn Edlund, Rebecca Huerta, Jon Canby, Jeff Kirchler, Chris Bleuenstein, Tim Geiger, Susan Corey, Jeff Sparks, Jennifer Garcia, Jennifer Rock, Steve Koestner

**Staff:** Mark Meltzer, Theresa Barrett, Angela Pennington

**1. Call to order, introductory remarks, and approval of meeting minutes.** The Chair called the meeting to order at 12:01 p.m. The Chair asked if there were any corrections to the August 13, 2018 draft meeting minutes. Those minutes should reflect Mr. Levey's presence on August 13.

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

**2. Status reports.** The Chair then asked members for brief status reports. Judge Myers reported that the number of pending capital cases in Maricopa County increased from 47, as reported at the August meeting, to 52 cases. One of the new cases was a remand for resentencing. There are 25 pending capital petitions for post-conviction relief; 16 are in the pleading stage, 8 are fully briefed and are now before the assigned judge, and counsel was recently appointed in one case. Mr. Eliason concurred with Judge Myers' report. Ms. Phillis has 72 staffed cases, which includes potential capital cases.

**3. Discussion of a draft report to the Arizona Judicial Council.** The Chair will present the Oversight Committee's report to the Arizona Judicial Council ("AJC") on December 13, 2018. A draft report was included in the meeting materials.

**The first recommendation** in the draft report (to "establish a committee to study jury issues in capital cases"), was premised on materials and a presentation provided by Mr. Schaye and discussed by members at the August meeting. The Chair noted that one component of the recommendation – concerning the content of jury instructions – fell within the ambit of the State Bar of Arizona rather than the Court. Other components involved judicial education and should be addressed by the AOC's Education Services

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Division or by superior court educational programs, rather than by a new committee. The Chair observed that the Maricopa County bench, in conjunction with the AOC, conducts capital case training for judges statewide on a two-year cycle, with the next program scheduled for 2019. The Chair then opened this recommendation for further discussion.

A prosecutor representative discussed this recommendation with colleagues, and they oppose it. They are satisfied with the State Bar's role in drafting jury instructions. A judge member expressed concerns that the new committee might unduly constrain judicial independence when conducting trials. Judges do not have uniform practices for jury selection and the member had concerns that uniform jury selection practices would be an objective of the new committee. The member added that judicial education on capital cases regularly includes information concerning jury selection. Mr. Schaye, who noted the possibility that his article would not be published in the *Arizona Attorney* magazine, emphasized that the purpose of the new committee would be to study and make recommendations on a broad range of issues involving the trial of a capital case. It would obtain input from a variety of disciplines and seek common ground on areas of universal interest.

The Chair noted that most members continued to support Mr. Schaye's proposal and that the Oversight Committee's report would include this recommendation.

**The second recommendation** was to support a statutory increase in the compensation rate for appointed counsel in capital post-conviction proceedings. Maricopa's Office of Public Defense Services indicated that private attorneys annually submit bills on capital PCRs for about 25,000 hours. At an hourly rate of \$100, this equates to about \$2.5 million per year. A \$50 increase in the hourly rate would be an aggregate annual increase of \$1.25 million. However, the Oversight Committee's recommendation was not for a specific dollar increase, but rather it would set a floor of \$100 and allow each county to authorize payment of a higher hourly rate. The Chair then invited further discussion.

Although one member supported an increase in the rate instead of a floor, other members believed that the floor would provide counties with greater flexibility. A floor would allow an increase when budgetary circumstances permitted a higher rate; the decision would be left to local boards of supervisors rather than be fixed by statute. Members noted that over the past few years, the Legislature has shown minimal interest in amending this statutory provision and have even limited State funding to counties under A.R.S. § 13-4041(H).

Considering all these circumstances, members agreed to leave intact the draft recommendation to amend the statute to set a floor for the hourly rate, which would allow increases in the rate on a local level.

**A new recommendation** from Mr. Lieberman, as shown in the meeting materials, would amend Criminal Rule 6.8(e). This rule allows the appointment of counsel in capital cases in “exceptional circumstances” when counsel does not meet the other required qualifications. The current provision requires counsel appointed in exceptional circumstances to associate with a qualified counsel. Mr. Lieberman’s proposed one-word amendment would require counsel to “meaningfully” associate with a qualified lawyer. He based his proposed amendment on anecdotal information that some associated attorneys do very little in a case. He acknowledged that “meaningfully” could be hard to define, but it could be determined by the court on a case-by-case basis. He noted that other terms such as “substantial procedural right” in Rule 12.9, are also amorphous and undefined.

A member thought that counsel’s relationships by necessity must be meaningful, even without including that adjective in the rule. One member observed that a one-word addition to the rule might not change the practices of some attorneys. Another member proposed an alternative of adding the “meaningful” requirement as a comment to the rule, with an explanation of its meaning. Mr. Lieberman rejected as too vague a suggestion that a comment provide specific criteria for a meaningful association. The Chair then called for a vote on Mr. Lieberman’s proposal. The Committee was evenly split: 6 members in favor, and 6 members opposed. The Chair broke the tie by voting in favor. The report will note the split and will request the AJC’s support for filing a rule petition seeking an amendment to Rule 6.8(e).

**The third recommendation** would modify the way counsel are appointed in capital appeals and PCRs, so that appellate counsel would be appointed by the Supreme Court, and PCR counsel would be appointed, with the Supreme Court’s grant of authority, by the presiding judge of the county. Maricopa County envisions that its existing review committee would evaluate PCR counsel for every county, provided that the attorneys are on a list that the Supreme Court is required by statute to maintain. See A.R.S. § 13-4041(C). The proposal does not contemplate a change to that statute. The Chair opened the matter for discussion.

One member suggested that the Court’s grant of authority to a presiding judge not be a blanket authority by administrative order. Rather, it should be on a case-by-case basis, at least pending an opportunity to consider whether this method works well. The member added that the Supreme Court would still need to evaluate the qualifications of attorneys on the Court’s list before any evaluation by Maricopa’s review committee. Members discussed the hypothetical situation of a non-Maricopa presiding judge appointing on a capital PCR an attorney who had not been approved by Maricopa’s review committee, but who was nonetheless on the Supreme Court’s list. One member

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thought this might be contrary to Arizona's ongoing effort to "opt-in" under the AEDPA; the member asked the Oversight Committee to defer this recommendation for another year pending resolution of the opt-in request. But another member responded that the purpose of the review committee's evaluations is to improve the process, and that few concerns have been raised regarding the qualifications of attorneys who have come before the committee during recent years.

After further discussion, members refined the recommendation to allow a presiding judge to request the Supreme Court's permission to make an appointment in a given capital case from the list maintained by the Supreme Court. Maricopa's Office of Public Defense Services has seven attorneys currently available for appointment on capital appeals; members had no objections to the Supreme Court appointing appellate counsel. Members accordingly approved both components of this recommendation. A member asked that the recommendation not refer to "reversing" the current structure, because the current structure was historically rational, and the Chair agreed.

**The fourth recommendation** requested the AJC to decide whether to disband or to extend the term of the Oversight Committee. One member suggested the recommendation be stronger, i.e., to extend the term. The member observed that the Oversight Committee brings a group of stakeholders together like no other group; unanticipated issues arise in the capital case area, and it is helpful to have the Committee intact and available when that happens. Another member noted that even when the Oversight Committee does not have much to discuss, there is value in having regular meetings and conversations so that issues do not go unnoticed and unaddressed. A member then made this motion:

**Motion:** To recommend extending the Oversight Committee for another three-year term. The motion received a second and carried, nine in favor, one opposed, with one member (Mr. Lieberman) abstaining.

The Chair then requested the members' authority to finalize the Committee's report to the AJC, which was followed by a motion:

**Motion:** To authorize the Chair to finalize the Committee's report to the AJC, in his discretion and consistently with today's discussion, and to make additional revisions as appropriate. The motion was seconded and passed unanimously.

The Chair directed staff to distribute the final version of the report to the members before he presents it to the AJC on December 13.

**4. A proposal regarding death penalty prosecutions.** Judge Cattani briefly presented a proposal, which is still being explored, regarding the manner of bringing

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death penalty prosecutions in Arizona. He noted that there currently is a disconnection between who initiates the death penalty case and brings it to trial, i.e., a county attorney, and who has responsibility for the case thereafter, through the appeal and state and federal post-conviction proceedings, i.e., the Attorney General. As a result, the State bears the appellate and post-conviction costs of the county attorney's decision to charge the case, which puts strain on the State's finite resources. Judge Cattani proposed that the State, i.e., the Attorney General, should make capital decisions statewide, and the State should assume financial responsibility for those decisions.

Under this proposal, a county attorney would recommend filing a death notice to the Attorney General. If the Attorney General agreed to file, it would pay the cost. If it declined the filing, the county attorney could still prosecute, but it would do so at county expense until the case concludes. This structure would facilitate the Attorney General filing a death notice in a county that currently could not afford the financial burden. A premise of this proposal was that if the State of Arizona elected to have a death penalty, it should recognize the cost and be willing to appropriate the expense. Judge Cattani concluded his presentation by asking, if Arizona was going to adopt the death penalty today, would it do so with a different and better structure? Members discussed Judge Cattani's proposal but took no action.

**5. Call to the public; adjourn.** There was no response to a call to the public. For the good of the order, Judge Myers announced that in December, Michele Lawson would assume the position created by Carolyn Edlund's retirement. (See the August 17, 2018 meeting minutes, page 1.)

The meeting adjourned at 1:55 p.m.