

**JOINT REPORT
OF THE
CAPITAL CASE
OVERSIGHT COMMITTEE
&
MARICOPA COUNTY SUPERIOR COURT
TO THE
ARIZONA JUDICIAL COUNCIL**

NOVEMBER 2008



CAPITAL CASE OVERSIGHT COMMITTEE

November 2008

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Hon. Ronald Reinstein, Judge of the Maricopa County Superior Court (ret.)

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Executive Summary

This report of the Capital Case Oversight Committee and the Maricopa County Superior Court follows the September 2007 report of the Capital Case Task Force (“Task Force Report”).

In February 2007, the Task Force was directed by Supreme Court Administrative Order 2007-18 to examine a significant increase in the number of pending capital cases in Arizona courts. One of the recommendations of the Task Force was the creation of an oversight committee to monitor the number of capital cases, primarily those in Maricopa County. The Oversight Committee was created by Supreme Court Administrative Order 2007-92 in December 2007.

The Oversight Committee found that as of July 2008, there were 155 cases pending in the Superior Court statewide in which a notice of intent to seek the death penalty had been filed. Maricopa County accounted for 82% of this number, or 127 cases. The Committee believes that the increase in pending capital cases, at least in Maricopa County, is attributable to protracted pretrial proceedings, especially for mitigation discovery, and, to a lesser extent, lengthier trials for capital cases. Calendar conflicts of trial counsel, which require postponement of trial dates, and the residual *Ring* remands, further contribute to the backlog of pending cases. The Committee also believes that the spike in the number of death notices filed in 2006 is a factor in the backlog, because most of these cases are still being processed.

Because Maricopa County will probably not resolve the pending inventory of cases more quickly than it already is, a surge of direct appeals to the Arizona Supreme Court is not anticipated. The Task Force reported that the Supreme Court can process ten capital cases annually. The Oversight Committee anticipates that notices of capital appeals for 2008 will be in the range of ten to twelve cases. If the Supreme Court needs additional resources, the Committee recommends, as did the Task Force, that Court of Appeals judges fill in temporarily.

The Committee also recognizes that some areas addressed by the Task Force still require attention. For example:

- More defense counsel are needed for post-conviction relief (“PCR”) proceedings. Fifteen convicted defendants whose direct appeals are final do not have post-conviction relief counsel. Some of these defendants have been without counsel for more than a year. To address this situation, the Oversight Committee reiterates the following recommendations previously made by the Capital Case Task Force:
 1. Amend A.R.S. § 13-4041 to increase the hourly rate for post-conviction relief counsel, and remove the 200-hour “cap.”
 2. Support legislation to amend A.R.S. § 41-4301 to remove training prohibitions and increase staff for the State Capital Post-conviction Public Defender’s Office.

- The Oversight Committee re-urges two other recommendations made by the Task Force to deal with the backlog of cases in the trial court:
 1. Support efforts to amend Article 6, Section 20, of the Arizona Constitution, and A.R.S. § 38-813, and permit retired judges to resume judicial duties with fair compensation.
 2. Recommend modification of the superior court's judicial rotation policy for the criminal bench.

- The Oversight Committee suggests the following additional actions:
 1. Adopt a rule for post-conviction relief management conferences in capital cases.
 2. Develop a statewide rule regarding mitigation discovery masters.
 3. Adopt a rule regarding the preservation and transfer of the case file.
 4. Recommend as a best practice that the prosecutor explain to victims at an early stage of the case the comparative times for resolving capital and non-capital murder cases.
 5. Continue the existence of the Capital Case Oversight Committee.

Introduction

There has been an increase in the number of pending capital cases in the Superior Court of Arizona in recent years, particularly in Maricopa County. Capital cases are resource intensive, and an increase in the volume of pending cases in the superior court ultimately impacts other courts, notably the Arizona Supreme Court on direct appeals, as well as the federal courts, particularly on petitions for habeas corpus.

To address the issue of the increased volume of pending capital cases, the Arizona Supreme Court in February 2007 issued Administrative Order 2007-18, which created the Capital Case Task Force. The Task Force examined the sufficiency of resources and the adequacy of procedures for capital case processing at multiple stages of the judicial process. The Task Force's assessment culminated in a report to the Arizona Judicial Council, along with recommendations, in October 2007. One of the recommendations was to establish a Capital Case Oversight Committee.¹

In December 2007, Administrative Order 2007-92 established the Capital Case Oversight Committee. The purpose of the Committee was (1) to study and recommend measures to facilitate capital case reduction efforts; (2) to make recommendations for adequate notice to the Supreme Court to assist the Court in making the necessary modifications to its staffing levels and judicial assignments to ensure the timely processing of appeals; and (3) to develop recommendations for any formal policies deemed necessary.

The Oversight Committee convened six times during 2008. This report is now submitted by the Committee to the Arizona Judicial Council as directed by Administrative Order 2007-92.

The Committee's report is built upon the October 2007 report of the Capital Case Task Force. The historical background of capital cases in Arizona, the procedural details of capital case processing, and the other observations of the Task Force are all incorporated within this report by the Oversight Committee.²

The Committee's report attempts to state the interests of all of the stakeholders in the capital case process. All of the stakeholders are represented on the Capital Case Oversight Committee.³

¹ The Report of the Capital Case Task Force can be found at <http://supreme.state.az.us/cctf/FinalRpt092007.pdf>.

² Nine of the ten members of this Committee were also members of the Task Force.

³ All ten members of the Capital Case Oversight Committee are from Maricopa County. (The Capital Case Task Force was also composed of only Maricopa County members.) Except as otherwise noted, the Maricopa County Superior Court, which is the origin of the majority of capital cases, will be the focus of this report.

The Committee's report focuses on three areas:

- Data. This section provides current data to update the status of capital case management since the Task Force's report.
- Task Force Recommendations. This section discusses implementation of recommendations by the Task Force, and whether refinements to those recommendations are warranted.
- Oversight Committee Recommendations. This section contains an additional set of recommendations for capital case processing.

I. Data

The data defines the situation.⁴ The Oversight Committee believes that a crisis point in capital case management can be identified only when there has been a significant increase in case filings, a decrease in case dispositions, an increase in case aging, or some other, quantifiable deviation from a preexisting norm.⁵

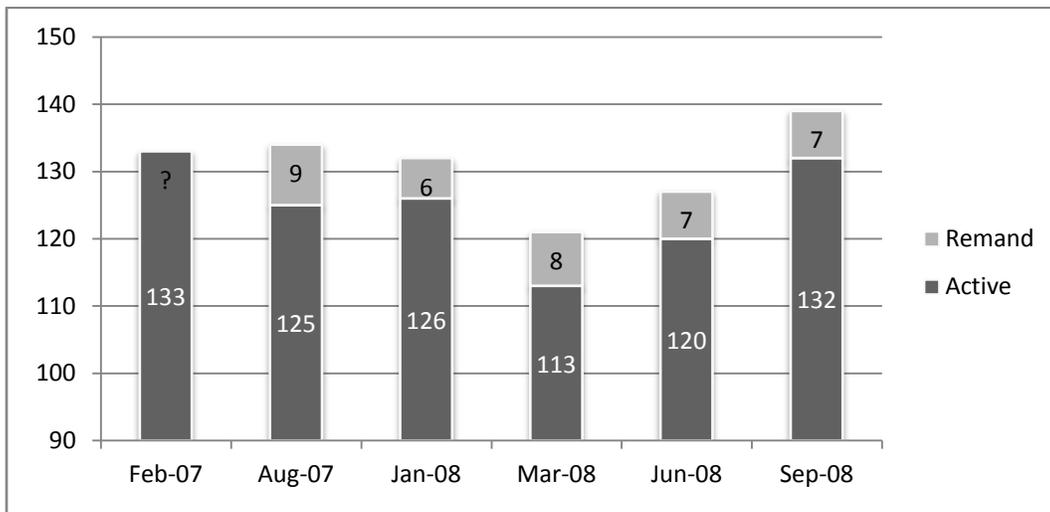
State and County Data.

Statewide Pending Capital Case Volume. As of **July 2008**, there were **155 capital cases** pending in the superior courts statewide. This figure includes cases remanded for sentencing, but excludes post-conviction relief petitions. See Appendix A for a breakdown of this total by county. Maricopa County accounts for 82% of the pending cases, while 9% are in Pima County. The number of pending capital cases can vary on a daily or weekly basis, as new cases are filed or existing cases are terminated.

Maricopa County Superior Court Pending Capital Case Volume. Pending case inventories in the Maricopa County Superior Court have been reported to the capital case committees as follows, starting with the initial meeting of the Capital Case Task Force in February 2007:

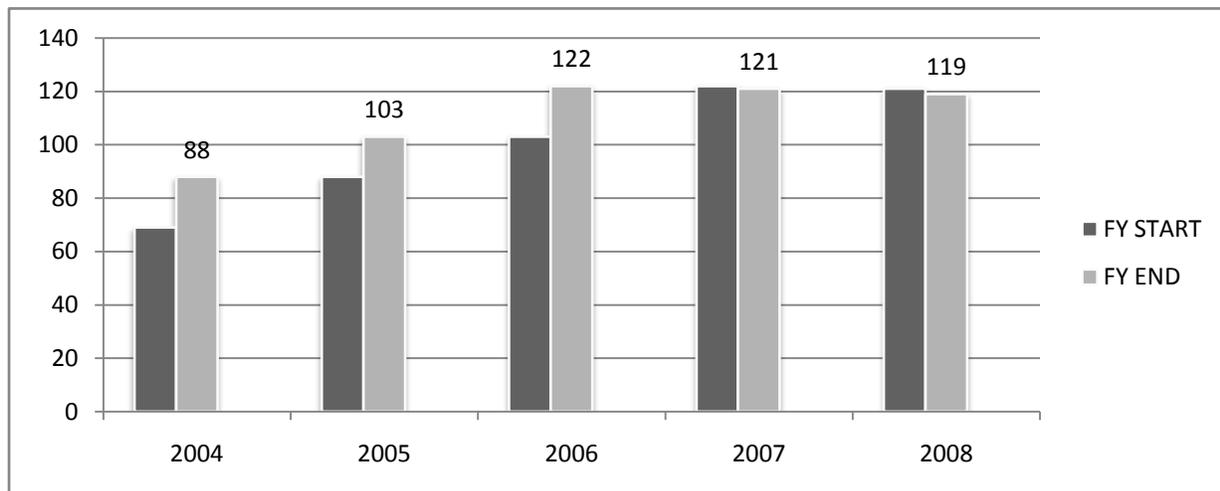
⁴ A prior study of capital case processing by the Arizona Attorney General's Capital Case Commission (which can be found online at <http://www.azag.gov/CCC/FinalReport.html>) contains a wealth of statistical material. However, the data in that report, which was released in final form in December 2002, is now outdated as a result of *Ring v. Arizona*, 536 U.S. 584 (2002), and statutory changes to Arizona's capital case sentencing procedure, which also occurred in 2002, as a result of the *Ring* decision.

⁵ A starting data point is the number of inmates on death row. The Arizona Department of Corrections website reports that there are currently 121 inmates on Arizona's death row. The tenure of four of those inmates dates back to 1982. One inmate has been executed in Arizona since the year 2000, on May 22, 2007.



Pending Capital Cases - Maricopa County 2007-2008, Active + Remands, per reports to Task Force and Oversight Committee

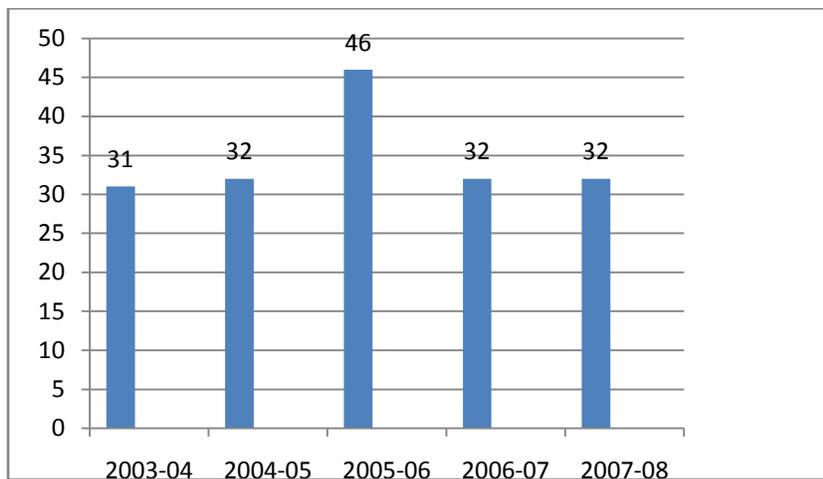
For a longer term perspective, the Maricopa County Superior Court statistician's data showed the following inventory of capital cases as of the start and at the end of the fiscal year for a period of five years:



Pending Capital Cases - Maricopa County 2004-2008 Fiscal Years, per Superior Court statistician

Maricopa County Capital Case Filings. The presiding criminal judge of the Maricopa County Superior Court, who maintains a set of statistics separately from the court statistician, reported that for **calendar year 2007, twenty-six capital cases** were filed in the superior court, an average of a little more than two cases per month. For the **first eight and one-half months of 2008**, there were **thirty-three capital case filings**, or almost four cases per month.

The Maricopa County Superior Court statistician’s inventory of capital cases is kept on a fiscal year (July 1-June 30) basis. Those numbers show new capital filings, that is, defendants against whom a notice of intent to seek the death penalty has been filed,⁶ as follows:



Capital Case Filings - Maricopa County, fiscal years 2004-2008, per Superior Court statistician

Some variation of capital case filings is unpredictable. For example, in 2008, the Maricopa County Attorney filed a single indictment charging eight defendants with first degree murder. Six of those eight defendants were initially identified as “potential” capital defendants by the Office of Public Defense Services, triggering the appointment of first chair counsel for each.⁷ It now appears that three of the defendants will probably receive a notice of intent to seek the death penalty.

⁶ The statistician’s figure for FY 2007, showing thirty-two capital cases filed, is inconsistent with the number shown in footnote 4 of the Task Force Report, which noted that thirty-four capital notices had been filed by the Maricopa County Attorney for fiscal year 2007.

⁷ The Office of Public Defense Services, through routine communications with the Maricopa County Attorney’s Office, maintains a list of “potential” capital case defendants, that is, first-degree murder cases where it appears likely that a notice of intent to seek the death penalty will be filed.

From a longer term perspective, it does not appear that the number of death notices filed annually in Maricopa County has significantly increased over the past decade. The Maricopa County Office of Management and Budget, in an August 10, 2007 letter to the Chair of the Capital Case Task Force, provided the following numbers of capital case filings in Maricopa County for each of the past eleven fiscal years:

<u>Fiscal year</u>	<u>Filings</u>
1997-1998	50
1998-1999	39
1999-2000	31
2000-2001	28
2001-2002	32
2002-2003	26
2003-2004	33
2004-2005	30
2005-2006	41
2006-2007	32

Although there is an apparent discrepancy between budget office's figures and those of the superior court statistician, as shown in the table on the preceding page, that office's numbers indicate that even during a decade of population growth, the number of capital case notices filed in Maricopa County has been relatively consistent.

Volume of Death Sentences (Maricopa County and Statewide). The Administrative Office of the Courts ("A.O.C.") maintains an Annual Data Book on a fiscal year (July 1-June 30) basis. The data from these books discloses the following:

	2004	2005	2006	2007	2008
Maricopa County death sentences	6	7	16	8	6 ⁸
Statewide death sentences	8	9	16	8	N.A.
Maricopa County death sentences as a percentage of state total	75	78	100	100	N.A.

Appellate and Post-Conviction Relief proceedings. As of November 12, 2008, there were seventeen direct appeals pending on capital convictions.

From January 2005 through August 2008, thirty-two opinions were issued in capital cases.⁹ Death sentences were affirmed in twenty-five. Four cases were remanded for resentencing, two death sentences were reduced, and one capital conviction was reversed.

⁸ The FY 2008 data for Maricopa County is taken from its court statistician, and not from the A.O.C. Data Book.

There were eleven initial petitions for post-conviction relief in capital cases pending in the superior court as of November 17, 2008. One petition for review of a capital case PCR was denied by the Arizona Supreme Court on October 28, 2008.

Discussion.

Based on the data from Maricopa County, there has been a significant increase since 2004 in the number of pending capital cases in the Maricopa County Superior Court. This is likely due to protracted pretrial proceedings, especially for mitigation discovery, *Ring* remands, and, to a lesser extent, lengthier trials.¹⁰ Calendar conflicts of trial counsel, which necessitate postponement of trials, are also a contributing factor. Other than a spike in the number of death notices filed in 2006, the large volume of pending capital cases does not appear to be a consequence of any sustained increase in the number of capital case filings. In short, the capital case inventory in Maricopa County is higher because cases are taking more time to process and resolve.

Between 2007 and 2008, the number of pending cases in Maricopa County appears to have stabilized in a range of 115-135.

Although there is a rough leveling off of the number of new capital case filings in Maricopa County, at the same time there has been an increase in the rate of disposition of those cases by the court. The Maricopa County Superior Court's annual disposition of capital cases now approximates the number of new annual capital case filings.¹¹ Because filing and disposition volumes are in equilibrium, there is no expectation that the inventory of cases will be reduced.

The annual number of statewide cases resulting in a sentence of death has returned to the single digits, following a double digit surge in 2006. The number of death sentences imposed, being perhaps the single most important piece of data in this report, is not easily prognosticated. The number of capital cases pending in the trial courts statewide, as of July 2008, was 155. *See* Appendix A. Assume that 30% of those cases are resolved over the following twelve months (N= 46 cases). Further assume that 40% of the forty-six cases (eighteen cases) are resolved by

⁹ By county, the breakdown is Maricopa, twenty-two; Pima, five; Mohave, three; Yavapai, two.

¹⁰ It takes at least thirty months before a capital case in Maricopa County is ready for trial. The presiding criminal judge reported that the average length of an entire jury trial, including the guilt phase, is eighty-four days.

¹¹ The presiding criminal judge reported to the Oversight Committee that during calendar year 2007, thirty-six capital cases were resolved; and that seventeen cases were resolved in the first six months of 2008. The court statistician's data showed that during fiscal year 2006-07, thirty-five cases were resolved; and that thirty-five cases were resolved in fiscal year 2007-08.

trial; and that 60% of those trials result in death sentences. Given those assumptions, eleven new direct appeals to the Arizona Supreme Court will follow.

New resources have been developed to address post-conviction relief issues in capital cases. In November 2007, the State Capital Post-conviction Public Defender's Office, created earlier in 2007 by legislative enactment, began operation. This office handles only capital case PCRs. It has three attorneys on staff: the director, the sole capital-case-qualified attorney in the office; one part-time attorney; and one full-time attorney. This office also has a full-time mitigation specialist. The Office of Statewide PCR counsel is currently handling four cases.¹²

The Arizona Supreme Court Staff Attorney's Office maintains a list of private counsel qualified to handle PCR proceedings. There are eighteen names on the list. No new names have been added since August 2006. Presently the attorneys on this list are handling seven PCR cases.

As of November 17, 2008, fifteen capital defendants were awaiting the appointment of PCR counsel. Two of these defendants have been on the list of PCR defendants awaiting the appointment of counsel for more than a year-and-a-half.

As of August 1, 2008, there were seventy-one Arizona capital cases at various stages of federal habeas corpus. Two of these cases have been in the federal system for more than twenty years. The average age of these seventy-one proceedings in the federal courts is nine years. The federal processing of capital cases is complex and beyond the scope of this report

Comments on Data Compilation.

Different stakeholders have reported the volume of pending capital cases, and other data, to the Task Force and to the Committee. These reports have been made by the presiding criminal judge of Maricopa County; by administrators of the Maricopa County Superior Court; by prosecutors; by defender agencies; and by the staff of the Arizona Supreme Court.

Some numbers are readily quantifiable. For example, the number of direct appeals in capital cases can be determined with certainty. Other numbers are less standardized, particularly with regard to the number of capital cases pending in the superior court.

An example of a non-standard number is the reporting of pending "active" cases. Sometimes the reference is to all capital cases pending in the Superior Court. At other times, cases which have been remanded to the superior court – either as a *Ring*¹³ remand or for other

¹² The Governor's budget for FY 2009 recommended funding the State Capital PCR Office for seven new positions and for expert witness fees associated with capital post-conviction cases. The recommended funding would have allowed that office to handle eight to twelve cases at a time. Additional funding was not, however, provided in the budget that was passed.

¹³ *Ring* held unconstitutional that portion of A.R.S. § 13-703 that allowed judges to find facts that led to the finding of an aggravating factor, which made a defendant eligible for the death sentence.

reasons – are excluded from the “active” case total, and are instead counted in a separate category. Cases which have resulted in a guilty plea may be counted as “active” cases because they are pending sentencing; or, because they will probably not result in trials, these cases may not be considered in the “active” case total. A case in which the prosecution has been deferred pending a defendant’s restoration to competency may or may not be counted as an “active” case.

It is also important, when evaluating the available data, to determine if the figures refer to capital “cases,” or to capital “defendants.” As of June 30, 2008, for example, there were four “cases” pending in the Maricopa County Superior Court, in which there were nine defendants against whom notices of intent to seek the death penalty had been filed.¹⁴

Finally, some statistics are kept on a calendar year basis, while others are kept on a fiscal year (July 1 to June 30) basis. Some statisticians keep their numbers as of different days of the month.

These differences in data collection methods are noted insofar as numbers previously reported are not always amenable to comparisons. There may be unexplainable differences in data when consistency would be expected. Different methodologies could lead to an understatement or an overstatement of the actual volume of pending capital matters.

The Chair of the Oversight Committee directed that the Maricopa County stakeholders who keep data meet and discuss standards for capital case data management. Thereafter, representatives of the superior court, county attorney, and defender agencies agreed on a standard reporting system for capital cases. A copy of that protocol is attached as Appendix B. The superior court’s statistician agreed to provide monthly reports on specified categories of data, including case volumes and time periods from arraignment to case termination. The information will be valuable in establishing trends in capital case inventories and case processing times.

II. Task Force Recommendations

This section discusses how the recommendations of the Capital Case Task Force have been implemented since its report in October 2007.

Summary of Recommendations for Trial Courts.

The Capital Case Task Force made the following six recommendations for improvements in the trial court:¹⁵

1. Mitigation Improvements
 - a. Amend Ariz. R. Crim. P. 15.1 (i).

¹⁴ Three cases had two capital defendants; and another had notices of intent to seek the death penalty filed against three defendants.

¹⁵ Task Force Report at page 9.

- b. Include a mandatory mitigation cooperation advisement at the first scheduling conference held by a Mitigation Discovery Master in Maricopa Superior Court.

2. Judicial Resources

- a. Support efforts to amend Article 6, Section 20 of the Arizona Constitution and A.R.S. § 38-813.
- b. Modify the superior court's judicial rotation policy for the criminal bench.
- c. More judges for the superior court.
- d. Conduct periodic formal training in capital case management.

Discussion.

1a. Ariz. R. Crim. P. 15.1(i). The Task Force recommended the amendment of Rule 15.1(i). A petition to amend Rule 15.1(i) was filed on November 21, 2007. (R-07-0019.) The sole response to the petition came from the Maricopa County Attorney, who expressed support. The Arizona Supreme Court adopted the amendment to Rule 15.1(i) on September 8, 2008.

Before the amendment, Rule 15.1(i) required the prosecutor to file a notice of intent to seek the death penalty within sixty days after arraignment. Under that rule, the time could be extended, upon stipulation, for an additional thirty days.

Under the amended rule, the time for the prosecutor to file the notice of intent to seek the death penalty can be extended, upon stipulation, for an additional sixty days; and thereafter, upon stipulation and with court approval, for a longer period. The amended rule requires the prosecutor to consult with the victim before entering into any stipulation. The amended rule provides that a case will be treated as a capital case, requiring the appointment of two attorneys and a mitigation specialist, upon the filing of any stipulation to extend the time for filing of a death penalty notice.

The amended rule change was motivated by a belief that “the additional time afforded by this stipulation may help the defense team identify mitigating evidence that could persuade a prosecutor not to seek a death sentence, thereby conserving judicial and capital defender resources.”¹⁶

It appears, however, that the prosecutor may delay filing a death penalty notice in only a few cases. Such cases might involve a medical or psychiatric defense, when, because of a medical privilege, the prosecutor could not obtain pertinent mitigating medical records without the defendant's written authorization. The Pima County Attorney's Office has reported that it always invites defense counsel to present whatever mitigation evidence counsel wishes that office to consider before it files a Rule 15.1(i) notice. In a majority of the cases, however, the invitation is declined.¹⁷

¹⁶ R-07-0019 at page 2.

¹⁷ The Pinal County Attorney's office has a similar practice of inviting defense counsel to present evidence of mitigation before the office files a notice of intent to seek the death penalty.

The Oversight Committee, therefore, does not anticipate an appreciable decline in pending capital cases as a consequence of this rule change.

1b. Mitigation Discovery Masters. The Task Force recommended further steps in developing the role of mitigation discovery masters, including efforts to advise defendants of the importance of mitigation in capital proceedings. The implementation of the mitigation discovery master concept in Maricopa County has been a significant change in the way that capital cases are processed in Maricopa County post-*Ring*.

Mitigation is often the most compelling evidence to persuade a jury to decide that a life sentence should be imposed. The mitigation effort is also the most time consuming portion of pretrial discovery. The sole function of the mitigation specialist, as well as much of the work of defendant's counsel, is directed toward uncovering evidence of mitigation.

Mitigation discovery masters are capital-case-qualified judges. The mitigation discovery masters understand the importance of obtaining mitigation evidence, and they can be of great assistance to the defense in securing such evidence. However, the mitigation cooperation advisement recommended by the Task Force is not always given. Other mitigation practices lack consistency among these discovery masters.

The Oversight Committee has considered the adoption of a rule for mitigation discovery proceedings, but it has not yet reached a consensus regarding the language of a proposed rule. This will be discussed further in Section III.

2a. Article 6, Section 20 and A.R.S. § 38-813. The Task Force recommended that changes be made to the Arizona Constitution and the Arizona Revised Statutes to promote the use of experienced, but retired, judges in managing capital cases. Existing provisions permit retired judges to return to the bench and receive full compensation "less any amount received in retirement benefits." While retired judges may be available to sit on capital cases, the resulting minimal financial compensation is a substantial disincentive to returning to the bench.¹⁸

The Oversight Committee continues to support the Task Force's recommendation. Although the tight budgets at all levels of government make it unlikely that this recommendation will be implemented, it is nevertheless a valid recommendation.

2b. Judicial Rotation Policy. The Task Force recommended that the superior court keep capital-case-qualified judges on a five-year criminal assignment rather than the normal two-to-three-year rotation. The Oversight Committee continues to strongly support this recommendation. Capital cases are complex, the learning curve is considerable, and knowledgeable and experienced capital-case judges should remain where they are most needed.

¹⁸ The Task Force estimated that the compensation for a returning retired judge would be in the neighborhood of \$13 per hour, versus \$65 per hour for a judge pre-retirement. Task Force Report at page 12. There is currently one retired judge sitting as a special assignment judge and hearing criminal cases, including capital cases, in Maricopa County.

When less experienced judges are brought onto the criminal bench, they will not be immediately ready to preside over capital cases. They will, however, be able to handle many other criminal matters. To that extent, these newer judges still offer valuable help by relieving the capital-case-qualified judges of a significant portion of their felony caseload.

Judicial rotations involve a number of factors: a policy that judges rotate through different divisions of the court during their judicial careers, the needs of the court, the personal preferences of the judges themselves, and other factors.

The Task Force recommended that when capital-case-qualified judges rotate to new assignments, they take their capital case(s) with them.

The presiding criminal judge of Maricopa County has explained that when capital-case-qualified judges rotate to a juvenile or family law assignment, they cannot take a capital case with them because the juvenile and family law courtrooms are not adapted for jury trials. The presiding criminal judge does not control judicial assignments. The presiding criminal judge, however, makes every effort to have capital-case-qualified judges rotate to a special assignment calendar, and as a second choice, to a civil calendar, so that they can retain their capital cases.

Although the Oversight Committee did not find that a rule change concerning judicial rotations would be appropriate, the Committee nonetheless continues to support the recommendation of the Task Force that capital case-qualified judges maintain their criminal assignments for extended periods. The majority of the Committee recommends that experienced judges with capital cases remain on the criminal bench for a five-year term, rather than being rotated to other judicial divisions after two or three years on a criminal calendar.

2c. More Judges. The Task Force believed that with the current population, the Maricopa County Superior Court, under A.R.S. § 12-121, was understaffed by about thirty divisions.¹⁹

The Oversight Committee acknowledges that more judges would reduce case processing times to some degree. Regardless of the number of judges on the bench, pretrial discovery in a capital case in Maricopa County will still require, on average, at least two years to complete.²⁰ Trials will continue to take three or four months to finish. More judges will reduce caseloads per judge; and more judges would help avoid continuances of a trial when there is no judicial officer available to preside at trial. An increase in judges will afford each case greater attention, perhaps

¹⁹ See Task Force Report at page 14.

²⁰ Although all the stakeholders in Maricopa County appear to agree that a capital case requires approximately thirty months of pretrial preparation, the Pima County Attorney reports that capital cases in that county routinely proceed to trial in eighteen months, as required by Rule 8.2(a)(4).

including better spacing of pretrial and mitigation conferences. Nonetheless, this goal yields to the current reality of government budgets.²¹

Maricopa County is developing the infrastructure to meet the demand for judicial officers. The county has approved plans for, and has funded, a new criminal courts building. The building, which has a design capacity of thirty-two courtrooms, will have twenty-two courtrooms completed during the initial construction phase; the projected completion date is 2012. Presumably additional judges and staffs will be funded at that time.

Finally, the report of the Capital Case Task Force anticipated the establishment of a capital case manager in the Maricopa County Superior Court.²² The position was created but never filled. Capital case management duties are being handled by the presiding and assistant presiding criminal judges, and by administrative staff.

2d. Formal training.²³ The Task Force recommended formal training in judicial capital case management. A grant-funded program entitled “Managing the Capital Case in Arizona” was presented at the judiciary’s education center in Phoenix by the National Judicial College in September 2007. The two-and-a-half day program dealt with pretrial motions, jury selection, the three phases of a death penalty trial, sentencing, post-trial matters, and emerging issues. The faculty included Arizona Supreme Court Justice Andrew Hurwitz, Maricopa County Superior Court Judges Duncan, Granville, and McMurdie, as well as two law professors. The program was attended by forty-six judges from across Arizona, who gave the program high marks.

A subsequent program was funded and presented by the Maricopa County Superior Court in December 2007. The “Phase Two” afternoon workshop on capital case management focused on voir dire procedures and jury selection issues in death penalty cases. The workshop was attended by twenty-nine Maricopa County Superior Court judges.

A third program on capital cases will be open to other disciplines, including attorneys, possibly with judges as facilitators. This program will be funded from a grant from the Department of Justice, and will be scheduled in 2009.

²¹ As Oversight Committee member Ronald Reinstein, then-presiding criminal judge of the Maricopa County Superior Court, said in a comment to a rules petition more than a decade ago: “Because of inadequate resources in our courts, prosecution agencies, indigent defense agencies, and court appointment counsel budgets, we are being asked to do more with less.” (Comment to petition regarding Ariz.R.Crim.P. 17.4, 1997.)

²² See Task Force Report at page 7.

²³ These formal training programs are being coordinated by Paul Julien, Administrative Office of the Courts, and Robin Hoskins and Elizabeth Evans, from the Maricopa County Superior Court.

Summary of Recommendations for Direct Appeals.

The Capital Case Task Force made the following three recommendations for improvements in the process of direct appeals:²⁴

1. Establish minimum standards for managing transcript production.
2. Support legislation to amend A.R.S. § 12-224 to increase the per page rate for transcripts prepared for appeals.
3. Increase staffing at the Supreme Court, Attorney General and Maricopa County Public Defense Services to avoid conflicting deadlines and accommodate increased appeal volume.

Discussion.

1. Court Reporter Standards. The Task Force recommended establishing minimum standards for managing transcript production. Supreme Court Administrative Order 2007-87, “Establishing Standards for Verbatim Reporting in Capital Case Proceedings”, issued on November 29, 2007. This Administrative Order, proposed by the Task Force, provides directives for managing court reporter assignments, record management considerations, and substitute records in the event original reporter notes are unavailable.

2. A.R.S. § 12-224. The Task Force recommended support for legislation to increase the per-page rate for the preparation of transcripts. A proposal to amend A.R.S. § 12-224 was prepared by Capital Case Task Force staff and submitted to the Arizona Judicial Council in August 2007.²⁵ The proposal was not well-received, in large part because it would have placed an increased expense on county governments. The proposal was therefore not included in the Arizona Judicial Council’s package to the Legislature. Because of the budget situation, a similar proposal would undoubtedly have an equivalent lack of success.

3. Increase Staffing. The Task Force recommended the consideration of staff increases, including at the Supreme Court, but was sensitive to the evolving data on capital cases. Based on the data in Section I of this report, it appears that the majority of first-degree murder cases with death penalty notices are resolved other than by conviction for capital murder. In 2007, thirty-six Maricopa County capital cases were resolved, but only seven cases, or just fewer than 20% of these cases, resulted in a death sentence for the 2007 calendar year. For the first six months of 2008, seventeen Maricopa County capital cases were resolved, and five cases, or

²⁴ Task Force Report at page 16.

²⁵ The legislative proposal addressed three areas: the court reporter’s page rate under A.R.S. section 12-224; the cap provided by A.R.S. section 41-4301 on the number of lawyers who could work for the State Capital PCR Defender; and the cap under A.R.S. section 13-4041 regarding the limit on hours for private PCR counsel. No portion of the proposal went beyond the Arizona Judicial Council.

about 30%, resulted in a death sentence.²⁶ Doubling the figure for the first six months, a projection for the full 2008 calendar year would be ten death sentences.²⁷ The Supreme Court presently handles ten capital cases annually with current resources.²⁸

The Oversight Committee makes two observations.

First, it is not the number of capital cases that are filed which impacts the number of direct appeals to the Arizona Supreme Court. Rather, it is the number of cases that result in a death sentence that determines the number of direct appeals. This is, and should continue to be, a limited percentage of the total number of capital cases filed. For example, in Maricopa County, for fiscal years 2004-2008, a total of 173 notices of intent to seek the death penalty were filed. During those same five years, a total of forty-three death sentences were imposed, including fiscal year 2006, in which sixteen death sentences were imposed. Only about one in four notices of intent to seek the death penalty culminate with the imposition of a death sentence.

Second, the volume of direct appeals will not increase any faster than the ability of the superior court to dispose of cases. The Maricopa County Superior Court, where most Arizona capital cases originate, has finite resources for processing capital cases, and it is unlikely that additional resources will be available for that court in the near future.

Given these two factors, the consensus of the Committee is that for the foreseeable future, the number of capital cases on direct appeal to the Arizona Supreme Court should not grow by any significant amount, and that the number of direct appeals per year should remain fewer than a dozen.

In the event of an increase, however, it is unlikely that government funds will be available to increase staff for handling direct capital appeals. In light of the difficulty the State of Arizona had in balancing the fiscal year 2008-2009 budget, many state agencies were fortunate not to have budget cuts requiring reductions of staff, much less additional funds for expansion of staff.

If, however, there is an increase in the volume of direct appeals in capital cases, then the Committee submits that the most appropriate remedy is one suggested by the Capital Case Task Force: “use court of appeals judges to fill in if the Supreme Court experiences a heavier-than-usual volume of appeals in any given year.”²⁹

Having Court of Appeals judges assist appears to be the most cost-effective solution for a situation that may be only temporary. This solution would not require appointment of additional judges or hiring of clerical staff, or the creation of a new court structure, or any constitutional or

²⁶ These figures were provided by the presiding criminal judge of Maricopa County.

²⁷ An alternate projection of eleven death sentences annually was discussed at page 10.

²⁸ Task Force Report at pages 18-19.

²⁹ Task Force Report at page 19.

legislative change. The process is already authorized under Article 6, Section 3, of the Arizona Constitution. It is a flexible solution, and it can be used as frequently as needed. If, for example, there are thirteen direct capital case appeals next year, the assistance of three judges from the two divisions of the Court of Appeals may well be a sufficient, additional resource to resolve the increased capital caseload. One or more staff attorneys may need to be hired to assist these judges.

Summary of Recommendations on Post-Conviction Relief.

The Capital Case Task Force made the following three recommendations for improvements in the process of petitions for post-conviction relief:³⁰

1. Amend A.R.S. § 13-4041 to increase the hourly rate for post-conviction relief counsel, and remove a 200-hour “cap”.
2. Support legislation to amend A.R.S. § 41-4301 to remove training prohibitions and increase staff for the State Capital Post-conviction Public Defender’s Office.
3. Support a rule change to institute mandatory case management conferences in all post-conviction relief cases.

Discussion.

1. The PCR Cap. The Task Force recommended raising the statutory cap on compensation for PCR work. As noted in footnote 25, *supra*, proposals presented in 2007 to the Arizona Judicial Council to raise the hourly rate for PCR counsel, and to remove the cap, had no success. Existing A.R.S. § 13-4041(G) permits counsel to seek compensation for time in excess of 200 hours by application to the trial court. It appears that these requests are regularly granted, and if the application is denied, the attorney may file a special action with the Arizona Supreme Court. Nonetheless, every participant in PCR proceedings recognizes that a petition for post-conviction relief in a capital case can rarely be presented with only 200 hours of preparation. To the extent it dissuades an attorney from accepting an appointment on a PCR, the cap does a disservice to the judicial system. Accordingly, the Oversight Committee concurs with the recommendation of the Task Force that this cap be removed.

2. Training and Staff for the State PCR Office. The Task Force recommended support for increasing funding for the State Capital Post-conviction Public Defender’s Office. However, observations about budget limitations, made elsewhere in this report, would apply to any Committee suggestion to increase the size of the State PCR Office.³¹ Nevertheless, the Oversight Committee unanimously recognizes that the State Capital Post-conviction Public Defender’s Office lacks the staff necessary to accomplish its statutory directive.

As of November 2008, there were fifteen defendants under a death sentence who were awaiting the appointment of PCR counsel. A delay in the appointment of counsel for those defendants who are ultimately guilty results in an added emotional burden for their victims. For those

³⁰ Task Force Report at page 20.

³¹ See footnotes 12 and 25, *supra*.

defendants who have meritorious PCR claims, a delay in the appointment of counsel renders an injustice.

The State Capital Post-conviction Public Defender's Office must be adequately staffed. At current staffing levels, the director of this office believes that the office can actively represent only four PCR clients at a time. Even if there is no money in the present budget for additional staff, there is no rationale for the provision in A.R.S. § 41-4301 limiting the office to three deputies and four other employees. When the money is available for more deputy defenders and other employees, the positions should be funded. At present, it will cost the State nothing to remove this limitation on the size of the office. The backlog of unrepresented defendants on capital PCRs requires that the limitation be eliminated from the statute.

The Oversight Committee also believes that other amendments to A.R.S. § 41-4301, proposed in Appendix D to the Task Force Report, are sound recommendations. The State Capital Post-conviction Public Defender's Office is a knowledgeable resource for capital case PCRs. There is no reason why this knowledge should not be shared with counsel outside of that office. The Oversight Committee therefore concurs with the Task Force's recommendation that the restrictive statutory provisions be deleted.

3. PCR Case Management Conferences. The Task Force recommended the creation of a rule ensuring early and periodic case management conferences for PCR. Drafts of a rule for PCR case management conferences were prepared at the conclusion of the Task Force project. Those drafts have now been integrated by the Committee, which supports this recommendation. *See* Section III.

III. Oversight Committee Recommendations

The Committee recognizes that given the current budget climate, additional funding will be difficult to come by. Therefore, the committee's focus is on recommendations that do not require financial appropriations.

1. Adopt a Rule for Post-Conviction Relief Management Conferences in Capital Cases. A proposed rule is included in Appendix C.

2. Develop a Statewide Rule Regarding Mitigation Discovery Masters. The Oversight Committee believes that the substance of Maricopa County Superior Court Administrative Order 2007-50 concerning mitigation discovery masters, along with a number of concepts suggested by the Maricopa County Superior Court presiding criminal judge in a comment to rule petition R-07-0005, be adopted as a statewide rule of procedure. Although any proposed rule would be incorporated within the Arizona Rules of Criminal Procedure, the decision to use mitigation discovery masters would be discretionary and dependent upon local court needs.

A proposed rule would need to accommodate the needs and viewpoints of all of the stakeholders, including the courts, prosecutors, defense counsel, and victims. The Oversight Committee has discussed these various perspectives at its meetings, and the Committee has not yet reached a consensus on all features of a draft rule. If the Oversight Committee is maintained

beyond December 31, 2008, it will further consider a proposed rule for mitigation discovery conferences.

Pending the adoption of a rule, mitigation discovery masters are continuing to receive training through the Maricopa County Superior Court on their role and function during mitigation discovery conferences.

3. Adopt a Rule Regarding the Preservation and Transfer of the Case File. A recurrent problem for defense counsel in capital cases is acquiring the complete file of prior counsel. Concerns have been raised in specific cases that subsequent counsel will probably never get the entire file. While this is a problem in all cases, it is more of a problem with private counsel than it is with public agency counsel.

Specific difficulties include:

- Individuals (attorneys, specialists, investigators) may work on a case yet do not place all of their work product in the defendant's file;
- Electronic information, including emails, from the computers of individuals who worked on the case is not always saved or made available to new counsel; and
- Certain defendants may not be willing to waive the attorney-client privilege regarding communications they had with their original counsel.

Similar issues were discussed by the Capital Case Task Force, but a proposed rule to address these matters was rejected. The rejection was premised in large measure on a cost analysis, including the expense of secured storage in a central file repository, and expenditures for digital scanning of paper files and backup of electronic files.

The Committee proposes an amendment to Arizona Rule of Criminal Procedure 6.3 which would place continuing duties on defense counsel in a capital case to keep the file complete. The proposed amendment is in Appendix D. This amendment is modeled on Guideline 10.13 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Unlike the concept considered by the Task Force, this proposal would entail no costs for storage or backup beyond what should already be present with good office management.

4. Recommend as a Best Practice that the Prosecutor Explain to Victims at an Early Stage of the Case the Comparative Times for Resolving Capital and Non-Capital Murder Cases. Capital murder cases take several years to resolve in the trial court, and even longer for appeals and other post-conviction procedures. By comparison, non-capital murder cases can typically reach finality in a few years. Before litigation begins, many victims' families are unaware of the time it takes to resolve a capital case. It is often long after a capital case has begun that the family learns of the extremely lengthy time required to conclude a death penalty case, compared to a non-capital case. Anecdotally, victims often do not know about the length

of the process until they are given this information as an incentive to agree to a disposition without a death sentence at a resolution management conference.

The time required to prosecute a capital case is emotionally difficult for victims' families. Victim advocates have therefore urged that an advisement be incorporated in Rule 39, requiring the State to advise a victim's family of the length of the court process for capital versus non-capital murder cases. The Committee declined to adopt this advisement as a formal rule. Nonetheless, the Oversight Committee recommends as a best practice that the prosecutor confer with the victim at an early stage of a capital case and disclose to the victim the prolonged period the death penalty process will require, and the comparative time for processing the case through trial, appeal, and post-conviction proceedings if the notice of intent to seek the death penalty was not filed.

5. Continue the Existence of the Capital Case Oversight Committee. The Committee is a forum for representatives of the courts, the bar, and the community to interact on capital case issues on an ongoing basis in a meaningful and productive way. Such discussions may include addressing the discrepancy in pretrial processing times between capital cases in Maricopa and Pima counties. Similarly, a rule of procedure regarding mitigation discovery conferences should be developed for adoption. The Committee would also be helpful in addressing any increase in capital case volumes, should one occur, without reconstituting an ad hoc committee on an exigent basis. Moreover, an ongoing Committee would allow collaboration on refinements in capital case procedures so that the system may be continually improved.

Concluding Comments

(1) Some issues concerning capital case processing can be effectively addressed with little or no cost. Other concerns will remain unresolved because they require funding, and at the present, significant increases in funding are unlikely. Funds for new programs, increased staff, and higher compensation are scarce.

(2) *Ring* remands are working their way through the trial and appellate courts. The number of *Ring* remands in the superior court is slowly, but steadily, declining. In a matter of two or three more years, these remands should no longer contribute to the capital caseload in the trial courts.³²

(3) Jury sentencing on capital cases in Arizona has had an impact on capital case volumes. First, it now takes longer to prepare a capital case for trial because if a defendant is found guilty of first-degree murder, the sentencing phase begins shortly afterward. Defense counsel must be prepared for those proceedings before the trial begins, and pretrial preparation time is extended accordingly. Second, juries, particularly in Maricopa County, are deciding that

³² More than two dozen capital cases were "*Ring*" remands. See Task Force Report at footnote 2. Five *Ring* remands are currently pending in the Maricopa County Superior Court, and two are pending in Pima County.

a death sentence is the appropriate sentence more often than when judges were responsible for sentencing.³³

(4) The number of first-degree murder cases in which the prosecutor has filed a notice of intent to seek the death penalty has not appreciably increased since the 2002 change in Arizona's death penalty statute, compared to the pre-*Ring* levels.

The pending capital case inventory in Arizona is high, or at least higher than it has been during the past decade. A higher volume of pending capital cases is, for the time being, the new norm.

³³ Data presented to the Oversight Committee by the superior court and prosecutors showed that juries returned with death sentences in at least 60% of their penalty verdicts. Exhibit 2 to the report of the Attorney General's Capital Commission (see footnote 4, *supra*) indicated that under judge sentencing, a death penalty was imposed on about 20% of convicted, death-eligible defendants.

APPENDIX A

Pending Capital Cases, by County

A survey of Arizona County Attorneys in **July 2008**, revealed the following information about pending capital cases. The numbers below include remands, but do not include capital case PCR petitions. (Note: The Maricopa County Attorney was not included in the survey; information regarding Maricopa County is detailed elsewhere in this report.)

<u>County</u>	<u>Number of capital cases currently pending</u>
Apache	1
Cochise	0
Coconino	0*
Gila	0
Graham	0
Greenlee	0
LaPaz	0
Maricopa	127
Mohave	2
Navajo	0
Pima	14
Pinal	3
Santa Cruz	0
Yavapai	3*
Yuma	5*
TOTAL	155

Please see the notes on the following page.

Apache. One capital case is pending. The Apache County Attorney reported that this case, filed in 2007, is the only capital case that has ever been prosecuted in that county during his lifetime.

Cochise. There has been no capital case in Cochise County since 2004.

Coconino. *No response provided by the County Attorney. Figures on the preceding page are from Diane Alessi, capital case staff attorney for the superior courts of Arizona.

Gila. There has been no capital case in Gila County since 2001.

Graham. There has been no capital case in Graham County since 2004.

Greenlee. There has been no capital case in Greenlee County since 2004.

LaPaz. There has been no capital case in LaPaz County since 2004.

Maricopa. There were 127 pending cases as of June, 2008. See page 9 of this report.

Mohave. Two capital cases are pending. One was filed in 2006; the other was filed in 2007. Mohave County also reports that no death sentences have been imposed in Mohave County since 2004. However, there are four capital case PCRs pending at the current time.

Navajo. There has been no capital case in Navajo County since 2004.

Pima. There are eleven capital case defendants, and three additional capital defendants awaiting resentencing on *Ring* remands. As of July 10, 2008, there were nine “active” capital defendants. Two capital cases were added later in July. One capital case trial concluded in 2008 with a verdict of life. Three cases concluded in 2005 with a death verdict; and one case concluded in 2006 with a death verdict. No death sentences were imposed in Pima County in 2007.

Pinal. Three capital cases are pending. One case, filed in 2002, has a September, 2008 trial date. Another case, filed in 2006, has an October, 2008 trial date. The third case, filed in 2005, has a pending Rule 11 proceeding. Pinal County has a policy that once a Rule 15 death notice is filed, there is no plea bargaining to a lesser sentence. Going back to 2004, one capital case has been tried, and that was in 2004. The jury hung on penalty, and a natural life sentence was ultimately imposed.

Santa Cruz. There has been no capital case in Santa Cruz County since 2004.

Yavapai. *No response provided by the County Attorney. Figures on the preceding page are from Diane Alessi, capital case staff attorney for the Superior courts of Arizona.

Yuma. * See note above.

APPENDIX B

CAPITAL CASE DATA MANAGEMENT Maricopa County Superior Court

Purpose: Reports based upon consistent and reliable data collection methods will be provided monthly on the status of capital cases in the Superior Court, for the purpose of evaluating capital case trends.

I. Counting Active Capital Cases (“Ins”)

a. Unless a case becomes inactive (see Section III), a case is active from the time it is first counted until the time it is terminated.

b. A case will be counted as an active capital case when:

(i) a notice of intent to seek the death penalty has been filed pursuant to Rule 15.1(i)(1);

(ii) a stipulation has been filed under Rule 15.1(i)(1) which extends the time for filing a notice of intent to seek the death penalty;

(iii) a petition for post-conviction relief is granted; or

(iv) a case is remanded from an appellate or federal court, other than a *Ring* remand, regardless of the phase for which the case is remanded. (*Ring* remands are not counted as active cases. See section V(b)(11).)

c. When a capital case is remanded to a grand jury and a new indictment follows:

(i) if the new indictment has the same CR number, it is not counted as a new case;

(ii) if the new indictment has a different CR number, it is counted as a new case, and the old case in which the indictment was dismissed is counted as a case termination.

II. Case counting rules

a. If an individual defendant is charged with multiple capital crimes under a single CR number, this is counted as one active case.

b. If an individual defendant is charged in multiple capital cases, every case with a different CR number is counted as a separate active case.

c. If multiple defendants are charged with a capital crime under a single CR number, each defendant is counted as a separate active case.

III. Counting inactive capital cases

a. A case in which a defendant is ordered to receive treatment for restoration to competency under Rule 11 is counted as an inactive case. (If the defendant is restored, the case again becomes an active case.)

b. A case in which a special action is filed is counted as an inactive case if an order is issued that the case is stayed. (When the stay is lifted, the case again becomes an active case.)

IV. Counting active capital case terminations

An active capital case is terminated when:

a. a defendant is sentenced following a jury proceeding;

b. a defendant is sentenced following a plea;

c. not as part of a plea agreement, the prosecutor withdraws the Rule 15.1(i) notice;

d. the prosecutor dismisses the case;

e. the defendant is acquitted; or

f. a notice of intent to seek the death penalty is not filed with the time period specified in a Rule 15.1(i)(1) stipulation.

V. Monthly data summaries

a. Data will be collected and made available monthly. Data will be collected on the 17th day of the month, and will be current through the last day of the prior month.

b. The monthly data summary will include the following categories of information:

(1) The total number of pending active cases.

(2) The total number of cases in which defendants have pled guilty but have not been sentenced. (While these cases are counted as active cases, a sub-category should distinguish these cases to clarify that, while active, these cases are highly unlikely to proceed to trial and will not require intensive case management.)

- (3) The average number of days that have passed since arraignment for active cases.
- (4) The total number of inactive cases.
- (5) The total number of new cases which became active during the month covered by the report.
- (6) Defendant names and case numbers when a jury trial has commenced or is in progress during the month covered by the report.
- (7) Defendant names and case numbers in which a sentence of death has been pronounced during the month covered by the report.
- (8) The total number of active cases which have terminated during the month covered by the report.
- (9) The average number of days that passed from arraignment to termination* for cases which were terminated during the month covered by the report following sentencing after a plea;
- (10) The average number of days that passed from arraignment to termination* for cases which were terminated during the month covered by the report following sentencing after a trial.
- (11) The total number of Ring cases. These will be included in the monthly summary as a distinct category until the number of *Ring* cases reaches zero.

*The period for which a case was inactive will be excluded from the computations under numbers (9) and (10).

APPENDIX C

PROPOSED AMENDED RULE 32.7, ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 32.7. Informal conference.

Informal conference. The court may at any time hold an informal conference to expedite the proceeding. In a capital case, the court shall hold an informal conference within 90 days after the appointment of counsel on the first notice of a petition for post-conviction relief. The defendant need not be present if the defendant is represented by counsel who is present.

APPENDIX D

PROPOSED AMENDED RULE 6.3(d), ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 6.3. Duties of Counsel; Withdrawal

- a) Notice of Appearance. [No change.]
- b) Duty of Continuing Representation. [No change.]
- c) Duty Upon Withdrawal. [No change.]
- d) [New] Duty of Defense Counsel to Preserve the File in a Capital Case. Defendant's counsel shall maintain the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation and provide the client's complete records and files, as well as all information regarding every aspect of the representation, to successor counsel.

COMMENT

Each counsel representing a capital defendant shall make every effort to ensure that successor counsel is provided with a complete copy of the records and file consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.13 (2003). The purpose of this rule is to ensure that files are maintained in accordance with the ABA Guidelines and to reduce the delay that sometimes occurs in readying the file for transfer. A file should be properly maintained during the representation and properly stored so it can be expeditiously provided to successor counsel.

The entirety of the attorney's files, including, but not limited to notes, electronic files and correspondence, investigator produced product and mitigation specialist produced product, shall be included.