

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
January 29, 2009**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Gary Donahoe
Hon. Ronald Reinstein
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
Phil MacDonnell
Paul Prato
(All members present)

Guests:

Hon. Timothy Ryan
James Beene
Patricia Nigro
Robert Shutts
John Pressley Todd
Keli Luther
Sally Wells
Rick Unklesbay
Dale Baich
Brent Graham

Staff: Mark Meltzer, Lorraine Nevarez

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1. Call to Order and Approval of the Meeting Minutes. The meeting was called to order at 12:05 p.m. The Chair welcomed Judge Donahoe, the new presiding criminal judge of the Maricopa County Superior Court, as a member of the Oversight Committee. The minutes of the November 13, 2008, Committee meeting were approved without objection.

2. Discussion of Administrative Order 2008-93. The Chair summarized the two major areas of work the Oversight Committee would focus on pursuant to this administrative order:

- Mitigation discovery conferences, and whether any rule that may be ultimately recommended by the Committee should have statewide application or only local.
- Time limits under Ariz. R. Crim. P. 8.2(a)(4). The time limit for capital cases currently specified under that rule is 18 months from the date of arraignment.

3. Preliminary discussion regarding mitigation discovery. The Chair noted that mitigation discovery proposals had recently been submitted by Judge Donahoe and by Phil MacDonnell. Judge Donahoe and Mr. MacDonnell commented on their respective proposals.

Judge Donahoe noted that his proposal permits ex parte conferences only for mitigation discovery, and not for discovery regarding guilt phase evidence. He also pointed out that his draft proposal specifies the authority of the mitigation discovery master, and that it gives consideration to issues involving victims. He added that his proposal includes a model order if his draft is ultimately adopted as a statewide rule.

Mr. MacDonnell requested, in addition to review of his draft rule by this Committee, that his proposal be considered by the criminal court bench.

The Chair suggested that a member work group be created to discuss both of these mitigation discovery proposals before the next Committee meeting. The Chair requested that the work group proceed on information rather than supposition.

The following comments were then made:

- Is the current mitigation discovery process working or useful for its intended purpose?
- Because the State is not present at the mitigation discovery conference, it may not have full knowledge as to how the conference proceeds.
- Has there has been any demonstration that the mitigation discovery conferences are reducing the processing time for capital cases?
- Because the mitigation discovery procedures have only been utilized for a comparatively short time, it may be too early to tell if the process works effectively.
- As a result of these mitigation conferences, defense counsel are acquiring records in situations there was previously resistance.

Mr. Logan stated that he had reviewed Mr. MacDonnell's proposed draft of Rule 15.9(E) with other members of the defense bar, and that with certain refinements, it might be generally acceptable. He noted that he had suggested specific changes to Mr. MacDonnell, and added that the proposed Rule 15.9(E) might be a good starting point for the work group.

Mr. Levey asked that victims' rights be considered by the work group, especially if the defendant is present at the mitigation discovery conference.

Mr. Cattani expressed the view that it would be inappropriate to waive the defendant's presence at a mitigation discovery conference if the intention of that waiver was solely to bar the victim's attendance. He proposed that if the proceeding was strictly ex parte, that neither the defendant nor the victim should be present. He stated his approval of the provision in proposed rule 15.9(E) which would require a showing of need before having an ex parte proceeding.

ACTION: After considering the comments, the Chair appointed Mr. Logan to lead the mitigation discovery work group, and Judge Donahoe and Mr. MacDonnell as work group members. The Chair also recommended that Mr. Logan and Mr. MacDonnell bring trial attorneys to work group sessions for additional information and insights. The Chair suggested that Mr. Logan's work group might also obtain input from the Supreme Court's Commission on Victims in the Courts ("COVIC"). The Chair concluded by stating that these mitigation discovery proposals would be considered at a future meeting of the Oversight Committee.

4. Capital Case Statistics. The Chair noted that staff's data summaries for October, November, and December, 2008, were available on the Committee's web page. These data summaries were compiled pursuant to a recommendation set out in the Committee's November, 2008, report.

Judge Donahoe provided his data. One set of his data covered all of calendar year 2008, and the other was for the month of January, 2009, through the 20th day of the month. In summary, his data is as follows:

- For 2008: 41 cases were filed, 29 cases were terminated, and 44 resolution management conferences were conducted.
- For 2009, through January 20th: one case was filed, 2 cases were terminated, and 11 resolution management conferences were conducted.

Judge Donahoe noted that as of January 20, 2009, his data showed 138 capital cases pending in the Maricopa County Superior Court, of which 4 were *Ring* remands and 3 were other remands.

Mr. MacDonnell cited the value of standardizing and defining capital case data, which had been recommended in the Oversight Committee's November, 2008, report to the Arizona Judicial Council. Using data he had acquired before as well as after that recommendation, Mr. MacDonnell provided a handout to the members that included a chart showing the total number of pending capital cases in Maricopa County, the new filings and case terminations ("ins and outs"), and a trend line. Mr. MacDonnell noted that this data indicated that the "ins and outs" were flat. Mr. MacDonnell provided additional data showing that capital case aging was increasing.

5. Maricopa County capital case processing. The data led to a discussion on case processing.

Judge Donahoe stated that he has at least 15 judges qualified to try capital cases, and that these judges can try as many capital cases as are ready for trial. Judge Donahoe introduced his assistant presiding criminal judge, Judge Timothy Ryan, who addressed the Committee.

Judge Ryan advised that he monitors capital case scheduling. He stated that attorney calendar conflicts reflect an attorney readiness issue rather than a court availability issue. He also noted his impression that there did not appear to be an adequate number of mitigation specialists, so that the mitigation specialists had heavy case loads; and that these heavy case loads often required 18 to 24 months for the mitigation specialists to complete their investigations.

Mr. Logan told the members that he had received no complaints from lead defense counsel concerning a shortage of mitigation specialists. Mr. Logan explained that he assigns a lead attorney to a capital case, and that lead counsel selects a second chair and a mitigation specialist. In the process of selecting a mitigation specialist, the lead attorney and specialist are supposed to assure that the specialist has sufficient time to work on the case.

ACTION: Mr. Logan will inquire further whether there might be a shortage of available mitigation specialists.

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Judge Ryan observed that prosecutors also have full schedules, and on occasion, when a particular prosecutor is unavailable, the victim wants a continuance so that the assigned prosecutor will handle the trial. Judge Ryan attempts to have a conference one month before the trial date to screen for scheduling issues. He noted one case that was able to start on the designated trial date because another prosecutor filled in during jury selection until the assigned prosecutor became available. Judge Ryan stated that the court is committed to addressing trial scheduling. He cited advance notice to the court as a key for dealing with scheduling issues. Judge Ryan also warned of the pending retirements of both prosecutors and defense counsel as having a potential impact on scheduling.

Judge Ryan informed the Committee that when one of the capital trained judges is assigned to a civil calendar, with a suitable courtroom, that he is requesting that capital cases remain with that judge, and that this process increases the number of judges and courtrooms which can be used for trials of capital cases. Judge Donahoe advised the Committee that if a capital case is ready for trial, a judge with a courtroom will be available.

6. New D.O.J. regulations. Mr. Cattani updated the Committee on new Department of Justice regulations which will affect post-conviction proceedings.

Mr. Cattani explained that the opt-in provisions of the federal legislative scheme were intended to provide a quicker disposition of federal court reviews of a state's capital convictions, as long as the state provided competent defense counsel and an adequate method of compensating defense counsel. The United States Attorney had the task of preparing regulations to implement the federal legislation.

In December, 2008, the United States Attorney promulgated regulations, to become effective on January 12, 2009. The Arizona Attorney General had planned to submit an application for "opting in" shortly after that date. Four days before the effective date of these new regulations, a federal court for the Northern District of California issued an order restraining the Department of Justice from implementing the regulations. On January 20, 2009, that court issued a corollary preliminary injunction.

Notwithstanding this development, Mr. Cattani advised that the Arizona Attorney General may still submit to the U.S. Attorney its application to opt-in. Even if the application is approved, an appeal to the U.S. Supreme Court, taking at least a year, is anticipated. It is Mr. Cattani's belief that if Arizona is ultimately accepted as an opt-in state, private defense counsel might have greater incentive to take capital cases involving post-conviction relief.

7. Proposed Rule Amendments. Ms. Hallam sought the Committee's recommendation on two proposed amendments to the Arizona Rules of Criminal Procedure.

Rule 31.13(f). This rule concerns the time for filing appeals briefs in capital cases. As a matter of practice under the existing rule, a Supreme Court staff attorney conducts a telephonic conference with counsel to establishing a briefing schedule. This schedule varies based on

individual circumstances, and therefore there is little uniformity in briefing schedules. Moreover, under this process, there are frequent requests for extensions in which to file the brief.

The proposed rule amendment would establish a uniform time (90 days after notice of completion of the record for the opening brief, 60 days thereafter for the answering brief, and 30 days thereafter for the reply brief.) A motion to extend these limits could still be filed if the time was inadequate.

Mr. Lieberman inquired if 90 days was sufficient time for preparing the opening brief. Ms. Hallam advised that for the past ten appeals, one opening brief had been filed at 100 days after the notice, another had been filed at 105 days thereafter, and on eight other cases, multiple extensions were requested after the 90 day limit.

COMMITTEE RECOMMENDATION: There was nonetheless no objection to the proposed rule change, and the Committee would support it.

Rule 6.8(c). This proposed amendment originated from a situation in which an attorney was thought qualified to handle a capital appeal, but lacked the experience of an evidentiary hearing in a post-conviction proceeding, which is required for qualification under Rule 6.8(c). Ms. Hallam proposed addressing this situation, and perhaps attracting a great number of attorneys to handle capital appeals, by setting out separate requirements for appellate attorneys and post-conviction counsel, rather than a single qualification under this rule. While there would be no change in the existing qualifications for post-conviction counsel, the requirement of having the experience of participating in a PCR evidentiary hearing would be deleted for appeals counsel.

COMMITTEE RECOMMENDATION: There was no objection to this proposal, and the Committee would support such a rule change.

8. Capital case processing in Pima County. The Chair invited Mr. Rick Unklesbay, senior trial counsel with the Pima County Attorney, to address the members on capital case processing in Pima County.

Mr. Unklesbay began by noting that in Pima County, most capital cases are pled or go to trial within 18 to 20 months from the date of arraignment. It is Mr. Unklesbay's belief that the 18 month time limit of Rule 8.2(a)(4) is reasonable and realistic, and that any longer time, as has been proposed, would be objectionable. He felt that victims especially would object to a longer time.

Mr. Unklesbay cited the low capital case volume in Pima County, contrasted with that in Maricopa County, as being a substantial factor in the timely processing of capital cases in Pima County.

Mr. Unklesbay provided the members with a handout showing the pending capital cases in Pima County as of January 12, 2009. There were 16 cases on this list. No Pima County judge had more than one capital case, with the exception of one judge, who had two cases. There were 12

different defense counsel assigned to these 16 capital cases. Four of those attorneys had two cases; the other eight attorneys each had a single case.

Three of the 16 cases on this handout had aged over 1,000 days since the arraignment; but two of those cases were *Ring* remands, and the third case involved a lengthy Rule 11 proceeding. Of the remaining 13 cases, the oldest was 701 days since arraignment; and this figure of 701 days was the date from arraignment to the next calendar event, which is a trial date set in February, 2009. The average total number of days from arraignment to the next calendar date, including the *Ring* cases, was 620 days. Excluding the *Ring* cases, the mean number of days to the next calendar event was 476 days. [Note: Staff's December, 2008, data summary showed the average number of days since arraignment for the 131 non-*Ring* capital cases then pending in Maricopa County was 799 days.]

Mr. Unklesbay believed that the low ratio of judges to cases (typically 1:1) permitted better case management and the enforcement of event deadlines. Mr. Unklesbay believed that the low ratio of defense counsel to cases also promoted more prompt resolution of each case because counsel was not dividing time among several cases.

Mr. Unklesbay cited several other factors which promoted timely disposition of capital cases. Pima County attracts mitigation specialists from Maricopa County and from other states, and each mitigation specialist in Pima County tends to have fewer cases than the specialists in Maricopa County. Judges enforce deadlines. There is a low turnover of attorneys in his office. Prosecutors solicit defense counsel input prior to filing a death notice, and that contributes to more selective decisions about which cases warrant a death notice. Few death-notice cases are resolved by plea bargain, and there is an expectation that once a death notice is filed, the case will go to trial.

Mr. Unklesbay explained that a death notice is filed in fewer than 10% of all first degree murder cases prosecuted by his office. For a period, the number was in the range of 6 to 7%, but because of some very recent filings, the number is now closer to 10%. This contrasts to about 30%, which was the rate for his office in the 1990's.

Mr. Unklesbay also explained that trials for capital cases are conducted five days a week. On four days, when the court has other matters on its calendar, trial sessions are still held in both the morning and the afternoon; but on the court's "dark day", an even longer day-long session can be held. Most juries are selected in a week; a lengthy jury selection process consumes two weeks. Most capital case trials are concluded within four to six weeks.

Mr. Unklesbay then invited questions and comments.

One Committee member commented that if only a fourth of the Maricopa County cases in which a death notice was filed actually concluded with a death sentence, then perhaps too many death notices were being filed, and that greater selectivity was needed.

In response to a question, Mr. Unklesbay stated that there was no need for mitigation discovery masters in Pima County. When *ex parte* motions are filed, there are typically no hearings. On

those few motions where a hearing is set, if the matter involves guilt phase issues, the prosecutor is present. The County Attorney has an open file policy, under which the prosecutors' files are fully accessible by defense counsel. Mr. Unklesbay also believes that there are good lines of communication between prosecutors and defense counsel, and defense counsel are not reluctant to ask for the prosecutors' assistance in obtaining records.

Responding to another question, Mr. Unklesbay stated that it's not unusual for a judge to deny a motion to continue, and he's unaware of any trial judge's decision denying a postponement motion being set aside by an appellate court. He noted that when motions to continue are granted, it is frequently for a shorter length of time than requested. He added that judges usually hold status conferences every sixty days, at which time defense counsel are asked if they are having any discovery problems. If counsel consistently denies any problems at these status conferences, a judge would not be receptive to a motion to continue which is subsequently filed.

The Chair on behalf of the members thanked Mr. Unklesbay for addressing the Committee. The Chair noted that the issues raised in Mr. Unklesbay's presentation would be revisited by the Committee.

The Chair asked the members to submit to staff as soon as possible any proposals or comments they had with regard to extending the existing time limit under Rule 8.2(a)(4). The proposals and comments which are received will be circulated by staff to the members before the next meeting. The Chair advised that the next Committee meeting will be scheduled for March, in anticipation of submitting the Committee's recommendations on this time limit issue to the Chief Justice by May 1, 2009.

9. Call to the Public; Adjournment.

There was no response to the call to the public.

The meeting was adjourned at 1:25 p.m.