

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
March 5, 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:

Brent Graham  
James Beene  
Patricia Nigro  
Robert Shutts  
John Todd  
Chris DuPont  
Michael Terribile  
Jennifer Garcia  
Jerry Landau  
Theresa Barrett

Staff: Mark Meltzer, Tama Reily

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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 minutes of the January 29, 2009, Committee meeting were unanimously approved.

**2. Legislative Update.** Jerry Landau, the director of government affairs for the Administrative Office of the Courts, summarized four bills which were introduced in the current legislative session that had potential impacts on capital cases. One of these bills, HB 2318 (which would have made a gang initiation murder eligible for the death penalty), was recently stricken. Another bill, HB 2196 (which would have imposed a moratorium on the death penalty until the year 2024), was not given a hearing. Two other bills are pending: SB 1112 (which would repeal life with a possibility of release as a sentencing option for first degree murder, leaving only the options of natural life or death), and SB 1253 (which would add a drive-by shooting as a predicate offense for felony murder.) Mr. Landau responded to members questions concerning these bills. The Chair thanked Mr. Landau for providing information to the Committee.

**3. Status of the Anti-terrorism and Death Penalty Act Regulations.** Mr. Cattani advised the members that the comment period for these regulations was re-opened by the Department of Justice until April 6, 2009. The Arizona Attorney General's application to "opt-in" will be on hold pending the conclusion of the comment period.

**4. Report from the work group on a rule for mitigation discovery conferences.** Mr. Logan reported that he had spoken with Mr. MacDonnell on this subject, and they had exchanged draft versions of a proposed mitigation discovery rule. Mr. Logan was thereafter informed by a judicial officer that the mitigation master program was going to be eliminated. Because of an

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expectation that the program might cease to exist, no further work was done by the work group on a draft rule.

**5. Maricopa County capital case processing.** Judge Donahoe provided additional information regarding capital case processing in Maricopa County.

Judge Donahoe reported that about 21,000 criminal cases had been filed in the Maricopa County Superior Court during the first seven months of FY 2009. The expectation was that for the full fiscal year, the total number of criminal filings would be between 36,000 and 40,000. During the initial seven months of fiscal year 2009, 532 criminal trials were conducted by the court. Judge Donahoe noted that the management responsibilities of the criminal division extend well-beyond its approximately 130 pending capital cases. Judge Donahoe stated that the Maricopa County Superior Court therefore intends to implement a different case management approach in order to promote more expedient processing of capital cases.

A decision was made by the superior court to strictly enforce the speedy trial limits of Ariz. R. Crim. P. 8.2(a)(4), which require capital cases to proceed to trial within 18 months of the arraignment date.

To accomplish this goal:

- Certain judges (to include Judges Granville, Steinle, McMurdie, Mroz, Duncan, and Kemp) will be assigned as capital judge managers. Each judge will manage approximately 20 capital cases.
- Capital judge managers will handle all discovery issues. If there is a need for an *ex parte* discovery hearing, a party will be required to proceed under Rule 15.9(b), Ariz. R. Crim. P. Mitigation discovery masters will soon be relieved of their duties.
- Case management conferences will be conducted by the capital judge managers in each case every sixty days. Counsel will be permitted to submit a written case management plan to the court, and if no plan is presented, the court will provide one to counsel. The intent of each plan is to have a capital case ready to go to trial in 18 months.
- All 26 judges in the criminal division will be qualified to try a capital case. One of these judges will be available for any capital case that is ready for trial. If the criminal division is occupied with trials of capital cases, the presiding judge has authorized the use of judges in the civil division to try other, non-capital criminal cases.
- The associate presiding criminal judge will continue to review all motions to extend capital case court dates, in order to assure consistency in rulings on these motions.

Judge Donahoe advised that a minute entry regarding discontinuation of the mitigation discovery conferences would go out shortly, followed by reassignments of the cases to one of the capital judge managers.

A discussion on the new approach to capital case processing in Maricopa County ensued. Members made these observations:

- There was an absence of any prior notice or advisement from the court of these anticipated changes.
- There are not enough attorneys in Maricopa County to meet the goals of this new approach.
- Qualified attorneys may be reluctant to accept additional capital case assignments if the cases must be ready for trial within 18 months.
- Attorneys who have been assigned capital cases within the past year may ask to withdraw due to an inability to meet the 18 month time limit, in light of their existing capital case load. If attorneys withdraw, these cases may not be reassigned because of the unavailability of any substitute counsel.
- While Pima County may be able to have case loads of one capital case per attorney, or at most two cases per attorney, because of the high number of capital cases in Maricopa County, and the limited number of qualified lead counsel in Maricopa County, the Pima County ratio of cases per counsel would be impossible to achieve in Maricopa County. There are only about fifty qualified lead counsel in Maricopa County, and if each lead counsel was assigned one, or even two, of the 130 to 140 pending cases, this would still leave many capital defendants without representation.
- The capital case backlog accumulated over time, and it will take more than 18 months to eliminate the backlog.

Judge Donahoe was asked how the court will deal with counsels' scheduling conflicts. Judge Donahoe replied that while calendar conflicts will be taken into consideration, consideration will also be given to those cases which have been pending for four or five years, and which are still not ready for trial. A suggestion was made that court representatives meet with stakeholders for a discussion concerning its change of approach. Judge Donahoe noted that the change had been discussed within the court, and the changes were supported by court administration.

**7. Proposed Amendment to Rule 8.2(a)(4).** The Chair noted that although R-07-005, which proposed an extension of the speedy trial limit in capital cases to 30 months, was not adopted by the Court at its September, 2008, rules agenda, nonetheless the Court had directed this Committee to further study the issues raised by that petition. One of the concerns was whether the 18 month time limit should be maintained if it had no credibility.

Accordingly, a proposed amendment to Rule 8.2(a)(4) was presented to the members for their consideration. Under this proposal, the 18 month time period would begin to run from the filing of the death notice, rather than from the arraignment date. This would effectively lengthen the time for pretrial preparation. A discussion on the proposal followed, during which the following comments were made:

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- Defense counsel in Pima County appear to rarely request an extension of time under the new Rule 15.1(i) in order to allow presentation of mitigation evidence. Accordingly, 60 days would likely be the maximum period that the speedy trial time limit would be extended under this proposed amendment to Rule 8.2(a)(4).
- The Maricopa County Attorney usually files a death notice within 60 days after arraignment, and the notice is often filed within as little as 30 days after the arraignment. Only in exceptional circumstances is the filing date of a notice continued by stipulation under Rule 15.1(i) beyond the initial 60 days, and then the extension is only for an additional 30 days.

It was the consensus of the members that the proposed change to Rule 8.2(a)(4) would minimally address the situation because it would extend the speedy trial time limit by just two months, and the resulting, additional period of time would still not be sufficient for the required pretrial preparation.

The Chair noted that any rule which might be adopted would be statewide, and not local, although the situation giving rise to a rule change, for the most part, has arisen in Maricopa County. The Chair then inquired of the members whether a rule amendment providing for a 24 month period from either the arraignment date, or from the date of filing of the notice, would be adequate and acceptable. The Chair suggested that with the limited number of available defense counsel, some compromise on the time limit might be appropriate.

Judge Donahoe observed that if the time limit is extended to 24 months, the criminal division would enforce the 24 month limit.

Other members made these comments:

- The Maricopa County Superior Court should be allowed time to put its new approach into effect.
- The courts should not start down the slippery slope of extending case processing times.
- A time limit that does not work should not be enforced by the courts.
- The courts should be cautious about proceeding to trial in a hurried manner, as this might increase the incidence of reversible error, which would ultimately hurt victims.
- If the court is committed to adhere to the speedy trial time period provided by the rule, the announced change of approach by the criminal division may represent a real culture change.
- A capital case should proceed to trial only when it's ready, and not sooner. Rule 8.2(a)(4) should not be viewed in isolation. Rather, it should be considered along with Rule 8.2(d), which allows for extensions of time limits.

- There are reasons why some capital cases are old. Motions to continue were filed in these cases, and the judges, by granting the motions, found good cause or extraordinary circumstances warranting delays. These delays were justifiable under the ABA Guidelines and controlling case law, both of which require effective assistance of defense counsel.
- The ABA Guidelines are not the controlling standard, and the applicable case law requires a reasonable but not a prolonged investigation by defense counsel.
- A culture of delay perpetuates itself. A 24 month period may not reflect the reality of when a capital case could be ready for trial, because a case might be ready sooner than that. Some capital cases might even be ready for trial before 18 months, but the prevailing culture is to take a case to trial only after exhausting all available time.
- With the additional passage of time, the memory and credibility of a witness could be impaired.
- What would happen if the superior court's new approach reduced the backlog of cases, and 18 months became realistic again; would there still be any justification for a 24 month time limit?
- The backlog of cases might be reduced by having an independent panel, perhaps consisting of retired judges or experienced appellate prosecutors, review the pending cases. A panel could cull out those cases which the panel felt did not warrant a death sentence.
- The suggested panel would interfere with prosecutorial discretion.
- Prosecutors and defenders should meet early in the process to distinguish a case which would likely go to trial from one which should settle.
- The extensive data in the report of the Attorney General's Capital Case Commission indicated that the biggest factor in determining a death sentence was not mitigation evidence, but rather the nature of the crime itself, and the nature of the murder should be apparent at an early stage of the case.

The members then discussed Maricopa County data. This data has shown that over 70% of cases in which death notices are filed resolve without a death sentence. The consensus of the Committee was that both sides should make an earnest effort to identify those cases which are likely to settle, and they should conclude these cases as early in the proceeding as possible. This strategy could significantly reduce the backlog of pending capital cases, as well as save considerable resources.

The consensus of the Committee was that with the high volume of capital cases in Maricopa County, the 18 month time limit was not realistic at the present time. However, the superior court's new approach should be followed to see what results.

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The Chair suggested that the Committee reconvene next month to continue the discussion on time limits. The focus of the next meeting should include consideration of:

- Whether a 24 month time limit is appropriate in light of the Maricopa County Superior Court's new approach to capital case management; and
- Whether it's possible to identify at an early stage of a capital case those specific factors which will likely lead to a resolution of the case without a death sentence.

The Chair invited members to submit to staff any proposals for rule changes, as well as other comments on the issues before the Committee.

#### **8. Call to the Public; Adjournment.**

There was no response to the call to the public.

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