

Progress Report
of the
Capital Case Oversight Committee
to the
Arizona Judicial Council

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Executive summary. On December 18, 2013, by Administrative Order number 2013-115 (Appendix 11), the Chief Justice extended the term of the Capital Case Oversight Committee (“Oversight Committee”) for two years. This Order required the Oversight Committee to submit annual reports to this Council, and in December 2014, the Oversight Committee submitted an interim report.

The Oversight Committee has a long history. The Committee’s predecessor was the Capital Case Task Force (“Task Force”). Administrative Order 2007-18 established the Task Force on February 12, 2007. That Order noted an “unprecedented number of capital cases currently awaiting trial in Maricopa County.” The Order directed the Task Force “to examine the issues relevant to the availability of adequate resources for processing capital cases in Maricopa County and in the appellate courts of Arizona and make recommendations for rule and statutory amendments that would promote efficient resolution of these cases in light of the pending caseload....”

The Task Force represented stakeholders from diverse capital case perspectives, and included a blue-ribbon list of members. The Chair of the Task Force was Supreme Court Justice Michael Ryan. Its members included the Hon. Ann Scott Timmer, then the vice-chief judge of Division One of the Court of Appeals; Kent Cattani, who was then the Arizona Attorney General’s chief counsel for capital litigation; and Judge Ronald Reinstein of the Superior Court in Maricopa County. The Task Force presented its report to the Arizona Judicial Council in September 2007.

The Task Force report made a number of recommendations. Its concluding recommendation was that the Arizona Supreme Court establish a committee to monitor capital caseload reduction efforts in Maricopa County. The Task Force envisioned this committee would hold meetings and “assure interested parties that there will be a cooperative environment in which to share information, air concerns, and facilitate development of any formal policies deemed necessary.” (Task Force report at pages 23-24.) The Supreme Court accordingly established the Capital Case Oversight Committee on December 6, 2007, by the entry of Administrative Order 2007-92. (Appendix 11.) Justice Ryan served as chair of this Committee until his passing in 2012; thereafter and to the present, Judge Reinstein has been chair.

The Oversight Committee submitted written reports to this Council in 2008, 2009, 2010, 2012, 2013, and 2014. The Oversight Committee's 2008 report addressed the formidable volume of capital cases in Maricopa County. Successive Oversight Committee reports confirmed a substantial reduction in the number of Maricopa County's capital cases. Here are three examples of findings and expectations included in the 2007 Task Force report, with comparisons to data eight years thereafter:

1. As of August 27, 2007, there were 149 pending capital cases in Maricopa County (Task Force report at page 3.)
 - As of September 30, 2015, there were 67 pending capital cases in Maricopa County. (Appendix Table 1.) This represents a 55% reduction – a reduction of more than half – in the number of capital cases pending eight years ago.
2. The Maricopa County Attorney filed 46 death penalty notices in FY 2006 and 34 notices in FY 2007. (Task Force report at page 5, footnote 4.) The 2007 Task Force report anticipated that in the future, the Maricopa County Attorney would file 35 to 45 capital cases each year. (Task Force report at page 5.)
 - The number of new notices of intent to seek the death penalty actually filed in successive 12-month periods between October 2008 and September 2015 were, respectively, 18, 32, 26, 24, 19, 18, and 12 notices. (Appendix Table 2.) This is an average of 21 notices per year. At no time did the actual number of notices reach the “35 to 45” range that was estimated in 2007.
3. The 2007 Task Force report indicated that the then-current number of capital cases would have a “ripple effect” on the criminal justice system as these cases moved out of the superior court on direct appeal. (Report at page 5.)
 - As of November 2008, there were 17 direct appeals of capital convictions pending before the Arizona Supreme Court. (2008 Oversight Committee report at page 9.) By October 2009, that number had increased to 23 capital appeals. (2009 Oversight Committee report at page 12, footnote 22.) But as of September 2015, there were ten pending direct capital appeals. (The Supreme Court

has issued five opinions in capital cases in the twelve months since the Oversight Committee's 2014 report, as well as five opinions in the twelve months preceding the 2014 report.)

The expectations in the 2007 Task Force report of ever-increasing capital case volumes at the trial and appellate levels never came to pass.

This report will summarize what happened over the eight years since 2007, and attempt to put those events in an historical perspective. This report concludes with four recommendations:

- A. This Court should continue to monitor capital case data.
- B. This Court should support efforts to secure reasonable compensation for capital PCR counsel.
- C. The Court should plan for, participate in, and encourage education and training for capital case stakeholders.
- D. The Court should enter an Order that either extends or disbands the Oversight Committee.

The Oversight Committee's focus has been on capital case volume, the efficiency and effectiveness of court procedures, court and human resources, and similar issues. It has never concerned itself with, nor was it charged to consider, the merits of capital punishment or the policy underlying the death penalty. The Oversight Committee did not discuss whether the death penalty was equitably applied, or whether any particular case warranted a death sentence. Although the existence of capital punishment or its application in certain circumstances have been debated in other forums and jurisdictions, those issues are not within the Oversight Committee's purview.

Sources of data. Capital case data in Arizona over past decades has not been uniformly collected or integrated for analysis. A major exception was the 2002 report of the Arizona Attorney General's Capital Case Commission. (The report is located at <https://www.azag.gov/cc/final-report>) Three Supreme Court justices (Justices Ryan, Feldman, and Moeller) were among the two dozen members of the Commission. Dr. Peg Bortner, a professor at the Center for Urban Inquiry, College of Public Programs, Arizona State University, meticulously compiled and prepared more than one hundred pages of capital case data, and analyzed that data based on a broad number of criteria. Some of that data is

included in this report (Appendix 10), but much of Dr. Bortner's 2001-2002 data now has less relevance as a result of *Ring v. Arizona*, 536 U.S. 584 (2002) and statutory changes to Arizona's capital case sentencing procedure in 2002.

Since 2008, the Capital Case Oversight Committee has compiled some basic capital case data from Maricopa County and statewide. The data contained in Tables 1 through 9 of this report was derived from that effort. Other data in this report was extracted from publicly accessible websites, such as the Arizona Department of Corrections' death row webpage.

The 2007 capital case crisis. One might surmise that the precipitating factor for the 2007 capital case crisis in Maricopa County was the filing of an inordinately high number of death notices. (A first degree murder case becomes a capital case when the State files a timely notice of intent to seek the death penalty.) But a review of the data renders that surmise doubtful.

Dr. Bortner's data, Appendix 10, indicates that for the five-year period 1995-1999, a total of **230 death notice cases** were filed in Maricopa County.

➤ This is an average of **46 cases** annually.

The Maricopa County Superior Court statistician maintained an inventory of capital cases for the period 2003 to 2008 on a fiscal year (July 1 to June 30) basis. The statistician's numbers in the years leading up to the crisis showed capital case filings as follows:

2003-04	31 cases
2004-05	32 "
2005-06	46 "
2006-07	32 "
2007-08	32 "

5-year total: 173 cases, or **about 35 cases** annually

Given that prosecutors filed fewer, not more, death notices during the five years preceding the capital case crisis than during a comparable, previous five-year period, the number of filings from 2003 to 2008 did not appear to precipitate the crisis. If not, then what did?

Jury sentencing. As a result of *Ring* and Arizona's new capital case sentencing statutes that became effective in 2002, juries were empowered to determine whether the sentence in an alleged capital case should be life, or death. Formerly, judges alone made that determination. A capital case is therefore a three-stage proceeding. In the first phase, a jury determines if a defendant is guilty of first degree murder. During the second phase, the same jury decides whether the State has proven its allegations of statutory aggravating factors. In the third and final phase, also known as the sentencing or penalty phase, the jury considers whether to return a verdict of death or life.

Exhibit 13 of Dr. Bortner's Data Set II (Appendix 10) showed the length of time from indictment to sentence in death notice cases in Maricopa County between 1995 and 1999. The exhibit indicates that median range was about **2.5 years** (1.9 years from indictment to trial, plus 6.4 months from verdict to sentence. This data set did not include the actual length of trials, which would need to be added.)

Between October 2008 and September 2015, the Maricopa County Superior Court conducted 67 trials. (Appendix 9.) Excluding about a dozen mistrials (often because the jury was unable to reach a verdict in the penalty phase) and trials following appellate remands (which would skew the result), the average length of time between arraignment and sentence was **4.08 years**, or about 49 months (N = 52 cases).

But rather than characterizing death penalty cases as "moving slower" through a "clogged" court system, the Oversight Committee submits that these cases take longer simply because there is more to do before and during trial than there was two decades ago.

Before trial, and under applicable statutes, cases, and standards, defendants in capital cases undergo testing for intelligence, competency, and sanity. Mitigation specialists make ongoing requests to obtain records, going back to the defendant's childhood or even to the time of defendant's birth. There is a need to access and review records from schools, health care providers, employers, the military, courts, and penal institutions, some of which might never have been digitized and may be archived long ago and stored in boxes in remote warehouses that may be difficult to locate. It is also necessary for the defense to locate and interview witnesses who may live out-of-state or out of the country, and to find, retain, and prepare appropriate expert witnesses. And as before *Ring*,

counsel need to be fully prepared for what might be a complex guilt phase trial. Trial preparation should be thorough, deliberate, and paced. Good trial preparation takes more time than inadequate preparation.

Trials also take longer than they did in the 1990s. Before *Ring*, the jury was discharged after a verdict in the guilt phase. The jury now remains for, and counsel must be fully prepared for, the aggravation and penalty phases of a capital trial, which may last for weeks if not months. (Footnote 10 of the Oversight Committee's 2008 report noted that the length of an entire capital jury trial in Maricopa County, including the penalty phase, was 84 days.) Jury trials, including deliberations following each stage of the proceeding, inherently require more time.

Meanwhile, the prosecutor is dealing with similar requirements as the defense. The prosecutor also needs to contact relevant witnesses and experts for the case in chief and for rebuttal during all three stages of the trial. Pretrial proceedings may include lengthy plea bargaining between counsel. And the court must take the time, and have the resources, to effectively and fairly manage this complex criminal litigation.

So the answer to the question of what precipitated the capital case crisis might in hindsight focus on the multi-faceted and time-consuming process for jury sentencing that was implemented more than a decade ago. This is now the elemental nature of death penalty cases.

Oversight Committee accomplishments. The capital case crisis did not develop quickly. But true to what was envisioned by the 2007 Task Force, the Oversight Committee offered an environment where interested parties had “a cooperative environment in which to share information, air concerns, and facilitate development of any formal policies deemed necessary.” (When the term of the Oversight Committee was extended by the Court pursuant to Administrative Order 2013-15, its nine exclusively Maricopa County members were joined by four new members, two from Pima County, one from Yavapai County, and a private practitioner from Maricopa County.)

(1) *Data collection protocols.* It became apparent early in the life of the Oversight Committee that the superior court, prosecutors, and defender agencies collected capital case data differently. As an example, these stakeholders sometimes distinguished the number of pending cases as “active,” “remands,” or

“potential.” (A case that was pending for competency restoration may or may not have been counted as “active.” In a “potential” case, a death notice had not been filed, but it might be anticipated.) If a defendant was convicted of capital murder and immediately sentenced, but sentencing on any non-capital counts was deferred, there was not uniform treatment of the date of case termination. Some stakeholder reports referred to capital “cases,” but this overlooked the fact that one case might have more than one “defendant.” On the other hand, one defendant could have multiple capital cases. Some stakeholders kept data on a calendar year basis, while others kept data by fiscal year.

Accordingly, Justice Ryan directed the Maricopa stakeholders who kept data to meet and discuss standards for capital case data management. This resulted in the stakeholders’ agreement on a data reporting protocol. (The protocol was included in Appendix B to the Oversight Committee’s 2008 report; it was subsequently revised as shown in Appendix B of the Oversight Committee’s 2009 report.)

(2) *Rule petitions.* The Oversight Committee supported the Task Force recommendation to amend Rule 15.1(i) of the Arizona Rules of Criminal Procedure. This recommendation resulted in the filing of R-07-0019 in November 2007.

Before the proposed amendment, Rule 15.1 required the prosecutor to file a notice of intent to seek the death penalty within sixty days after a defendant’s arraignment. The old rule allowed a stipulated extension for thirty days. Under the amended rule, which the Court adopted effective January 1, 2009, the time for the prosecutor to file a notice of intent to seek the death penalty could be extended by 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 such stipulation.) In the words of the rule petition, “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.” The amended rule also 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 a notice.

The Oversight Committee filed two other rule petitions in 2008.

The Clerk of the Supreme Court automatically files a notice of post-conviction relief on behalf of a defendant whose death sentence is affirmed on direct appeal. Post-conviction proceedings in the superior court can be as complex and time consuming as pre-judgment proceedings, and require similar, systematic case management by the assigned judge. R-08-0042, adopted by the Court effective January 1, 2010, amended Rule 32.7 and required the trial court to hold an informal conference in the case within 90 days after the appointment of counsel on the first notice of post-conviction relief.

Another issue associated with capital cases, particularly post-conviction proceedings, involved defense counsel's preservation for successor counsel of a defendant's file. In R-08-0041, the Oversight Committee proposed an amendment to Rule 6.3 that expressly required defense counsel to maintain the records "in a manner that will inform successor counsel of all significant developments relevant to the litigation" and to provide to successor counsel the client's "complete records and files, as well as all information regarding every aspect of the representation." The Court adopted the proposed amendment effective January 1, 2010.

The Oversight Committee also filed a rule petition in 2010, R-10-0012, which proposed an amendment to Rule 8.2(a)(4) – the "speedy trial" rule for capital cases – and that became effective on January 1, 2011. The amendment extended the speedy trial time limit from *18 months from the date of arraignment*, to *24 months from the date a notice of intent to seek the death penalty is filed*. The Oversight Committee's expectation was that with this rule amendment, counsel would have adequate time to fully prepare each case for trial. As a practical matter, there has not been strict adherence to either the old or the new time limit, but the new limit is at least more realistically aligned with the time required for counsel preparing a capital case for trial.

(3) Screening for qualified counsel. A capital case proceeds through three levels of the state court system: first, through the superior court, for trial; then, following a death sentence, to the Supreme Court on direct appeal; and then back to the superior court on an automatic petition for post-conviction relief. In what may be an anomaly, the superior court appoints counsel for the appeal to the Supreme Court, and the Supreme Court appoints counsel for post-conviction proceedings in superior court.

A recurring issue following conviction is the effectiveness of defense counsel. Basic qualifications for defense counsel in a capital case are set out in

Rule 6.8. But those requirements are quantitative rather than qualitative. The Oversight Committee, and those who make these appointments, believed that more comprehensive screening of counsel's qualifications was warranted. The need to appoint counsel cannot be adequately satisfied if the appointed attorney is not qualified for a death penalty case.

In 1996, and to assure that each appointee would provide high quality legal services, the Arizona Supreme Court established an advisory committee to screen private counsel's applications for appointment in post-conviction proceedings. But the Court disbanded this advisory committee in 2001.

In 2010, the Oversight Committee considered a presentation from the California Supreme Court's Automatic Appeals Monitor. The California Monitor advised that California requires an applicant for appointment in a capital post-conviction proceeding to submit writing samples that demonstrate an ability to analyze complex legal issues, and to submit references, who the Monitor actually contacts. The Monitor declines to appoint busy trial attorneys to a capital PCR because that attorney, although qualified, may not have the time required for post-conviction work. He requires that appointed counsel submit progress reports to the court while a PCR is pending, and he also requires that appointed counsel consult with another experienced attorney during the course of a collateral proceeding. He noted that previously appointed attorneys may have "life-changing experiences" that cause them to become unsuitable for appointment, or that they may rely on the work product of subordinates rather than doing the work themselves, and the Monitor accordingly screens for those issues.

The Oversight Committee thereafter discussed different proposals for screening capital counsel, including a formal "screening committee" (that would be established by administrative order), or an informal and flexible "advisory panel" (that would gather information and have candid and confidential discussions about each applicant.) The Oversight Committee unanimously recommended the advisory panel proposal. Although this proposal was not adopted by the Court, the Oversight Committee's chair has worked closely during the past two years with the Court's capital staff attorney to carefully evaluate applications for appointment as PCR counsel, using many of the California Monitor's screening techniques. Also during that time, a small Oversight Committee cadre has revised the Court's application form to make the information supplied by each attorney applicant more comprehensive and meaningful.

These recent actions by members of the Oversight Committee have contributed to there being an adequate number of competent counsel available for appointments on capital PCR proceedings. In 2009, there were 18 defendants awaiting the appointment of counsel on a capital PCR. By October 2013, this number had been reduced to six; a year later, there was no backlog of defendants awaiting the appointment of counsel. As of the writing of this report, the number stands at “two,” but it’s expected that an appointed lawyer will soon be appointed in those cases, and then every capital defendant in Arizona will have PCR counsel.

The Oversight Committee’s 2010 report recommended that county public defenders be considered for appointment on capital PCRs. (2010 Report at page 14.) It’s noteworthy that public defender agencies in Maricopa County have recently accepted PCR appointments. As a practical matter, this arrangement is more cost-effective for the county than the appointment of private counsel. But regardless of the economics, the agencies’ acceptance of appointments also facilitates the timely appointment of qualified PCR counsel. Many of the PCRs now pending in superior court are cases that were affirmed on appeal subsequent to the peak of the 2007 crisis. Maricopa County alone has 29 capital defendants with pending petitions for post-conviction relief.

Coincidentally, in January 2012, the Maricopa County Superior Court entered Administrative Order 2012-008, superseded by Administrative Order 2012-118 entered on August 10, 2012. The Orders require a formal evaluation by a “*Capital Defense Review Committee*” of applications for appointment of capital case counsel by the trial court. The Orders encompass appointments as a capital defendant’s lead trial counsel, trial co-counsel, and appellate counsel. A.O. 2012-118 provides that all capital counsel eligible for appointment through the Maricopa County Office of Public Defense Services receive an evaluation every three years of his or her qualifications, and have approval of the presiding criminal judge for appointment on a capital case.

False starts. The past eight years have also witnessed well-intentioned attempts to deal with the capital case crisis that have fallen short.

(1) *Mitigation discovery masters.* Mitigation is often the most compelling evidence to persuade a capital case jury that a life sentence should be imposed. The mitigation effort is frequently the most time-consuming portion of pretrial investigation and discovery.

The mitigation discovery master concept was initiated in Maricopa County in April 2007 by the superior court's entry of Administrative Order 2007-50. The mitigation discovery master was an experienced criminal judge, other than the one assigned to the case, who facilitated the mitigation investigation with appropriate orders. The concept allowed the master to confer *ex parte* with the defense team to eliminate, when possible, obstacles to uncovering mitigation evidence.

The mitigation discovery master concept was not always satisfactory. First, it required two judges on a single case, and it therefore had a greater cost of judicial resources. Second, it did not sit well with victims, who were customarily excluded from pretrial mitigation proceedings in which only the defense appeared before a judge. And third, it did not appear that mitigation discovery masters appreciably shortened the time needed by defense counsel to prepare for trial.

In early 2009, the Maricopa County Superior Court adopted a new capital case management approach. That approach dispensed with mitigation discovery masters and relieved them of their duties. The capital case judge assigned to the case thereafter handled all discovery issues, and if an *ex parte* discovery hearing was necessary, a party was required to proceed under Rule 15.9(b).

(2) *State Capital Post-Conviction Public Defender.* The Legislature established this new executive office in 2007 by enactment of Title 41, Chapter 42, A.R.S. §§ 41-4301, et. seq. The office began operations in November 2007. The intent of this legislation was that, like a public defender office in the trial court, the Post-Conviction Defender would be appointed on capital PCRs statewide. This would not only be economically advantageous; it would also facilitate an experienced, specialized practice and become a knowledge resource for other capital defense counsel.

By November 2008, the Post-Conviction Defender had four PCR cases. But the office encountered fiscal difficulties shortly thereafter, primarily caused by budget cuts, staff reductions, and furloughs. The enacting legislation had a 2012 sunset provision. The Legislature's budget for fiscal year 2013 included a repeal of the statutes establishing the office. Maricopa County's Office of the Public Advocate absorbed the majority of the State Defender's five pending cases, as well as most of its staff.

(3) *R-14-0010.* This rule petition, filed by the Arizona Attorney General, requested amendments to various rules of criminal procedure. The petition

essentially requested that a post-conviction proceeding in a capital case precede, rather than follow, a direct appeal. The petition was prompted in part by a United States Supreme Court opinion, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (Arizona requires a defendant to raise a claim of ineffective assistance of trial counsel in post-conviction proceedings, rather than on direct appeal. *Martinez v. Ryan* held that the ineffectiveness of defendant's post-conviction counsel in challenging the effectiveness of trial counsel could provide cause for excusing the defendant's failure to raise trial counsel's ineffectiveness in state court.)

The Oversight Committee discussed this rule petition at a meeting in March 2014. Oversight Committee members were profoundly and intractably divided on a recommendation concerning this rule petition. Some took the view that this new procedure would serve justice by facilitating earlier evidentiary hearings, when witness memories were fresher and before evidence was lost, rather than delaying them for the years it took to conclude a direct appeal. Others viewed it as an unnecessary cost of millions of dollars for a post-conviction proceeding, because a conviction might first be reversed on direct appeal and avoid the need for, and the expense of, a PCR. Accordingly, the Committee provided no formal comment to the Court. This is perhaps the only issue on which the Oversight Committee has been unable to develop consensus. And although at its August 2014 rules agenda the Court reopened the matter and asked for data or studies in capital cases jurisdictions with a review procedure similar to the one proposed by the Attorney General, it appeared that scant, if any, such data existed, and the Oversight Committee was again unable to file a comment.

A turning point. If this report had to identify a single turning point in ameliorating the capital case crisis, it would be the Oversight Committee's March 5, 2009 meeting. At this meeting, the then-presiding criminal judge of the Maricopa County Superior Court publicly announced a new approach for capital case management. The presiding criminal judge advised that he intended to enforce the requirement of then-existing Rule 8.2(a)(4), which required capital cases to proceed to trial within eighteen months from arraignment. He also stated that all twenty-six judges in Maricopa County's criminal division would be qualified to try capital cases, and that one of these judges would be available for any capital case that was ready for trial. No case would be continued because of the unavailability of a judge or a courtroom. A Maricopa County Administrative Order, Number 2009-023, included a requirement that upon the filing of a notice of intent to seek the death penalty, the presiding criminal judge would issue a

capital case assignment and scheduling order. The order, among other things, required IQ, competency, and sanity prescreening evaluations; set a firm trial date; required any continuances of the trial date to be heard by the presiding criminal judge; and required disclosures within the times set by applicable criminal rules. The order also set an initial case management conference, and required the parties to jointly submit written status reports to the court.

In a seven-month interval between March and September 2009, 33 capital cases were resolved, more than a dozen by jury verdict. However, defense attorneys contended that the new case management approach required some of these cases to proceed to trial before they were ready, and without being fully prepared. In any event, by January 2010, the number of pending capital cases in Maricopa County had dipped below 100 (in February 2009 there were 131 cases; in January 2010, there were 97 cases). By the end of 2010, the number had been reduced to 68 cases. The number has since remained in a range of 60-70 pending capital cases during any given month. (Appendix Table 1.)

The turnaround is also noteworthy in light of the fact that during calendar year 2010, there were three Maricopa County Attorneys. (The elected County Attorney resigned in April 2010 to run for statewide office. He was replaced by an interim County Attorney, who was defeated in a primary election in September, and succeeded by a new County Attorney, who was elected in November.) The interim county attorney ordered a review of every death-noticed case then pending in Maricopa County, and he withdrew some death notices following that review.

Continuing education. Prosecutors and defense counsel customarily have separate training under the auspices of their respective organizations, rather than conducting joint training.

In November 2014, the AOC's Education Services Division in partnership with the Superior Court in Maricopa County conducted a two-day statewide training for judges on Processing Capital Cases. A total of 34 judges attended. Another 21 judges, including Judges Kent Cattani, Andrew Hurwitz, and Ronald Reinstein, (along with attorneys and experts) served as faculty. The program received an overall participant evaluation of 4.9 out of 5.0. Topics at this program included case management, discovery and mitigation management, common mitigation issues, pretrial motions, jury selection, the three phases of a capital trial, settlement conferences, sentencing, media issues, appellate issues,

and post-conviction relief. (The program sessions are available in video on Wendell, the judicial intranet site. A capital case bench book and resource materials from previous capital case training sessions are also available on Wendell.)

In September 2015, the General Jurisdiction New Judge Orientation program included two criminal sessions with preliminary information on capital cases. The program was attended by 31 new general jurisdiction judges. Judges Reinstein, Myers, and Welty served as faculty for these sessions, which were also highly rated by the participants.

On the horizon. The reduction in the number of pending capital cases in Maricopa County also resulted in a reduction in the number of pending capital cases statewide. (Seven counties – Coconino, Gila, Graham, Greenlee, LaPaz, Navajo, and Santa Cruz – have not had a capital case during the past eight years.) The statewide number of capital cases pending trial fell from 155 cases in July 2008 to 83 cases in September 2012. Maricopa’s number during that time period dropped from 127 cases to 63 cases (a 50% reduction). Pima County also had a substantial reduction, from fourteen cases in 2008 to five cases in 2012 (a 64% reduction). And Yuma County went from five cases in 2008 to one case in 2012 (an 80% reduction.)

Two counties had an increase in their capital caseloads. Yavapai County went from three cases in 2008 to five cases in 2012, and seven cases in 2013. However, by 2015, Yavapai County had reduced its pending capital cases to three. Pinal County had three capital cases in 2008, which increased to five cases in 2012 and seventeen cases in 2014. It reduced that number to fourteen cases in 2015. None of the death noticed cases in Yavapai or Pinal County during the past eight years have concluded with a sentence of death. Death sentences in Arizona over the past eight years have occurred in only three counties: Maricopa, Mohave, and Pima. (Appendix Table 7.)

Although the total number of filings has dropped during the past eight years, the analysis a prosecutor undertakes before filing a death notice remains the same: whether there is sufficient evidence to show guilt and aggravating factors beyond a reasonable doubt, and whether the totality of circumstances justify death as a just punishment. Prosecutors and others would likely agree that there is no “magic number” of death notices. The filing of a death notice is contextual and solely within the discretion of elected prosecutors.

Another issue on the horizon is the outcome of post-conviction proceedings. Of the 67 pending capital cases in Maricopa County in September 2015, four cases (or about six percent) are penalty phase retrials following a death sentence. Two of these cases were remands from federal court; two other cases derived from orders in post-conviction proceedings in state court. And at its October 29, 2015 meeting, a federal public defender reported that the Ninth Circuit remanded to the district court for evidentiary hearings more than a dozen Arizona cases on the basis of *Martinez v. Ryan (supra)*. Penalty phase retrials, which are costly financially and, for the victims, emotionally, often result from the ineffective assistance of trial counsel. The lesson from these experiences is that properly qualified, trained, diligent, and fairly compensated defense counsel are essential in death penalty cases.

Extend or disband the Oversight Committee. Several of the previous reports to the Arizona Judicial Council considered whether to extend or disband the Oversight Committee, and the issue presents itself again in 2015.

One member believes that the capital case crisis is a past event, and accordingly, the term of the Oversight Committee does not need to be extended. That member suggested that stakeholders can meet informally, outside the structure of a formal committee, and that courts can track their own capital case data. A couple members believe that a committee that meets once a year, as this Committee has done for the past two years, has only marginal value, and at the very least, if this Committee merits an extension, it should meet a few times annually.

A large majority of members felt that the Oversight Committee has continuing relevance. First, these members believe there are continuing issues. There has been a recent increase in the number of capital cases in Pinal County, and there appears to be a shortage of qualified mitigation specialists. The Attorney General's office has not yet sponsored another bill or introduced another rule petition that would require capital post-conviction proceedings to precede direct appeals, as it has done during the past two years, but that office continues to discuss a reintroduction of these changes. A restyling of the Arizona Rules of Criminal Procedure is anticipated, and the Oversight Committee might have an interest in reviewing and commenting on the associated rule petition. And there routinely seems to be developments in the Arizona Legislature, the Ninth Circuit, and other federal courts that impact Arizona death penalty litigation.

The majority submits that the Oversight Committee appears to be the only statewide forum where a cross-section of stakeholders can discuss issues and share concerns associated with capital litigation. When this Committee considered its existence in 2013, one member stated that the Oversight Committee should continue as long as Arizona has a death penalty. A judge member commented during the October meeting that extending the term of the Oversight Committee will enable it to look at new capital case issues as they arise, even if there are no particular issues before the Committee now.

Recommendations. The Oversight Committee has four recommendations.

- A. *This Court should continue to monitor capital case data.* This does not need to be done under the supervision of the Oversight Committee. But someone should be routinely collecting capital case data, first, for research and study purposes, but also, to discern trends and to alert the trial and appellate courts of any anticipated changes in capital case volumes.
- B. *This Court should support legislative efforts to secure reasonable compensation for capital defense counsel in post-conviction proceedings.* This recommendation has been ingrained in every report that the Oversight Committee has submitted to this Council. The statutory rate of \$100 per hour (A.R.S. § 13-4041) appears to be too low to attract the best and most capable capital defense counsel.
- C. *The Court should plan for, participate in, and encourage education and training for capital case stakeholders.* Specialized and ongoing training is essential for prosecutors, defense counsel, mitigation specialists, and judges.
- D. *The Court should enter an Order that either extends or disbands the Oversight Committee.* The Oversight Committee met once in 2014, and once this year. Although a minority of its members believes that the Oversight Committee should be disbanded, the great majority of members support its continuation.