

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
SEPTEMBER 18, 2008**

Members Present:

Hon. Michael D. Ryan, Chair  
Hon. Anna Baca  
Kent Cattani  
Donna Hallam  
Dan Levey  
Marty Lieberman  
James Logan  
Phil MacDonnell  
Paul Prato  
Hon. Ronald Reinstein

Guests:

James Beene  
Robert Shutts  
Sally Wells  
Theresa Barrett  
John Todd  
Katy Proctor  
Keli Luther  
Rudy Gerber

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 minutes of the June 26, 2008, Committee meeting were unanimously approved.

**2. Status reports.** Members of the Committee provided case volume and other updates as follows:

**A. Judge Baca.** Judge Baca provided figures concerning pending capital cases in Maricopa County:

Total: 141 cases  
*Ring*: 5 of the total  
Other remands: 4 of the total

Judge Baca also provided the following data on dispositions to date in calendar year 2008:

Pleas: 9  
Trial, life: 4  
Trial, death: 5  
Acquittals: 0  
Dismissals: 2  
Notice w/d: 1  
  
Total case terminations: 21

Judge Baca stated that so far in 2008, there have been resolution management conferences in 38 cases. Pleas resulted from resolution management conferences in 7 cases; and pleas were entered without resolution management conferences in 3 cases. In 10 cases, resolution management conferences resulted in no settlement. Plea discussions are continuing subsequent to the conferences in 18 cases.

Judge Baca also noted that 26 cases were filed in calendar year 2007; that is, on average, 2.2 new cases per month. For the first 8-1/2 months of 2008, there have been 33 filings, or about 3.8 new cases per month.

**B. Mr. Logan.** Mr. Logan provided the following information regarding the number of capital cases in Maricopa County:

Active cases:	126
Potential cases:	16
Pled, not sentenced:	8
Remands:	7
Total:	157

These numbers were accurate as of September 3, 2008. Mr. Logan today adjusted the number of potentials: five potential cases were deemed not capital; and in two cases that had been potential, death penalty notices were filed. Mr. Logan's adjusted numbers are 132 active cases (which is consistent with Judge Baca's figure); 7 remands; and 8 potential capital cases. He noted that a case which recently went to trial resulted in a hung jury following the penalty phase, and that phase will need to be retried.

Mr. Logan added that every capital defendant currently has first and second chair counsel and a mitigation specialist. He continues to expend resources for capital cases, notwithstanding the budget situation. He noted that last year, the Board of Supervisors covered a \$4.5 million shortfall for the cost of providing counsel in felony cases, including counsel in capital cases.

On the subject of budgets, Judge Baca informed the Committee that the State of Arizona had swept \$1 million from the lengthy trial fund. This may impact capital cases, including a capital trial which has just begun and which is projected to go for nine months.

**C. Ms. Hallam.** Ms. Hallam gave the following numbers and update:

There are 17 capital appeals pending in her office. This is a decrease from the June number (21 cases), and reflects opinions which have been issued by the Court in the intervening months.

There are 17 capital cases without PCR counsel. This represents an increase of two cases since her report at the June Committee meeting. Justice Ryan noted that when the PCR notice was filed in these cases, an order was also entered staying the time for filing the PCR petition pending the appointment of counsel.

**D. Mr. Lieberman.** Mr. Lieberman reported that his office may be able to take another PCR case later this year.

### **3. Discussions on specific issues.**

**A. The Committee's report to the Arizona Judicial Council.** Justice Ryan provided several rule change recommendations for consideration by the members in conjunction with the Oversight Committee's pending report to the Arizona Judicial Council. Pursuant to the administrative order which established the Oversight Committee, this report is due in December; and since the A.J.C. meets in the first week of December, the report should be completed by mid-November. Justice Ryan invited the members to submit their comments to Committee staff within the next couple weeks on the proposed rules, as well as any recommendations the members may have concerning other aspects of capital case processing. Staff will synthesize the members' comments in a draft Committee report.

Justice Ryan recommended that the Committee meet again in October to discuss the draft report. A meeting date will be determined. It may also be necessary for the Committee to meet again thereafter to finalize the report.

**B. Time required to get a capital case to trial.** Judge Baca informed the Committee that about half of the current active capital cases have been pending for at least 18 months. It takes three to four years to get to a capital case to trial. Cases that were filed in 2005 are just now going to trial.

Justice Ryan advised that a rule petition had been pending before the Arizona Supreme Court which sought to extend the Rule 8 time limit in a capital case to 30 months from the date of arraignment. The rule petition was recently rejected by the Court.

Justice Ryan also informed the members that the Chief Justice intends to issue an administrative order which would extend the term of the Oversight Committee, and Justice Ryan requested that the members of the Committee stay on for that extended term. The Chief Justice specifically wanted the Committee during its extended term to consider whether 18 months is a realistic time in which to get a capital case ready for trial; and if not, what a realistic length of time would be, one that would be credible and would also take into consideration available resources.

A suggestion was made that a first continuance in a capital case should be granted for good cause, but that any further continuances should be granted only on a higher showing of extraordinary circumstances. Another suggestion was made that the presumptive time for speedy trial should start to run upon the filing of the death notice, rather than at the time of arraignment.

Judge Baca noted that there are currently five cases ready for trial which cannot proceed because of attorney scheduling conflicts. Mr. Prato commented that because of the team concept utilized by his office, if one attorney is unavailable for trial, another attorney on the team could be ready. Most teams have about five cases, but if the caseloads are reduced, there would be even fewer scheduling conflicts.

Mr. MacDonnell stated that his office is training more prosecutors for capital cases, thereby increasing the capacity of his office, and suggested that the defender offices should do this also. Mr. MacDonnell also objected to mitigation discovery which is obtained through ex parte proceedings before a discovery master being used during the case in chief, and said that this is inconsistent with the discovery rules.

Mr. Logan added that there are no more private attorneys available for appointment in Maricopa County who are qualified under the ABA standards governing defense counsel in capital cases.

**C. Member comments.** Committee members were invited by the Chair to express comments on case processing times and other matters, and the following comments were made:

- The present speedy trial time of 18 months deceives victims. The rule is unrealistic because it is not followed 100% of the time. A 24 month time-line would be more appropriate.
- Attorney scheduling conflicts impede time limits.
- An extension of the time limits to get a case to trial is a slippery slope.
- If there is a problem with attorney scheduling, more attorneys should be handling these cases.
- For more than a year following the *Ring* decision, no cases were going to trial pending the development of new rules and procedures, and the trial courts are still digging out of the hole created by that moratorium.
- Ineffective assistance of counsel at sentencing is the most frequent basis that a death case will be set aside by a federal court.
- The limited resources which are available should be directed toward those capital cases in which a death sentence will likely result. Current data shows that approximately only one out of five cases in which a death notice is filed actually culminate with the imposition of a death sentence.
- Reducing the current backlog of cases in Maricopa County will require either a surge of resources, or greater selectivity in filing death penalty notices, although the County Attorney decides which cases should be tried as capital cases.
- The number of cases that are resolved before trial is low because it is difficult for all stakeholders, including the defendant, to agree to settlement.
- Some cases need to go through the discovery process to produce evidentiary justification for a non-capital case resolution.

- Will extensions under the amended Rule 15.1(i) make a difference in the number of death notices that are filed?

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

Keli Luther responded on a call to the public. Ms. Luther is an attorney and a victims' advocate. She commented that Phoenix is the fifth largest city in the country, and it should have more attorneys available, if needed, to handle capital cases. She suggested that we plan now for future needs. Ms. Luther questioned whether ex parte mitigation discovery proceedings are a good idea. She believes that victims have a right to be present at any proceeding where the defendant is present.

The Committee agreed to meet next in October. Justice Ryan again encouraged members to submit their comments about the Committee's report to Committee staff as soon as possible.

The meeting was adjourned at 1:10 p.m.