PROGRESS REPORT

OF THE

CAPITAL CASE OVERSIGHT COMMITTEE

TO THE

ARIZONA JUDICIAL COUNCIL

NOVEMBER 2009

CAPITAL CASE OVERSIGHT COMMITTEE

November 2009

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Hon. Gary Donahoe, Presiding Criminal Judge, Maricopa County Superior Court

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

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I. Executive Summary.

The Arizona Supreme Court issued Administrative Order number 2008-93 in conjunction with the November 2008 report of the Capital Case Oversight Committee. The order extended the term of the Oversight Committee for one year, and directed that a status report be submitted to the Arizona Judicial Council in December 2009.

This 2009 report is data driven. The data is encouraging but at the same time raises concerns with respect to direct appeals and post-conviction relief proceedings.

The encouraging data is that the Maricopa County Superior Court has reduced its pending capital case inventory by more than fifteen percent since January 2009. The reduction has been achieved through a combination of two factors: strict adherence to the time limits specified in Rule 8.2(a)(4) of the Rules of Criminal Procedure, which has substantially increased the number of capital case dispositions; and a significant decline in the number of new notices of intent to seek the death penalty filed by the Maricopa County Attorney. A reduction in the inventory of capital cases is notable not only for its impact in reducing court congestion, but also for major cost savings.[1]

On the other hand, this increase in dispositions of capital cases at the trial court level has resulted in a greater number of death sentences. Although the number of death sentences imposed over the past several years has, with one exception, been in the single digits, through September 2009 the number of death penalty judgments for the calendar year stood at eleven, and this figure may increase by year's end. Death sentences are directly appealed to the Arizona Supreme Court.[2] The increased number of these complex capital appeals poses potential resource issues for the Supreme Court.

In addition, the number of capital defendants who require the appointment of counsel on petitions for post-conviction relief is increasing faster than the availability of counsel for appointments. This has resulted in a critical number of capital cases being stayed for years during the initial post-conviction stage of state court criminal proceedings.

This report makes two recommendations. First, the Oversight Committee recommends an adoption of an amendment to Rule 8.2(a)(4). The proposed amendment would enlarge the speedy trial limit in a capital case from eighteen months from the date of arraignment, which is the existing rule, to twenty-four months from the date of filing the notice of intent to seek the death penalty. This amendment is intended to promote more effective preparation for trial. Second, the Oversight Committee recommends that its term be extended for another year. This

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[1] *See* Minute entry dated 08/03/2009 in CR 2006-007790-001 DT, at page 4. The minute entry recited that capital cases, which constitute less than one-quarter of one percent of all criminal cases in Maricopa County, nonetheless consume over one-fourth of the budget for public defense services, at an estimated cost of more than $14 million.

[2] *See* A.R.S. §13-4031: "…criminal actions involving crimes for which a sentence of death has actually been imposed may only be appealed to the supreme court."

recommendation would allow the Oversight Committee to further study and identify possible solutions for the increasing number of direct appeals and petitions for post-conviction relief. It would also permit ongoing monitoring by the Committee of capital cases at the trial court level to verify whether the current data trends might be only temporary.

II. Introduction.

This is the third capital case report submitted within the past three years by an ad hoc Supreme Court committee to the Arizona Judicial Council. This report follows the September 2007 report of the Capital Case Task Force (the "Task Force report"), and the November 2008 report of the Task Force's successor, the Capital Case Oversight Committee (the "November 2008 report".)

The Capital Case Oversight Committee was established by Administrative Order 2007-92. The purpose of the Oversight 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 term of the Oversight Committee was extended until December 31, 2009, by Administrative Order 2008-93:

> The Committee shall continue with its duties, as set forth in Administrative Order No. 2007-92, and in addition, shall: report its findings and recommendations concerning the use of mitigation discovery conferences for capital cases in Maricopa County; and study and make recommendations, as needed, concerning the reasonableness of the time limit for capital cases established by Ariz. R. Crim. P., Rule 8.2(a)(4), and issues related thereto.

The Oversight Committee met four times during 2009. Three of those meetings occurred during the first four months of the year. The Committee thereafter recessed for six months before meeting again. This interval permitted time to assess a new approach for capital case management that was initiated in the Maricopa County Superior Court in early 2009.

In summary, 2009 saw the reversal of a trend towards an increasing number of capital cases in Maricopa County. During the first nine months of 2009, the number of pending cases has shown a month-by-month decline as more capital cases were resolved either by plea or by jury verdict. Concurrently, more than one-third fewer notices of intent to seek the death penalty were filed during the past twelve months than in corresponding periods during previous years.

As a consequence of these two factors, at the end of September 2009, there were 109 pending active capital cases in the Maricopa County Superior Court. This figure compares to 127 pending active cases as of the November 2008 Oversight Committee report and 131 pending active cases in January 2009.

While the reduction in capital cases at the trial court level is encouraging, the trend has other consequences. Eleven death sentences have been imposed in trial courts statewide during the first nine months of the calendar year, resulting in eleven direct appeals to the Arizona Supreme Court. The increased number of direct appeals has resource implications for the Arizona Supreme Court.

After each capital appeal is resolved, and a petition for certiorari has been denied by the United States Supreme Court, a petition for post-conviction relief is automatically filed in state court. New defense counsel must then be appointed for each defendant on whose behalf a PCR petition has been filed. Too few qualified attorneys are available for PCR appointments. This has caused lengthy delays in the state's post-capital judgment process.

The Oversight Committee submitted two rule petitions that were adopted during the Supreme Court's August 2009 rules agenda. A summary of these two rules is in Appendix A.

III. Data.

A. Maricopa County Data. More than 80% of Arizona's capital cases originate in Maricopa County. Beginning in October 2008, and pursuant to a recommendation detailed at pages 11-12 of the November 2008 report, the Oversight Committee has prepared monthly data summaries of capital case activity in the Maricopa County Superior Court. As of the submission of this report, therefore, the Oversight Committee has collected a full year of data on a monthly basis. Recent data from this Court is summarized in the following table.

Month	**# of New Active Cases**	**# of Active Cases Terminated**	**Defendants Sentenced To Death**
October 2008	3	1	0
November	2	2	0
December	1	3	0
2008: 3 month total	6	6	0
January 2009	1	2	1: Prince [*Ring*]
February	2	2	0
March	0	7	1: Hausner**
April	2	5	1: Lehr [*Ring*]
May	0	4	1: Delahanty
June	0	3	1: Gallardo
July	3	4	1: Grell [*Ring*]
August	3	5	2: Cota, Hardy
September	1	5	1: Manuel
2009: 9 month total	12*	37	9
Twelve month total	**18**	**43**	**9**

*New active cases for 2009 have all been filings of notices of intent to seek the death penalty. None of these new cases were remands from state or federal courts. One *Ring* remand that had been counted separately was reclassified as an "active" case in July 2009, but it was not counted here as a "new" case.

**Hausner's sentencing resulted in the termination of three active cases.

1) The number of new death notices filed in Maricopa County during the period October 2008 to September 2009 was below the norm. The preceding table indicates that eighteen death notices were filed in Maricopa County during that period. By comparison, during the full 2008 calendar year, forty-one notices were filed.[3] The November 2008 report noted that the number of notices filed in prior fiscal years ranged from thirty-one in fiscal year 2004 to forty-six in fiscal year 2006; thirty-two notices were filed in fiscal year 2007, and thirty-two notices were also filed in fiscal year 2008[4].

Although the October 2008 through September 2009 twelve month period is neither a calendar year nor a fiscal year, the figure of eighteen new notices nonetheless reflects a notably lower death penalty filing rate than the other twelve month periods.[5]

2) The number of case terminations in Maricopa County increased after the new capital case management approach became effective in early 2009.

The November 2008 report to the Arizona Judicial Council characterized the number of new death notices filed in Maricopa County and the number of capital cases that were being resolved as roughly in equilibrium. The expectation at that time therefore was that the inventory of capital cases had stabilized, but that it would not be reduced in the near future.[6]

The presiding criminal judge of the Maricopa County Superior Court publically announced a new capital case management approach at a meeting of the Oversight Committee on March 5, 2009. In the seven month interval between March and September 2009, thirty-three capital cases were resolved.[7] This figure compares favorably with the number of capital case resolutions identified in footnote 11 of the November 2008 report:

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[3] *See* the Oversight Committee minutes of January 29, 2009, at page 4.

[4] *See* the November 2008 report at page 8. The November 2008 may be accessed on-line at http://www.supreme.state.az.us/cctf/CCOS%20Final%20Version%20posted.pdf

[5] Information was presented during the October 30, 2009 meeting of the Oversight Committee that there are currently as many as sixteen "potential" capital cases, that is, cases that are under consideration by the Maricopa County Attorney for the filing of a notice of intent to seek the death penalty.

[6] *See* the November 2008 report at page 10.

[7] Issues have arisen on the monthly data summaries about the timing of case terminations. In a case in which a defendant is sentenced to death without delay following a jury verdict, but sentencing is deferred on related non-capital verdicts, is the case terminated on the death sentencing date or on the sentencing date for the other offenses? The capital case data management protocol set out in Appendix B of the November 2008 report has been revised to resolve this question. The revised document, which is in Appendix B of the instant report, includes other revisions, such as the elimination of a category of "inactive" cases.

> 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.

During 2009, the Maricopa County Superior Court's criminal bench conducted jury trials in a higher number of capital cases than in prior years.[8] In January and February, two capital trials were in progress. This number increased to three cases in trial during March, five in April, six in May, seven in June, six in July, and eight in August. As the presiding criminal judge noted at the March 5, 2009 meeting of the Oversight Committee, all twenty-six judges in the criminal division would be qualified to try capital cases[9] and one of these judges would be available for any capital case that is ready for trial.[10]

There has been a commensurate increase in the number of capital cases in which pleas were entered. In September 2009, for example, sentencing dates were pending in seven capital cases in which plea agreements had been reached.

B. Statewide Data. Although Maricopa County accounts for more than eighty percent of capital case activity in Arizona, several other counties also contribute to the statewide total. As of the end of September 2009, Pima County had thirteen pending cases, Yuma and Pinal counties each had four, Mohave had three, Yavapai had two, and Apache had one. The remaining eight counties had no pending capital cases. Arizona's counties, excluding Maricopa, therefore accounted for twenty-seven capital cases. Although the number pending may have varied by one case in an individual county, the aggregate figure for these fourteen counties is approximately the same number of cases that was pending in July 2008. *See* table in Appendix C; (twenty-eight cases in these counties in 2008 versus twenty-seven cases in 2009).

Two defendants (Nordstrom and Payne) were sentenced to death in Pima County during the first nine months of 2009.

IV. Mitigation Discovery Masters.

Administrative Order 2008-93 directed the Oversight Committee to report its findings and recommendations concerning the use of mitigation discovery conferences for capital cases in Maricopa County.

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[8] Maricopa County has concluded all but one *Ring* remand.

[9] A Department of Justice training grant for capital cases was recently obtained by the Administrative Office of the Courts. Superior court judges as well as capital litigation counsel will be eligible to participate in the training program. The Administrative Office of the Courts will administer the grant through its Education Services Division.

[10] *See* Oversight Committee minutes, March 5, 2009, at page 2.

Maricopa County's new capital case management approach no longer includes the use of mitigation discovery masters. As part of the new capital case management approach, mitigation discovery masters were relieved of their duties. The capital case judge assigned to a case currently handles all discovery issues. If an *ex parte* discovery hearing is needed, a party is required to proceed under Rule 15.9(b) of the Rules of Criminal Procedure. Accordingly, the inquiry concerning mitigation discovery masters is now moot.

V. Rule 8.2(a)(4) Time Limits.

Administrative Order 2008-93 also directed the Oversight Committee to study and make recommendations, as needed, concerning the reasonableness of the time limit for capital cases established by Ariz. R. Crim. P., Rule 8.2(a)(4), and related issues.

Rule 8.2(a)(4) of the Rules of Criminal Procedure sets the "speedy trial" time limit for a capital case at eighteen months from arraignment.[11] At the March 5, 2009 meeting of the Oversight Committee, the Maricopa County presiding criminal judge announced his commitment to strictly enforce Rule 8.2(a)(4)'s time limits.[12] The increased number of trials and dispositions in Maricopa County's capital cases is in large part a reflection of that commitment.

An August 2009 minute entry issued in a Maricopa County capital case observed that "institutionally, capital cases rarely resolve in eighteen months or less in Maricopa County Superior Court, if ever." A footnote in the minute entry said:

> By use of the term 'institutionally', the Court is not attempting to infer that this is appropriate, merely that this is the time frame for about 99% of the capital cases in Maricopa County since 2004, when the Court began tracking data and information regarding capital cases.

Minute entry dated 08/03/2009 in CR 2006-007790-001 DT, at page 3.

The Oversight Committee's data from the Maricopa County Superior Court confirms this reality. Between March and August 2009:

- Ten non-*Ring* cases were resolved by jury verdict. An average of 1,195 days passed from arraignment to sentencing following eight death

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[11] Eighteen months times thirty days a month equals 540 days.

[12] The announcement of this new case management approach was followed by an administrative order, number 2009-108, issued by the presiding judge of the Maricopa County Superior Court on September 3, 2009. The foundation of this order is Rule 8.2(a)(4). *See* Appendix E.

verdicts. Two life sentences were imposed subsequent to verdicts, an average of 1,077 days after arraignment.[13]

- Nineteen cases concluded by sentencing following entry of a plea. The average time from arraignment to sentence for these cases was 942 days.

At an Oversight Committee meeting in January 2009, a Pima County prosecutor provided a time line for sixteen capital cases pending in that county. Three of the sixteen Pima County cases had aged more than 1,000 days since arraignment, but two of those cases were *Ring* remands, and the third case involved a lengthy restoration to competency proceeding. Of the remaining thirteen cases, the oldest was 701 days from arraignment.[14] 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 age of Pima County's capital cases from arraignment to the next calendar event was 476 days.[15]

The eighteen month limit provided in Rule 8.2(a)(4) may not be congruent with the reality of Maricopa County's times for resolution of capital cases. However:

- In the five counties other than Maricopa and Pima that have pending capital cases, the time to disposition frequently exceeds thirty months.[16]

- Maricopa County has achieved a significant reduction in its capital case inventory, notwithstanding that the average time to case resolution currently exceeds the Rule 8.2(a)(4) time limit. Moreover, the Maricopa County Superior Court adopted a policy earlier this year that endeavors to strictly enforce the Rule 8.2(a)(4) time limit.

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[13] These figures represent days from arraignment to sentencing, whereas the eighteen month time limit of Rule 8.2(a)(4) concerns the period between arraignment and the commencement of trial.

[14] This figure of 701 days was the date from arraignment to the next calendar event, which was a trial date set in February 2009.

[15] No Pima County judge had more than one capital case with the exception of one judge, who had two cases. There were twelve different defense counsel assigned to these sixteen capital cases. Four of those attorneys had two cases; the other eight attorneys each had a single case. The Pima County prosecutor believed that the low ratio of judges to cases (typically 1:1) permitted better case management and the enforcement of event deadlines. He believed that the low ratio of defense counsel to cases also promoted more prompt resolution of each case because counsel were not dividing time among several cases.

[16] An Oversight Committee survey in March 2009 of prosecutors in counties other than Maricopa and Pima concerning the age of their respective pending capital cases obtained approximate aging times of 82, 71, 35, 33, 30, 30, 26, 24, 13, 11, and 2 months (median = 30 months.)

Some members of the Oversight Committee believe that the Rule 8.2(a)(4) time limit does not work in practice and therefore should not be enforced by the court. These members note that Rule 8.2(d) permits an extension of time limits, and that proceeding to trial in a hurried manner may increase error, which would ultimately hurt victims. Other committee members hold the opinion that the Maricopa County Superior Court should be allowed time to put its new case management approach into effect, that a genuine effort is being made to change the dynamics of postponements in capital cases, and that an extension of the Rule 8.2(a)(4) limit would be a start down a slippery slope.

The consensus of the Oversight Committee is that the time in a capital case should begin to run from the date of the filing of a notice of intent to seek the death penalty, rather than from the date of arraignment, as presently provided in Rule 8.2(a)(4). This extension of time would more realistically accommodate the amendments to Rule 15.1(i)(1) of the Rules of Criminal Procedure,[17] as well as the additional procedures which may be required for a *Chronis* hearing.[18]

A majority of members on the Oversight Committee also believe that the time in Rule 8.2(a)(4) should be extended from eighteen months to twenty-four months.[19] These members believe that defense counsel are unable to prepare for trial in a capital case within eighteen months, and that claims of ineffective assistance of counsel may be raised under the existing rule because it affords inadequate time for trial preparation. An extension of the Rule 8.2(a)(4) time limit had been the subject of a prior rule petition.[20]

The strict enforcement of Rule 8.2(a)(4) has reportedly caused defense counsel to limit their capital case loads by declining additional appointments. There is a finite number of capital-qualified defense attorneys in Maricopa County, yet the availability of these attorneys for appointments will need to balance the volume of new capital cases requiring appointed counsel. Whether an enlargement of the speedy trial time limit would encourage capital defenders to accept more capital cases remains to be seen.

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[17] Rule 15.1(i)(1) permits the State to file a notice of intent to seek the death penalty up to sixty days after arraignment. The amendment to Rule 15.1(i)(1) adopted in 2008 permits this period to be extended for sixty days, or even longer, upon the filing of a stipulation, subject to court approval.

[18] *Chronis v Steinle* 220 Ariz. 559, 208 P.3d 210 (2009), allows a capital defendant to request a judicial finding of probable cause on alleged aggravating factors that might warrant a death sentence.

[19] Five members of the Oversight Committee were in favor of a twenty-four month time limit. Four members supported an eighteen month time limit. The Chair did not vote. *See* the Oversight Committee meeting minutes, October 30, 2009.

[20] Rule Petition Number 07-0005 sought to modify Rule 8.2(a)(4) by extending the speedy trial limit to thirty months. The Petition concluded that "Rule 8.2(a)(4) as currently written provides insufficient time to allow defense counsel to adequately prepare for the guilt phase, the aggravation phase and the penalty phase, simultaneously." *See* the Petition at page 13. The Petition was rejected by an Order dated September 16, 2008.

A proposed change to Rule 8.2(a)(4) is in Appendix D.

VI. Direct appeals to the Arizona Supreme Court.

The Oversight Committee's November 2008 report stated:

> 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 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.

See November 2008 report at pages 10-11. The calculation was a hypothetical; it was premised on what were considered to be reasonable assumptions from past data and it expressed only one possible scenario.

As noted above, nine defendants (including three defendants in *Ring* cases) have been sentenced to death during the first nine months of 2009 in Maricopa County. Two more defendants were given a death sentence in Pima County. This brings the statewide total to eleven death sentences as of the end of September 2009, with three more months remaining in the year.

The November 2008 report, referring to the Task Force report at pages 18-19, noted:

> The Supreme Court presently handles ten capital cases annually with current resources.

The AOC's data book, referenced at page 8 of the November 2008 report, indicated that in fiscal year 2006, there were sixteen death sentences (all from Maricopa County). But otherwise, the annual number of death sentences statewide has been in the single digits for the last several years.[21] How would the filing of eleven (and quite possibly, thirteen or fourteen) new direct appeals in 2009 impact the Supreme Court?[22]

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[21] The AOC data books have figures for fiscal year 2004: eight death sentences; for fiscal year 2005: nine death sentences; for fiscal year 2006: sixteen death sentences; for fiscal year 2007: eight death sentences; and for fiscal year 2008: nine death sentences. The Maricopa County Attorney's office has indicated that during calendar year 2008, the number of defendants sentenced to death in Maricopa County was five, including one *Ring* defendant.

[22] As of October 2009, there were twenty-three capital appeals pending in the Arizona Supreme Court.

A double-digit number of capital appeals filed during a single calendar year could necessitate that the Supreme Court have access to additional resources. The Oversight Committee submits that the most appropriate assistance would be as 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."[23] On this subject, the November 2008 Oversight Committee report noted:

> 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 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.

(November 2008 report at page 18-19.)

Given the current status of the state budget, it may not be possible to hire additional staff to assist a court of appeals judge who is serving on a capital case, but one or more of the Supreme Court's staff attorneys might be allocated for that purpose on a temporary basis.

VII. Petitions for Post-Conviction Relief.

The November 2008 report noted:

> 1. In November 2007, the State Capital Post-conviction Public Defender's Office, which was created by legislative enactment earlier in 2007, began operation. At the time of the November 2008 report, the Office of Statewide PCR counsel was handling four cases.
>
> 2. The Arizona Supreme Court Staff Attorney's Office maintains a list of private counsel qualified to handle PCR proceedings. There were eighteen names on the list as of the time of the November 2008 report, and the attorneys on this list were handling seven PCR cases. No new names had been added to the list since August 2006.
>
> 3. As of November 17, 2008, fifteen capital defendants were awaiting the appointment of PCR counsel. Two of these defendants had been on the list requiring the appointment of counsel for more than a year-and-a-half.

As of October, 2009:

> 1. The State Capital Post-conviction Public Defender's Office was continuing to handle four PCRs, notwithstanding significant cuts to its budget in FY 2009

[23] *See* November 2008 report at page 18, referring to the Task Force report at page 19.

and FY 2010. During the past year, it has been unable to accept additional appointments.

2. Two new names were added in 2008 to the list of private attorneys maintained by the Staff Attorney's Office, yet private counsel have accepted appointments in only four capital PCRs during the past three-and-a-half years: one PCR in May 2006, one in 2008, and two in 2009.

3. As of October 2009, eighteen capital defendants were awaiting the appointment of PCR counsel. The oldest of these cases dates back to a direct appeal opinion issued on August 15, 2006.

The number of unrepresented defendants is increasing faster than public and private attorneys are accepting appointments. The automatic petitions for which there is no representation are stayed, sometimes for years. This is a disservice to victims, who are guaranteed the right to a "prompt and final conclusion of the case after the conviction and sentence" under Article II, § 2.1(10) of the Arizona Constitution, and to the public perception of criminal justice. It is also a disservice to capital defendants, some of whom may be entitled to a new trial or sentencing.

A variety of remedies to address this backlog have been discussed by members of the Oversight Committee. However, these discussions have been secondary to the more pressing situation of the capital case inventory in the trial court, which has commanded the Oversight Committee's attention during the past year. Discussions regarding capital case PCRs have therefore not advanced beyond a preliminary stage. The increasing number of unrepresented defendants on capital PCR petitions warrants further consideration by the members on the Oversight Committee.[24]

[24] The training grant referred to in footnote 9 *supra* may also be a resource for developing solutions for the lack of available defense counsel on capital case PCRs.

VIII. Recommendations.

The Oversight Committee makes the following recommendations at this time:

1. Adopt an amendment to Rule 8.2(a)(4) regarding the speedy trial limit in capital cases.

This amendment, discussed at pages 11-12, and as set out in Appendix D, would increase the speedy trial limit for a capital case to proceed to trial from eighteen to twenty-four months, and would start the period upon the filing of a notice of intent to seek the death penalty, rather than at defendant's arraignment on a first degree murder charge.

2. Extend the term of the Oversight Committee for an additional year.

The Oversight Committee commends the accomplishments of stakeholders in Maricopa County, several of whom are Oversight Committee members, in reducing the trial court's capital case inventory.

While encouraging figures have been provided at the trial court level, the capital case inventory at the appellate court level is growing. The Supreme Court may benefit from further monitoring by the Oversight Committee of both the number of direct appeals as well as the number of pending capital cases in the trial court. The increasing inventory of capital case petitions for post-conviction relief that lack appointed counsel has additional potential for delaying the finality of state court proceedings. This latter issue should receive further consideration, and it would be a primary task if the term of the Oversight Committee is extended.

Accordingly, the Oversight Committee recommends that its term be extended for one year.

Appendix A

The following amendments to the Rules of Criminal Procedure were adopted in August, 2009, following petitions filed by the Oversight Committee in December, 2008:

(1) The amendment to Rule 6.3 was a result of rule petition number R-08-0041. The rule amendment is intended to facilitate the transfer of defense counsel's file in a capital case to successor counsel. The amendment to Rule 6.3 requires capital defense counsel to maintain records in 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." It also requires successor counsel, immediately upon undertaking representation, to collect the complete file from prior counsel, and to maintain the records in this same manner.

(2) Rule petition number R-08-0042 concerned an amendment to Rule 32.7. This rule amendment requires the trial court to conduct a mandatory informal conference within ninety days after the appointment of counsel on a first petition for post-conviction relief in a capital case.

Both amendments will become effective on January 1, 2010.

Appendix B

CAPITAL CASE DATA MANAGEMENT: Maricopa County Superior Court
October 2009 Revisions to the November 2008 document, with markup

Purpose: Reports based upon consistent and reliable data collection methods will be provided monthly on the status of capital cases in the Maricopa County 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. 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); or

~~(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)~~ (ii) after conviction, a case is remanded for further death penalty proceedings 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 IV(b)(~~11~~ 10).)

~~c~~ b. When a capital case is remanded to a grand jury and ~~a new~~ the grand jury returns with a subsequent 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~~ III. Counting active capital case terminations

An active capital case is terminated when:

a. a defendant is sentenced to death following a ~~jury proceeding~~ trial, regardless of the number of collateral non-capital counts for which sentencing is pending;

b. a defendant receives a non-capital sentence following a trial on a capital charge;

c. a defendant is acquitted following a trial;

~~b~~ d. a defendant is sentenced following a plea;

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

f. the court determines that probable cause does not exist for any of the alleged aggravating factors; or

g. the court strikes the notice of intent to seek the death penalty or dismisses the case for any other reason.

~~e the defendant is acquitted~~.

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~~ .

IV. Monthly data summaries

a. Data will be collected and made available monthly. Data will be collected ~~on the 17th~~ by the 20th 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, with the defendant names and case numbers. ~~(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~~ 4) The total number of new cases ~~which~~ that became active during the month covered by the report, with the defendant names and case numbers.

(~~6~~ 5) Defendant names and case numbers when a jury trial has commenced or is in progress during the month covered by the report.

(~~7~~ 6) Defendant names and case numbers in which a sentence of death has been pronounced during the month covered by the report.

(~~8~~ 7) The total number of active cases which have terminated during the month covered by the report.

(~~9~~ 8) The average number of days that passed from ~~arraignment~~ filing the notice of intent to termination* for cases which were terminated during the month covered by the report following sentencing after a plea;

(~~10~~ 9) The average number of days that passed from ~~arraignmen~~t filing the notice of intent to termination* for cases which were terminated during the month covered by the report following sentencing after a trial.

(~~11~~ 10) 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).~~

CAPITAL CASE DATA MANAGEMENT: Maricopa County Superior Court
October 2009 Revisions to the November 2008 document, no markup

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

I. Counting Active Capital Cases ("Ins")

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

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

(2) after conviction, a case is remanded for further death penalty proceedings 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 IV(b)(10).)

b. When a capital case is remanded to a grand jury and the grand jury returns with a subsequent indictment:

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

(2) 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 active capital case terminations An active capital case is terminated when:

a. a defendant is sentenced to death following a trial, regardless of the number of collateral non-capital counts for which sentencing is pending;

b. a defendant receives a non-capital sentence following a trial on a capital charge;

c. a defendant is acquitted following a trial;

d. a defendant is sentenced following a plea;

e. not as part of a plea agreement, the prosecutor withdraws the Rule 15.1(i) notice, or the prosecutor dismisses the case;

f. the court determines that probable cause does not exist for any of the alleged aggravating factors; or

g. the court strikes the notice of intent to seek the death penalty or dismisses the case for any other reason.

IV. Monthly data summaries

a. Data will be collected and made available monthly. Data will be collected by the 20th 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, with the defendant names and case numbers.

(3) The average number of days that have passed since arraignment for active cases.

(4) The total number of new cases that became active during the month covered by the report, with the defendant names and case numbers.

(5) Defendant names and case numbers when a jury trial has commenced or is in progress during the month covered by the report.

(6) Defendant names and case numbers in which a sentence of death has been pronounced during the month covered by the report.

(7) The total number of active cases which have terminated during the month covered by the report.

(8) The average number of days that passed from filing the notice of intent to termination for cases which were terminated during the month covered by the report following sentencing after a plea;

(9) The average number of days that passed from filing the notice of intent to termination for cases which were terminated during the month covered by the report following sentencing after a trial.

(10) 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.

Appendix C

Pending Capital Cases, by County. A survey of Arizona County Attorneys in **July 2008**, revealed information about pending capital cases in the column on the left. A survey of County Attorneys in **September 2009** provided updated information, as shown in the column on the right. 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 or in the November 2008 report.)

County	July 2008	Sept. 2009
Apache	1	1
Cochise	0	0
Coconino	0*	0
Gila	0	0
Graham	0	0
Greenlee	0	0
La Paz	0	0
Maricopa	127	109
Mohave	2	3
Navajo	0	0
Pima	14	13
Pinal	3	4
Santa Cruz	0	0
Yavapai	3*	2
Yuma	5*	4
TOTAL	**155**	**136**

*No response was provided by the County Attorney. The indicated figure was provided by Diane Alessi, capital case staff attorney for the superior courts of Arizona.

Appendix D

Proposed amendment to Rule 8.2(a)(4), Ariz. R. Crim. P.

Rule 8.2. Time limits

a. General. Subject to the provisions of Rule 8.4, every person against whom an indictment, information or complaint is filed shall be tried by the court having jurisdiction of the offense within the following time periods:

(1) – (3). [No change.]

(4). Capital Cases. ~~Eighteen~~ Twenty-four months from ~~arraignment, if~~ the date the state files a notice of intent to seek the death penalty pursuant to Rule 15.1(i).

b. – e. [No change.]

Appendix E

Maricopa County Superior Court Administrative Order 2009-108

(Please see the next page.)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN THE MATTER OF CAPITAL	)	ADMINISTRATIVE ORDER
CASE MANAGEMENT PLAN	)	No. 2009-108
_____	)	(Replaces No. 2007-023)

The Arizona Supreme Court has ordered that capital cases shall be tried within eighteen months from arraignment. *See* Rule 8.2(a)(4), Arizona Rules of Criminal Procedure.

The just and speedy processing of capital cases requires a uniform and active case management policy. The following procedures shall be followed by the Superior Court in Maricopa County for the management of capital cases.

IT IS ORDERED:

1. All capital cases shall be managed pursuant to this Capital Case Management Plan.

2. Upon filing by the State of the Notice of Intent to Seek the Death Penalty, the Criminal Department Presiding Judge or his/her designee shall issue a capital case assignment and scheduling order similar in form to Attachment A. The case assignment and scheduling order shall at a minimum:

   a. Set the last day eighteen months from arraignment;
   b. Set a firm trial date within the last day;
   c. Set a date for a final trial management conference approximately thirty days before the firm trial date;
   d. Assign the case to a capital case management judge;
   e. Set the first case management conference before the assigned judge;
   f. Order that a resolution management conference be conducted at least sixty days before the final trial management conference.

3. Each capital case shall be assigned to a capital case management judge. That judge shall manage the case and, if available, preside over the trial. Should the capital case management judge be unavailable to try the case, the Criminal Department Presiding Judge or his/her designee shall reassign the case as soon as possible after being advised of the assigned capital case management judge's unavailability.

4. At the first case management conference, the assigned judge shall set subsequent case management conferences not more than every 60 days. Prior to each case management conference, the assigned judge shall require counsel to submit a jointly agreed upon written case status report showing the progress made on the case.

5. Any motion to continue the firm trial date or to extend the last day shall be ruled on by the Criminal Department Presiding Judge or his/her designee.

DATED this 3rd day of September, 2009.

_____
Barbara Rodriguez Mundell
Presiding Judge

Original: Clerk of the Court

Copies: Hon. Gary Donahoe, Criminal Department Presiding Judge
All Criminal Court Judges and Commissioners
Marcus Reinkensmeyer, Judicial Branch Administrator
Phil Knox, Court Administrator, General Jurisdiction Courts
Bob James, Criminal Court Administrator
Maricopa County Sheriff's Office
Maricopa County Attorney's Office
Office of Public Defense Services
Office of the Public Defender
Office of the Legal Advocate
Office of the Legal Defender

Attachment A

Capital Case Assignment and Scheduling Order

The State has filed a notice seeking the death penalty. Rule 8.2(a)(4), Arizona Rules of Criminal Procedure, requires capital cases to be resolved within eighteen (18) months from arraignment thus guaranteeing Defendant's right to a speedy trial. Article II, § 2.1 (10), Constitution of the Arizona, guarantees each victim the right to a speedy trial. The arraignment occurred on _____.

Rule 1.2, Arizona Rules of Criminal Procedure, provides:

> These rules are intended to provide for the just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.

The Arizona Rules of Criminal Procedure will be enforced to achieve those goals. Material facts and exhibits not disclosed may be precluded. Failure to timely disclose information required to be disclosed pursuant to Rules 15.1 and 15.2, Arizona Rules of Criminal Procedure, may result in sanctions being imposed. Counsel should assure that their respective disclosure statements and supplements are complete and comprehensive.

Accordingly,

IT IS HEREBY ORDERED setting the **last day as** _____.

IT IS FURTHER ORDERED pursuant to A.R.S. §§ 13-753 and 13-754, that Defendant undergo IQ, competency and sanity prescreening evaluations. In the event an objection to the testing is not filed by Defendant within ten business days of the date of this minute entry, the Court will appoint one or more experts to conduct the prescreening evaluations regarding Defendant's intelligence quotient, competency to stand trial and whether Defendant was sane at the time Defendant allegedly committed the charged crime(s).

IT IS FURTHER ORDERED setting trial on _____ **at** _____ **a.m.** This is a firm trial date and will not be continued absent a "showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." *See* Rules 8.2(d) and 8.5(b), Arizona Rules of Criminal Procedure. The trial date is being set early in the case to assist assigned counsel in resolving any scheduling conflicts. Expert witnesses should be informed of the

trial date to confirm their availability. If an expert witness is not available at the time of trial, counsel should arrange to take a videotape deposition for presentation of that expert witness' testimony to the jury.

IT IS FURTHER ORDERED that the assigned judge shall not grant a continuance to the trial date. Any motion to continue the trial date must be submitted to the Criminal Department Presiding Judge or his/her designee.

IT IS FURTHER ORDERED assigning this case to Judge _____. The assigned judge will handle all pretrial matters. In the event the assigned judge is in trial or otherwise unavailable on the trial date, another judge will try the case.

IT IS FURTHER ORDERED that the following disclosure schedule shall apply:

1. The State shall abide by the time limits set forth in Rule 15.1, and in particular, Rule 15.1(i), Arizona Rules of Criminal Procedure.

2. The Defendant shall abide by the time limits set forth in Rule 15.2, and in particular, Rule 15.2(h), Arizona Rules of Criminal Procedure. All mitigation evidence shall be disclosed in accordance with the requirements of Rule 15.2(h).

3. Alternatively, counsel may personally confer and present to the court at the first case management conference a case management plan including a discovery and disclosure schedule which, if adopted by the court, will be the controlling schedule for the case. The case management plan proposed by counsel must accommodate the above trial date and last day.

4. The disclosure of each expert witness shall be accompanied by at least three dates on which the expert and the disclosing party's counsel are available for opposing counsel to conduct an interview of the expert witness.

The schedule established by the Arizona Rules of Criminal Procedure or adopted by the court may be deviated from by written agreement between counsel and approval of the assigned judge, but any deviation from the time limits prescribed by the Arizona Rules of Criminal Procedure or the adopted case management plan shall not affect the last day or trial date.

Evidence, material facts or exhibits not fairly disclosed will not be used during any phase of the trial.

IT IS FURTHER ORDERED that prior to the next scheduled status conference before the assigned judge, counsel who will try the case shall

personally meet and decide on a date by which all witness interviews shall be completed. The judge shall include that date in the status conference minute entry. Information obtained during interviews occurring after that date will not be grounds for a continuance of the trial date.

IT IS FURTHER ORDERED that counsel have set and participate in a resolution management conference at least 60 days prior to the final trial management conference. All counsel shall attend the resolution management conference including those who have the authority to settle the case. If the trial attorney must consult with someone in order to obtain authority to settle the case, the person with whom consultation is required shall personally attend the resolution management conference.

IT IS FURTHER ORDERED setting a case management conference before the assigned judge on _____ **at** _____ **a.m.** The assigned judge shall set subsequent case management conferences not more than every 60 days.

IT IS FURTHER ORDERED that at each case management conference, counsel shall submit a jointly agreed upon written case status report showing the progress made on the case. At a minimum, the report shall set forth the status of all forensic testing and the number of interviews completed. Failure to submit a written report may result in the imposition of sanctions.

At Defendant's counsel's request, an Order for Production of Mitigation Documents pertaining to acquisition of Defendant's records will be signed by the Criminal Department Presiding Judge and will be available for pickup in the chambers of the Criminal Department Presiding Judge by Defendant's counsel, Defendant's mitigation specialist or an authorized representative of Defendant.

IT IS FURTHER ORDERED that all *ex parte* motions requesting additional orders for acquisition of mitigation evidence shall be submitted to the assigned judge. Should an *ex parte* meeting with the assigned judge to discuss the details of the mitigation work be deemed necessary, defense counsel may make that request pursuant to Rule 15.9(b), Arizona Rules of Criminal Procedure.

IT IS FURTHER ORDERED setting a final trial management conference on _____ **at** _____ **a.m.**

IT IS FURTHER ORDERED that all materials needing language translation must to submitted to CITS no later than 120 days prior to the final trial management conference. Counsel shall advise CITS of any interpreter needs at trial no later than 60 days before trial.

IT IS FURTHER ORDERED:

1. **No less than five (5) judicial days prior to the final trial management conference**, counsel shall file:

   A. Any trial memoranda (optional), which will be in lieu of post-trial briefs unless otherwise requested by the Court at the conclusion of the trial.

   B. Motions *in limine*, which must meet the test of **State v. Superior Court**, 108 Ariz. 396, 499 P.2d 152 (1972): "The primary purpose of a motion *in limine* is to avoid disclosing to the jury prejudicial matters which may compel a mistrial." Each motion shall be limited to one issue and no more than five (5) such motions per side will be considered by the court.

   C. A Joint Pretrial Statement (**not optional**). **Objections to exhibits and deposition testimony are deemed waived unless set forth in the Joint Pretrial Statement.**

   D. An agreed upon jury questionnaire.

   E. Proposed jury instructions. Prior to the due date for the proposed jury instructions, counsel shall personally consult for the purpose of preparing and submitting a joint set of agreed-upon preliminary and final jury instructions and clean copies thereof. If counsel request any non-uniform jury instruction, the Court requests that counsel provide a disk containing all non-uniform jury instructions in Word format.

Non-RAJI (Revised Arizona Jury Instructions – Criminal, 3rd Ed.) instructions should be typed, each on a separate page with a heading (i.e.: Defendant's Instruction No. 2 etc.), and provide authority for the instruction. Please number each instruction consecutively, rather than leaving a blank space for someone else (such as the court) to number. Counsel should also submit a clean copy of each non-RAJI instruction.

2. Written response to a motion *in limine* may be filed no later than noon of the day before the final pretrial conference.

3. At least three days before the trial date, the trial lawyers or their knowledgeable assistants shall appear in the trial division to present all exhibits. The exhibits will be marked serially as they are listed in the LIST OF EXHIBITS which will be prepared by counsel and downloaded (saved) onto a CD in Microsoft Word and given to the clerk with the exhibits. The parties shall advise the division, referring specifically to

the pretrial statement, which exhibits may be marked directly in evidence. All exhibits will be clearly marked to correspond with the list provided. **Counsel are directed to meet <u>in person</u> to exchange the exhibits before coming to court. Counsel will make sure that they do not bring to the clerk a set of exhibits that includes duplicate exhibits.** Counsel should not reserve exhibit numbers for additional exhibits, miscellaneous demonstrative exhibits, and the like. Counsel shall also present original depositions for filing at that time. Written stipulations to admit specified exhibits in evidence are encouraged. If an objection to an exhibit is not stated in the pretrial statement, all objections are deemed waived and the trial judge will assume the exhibit may be marked directly in evidence.

4. All documents and pleadings described above shall be delivered or telefaxed to opposing counsel on the date they are delivered to the Court.

5. All motions other than motions *in limine* shall be filed at least **60 days before the final pretrial management conference** to allow sufficient time for briefing and oral argument. The trial will not be continued because a motion is pending.

6. Expert witnesses should be scheduled to allow sufficient time to complete direct, cross and redirect examinations by 4:30 p.m. If a doctor or other expert witness is scheduled to appear in the afternoon on any trial day, the party calling the witness should consider having the witness plan on returning to court the morning of the next trial day unless all counsel have agreed to a time allocation for completing their questioning by 4:30 p.m. The trial judge will likely not keep the jury later than 4:30 p.m.