PROGRESS REPORT

OF THE

CAPITAL CASE

OVERSIGHT COMMITTEE

TO THE

ARIZONA JUDICIAL COUNCIL

December 2013

Justice 20|20

Capital Case Oversight Committee

December 2013

Chair: Hon. Ronald Reinstein, Superior Court in Maricopa County (retired)

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Hon. Kent Cattani, Court of Appeals, Division One

Ms. Donna Hallam, Staff Attorney, Arizona Supreme Court

Ms. Kellie Johnson, Office of the Pima County Attorney

Mr. Dan Levey, Executive Director, Parents of Murdered Children

Mr. Marty Lieberman, Maricopa County Legal Defender

Mr. James Logan, Director, Maricopa County Office of Public Defense Services

Mr. William Montgomery, Maricopa County Attorney

Mr. Daniel Patterson, Office of the Maricopa County Public Defender

Ms. Sheila Polk, Yavapai County Attorney

Mr. Natman Schaye, Arizona Capital Representation Project

Hon. Joseph Welty, Superior Court in Maricopa County

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I. Executive Summary

This is the fifth report of the Capital Case Oversight Committee ("Oversight Committee") to the Arizona Judicial Council. The Supreme Court established the Oversight Committee's predecessor, the Capital Case Task Force, in February 2007 because of an *"unprecedented number"* of capital cases in Maricopa County. Maricopa County at that time had almost one hundred forty capital cases pending trial. The Court created the Oversight Committee in December 2007 pursuant to a Task Force recommendation that a Supreme Court committee monitor Maricopa County's efforts at reducing its capital caseload.

As noted in the Oversight Committee's 2012 report, Maricopa County's subsequent reduction efforts effectively reduced its capital caseload. The number of pending capital cases in Maricopa County is now approximately half of what it was five years ago.[1]

The Oversight Committee has also monitored the number of capital cases pending in trial courts statewide because those cases may potentially affect the volume of direct appeals to the Arizona Supreme Court. In addition to Maricopa, capital cases are currently pending in five counties. During the past several years, the number of cases in these other counties has remained at about one-fourth of the statewide total. While the number of pending cases in these five counties fluctuates annually, the current number is not too different from what it was in 2008.[2]

At the Supreme Court level, there were nineteen direct capital appeals pending when the Oversight Committee submitted its 2012 report. As of the end of October, 2013, the number is twelve. The Oversight Committee's 2012 report noted that there were seven defendants awaiting the Supreme Court's appointment of counsel for a capital post-conviction proceeding. This year that number is six.

Because of the relative stability of the capital caseload in 2013, the Oversight Committee only convened twice this year. Nevertheless, the Oversight Committee has concerns about the impact of recent United States Supreme Court opinions on Arizona capital cases, as well as potential changes to capital case procedures, as discussed later in this report. The Oversight Committee accordingly recommends that the Arizona Judicial Council support a two-year extension of the Oversight Committee's term.

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[1] Please see Appendices 1, 2, and 3.

[2] Please see Appendices 4 and 5.

II. Capital Cases in the Superior Court and the Supreme Court

In October 2008, the Oversight Committee began collecting a limited amount of Maricopa County capital case data on a monthly basis. The Oversight Committee has now accumulated five years (sixty months) of this data, and the data confirms a substantial reduction of Maricopa County's capital caseload.

Since 2008, the Oversight Committee has also conducted an annual survey of county attorneys statewide concerning the number of their pending capital cases.[3]

Superior Court, Maricopa County

1. Number of notices of intent to seek the death penalty: A first-degree murder case becomes a capital case when the prosecutor files a notice of intent to seek the death penalty pursuant to Rule 15.1(i), Ariz. R. Crim. P. Between 2004 and 2008, the years preceding the "capital case crisis" in Maricopa County, prosecutors filed approximately **thirty to forty** death notices annually.[4] By comparison, for successive twelve-month periods from October 2008 through September 2013, the annual numbers of new filings were **eighteen, thirty-two, twenty-six, twenty-four, and nineteen.** The number of cases where the Maricopa County Attorney filed a notice of intent to seek the death penalty has therefore decreased during the second half of the past decade.

2. Ratio of filings to terminations: In 2009 and 2010, the number of capital case terminations (117 cases) was more than twice the number of new filings (50 cases). Please see Appendices 2 and 3. The high number of terminations was a result of Maricopa County's new approach to managing capital cases, which it implemented in early 2009.[5] However, for the past three years, the ratio of terminations to filings in Maricopa County moved closer to one-to-one, that is, the number of new capital cases and the number of capital case dispositions in Maricopa County are now nearly equal.

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[3] Please see Appendix 4.

[4] A more detailed explanation of these numbers is at page 6 of the 2012 Oversight Committee report. The numbers stated above are "approximate" because Maricopa County furnished two sets of data for the period 2004-2008, and the annual figures in these two sets varied. The Maricopa County Office of Management and Budget, in an August 10, 2007 letter to the Chair of the Capital Case Task Force, indicated that for FY 1997-1998, there were fifty death notices filed in Maricopa County, which appears to be the highest number for a single year.

[5] The new approach included rigorous enforcement of a policy on trial postponements; conducting meaningful and productive pretrial conferences; and assuring that a courtroom and an experienced judge were available on the date set for trial.

3. Number of pending cases: Appendix 1 shows the number of pending capital cases in Maricopa County during a five-year period. During 2009 and 2010, the number of pending cases declined every month. During calendar year 2011, however, and continuing until the present time, the number, with only minor exceptions, has stayed between sixty and seventy cases. There has therefore been stability for the past three years in the number of pending capital cases in Maricopa County, but at about half the level it was five years ago.

Superior Court, Statewide

Capital cases are currently pending in five of the other fourteen Arizona counties: Cochise, Pima, Pinal, Yavapai, and Yuma. Appendix 4 contains the number of pending capital cases in all of Arizona's counties, by year, for the past six years. The total statewide number, which is heavily dependent on the number of pending capital cases in Maricopa County, decreased every year between 2008 and 2012. However, in 2013, the statewide number increased by about fourteen percent. Maricopa, Pinal, and Yavapai contributed to the increase, although Cochise, Mohave, and Pima partially offset the increase. The Oversight Committee at this time considers the statewide increase to be a temporary fluctuation. Whether the increase portends a reversal of a five-year trend of decreasing numbers is contingent on future data.

Supreme Court, Direct Appeals

There were seventeen capital cases pending on direct appeal to the Arizona Supreme Court in October 2008. There were twenty-three appeals in October 2009 and twenty-seven in November 2010. The increased number of appeals reflected the number of death sentences then imposed by trial courts statewide: fifteen capital sentences in calendar year 2009, and ten in 2010. Yet in 2011, there were eight death sentences statewide, in 2012 there were four, and for the first ten months of 2013, there were three.

It is also noteworthy that in the thirty-month period between April 2011 and September 2013, the Arizona Supreme Court issued twenty-seven opinions in capital cases. A lower number of death sentences recently imposed by trial courts, combined with a large number of death penalty dispositions in the Supreme Court, have significantly decreased the number of pending death penalty appeals. As of the end of October 2013, there were twelve direct appeals pending in the Arizona Supreme Court. The oldest notice of appeal was filed in March 2011.

Supreme Court, Post-Conviction Proceedings

The Committee's 2009 report noted that the number of capital cases where the Supreme Court Clerk had filed pro forma notices for post-conviction relief, and for which there were no available counsel for appointment, stood at eighteen. However, that number declined to fourteen in 2010, and after a further drop to one, it stood at seven in September 2012. As of October 2013, there were six defendants lacking PCR counsel. These decreases were achieved even though the State Capital Post-Conviction Public Defender, a state office created by the Legislature in 2007 to accept appointments on capital PCRs, ceased to exist in 2012.

However, recent United States Supreme Court opinions may be changing the landscape of post-conviction proceedings.

The Oversight Committee's 2012 report mentioned *Martinez v Ryan,* 132 S. Ct. 1309, 182 L. Ed. 2d 272 (March 20, 2012), a non-capital case from Arizona. This U.S. Supreme Court opinion held that because Arizona required a defendant to raise a claim of ineffective assistance of trial counsel in collateral proceedings, rather than on direct appeal, the ineffectiveness of the 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. Although the U.S. Supreme Court declined to recognize an explicit constitutional right to the effective assistance of counsel in collateral proceedings, it held that ineffective assistance by PCR counsel might allow a defendant to raise for the first time in a federal habeas petition a claim that his PCR counsel should have raised in state court.

Trevino v Thaler, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (May 28, 2013), extended the application of *Martinez* to a capital proceeding in Texas. Texas did not require a defendant to raise his ineffective assistance of trial counsel claim in a post-conviction proceeding; however, it imposed substantial obstacles to raising the claim on direct appeal. The Supreme Court concluded that where the design and operation of state procedures made it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, the holding in *Martinez* would apply.

An illustration of how the complexity of these Supreme Court cases has altered the PCR landscape is *Detrich v Ryan,* (CA 9, No. 08-99001, September 3, 2013). This en banc decision concerning an Arizona capital case includes a four-judge plurality opinion, two concurring opinions, and the dissent of five judges.

III. Recommendations

Recommendation #1: Support an amendment to A.R.S. § 13-4041.

A.R.S. § 13-4041 concerns the fee of counsel appointed on a post-conviction proceeding in a capital case. The statute provides for a one-hundred dollar hourly fee. The Oversight Committee has recommended over the past several years that the hourly rate in A.R.S. § 13-4041 be increased to at least one-hundred twenty-five dollars, and it now reaffirms that recommendation. This proposed increase would match the rate of compensation for PCR counsel with the current rate provided by Maricopa County for attorneys defending a capital case at the trial stage. There is no rationale for compensating PCR counsel less than trial counsel. The Oversight Committee believes that an hourly rate of one-hundred seventy-five dollars, which is comparable to the federal rate in a capital case, would further encourage qualified attorneys to apply for capital PCR appointments.

Recommendation #2: Extend the term of the Oversight Committee.

This recommendation has been included in each of the Oversight Committee's prior reports, and there are several sound reasons for supporting the recommendation again this year.

The apparent stability of capital case data, and in some important areas such as appeals and PCRs, meaningful reductions, could quickly change. A few counties have recently had increases in the number of capital cases pending trial. The Oversight Committee should therefore continue to monitor capital caseloads.

The Oversight Committee's responsibilities include the review of rule petitions concerning capital cases. The Oversight Committee has filed rule petitions as well as comments on rule petitions over the past several years, and this too is an important and ongoing committee function.

The U.S. Supreme Court opinions noted above could culminate in the alteration of post-conviction procedures. Some Arizona stakeholders already are contemplating changes to the sequence of capital appeals and post-conviction proceedings. Senate Bill 1413, introduced during the 2013 Legislative session to implement such changes, failed to pass, but other legislative or rule proposals may be forthcoming. In addition, the United States Attorney General continues to promulgate regulations concerning a Certification Process for State Capital Counsel Systems (also known as the "opt-in" provisions.) These regulations include requirements concerning the competency and compensation of court-appointed counsel for capital defendants.[6]

The Supreme Court opinions and pending federal regulations discussed above highlight the importance of appointing competent and adequately-compensated counsel at every stage of a capital proceeding. This past year the Oversight Committee revised the application for attorney appointments on capital PCR proceedings. However, these Supreme Court opinions and potential federal regulations warrant further diligence in assuring that Arizona's capital defendants have effective counsel. The Oversight Committee serves a useful role in achieving this objective.

The members of the Oversight Committee include judges, prosecutors, public and private defense counsel, a Supreme Court staff attorney and a victims' advocate. Oversight Committee members have indispensible insights and advantageous historical perspectives on capital

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[6] The most recent regulations published by the United States Attorney are the subject of a temporary restraining order issued by a federal district court on October 18, 2013, in Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona, Plaintiffs, versus the United States Department of Justice and Eric H. Holder, Defendants (N.D. Cal., C-13-4517-CW). The district court has scheduled a hearing on the TRO for November 14, 2013.

litigation in Arizona, and this group should remain intact. As noted in the 2012 report, as long as there is a death penalty in Arizona, issues will continue to arise.

Therefore, the members respectfully and unanimously recommend an extension of the term of the Oversight Committee for two more years.

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1. Number of capital cases pending trial in the Maricopa County Superior Court: October 2008 through September 2013

2. Maricopa County capital case recap: October 2008 to September 2013

3. Combined Maricopa County data summary for twelve month periods, 2008 to 2013

4. Capital cases pending trial in Arizona by county: 2008 to 2013

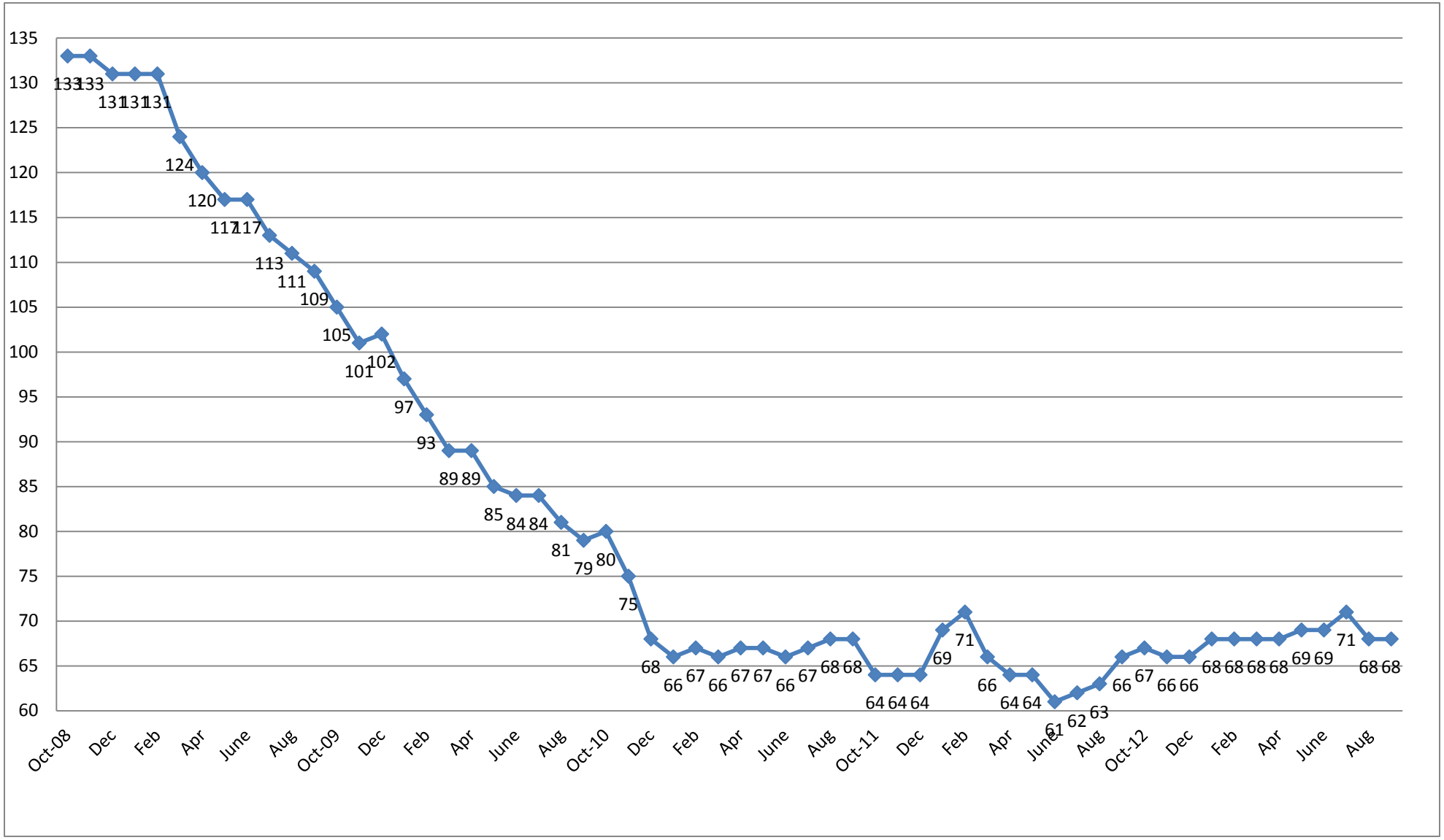
5. Number of capital cases pending trial outside Maricopa County, July 2008 to September 2013

6. Capital cases pending trial statewide, July 2008 to September 2013

7. Number of defendants sentenced to death statewide, 2008 to 2013

8. Executions, 2000 to October 2013

#1: Number of Capital Cases Pending Trial in the Maricopa County Superior Court, by Month: October 2008 through September 2013



Maricopa County
Five-year capital case recap

#2: Maricopa County Capital Case Recap: October 2008 to September 2013 (5 years)

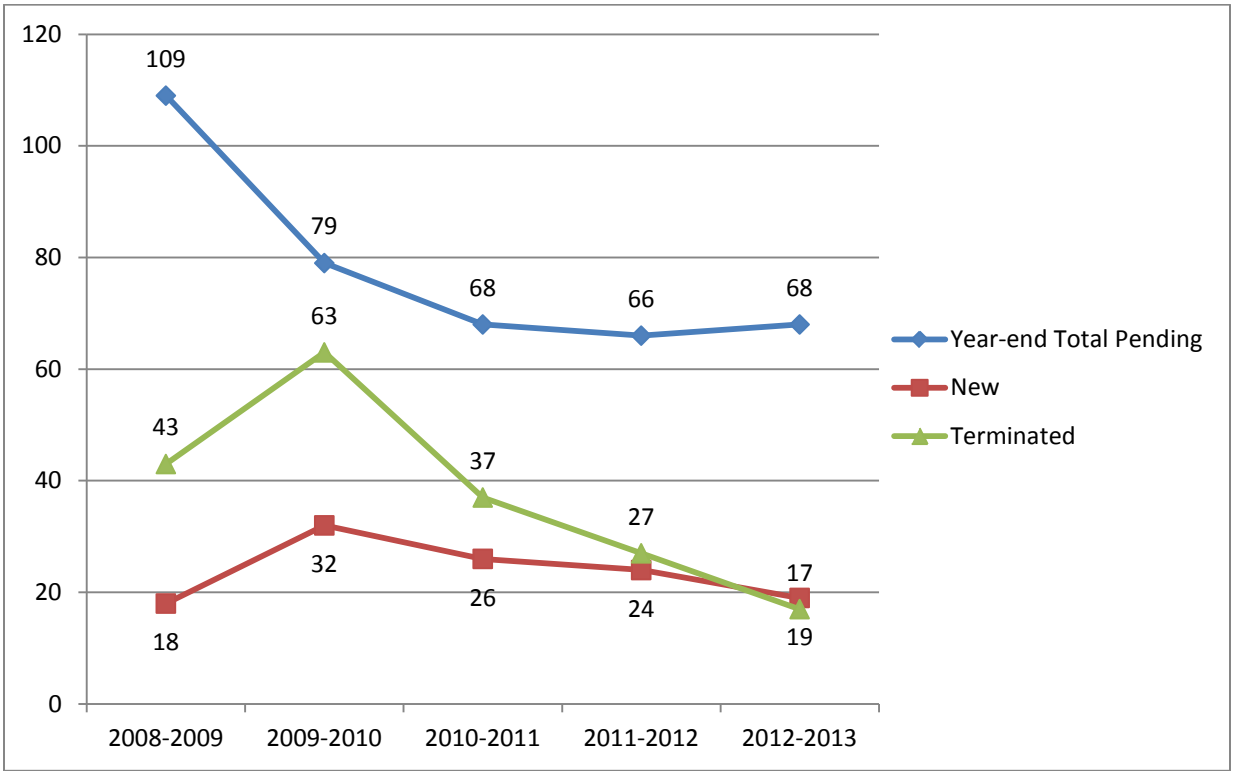
MONTH	# OF NEW CASES	# OF ACTIVE CASES TERMINATED	DEFENDANTS SENTENCED TO DEATH
October 2008	3	1	0
November	2	2	0
December	1	3	0
January 2009	1	2	1: Prince [*Ring*]
February	2	2	0
March	0	7	1: Hausner
April	2	5	1: Lehr [*Ring*]
May	0	4	1: Delahanty
June	0	3	1: Gallardo
July	3	4	1: Grell [*Ring*]
August	3	5	2: Cota, Hardy
September	1	5	1: Manuel
12 month sub-total	**18**	**43**	**9**
October	3	7	0
November	1	5	1: Van Winkle
December	7	6	1: Patterson
CY 2009 sub-total	23	55	11
January 2010	1	6	1: Medina
February	0	5	2: Boyston, Ovante
March	1	5	0
April	2	2	2: Joseph, Martinez
May	2	6	1: Parker
June	5	6	0
July	5	5	0
August	3	6	1: Fitzgerald
September	2	4	0
12 month sub-total	**32**	**63**	**9**
24 month sub-total	**50**	**106**	**18**
October 2010	4	3	2: Gomez, Rose
November	1	6	0
December	1	8	1: Hernandez
CY 2010 sub-total	27	62	10
January 2011	3	5	0
February	3	2	1: Burns
March	2	3	0
April	1	0	0
May	3	3	2: Naranjo, Reeves
June	1	2	0
July	1	0	0
August	4	3	0
September	2	2	1: Miller
12 month sub-total	**26**	**37**	**7**
36 month sub-total	**76**	**143**	**25**

Maricopa County
Five-year capital case recap

Maricopa County Capital Case Recap: Continuation

MONTH	**# OF NEW CASES**	**# ACTIVE CASES TERMINATED**	**DEFENDANTS SENTENCED TO DEATH**
October 2011	2	6	1: Benson
November	2	2	1: Goudeau
December	1	1	0
CY 2011 sub-total	25	29	6
January 2012	6	1	0
February	3	1	0
March	1	6	0
April	0	2	0
May	1	1	0
June	0	3	0
July	2	1	0
August	2	1	1: Lynch
September	4	2	1: Anthony
12 month sub-total	**24**	**27**	**4**
48 month sub-total	**100**	**170**	**29**
October 2012	1	0	0
November	1	2	0
December	1	1	1: Leteve
CY 2012 sub-total	22	21	3
January 2013	3	1	0
February	2	2	1: Escalante-Orozco
March	1	1	0
April	1	1	0
May	4	3	0
June	1	1	0
July	4	2	0
August	0	3	1: Gunches
September	**0**	**0**	**0**
12 month sub-total	**19**	**17**	**3**
60 month total	**119**	**187**	**32**

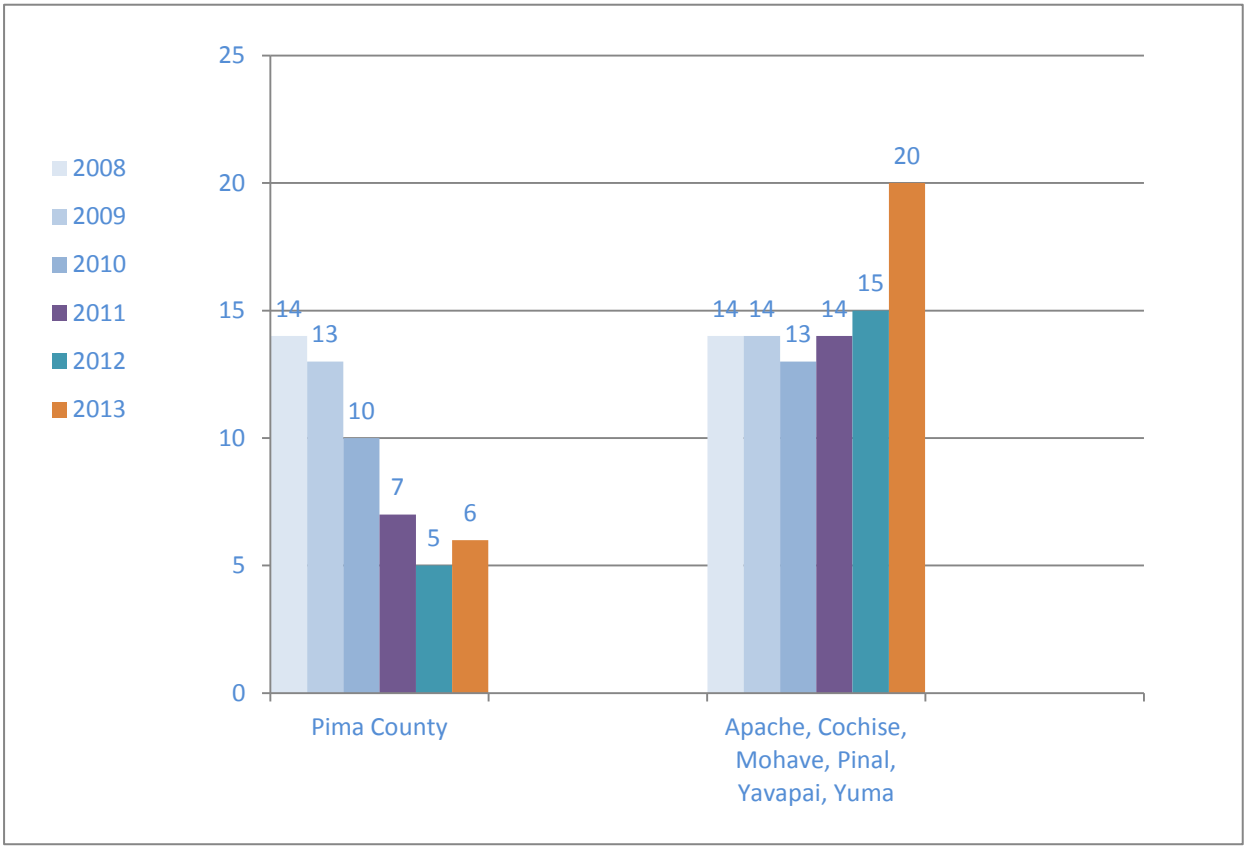
#3: Combined Maricopa data summary for twelve month periods



#4: Capital cases pending trial in Arizona by county: 2008 to 2013

County	July 2008	Sept. 2009	Sept. 2010	Sept. 2011	Sept. 2012	Sept. 2013
Apache	1	1	0	0	0	0
Cochise	0	0	1	3	3	2
Coconino	0	0	0	0	0	0
Gila	0	0	0	0	0	0
Graham	0	0	0	0	0	0
Greenlee	0	0	0	0	0	0
La Paz	0	0	0	0	0	0
Maricopa	127	109	79	68	63	68
Mohave	2	3	2	1	1	0
Navajo	0	0	0	0	0	0
Pima	14	13	10	7	5	6
Pinal	3	4	5	5	5	10
Santa Cruz	0	0	0	0	0	0
Yavapai	3	2	2	2	5	7
Yuma	5	4	3	3	1	1
TOTAL	**155**	**136**	**102**	**89**	**83**	**95**

#5: Number of Capital Cases Pending Trial Outside Maricopa County



#6: Number of Capital Cases Pending Trial Statewide

Date	# of Cases
July 2008	155
Sept 2009	136
Sept 2010	102
Sept 2011	89
Sept 2012	83
Sept 2013	95

#7: Number of Defendants Sentenced to Death Statewide

Year	# of Defts	Source by County
2008	5	Maricopa (5)
2009	15	Maricopa (11), Pima (3), Mohave (1)
2010	10	Maricopa (10)
2011	8	Maricopa (6), Pima (2)
2012	4	Maricopa (3), Pima (1)
2013 (10 mos.)	3	Maricopa (2), Mohave (1)

#8: Number of Executions in Arizona

Year	# of Executions
2001-2006	0
2007	1
2008	0
2009	0
2010	1
2011	4
2012	6
2013 (10 mos.)	2