

Capital Case Oversight Committee
Interim Report to the Arizona Judicial Council
December 11, 2014

1. Introduction. The Chief Justice entered Administrative Order 2013-115 on December 18, 2013 and extended the term of the Capital Case Oversight Committee for two years. This Order requires the Oversight Committee to submit annual reports to the Arizona Judicial Council. This report, the first of two, contains no recommendations.

2. Data. The Oversight Committee has collected basic data on capital cases in Maricopa County and statewide during the past six years. Current data is as follows.

a. Pending cases in Maricopa County. As of September 2014, 67 capital cases were pending trial in Maricopa County. Over the past several years, Maricopa County has had between 60 and 70 capital cases pending trial. This range has remained fairly steady during 2011, 2012, 2013, and 2014. The narrowness of the range indicates an equilibrium, i.e., that the number of newly filed death penalty notices is roughly equivalent to the number of capital case dispositions.

This current level of pending cases is approximately one-half the number of cases pending at the peak of the capital case crisis in Maricopa County during 2007-2008 that gave rise to the establishment of this committee.

b. Pending cases statewide. Statewide, the number of pending capital cases has risen slightly over the past year. As of September 2014, 99 capital cases were pending, compared to 94 pending cases in September 2013. However, the number of statewide cases currently pending is about one-third less than the number pending in 2008.

Nine of Arizona's counties have no capital cases pending. Cochise County, which had 2 capital cases a year ago, and Yuma County, each have 1 pending capital case at the present time. Pima County has 6 pending cases, and Yavapai has 7, the same numbers as a year ago.

Pinal has 17 pending capital cases, compared to 10 in September 2013 and 5 in September 2012. As well as requiring more judge time, Pinal County's increased capital caseload requires other human resources for staffing those cases, particularly additional, qualified court-appointed defense counsel and mitigation specialists. Pinal County is finding some of those human resources in Maricopa and Pima Counties. However, Pinal's resource needs may be approaching the "crisis" magnitude that Maricopa experienced several years ago.

c. Death sentences. Automatic notices of appeal of a death sentence were filed in 4 cases, all arising from Maricopa County, since the Oversight Committee's last annual report to the Arizona Judicial Council. This statewide number is comparable to the preceding period (3 notices), but it is a substantial drop from the number of notices of appeal filed in 2009 (15 notices), 2010 (10 notices), and 2011 (8 notices).

d. Pending appeals. There are currently 13 direct appeals in the Arizona Supreme Court, compared with 12 at this time last year. Since the Oversight Committee's 2013 report, the Court has issued opinions in 5 capital cases.

e. Post-conviction relief proceedings. The Oversight Committee does not track the number of capital post-conviction relief ("PCR") proceedings in trial courts statewide. However, at the present time in Maricopa County, there are 39 pending capital PCRs, compared to 38 a year ago.

f. Executions. One inmate under a death sentence was executed subsequent to the Oversight Committee's last annual report to the AJC. Since 2007, Arizona has had 15 executions, with the highest number, 6 executions, occurring in 2012.

3. Procedure. Under current capital case practice, the Arizona Supreme Court issues an execution warrant concurrently with its denial of a petition for review of the trial court's denial of a first petition for post-conviction relief. The Court upon issuing that warrant distributes it to a variety of stakeholders in the judicial and executive departments of state government and in the federal court system. A defendant typically seeks federal habeas relief within days after the Court issues a warrant, and when the federal district court assumes jurisdiction, it promptly stays the execution warrant and must notify these multiple stakeholders. An amendment to Rule 31.17(c)(1) of the Arizona Rules of Criminal Procedure was adopted in 2014, with an effective date of January 1, 2015 (R-13-0051). The amendment defers the Court's issuance of the execution warrant for 15 days after the denial of a petition for review on the PCR. This interim permits the defendant to request federal habeas relief, which as a practical matter makes the Arizona Supreme Court's issuance of the warrant unnecessary.

A petition and amended petition filed by the Arizona Attorney General in R-14-0010 requested amendments to various rules in the Rules of Criminal Procedure. The petition essentially requests that a post-conviction proceeding in a capital case precede the direct appeal. (The petition in part is in response to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).) The Capital Case Oversight Committee considered R-14-0010 at a meeting in March 2014. The committee members were profoundly and intractably divided on a

recommendation concerning this rule petition, and the committee therefore provided no formal comment to the Court. At its August rules agenda, the Court reopened the matter for further comment and asked for general information, data, or studies regarding the administration of capital cases in states with a unitary review procedure similar to the procedure proposed by the Attorney General. It appears at this time that among death penalty jurisdictions, only a few have a unitary procedure, and those that do have low capital case volumes. Accordingly, there is scant data on this process and the Oversight Committee does not anticipate filing a substantive comment before the reopened comment deadline of January 16, 2016.

4. Appointment of counsel. The appointment of trial and appellate counsel in capital cases is within the purview of the superior court. In 2012, the Superior Court in Maricopa County by local administrative order established a Capital Defense Review Committee. This Maricopa County committee is charged with reviewing and making recommendations to the presiding criminal judge concerning the qualifications of applicants for appointment as first and second chair defense counsel at trial, and as counsel on appeal. This nine-member committee does extensive reviews of applicants, which can take months to complete. During its first two years it has made recommendations, not always favorable, regarding more than two dozen first-chair attorneys and appellate applicants. Members of the capital defense bar outside of Maricopa County have suggested the creation of a parallel, statewide review committee for the remaining counties, but this has not been implemented.

The Arizona Supreme Court appoints defense counsel in a first petition for post-conviction relief in a capital case. In 2009, there were 18 defendants awaiting the appointment of counsel on a capital PCR. By October 2013, this number had been reduced to 6. At the present time, the Supreme Court has appointed counsel for every capital defendant with a pending first PCR proceeding; there is currently no backlog awaiting the appointment of counsel.

5. Education. The Judicial College of Arizona and the AOC's Education Services Division conducted a wide-ranging course on capital cases in November 2014. Over the course of two days, a stellar faculty of judges and subject matter experts covered, among other things, case management, discovery, motion practice, jury selection, all three phases in the trial of a capital case, settlement conferences, sentencing, media coverage, and appellate issues. The program was attended by more than three dozen judges.

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6. Conclusion. The Oversight Committee will continue as directed by A.O. 2013-115, and pursuant to that Order it will present its second report to the Arizona Judicial Council in December 2015.

Respectfully submitted,

Hon. Ronald Reinstein (ret.)
Chair, Capital Case Oversight Committee