

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES**

January 16, 2008
Supreme Court Building, Phoenix, AZ

MEMBERS PRESENT:

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

MEMBERS ABSENT:

Ronald Reinstein

GUESTS:

James Beene
Bob Shutts
Theresa Barrett
Cindy Cook
Melinda Hardman
Cari Gerchick

STAFF:

Lorraine Nevarez * Jennifer Greene

I. Call to Order, Introductions & Review of Administrative Order No. 2007-92

Justice Ryan called the meeting to order at 12:05 PM. The members reviewed the terms of the administrative order establishing the Oversight Committee.

II. Updates on the Status of Capital Case Processing in Maricopa County

a. Cases awaiting trial: Judge Baca reported that there are 126 pending cases including six *Ring* remands; Jim Logan has 128 cases on his list including nine remands.

b. Available defense attorneys: All pending cases have assigned counsel, and at least a few defense lawyers are available to handle new filings. Staffing at the Public Defenders Office is “in good shape,” although there is one mitigation specialist vacancy, which the County is expected to fill despite the recently-announced hiring freeze.

c. Judicial and administrative staffing: One criminal judge has been designated as the Capital Case Judge pursuant to the County’s allocation of one additional judge to handle capital cases. Three other Special Assignment Criminal Dept judges have also been assigned duties to include some concentrated assistance with capital cases, but they also continue to handle non-capital complex criminal matters. It appears the County will not be seeking additional judgeships from the Governor for the time being. The court has not been able to fill the capital case manager position and recently re-advertised it. The hiring freeze may impact the court’s ability to hire someone for this position. The Presiding and Associate Presiding Criminal Judges are sharing the responsibilities of the capital case manager position and are tracking and actively managing the progress of each case.

d. New case filings: From February to December, 2007, 27 new capital cases were filed. The rate at which new capital cases are being filed has slowed since the summer. Five new cases were filed in June, July, August, and September, one was filed in October, no new cases were filed in November, and one was filed in December. The County Attorney's Office reported that the decrease in new case filings is solely due to the facts underlying the recent homicide cases they have charged. Each case is considered on its merits; future filing rates cannot be predicted.

e. Case terminations: Four capital case trials began in January; in one case the defendant entered a guilty plea in the middle of the trial. Five more are scheduled to begin in February. From February to December, 2007, 39 cases were terminated (i.e. sentenced, acquitted or dismissed). In 32 of the cases that were terminated, 15 ended in a plea, in three cases, the prosecution withdrew its death notice, another three ended through some other type of dismissal, and 12 went to trial -- resulting in five life sentences, six death sentences, and one acquittal.

f. Resolution Management Conferences: The new resolution management conference process has avoided several trials in cases involving defendants who were reluctant to agree to take a plea offer. The success in resolving these cases may be partly a consequence of the court's policy of allowing the defendant's family members and doctors to attend these conferences and confer privately with the defendant during the conference.

g. Mitigation Special Masters: Each pending case has been assigned an experienced judge to act as a special master, with the exception of a few cases that are nearing trial. The special masters have been effective at moving some cases along that had been lagging. When feasible, these judges have been assigned to groups of cases to permit the judge to deal with the same attorneys or defender offices on multiple cases.

h. Length of trials: At or before the next meeting, the trial court will provide the committee with an analysis of how many trial days were needed in recent capital trials. All attorneys now use questionnaires to narrow the focus of voir dire, although this may not be shortening the length of the voir dire process significantly.

i. Judicial rotations: The court is currently working on its annual judicial rotations for June. At least one criminal judge will be taking a capital caseload to the judge's forthcoming special assignment duties in the civil department, but this may not be practical for some who are rotating to other types of assignments.

j. PCR cases awaiting appointment of counsel: There are 13 defendants in post-conviction relief status who are awaiting assignment of defense counsel over and above those that were transferred to the Office of the State Post-Conviction Public Defender. Only one or two private attorneys on the appointment list are still willing to handle these cases.

k. Other news: The County Attorney's Office is analyzing recent jury verdicts in capital cases to try to identify common features of those that ended in a life sentence as opposed to those in which the jury imposed a death sentence to inform the office's decision-making on charging homicides. Mr. MacDonnell noted that the trial court's efforts have had a very positive impact.

III. Status Report on Task Force Recommendations

Staff reviewed the status of the recommendations that came out of the Capital Case Task Force. In addition to establishing the Oversight Committee, the Chief Justice also issued the recommended policy on trial transcript management. The Judicial Council agreed to include in its legislative package the proposal to increase the hourly rate for PCR counsel. However, state budget concerns will mean this proposal will not be advanced this year. For the same reason, the proposal for an increase in the page rate for transcripts will reportedly not be advanced by the Arizona Court Reporters Association this year. Staff filed the recommended Rule 28 petition to amend Criminal Rule 15.1(i) dealing with a stipulated extension on the deadline for filing a notice of intent to seek death. The comment period for this proposal ends May 20th. If the Supreme Court adopts the change, the effective date will likely be set for January 1, 2009. The Superior Court in Maricopa County has applied for grant funding for more capital case training for judges and lawyers that will likely include a focus on Rule 32.

Mr. Lieberman explained that he has not tried to pursue a statutory amendment to A.R.S. § 41-4301 because the statute prohibits him from engaging in lobbying. However, he has submitted a budget request in the event someone else manages to amend the statute to permit him to hire more staff. He now has two lawyers working with him but will lose one on June 30, 2008. That position is funded with funds which are not available in FY09. Unless FY09 is funded at levels greater than FY08 (which is not anticipated), the office will have only one staff attorney after June 30th.

The Chair asked Mr. Cattani to explore with Mr. Lieberman whether the Attorney General's Office could assist in seeking a statutory amendment to § 41-4301 as the Task Force had originally recommended.

IV. Call to the Public and Adjournment

The Chair asked members to meet again before March 27th. Dates will be circulated. No response was heard from the call to the public.

The meeting was adjourned at 12:55 PM.

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES**

March 13, 2008

Supreme Court Building, Phoenix, AZ

MEMBERS PRESENT:

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

GUESTS:

James Beene
Bob Shutts
Theresa Barrett
Phil MacDonell

STAFF:

Jennifer Greene
Lorraine Nevarez
Theresa Barrett

Call to Order

Justice Ryan called the meeting to order at 12:05 PM. The Chair welcomed the members.

Approval of Minutes

The minutes of the January 16th meeting were moved and approved without modification.

Updates on the Status of Capital Case Processing in Maricopa County

a. Pending case inventory in the trial court: Judge Baca and Jim Logan reported that case filings and case loads are decreasing. There are a total of 121 pending cases, including eight remands.

b. Results to date of case management innovations: Judge Baca reported the Court's updated breakdown for 2007 Capital Case Data. It was noted that the 2007 numbers reflected ten pleas without a Resolution Management Conference (RMC). So far in 2008 there have been two pleas at a RMC and two that fall into the "other" category (i.e., either after an RMC or without a RMC). Judge Baca explained that typically cases go to a RMC when they reach a point in time when it is helpful to bring all parties together with the judge. However, while RMCs work for some capital cases it was argued they are not appropriate for all cases. It was agreed a RMC is useful mostly to give reluctant defendants "a push."

c. Capital case manager position: Judge Baca reported that the court has not been able to fill the capital case manager position due to the County's hiring freeze. As a result, she and Timothy Ryan, Associate Presiding Criminal Judge, are sharing the responsibilities of the capital case manager position and are tracking and actively managing the progress of each case.

d. Case management system improvements: Judge Baca indicated that their experience so far suggests mitigation judges are helping the defense teams in acquiring discovery in a timelier manner. In addition to this case management improvement, Judge Baca is now holding weekly meetings to review case status and issues impacting case progression. Following these meetings, relevant case information is sent out to the appropriate court staff and interested parties. Judge Baca clarified confidentiality is preserved and the mitigation judge does not disclose information to the trial judge at these meetings. Jim Logan commented that he is getting email updates on cases and appreciates having one place to get information from the court.

e. State Capital PCR Defense Office budget: Mr. Lieberman explained he has submitted a budget request in the event another state agency or system stakeholder manages to amend the statute to permit him to hire more staff. He now has two lawyers working with him but will lose one on June 30, 2008. The position he is going to lose is funded with monies which are not available in FY09. Accordingly, Mr. Lieberman noted that unless FY09 is funded at levels greater than FY08 (which is not anticipated) the office will have only one staff attorney after June 30th.

Kent Cattani indicated his office is willing to attach the proposal (provided in meeting handouts) as a striker but it is simply not good timing for his office to move forward with Mr. Lieberman's other proposed changes.

f. Pending direct appeals and capital PCRs awaiting appointment of counsel: Ms. Hallam reported that there is no sign of accelerating appeals yet. She then provided the following status of appeals for 2008:

- Direct Appeals -20
- Capital Cases without PCR Counsel-15

Ms. Hallman reported difficulty with securing counsel for Post Conviction Release (PCR) cases. Reasons for lack of interest in these cases were then discussed. It was questioned whether pending legislation (SB1062) could impact plea bargaining in capital cases. Staff agreed to check on the status of this legislation and report back to the Committee.

g. Other News: Judge Baca gave an update on the average number of trial days needed in recent capital trials:

- With guilt phase included-84 days
- With only aggravation and mitigation-on average 50 days
- Jury selection-on average 5-12 days

h. Call to the Public and Adjournment: No response was heard from the call to the public. The Chair asked staff to circulate proposed dates for a June meeting. The meeting was adjourned at 1:05 PM.

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
JUNE 26, 2008**

Members Present:

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

Members not Present:

Hon. Ronald Reinstein
Dan Levey

Guests:

James Beene
Robert Shutts
Theresa Barrett

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 12:25 p.m. The minutes of the March 13, 2008, committee meeting were unanimously approved.

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

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

Active cases:	119
Potential cases:	17
Pled, not sentenced:	11
Remands:	7
Total:	154

These numbers are accurate as of June 25, 2008.

Mr. Logan acknowledged that the number of cases in the Maricopa County Superior Court approximates the number from a year-and-a-half ago, with three distinctions. First, the number of potential capital cases noted above is probably overstated. Second, all actual and potential capital defendants are now being provided “first chair” counsel promptly after their arrest. Third, every capital defendant has an assigned mitigation specialist, or is the process of getting one. An exception involves an eight-defendant case, six of whom are capital defendants; and given that complexity, it may take longer to see which mitigation specialist is going to be working with each individual defense counsel.

Mr. Logan also noted that the appointed contract attorneys select their mitigation specialists; he does not assign them. The rate for the contract specialists is \$55/hour. These contracts are for

three years. Mr. Logan estimated that roughly 35% of the capital case defendants have privately appointed counsel; the balance have counsel from one of the three public defense agencies.

B. Judge Baca. Judge Baca provided her numbers on pending capital cases in Maricopa County:

Total:	127
<u>Ring</u> :	5 of the total
Other remands:	2 of the total

Judge Baca's number of cases, excluding the Ring and other remands, totals 120. Mr. Logan and Judge Baca discussed how their totals were substantially equivalent. In particular, each total represents a snapshot at a certain point in time. They could each derive their data at different times, resulting in a nominal difference, in this instance, of one case.

Judge Baca noted that so far in 2008, there have been 15 cases which have had resolution management conferences. She emphasized that this is not the number of conferences, but rather the number of cases having conferences, because some cases require multiple conferences.

Judge Baca also shared her computations of capital case filings. Her figures showed that 26 cases were filed in calendar year 2007; that is, on average, 2.2 cases per month. For the first six months of 2008, there have been 17 filings, or about 2.8 cases per month.

Judge Baca also provided the following disposition data comparing 2007 versus the first half of 2008:

Pleas:	18 in 2007 vs 7 in 2008
Trial, life:	4 in 2007 vs 2 in 2008
Trial, death:	7 in 2007 vs 5 in 2008
Acquittals:	1 in 2007 vs 0 in 2008
Dismissals:	3 in 2007 vs 2 in 2008
Notice w/d:	3 in 2007 vs 1 in 2008

Total case terminations:	36 in 2007 vs 17 in 2008
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C. Mr. MacDonnell. Mr. MacDonnell provided these numbers:

Between 2001 and 2005, the average time to resolution of a capital case was 43 months. More recently, the time to get to trial has been about 30 months (this figure includes projected or estimated trial dates.) He believes that the processing time for capital cases is speeding up.

The last eleven jury verdicts, going back to November, 2007, have been 8 death verdicts and 3 life verdicts, i.e., about 72% death verdicts.

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D. Ms. Hallam. Ms. Hallam gave the following numbers and update:

There are 21 capital appeals pending in her office. This is an increase of a few cases over prior years. She stated that there is greater cooperation of the managing court reporter in Maricopa County concerning transcript preparation. Also, some contract attorneys are handling multiple capital case direct appeals. Ms. Hallam reported that the justices are available for the pending cases, but that a portion of these cases are still in the briefing stage and are not yet ready to go to the judicial chambers. There have been some additional requests for extensions of time by appellate counsel on both sides.

There are 15 capital cases without PCR counsel. This represents no change since her last report. She has received no new applications from attorneys for placement on her list of available counsel.

E. Mr. Lieberman. Mr. Lieberman reported that his office has three capital PCR matters. None of them have yet reached the point where he has been able to file a petition in the Superior Court. He noted that the pre-petition stage in the Superior Court is the most labor intensive part of the process. He is hopeful that after a petition has been filed, or even after one of these matters has reached the stage in which a petition for review has been filed, that he will be able to take on additional cases.

Mr. Lieberman also advised the committee that the budget bill now pending in the Legislature and likely to be adopted will permit him to maintain the size of his office. With this budget, his office will not expand, but it will not decrease in size either.

3. Discussions on specific issues.

A. Transfer of case files. Mr. Lieberman stated that he has a problem in every case in getting the file of prior counsel. He has one case in particular which he believes he will probably never get the complete file. He believes that while this is a problem in all cases, it is more of a problem with private counsel that it is with public agency counsel. Specific difficulties include:

- Individuals working on a case not placing their work product in the defendant's file;
- Collecting electronic information, including emails, from the computers of individuals who worked on the case; and
- The unwillingness of certain defendants to waive the attorney-client privilege.

The committee members recalled that these or similar issues were discussed by the Capital Case Task Force, and that a proposed rule to address these matters was rejected. The rejection was premised in large measure on a cost analysis, including the cost of secured storage and backup.

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Action item. Mr. Lieberman, with the assistance of Mr. Cattani, will attempt to have an outline of a new proposal to address the issues arising from transfer of case files by the next meeting of this committee.

B. Rotation of judges with capital cases. An inquiry was raised about the proposal of the Capital Case Task Force that judges with capital cases retain those cases after they were rotated off the criminal bench. A number of rotations took place earlier this month.

Judge Baca responded. She noted that a criminal judge rotated to a family law or juvenile assignment cannot keep a capital case because the domestic and juvenile courtrooms are not adapted for jury trials. A judge who rotates to a civil assignment can keep a capital case, and she tries to have the judge in this circumstance keep the capital case.

Judge Baca also noted that she is using the special assignment judges, including Judge Granville, extensively for capital cases. She is attempting to keep these judges on longer assignments. Judge Baca also advised that she has a weekly committee meeting of her judges with capital case assignments. This committee reviews which cases are ready to go to trial, and if the assigned judge is unavailable, they find another qualified and available judge to conduct the trial. Judges who are new to a criminal calendar do not immediately get capital case assignments, so not all of the judges on the criminal bench are taking capital cases.

4. Call to the Public; Adjournment.

There was no response to the call to the public.

The committee agreed to meet next in September.

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

**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
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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.

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
October 8, 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
Jennifer Garcia
John Pressley Todd
Dale Baich
Keli Luther
Rudy Gerber
Kimberly DeBeus
Kerri Chamberlin
Patricia Nigro

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 12:03 p.m. The minutes of the September 18, 2008, Committee meeting were approved without objection.

2. Discussion of the draft Committee report. The Chair asked the members to comment on the draft report and the accompanying rules, both of which had been previously circulated, and the following topics were then discussed by the members.

a) Proposed Rule 15.10. The draft report included a proposed Arizona Rule of Criminal Procedure, Rule 15.10, regarding ex parte mitigation discovery conferences in capital cases.

Mr. MacDonnell opened with a comment that this proposal for a “shadow judge” was anathema to the principle of open judicial proceedings, as established in Article II, section 11, of the Arizona Constitution, as well as contrary to the constitutional right of victims to be present at criminal proceedings. He added that there has been no showing that mitigation discovery conferences expedite the capital case process; and that Rule 15.9(b) already allows ex parte proceedings, but only when there has been a proper showing of need. He also submitted that the mitigation discovery process has been abused by using it for discovery on issues relating to guilt. In support of this statement, he provided the members with a recent court minute entry, and he also related an incident in which sneakers with potential materiality to the guilt phase had been subpoenaed ex parte from a co-defendant’s mother.

Judge Reinstein noted that Rule 39(b) of the Arizona Rules of Criminal Procedure, which gives the victim a right to attend “all criminal proceedings”, is more expansive than either the

underlying constitutional or statutory provisions. He commented that while it was salutary to give a capital defendant a cooperation advisement, the victim and prosecutor should be present when this is done. He also pointed out that mitigation masters may issue an order which could lead to a case continuance, or an ex parte order may impact the victim's family, and these practices would be objectionable.

Mr. Levey joined in comments about the unfairness of excluding victims from these mitigation discovery proceedings.

Judge Baca stated that she had discussed proposed Rule 15.10 with other judges assigned to the criminal divisions. She did not believe that the concept of mitigation discovery conferences should be abandoned. She agreed that the mitigation discovery masters should have additional training on their role and function. She stated that the language of proposed Rule 15.10 requires further study and revision.

Mr. Cattani and Mr. Shutts inquired why existing Rule 15.9(b) is not adequate for mitigation discovery. Judge Baca responded by noting the broad responsibility of capital defense counsel under the A.B.A. Guidelines to do an extensive mitigation investigation, compared to the narrow application of Rule 15.9(b). She submitted that Rule 15.9(b) "ignores the whole picture" presented with a capital case defense. She added that a mitigation discovery master can only operate within the time lines set by the trial judge, and that any mitigation delays are referred to the trial judge.

Mr. Lieberman cited as a case management consideration the need for frank discussion on mitigation discovery with the mitigation discovery master. Mr. Logan noted that initially, mitigation discovery conferences were opposed by defense counsel, who thought the conferences would lead to micromanagement of their cases, although this opposition has dissipated. He also stated that capital cases typically take at least three years to process, and that because the mitigation discovery conferences have been used for only about one year, it is too early to tell if they expedite case processing.

Mr. Cattani asked why even though mitigation discovery may be an ex parte proceeding, the prosecutor should not be provided with any ex parte orders issued by the mitigation discovery master. Judge Baca replied that it is because defense counsel may or may not use the records described in the order. Mr. Logan added that the orders frequently contain specific information such as places of the defendant's medical treatment and the names of defendant's medical providers.

Mr. MacDonnell commented that while we have an adversarial system, the mitigation discovery conferences are not adversarial proceedings. Mr. Logan noted when a trial judge conducts ex parte proceedings, it increases the potential for recusal, which could result in more delay.

Judge Reinstein considered the possibility of changing the broad language in Rule 39, which gives the victim the right to be present "at all criminal proceedings," so that the rule conformed to the more limited constitutional and statutory provisions; and then mitigation conferences could be conducted without the defendant, the prosecutor, or the victim being present, thereby allowing

the defense attorney to make ex parte requests for resources or assistance in obtaining discovery. It was noted that the constitution and statutes create rights, but that rules of implementation cannot create new rights.

Justice Ryan commented that the mitigation discovery conferences should respect victims' rights, and that the mitigation conferences should be restricted to what was necessary for mitigation discovery. He raised the possibility of expanding Rule 15.9 to deal with mitigation discovery in capital cases. He asked Judge Baca, Mr. MacDonnell, Mr. Logan, and other members to confer prior to the next meeting and work on alternatives to the proposed Rule 15.10.

In later discussions during the meeting, it was agreed that there was not sufficient time before the report was due in which to draft, and to reach consensus on, new language for a proposed rule, and that this Committee would continue to work on a draft of a rule amendment regarding mitigation discovery conferences following submission of its report to the Arizona Judicial Council.

b) PCR counsel. Mr. Lieberman brought the members attention to a section in the draft report dealing with PCR counsel. Mr. Lieberman observed that there are three reasons defense attorneys are reluctant to accept appointments on capital case PCRs: the 200 hour "cap", the hourly rate, and the potential for "opting in". He noted that even if the hourly rate was increased from \$100 to \$125, as recommended by the Capital Case Task Force, that it would still be less than the federal rate. He stated that the 200 hour cap was contrary to the A.B.A. Guidelines. He submitted that the Committee should re-urge removal of the cap, as well as an increase in the hourly rate, even though these recommendations might be rejected because of the budget situation, because it was important to stress the need for these changes.

Mr. Lieberman also proposed that the Committee recommend removal of the statutory limit on the size of his office staff. If the recommendation is approved, it would not result in any additional expenditure until the positions are actually funded. He recommended as well that the State PCR office be a training resource for other PCR attorneys, as long as the training did not involve trials or appeals.

Mr. MacDonnell responded that the Committee should continue to advocate for the hourly rate increase and removal of the cap, notwithstanding the budget situation. Mr. Logan added that it would be irresponsible to not make the recommendations, and that the State PCR office was the logical resource for PCR training. Mr. Cattani thought that as a practical matter, hours above the cap were typically approved, so removing the cap would not encourage any additional attorneys to be appointed on PCRs, but he supported Mr. Lieberman's recommendations.

It was the consensus of the Committee that the section of the draft report dealing with the above issues be revised as recommended by Mr. Lieberman.

c) Proposed Rule 6.3(d). Mr. Lieberman commented that the draft of Rule 6.3(d) of the Arizona Rules of Criminal Procedure, regarding preservation and transfer of defense counsel's file, was a good concept, but that it micromanaged the requirement, and that the imposition of

sanctions was unnecessary. He submitted an alternative: a proposed Rule 6.8, which duplicated the A.B.A. Guidelines. Mr. Logan noted that placing this proposal in Rule 6.8 would make the requirement applicable only to appointed counsel rather than all counsel. Ms. Hallam suggested that this proposal be placed in Rule 6.3. The revised draft will reflect these changes.

d) Data. With regard to the section of the draft report dealing with data, the Chair and members noted certain apparent inconsistencies in section I of the draft report, along with issues concerning data collection generally. Mr. Shutts noted, for example, that if a death notice is dismissed while the matter returns to a grand jury for additional charges, the data reflects this as a dismissal, notwithstanding a re-filing. Mr. Logan asked whether a case should be counted as capital upon the filing of the underlying murder charge, or when the Rule 15.1(i) notice is filed.

Mr. Shutts and Mr. MacDonnell related that about one-third of death notices which are filed culminate in a death sentence. A discussion ensued about why two-thirds of death notices result in a sentence other than death, and whether the capital case process could be improved by reducing the number of notices of intent to seek the death penalty which are filed. Mr. MacDonnell noted that there has been insufficient time to generate statistics regarding the factors a jury considers appropriate for a death sentence, since the implementation of legislation requiring juries to determine penalty has been relatively recent.

The Chair determined that the members who collect data need to confer on defining data measurements, and he directed staff to coordinate these discussions prior to the next Committee meeting.

e) Judicial Rotation. Mr. MacDonnell reiterated that the Task Force recommendation for extended assignments of judges to capital case calendars should be adopted by the Oversight Committee, and he asked that a rule on this recommendation be implemented. Judge Reinstein stated that the difficulty judges have with keeping a capital case after rotating to a family or juvenile court would support longer assignments to a criminal division. Judge Reinstein concurred that rotation from the criminal bench should not be done just for the sake of rotation, and the members agreed generally with this concept.

Judge Baca, however, cautioned against putting this recommendation into a rule. She noted that the superior court has more than 100,000 cases, and 150 capital cases should not be the sole focus of whether and when judges should be rotated. She reminded the members that there are presently five special assignment judges in the criminal department who assist on capital cases. Mr. MacDonnell suggested that in lieu of a rule, the Committee make a recommendation to the superior court about having longer judicial rotations to criminal case calendars. The consensus of the members was that the term of judicial assignments was within the purview of the presiding judge of the superior court. Nevertheless, a majority of the Committee believed that the report should include a recommendation about judicial rotation similar to that made by the Capital Case Task Force.

f) Proposed Rule 39(c). The draft report proposed a statewide rule of criminal procedure which would require the prosecutor to advise the victim of the length of time needed for final resolution of a capital case, versus the comparative time period if a death notice was not filed.

Mr. MacDonnell thought that this proposal would infringe on the relationship the prosecutor has with the victim. He noted that there were too many vagaries about the future, including changes in statutory and case law, and that the advisement would simply become a statistical presentation or an advisement that death penalty cases take a long time.

Mr. Levey responded that it was important that the victims be educated about the time involved, and that victims be given realistic expectations. He added that many victims had not known how long the process actually took. Judge Reinstein and Judge Baca noted that victims often do not know about the length of the process until they are given this information as an incentive to agree to a resolution without a death sentence during the course of a resolution management conference.

The Chair stated that a compromise on this proposal may be that the Committee recommend a practice that the victim be given this advice, rather than reducing it to a rule.

g) Comments regarding the backlog of cases. Mr. Logan and Mr. Prato recommended that language in section I of the report regarding a “perception of a crisis” be deleted, and the Committee concurred. Judge Baca suggested, and the Committee agreed, that counsels’ calendar conflicts with trial dates, as well as mitigation discovery, need to be identified as factors which contributed to the backlog of cases. Mr. Logan noted that even though there may not be a trend of more death notices being filed, a spike in filings in fiscal year 2006 (when 41 notices were filed) continues to have an impact on the backlog, inasmuch as these cases are still being processed. Ms. Hallam added that although the number of *Ring* remands is relatively low now, this is still a contributing factor to the backlog.

h) Pending comments on the draft. Mr. Lieberman stated that his office has concerns with the proposal for case management conferences in Rule 32 proceedings. Mr. Gerber will prepare written comments detailing these concerns, and forward those comments to Mr. Cattani and to staff. Mr. Lieberman may also have additional comments regarding his suggestion that the Attorney General forebear from seeking “opt in” status for defendants awaiting the appointment of PCR counsel.

3. Department of Justice Grant. Judge Reinstein informed the members that the Department of Justice has provided \$40,000 in grant funds to Maricopa County. The funds were obtained by Robin Hoskins, a grant coordinator at the Maricopa County Superior Court. These funds are for training on capital case issues. Judge Reinstein noted that this training will be particularly valuable because judges, prosecutors, and defense counsel will be permitted to jointly participate in the training sessions.

4. Capital Case Staff Attorney. An announcement was made that a staff attorney for capital cases has been hired by the Maricopa County Superior Court. The attorney’s name is Patricia Nigro.

5. Call to the Public; Adjournment.

There was no response to the call to the public.

The Committee agreed to meet again in early November. The Chair advised that this meeting will be scheduled for two hours.

The meeting was adjourned at 1:40 p.m.

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
November 13, 2008**

Members Present:

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

Guests:

Hon. Gary Donahoe
James Beene
Patricia Nigro
Robert Shutts
John Pressley Todd

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 12:45 p.m. The minutes of the October 8, 2008, Committee meeting were unanimously approved.

2. Discussion of the draft Committee report. The Chair asked the members to comment on the revisions to the draft report and the accompanying rules.

a) Proposed Rule 32.7 concerning informal conferences in post-conviction relief proceedings. The draft report included a proposed amendment to Rule 32.7, Arizona Rule of Criminal Procedure, adding new sections (a) and (b) regarding mandatory and discretionary conferences for initial and successive PCR petitions in capital cases.

Mr. Lieberman opened the discussion by stating his objections to the proposed rule. He believed that at 90 days after appointment, PCR counsel was not ready to discuss preliminary legal issues, as proposed by the draft rule, or to discuss an estimated time when the petition might be filed. He stated that the proposed rule would impose micromanagement on the process.

Members questioned a written comment submitted by the PCR Defender Office, specifically, whether the 3000 attorney hours a Florida study indicated was necessary for PCRs was too high. Mr. Lieberman conceded that this might be high, but this was Florida's experience. He added that the time required by defense counsel for a PCR proceeding was dependent on what the investigation revealed. Mr. Cattani responded that he had spoken with Florida agencies about this study, and he noted that the study was done in 1998. He believed that at that time, two defense attorneys were not required for trial. Mr. Cattani added that with two qualified defense

attorneys, which the Arizona Rules of Criminal Procedure currently require, along with a proper investigation and the appropriate experts, a defendant should receive a fair trial, and a PCR investigation requiring thousands of hours should not be needed. Mr. Lieberman replied that the standards in Arizona require a re-investigation, not a new investigation.

Mr. Cattani went on to state that in the Florida system, the state's PCR office also handles federal habeas proceedings, with federal court compensation. Inasmuch as there is no right to effective assistance of PCR counsel, there is no conflict of interest in this arrangement. Because the same attorneys handle the state PCR and the federal habeas, counsel are already familiar with the facts. It is logical not to have different people re-doing the investigation, especially because there are no new issues in the federal habeas proceeding. Mr. Cattani requested that Arizona explore having PCR counsel also doing the habeas proceedings.

Mr. Lieberman stated that California has a habeas corpus resource center. The center's attorneys do capital appeals, PCRs, and habeas petitions. Mr. Lieberman is open to discussion of such an arrangement, although it requires much further consideration. He expressed concern about opt-in issues. Ms. Hallam suggested speaking with the federal public defender in Arizona, inasmuch as early appointment of habeas counsel is being discussed at that office. Mr. Cattani also indicated that the views of capital PCR defenders in other states should be solicited.

The members returned to the discussion of the proposed amendments to Rule 32.7. Mr. Lieberman suggested that the biggest problem in the area of PCRs was getting counsel appointed, rather than processing the petitions. Ms. Hallam did not believe that the proposed rule would have an adverse impact on the appointment of counsel. Mr. Cattani and Judge Reinstein added that it was important to get the PCR proceeding in front of the court rather than letting the matter languish for an extended period. Mr. Cattani noted that the intent of the PCR proceeding was not to retry every case, but rather to remedy those rare situations where justice went awry.

The Committee proceeded to address three specific issues arising from the proposed amendments to Rule 32.7. What is the appropriate time after appointment of PCR counsel when an informal conference could be conducted? What should be discussed at an informal conference? Do the defendant and the victim have a right to be present at an informal conference?

Mr. Todd believed that prior to an informal conference, PCR counsel should have had an opportunity to read the record and to speak with trial counsel, and to identify areas that could be at issue. Mr. Lieberman cautioned against having to disclose in open court areas of investigation, and he noted a potential need to obtain ex parte orders. Mr. Logan stated that every capital case is different, and that it is difficult to fashion a rule that applies to all capital cases. Mr. Cattani replied that these cases are all similar because every case involves a defendant who was convicted and who was represented by two qualified attorneys. The Chair suggested taking out language in the proposed rule that would require counsel to be prepared to discuss preliminary legal issues. This suggestion was adopted by the members.

On the issue of when the conference would occur, Mr. Levey noted that from the perspective of the victim, there was value for the case to go before a judge, even if the case was then continued.

Mr. Lieberman stated that on his current petitions, he is filing motions to continue every sixty days. Mr. Beene proposed having both sides agree about when to schedule an informal conference. Mr. Beene and Mr. Cattani also stated that as with the federal model, a conference, although not definitive, would get the case moving and keep it from stagnating. Judge Reinstein felt that the benefit of the conference was to keep the case from falling through the cracks, as well to have a discussion of pertinent issues. He added that if an informal PCR conference in capital cases is discretionary with the court, some judges may not schedule them.

A suggestion was made that when the prosecutor wants to move a PCR petition along, the prosecutor could make a unilateral request for an informal conference with the court. Judge Donahoe, who now serves as the Rule 32 unit judge, responded that he is not seeing such requests being made. He also noted that the PCR is not assigned to a trial judge until after the PCR pleadings have closed; and that the original trial judge is not always available for the PCR assignment because of the lapse of years since sentencing.

Judge Baca inquired of Mr. Lieberman at what point would he be able to meaningfully discuss a PCR case with the court? Mr. Lieberman stated that ninety days from the date of appointment would be reasonable, but that he nonetheless opposed the proposed rule. Mr. Todd added that in federal court, the conferences are set about thirty days after appointment.

The Committee's consensus was that the informal conference on a capital case PCR should be held within 90 days after the appointment of counsel.

It was also the consensus of the Committee that preparation of the petition should be included as a subject for discussion at the informal conference.

Mr. Levey inquired whether under this proposed rule the victim would have a right to be present at an informal conference. It was his belief that the victim had that right. Mr. Lieberman objected to the defendant not having a right to be present if the victim was present. Mr. Cattani felt that that was no requirement that anyone other than counsel be present at an informal scheduling conference. Judge Reinstein concurred, and added that informal scheduling conferences are typically held in chambers.

Mr. Lieberman advised that while the PCR defendant usually waives his presence, the proposed rule should state only that the defendant "may waive his presence". A discussion ensued about the costs and security concerns of transporting death row inmates to the superior court for an informal scheduling conference on a PCR proceeding. Mr. Logan stated that because the conference would be mandatory, and because orders would be entered at the informal conference, the defendant would have a right to be present.

Mention was made that the victim is often endorsed on minute entries setting scheduling conferences, and if the victim does appear at the informal conference, it's unlikely that the judge would deny the victim access to the proceeding. It was noted that other than in Rule 39, the rules generally do not specify that the victim has a right to be present at a particular proceeding, and that such language should not be added to the proposed rule under discussion. It was the

consensus of the members that it was up to the prosecutor to explain the informality of the conference to the victim, and the lack of a need for the victim to be present.

Mr. MacDonnell made the following suggestions: that sections (a) and (b) of the proposed Rule 32.7 be deleted; and that the existing, two-sentence Rule 32.7 simply be modified by adding a sentence between the two existing sentences which would provide that on a first petition for post conviction relief in a capital case, the court would hold an informal conference within 90 days after the appointment of counsel. The defendant's presence would be addressed by the last sentence of existing Rule 32.7.

Mr. MacDonnell's suggestion was then made in the form of a motion.

Motion: That Rule 32.7 as it is currently stated be amended by adding the following sentence between the two existing sentences: "In a capital case, the court shall hold an informal conference within 90 days after the appointment of counsel on a first petition for post conviction relief."

The **motion passed**, eight in favor, none opposed, with two abstentions.

Judge Reinstein noted that the particulars of what should be discussed at an informal PCR conference in a capital case could be a matter of judicial education. The Chair suggested that the draft of the earlier version of Rule 32.7(a) might be used as a template. Staff will forward a copy of that draft version to the Judicial Education Center.

b) PCR data. Ms. Hallam provided updated PCR data, as follows.

- The number of defendants awaiting appointment of PCR counsel has changed from seventeen to fifteen, effective as of November 17, 2008.
- Two of the defendants awaiting counsel have been on the appointment list for more than a year-and-a-half.
- One petition for review of a capital case was denied by the Arizona Supreme Court on October 28, 2008.
- As of November 17, 2008, there will be eleven "first" PCR petitions pending in the superior court.

The Committee's report to the Arizona Judicial Council will be revised to reflect these updates.

c) Capital Data Management. Staff advised that a new case termination event needed to be added to Appendix B of the Committee report concerning capital data management. The new termination event would be when a notice of intent to seek the death penalty was not filed within the time period specified in a Rule 15.1(i)(1) stipulation. It was also noted during the ensuing discussion that a new active event needed to be added for those situations in which a petition for post-conviction relief in a capital case was granted. The Committee report will be revised to reflect these two additions, and the Maricopa County Superior Court's statistician will be notified of these changes.

d) Other revisions to the draft report. The following further revisions to the draft report were discussed:

- 1) It was noted that mitigation discovery conferences, which were implemented in 2007, were still too new to declare that these were “productive” proceedings. Accordingly, that word was removed from page 14 of the draft report.
- 2) Judge Baca and Judge Reinstein advised that the grant training program mentioned at page 16 might not be open to judges, although judges might be facilitators, and descriptive language of the program in the report was modified accordingly.
- 3) The statement at page 19 of the draft report, stating that the PCR cap was “archaic, unreasonable, and unrealistic” was deleted.
- 4) Language at page 20 which stated that a proposed rule for PCR case management conferences had been prepared by Task Force members representing “the prosecution and defense” was deleted.
- 5) A phrase at page 21 which stated that the time required to prosecute a capital case “deprives victims’ families of closure within a reasonable time” was deleted.

There were no further comments or revisions concerning the draft report, and the report will be submitted to the Arizona Judicial Council for consideration at its next meeting on December 2, 2008.

3. Other business. Judge Baca formally introduced Judge Gary Donahoe to the Committee members. Judge Donahoe will be succeeding Judge Baca as the presiding criminal judge upon her retirement in January, 2009.

The members briefly discussed the budget crisis. Prosecution as well as defense agencies are or will be affected by the ongoing financial situation. It is yet unknown if or how this will impact the appointment of defense counsel.

The Chair reminded the members that an administrative order would be issued extending the term of the Oversight Committee. The current members of the Oversight Committee all agreed to continue as members during an extended term. The Chair thanked the members for their service on the Oversight Committee.

4. Call to the Public; Adjournment.

There was no response to the call to the public.

The meeting was adjourned at 2:45 p.m.