

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
January 29, 2009**

Members Present:

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

Guests:

Hon. Timothy Ryan  
James Beene  
Patricia Nigro  
Robert Shutts  
John Pressley Todd  
Keli Luther  
Sally Wells  
Rick Unklesbay  
Dale Baich  
Brent Graham

Staff: Mark Meltzer, Lorraine Nevarez

=====

**1. Call to Order and Approval of the Meeting Minutes.** The meeting was called to order at 12:05 p.m. The Chair welcomed Judge Donahoe, the new presiding criminal judge of the Maricopa County Superior Court, as a member of the Oversight Committee. The minutes of the November 13, 2008, Committee meeting were approved without objection.

**2. Discussion of Administrative Order 2008-93.** The Chair summarized the two major areas of work the Oversight Committee would focus on pursuant to this administrative order:

- Mitigation discovery conferences, and whether any rule that may be ultimately recommended by the Committee should have statewide application or only local.
- Time limits under Ariz. R. Crim. P. 8.2(a)(4). The time limit for capital cases currently specified under that rule is 18 months from the date of arraignment.

**3. Preliminary discussion regarding mitigation discovery.** The Chair noted that mitigation discovery proposals had recently been submitted by Judge Donahoe and by Phil MacDonnell. Judge Donahoe and Mr. MacDonnell commented on their respective proposals.

Judge Donahoe noted that his proposal permits ex parte conferences only for mitigation discovery, and not for discovery regarding guilt phase evidence. He also pointed out that his draft proposal specifies the authority of the mitigation discovery master, and that it gives consideration to issues involving victims. He added that his proposal includes a model order if his draft is ultimately adopted as a statewide rule.

Mr. MacDonnell requested, in addition to review of his draft rule by this Committee, that his proposal be considered by the criminal court bench.

The Chair suggested that a member work group be created to discuss both of these mitigation discovery proposals before the next Committee meeting. The Chair requested that the work group proceed on information rather than supposition.

The following comments were then made:

- Is the current mitigation discovery process working or useful for its intended purpose?
- Because the State is not present at the mitigation discovery conference, it may not have full knowledge as to how the conference proceeds.
- Has there has been any demonstration that the mitigation discovery conferences are reducing the processing time for capital cases?
- Because the mitigation discovery procedures have only been utilized for a comparatively short time, it may be too early to tell if the process works effectively.
- As a result of these mitigation conferences, defense counsel are acquiring records in situations there was previously resistance.

Mr. Logan stated that he had reviewed Mr. MacDonnell's proposed draft of Rule 15.9(E) with other members of the defense bar, and that with certain refinements, it might be generally acceptable. He noted that he had suggested specific changes to Mr. MacDonnell, and added that the proposed Rule 15.9(E) might be a good starting point for the work group.

Mr. Levey asked that victims' rights be considered by the work group, especially if the defendant is present at the mitigation discovery conference.

Mr. Cattani expressed the view that it would be inappropriate to waive the defendant's presence at a mitigation discovery conference if the intention of that waiver was solely to bar the victim's attendance. He proposed that if the proceeding was strictly ex parte, that neither the defendant nor the victim should be present. He stated his approval of the provision in proposed rule 15.9(E) which would require a showing of need before having an ex parte proceeding.

**ACTION:** After considering the comments, the Chair appointed Mr. Logan to lead the mitigation discovery work group, and Judge Donahoe and Mr. MacDonnell as work group members. The Chair also recommended that Mr. Logan and Mr. MacDonnell bring trial attorneys to work group sessions for additional information and insights. The Chair suggested that Mr. Logan's work group might also obtain input from the Supreme Court's Commission on Victims in the Courts ("COVIC"). The Chair concluded by stating that these mitigation discovery proposals would be considered at a future meeting of the Oversight Committee.

**4. Capital Case Statistics.** The Chair noted that staff's data summaries for October, November, and December, 2008, were available on the Committee's web page. These data summaries were compiled pursuant to a recommendation set out in the Committee's November, 2008, report.

Judge Donahoe provided his data. One set of his data covered all of calendar year 2008, and the other was for the month of January, 2009, through the 20<sup>th</sup> day of the month. In summary, his data is as follows:

- For 2008: 41 cases were filed, 29 cases were terminated, and 44 resolution management conferences were conducted.
- For 2009, through January 20<sup>th</sup>: one case was filed, 2 cases were terminated, and 11 resolution management conferences were conducted.

Judge Donahoe noted that as of January 20, 2009, his data showed 138 capital cases pending in the Maricopa County Superior Court, of which 4 were *Ring* remands and 3 were other remands.

Mr. MacDonnell cited the value of standardizing and defining capital case data, which had been recommended in the Oversight Committee's November, 2008, report to the Arizona Judicial Council. Using data he had acquired before as well as after that recommendation, Mr. MacDonnell provided a handout to the members that included a chart showing the total number of pending capital cases in Maricopa County, the new filings and case terminations ("ins and outs"), and a trend line. Mr. MacDonnell noted that this data indicated that the "ins and outs" were flat. Mr. MacDonnell provided additional data showing that capital case aging was increasing.

**5. Maricopa County capital case processing.** The data led to a discussion on case processing.

Judge Donahoe stated that he has at least 15 judges qualified to try capital cases, and that these judges can try as many capital cases as are ready for trial. Judge Donahoe introduced his assistant presiding criminal judge, Judge Timothy Ryan, who addressed the Committee.

Judge Ryan advised that he monitors capital case scheduling. He stated that attorney calendar conflicts reflect an attorney readiness issue rather than a court availability issue. He also noted his impression that there did not appear to be an adequate number of mitigation specialists, so that the mitigation specialists had heavy case loads; and that these heavy case loads often required 18 to 24 months for the mitigation specialists to complete their investigations.

Mr. Logan told the members that he had received no complaints from lead defense counsel concerning a shortage of mitigation specialists. Mr. Logan explained that he assigns a lead attorney to a capital case, and that lead counsel selects a second chair and a mitigation specialist. In the process of selecting a mitigation specialist, the lead attorney and specialist are supposed to assure that the specialist has sufficient time to work on the case.

**ACTION:** Mr. Logan will inquire further whether there might be a shortage of available mitigation specialists.

*Draft Meeting Minutes: January 29, 2009*  
*Capital Case Oversight Committee*

Judge Ryan observed that prosecutors also have full schedules, and on occasion, when a particular prosecutor is unavailable, the victim wants a continuance so that the assigned prosecutor will handle the trial. Judge Ryan attempts to have a conference one month before the trial date to screen for scheduling issues. He noted one case that was able to start on the designated trial date because another prosecutor filled in during jury selection until the assigned prosecutor became available. Judge Ryan stated that the court is committed to addressing trial scheduling. He cited advance notice to the court as a key for dealing with scheduling issues. Judge Ryan also warned of the pending retirements of both prosecutors and defense counsel as having a potential impact on scheduling.

Judge Ryan informed the Committee that when one of the capital trained judges is assigned to a civil calendar, with a suitable courtroom, that he is requesting that capital cases remain with that judge, and that this process increases the number of judges and courtrooms which can be used for trials of capital cases. Judge Donahoe advised the Committee that if a capital case is ready for trial, a judge with a courtroom will be available.

**6. New D.O.J. regulations.** Mr. Cattani updated the Committee on new Department of Justice regulations which will affect post-conviction proceedings.

Mr. Cattani explained that the opt-in provisions of the federal legislative scheme were intended to provide a quicker disposition of federal court reviews of a state's capital convictions, as long as the state provided competent defense counsel and an adequate method of compensating defense counsel. The United States Attorney had the task of preparing regulations to implement the federal legislation.

In December, 2008, the United States Attorney promulgated regulations, to become effective on January 12, 2009. The Arizona Attorney General had planned to submit an application for "opting in" shortly after that date. Four days before the effective date of these new regulations, a federal court for the Northern District of California issued an order restraining the Department of Justice from implementing the regulations. On January 20, 2009, that court issued a corollary preliminary injunction.

Notwithstanding this development, Mr. Cattani advised that the Arizona Attorney General may still submit to the U.S. Attorney its application to opt-in. Even if the application is approved, an appeal to the U.S. Supreme Court, taking at least a year, is anticipated. It is Mr. Cattani's belief that if Arizona is ultimately accepted as an opt-in state, private defense counsel might have greater incentive to take capital cases involving post-conviction relief.

**7. Proposed Rule Amendments.** Ms. Hallam sought the Committee's recommendation on two proposed amendments to the Arizona Rules of Criminal Procedure.

Rule 31.13(f). This rule concerns the time for filing appeals briefs in capital cases. As a matter of practice under the existing rule, a Supreme Court staff attorney conducts a telephonic conference with counsel to establishing a briefing schedule. This schedule varies based on

individual circumstances, and therefore there is little uniformity in briefing schedules. Moreover, under this process, there are frequent requests for extensions in which to file the brief.

The proposed rule amendment would establish a uniform time (90 days after notice of completion of the record for the opening brief, 60 days thereafter for the answering brief, and 30 days thereafter for the reply brief.) A motion to extend these limits could still be filed if the time was inadequate.

Mr. Lieberman inquired if 90 days was sufficient time for preparing the opening brief. Ms. Hallam advised that for the past ten appeals, one opening brief had been filed at 100 days after the notice, another had been filed at 105 days thereafter, and on eight other cases, multiple extensions were requested after the 90 day limit.

**COMMITTEE RECOMMENDATION:** There was nonetheless no objection to the proposed rule change, and the Committee would support it.

Rule 6.8(c). This proposed amendment originated from a situation in which an attorney was thought qualified to handle a capital appeal, but lacked the experience of an evidentiary hearing in a post-conviction proceeding, which is required for qualification under Rule 6.8(c). Ms. Hallam proposed addressing this situation, and perhaps attracting a great number of attorneys to handle capital appeals, by setting out separate requirements for appellate attorneys and post-conviction counsel, rather than a single qualification under this rule. While there would be no change in the existing qualifications for post-conviction counsel, the requirement of having the experience of participating in a PCR evidentiary hearing would be deleted for appeals counsel.

**COMMITTEE RECOMMENDATION:** There was no objection to this proposal, and the Committee would support such a rule change.

**8. Capital case processing in Pima County.** The Chair invited Mr. Rick Unklesbay, senior trial counsel with the Pima County Attorney, to address the members on capital case processing in Pima County.

Mr. Unklesbay began by noting that in Pima County, most capital cases are pled or go to trial within 18 to 20 months from the date of arraignment. It is Mr. Unklesbay's belief that the 18 month time limit of Rule 8.2(a)(4) is reasonable and realistic, and that any longer time, as has been proposed, would be objectionable. He felt that victims especially would object to a longer time.

Mr. Unklesbay cited the low capital case volume in Pima County, contrasted with that in Maricopa County, as being a substantial factor in the timely processing of capital cases in Pima County.

Mr. Unklesbay provided the members with a handout showing the pending capital cases in Pima County as of January 12, 2009. There were 16 cases on this list. No Pima County judge had more than one capital case, with the exception of one judge, who had two cases. There were 12

different defense counsel assigned to these 16 capital cases. Four of those attorneys had two cases; the other eight attorneys each had a single case.

Three of the 16 cases on this handout had aged over 1,000 days since the arraignment; but two of those cases were *Ring* remands, and the third case involved a lengthy Rule 11 proceeding. Of the remaining 13 cases, the oldest was 701 days since arraignment; and this figure of 701 days was the date from arraignment to the next calendar event, which is a trial date set in February, 2009. 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 number of days to the next calendar event was 476 days. [Note: Staff's December, 2008, data summary showed the average number of days since arraignment for the 131 non-*Ring* capital cases then pending in Maricopa County was 799 days.]

Mr. Unklesbay believed that the low ratio of judges to cases (typically 1:1) permitted better case management and the enforcement of event deadlines. Mr. Unklesbay believed that the low ratio of defense counsel to cases also promoted more prompt resolution of each case because counsel was not dividing time among several cases.

Mr. Unklesbay cited several other factors which promoted timely disposition of capital cases. Pima County attracts mitigation specialists from Maricopa County and from other states, and each mitigation specialist in Pima County tends to have fewer cases than the specialists in Maricopa County. Judges enforce deadlines. There is a low turnover of attorneys in his office. Prosecutors solicit defense counsel input prior to filing a death notice, and that contributes to more selective decisions about which cases warrant a death notice. Few death-notice cases are resolved by plea bargain, and there is an expectation that once a death notice is filed, the case will go to trial.

Mr. Unklesbay explained that a death notice is filed in fewer than 10% of all first degree murder cases prosecuted by his office. For a period, the number was in the range of 6 to 7%, but because of some very recent filings, the number is now closer to 10%. This contrasts to about 30%, which was the rate for his office in the 1990's.

Mr. Unklesbay also explained that trials for capital cases are conducted five days a week. On four days, when the court has other matters on its calendar, trial sessions are still held in both the morning and the afternoon; but on the court's "dark day", an even longer day-long session can be held. Most juries are selected in a week; a lengthy jury selection process consumes two weeks. Most capital case trials are concluded within four to six weeks.

Mr. Unklesbay then invited questions and comments.

One Committee member commented that if only a fourth of the Maricopa County cases in which a death notice was filed actually concluded with a death sentence, then perhaps too many death notices were being filed, and that greater selectivity was needed.

In response to a question, Mr. Unklesbay stated that there was no need for mitigation discovery masters in Pima County. When ex parte motions are filed, there are typically no hearings. On

those few motions where a hearing is set, if the matter involves guilt phase issues, the prosecutor is present. The County Attorney has an open file policy, under which the prosecutors' files are fully accessible by defense counsel. Mr. Unklesbay also believes that there are good lines of communication between prosecutors and defense counsel, and defense counsel are not reluctant to ask for the prosecutors' assistance in obtaining records.

Responding to another question, Mr. Unklesbay stated that it's not unusual for a judge to deny a motion to continue, and he's unaware of any trial judge's decision denying a postponement motion being set aside by an appellate court. He noted that when motions to continue are granted, it is frequently for a shorter length of time than requested. He added that judges usually hold status conferences every sixty days, at which time defense counsel are asked if they are having any discovery problems. If counsel consistently denies any problems at these status conferences, a judge would not be receptive to a motion to continue which is subsequently filed.

The Chair on behalf of the members thanked Mr. Unklesbay for addressing the Committee. The Chair noted that the issues raised in Mr. Unklesbay's presentation would be revisited by the Committee.

The Chair asked the members to submit to staff as soon as possible any proposals or comments they had with regard to extending the existing time limit under Rule 8.2(a)(4). The proposals and comments which are received will be circulated by staff to the members before the next meeting. The Chair advised that the next Committee meeting will be scheduled for March, in anticipation of submitting the Committee's recommendations on this time limit issue to the Chief Justice by May 1, 2009.

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

There was no response to the call to the public.

The meeting was adjourned at 1:25 p.m.

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
March 5, 2009**

Members Present:

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

Guests:

Brent Graham  
James Beene  
Patricia Nigro  
Robert Shutts  
John Todd  
Chris DuPont  
Michael Terribile  
Jennifer Garcia  
Jerry Landau  
Theresa Barrett

Staff: Mark Meltzer, Tama Reily

=====

**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 January 29, 2009, Committee meeting were unanimously approved.

**2. Legislative Update.** Jerry Landau, the director of government affairs for the Administrative Office of the Courts, summarized four bills which were introduced in the current legislative session that had potential impacts on capital cases. One of these bills, HB 2318 (which would have made a gang initiation murder eligible for the death penalty), was recently stricken. Another bill, HB 2196 (which would have imposed a moratorium on the death penalty until the year 2024), was not given a hearing. Two other bills are pending: SB 1112 (which would repeal life with a possibility of release as a sentencing option for first degree murder, leaving only the options of natural life or death), and SB 1253 (which would add a drive-by shooting as a predicate offense for felony murder.) Mr. Landau responded to members questions concerning these bills. The Chair thanked Mr. Landau for providing information to the Committee.

**3. Status of the Anti-terrorism and Death Penalty Act Regulations.** Mr. Cattani advised the members that the comment period for these regulations was re-opened by the Department of Justice until April 6, 2009. The Arizona Attorney General's application to "opt-in" will be on hold pending the conclusion of the comment period.

**4. Report from the work group on a rule for mitigation discovery conferences.** Mr. Logan reported that he had spoken with Mr. MacDonnell on this subject, and they had exchanged draft versions of a proposed mitigation discovery rule. Mr. Logan was thereafter informed by a judicial officer that the mitigation master program was going to be eliminated. Because of an

*Draft Meeting Minutes: March 5, 2009  
Capital Case Oversight Committee*

expectation that the program might cease to exist, no further work was done by the work group on a draft rule.

**5. Maricopa County capital case processing.** Judge Donahoe provided additional information regarding capital case processing in Maricopa County.

Judge Donahoe reported that about 21,000 criminal cases had been filed in the Maricopa County Superior Court during the first seven months of FY 2009. The expectation was that for the full fiscal year, the total number of criminal filings would be between 36,000 and 40,000. During the initial seven months of fiscal year 2009, 532 criminal trials were conducted by the court. Judge Donahoe noted that the management responsibilities of the criminal division extend well-beyond its approximately 130 pending capital cases. Judge Donahoe stated that the Maricopa County Superior Court therefore intends to implement a different case management approach in order to promote more expedient processing of capital cases.

A decision was made by the superior court to strictly enforce the speedy trial limits of Ariz. R. Crim. P. 8.2(a)(4), which require capital cases to proceed to trial within 18 months of the arraignment date.

To accomplish this goal:

- Certain judges (to include Judges Granville, Steinle, McMurdie, Mroz, Duncan, and Kemp) will be assigned as capital judge managers. Each judge will manage approximately 20 capital cases.
- Capital judge managers will handle all discovery issues. If there is a need for an *ex parte* discovery hearing, a party will be required to proceed under Rule 15.9(b), Ariz. R. Crim. P. Mitigation discovery masters will soon be relieved of their duties.
- Case management conferences will be conducted by the capital judge managers in each case every sixty days. Counsel will be permitted to submit a written case management plan to the court, and if no plan is presented, the court will provide one to counsel. The intent of each plan is to have a capital case ready to go to trial in 18 months.
- All 26 judges in the criminal division will be qualified to try a capital case. One of these judges will be available for any capital case that is ready for trial. If the criminal division is occupied with trials of capital cases, the presiding judge has authorized the use of judges in the civil division to try other, non-capital criminal cases.
- The associate presiding criminal judge will continue to review all motions to extend capital case court dates, in order to assure consistency in rulings on these motions.

Judge Donahoe advised that a minute entry regarding discontinuation of the mitigation discovery conferences would go out shortly, followed by reassignments of the cases to one of the capital judge managers.

*Draft Meeting Minutes: March 5, 2009*  
*Capital Case Oversight Committee*

A discussion on the new approach to capital case processing in Maricopa County ensued. Members made these observations:

- There was an absence of any prior notice or advisement from the court of these anticipated changes.
- There are not enough attorneys in Maricopa County to meet the goals of this new approach.
- Qualified attorneys may be reluctant to accept additional capital case assignments if the cases must be ready for trial within 18 months.
- Attorneys who have been assigned capital cases within the past year may ask to withdraw due to an inability to meet the 18 month time limit, in light of their existing capital case load. If attorneys withdraw, these cases may not be reassigned because of the unavailability of any substitute counsel.
- While Pima County may be able to have case loads of one capital case per attorney, or at most two cases per attorney, because of the high number of capital cases in Maricopa County, and the limited number of qualified lead counsel in Maricopa County, the Pima County ratio of cases per counsel would be impossible to achieve in Maricopa County. There are only about fifty qualified lead counsel in Maricopa County, and if each lead counsel was assigned one, or even two, of the 130 to 140 pending cases, this would still leave many capital defendants without representation.
- The capital case backlog accumulated over time, and it will take more than 18 months to eliminate the backlog.

Judge Donahoe was asked how the court will deal with counsels' scheduling conflicts. Judge Donahoe replied that while calendar conflicts will be taken into consideration, consideration will also be given to those cases which have been pending for four or five years, and which are still not ready for trial. A suggestion was made that court representatives meet with stakeholders for a discussion concerning its change of approach. Judge Donahoe noted that the change had been discussed within the court, and the changes were supported by court administration.

**7. Proposed Amendment to Rule 8.2(a)(4).** The Chair noted that although R-07-005, which proposed an extension of the speedy trial limit in capital cases to 30 months, was not adopted by the Court at its September, 2008, rules agenda, nonetheless the Court had directed this Committee to further study the issues raised by that petition. One of the concerns was whether the 18 month time limit should be maintained if it had no credibility.

Accordingly, a proposed amendment to Rule 8.2(a)(4) was presented to the members for their consideration. Under this proposal, the 18 month time period would begin to run from the filing of the death notice, rather than from the arraignment date. This would effectively lengthen the time for pretrial preparation. A discussion on the proposal followed, during which the following comments were made:

*Draft Meeting Minutes: March 5, 2009*  
*Capital Case Oversight Committee*

- Defense counsel in Pima County appear to rarely request an extension of time under the new Rule 15.1(i) in order to allow presentation of mitigation evidence. Accordingly, 60 days would likely be the maximum period that the speedy trial time limit would be extended under this proposed amendment to Rule 8.2(a)(4).
- The Maricopa County Attorney usually files a death notice within 60 days after arraignment, and the notice is often filed within as little as 30 days after the arraignment. Only in exceptional circumstances is the filing date of a notice continued by stipulation under Rule 15.1(i) beyond the initial 60 days, and then the extension is only for an additional 30 days.

It was the consensus of the members that the proposed change to Rule 8.2(a)(4) would minimally address the situation because it would extend the speedy trial time limit by just two months, and the resulting, additional period of time would still not be sufficient for the required pretrial preparation.

The Chair noted that any rule which might be adopted would be statewide, and not local, although the situation giving rise to a rule change, for the most part, has arisen in Maricopa County. The Chair then inquired of the members whether a rule amendment providing for a 24 month period from either the arraignment date, or from the date of filing of the notice, would be adequate and acceptable. The Chair suggested that with the limited number of available defense counsel, some compromise on the time limit might be appropriate.

Judge Donahoe observed that if the time limit is extended to 24 months, the criminal division would enforce the 24 month limit.

Other members made these comments:

- The Maricopa County Superior Court should be allowed time to put its new approach into effect.
- The courts should not start down the slippery slope of extending case processing times.
- A time limit that does not work should not be enforced by the courts.
- The courts should be cautious about proceeding to trial in a hurried manner, as this might increase the incidence of reversible error, which would ultimately hurt victims.
- If the court is committed to adhere to the speedy trial time period provided by the rule, the announced change of approach by the criminal division may represent a real culture change.
- A capital case should proceed to trial only when it's ready, and not sooner. Rule 8.2(a)(4) should not be viewed in isolation. Rather, it should be considered along with Rule 8.2(d), which allows for extensions of time limits.

- There are reasons why some capital cases are old. Motions to continue were filed in these cases, and the judges, by granting the motions, found good cause or extraordinary circumstances warranting delays. These delays were justifiable under the ABA Guidelines and controlling case law, both of which require effective assistance of defense counsel.
- The ABA Guidelines are not the controlling standard, and the applicable case law requires a reasonable but not a prolonged investigation by defense counsel.
- A culture of delay perpetuates itself. A 24 month period may not reflect the reality of when a capital case could be ready for trial, because a case might be ready sooner than that. Some capital cases might even be ready for trial before 18 months, but the prevailing culture is to take a case to trial only after exhausting all available time.
- With the additional passage of time, the memory and credibility of a witness could be impaired.
- What would happen if the superior court's new approach reduced the backlog of cases, and 18 months became realistic again; would there still be any justification for a 24 month time limit?
- The backlog of cases might be reduced by having an independent panel, perhaps consisting of retired judges or experienced appellate prosecutors, review the pending cases. A panel could cull out those cases which the panel felt did not warrant a death sentence.
- The suggested panel would interfere with prosecutorial discretion.
- Prosecutors and defenders should meet early in the process to distinguish a case which would likely go to trial from one which should settle.
- The extensive data in the report of the Attorney General's Capital Case Commission indicated that the biggest factor in determining a death sentence was not mitigation evidence, but rather the nature of the crime itself, and the nature of the murder should be apparent at an early stage of the case.

The members then discussed Maricopa County data. This data has shown that over 70% of cases in which death notices are filed resolve without a death sentence. The consensus of the Committee was that both sides should make an earnest effort to identify those cases which are likely to settle, and they should conclude these cases as early in the proceeding as possible. This strategy could significantly reduce the backlog of pending capital cases, as well as save considerable resources.

The consensus of the Committee was that with the high volume of capital cases in Maricopa County, the 18 month time limit was not realistic at the present time. However, the superior court's new approach should be followed to see what results.

*Draft Meeting Minutes: March 5, 2009*  
*Capital Case Oversight Committee*

The Chair suggested that the Committee reconvene next month to continue the discussion on time limits. The focus of the next meeting should include consideration of:

- Whether a 24 month time limit is appropriate in light of the Maricopa County Superior Court's new approach to capital case management; and
- Whether it's possible to identify at an early stage of a capital case those specific factors which will likely lead to a resolution of the case without a death sentence.

The Chair invited members to submit to staff any proposals for rule changes, as well as other comments on the issues before the Committee.

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

There was no response to the call to the public.

The meeting was adjourned at 1:25 p.m.

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
April 9, 2009**

Members Present:

Hon. Michael D. Ryan, Chair  
 Hon. Gary Donahoe  
 Hon. Ronald Reinstein  
 Kent Cattani  
 Donna Hallam  
 Dan Levey  
 Marty Lieberman  
 James Logan  
 Phil MacDonnell  
 Brent Graham, proxy for Paul Prato  
 (All members present)

Guests:

Hon. Timothy Ryan  
 James Beene  
 Sally Wells  
 Robert Briney  
 Bruce Peterson  
 John Todd  
 Dale Baich  
 Jennifer Garcia  
 Diane Alessi  
 Patricia Nigro  
 Cassidy Crossen  
 Theresa Barrett

Staff: Mark Meltzer, Lorraine Nevarez

=====

**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 March 5, 2009, Committee meeting were approved without objection.

**2. Update on capital appeals and petitions for post-conviction relief.** Donna Hallam provided current data as follows. There are 19 pending capital appeals. An answering brief has been filed in the majority of those cases.

There are 15 defendants on whose behalf a petition for post-conviction relief notice has been filed, but who still require the appointment of counsel. The oldest of these cases dates to August, 2006, which is when the underlying conviction was affirmed on direct appeal. Counsel was recently appointed on another PCR proceeding in which the conviction was affirmed on direct appeal in August, 2006. A new attorney has been added to the appointment list for PCR counsel.

A discussion followed about utilizing the same counsel for both a state petition for post-conviction relief and for a federal habeas corpus petition. An arrangement to permit this has been explored recently by state and federal agencies. One possibility would have state PCR counsel continue as counsel in federal habeas proceedings. An alternative would have federal counsel handle the state and federal petitions, although under this scenario, an issue might arise pursuant to A.R.S. section 13-4041. Another alternative would be to utilize county public defenders for PCR cases arising in another county; this might minimize conflicts of interest. It was brought to the members' attention that the time frames for PCR proceedings have become

longer since the Attorney General's Capital Case Commission Report, which was issued less than ten years ago.

Ms. Hallam will draft petitions for amendments to two rules of the Arizona Rules of Criminal Procedure, which the Oversight Committee had discussed at its January 29, 2009. One of these petitions will address Rule 6.8 (qualifications of counsel); another will concern Rule 31.13(f) (time limits for capital case appeals). Ms. Hallam advised that the petitions must be filed under the present rule cycle by January 10, 2010.

### **3. Judicial update on capital case management in the Maricopa County Superior Court.**

Judge Donahoe presented recent data. He reported that there are currently eight capital cases in trial in the Maricopa County Superior Court. As of the run date of his data earlier this month, thirteen capital cases had been resolved so far in 2009. Ten defendants had entered pleas in capital cases that provided for non-capital dispositions, and these ten defendants were awaiting sentencing. Two more defendants entered guilty pleas after the run dates of Judge Donahoe's data. There are 130 capital cases pending, all of which have been assigned to capital case judge managers. If the twelve cases where defendants have pled but have not yet been sentenced are subtracted from this pending case figure, there would be 118 pending active capital cases in the Maricopa County Superior Court. Six notices of intent to seek the death penalty have been filed this year.

In June, a Pennsylvania judge will provide further training for the superior court judges on capital case resolution.

### **4. Update by trial attorneys on capital case management in the Maricopa County Superior Court.**

Mr. Logan reminded the members that he counts potential capital cases as well as cases in which a notice has been filed, because he must staff potential cases. Mr. Logan's count was 118 cases in which a death notice has been filed, eight potential cases, and six remands, for a total of 132 cases. Mr. Logan reported that all potential and active capital cases are fully staffed, or are in the process of being fully staffed. Mr. Logan added that the established defender offices also have their capital cases fully staffed, inasmuch as those offices do not accept cases if adequate staffing is not available. Mr. Graham confirmed that the Maricopa County Public Defender has fully staffed the capital cases in his office.

Mr. MacDonnell reiterated Judge Donahoe's report of a number of recent pleas in capital cases, and he added that pleas in additional cases may be forthcoming. The county attorney's study about which cases merit the death penalty, based on jury verdicts, is ongoing. In the future, Mr. MacDonnell anticipates a reduced number of death notices being filed, and an increase in case resolutions.

Mr. Levey inquired of the members why some older cases may have trial dates later than newer cases. Judge Donahoe noted that with the superior court's new approach, consistency is being sought in case management. Trial dates have been set for cases which previously did not have dates. Judge Ryan affirmed that judges are now entering appropriate orders and actively managing cases. He noted that at the same time, judges do not want to rush a case to trial and cause error.

**5. Continuing discussion from the March 5<sup>th</sup> meeting regarding speedy trial limits in capital cases and early case resolutions.** Oversight Committee staff reported the results of a survey of Arizona county attorneys, excluding Maricopa and Pima, on capital case aging. Thirteen of thirteen county attorneys responded to the survey. There are eleven capital cases pending in these thirteen counties. The average age from arraignment of these cases is over 32 months. This compares to an average age since arraignment in Maricopa County of 27 months. Staff's conclusion was that low judge/attorney to capital case ratios do not necessarily result in speedier times to disposition.

Judge Donahoe believed that an explanation rests with the lack of excess capacity to try capital cases in the smaller counties. Non-capital cases also need to be processed and tried in these counties, and a smaller county may lack adequate judge and attorney resources to speedily resolve all case types. Some counties may not have sufficient capital qualified defense counsel, and may need to import attorneys and mitigation specialists from outside the county. It was Judge Donahoe's opinion that a county's excess capacity of judges and attorneys was the best predictive factor of its ability resolve capital cases in a timely manner, and that counties which have that excess capacity should establish the speedy trial standard for other counties.

Judge Reinstein inquired about the average times to trial on capital cases in other metropolitan courts. He asked whether 18 months should be considered an aspirational time limit, or whether any comparable time is actually being achieved in other jurisdictions. He added that whatever time limit Arizona uses should be a realistic one. The Chair concurred that the Oversight Committee needs to see time limit data from other urban courts, such as those in Florida, Virginia, Texas, and California.

**ACTION:** Mr. Cattani volunteered to search for the requested information. He will find the speedy trial time limit provided by statute or rule for capital cases in other jurisdictions, and compare that time period with the actual length of time it is taking to go to trial or to resolve these cases. Oversight Committee staff will assist Mr. Cattani in researching and compiling this data for the next Oversight Committee meeting.

Mr. MacDonneell suggested that if possible, an attempt should be made to use Arizona time measurement parameters, so that the data from these other jurisdictions will be a fair comparison to Arizona's data. For example, Arizona measures its speedy trial timeline in capital cases from the date of arraignment, and it would be meaningful to compare the data from other jurisdictions along a similar time line.

Members also observed that some capital cases in Arizona may have unique circumstances that contribute to the complexity or aging of the case. For example, it is known that some pending cases in Maricopa County have had, or may have, postponements because of the illness or retirement of one of the assigned trial attorneys or judicial officers.

Judge Ryan addressed the merit of having Rule 17.4(a) conferences early in a capital case. These conferences would, among other things, provide a means for the victim to interact with the court. The court could explain the capital case process to the victim, so that the victim

understands the nature of the proceedings and the time requirements of the case. The victim could provide input on whether the case should be a capital one. Mr. MacDonnell observed that the county attorney attempts to be sensitive to the victim's situation, and that the passage of time is often a part of the process for a victim. Judge Ryan noted that the courts also have sensitivity to the victim, and that listening to the victim, explaining the process, and answering questions can be helpful. Mr. Logan commented that a series of conferences could be beneficial. During the course of their discussion, members expressed that some capital cases are truly death penalty cases, and as to these cases, early and frequent resolution conferences may have little effect.

Judge Reinstein updated the members on the status of a Department of Justice training grant that had recently been obtained by Maricopa County. The Administrative Office of the Courts, through staff in the Education Services Division, will now administer the grant. A curriculum development meeting for courses conducted under this grant will be held at the National Judicial College in Reno, Nevada, next month. It's anticipated that capital case resolution will be included in the curriculum. Judges can now participate in the program, and two Maricopa Superior Court judges, as well as Mr. Cattani, will attend this curriculum development meeting.

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

There was no response to the call to the public.

The Chair recommended that the next Oversight Committee meeting be deferred for a few months. This will permit research to be conducted on case processing times in other jurisdictions. This will also allow time to assess the early progress of the new capital case management approach in Maricopa County.

The meeting was adjourned at 1:05 p.m.

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
October 30, 2009**

Members Present:

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

Guests:

Hon. Timothy Ryan	John P. Todd
Hon. Andrew Sonner	Paul Julien
Thomas Charron	Robert Shutts
Peter Gilchrist	Mary Durand
Bennett Brummer	Vikki Liles
Joseph Trotter	Theresa Barrett
Bob James	Rena Glitsos
Dale Baich	Diane Alessi
Jennifer Garcia	James Haas

Staff: Mark Meltzer, Lorraine Nevarez

=====

**1. Call to Order and Approval of the Meeting Minutes.** The meeting was called to order at 12:10 p.m. The minutes of the April 9, 2009 Committee meeting were approved without objection.

**2. Judicial update on capital case management in the Maricopa County Superior Court.** Judge Donahoe introduced an American University team that has been conducting a review of capital case management in Maricopa County through a grant from the Bureau of Justice Assistance. Team members who were present included the Hon. Andrew Sonner, an appellate judge from Maryland; Thomas Charron and Peter Gilchrist, district attorneys from Georgia and North Carolina; and Bennett Brummer, a Florida public defender. Two other team members not present were the Hon. Terry Ruckriegle and Michael Judge. The team members met this past week with a variety of Arizona stakeholders, including judges, prosecutors, and public defenders.

Judge Donahoe receives updated capital case data every Tuesday, and he presented to the committee his statistics as of Tuesday, October 27, 2009. There were 106 pending capital cases. Five of these cases were in trial. Seven cases were set for sentencing. Approximately half a dozen cases are set to go to trial before the end of this year. Forty-eight cases have been resolved during calendar year 2009 as of October 27<sup>th</sup>. Judge Donahoe commended his criminal bench for their efforts in resolving and trying these cases.

**3. Update by trial attorneys on capital case management in the Maricopa County Superior Court.** Mr. MacDonnell agreed that there has been a recent reduction in the county's capital case inventory, but he believes that data must be examined for a time period greater than one

year to establish long term trends. He noted that a number a cases presently under consideration by his office for the death penalty may increase the court's inventory before the end of the year.

Mr. Logan stated that while the number of "potential" capital cases stood at four only two months ago, at the present time there are twelve cases that he is tracking in which a death notice might be filed. He added that there are four other cases in which a stipulation has been filed under Rule 15.1(i)(1) to extend the time for filing a notice that the state is seeking the death penalty, so that potentially more than a dozen new capital cases may become active in the near future.

The discussion turned to the availability of trial counsel. Mr. Shutts advised that the county attorney has assigned new prosecutors to cases that were ready for trial because the previously assigned teams were in trial on other cases. Mr. Logan informed the committee that he is having problems staffing the defense teams. He stated that because the court now enforces the eighteen month time limit, defense counsel have had to reduce their case loads, and he is having difficulty locating other qualified counsel to accept appointments on these cases.

Judge Donahoe stated that either he or his designated judge hears motions to continue in capital cases.

The following comments were made by members:

- The first sentence of Maricopa County Superior Court A.O. 2009-108, which states: "the Arizona Supreme Court has ordered that capital cases shall be tried within eighteen months from arraignment" should not be construed to mean that the Supreme Court has ordered the implementation of any speedy trial requirements other than as set forth in Rule 8.2(a)(4).
- A group of experienced individuals should endeavor to identify factors which might assist in predicting death sentences that might not withstand appellate review. The application of these factors to pending cases might assist in screening out those cases which are not truly death penalty cases.
- Because capital cases are factually intensive, it might be difficult to determine what a fact finder might ultimately decide merits a death sentence.
- Two-thirds of capital cases that proceed to trial in Maricopa County result in a death sentence.
- In contrast, only about twenty-five percent of the cases in which a death notice has been filed in Maricopa County result in capital convictions. This circumstance causes a diversion of limited resources on the remaining seventy-five percent of these cases. If cases warranting a death notice are appropriately selected, ninety percent or more of the cases should result in a death sentence.

- The strict enforcement of Rule 8.2(a)(4) time limits that results in a reversal by a reviewing court would be counterproductive.

**4. Update on capital appeals and petitions for post-conviction relief.** Ms. Hallam advised that there are twenty-three capital appeals pending before the Arizona Supreme Court. Eleven of these cases have “2009” case numbers, and six have “2008” case numbers. Each justice has been assigned two at-issue capital appeals. There are eighteen petitions for post-conviction relief in capital cases for which defendants are unrepresented by counsel. Appointments might be made in three of these cases in the near future, which would reduce the number to fifteen. One attorney recently accepted an appointment on a capital PCR petition on a pro bono basis.

Mr. Lieberman advised that while his office may take another case, the office is in a dire budget situation. One attorney position that is funded through an Arizona Criminal Justice Commission grant may not receive grant funding next year. The state budget for the State PCR Defender’s office may be cut by fifteen percent. The two attorneys currently on staff are not Rule 6.8 qualified. He has one mitigation specialist, one part-time investigator, and one office assistant/paralegal. His office is prohibited from sponsoring or funding training, and he cannot give advice to private attorneys on PCR proceedings. He has proposed that his office be allowed to give advice and to provide training on capital PCRs, and that the statutory limits on the size of his staff be removed.

Thereafter members made these comments:

- Private law firms might be reluctant to accept a capital case PCR because of the economic crisis, but perhaps these firms should be approached again.
- Pro bono counsel may want to select a particular case rather than having a case randomly assigned.
- Pro bono counsel may wind up paying a portion of capital PCR expenses out of their own pocket because public reimbursement is insufficient.
- Public defender offices should accept PCR appointments if there is no conflict.
- Few public defenders meet the qualifications for capital PCR counsel.
- Issues that have to be considered on PCR appointments include the qualifications of counsel, the available resources of the attorney or of the office accepting the appointment, and whether any conflicts of interest exist.

The Chair concluded the discussion on appeals and PCRs by noting that the increasing number of capital case dispositions at the trial court level places additional pressure on the Supreme Court’s resources. The use of judges from the Court of Appeals may be necessary to resolve a higher volume of capital appeals.

**5. Capital training grant.** Paul Julien, a judicial education officer from the Education Services Division of the A.O.C., addressed the members concerning a capital case processing training grant. Mr. Julien explained how a prior grant application by Maricopa County to the Department of Justice, Bureau of Justice Assistance was resubmitted for statewide training. Pursuant to this submission, a \$100,000 grant was awarded earlier this month. The grant period is twenty-four months. The program will be used for the training of judicial officers, prosecutors, and defense counsel throughout Arizona. A model curriculum has been developed, and it will include recent legal developments, discovery issues, jury selection, mitigation, mental health and mental retardation considerations, practice issues, and case management. In response to a comment from Mr. Levey, Mr. Julien advised that the program may possibly include victim issues as well.

Judge Reinstein added that another grant has been obtained by the National Clearinghouse for Science, Technology, and the Law for a program on “forensic science in capital litigation” in Phoenix on November 19-20. This program is being offered to seventy-five prosecutors and defense attorneys throughout the western half of the United States. Several prosecutors and public defenders from Maricopa County will be attending.

**6. Comparison of capital case processing times in other jurisdictions.** Mr. Cattani presented the results of his informal research regarding capital case processing times in other states. He noted that he found only one state, Georgia, which like Arizona has a speedy trial requirement specifically for capital cases. Based on anecdotal information, he stated that the time for getting a capital case to trial in other states is “all over the board”, and varies not only by state but also by counties within a state. The longest time is in California, where it takes about four years for a capital case to advance to trial. Georgia and Ohio take about two years, Texas takes one to two years, and Tennessee takes about one year. Mr. Cattani submitted that the average time for a capital case to get to trial in those states with the death penalty is about two years.

The guest from Georgia, Mr. Charron, noted that the Fulton County courthouse shooting took about five years to go to trial, but that was partially because one of the victims was a judge, and it was difficult to find a trial judge without a conflict of interest. He added that there are about a hundred capital cases pending in Georgia.

The discussion turned again to resources. Members commented:

- The time to trial in any jurisdiction may be dependent on the availability of resources.
- In some jurisdictions in which there are inadequate resources, the court has required the prosecutor to withdraw death notices on selected cases that exceed available resources.
- An inquiry was made regarding whether a sufficient number of judges in Maricopa County are assigned to capital cases. It was noted in response that seven judges on the county’s criminal bench are assigned to the approximately one hundred pending capital cases; that is, that about one-quarter of the criminal bench is dedicated to only four-tenths of one percent of the county’s criminal caseload (100 cases out of a total of 40,000) that is capital.

- In response to another question about a late 10:30 a.m. daily start for a trial, it was noted that this limitation results from the time an inmate is delivered to the court by the sheriff rather than the court's schedule.
- Limited resources also place pressure on defense attorneys. The committee's inquiry should focus not just on the number of death notices that are filed, but rather on the availability of defense counsel to represent defendants in these cases, because without defense counsel, the cases cannot be processed.

Mr. MacDonnell provided data showing that between 2004 and 2009, the population in the county increased by 3.3 percent per year, and homicides increased by 2.4 percent yearly, yet the rate of capital filings went up by only 1.2 percent per year during that period.

- Cases that are going to trial now are three to four years old and are "ripe". Motions to continue in this group of cases usually fail to establish good cause for postponements.
- Certain cases should be resolved short of trial but sometimes defendants in these cases decline to accept reasonable plea offers.
- Changes in case law from the United States Supreme Court also contribute to delays in processing capital cases.

**7. Discussion of a draft progress report to the Arizona Judicial Council.** Administrative Order 2008-93 requires the Oversight Committee to submit a progress report to the Arizona Judicial Council in December 2009. Committee staff provided a draft report for consideration by the members, and the following comments were made concerning the draft:

- Mr. Levey is now the Director of Victim Services for the Arizona Attorney General.
- Numbers between twenty-one and ninety-nine that are spelled out should be hyphenated.
- It is questionable whether trends can be established when data is available for only a limited period.
- A delay in the appointment of counsel can become prejudicial because of the destruction of relevant records.
- Victims generally want capital cases concluded as quickly as possible and with the imposition of a death sentence.
- At pretrial conferences, victims want answers to their questions. They want to be recognized, heard, and understood.

- The report should reflect that some members of the Oversight Committee have concerns about defense counsel being required to try a case in eighteen months when counsel are not sufficiently prepared.
- The extension of the speedy trial time limit by at most sixty days, which would result from the eighteen month time limit running from the filing date of the death notice rather than from the date of arraignment, is totally inadequate. As a practical matter, the extension could be as short as a few days. An extension should be long enough to be meaningful.
- The proposed change from the date of arraignment to the date the notice is filed is logical but the eighteen month time period should not be extended. Eighteen months may be aspirational but progress is being made in reducing the case inventory.
- An extension of the time limit will be a start down a slippery slope.
- The courts will enforce whatever time limit is provided by the rule.
- The eighteen month period would be more practical if there were fewer capital cases.
- It's difficult to predict the number of capital cases that will be filed.
- Capital cases need to be tried without reversible error.
- Some defense attorneys have three or four capital cases, but they have had three or four years to prepare the cases. If the time limit is eighteen months, case loads of defense counsel will need to be limited.

Mary Durand, an experienced mitigation specialist, was permitted to address the committee. Ms. Durand reminded the members that mitigation specialists must comply with ABA standards, and typically this requires 800 to 1000 hours of a specialist's time for a capital case. She noted that some specialists in Maricopa County have as many as eight capital cases. She also noted that the most important time in a complex capital case is the first forty-eight hours after arrest, when the defendant's mental state can best be assessed and when statements and other evidence can be acquired. Under current procedures, however, a capital defense team is often not in place until sixty days after the arrest. She stated that the prosecutor frequently goes to the crime scene, and a defense representative should be available to go to the scene too. She added that delay in appointing the defense team may lead to the destruction of records and notes. Ms. Durand submitted that eighteen months is "not even close" to an adequate time to prepare for trial, and that twenty-four months would be appropriate only with a reasonable case load.

**Motion:** At this point a motion was made to adopt the draft report. The motion was seconded.

The motion passed unanimously. CCOC 2009-01.

A request was made that the members vote specifically on the two recommendations made in the draft report.

**Motion:** A motion was then made and seconded to amend the proposed text of Rule 8.2(a)(4) in the draft report to provide that the speedy trial time limit in a capital case be twenty-four months from the filing of the notice of intent to seek the death penalty, rather than eighteen months from the date of filing of the notice, as set out in the draft report.

The motion passed: five in favor and four opposed. CCOC 2009-02. (The Chair did not vote. See A.C.J.A. §1-104(F): “Approval of a majority of those voting shall constitute an action of the council.”)

**Motion:** A motion was made and seconded to extend the term of the Oversight Committee for one year, until December 2010.

The motion passed unanimously. CCOC 2009-03.

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

Rena Glitsos responded to a call to the public. Ms. Glitsos, a criminal defense attorney, observed that the accused has important rights of due process and to the effective assistance of counsel. She stated that when defense counsel makes a motion to continue, it constitutes an avowal to the court that the case is not ready to go to trial and it should be considered in that light. She added that not only must defense counsel deal with conflicting court dates, they must also consider the human side as well as constitutional aspects of their cases.

There being no further business before the committee, the meeting was adjourned at 2:00 p.m.