

**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

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**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.