

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
DRAFT 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

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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 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 fifteen 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 using 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 under A.R.S. section 13-4041. Another alternative would be to use 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 it takes for PCR proceedings to be completed has 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 meeting. 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 in which defendants have pled but have not yet been sentenced are subtracted from this pending case figure, there are 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, and that contract attorneys have informed him that they could take additional capital cases.

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. Levy 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 5th 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 thirty-two months. This compares to an average age since arraignment in Maricopa County of twenty seven 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 to resolve capital cases in a timely manner, and that the speedy trial standard should not be established based on case aging statistics from smaller counties.

Judge Reinstein inquired about the average times to trial on capital cases in other metropolitan courts. He asked whether eighteen 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 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. MacDonneill 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 instance, 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.