

# JUDICATURE

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## CAPITAL CASE CRISIS IN MARICOPA COUNTY, ARIZONA

A RESPONSE  
FROM THE  
DEFENSE

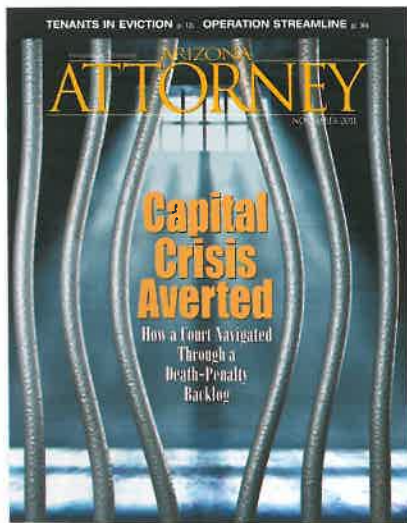
# CAPITAL CASE CRISIS IN MARICOPA COUNTY, ARIZONA

## A RESPONSE FROM THE DEFENSE

*The decision on whether to seek death is left almost entirely to the unfettered discretion of an elected County Attorney.*

by **CHRISTOPHER DUPONT** and **LARRY HAMMOND**

*Editor's note: this manuscript is in response to an article that follows on page 221 and first appeared in Arizona Attorney in November, 2011.*



In March 2007, there were more than 140 capital cases pending in Maricopa County Superior Court. Fifteen of those people charged with death eligible offenses were without legal counsel.<sup>1</sup>

To put the numbers in perspective,

at the high water mark there were 149 active death penalty cases in Maricopa County.<sup>2</sup> At the same time, Los Angeles County had 36 capital cases pending, Clark County (Las Vegas) had 36 pending, and Harris County (Houston) had 17. That means Maricopa County alone had 65 percent more cases pending than the next three highest death penalty-charging jurisdictions combined. While Los Angeles and Harris County had less than one capital case pending per 100,000 residents and Clark County had less than two per 100,000, Maricopa County had nearly four death penalty cases per 100,000 residents.<sup>3</sup>

While the various stakeholders in the court system had different motivations and methods for reacting to what has commonly been called the capital case crisis, this article presents the defense perspective.

### Arizona's murder statute and death-eligible offenses

In Arizona, the prosecution may elect to seek the death penalty if a person is charged with first-degree

murder, and there is probable cause to assert one of fourteen aggravating factors. Significantly, many of the aggravating factors listed in the capital murder statute are identical to statutory aggravators that apply to every felony offense. For example, the state might allege as an aggravating factor that a murder was, "especially heinous, cruel or depraved"<sup>4</sup> or that that the murder was committed "with the expectation of pecuniary gain."<sup>5</sup> Those same two aggravating factors could be alleged in any felony case<sup>6</sup> and are often alleged in first-degree

The authors are grateful for the research and writing assistance provided by Emily Downs, a recent graduate from the Phoenix School of Law.

1. See Pleading "Response of the Parties to Court's March 2 Directive." *State of Arizona v. Scan Dexter Pierce*, Maricopa County Nos. CR2006-154530-001-DT & CR2006-011386-001 DR, dated March 7, 2007.

2. ARIZONA SUPREME COURT CAPITAL CASE OVERSIGHT COMMITTEE. MINUTES, September 8, 2008. <http://www.azcourts.gov/Portals/74/CCTF/Minutes/minOS-09.pdf>

3. "Death-penalty Backlog Strains Justice System," Jahnna Berry, Arizona Republic, February 22, 2007.

4. A.R.S. §13-751(f) (6)

5. A.R.S. §13-751(f) (5)

murder cases that do not proceed as death penalty cases.

The failure to distinguish capital murder aggravators from other, regular felonies produces unreliable and arbitrary results. Pointedly, a study by Arizona counsel in a recent death penalty case found the Maricopa County Attorney alleged 78 percent of capital cases were especially heinous, cruel or depraved; the same County Attorney also alleged that 23 percent of non-capital first degree murder cases were especially heinous, cruel or depraved.<sup>7</sup>

Because the statutory capital sentencing scheme in Arizona is so inclusive, it does not serve to narrow the class of murders that are death-eligible. Instead, the decision on whether to seek death is left almost entirely to the unfettered discretion of an elected County Attorney.

As another example, many states allow for allegations of prior serious felony convictions as a basis for seeking the death penalty; after all, such prior felony convictions tend to prove an historic propensity to commit future serious crimes. Arizona is the only state in the Union

that permits an allegation of *concurrent* felony convictions. There are more than thirty felony offenses that qualify as serious pursuant to this section.<sup>8</sup> The practical result is that, from a single incident involving an armed robbery and a resulting murder, a defendant might be charged with felony murder and therefore would be death-penalty eligible. The felony murder would be predicated upon armed robbery, and the same armed robbery could then be alleged as an aggravating factor in the capital litigation.

Serious felony offenses are such a common circumstance in homicide cases in Arizona the Coconino County attorney filed this particular aggravator in 100 percent of the cases selected for capital prosecution; the Maricopa County Attorney filed this aggravator in 60 percent of such cases.<sup>9</sup>

In the absence of legislation meaningfully restricting prosecutors from seeking the death penalty, it is not surprising there are significant inconsistencies between counties, and between County Attorneys even in the same County.

Complicating this lack of legislative guidance and refocusing on Maricopa County, we are aware the Maricopa County Attorney has no written policy to determine which murders should qualify for the death penalty, and no written policy to identify which mitigating factors, whether taken together or in combination, would militate against seeking death. This is despite the 2006 recommendation from the Arizona Attorney General Capital Case Commission that "prosecutors develop written policies regarding the identification of cases in which to seek the death penalty, including a provision to solicit or accept defense input before seeking the death penalty."<sup>10</sup>

The result: the Maricopa County Attorney seeks the death penalty in nearly 50 percent of all first-degree murder cases. It is beyond the analytic aspirations of this paper to determine whether the Maricopa County Attorney in 2006 and 2007 intentionally increased capital case filings in order to achieve a political

or public relations benefit or to overwhelm the capital defense system, but it is important to point out that concurrent with a policy that included an extreme increase in capital case filings, the Maricopa County Attorney went to the legislature to introduce a bill that would have tightly restricted the time available for the defense to prepare for trial in capital cases and would have limited discovery in post-conviction proceedings.<sup>11</sup> At the same time, the County Attorney began making public comments blaming defense counsel for failure to efficiently manage caseloads as a reason for the extreme number of pending capital cases. According to then-Maricopa County Attorney Andrew Thomas, "Criminal defense attorneys do everything possible to delay...Too many criminal defense lawyers specialize in trying to confuse people... [such as when they blame the County attorney]for the current backlog of capital cases...The backlog is more correctly attributed to defense of only six cases...The backlog of capital cases could be eliminated simply by increasing defense caseloads to a more reasonable amount or making similar adjustments."<sup>12</sup>

### The Caseload Problem

Two states have statutorily limited caseloads for capital defenders. Washington State limits attorneys to no more than one open capital case at a time; and Indiana permits an attorney to represent one capital client and up to twenty other felony matters.<sup>13</sup> There is no such statutory provision, judicial directive or public policy that defines appropriate caseloads for capital defense attorneys in Maricopa County.

It is axiomatic that the amount of time an attorney may devote to any single case is inversely proportional to the size of the rest of his or her caseload. An attorney with one case can devote full attention to that case. This is a significant point that will be explored in more detail as we look at the experiences of capital defenders later in this article because capital trials require, on average, 3,557 hours of attorney time.<sup>14</sup> It is also important

6. A.R.S. §13-701 - Sentence of Imprisonment for Felony; §13-701(d) - Aggravating Factors: (d) (5) - Especially cruel, heinous or depraved; (d) (6) Pecuniary gain.

7. See Pleading "The Penalty of Death is Unconstitutional." *State of Arizona v. Steven Carroll DeMocker*, Yavapai County No.P1300CR20081339, filed February 16, 2010 by Larry Hammond, Anne Chapman and John Sears (Page 49).

8. A.R.S. §§751(I) & 13-705(P)

9. "The Penalty of Death is Unconstitutional." (Footnote 8, supra page 47)

10. Summary of Attorney General Janet Napolitano's Capital Case Commission Recommendations. Office of the Attorney General, State of Arizona, Capital Case Commission Final Report, June 5, 2006. <http://www.azag.gov/CCC/Final-Report.html>.

11. SB186, State of Arizona Senate, Forty-eighth Legislature, First Regular Session, 2007.

12. "Arizona logjam makes mockery of death penalty," Andrew Thomas, Viewpoint, Arizona Republic, February 18, 2007.

13. Affidavit of Jon Gould dated August 10, 2009, filed in *State of Arizona v. Demetrio Acosta Ortusastegui*, Case No. CR 2007-145282-001 DT

14. Jon Gould and Lisa Greenman. Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost, Quality, and Availability of Defense Representation in Federal Death Penalty Cases Preliminary Report on Phase One of the Research, September 2010. [http://www.uscourts.gov/defenderservices/FDPC\\_Content.cfm](http://www.uscourts.gov/defenderservices/FDPC_Content.cfm).

to note the time limit to begin a capital trial in Arizona is now 24 months from the time a notice of intent to seek the death penalty is filed by a prosecuting agency.<sup>15</sup> This right to speedy trial is guaranteed to both defendants and to victims, including the family of deceased victims.<sup>16</sup>

The reality of capital defense during the crisis was shaped by these two converging dynamics: a dramatic increase in workload (commonly six pending capital cases at any given time); and a tighter timeframe in which to investigate and present a defense.

While defense counsel reacted to the capital case crisis by accepting a higher workload, as explained in the companion article authored by Judges Rayes and Gottsfield and Commissioner Starr, the Superior Court understandably reacted by concentrating the efforts of its judges and administrators on processing cases more quickly.

Maricopa County Administrative Order 2007-023 set out a case management approach with the stated commitment to enforce the presumptive trial date of 18 months for capital cases.<sup>17</sup> The Court was successful as Deputy County Attorney Phil MacDonnell pointed out to the Arizona Supreme Court by providing 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 percent death verdicts."<sup>18</sup>

Heavy caseloads combined with shortened timeframes to investigate and litigate cases have had devastating effects on attorneys' ability to defend capital cases. This dynamic has produced very predictable results.

The death penalty conviction rate for those cases in which the prosecution filed a notice of intent to seek

the death penalty has grown from 6.3 percent in 1999 to 20.9 percent in 2009.<sup>19</sup> The death penalty rate for death penalty cases which actually proceeded to trial increased even more dramatically - from 10.3 percent in 1999 to 72.7 percent in 2008.<sup>20</sup> That means that for every three defendants charged with a capital offense who proceed to trial in Maricopa County two are sentenced to death. This rate sharply diverges from a rate of 25 percent of death sentences that went to trial in United States District Court.

The press for time has led to other notable trends in capital defense in Arizona. In researching data for this article, the authors reviewed all cases in Maricopa County that resulted in a death sentence from January of 2008 to October of 2011. We listed all motions filed in capital cases and each expert noticed by the defense as a potential witness. We also reviewed a sampling of the motions that had been filed. During this process, we found that very few original motions were submitted in those cases that resulted in a death sentence. The vast majority of pleadings were based entirely on templates readily available to members of the defense community through seminars and internet listservs.

It became apparent through our research that the defense community in Maricopa County adapted to the crisis in ways that in hindsight seem highly predictable. The common experience of discreet legal communities, the "local legal culture," has been studied and described in some detail.<sup>21</sup> According to Church, "Local legal culture is conceptualized as common practitioner norms governing case handling and participant behavior in a court." The study identified general agreement among

15. Rule 8.2(a)(4), Arizona Rules of Criminal Procedure.

16. Article II §§ 2.1 and 24, Arizona Constitution.

17. "PART 2 - The Capital Case Crisis in Maricopa County: What (Little) We Can Do About It" Hon. Robert Gottsfield and Marianne Alcorn. Arizona Attorney Magazine

18. Statement of Deputy County Attorney Phil MacDonnell to ARIZONA SUPREME COURT CAPITAL CASE OVERSIGHT COMMITTEE. MINUTES, June 26, 2008. <http://www.azcourts.gov/>

attorneys in particular legal communities, especially with respect to procedural matters, and those beliefs tended to manifest in actual practices. We found evidence of this phenomenon not just in the motion practice in the Maricopa County capital defense community, but also in normative workloads accepted by the individual practitioners. Despite caseloads that can be described as excessive (as many as six or seven capital cases pending at any given time), only two defense teams who represented clients sentenced to death from 2008 to the end of 2010 moved the court to withdraw due to an excessive caseload.

One team that moved to withdraw informed the court that its members had been either preparing or conducting three capital trials for three different defendants for nine of the preceding twelve months; they emphasized to the court that their client had a claim of actual innocence; and they reminded the court that lead counsel had recently retired and been replaced. The court denied the motion. In the other case, defense counsel advised the court he had six other capital cases pending and could not effectively represent a seventh; that motion, too, was denied.

Without written guidelines on caseloads, the local legal community is left with the impression that six capital cases is the standard, or indeed may be too few capital cases.

Here are typical predicaments of capital defense attorneys in Maricopa County<sup>22</sup>:

**Attorney 1** requested a trial continuance on behalf of a capital client he had represented for 13 months. He detailed the hours he had spent on other cases during those 13 months:

Portals/74/CCTF/Minutes/minOS-06.pdf

19. See Table 1.

20. See Table 2.

21. Thomas W. Church, Jr. Examining Local Legal Culture, 10 Law and Social Inquiry 449 (1985)

22. Identifying information is intentionally omitted as it is the intention of the authors to focus on the systemic rather than the individual. The specific instances are merely reported as evidence of the local legal culture.

Capital Defendant 1	1,118 hours
Capital Defendant 2	658 hours
Capital Defendant 3	165 hours
Capital Defendant 4	209.5 hours
	2,150.5 hours

**Attorney 2** accepted appointment in a case involving 74 felony counts, including 9 homicides, 1,400 items of evidence, 700 witnesses, more than 309 hours of jail tapes, 31 crime scenes and 22,000 pages of reports. The team of two attorneys reported involvement in nine other capital trials during the relevant timeframe. One attorney reported his *trial* schedule leading up to a 2009 motion to continue as such:

February 2007  
*State v. Capital Defendant 1*

March 12- May 7, 2007  
*State v. Capital Defendant 2*

July 2007-Sept. 2007  
*State v. Capital Defendant 3*

Sept. 2007- Dec. 2007  
*State v. Capital Defendant 4*

Feb. 2008- April 2008  
*State v. Capital Defendant 5*

It should be noted that one of these attorneys reported on his website that he tried other cases all across the state of Arizona. One of the attorneys candidly admitted in a court pleading he had had “[v]ery little if any time to prepare ...trial duties.” “Trial schedule and prep time left little if no time to actually even sit down with [defendant] to assist him in various important aspects of his defense.”

In one of the five capital cases listed above - that also resulted in a death penalty - the defendant waived jury trial on aggravating factors and then waived the presentation of all penalty phase witnesses. These stories were common knowledge among the local death penalty defense community.

Beyond speculation about whether the County Attorney may have delib-

23. Joe U. Smith, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984)

24. Judge Rayes assumed the position of Presiding Criminal Judge in March 2010; he was recently awarded Judge of the Year honors by the American Board of Trial Advocates.

erately contributed to the establishment of this disturbing legal culture, the question remains, “[w]hether the system so overworks the attorneys that it violates the Fifth and Sixth Amendments to the U.S. Constitution.”<sup>23</sup> The other question that will undoubtedly be raised: did the attorneys preserve the issue of systemic error in a way that will allow substantive review?

### Meaningful Reform

Reform for the court, the public defense agencies and private defense counsel has meant increasing caseloads while at the same time decreasing the time to trial. In an encouraging development, however, the Superior Court in Maricopa County has recently made real efforts at procedural reform. The Court has implemented two related procedures in an attempt to improve the quality of capital counsel in Maricopa County. Presiding Criminal Judge Douglas Rayes<sup>24</sup> has instituted hearings pursuant Rule 6.2 of the Arizona Rules of Criminal Procedure to question all appointed counsel at the time of appointment concerning their qualifications and their caseloads. Also,

TABLE 1.

	Total	Rate
First Degree Murder 1995-1999 <sup>1</sup>	524	
Death Notices	230	43.9%
Death Notice Trials	106	46.1%
Death Verdict after Trial	11	10.3%
Death Sentence per Death Notice 1995-1999	13	6.3%
Death Sentence per Case Resolved 2007-2009		25.0%
Death Sentence per Case Resolved 2009 <sup>2</sup>	10	20.9%
Death Sentence per Death Notice 2010	5	11.1%

1. Data from Office of the Attorney General, State of Arizona, Capital Case Commission Final Report, June 5, 2006. Data Set II Research Report, Exhibit 3. County Comparison: Processing of First-Degree Murder Indictments, 1995-1999. <http://www.azag.gov/CCC/Data%20Set%20II%20Report%20June%202002.pdf>

2. Data from Office of the Attorney General, State of Arizona, Capital Case Commission Final Report; Data Set II Research Report, Exhibit 3. County Comparison: Processing of First-Degree Murder Indictments, 1995-1999.

TABLE 2.

Jurisdiction	Death Penalty Rate at Trial
United States District Court <sup>1</sup>	25.0%
Maricopa County 1995-1999 <sup>2</sup>	10.3%
Administrative Order 2007-023, Capital Case Management	
Maricopa County November 2007-June 2008 <sup>3</sup>	72.7%
Maricopa County FY 2009 <sup>4</sup>	63.3%
Maricopa County FY 2010 <sup>5</sup>	64.7%

1. Statement of Jon Coult to ARIZONA SUPREME COURT CAPITAL CASE OVERSIGHT COMMITTEE MINUTES, January 18, 2011. <http://www.azcourts.gov/Portals/74/CCOC/Jan11CCOCMinutes.pdf>.

2. Data from Office of the Attorney General, State of Arizona, Capital Case Commission Final Report; Data Set II Research Report, Exhibit 3. County Comparison: Processing of First-Degree Murder Indictments, 1995-1999.

3. Statement of Deputy County Attorney Phil MacDonnell to ARIZONA SUPREME COURT CAPITAL CASE OVERSIGHT COMMITTEE MINUTES, June 26, 2008. <http://www.azcourts.gov/Portals/74/CCCF/Minutes/min08-06.pdf>

4. ARIZONA SUPREME COURT CAPITAL CASE OVERSIGHT COMMITTEE MINUTES, October 30, 2009. <http://www.azcourts.gov/Portals/74/CCOC/CapOversightMinutes10302009.pdf>

5. Statement of Presiding Criminal Judge Douglas Rayes, Maricopa County Superior Court to ARIZONA SUPREME COURT CAPITAL CASE OVERSIGHT COMMITTEE MINUTES, January 18, 2011. <http://www.azcourts.gov/Portals/74/CCOC/Jan11CCOCMinutes.pdf>.

Presiding Maricopa County Superior Court Judge Davis recently signed Administrative Order No. 2012-08 that establishes a Quality Assurance Panel to review applications for appointment as counsel in capital cases and to monitor performance of appointed counsel. Arizona may now be approaching the point where our courts are able to claim that steps have been taken to assure that the indigent capitally accused will have competent counsel with the time and resources necessary to provide representation consistent with the ideals of our profession.

The recently established Committee will be composed of representatives from the public defender organizations in Maricopa County who themselves have practiced at a level contemplated by the guidance afforded by the American Bar Association. Four other members of the Committee will be members of the private criminal defense bar who are experienced in capital defense. The application process contemplates that the Committee will undertake a reasonably thorough review of the applicants' training, experience and work product. Committee members will meet with each applicant and will also contact references who might be familiar with the applicant's work in other cases. The Committee will also be responsible for re-examining the qualifications or capacity to handle cases of those approved to do work in this highly specialized and difficult field.

This is a new undertaking in this State both for the Court and for the defense bar. Refinements will undoubtedly become evident as the Committee begins to develop the application and review process, but there is every reason to hope that the caseloads of death penalty lawyers in this County will go down and that the days of rote, repetitive and unfocused defense we have found in the last few years will also become a thing of the past.

### Post-Conviction

Recently, the current Maricopa County Attorney William Montgomery

addressed the post-conviction capital review process in this State. He argued that the state court post-conviction procedures in place are sufficient and obviate the need for further federal habeas corpus review. "I believe federal collateral review is unnecessary in contemporary times because state courts and the United States Supreme Court can competently determine whether an execution is lawful... Congress should not fund the Federal Public Defender's Office to represent state capital convicts in [habeas corpus proceedings]."<sup>25</sup>

The County Attorney's remarks predated the very recent decision by the United States Supreme Court in an important case from Arizona: *Martinez v. Ryan*, 2012 WL 912950 (U.S. Mar. 20, 2012). The Court was presented there with an important question. What assurance can a convicted criminal defendant have that a competent lawyer will at some point investigate whether trial counsel had provided ineffective assistance? Given what we have said in this article about the reasons to doubt whether trial counsel in death penalty cases had sufficient time and resources to provide the counsel the Constitution contemplates, some court somewhere needs to be able effectively to review the performance of defense counsel at trial. The Supreme Court stopped short of holding that inmates are entitled to competent counsel at post-conviction, but held that if the State fails to provide competent counsel, a federal court should not be precluded from considering the inmate's habeas corpus claims.

The decision is of signal import. It recognizes the value our adversary system attaches to the Constitutional right established almost 50 years ago to competent counsel at the trial level. *Gideon v. Wainwright*, 83 S.Ct. 792 (1963). Where there is reason to doubt--as there is in Maricopa County, Arizona--whether our indigent defense system has failed, we now have some reason for optimism that a competent lawyer will be appointed to explore the performance of death penalty trial counsel

after the fact. It is self-evident that this is an unsatisfactory answer for every stakeholder in the criminal justice system and should propel reforms that will assure competent representation at the trial level.

### Conclusion

By far the greatest number of death penalty cases in America has been brought here in this one County. Why this one County has ascended to the top of the case-volume list will continue to be debated. The judges have addressed the administrative problems occasioned by this dramatic increase, and at one level they have certainly succeeded. Cases have been processed. The pending case numbers are now significantly reduced. The crisis from this perspective may well be over—at least for now or until another prosecuting agency decides to increase death penalty filings. But, one is left with the disturbing possibility that some of those on death row, and some of those who entered a plea to avoid the threat of the death penalty, may well have been innocent. Others most certainly had mitigating circumstances that should have been developed and presented by trial counsel. We cannot know how many people are on Arizona's death row today who should not be there, but it is hard to conclude that there are none.

The changes discussed in this article, we hope, will reduce the risk that the system will fail in the future. ★

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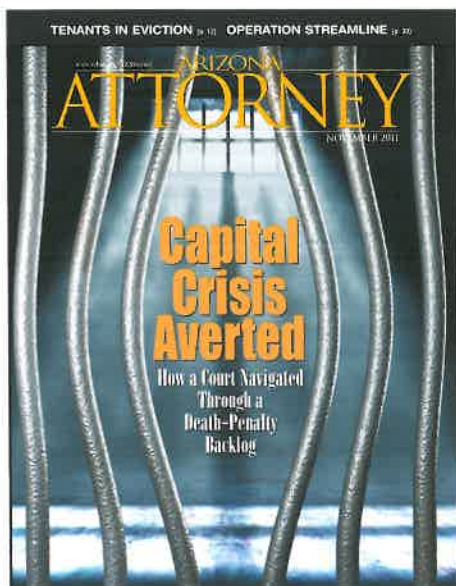
25. Facts make the case for the death Penalty," Bill Montgomery. My Turn, Arizona Republic, December 3, 2011.



# A Court's Remarkable Recovery From a Capital Case Crisis

by ROBERT L. GOTTSFIELD, DOUGLAS L. RAYES, and PATRICIA STARR

**Editor's note:** an earlier version of this article was published in *Arizona Attorney* in November, 2011.



In April and May, 2009, *Arizona Attorney Magazine* published, in two parts, "The Capital Case Crisis in Maricopa County: What (Little) We Can Do About It."<sup>1</sup> Our goal in that piece was to explain the complexities of the preparation and trial of such cases, the steps required, and the participants involved, as a way to explain why capital cases take so long to try. We also discussed how they eventually resolve at the end of a long state and federal appellate and post-conviction relief process. On average, the length of time from

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This article is dedicated to the memory of Marianne Alcorn, co-author of the original article.

The authors appreciate the feedback and reviews of this article provided by the following individuals: Paul Ahler, Mark Meltzer, Bob James, Hon. Paul McMurdie, Hon. Warren Granville, Hon. Ron Reinstein (ret.), Hon. Gary Donahoe (ret.), Hon. Tim Ryan, James Logan and Diane Alessi. They also appreciate the assistance of Susan Thomas and Dale Baich.

1. ARIZ. ATT'Y, April 2009, at 20; ARIZ. ATT'Y, May 2009, at 22.

arrest until execution of the sentence is 20 years.<sup>2</sup>

As of Aug. 31, 2008, the time frame used in the article, the capital caseload in Maricopa County Superior Court appeared dire, with few apparent options to reduce capital cases awaiting trial.<sup>3</sup>

As of July 1, 2011, almost three years later, the situation has changed drastically. This follow-up article sets forth the reasons for this turnaround and the continuing steps the court has adopted to deal with the problem of too many capital cases to try with an insufficient number of judicial officers, courtrooms,<sup>4</sup> experienced lawyers and mitigation specialists. We believe that what we describe may be used as a model for other jurisdictions faced with a similar problem, now or in the future.

### The Situation in August 2008

We made the following observations about the situation existing in Maricopa County Superior Court, where most Arizona capital cases are tried,<sup>5</sup> as of Aug. 31, 2008:

- There were 136 active untried capital cases<sup>6</sup> (this was one of the largest inventories of such cases in a single court in the United States).
- It was estimated that it would take the court nine years—until 2017—to process the 136 cases if no other capital cases were ever filed.<sup>7</sup>
- Since Jan. 1, 2008, and until the date of publication in April 2009, the court had received an average of 3.4 capital cases a month to try.
- Approximately 24 capital cases per year on average were resolved in Maricopa County Superior Court, usually 8 by trial and 16 by settlement (where

the notice of intent to seek the death penalty was withdrawn resulting in a plea) or otherwise.<sup>8</sup>

- The list of pending capital cases had grown over time because the rate of disposition had not kept pace with new case filings.

Built into the previous statistics and responsible in great measure for the crisis, the reader was asked to assume that:

- Capital cases take two to six months to try due to the three phases of such cases: the guilty /not guilty phase, the aggravation phase and the penalty/sentencing phase.
- With 240 work days per year, and 21 judges actually trying capital cases, the court could only try about 13 cases a year.

Since the first article:

- Experience has shown that capital cases take an average of approximately 41 days,<sup>9</sup> including trial and pre-trial hearings; instead of each capital judge being available for capital matters 240 days per year, because of law and motion days, there are on the average 175 days available per judge per year.
- Instead of 21 judges trying the cases, the court has dedicated six judges—about 25 percent of the judges assigned to the criminal bench—to handle capital cases; although judges other than the capital trial judges still try these cases, the majority are tried by the capital judges.
- Given recent history, it is estimated that instead of 13 trials per year, if all six capital judges did nothing but try capital cases four days a week, the

2. Final Report, Arizona Attorney General's Capital Case Commission, Dec. 31, 2002, as modified by the decision in *Ring II*, 536 U.S. 584 (2002), requiring juries and not judges find the facts making the defendant eligible for a death sentence, and a recession that limited resources for all participants. These original timeframes, as modified by the court, are now used as part of the PowerPoint presentation used by experienced Resolution Management Conference judges at their conferences with family members and other participants (see text *infra*). Discussed and shown graphically in the PowerPoint is the length of time it takes from arrest to trial (4-6 years); duration of trial (2-6 months); years from the start of the automatic appeal to the Arizona Supreme Court (§ 13-4031; ARIZ.R.CRIM.P. 31.2(b)) (2.7 years); months from defendant seeking a review by the United States Supreme Court and that Court's decision whether to accept review (7-9 months); once that Court accepts review and its decision (one year or more); from the denial of review by the Court to the filing by defendant of a petition for post-conviction (PCR) relief in the Maricopa County Superior Court (1-7 years); from the filing of a PCR to the ruling after a response and reply and possibly oral argument (6-7 months); from filing the petition for Writ of Habeas Corpus in the U.S. District Court to a ruling by that court (8 years); from the U.S. District Court decision affirming the conviction and death sentence to a review of defendant's petition seeking review by the Ninth Circuit (2-8 years); for United States Supreme Court to decide whether to review the Ninth Circuit decision based on petition for review filed by either party (8-7 months); and the average length of time from the imposition of the death sentence to the execution (20 years). If any court reverses the conviction, the process, of course, begins all over again.

3. The Capital Case Task Force (CCTF), a prime source for the original article, was established by the Arizona Supreme Court on Feb. 12, 2007 (Admin. Order No. 2007-18), which noted in a September 2007 report that

the capital caseload in Maricopa County was the result of a "confluence of factors including dramatic shifts in the legal rules on capital cases" and an increase in the number of new capital cases filed in fiscal year 2006 (41) combined with insufficient judicial resources for processing capital cases."

4. This is not a complaint. As noted in the original article (ARIZ. ATT'Y, April 2009, at 24), the court has been treated favorably by the Board of Supervisors over the years. Presently a 16-story tower is being built to house 22 criminal courtrooms with room to expand to another 10 divisions. In addition, and as noted in the original piece (*Id.* at 23), we have been in and are just emerging from a severe recession where departments of the county, including the courts, have had to slash budgets, with little sign of the recovery needed to get back to normal funding. We do point out that according to the Arizona Constitution (Art. 6, § 10) there should be in each county "one judge for each thirty thousand inhabitants or majority fraction thereof." Maricopa County, based on estimated 2009 census figures ([www.census.gov](http://www.census.gov)) showing 4,023,132 people, qualifies for 134 judges, but it only has 95 positions. Although we presently do not have the courtrooms for 39 more full-time judges, if the county's court system had been allowed to expand to keep up with population growth, the Maricopa County Superior Court would have been better able to address capital cases as well as the enormous increases in other types of criminal, civil, family and miscellaneous cases.

5. There are 16 states, the latest being Illinois, plus the District of Columbia, which are now non-capital jurisdictions, including prominently New York and New Jersey, mostly because of economic reasons. (See [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)). For instance, it is estimated that California spends \$125 million a year on its death penalty program. We stay with our initial position that you will not find in these pages a polemic against the death penalty, which is a public policy issue for the citizens of Arizona and the Legislature to consider.



court could try 25 capital cases per year. (There were 20 capital cases tried in Maricopa County in 2010, more than were tried in all the United States District Courts combined during that same time period.)

### The Situation in July 2011

Beyond all expectations, as of July 1, 2011, almost three years later, the situation has drastically changed:

- There are 66 (instead of 136) capital cases awaiting trial or other disposition.<sup>10</sup>
- It is estimated it will take less than three years (and not nine years)—or until 2014—to process those 66 cases if no other capital cases are filed.
- From Aug. 31, 2008 to July 1, 2011, the court has received an average of 2.2 capital cases a

6. This included five *Ring* remands (retrials of the penalty or sentencing phase only, because a judge rather than a jury issued the death penalty) with four capital cases requiring a retrial after a reversal. Because of the passage of time, there are no *Ring* remands left in the system today. If we had counted the 13 additional possible capital cases in the system (prosecution still had time to file a notice of intent to seek the death penalty), there were 149 actual (and potential) untried capital cases as of Aug. 31, 2008.

7. For analysis see ARIZ. ATT'Y, April 2009, at 23.

8. *Id.*

9. This is only an average. Some trials resolve more quickly, while others are lengthier.

10. Capital cases in the Maricopa County Superior Court are monitored and analyzed more thoroughly and frequently than any other type of case. Criminal Court Administration tracks all capital case data and provides updates to Criminal Department leadership on a weekly basis. The data contained in this section were compiled based on those weekly reports.

11. ARIZ. ATT'Y, April 2009, at 23.

12. ARIZ. ATT'Y, May 2009, at 26, referring to the Capital Case Task Force report of its findings to the Arizona Judicial Council on Oct. 24, 2007, *supra* note 3. See also Capital Case Task Force Minutes, Feb. 23, 2007, at 2.

month to try (rather than 3.4), with 13 cases sent in the last six months. (This filing rate still exceeds almost every jurisdiction in the country.)

- 15 cases have been resolved so far in 2011, and 1 case was being tried as of July 1, 2011; 15 more capital cases are scheduled to go to trial through Sept. 30, 2011.

Since July 2007, 183 capital cases have been resolved by the Maricopa County Superior Court and the parties, 47 by trial, and the rest by plea agreement or simply withdrawal of the death notice. Twenty-one different judges have handled these cases during that period. There were 41 pleas in 2009, 33 in 2010, and nine as of July 1, 2011.

Notably, the ratio of capital case filings to first-degree murder filings changed from 44.7 percent in fiscal year 2006 to 26.1 percent in fiscal year 2010. In other words, in fiscal year 2006, a notice of intent to seek the death penalty was filed in 47 percent of first-degree murder cases; in fiscal year 2010, a notice of intent to seek the death penalty was filed in 26.1 percent of such cases.

### How It Was Done

Three factors have in large part brought the crisis under control:

1. Maricopa County Superior Court adjusted its capital case management plan.
2. The court and the parties made successful use of Resolution Management Conferences.
3. The interim county attorney instituted a review of all existing capital cases.

### The Superior Court Steps In

A Capital Case Task Force (CCTF), chaired by Supreme Court Justice Michael D. Ryan, was established at the height of the crisis in 2007 by the Arizona Supreme Court. It included representatives from all the stakeholders: prosecution, qualified defense attorneys, and victims' rights organizations, as well as the Presiding Criminal Judge of the Maricopa County Superior Court.

The CCTF meetings provided opportunities for the parties to work together to find a means to more efficiently manage the surge of capital cases, caused in part by the then-County Attorney filing 41 capital cases in 2006.<sup>11</sup> However, the problem of resources was difficult to overcome. The system, as it existed, was not resourced for the capital case surge. There were limited numbers of capital-qualified attorneys willing to handle capital cases at the rate paid by the county.<sup>12</sup>

In January 2009, Judge Gary Donahoe, then the Presiding Criminal Judge, became convinced that the backlog could be addressed only by Superior Court enforcement of the existing speedy trial rules. Although the Rules of Criminal Procedure provided that capital trials were to be tried within 18 months of arraignment (Rule 8 was modified in Jan. 2011 to require trial 24 months after the state files a notice of the intent to seek the death penalty), because of the heavy caseloads carried by the capital attorneys and the limited number of mitigation specialists, the system had developed a reliance on trial continuances.

Judge Donahoe developed a case management plan to stringently enforce the speedy trial deadlines. To enact such a plan, significant additional court resources were necessary. For example, although capital cases comprised less than one percent of all cases filed in Maricopa County, the new plan dedicated 25 percent of the criminal judges to capital cases. This led to the Capital Case Management Plan.

### Capital Case Management Plan

In February, 2009, after vetting the plan with the criminal bench, the court rolled out the Capital Case Management Plan. The key components of the plan were:

- All capital cases were reassigned to six capital case management judges. Each capital case management judge was responsible for actively managing each case and, if available, trying the case. Active management included meeting with the lawyers at least every 60 days for case status conferences. It usually included questioning by the judge on the work that needed to be completed before trial and the work completed since the last conference.
- Firm trial dates were established. It was discovered that not all capital cases had trial dates. A firm trial date was set for each pending capital case.
- For each newly filed capital case, a comprehensive scheduling order was issued as soon as the notice of death was filed. Among other things, the scheduling order assigned the case to one of the capital case management judges, and a firm trial date was set within 18 months of the arraignment date.
- In order to assure firm trial dates, all criminal department judges received comprehensive capital case training. In the event the assigned capital case management judge was unavailable to try the case on its firm trial date, the case

would be assigned to another judge for trial.

- All motions to continue trials were to be heard by the Criminal Department Associate Presiding Judge.
- The capital case management judges met weekly with the Criminal Department Presiding and Associate Presiding Judges, the Criminal Department Court Administrator and other court administrative staff. These meetings identified potential trial conflicts, determined the status of workloads, and addressed specific problem cases. These meetings allowed the presiding judge to arrange reassignments of cases when conflicts existed, ensuring that trials proceeded as scheduled.
- Capital cases approaching their trial dates were set for a mandatory settlement conference (i.e. Resolution Management Conference).

The implementation of the new management plan was announced at the March 2009 meeting of the Capital Case Oversight Committee.<sup>13</sup> Eventually, the case management plan was reduced to an Administrative Order. Firm trial dates, active and consistent case management, stricter review of motions to continue trial dates and mandatory settlement conferences had an almost immediate effect on the capital case numbers. Cases were going to trial (as many as nine capital trials were in trial at one time) or were being settled.

It must be noted that with the move to the capital case management plan, serious concerns were raised by defense attorneys regarding whether the court was allowing enough time for development and preparation of the defense's case.

Because of the Maricopa County Superior Court's capital case management plan, capital cases are now heard on average within 30 months (admittedly still not within the time limits of Rule 8, which is 24 months), in contrast to the previous time period of 43 months.<sup>14</sup>

### Master Calendar

Another important factor in decreasing the capital case workload was the concomitant implementation, integrated by the Maricopa County Superior Court, of a master calendar in criminal cases. With the dedication of 25 percent

13. The Capital Case Oversight Committee was formed in December of 2007 by the Arizona Supreme Court to follow up with the work of the Capital Case Task Force.

14. This is only an average. Some cases are more complicated and take longer to resolve; some resolve more quickly. Federal judges and many state judges, such as in New York, may not participate in criminal settlement conferences. For a discussion of the Arizona experience see R.L. Gottsfield & Mitch Michkowsky, *How and Why To Do Settlement Conferences in Criminal Cases*, ARIZ. ATT'Y, April 2007, at 8.

of the judges assigned to the criminal bench to capital cases, it is the authors' belief that the case flow of the other noncapital cases would have been impaired but for the master calendar and the willingness of the civil bench to take overflow criminal cases. This immensely improved the case-flow management of non-capital cases, freeing up criminal judges to try more capital cases.

### Resolution Management Conferences

In addition to the enforcement of the speedy trial deadlines and active case management, another critical factor in resolving the capital crisis was the effectiveness of Resolution Management Conferences (RMCs). Rule 17.4 of the Arizona Rules of Criminal Procedure<sup>15</sup> allows the trial court, in its sole discretion, to "participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms with the interests of justice."

The court, with great investment of then-Associate Criminal Presiding Judge Tim Ryan, the capital case management judges, and retired judges, was proactive in scheduling and conducting mandatory capital RMCs. RMCs were complicated and fluid. Patience and finesse by the judges were necessary ingredients to a successful RMC.

Because of the design and policies of the County Attorney's Capital Unit, it was rare that the deputy county attorney attending came to an RMC with settlement authority. The Capital Review Committee at the County Attorney's Office did not re-evaluate a case for settlement unless the defendant first indicated a willingness to accept a resolution short of trial. The RMC was usually a multi-step process.

Judge Ryan started his RMCs in the courtroom. After calling the case he laid the ground rules.

Next, with the consent of the parties and victims,<sup>16</sup> he met with parties separately. For security, he met with the defendant in the courtroom and the victims and the State in chambers. Although they were not required to attend, the victims were always offered the opportunity and almost always did attend. This allowed the court to honor the victims' right to be heard and to provide them with general information about capital litigation.

It was made clear to the victims that the court was not advocating for the victims to support or not support the death penalty in the case. Educating the victims' families included a PowerPoint presentation that provided information on time frames (such as the typical 20-year period from the sentence of death to carrying out of the sentence), discussions about the appeal, PCR and federal habeas corpus process and an explanation of the high rate of death case reversals as compared to almost no reversals from guilty pleas with a life sentence. (Nationally, 51 percent of death penalty trial verdicts are reversed, whereas only one percent are reversed based on a plea where the death penalty has been waived by the state.<sup>17</sup>) Victims' families seeking justice and closure would often accept the information about the capital case process more readily from a judge than from the attorneys litigating the case.

Victims almost always expressed gratitude for the information. Although that was not the goal of the court, sometimes after such meetings, the victims advised the state that they did not object to a plea agreement where the death penalty was waived.<sup>18</sup>

Communication from the judge with the defendant at the RMC was another attempt at education about capital cases, but from a different perspective. To resolve a death case a defendant must typically agree to enter a plea of guilty to first-degree murder and agree to a sentence of life in prison. Some defendants start with the mindset that a sentence to death, which likely will involve serving 20 years or more on death row, is preferable to a life sentence in prison in the general population. The meeting with the defendant and his family is a chance for the judge to educate the defendant not only about the capital case process but also about life on death row. To assist the defendant to understand the conditions of death row, Judge Ryan sometimes requested attorneys who handle federal habeas corpus matters to attend the RMC. These lawyers have clients on death row, and they were able to describe firsthand the conditions of death row and the effect such conditions have had on their clients.<sup>19</sup>

After meeting with the parties and victims, Judge

15. Rule 17.4 must be read in conjunction with Arizona Rule of Evidence 408, which makes privileged and inadmissible statements made in compromise negotiations and settlement conferences.

16. In what follows it is understood that victims are "alleged" victims until a plea is accepted or a verdict entered in open court.

17. See discussion in *ARIZ. ATT'Y*, April 2009, at 24 and notes 31-33.

18. Often the victims advise they would rather have an attempt at closure sooner with a plea rather than wait out the average 20 years between conviction and the execution of the sentence. See note 2 *supra* for the average time frames for resolution of capital cases.

19. According to Dale Baich, the Assistant Federal Public Defender in charge of the Capital Habeas Unit in Arizona, on Arizona's death row:

Conditions are harsh. A death-row prisoner has no physical contact with other human beings. The prisoner is housed in isolation. Visits with family members, friends, and attorneys are through glass. Meals are delivered to the cell, where the prisoner eats alone. The food is delivered through a small slot in the cell door, obviating the opportunity for human contact. During recreation, the prisoner is alone. The number of books allowed and commissary items are limited. Jobs, educational opportunities, and other programs are not available. Death-row prisoners are confined to a cell for twenty-three hours a day, with one hour for a shower or recreation. Defendants who accept a plea to life avoid the harsh conditions of death row.

Ryan prepared a memo summarizing the parties' positions. The court never took a position in favor of either party. The memo was reviewed and approved by the trial attorneys and sent to those at the County Attorney's Office who had the authority to decide whether to reconvene the office's capital review committee to revisit the death decision and whether to extend a plea of something less than death.

If the information in the memo resulted in a change in position by the County Attorney on a plea, it was communicated to the defense attorney and the court, and a change of plea was taken. Although occasionally the plea was to some lesser offense, usually it was to first-degree murder with a life sentence.

### Change in County Attorney

In April, 2010, Andrew Thomas resigned as County Attorney, and the Board of Supervisors appointed former County Attorney Rick Romley as interim County Attorney. Romley had been the Maricopa County Attorney before Andrew Thomas, and many of the attorneys who had been leaders in his previous administrations were either still with the office or came back with him.

As interim County Attorney, Romley instituted a review of all pending capital cases, conducted by Chief Deputy Paul Ahler, applying the following standard: whether there was a reasonable likelihood of a jury imposing the death penalty at trial. His review resulted in the disposal of approximately 20 capital cases, resulting in plea agreements or simply dismissal of the death notice.

### Conclusion

Faced with the daunting task of managing more than twice the number of active capital cases than the Maricopa County Superior Court had traditionally experienced, the court designed a capital case management system and dedicated considerable resources. Once the court's redesigned capital case management system was up and running, the court became increasingly efficient at processing and trying capital cases.

The record number of capital cases that have been resolved the past three years—148 of them—is one indication of the court's capital case efficiency. The court's strict trial continuance policy, consistent with the criminal rules, cut delays significantly. The challenge for the court in the future will be to maintain consistency, avoid unnecessary delays, and continue to ensure a fair process for all parties. ★

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