

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

February 23, 2007

Phoenix, AZ

MEMBERS PRESENT:

Hon. Michael Ryan
James P. Beene
James Belanger
Kent Cattani
Donna Hallam
Mark Kennedy
Dan Levey

Hon. Stephen M. McNamee
Paul Prato
Hon. Ronald Reinstein
Robert J. Shutts
Hon. Ann Scott Timmer
MEMBER ABSENT:
Hon. James Keppel

GUESTS:

Shirley Hanson
Bill Montgomery
Treasure Van Dreumel
Christine Powell
Jim Dodger
Beth Hendrickson
Rudy & Sandra Padilla
Steve Twist
Hon. Mary Murguia
Kristine Fox
Deborah Bigley
Duane Lynn
Jo Anna R. Lynn
Kris Eberle
Amy Bjelland
Jessica Funkhouser

Katy Proctor
Rick Unklesbay
David Berkman
Phil McDonnell
John Rood
Pollyanna Wedra
Christian Palmer
Paul Davenport
Ben Varbil
Jen Bowser
Theresa Barrett

STAFF:

Jennifer Greene
Kim Ruiz
Lorraine Nevarez

I. Call to Order

A. Opening Remarks by Chief Justice Ruth McGregor

Justice Ryan called the meeting to order at 10:00 am and introduced Chief Justice Ruth McGregor who explained the Court's reasons for convening the task force. She stated that the Supreme Court is willing to consider any solutions proposed by the task force, and emphasized that any solution must take into consideration all aspects of the system.

B. Introductions

The members introduced themselves and described their professional experience with capital cases.

Justice Ryan reviewed the operating rules for the task force covering quorum requirements, attendance and proxy restrictions.

II. Stages of the Capital Case Process

Members enumerated the stages of capital case processing and identified the following points at which a case might typically be delayed and some of the practices in place to reduce delay:

The three legal defender agencies in Maricopa County have a centralized system for assigning capital cases among qualified defense counsel. Efforts are made to identify which homicide cases are likely to become capital cases as early as possible. One of these offices, the Maricopa Public Defender's Office has 12 capital-qualified attorneys who work in six teams. Each team includes a mitigation specialist, an investigator, and a paralegal. The office has three investigators. Each team handles as many as four to six cases at a time. The office lost four mitigation specialists in the past year and has not been able to fill the vacancies. Team assignments are permanent to avoid scheduling conflicts among co-counsel. The other two public defender offices are believed to have similar staffing levels.

If a case cannot be assigned to one of the legal defender offices because of a conflict or unavailability of counsel, the matter is sent to the Office of Contract Counsel (OCC) for assignment to a qualified private attorney. The Office has approximately 20 first-chair attorneys and 30 second-chair attorneys available to handle capital cases. The more senior defense lawyers are handling up to six cases at a time. Less experienced attorneys are not expected to handle as many cases at one time. These lawyers have immediate access to mitigation specialists and mental health experts. The OCC currently has 16 capital cases awaiting assignment for which there are no lead attorneys available.

The rules of criminal procedure prescribe that the pre-trial discovery phase be completed within eight months of initial appearance; in the first two months the prosecutor is required to produce its evidence and in the next 180 days the defense is to share its evidence. In recent years, development of mitigating evidence has become a much more important focus of the defense team's trial preparation. Ineffective assistance of counsel relating to mitigation and newly discovered mitigating evidence are now the primary grounds for reversal on appeal. Much of a defense lawyer's trial strategy – including jury selection -- will be dictated by the mitigation evidence planned for the penalty phase of the sentencing proceedings. Defense lawyers spend as much as 80 percent of their time developing the mitigation side of the case.

This reality delays trial preparation, at least in part, because a capital defendant must be willing to disclose a lot personal history information to the defense team before the mitigation specialists, investigators, and mental health experts can begin to gather relevant evidence. Often defendants are reluctant to be candid with their defense team members until a relationship of trust has been established. There is nothing routine about this work, every case is unique. Unlike the prosecution, the defense team is basically starting from square one in developing its evidence – especially the mitigation evidence, and pre-trial preparation often requires 24 to 30 months to

complete, although some cases are less complicated. Some have noted that the cases in which the parties took longer to prepare for trial are less likely to be overturned in the appellate courts.

Victims' families are generally contacted by the county attorney's victim services office either at the scene of the crime or immediately after charges are filed, and a victims' advocate follows them all the way through to execution.

Cases are assigned to judges in the criminal court based primarily on judges' caseloads. There are 24 judges in the court and 26 commissioners who handle less serious felony matters. A judge serving for the first time on a criminal assignment is not likely to be assigned a capital case until that judge has served at least a year on the criminal bench. Last year, the superior court processed 16 capital cases.

Capital cases proceed automatically from the superior court directly to the Supreme Court. Once the notice of appeal is filed, the focus is on compiling the record of the case from the trial court, including transcripts of all hearings. This work generally takes more than 40 days, and is handled by a member of the Supreme Court Staff Attorney's Office. Occasionally, some portion of the trial court proceedings must be reconstructed due to a missing record or court reporter. Once the record is complete, a briefing schedule is set. Continuances were not commonly requested by attorneys on appeal until recently. Capital case appeals usually raise twenty or more issues that must be analyzed by the court.

After the initial appeal, an automatic first-time petition for post-conviction relief is automatically instituted in the trial court. Delays are routine at this point because of difficulties finding defense lawyers willing to handle these cases ("Rule 6.8 list"). The situation can be attributed at least in part to an on-going controversy surrounding certain provisions in the Patriot Act (AEDPA) that has reduced the number of lawyers willing to take these cases. The fees attorneys receive (\$100 per hour) may also factor into the number of attorneys willing to do this work.

The original trial judge hears the post-conviction (PCR) case, even if the judge has rotated to another department. If post-conviction relief is denied at the trial court, which is the norm, the matter goes to the Supreme Court for discretionary review. All justices are involved in reviewing these matters. Most are denied, occasionally an issue will be returned to the trial court for an evidentiary hearing. This denial marks the end of the state court proceedings in a capital case. On average, the state court process takes approximately six years to complete.

The next step involves the case proceeding to the federal system. Generally an initial request to stay a warrant of execution will be granted pending habeas corpus proceedings in the federal district court. There are often more than 50 grounds alleged, all of which must be considered. The U.S. District Court in Arizona currently has a pending caseload of 56 petitions for habeas relief from state capital cases. The relatively recent availability of law clerks dedicated to death penalty cases has permitted the federal trial courts to move cases along more expeditiously. Factors leading to delay in the federal courts include:

- Turn over in attorneys and availability of substitute counsel
- The need to assign the case to a visiting judge because of conflicts of interest
- Evidentiary hearings may be needed on specific issues

- Decisions made in other criminal cases sometimes provide new legal grounds for challenging a conviction or a sentence or lead to a stay on processing cases until an issue potentially impacting many different cases is definitively resolved.
- The sheer number of cases considered by the Ninth Circuit Court of Appeals which has 24 judges and more than 10,000 case filings each year. There are 22 Arizona capital cases pending at the Ninth Circuit currently.
- Logistical problems associated with making a defendant or incarcerated witness available for an interview or a hearing.
- On-going mental health issues.
- The record in a capital case at the federal court can contain as much as 30,000 pages

As the execution date approaches, defense counsel often file multiple petitions raising new issues that can lead to further delay up and down the line. The leading cause for reversal and therefore the most commonly raised issue is ineffective assistance of counsel at sentencing. On average, a capital case requires 12 years to complete in the federal courts.

III. Report on Maricopa County's Current Case Backlog

Jessica Funkhouser, Special counsel to the Judicial Branch in Maricopa County, explained that there are 133 pending capital cases in the Superior Court in Maricopa County. The criminal department of the court handled 39,000 felony cases last year with 24 judges and 26 commissioners. Last year the court tried 16 capital cases. The court has established an in-house committee chaired by Judge Anna Baca who is the in-coming Presiding Criminal Division Judge. The committee has recommended changes to the way the court manages capital cases to bring more resources and eliminate unnecessary delay. Presiding Judge Barbara Mundell has issued Administrative Order No. 2007-112, dated February 23, 2007, that establishes a criminal complex and capital case designation and management plan. The plan establishes a number of standards for processing capital cases, including:

- Mandatory scheduling conference within 60 days from arraignment,
- Mandatory case management conferences every 30-45 days,
- For any continuance that is granted, the clerk will create a minute entry detailing the factual basis for the order, and the parties' respective positions on the motion.
- The Presiding Criminal Judge will rule on any request for continuance that would cause the trial date to be extended beyond 18 months from arraignment.

Ms. Funkhouser noted that the county has been trying to address funding issues for some time. Presiding Criminal Judge James Keppel has scheduled a hearing for March 2nd at which county budget representatives and defense and prosecuting attorneys will be asked to report on resources and expenditures.

In conjunction with the Administrative Office of the Courts and the Judicial College in Reno, NV, the court is planning a capital case management training conference for its judges in the fall.

The Maricopa Public Defender's Office has never set a standard for how many capital cases can be handled by one attorney, but the average is four to six, depending upon complexity. The most

the office can reasonably handle is 28 cases. The Office of Contract Counsel is short by 16 first-chair qualified defense attorneys.

The Supreme Court will need additional resources to handle the backlog as cases move up the pipeline. One possibility is to expand the jurisdiction of the court of appeals to allow that court to hear capital appeals and create a special panel to hear them supported by appropriate staffing levels.

IV. Patriot Act Update and the 2006 ABA Arizona Death Penalty Assessment Report

Mr. Cattani provided background on recent revisions to the Antiterrorism and Effective Death Penalty Act of 1996, and the subsequent amendments contained in the Patriot Act. The provisions of both Acts that were intended to encourage states to provide high-quality legal representation for capital defendants at the post-conviction and federal habeas corpus stages have not met their intended goal in many jurisdictions. The goal was to provide more experienced counsel earlier in the case and curtail the federal appellate options and timeframes for those states that were able to muster sufficient legal defenders. An unintended consequence of the statutory scheme has been the refusal on the part of some lawyers to take these cases as a means of ensuring defendants are processed under the older, more time-consuming arrangement.

Congress amended the Act last year to make more states eligible for the new expedited review process. The revision gives the U.S. Attorney General authority to handle some of the procedural aspects of the law in place of the courts. The Department of Justice will issue new guidelines in the near future that hopefully will resolve the stalemate. In Arizona, approximately 12 months are needed to find counsel willing to represent defendants in PCR cases.

Mr. Cattani explained that the 2006 American Bar Association's Arizona Death Penalty Assessment Report derived from the ABA Death Penalty Moratorium Implementation Project, and was funded by the European Union. The Arizona members of the workgroup that drafted the report voted against recommending a moratorium on the death penalty in Arizona – even the defense attorneys. However, the group did identify several areas needing attention that pertain to the work the task force has undertaken:

- More decentralized defense services (concern about representation in rural counties)
- Compensation for defenders and experts
- Proportionality review is needed to promote uniform application of the death penalty statewide and to avoid having one person decide whether to seek the death penalty in an individual case.
- A new jury instruction on the cruel-heinous aggravator is needed because of perceived ambiguities in this statute.

A new statewide office of capital case post conviction relief counsel will begin operating in the near future. Governor Napolitano is expected to appoint a director in the next month. The office will initially employ three attorneys, including the director, along with support staff. This agency will take over the work currently done by the Supreme Court Staff Attorney's Office in assigning qualified lawyers to represent defendants in PCR's.

V. Subcommittees

Justice Ryan asked for volunteers to work in subcommittees that will focus on trial and appellate case processing issues and develop strategies for the full committee to consider. The following membership and chairs were agreed on:

Trial Subcommittee

Hon. James Keppel (Chair)
Mark Kennedy
Paul Prato
James Belanger
Bob Shutts
Dan Levey
Hon. Ronald Reinstein

Appellate Subcommittee

Hon. Ann Timmer (Chair)
Hon. Stephen McNamee
Jim Beene
Kent Cattani
Donna Hallam
Hon. Michael Ryan

VI. Call to the Public

A number of homicide victims' family members recounted their frustration with the current system of handling capital cases.

A member of the Pima County Attorney's Office asked for the opportunity to comment on any proposals coming out of the task force. Pima County is not experiencing a backlog of capital cases, most cases are tried within the 18 month timeframe established by the rules of criminal procedure. There are also far fewer capital cases on file in Pima County compared with Maricopa County. The task force was asked to be mindful of the impact on other counties of any recommended changes to rules or statutes.

VII. Adjournment

Meeting adjourned at 12:30 p.m.

NEXT MEETING

Friday, March 23, 2007, 10:00 am – 12:00 pm, location to be announced.