

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

March 23, 2007

Judicial Education Center, Phoenix, AZ

MEMBERS PRESENT:

Hon. Michael Ryan

James Belanger

Kent Cattani

Donna Hallam

Honorable James Keppel

Hon. Ann Scott Timmer

Mark Kennedy

Martin Lieberman

Dan Levey

James P. Beene

Hon. Ronald Reinstein

Robert J. Shutts

Hon. Stephen M. McNamee by Deborah Bigbee

Paul Prato

STAFF:

Theresa Barrett

Lorraine Nevarez

GUESTS:

Jessica Funkhouser

Jim Haas

Tom Irvine

Phil MacDonnell

Jeremy Mussman

I. Call to Order

Justice Ryan called the meeting to order at 10:00 AM and welcomed Martin Lieberman who was newly appointed to the Task Force and several guests. The members introduced themselves and described their professional experience with capital cases.

II. Approval of the Minutes

The minutes from the February 23, 2007 meeting were moved and approved without amendment.

III. Subcommittee Updates

Subcommittees chairs were asked to update the task force on their recent meetings:

A. Trial Court Subcommittee

Judge Keppel, Chair, asked Tom Irvine, Special Counsel to Maricopa County Administration, and Jessica Funkhouser, Special Counsel to the Superior Court in Maricopa County, to provide details on developments at the trial court level aimed at resolving the current backlog.

(1) Maricopa County Management – Tom Irvine

Mr. Irvine presented information on the current status of efforts by county administration, the public defender offices and the county attorney on resolving the capital case backlog at the court. Initial conclusions were reported by the parties jointly in response to Judge Keppel's Order on March 7th.

Mr. Irvine explained the county has been proceeding as a non-partisan party to the discussions. Within the county's Office of Management & Budget is a Deputy Director assigned to the criminal justice system to process requests for resources from the court, defenders and prosecutors. The county is operating under standards established by the Arizona Supreme Court (the *Dann* Doctrine) on how to process resource requests within the justice system. Pursuant to those standards, all sides are working together, but the Board of Supervisors must make the ultimate decision because the Board has to balance the county budget.

There were 14 capital cases that did not have defenders or 1st chair defenders. Everyone worked very well together. The key to solving the immediate problem is the recommendation for creating a career path that provides a \$17,500 salary increase for lead capital defense counsel and prosecutors. This plan had actually been agreed upon last year but had not yet been implemented. County Management will recommend to the Board of Supervisors that this pay increase become effective March 1st. County Management expects the Board to adopt this recommendation.

The career path recommendation has attracted several eligible public defenders who were not handling capital case loads. Emergency procurements have brought in a few more private defense lawyers. The discussions also prompted an accelerated review of mitigation evidence by the County Attorney which resulted in withdrawal of four death penalty notices.

The report to Judge Keppel also refers to the section that discusses the need for data. The Maricopa County's Board of Supervisors has developed standards requiring evidence-based best practices for all criminal justice activities. Material differences exist as to the parties' anticipation of new capital cases. There was no agreement even on the list of pending capital cases. The parties also differed in the estimates for the number of capital cases for 2007-2008. The County Attorney is projecting 44 new cases, the defenders are projecting 84 new cases. The Superior Court's analysis is for 50 new cases. In last two years the County has increased the budget for capital defense by 74 percent (\$4.9 million to \$8.5 million). However this increased spending may not be enough to solve the problem.

The joint report to Judge Keppel recommended certain action items by the Superior Court. First, the court should schedule conferences in all pending cases and address whatever may be delaying their progress. Additionally, the court should develop and implement a case management plan for these cases in cooperation with all the parties.

The career path recommendation will hopefully encourage more lawyers to become first chair qualified and begin working for public defender agencies. There will also be salary

increases for line lawyers and supervisors. Documentation will hopefully be completed in the next few days.

The County is also conducting market data studies on salaries for support staff, paralegals, mitigation specialists and others in the defender offices. Modifications, where warranted, should hopefully be completed this year. The County is also developing centralized procurement for the defender offices and adjusting how the County procures specialists' services to expedite the contracting process. Improvements have also been made to managing assignments to avoid conflicting trial commitments by lead counsel.

Criminal justice is the single biggest component of county government. Last year the County added an Assistant County Manger for Criminal Justice (Peter Ozanne) who is working, inter alia, on a quality control plan that would be consistent with the ABA Guidelines (2.1) for capital representation.

In the view of County Management, the shortage of 1st chair lawyers has been caused by the backlog. The present situation has been building since the *Ring* case held up case processing several years ago while new rules and procedures were developed. For the past ten years, 35 to 50 new capital cases have been filed each year, plus the *Ring* cases that were remanded for new hearings. Limited judicial resources are part of the problem. Capital cases require two to three months to try. One judge can only preside over four such trials in a given year. Under the 18-month speedy trial rule, there should be an inventory of between 70 and 80 cases. There are now 140 pending cases; the 60 to 70 extra cases in the system must be disposed of in the next two to three years. The County Attorney's filing rate has not materially expanded the pending case list by more than five to ten new cases. The defenders' case load is not the issue either. Every time a pending case is resolved, a lead attorney is freed up, but not enough cases are being disposed of. Last year 24 capital cases were resolved, 16 of them by trial. The system cannot handle another year in which 45 or 50 new cases are filed and only 20 resolved. There must be a 1-in-1-out rate of resolving cases. If the list of pending cases grows by another 20 to 30 new cases, the system will have exceeded the number of available lead attorneys. Comprehensive case management and oversight by the court is needed to improve the situation.

The Public Defender needs more mitigation specialists, paralegals, and investigators but is cautiously optimistic about getting more staff positions. Finding the extra lawyers has not been difficult.

If mitigation evidence were required to be filed earlier, the County Attorney could review the case and decide sooner on whether to withdraw the death penalty notice. Judicial management could prompt this type of resolution.

(2). Superior Court Administration – Jessica Funkhouser

Jessica Funkhouser provided a list of pending cases as of February 2007. She told the Task Force that the Superior Court is developing:

- An automated means for collecting real-time data on each capital case;
- Investigating judicial resource needs, how many judges needed, how many commissioners could be used to handle judges' overflow cases so they can devote more time to capital cases; and
- Hiring a capital case flow manager with strong case management and statistical skills.

The court is conducting a manual search of case files to develop an agreed set of data. The court's statistics show that, over the last several years, the county attorney's office has filed approximately 4.5 capital cases a month, or 54 cases per year. The current list includes eight *Ring* cases (including one being heard in another county) and 129 other capital cases (including non-*Ring* remands), for a total of 136 awaiting trial.

The court may assign experienced criminal judges to hear early resolution management conferences to encourage early presentation of mitigating evidence and anything else that could resolve cases earlier. Judge Mundell's new administrative order requires status conferences every 30 to 45 days in capital cases. Judges will be given capital case training in May and October.

One of the specific logjams the court has identified is the 240-day deadline under Rule 15 for disclosing mitigation evidence to the county attorney. The court is investigating how it can assist the defense bar to adhere to that time frame.

Judge Mundell is contacting some of the judges who are expected to retire in the next two years (approx. 20) and some who are already retired to enlist them in clearing out the backlogged cases. She has been encouraged by the response she has received. Experienced criminal judges currently on civil assignment may also be tapped to handle some of the backlog.

The court has also looked at whether the 18-month trial frame needs to be adjusted to accommodate the mitigation investigation.

(3) Possible Amendments to the Death Penalty Statute

Judge Keppel invited Paul Prato to explain some other ideas the Trial Court Subcommittee has discussed. Mr. Prato explained that resolving the current situation may involve (1) reducing the supply of cases by changing the death penalty statute, (2) funding the resources needed to timely resolve the cases through some kind of death tax or otherwise, or (3) expanding the time frame allowed to resolve them.

The supply of cases has arguably resulted from the fact that the statute includes so many aggravators that almost any murder can now be prosecuted as a capital case. One solution to the problem would be to restructure the statute to create a tier system that would distinguish between aggravators qualifying for the death penalty ("the worst of the worst"), and others that qualify for natural life or life in prison. Mr. Prato offered to make available his research on other states' aggravators.

Discussion ensued regarding the impact on the system of jury sentencing and whether to recommend an amendment that would remove juries from sentencing. The *Ring* decision does not require jury sentencing, as long as the jury determines guilt and aggravators.. Some states have accommodated *Ring* by having the jury recommend a sentence, but then the judge has discretion to override the jury's recommendation. The more that needs to be explained to a jury, the more skilled the trial lawyers need to be. Taking the jury out of the penalty phase would reduce trial preparation time to some extent and might reduce the time needed to select a jury.

The Task Force also discussed the impact of judicial rotation on case processing. Some criminal judges are rotated off the criminal bench after only two years – not enough time to develop the level of expertise needed to handle a capital trial. Further complicating the picture is the fact that experienced judges who might be called upon to handle the backlog have been rotated to other departments such as Juvenile where the courtroom does not have a jury box, and the judge has less in the way of staff support. Perhaps the rotation policy should be temporarily suspended or the assignments lengthened for some or all criminal judges to assist in resolving the extra 60 to 70 cases.

B. Appellate Court Subcommittee Report

Judge Timmer gave an update of this subcommittee. Martin Lieberman will be joining the subcommittee. The subcommittee will be studying post conviction relief (PCR) proceedings. Problems identified in the initial meeting include delays in gathering the record for appeal, especially court reporters' transcripts; the subcommittee will be speaking with reporters to identify ways to improve efficiencies in this area. Due to the limited number of attorneys handling capital appeals and the caseloads they carry, requests for extension of time to file briefs are common.

Currently there is no backlog of direct appeals at the Supreme Court. However, with respect to PCRs, delay is engendered by the lack of qualified counsel. Eight PCR cases are currently pending assignment. One of these cases has been pending since 2005. Some of this delay will be remedied by the newly-established statewide PCR Counsel's Office. The subcommittee has discussed establishing a section of PCR attorneys at the Offices of the Legal Defender and/or Legal Advocate to give the Supreme Court a larger pool of qualified counsel.

Members pointed out that the Office of Legal Defender does not handle appeals. The Office of Legal Advocate has four appellate attorneys who handle PCR's from pleas, but not in capital appeals. The Public Defender's Office handles the direct appeal in a capital case, but generally is conflicted out of handling PCR's. The County's plan for a \$17,500 incentive has not been discussed in relation to appellate attorneys at the public defense offices. Representation in PCR's is covered by statute that authorizes \$100 an hour with a presumptive limit of \$20,000.

Pursuant to statute, the Arizona Supreme Court appoints counsel in the first capital PCR. There are no public defenders on that list of attorneys. Some of the attorneys on the Contract Counsel list who are handling capital trials and appeals also do PCR's. For subsequent PCR cases the Superior Court appoints counsel pursuant to statute.

The attorneys on the Office of Contract Counsel's list prefer trial work to PCR's. The strategy underlying the PCR is to prove ineffective assistance of counsel at trial or in the direct appeal – many lawyers are not interested in mounting an attack on a colleague's professional skills. It was suggested that not many attorneys can do all three types of cases well, and those that take on capital cases are not in it for the money. To develop a cadre of private attorneys to handle PCR's may require borrowing from the federal system where the hourly rate is deemed adequately rewarding and resources are available to hire investigators and mitigation specialists, just like the trial lawyers require. The statewide office of PCR counsel will need to be expanded to be able to handle the volume Maricopa County is generating. Not many attorneys are going to be willing to provide services if it will lead to Arizona "opting in" to the federal habeas reforms unless the defense is adequately resourced.

The \$20,000 statutory cap is routinely exceeded. The Office of Contract Counsel has paid \$85,000 to \$200,000 in some PCR cases. The Task Force may consider recommending expansion of Mr. Lieberman's office and money for resources and an increase in the hourly rate for private PCR counsel. Because of the nature of PCR cases, lawyers working together in an office that specializes in this area would be working in an environment more conducive to effective representation than would be true for most solo practitioners. The federal courts pay \$150 for lead counsel and \$125 for second chair counsel in habeas cases. The Attorney General's Office and the County Attorney's Offices have been supporting the establishment of an office of PCR counsel for years. Now that the office has been established, it needs more than mere start up money.

The subcommittee also identified delay at the federal level from the appointment of new counsel following the state PCR. The subcommittee will explore the feasibility of allowing state PCR counsel to represent their clients in the federal habeas corpus action with funding provided by the federal government to pay for that representation.

Another preventable delay identified by the subcommittee occurs when a new appellate or PCR lawyer must gather a previously-assigned counsel's files. The subcommittee has discussed recommending a new policy requiring that trial and appellate counsel deposit their defense files in a central repository for later use by attorneys representing the same defendant. The subcommittee also discussed creating judicial training materials to reduce the number of issues that are routinely raised in federal habeas proceedings. The provision in Rule 32.1(h) relating to "actual innocence" has also created quite a bit of litigation on the federal side that might be eliminated by clarifying the rule.

Until more data is available, the Appellate Courts Subcommittee cannot begin its identification of anticipated caseloads at the appellate level. Statewide data would be helpful for this project. The Supreme Court reviews about ten new direct appeals a year and the

subcommittee needs to know how many more to anticipate before it can design ways to handle the anticipated increase.

IV. Maricopa County Attorney's Office

Guest speaker, Phil McDonnell, Chief Deputy County Attorney, gave his office's support to the remarks of Tom Irvine and what has been said about improving case management and modifying rotation of experienced criminal judges to resolve the backlog. He also provided some preliminary capital case data from his office. The data indicates that of the 24 cases resolved in 2006, 10 were cases in which the defendant was arraigned in 2004 or later. Of those ten cases, one went to trial, seven ended in pleas, and two ended through some other disposition. A total of 116 arraignments on capital cases have been held since 2004.

The data showing the frequency with which jurors have imposed the death penalty may be skewed by the fact that many of these cases are *Ring* remands, in which a judge previously found the death penalty to be an appropriate sentence. The 74 percent rate may not hold up over time. The County Attorney hopes to provide more meaningful data to the Task Force in the near future.

V. Call to the Public

Jeremy Mussman, Public Defender's Office, urged against imposing stricter standards for mitigation disclosure, since care must be taken not to disclose evidence that would impact the guilt phase. The defense may need to have all its mitigation evidence in hand before it can determine what to disclose.

VI. Adjournment

Meeting adjourned at 12:20 PM.

NEXT MEETING

Friday, April 20, 2007
10:00 am – 12:00 pm
State Courts Building, Room 230