

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

April 20, 2007

Supreme Court Building, Phoenix, AZ

MEMBERS PRESENT:

James Beene
Kent Cattani
Donna Hallam
Hon. James Keppel
Martin Lieberman
Jim Logan
Hon. Stephen McNamee
Paul Prato
Bob Shutts
Hon. Ann Timmer

STAFF:

Lorraine Nevarez
Jennifer Greene

MEMBERS ABSENT:

Hon. Anna Baca
Jim Belanger
Dan Levey

GUESTS:

Theresa Barrett
Deborah Bigbee
Kristine Fox
Jessica Funkhouser
James Haas
Phil MacDonnell
Mike Malone
John Todd
Sally Wells

I. Call to Order & Approval of the Minutes

Justice Ryan called the meeting to order at 10:07 AM. The minutes of the March 23, 2007 meeting were moved and approved without amendment.

II. Subcommittee Updates

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

A. Appellate Subcommittee Report & Discussion

Judge Timmer went over the notes of the April 13 subcommittee meeting, the details of which are attached in Appendix A. Concerning the delay transcript production, Judge Mundell recently reported that the trial court has only 65 reporters on staff, and the county attorney's increased use of grand juries is placing additional pressure on this limited resource.

It was suggested that the trial court could contract with per diem reporters to handle capital trials at a price that would attract reporters and under terms that specify a precise timeframe for completing transcripts.

Jennifer Greene reported on the suggestion that the supreme court hire reporters to handle capital hearings for the superior court will require establishing additional bureaucratic infrastructure within the Administrative Office of the Courts or elsewhere. The one AOC division that contracts for reporters pays for those reporters from certification and licensing fees paid by fiduciaries, attorneys, legal document preparers, etc. to cover the hearings conducted by that division in disciplinary matters. The court uses reporting firms who are on the Arizona Department of Administration's state vendor lists.

The MCAO data review indicates the percent of death penalty sentences is running at 69 percent. Mr. Cattani recalls that the rate in Houston is around 65 percent. It was suggested that the task force recommend funding for data tracking. The data subcommittee supporting the Capital Case Commission produced some valuable insights.

The Appellate Courts Subcommittee may recommend that both the defense and prosecutors' case files be deposited somewhere where they could be accessed by successor counsel. A suggestion was made that access to the prosecutor's files could promote accuracy and fairness and possibly eliminate issues regarding compliance with *Brady* that commonly arise in PCR and habeas proceedings.

Based on data appearing in the recent *Latzer* report, which focused on time-to-disposition of capital appeals in 14 states, the Arizona Supreme Court is meeting the national average. While the subcommittee has identified delays in gathering the case records and completing briefing, there do not appear to be any other areas warranting reform at the appellate level, at current case volume. The subcommittee may need to recommend different scenarios for handling an increase in direct appeals, depending on how many are filed.

Currently eight cases await appointment of PCR counsel. Indications are that without more money, attorneys from public defender offices cannot be expected to take this on as it will mean taking them away from direct appeals.

The task force discussed the feasibility of enlisting retired judges to return to hear PCR's in the cases they handled before retiring. Retired judges have little incentive to return to work in Maricopa County because they are only paid the difference between their regular judge's salary and their pension.

Judge Keppel reported that the Board of Supervisors recently approved paying full salary to retired judges who fill judicial vacancies. He feels many retired judges would be willing to return to preside over capital trials, provided there are courtrooms available for them. Ms. Funkhouser reported that there are currently approximately five courtrooms available with jury space. The in-house committee has not discussed enlisting retirees to handle PCR's. Some will be asked to handle mitigation oversight and resolution management conferences (i.e. settlement).

B. Trial Subcommittee Report & Discussion

Judge Keppel reviewed the April 12 subcommittee meeting as described in the attached notes of the meeting (*see* Appendix B). He also stated that the in-house committee chaired by Judge Baca is meeting weekly. The committee has determined that a capital trial takes three months to try, on average. Accordingly, an automated system to track the cases and schedule trials that won't cause time conflicts for the parties involved is very much needed and is in development. The court is developing a capital case manager position that will be posted at an attractive salary. The court is planning to devote judicial resources to mitigation oversight on an *ex parte* basis to better monitor progress in developing mitigation evidence, remove logistical obstacles and otherwise facilitate discovery.

The superior court is also planning on instituting a resolution management conference, when appropriate, to get the parties together to talk about settlement, not necessarily early in the case, but at least not waiting until shortly before trial to raise the issue of settlement for the first time.

The timing of the resolution conference needs to permit defense team to put together its mitigation package so the prosecutors will be able to make reasoned decisions. It was suggested that the deadline for filing the notice of intent to seek the death penalty should be extended to permit this resolution conference to occur before the prosecution and victims' families commit to the death penalty. The 60-day deadline is often extended to 90 days currently. The federal system permits parties a longer timeframe; 60 to 90 days may be too arbitrary. If mitigation specialists are available, the defender agencies try to gear up as soon as a case has been identified as a "probable" capital case, but generally it's not possible to complete the mitigation investigation before the death notice must be filed.

Lack of mitigation specialists has become an obstacle; the defense teams are lacking ten specialists. The Public Defender's office lost four of its six specialists in the last 18 months, one to law school, the other three to better paying jobs. The ideal candidate has enough mental health experience – four to six years -- to be able to identify mental health criteria for referral to the experts. A Master's Degree in Social Work may substitute for some of the experience. The staff specialists in Maricopa are paid \$45,000 to \$60,000. Under the new county plan, contractors are to be paid \$55/hour. That represents an increase of \$15/hour more than what they were getting six months ago. Mitigation specialists in the federal system are paid approximately \$75/hour, depending on credentials and the nature of their investigation. The mitigation specialists working on non-capital cases have refused to apply for the higher-paying capital case positions due to the extra stress associated with these cases.

There is no specific training or certification program for capital mitigation specialists. The defender agencies devote considerable resources to training their specialists. The situation could be ameliorated if community colleges or A.S.U. could be persuaded to offer pertinent course work. The quality of work done by mitigation experts is a common issue at the habeas level; therefore, more training could assist in reducing delays in the federal courts. In

light of the important role they play and the apparent scarcity of this resource, Justice Ryan asked the Trial Subcommittee to provide the task force with recommendations relating to mitigation specialists.

III. Status of Cases Pending Trial

Jim Logan provided a copy of the current inventory of capital cases pending resolution at the superior court. Of the 143 currently pending, one notice has been dropped, eleven defendants have pled, three or four are in trial, so the list is down to 130 from the high 140's six weeks ago. Every defendant on the list has been assigned two defense attorneys, and all but approximately eight or nine cases have mitigation specialists assigned.

IV. Maricopa County Attorney's Office Data

Sally Wells, Chief Assistant County Attorney, provided two charts of data prepared by her office. She pointed out that the chart entitled, "Maricopa County Attorney's Office First Degree Murder and Capital Cases" includes cases that have not yet been filed because the defendant has not been arrested or has fled. Therefore, the numbers are higher than are reflected by the superior court's pending case list. Her office continues to develop data to assist the task force.

V. Future Planning

Given the Supreme Court's budget cycle, the task force may need to articulate interim recommendations before July for items associated with additional expenditures at the appellate level such as extra staff. Justice Ryan asked the subcommittees to prepare their recommendations for the June 15th meeting of the task force. Jennifer will investigate the feasibility of making a supplemental budget request, if the task force determines that funding is needed for appellate resources.

VI. Call to the Public

The Chairman offered a call to the public; No response being heard, the meeting was adjourned at 11:50 AM.

NEXT MEETING

Friday, May 18, 2007
10:00 am – 12:00 pm
State Courts Building, Room 230

Capital Case Task Force Subcommittee on Appeals

Report to the Task Force April 20, 2007

The Task Force's Subcommittee on Appeals held its second meeting on April 13, 2007. This report outlines the Subcommittee's progress to date in identifying current and anticipated problems and formulating a plan of action to pursue in crafting solutions.

A. Communication with court reporters

Jennifer Greene and Donna Hallam communicated with the court reporter board, described the delays in receiving transcripts in capital cases and discussed possible solutions. Specifically, they discussed the idea of crafting a rule requiring court reporters to periodically file notes and attendant documents, such as a dictionary and real-time transcript, into a central repository. The reporters were generally supportive of the idea but noted that counties have different rules regarding deposits, and storage by court clerks may be problematic.

The subcommittee discussed extensively different ideas to alleviate the delay in preparation of transcripts.

Plan of action: The Subcommittee will explore recommendations to make to the full task force, including the following:

(1) The supreme court should directly contract with a pool of court reporters to cover capital case proceedings, thereby removing the task from the superior court employed court reporters.

(2) Alternatively, superior court should assigned two court reporters to a capital case, who will then alternate responsibilities for covering

proceedings. While the capital case is in trial, these reporters should not be simultaneously assigned to proceedings likely to require transcripts.

(3) The superior court should establish a repository for periodic deposit of court reporter notes and attendant documents necessary for a third party to transcribe these notes. A supreme court rule may be necessary to accomplish this task.

(4) The supreme court should promulgate a rule requiring court reporters to prepare and file completed transcripts for capital case proceedings within sixty days of those proceedings. Donna and Jennifer will draft the proposed rule for the subcommittee's consideration.

(5) All capital case trials should be tried in electronic courtrooms, where available, in order to create an electronic backup of the record.

B. Defense attorney file repository

The subcommittee discussed a possible rule requiring a repository for files possessed by defense attorneys. Once their roles have ceased, these attorneys would deposit their files, thereby ensuring that future counsel would have immediate access to all necessary files. The repository would not be accessible by the State.

The subcommittee additionally discussed the need for a repository for files possessed by the State's attorneys.

Plan of action: The workgroup (Jim Beene, Kent Cattani, and Marty Lieberman) will meet before the next subcommittee meeting to draft a proposed rule petition to establish a repository. They will also explore the need for a repository for the State's files.

C. Scheduling oral argument before the Supreme Court

Donna Hallam reported that her investigation revealed no problems with the time in which the supreme court holds oral argument after a case becomes at issue. She provided a written report to the subcommittee, which additionally revealed that the time from notice of appeal to an opinion

is two years and six months; the national average. Most of the delay at the supreme court concerns gathering the record and receiving timely briefs, which the subcommittee is otherwise addressing.

After discussion, the subcommittee concurred with Donna's assessment.

Plan of action: None.

D. Assignment of PCR counsel

As previously reported, the Supreme Court is experiencing difficulties in appointing PCR attorneys due to a shortage of qualified counsel, resulting in delay. The subcommittee discussed the issues, including the feasibility of having the legal defender and legal advocate offices and public defenders offices outside Maricopa County take PCR cases. The subcommittee further discussed having state PCR counsel continue their representation in subsequent federal habeas corpus actions.

Plan of action: A work group consisting of Kristine Fox, Jim Beene, Marty Lieberman, and John Todd will contact representatives of the legal defender and legal advocate offices, non-Maricopa County public defenders, and Maricopa County to discuss their ability to have more public lawyers assume PCR representation.

The subcommittee further decided to shelve the idea of having attorneys from the newly created Capital Post-Conviction Defender Office continue representation in federal habeas corpus actions. In the subcommittee's view, such a change is not currently feasible. The subcommittee wishes to note the idea, however, for future consideration by the supreme court or its designee.

E. Training of superior court judges regarding PCR proceedings

The subcommittee discussed strategies to assuring that judges have sufficient training before conducting PCR proceedings.

Plan of action: The subcommittee will explore recommending that the supreme court remove any obstacles preventing retired judges who presided over capital trials from returning to conduct PCR proceedings in those cases.

The subcommittee will explore with the Judicial College whether it can devise a training program for judges before they preside over a capital case.

F. Assessing impact of current cases on future appeals

Jennifer Greene reported her progress to date in gathering statistics from the Maricopa County Superior Court regarding the number of pending capital cases and the court's plan for eliminating the backlog. She distributed a handout presenting three scenarios for eliminating this backlog, all of which are dependent upon whether and to what extent new judgeships are created. She is revising this handout and will make it available at the full task force meeting. Whether an increase in appeals is likely is dependent, in significant part, on whether the superior court is granted additional judges to clear the backlog. Thus, because we cannot predict what will occur on this front, the subcommittee will explore making recommendations based on all three scenarios.

The subcommittee does not yet have any statistics enabling it to predict how many of the charged capital cases in Maricopa County will likely result in death sentences.

Plan of action: The subcommittee will continue to gather statistics. Also, the subcommittee will devote an entire meeting to discuss what recommendations to make assuming each of the scenarios outlined in the attached memorandum.

G. Ariz. R. Crim. P. 32

As previously reported, confusion exists about the meaning and scope of Rule 32.1(h), Arizona Rules of Criminal Procedure. The subcommittee also discussed the possible need to amend the rule to address discovery issues in PCR proceedings and possibly adopting the federal model of having to seek permission from a court before filing a successive PCR petition.

Plan of action: A workgroup comprised of Kristine Fox, Jim Beene, Marty Lieberman, and John Todd will examine the rule and, assuming changes are warranted, will draft a proposed rule petition.

Capital Case Task Force
Trial Court Subcommittee
Notes of Meeting
April 12, 2007, 12:00 – 1:30PM
Cordova Room – Superior Court
Phoenix, AZ

Members Present:

Hon. James Keppel, Chair
Jim Belanger Hon. Anna Baca
Mark Kennedy James Logan
Dan Levey Robert Shutts
Paul Prato

Others:

Phil MacDonnell
Peter Ozanne
Sally Wells

Judge Keppel asked Judge Baca and Peter Ozanne to update the subcommittee on the status of their respective projects relating to capital case processing.

1. Superior Court in-house Committee Update

Judge Baca explained the superior court's in-house committee, which she chairs, is comparing the timelines set forth in Rule 15 and case aging reports to identify where the larger delays are occurring. The committee is developing enhancements to the court's automated case management system that will allow her and a capital case manager to monitor the inventory of capital cases in real time.

Criminal Department Administrator, Bob James, is completing a manual search of the existing capital cases to identify each case event and the length of time between events. Capital case trials are averaging three months, allowing for four trial days per week and holidays and other unavoidable recesses. One advantage of the new system will be to avoid competing schedules for lawyers in scheduling trials.

Many of the automation enhancements should be in place before the end of May. The court intends to offer the capital case manager position at a salary that will attract a knowledgeable, experienced administrator and hopes to fill the position within 90 days.

Another administrative order is in the drafting stage. It will address improvements in judicial oversight of the mitigation phase of the case and settlement conferences.

For mitigation, the concept is to have a judge or panel of judges, other than the one assigned to the case, confer periodically with defense counsel about mitigation, ensure progress is being made and assist in issuing orders to facilitate the timely gathering of mitigation evidence. The communication between the mitigation judge and the defense lawyers would be *ex parte* due to the anticipated reluctance of defense lawyers to disclose the status of their mitigation case at this stage. Any record of the hearing would be

sealed. The goal is to complete mitigation within the 240 day time frame established by rule. This timeline is often extended.

The goal of the settlement conference concept is to get all the players together as early as possible to talk about resolving a capital case that is susceptible to pretrial resolution. Of the existing inventory, the committee believes there may be approximately 20 cases in this posture. The conference would be assigned only to the most senior criminal judges. A few of these conferences have already been scheduled.

The subcommittee members raised their concerns about how a settlement conference would benefit a case in light of the difficulties associated with reaching a plea agreement in capital cases. Victims' family members are often reluctant to give up the possibility of an execution. Defendants may want a new lawyer when their attorney shows any indication that he or she thinks a plea to life in prison is a good idea. The county attorney's office has procedures it follows in determining when and whether to offer a plea. Judge Baca clarified that this conference would only be held when the case is at a point where this type of discussion is realistic and, hopefully, before all parties have become completely entrenched. Her committee suspects that at least some cases could benefit from such a conference earlier than two weeks before trial.

Judge Baca also reported that the court has responded to a request from county management for information on how many new judgeships are needed and how the new judges would be deployed to assist in resolving the capital case backlog. The plan under consideration is to put the new judges in assignments that will allow experienced criminal judges in other departments to move back to the criminal department to eliminate the backlog. Until the court knows how many new judgeships will be created, the court cannot identify the modifications needed for its rotation policy to address the backlog nor can it project how quickly the backlog can be eliminated.

2. County Management Update

Peter Ozanne, Deputy County Manager for Justice Services, presented a copy of the Emergency Plan filed by the parties responding to Judge Keppel's order last month (County, Public Defender agencies, and MCAO). The plan is intended as a temporary fix for the current shortage of qualified defense attorneys, but will promote a longer-term solution for enlisting qualified lawyers. The plan assumes five new case filings per month for the next three months and provides money for 15 additional lawyers, at a cost of approximately \$2,250,000. Qualified lead attorneys have been found to represent the 14 unassigned capital defendants by means of a pay increase. The plan provides for an extra \$17,500 for public defenders and prosecutors and additional pay for their support staff; private lead defense counsel will be paid \$125/hour, second chair lawyers would receive \$95/hour, and private mitigation specialists will be paid \$55/hour. The money is available now.

James Logan has accepted the job as coordinator of capital case assignments for the county. Mr. Logan provided an up-to-date case inventory list showing 146 cases and explained that nine of these cases have been resolved by a plea deal, three are currently in

trial, and two more pleas are expected to be entered on April 16th, for a balance of 132 cases. Three lawyers are available for the three in-coming cases in the pipeline. Seventeen new lead attorneys have applied; their qualifications are being reviewed. Nine or ten cases still lack mitigation specialists. Mr. Ozanne stated that qualified mitigation specialists are harder to recruit than lead attorneys.