

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

May 18, 2007

Supreme Court Building, Phoenix, AZ

MEMBERS PRESENT:

Hon. Anna Baca
James Beene
Jim Belanger
Kent Cattani
Donna Hallam
Dan Levey
Martin Lieberman
Jim Logan
Paul Prato
Hon. Michael Ryan, Chair
Bob Shutts, by Vince Imbordino, Proxy
Hon. Ann Timmer

MEMBERS ABSENT:

Hon. James Keppel
Hon. Stephen McNamee
Hon. Ron Reinstein

GUESTS:

Jessica Funkhouser
Phil MacDonnell
Mark McDermott
Mike Malone
Janet Scheiderer
Denise Young

STAFF:

Lorraine Nevarez * Jennifer Greene

I. Call to Order & Approval of the Minutes

Justice Ryan called the meeting to order at 10:08 AM. The Task Force approved the minutes of the April 20, 2007 meeting without amendment.

II. Subcommittee Updates

Subcommittees chairs were asked to update the Task Force on their recent meetings:

A. Trial Subcommittee Report & Discussion

Jim Logan, standing in for Judge Keppel, reviewed the May 10 subcommittee meeting notes attached as Appendix A hereto.

In response to the increased fee structure (\$55/hour), the Office of Contract Counsel (OCC) has received 9 applications from mitigation specialists that included six qualified specialists with previous capital case experience who have already been assigned to cases. Mr. Logan is working on how to mentor the other three applicants. Alternatively, they will be invited to apply to openings at the public defender's office. There is no deficit in mitigation specialists currently.

The new pay package for first chair attorneys (\$125/hour and monthly payments rather than sporadic payments during and after the case is closed) has attracted four new lawyers to the OCC. Mr. Logan is in discussions with the county about which public defenders are eligible for the extra salary. He is confident the issue will be resolved shortly.

Mr. Logan and Mr. Shutts revised the pending case list and broke it into five categories to better identify the status of each case. Of the 139 capital cases pending, there are 110 “active” cases pending trial, in another twelve cases, the defendant has already pled to a non-capital offense and is awaiting the trial of a co-defendant before sentencing can occur; ten cases are *Ring* remands pending re-sentencing; five cases are in Rule 11 status, and two cases are in post-conviction relief status. Three or four cases are in trial as of the date of the meeting.

Chris Bradley, the county OMB representative, is anticipating a lower number of future case filings than Mr. Logan and some of the other stakeholders expect. Mr. Bradley is now saying that the county might agree to add only one new judge. Mr. Bradley appears to be absolutely certain that the current situation is merely a temporary “bubble” that does not represent the future and does not warrant extra judgeships. The court is expected to resolve the situation through temporary means such as using retired judges. The lack of new judgeships, however, will impair Judge Baca’s plan to return experienced criminal judges to the criminal department from other rotations.

Judge Baca reported that the court can only give staff and courtroom space to one or two retired judges at a time. Only two retired judges have expressed an interest in returning to assist with handling the backlog, the judges who are planning to retire later this year may or may not be willing to help. Judge Reinstein has suggested some of the backlog could be resolved more expeditiously if the parties would agree to bench trials. The county wants to review the situation month-to-month.

The concept of a special master judge to oversee the mitigation phase has met with general acceptance by all involved.

Judge McNamee has alerted the subcommittee to the need to provide specific rulings in Rule 32 cases.

The subcommittee also discussed the idea of extending the Rule 15.1(i) 60-day deadline on filing a death notice. This would allow the defense some extra time to muster mitigation evidence that could avoid the capital case designation more expeditiously and better allocate existing resources. Under the rule, additional time can be granted. In many cases, a single 30-day extension beyond the 60 day deadline is requested and granted. If a prosecutor receives a request from defense counsel to delay filing the notice, the prosecutor’s office will generally accommodate that request. If the rule were re-worded to provide for an extra 60 days, rather than an extra 30 days, additional mitigation could be produced in time to prevent the death notice from being filed in a few cases, especially when the defendant is a “local,” and has therefore a lot of locally-available history.

Justice Ryan asked the subcommittee to draft a proposal for extending the extension, not the original 60-day deadline.

B. Appellate Subcommittee Report & Discussion

Judge Timmer reviewed the Appellate Subcommittee report, attached hereto as Appendix B.

(1) Court Reporting

The subcommittee has revised a proposed administrative order to address verbatim records and transcript production. The Committee on Superior Court will be asked to comment on the proposal at their June 1st meeting. A final version will be ready for approval at the next Task Force meeting. The subcommittee is also considering a recommendation to increase the statutory per page rates for transcripts.

(2) Defense File Repository

Marty Lieberman has drafted an amendment to Criminal Rule 6.8 to provide for a defense file repository, hosted by the Statewide Office of Post-Conviction Relief Counsel. The proposal calls for an electronic version of the file as well as the paper file being transferred to the PCR office. Once the case is moved to the federal court for habeas consideration, the office would be relieved of the responsibility of maintaining the paper file, but would retain the electronic file as long as the defendant is under a death sentence.

Mr. Prato commented that some of his clients have asked him not to transfer a particular record to successor counsel. In that situation, the attorney is presented with significant ethical questions in relation to what should be turned over to the repository. The original lawyer could be asked to retain the document pending release from the client or a court order. In civil practice, the lawyer might create a privilege log to identify the document in general terms, so the successor counsel would know whether to seek a court order to eliminate the privilege. Alternatively, the document could be segregated and maintained under seal by the repository, pending a court order either with or without a privilege log. When a client claims ineffective assistance of defense counsel, the defendant may effectively waive any privilege he or she may otherwise have been entitled to assert regarding a particular record in the file.

Although the proposed amendment speaks in terms of appointed counsel, privately retained attorneys would be expected to agree to turn records over to the repository.

It was acknowledged that the problem this proposal is designed to address is not caused by public lawyers – prosecutors and defense agencies follow reliable record management practices. The problem is with private sector lawyers and their personal files on the case. Most of the rest of the client's files would be readily available from the court. This rule will require a lot of extra work by everyone, even those who are not responsible for the delays created by a handful of practitioners. Attorneys are obligated under current regulations to maintain these files. One consequence of adopting the proposal might be that attorneys not create notes in the first instance, this has happened already in the federal system.

Justice Ryan asked the subcommittee to look into how other states handle this issue and suggested that with sufficient access restrictions and procedural safeguards in place, the defendant's privileges should be adequately protected.

Judge Timmer explained that the subcommittee could not agree on whether to impose a similar requirement on prosecutors.

(3) Rule 32 Counsel

The subcommittee wants to recommend additional funding for the State Capital Post-Conviction Defender's Office so the office can hire more lawyers. The current budget will allow initial staffing of one lawyer in addition to Mr. Lieberman. Mr. Logan stated that there is no legal impediment to having public defender agencies handle PCR's, it is simply a question of resources. If they take these cases, they will have less time to handle direct appeals. Some of the current appellate attorneys in these offices are moving into doing trial work. The Public Defender's office has been transferring up to 150 cases a week to the OCC and the alienage hearings required under Prop 100 are adding to the demand. Last week, the Public Defender transferred 200 cases to OCC. Some of the pending caseload might be assigned to the Pima County public defender's office through an intergovernmental agreement. IGA's have been considered in the past for related purposes.

Mr. Belanger commented that the federal system has the same problem finding habeas lawyers even though the federal courts pay much more than \$125/hour. Ms. Hallam explained the shortage of PCR counsel derives from a combination of lawyers' beliefs that (1) they will not be allowed adequate resources, i.e. mitigation specialists, (2) that they will be prejudicing their clients' cases under the AEDPA if they agree to represent them, and (3) the low rate of attorney compensation.

Mr. Lieberman also noted that the State Capital Post Conviction Defender's Office is statutorily restricted from providing both consulting and training to other attorneys. While it may be appropriate to prohibit these attorneys from consulting on new cases, the restriction on training other PCR counsel is an unnecessary impediment to developing a cadre of lawyers qualified to handle these cases.

III. Revised Data Projections

Committee staff presented a revised data projection based on a set of 78 capital cases resolved between January 2004 and April 17, 2007. The Maricopa County management has reportedly decided that the "backlog" of capital cases should be considered to be anything more than 70 cases. The county made this determination based on the 18 month arraignment-to-disposition standard in Rule 8 and the approximate rate of new case filings. Using the 70-case standard would mean the court needs to resolve approximately 60 cases (130 minus 60 = 70) and keep up with new case filings in order to eliminate the backlog and maintain a "normal" number of pending capital cases.

Judge Baca commented that although the rate of terminations (two per month) in the projection is correct, the rate of new case filings needs to be higher; recent filing rates are running at three new capital cases per month. In her opinion, the projected timing and rate of dispositions (3.5 to 4.6 per month over the next five years, with approximately 17 trials per year) appears to be unrealistic, especially given the county's position on new judgeships and how long it is likely to take to institute new case management practices under consideration. Members also questioned the county's assumptions about what constitutes a "normal" caseload given the fact that the parties often need more than 18 months to resolve these cases, and that the pending case load was typically closer to 50 cases, not 70 cases, until just a couple of years ago.

IV. Maricopa County Attorney's Office Proposals in SB 1286

Jim Beene summarized a number of the provisions from Senate Bill 1286 ("Victims Omnibus") and asked that the Task Force consider including these in its recommendations. At the request of the Chair, Mr. Beene agreed to work with the Trial Court Subcommittee on developing proposals for the full Task Force.

V. Adjournment

Justice Ryan told the Task Force members that they will need to complete their work on or before October. He also commented that he believes the Task Force will need to extend its term to provide for on-going oversight. The meeting was adjourned at 12:15 PM.

NEXT MEETING

Friday, June 15, 2007
10:00 am – 2:00 pm
State Courts Building, Conference Room 345A/B

Capital Case Task Force
Trial Court Subcommittee
Notes of Meeting
May 10, 2007, 11:30 – 1:00PM
Supreme Court Conference Room 412
Phoenix, AZ

Hon. Ron Reinstein, Acting Chair
James Logan
Dan Levey
Bob Shutts

Hon. Anna Baca
Paul Prato
Hon. Stephen McNamee

Also present:
Phil MacDonnell
Mark Malone
Jennifer Greene

1. Status of the County Management Emergency Plan

Jim Logan provided an update on the implementation of the county's emergency plan.

- The pay plan for prosecutors, public defenders and OCAC contractors has been approved but the details concerning which public defenders actually qualify for the extra compensation is still under discussion and should be resolved soon. Pay adjustments will be retroactive to March 12, 2007.
- Mr. Logan is working to get the attorney hiring process out from under the county procurement process to make the process more appropriate to the subject matter and more streamlined.
- OCAC mitigation specialists are now being paid monthly at \$55/hour. Mr. Logan was pleasantly surprised by the new applicants for this position. Nine people applied, three of whom have no prior experience. A group of defense attorneys are screening the applicants. Six have been recommended for immediate assignment. These specialists will be paid approximately twice what they would have made at a public defender agency (with no benefits).
- OCAC contract lawyers are now being paid monthly (rather than in three installments) at the rate of \$125/\$95 for first and second chair lawyers.
- A committee of mostly public defenders will screen the OCAC applicants' credentials. Three new lawyers have applied plus 15 lawyers who have been on the list before.
 - Paul Prato reported he does not anticipate losing any public defenders to the OCAC list; however mitigation specialists may be leaving to

join the OCAC list. As county employees, they earn approximately \$45,000 - \$60,000 depending on credentials, plus benefits. He has recently hired three people to replace three who left; two of the new specialists need training.

2. Pending case list

Mr. Logan has refined the pending case list to separate out the *Ring* cases, the Rule 11 cases, and those in which the defendant has plead guilty but is waiting to testify in a co-defendant's trial before being sentenced. The remaining cases are really the ones that should be characterized as the actively pending caseload. There are 120 cases on that list.

3. Centralized Case Tracking

Judge Baca explained that enhancements to the automated case management system are nearly completed. She has learned that some of the information in this database has not been updated in a timely fashion and efforts are underway to have the Judicial Assistants in the Criminal Department bring everything up to date. Some of the cases that should be off the list of pending cases are still on it because of the data entry delays. She believes that there are approximately 122 cases pending, which may include *Ring* cases. Even the *Ring* cases are difficult to schedule, because the penalty phase in capital trials takes 21 days on average.

4. Superior Court In-House Committee Update

(a) Additional judicial resources --

Judge Baca explained that her committee and county management are unable to reach agreement on the level of new capital case filings to anticipate in the future. Over the last four years, the county has seen on average approximately 4 new cases per month (48/cases per year). The County Attorney has stated he expects to file between 40 and 50 cases a year in the coming years. However, county management has taken the position that the court should expect to see only about 35 cases per year. Judge Baca was hoping to bring some of the more experienced criminal judges back to the criminal department and replace them in their current assignments with new appointees, if the county agreed to some new judgeships. She has asked for at least six new judgeships. Now the county is indicating it will not agree to even one new judge.

(b) Judicial oversight of the mitigation phase --

By the end of May, Judge Baca expects to announce the names of the judges who will participate as "buddy judges" or special masters in promoting timely completion of mitigation investigations. The panel will consist of four or five experienced criminal judges who may each work with one defense agency, to maximize the benefits of working regularly with the same defense teams.

The in-house committee continues to develop a plan for early settlement conferences in capital cases, and is considering whether to do it in stages. The subcommittee identified that one potentially helpful feature of this process would be giving the victim and the defendant a chance to hear from a judge on the likely outcome of the case and allowing the victim to have a chance to be heard by a judge.

(c) Judicial training --

The National Judicial College training scheduled for September will focus on Arizona death penalty law. Judge Baca is finalizing the list of judges who will be attending from her court. The training will permit her to assign capital cases to some of the six new criminal department judges who will rotate in next month. Six judges will rotate out to other divisions. The in-coming judges who lack capital case experience will not be handling capital cases.

Judge McNamee brought to the subcommittee's attention the fact that recent rulings by the Ninth Circuit demonstrate that court's concern with inconsistent application of Rule 32 standards by superior court judges. Training on this topic could avoid delays at the federal level. Similarly, he has seen habeas litigants raise the question whether the defendant was prejudiced by the absence of the attorney of record during a pretrial hearing. He suggested this issue could be headed off if trial judges would order the presence of the attorneys of record at all hearings in capital cases.

Judge McNamee also advised that the federal district court employs attorneys who specialize in capital cases to assist judges with capital case management and advice on legal issues.

(d) Capital case manager position --

The court recently advertised the new Capital Case Manager position and is hopeful that the position will be filled by late summer.

(e) Bench trial option --

Judge Reinstein asked whether defense and prosecuting attorneys would consider opting for a bench trial as a means of resolving cases more quickly. Those lawyers present suggested this could be an option as long as they could select the judge. Judge Baca indicated her willingness to assist in this process. Judge McNamee cautioned that a good record needs to be made of the defendant's waiver of the jury.

5. Extension of the deadline for filing the death notice

Bob Shutts stated his reluctance to promote an amendment to Rule 15 that would push the deadline too close to the speedy trial limit, and doing so could contribute to delay. Jim Logan stated that in 90 percent of new cases, the defender agencies are able to accurately predict when a notice will be filed. They do not await the filing of the notice to muster their resources. They begin gathering mitigation immediately. Mr. Logan suggested the current 60 day deadline should be left as is but an extension of time beyond the current 30 day extension deadline could be helpful with the

understanding that an extension would only be sought in cases in which the county attorney intends to file a death notice absent extraordinary circumstances.

**Capital Case Task Force
Subcommittee on Appeals**

**Report to the Task Force
May 18, 2007**

The Task Force's Subcommittee on Appeals held its third meeting on May 4, 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 presented a draft administrative order to address the problems with the delays in getting the transcripts from the court reporters. The order sets standards for superior courts in managing court reporters assigned to capital cases. The standards direct the courts to (1) provide for substitute records to guard against the impact of lost notes; (2) manage court reporter assignments in a manner that allows reporters time to transcribe proceedings; and (3) establish a repository for court reporter notes, which must be periodically deposited during the life of a case.

A discussion ensued regarding how court reporters work, how they are funded and if fines are appropriate. The subcommittee further discussed whether the administrative order should impose mandatory standards or whether it should be left as is, which leaves it to superior courts to set standards.

A discussion also took place regarding raising the transcript page rate per A.R.S. § 12-224 (\$2.50 per page for original and .30 per copy) or providing an expedited rate if the transcript must be sent to a subcontracting reporter.

Recommendations:

1. Adopt proposed administrative order but change language to say that the superior courts must set standards at a minimum as set forth in the proposed order.

2. Raise the minimum pay for court reporters for all cases in an amount that would attract court reporters to fill out pools of reporters. Alternatively, the counties should pay more for capital case transcripts to encourage reporters to subcontract the work and thus be more timely in filing transcripts.

3. Add suggested methods of encouraging timely transcriptions in the administrative order for consideration by courts.

Jennifer will take these recommendations to the committee on superior courts on May 25 to obtain feedback.

B. Defense attorney file repository

A workgroup met since the last subcommittee meeting. Marty Lieberman reported concerns with having his office, the Office of the State Capital Post Conviction Defender ("PCD"), serve as the repository because of conflict issues, i.e., housing files of co-defendants represented by other counsel. The workgroup considered utilizing a third-party repository, but rejected the idea due to anticipated cost. The group proposed sealing the paper records deposited with the PCD and then having the papers scanned to CD. The CDs then would be sealed and stored at the PCD. The paper records would go to the new lawyer. The lawyer giving up the files would have the responsibility for sealing and scanning so that the PCD would never see the paper records, unless, of course, they serve as new counsel. As lawyers complete their representation, they would return the file plus additions to the PCD. The workgroup provided a proposed change to Rule 6.8 to implement this procedure.

A discussion ensued regarding the merits of the proposal. The subcommittee decided to change the language of the proposed rule

amendment to clarify that the attorneys' notes shall also be deposited. The language may refer to the attorney file rather than "case records".

The workgroup disagreed somewhat about whether the rule should leave the manner of scanning or copying to an administrative order and whether the option of scanning vs. copying should be allowed. The subcommittee decided to remove the option of copying and mandate scanning.

Marty Lieberman will redraft the proposed rule with the subcommittee's comments in mind and will circulate it to the subcommittee.

The workgroup hasn't fully pursued idea of having the State deposit its files. The workgroup is divided on the issue. The workgroup will continue to discuss the issue, but it is unlikely that a meeting of the minds will occur.

C. Assignment of PCR counsel

An assigned workgroup has not had an opportunity to check with other agencies to determine if they can assume PCR representation. Donna Hallam provided the current list of 8 cases awaiting assignment to PCR counsel in order to enable the group to determine what agencies might be available to take cases. Members of the subcommittee expressed that private counsel do not take the state PCR cases because they don't pay well.

Recommendations:

1. Increase the number of attorneys the PCD can hire by removing a prescribed number of attorneys from the statute establishing that agency. Provide the PCD with the budget to allow it to fund the number of attorneys needed along with the corresponding number of investigators and mitigation specialists.
2. Eliminate the statutory limitation on training and assistance that the PCD can conduct.

3. Eliminate the cap for paying PCR counsel no more than \$20,000 and increase the hourly rate from \$100 to \$125 per hour to attract more private counsel.

The subcommittee also discussed increasing the funding for existing defender agencies to permit them to hire additional counsel to serve as PCR counsel. The workgroup will talk with those agencies to determine whether this is feasible.