

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

August 10, 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
Phil MacDonnell for Bob Shutts
Hon. John Gemmill for Ann Scott Timmer

STAFF: Jennifer Greene and Tama Reily

MEMBERS ABSENT:

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

GUESTS

Chris Bleuenstein
Mary Durand
Jessica Funkhouser
Vincent Imbordino
Vikki Liles
Amy Love
Bill Montgomery
Katie Proctor
Treasure VanDreumel

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 June 15th meeting with modifications proposed by Mr. Lieberman and Judge Baca.

II. Update on Court-County Efforts to Address the Backlog

Justice Ryan noted that the nine pages of comments of Thomas Irvine, on behalf of Maricopa County Administration, were not received until 45 minutes before the meeting. Therefore, they would be considered at the next Task Force meeting in September.

Judge Baca reported that the Board of Supervisors agreed in July to ask the Governor to appoint one new judge. This was far less than the court had asked for. The court has asked the Board to reconsider adding two additional judges, for a total of three new judgeships. It was noted that the statute (A.R.S. §12-121) establishing the process for creating new superior court judgeships sets an ideal ratio of one judge for every 30,000 residents, but this is permissive, not mandatory.

The superior court is now functioning with 94 judges, 56 commissioners and numerous judges *pro tempore*. The state pays half of judges' salaries (with the county paying the other half); the county pays the full salary for commissioners, but saves some costs associated with court reporters and judicial assistants who work out of a pool

arrangement with commissioners. Commissioners also occupy less physical space in the courthouse.

The county has approved funding for the new capital case manager position, but the projected timeframe for actually putting someone into the job has been pushed back to the fall or winter. This person will be an attorney, possibly someone who can work at the level of a judge *pro tempore*.

III. Determination of Final Recommendations and Written Comments Received in July

A. Rule 15.1(i) stipulated extension of time to file notice of intent to seek the death penalty. This proposal was approved with modifications to read:

(1) The prosecutor, no later than 60 days after the arraignment in superior court, shall provide to the defendant notice of whether the prosecutor intends to seek the death penalty. This period may be extended ~~for thirty days~~ up to 60 days upon written stipulation of counsel filed with the court. Once the stipulation is approved by the court, the case shall be considered a capital case for all administrative purposes including, but not limited to, scheduling, appointment of counsel under Rule 6.8, and assignment of a mitigation specialist. Additional extensions may be granted upon ~~motion of the state~~ stipulation of the parties and approval of the court. The prosecutor must confer with the victim prior to agreeing to an extension of the 60 day deadline or any additional extensions, if the victim has requested notice pursuant to A.R.S. section 13-4405.

COMMENT

The stipulations or extensions authorized by this rule are not to be used for unnecessary delay but are intended to allow defense counsel enough time

to gather and present mitigating evidence to the prosecution in those cases
when significant mitigating evidence is expected to be readily available.

B. Additional Superior Court Judges

Judge Baca explained that the criminal department currently has two special assignment judges who handle some capital cases as well as other complex felonies. She agreed that a special panel of capital case judges may gain some efficiencies and the court has asked the county to provide additional judges so that such a panel can be established. There are experienced judges willing to serve on such a panel. However, the court is also dealing with 38,000 new non-capital criminal cases each year, and without more judges, creation of a special panel is unlikely, given the other demands on the court. If the task force decides to recommend creation of a special panel for capital cases, it should be paired with a recommendation for more judges.

Calling retired judges back is not a realistic solution because those who are willing to serve are reluctant to work full-time for what they can legally be paid. Staff was asked to gather information on the feasibility of recommending an amendment to the retirement plan statutes that would eliminate the disincentive.

Judge Baca also explained the current situation should not be attributed to a lack of experienced judges, if a case is ready to be tried, a judge is available to preside over the trial. However, due to the allocation of resources in the public defender agencies, trial dates are often re-set because the lawyers have conflicting trial dates in other complex or capital cases. The defenders' caseloads make it very difficult to find a trial date when they will be available for a lengthy capital trial.

Jim Logan stated his objection to the use of the term "backlog" to describe the situation at the trial court, because the term implies something temporary in nature. The county's approach to the issue assumes the inventory will be reduced over time, whereas many people who are closely involved in the process do not foresee that happening, ever. The county's perspective dictates that few permanent resources be put in place to deal with the situation, which explains why the county is approaching the issue by suggesting the court use retired judges and recruiting more contract lawyers for the OCC list. The county took the position in March that the 135-case inventory would be at 75 cases within 12 months. Several months later, the list has barely changed; it now stands at 132 cases. In Mr. Logan's view, the possibility that the court will ever return to the previous level of 60 or 70 cases is remote.

C. Proposed new A.R.S. §13-4435.01

Phil MacDonnell explained that the proposal basically took the current rule and modified it, and put it into a statute, but it could be re-formatted as a new rule. It is designed to help meet the 18-month presumptive trial date in capital cases by involving the Supreme

Court in rulings on motions to continue. The motions could be handled by a special master appointed by the chief justice for this purpose. As he sees it, the process is similar to special actions that also involve the appellate courts in trial courts decision-making pre-trial. He believes that having to ask the Supreme Court, in and of itself, will deter parties from requesting continuances. He also stated that Court oversight is warranted, given the role the superior court has played in creating the current situation.

Concerns expressed about this proposal included:

- The proposal should be framed as a rule rather than a statute; it involves court procedures and the courts need more flexibility to modify procedures than can be done with a statute.
- Other counties that are not experiencing backlogs will have to live with this as well.
- The proposal would require the Supreme Court to play an atypical and arguably inappropriate role in managing the trial court.
- Current law dictates that juvenile cases take precedence over all other case types; this proposal would conflict with that law.
- Raises the potential for a conflict of interest by the chief justice, even if a special master is involved
- Unlike a special action, in which a panel of appellate judges determines whether to take jurisdiction, this will require Supreme Court involvement in every motion to continue.
- The superior court recently shifted the decision-making on these motions to the presiding and associate presiding criminal judge, which meets the goals of the proposal without involving the Supreme Court.
- If a special master is all that is needed, it could be a special master appointed by the superior court, no need to make it a Supreme Court appointee.
- The alleged need for this proposal is unfounded, trial judges require motions for continuance to be adequately supported; they are not granted casually.

It was pointed out that the concerns that may have prompted the proposal have already been addressed by two administrative orders issued by the superior court since the beginning of the year. Judge Baca was asked to provide copies of these orders and information on how the newly-established case management practices are working, including data on whether recent motions to continue were filed by defense attorneys or prosecutors and the grounds cited. She also will provide a copy of the job description for the new capital case manager position.

Judge Baca recalled that the main reasons cited in the motions she has seen have been delays encountered in the mitigation investigation and attorney scheduling conflicts, mostly but not exclusively from defense lawyers. Judge Baca and Associate Presiding Criminal Judge Tim Ryan hear all these motions pursuant to the new administrative policies. Another new policy about to be implemented will assign a criminal judge to oversee mitigation in each case as a Mitigation Special Master. The special master judges will be assigned in a cluster arrangement, allowing them to work regularly with the same defense agencies and attorneys. In addition, the criminal bench will receive

three days of National Judicial College training in capital case management beginning September 10th. The training will be updated annually. The superior court training office will ensure judges who rotate into the criminal department receive the training they need to be able to preside over capital cases.

This item was tabled for further consideration in September.

D. Modify judicial rotation policies

Justice Ryan reviewed the proposals previously discussed. The central theme of these modifications to normal rotation is to avoid re-assigning capital cases.

- Rotate some judges every four or five years, rather than every two or three years.
- Criminal judges rotating to other departments should keep their capital cases, or at least those nearing trial.
- Refrain from assigning new capital cases to judges who are about to be rotated to other departments.
- If a judge is scheduled for rotation off the criminal bench and he or she has a capital case that is on the eve of trial, move the judge to a “special assignment” calendar rather than another department until the trial is completed.

Judge Baca explained that there are too many capital cases to limit judicial assignments to only the most experienced judges. She reiterated that she is not assigning capital cases to inexperienced judges. She would like to return some of the most experienced criminal judges currently serving in other departments to the criminal department, if the county agrees to hire more judges, but the court must balance the court-wide demands on judicial resources in determining whether and to what extent it can alter the rotation policy. Without more judges, the balancing act becomes more problematical.

Mr. Lieberman suggested the final report should make it clear that the *Ring* decision required only that the jury determine eligibility for the death penalty, not that the jury actual decide on punishment. Even if the task force does not make a recommendation on whether juries should be sentencing defendants, this point should be made because by front loading the mitigation investigation, the process itself invites delay.

IV. Call to the Public

Mitigation Specialist, Mary Durand, submitted her written comments and asked that they be made part of the record of the meeting (attachment A). A major cause of delay in her investigations comes from public offices such as Child Protective Services, vital records, and health care providers. She urged the task force not to underestimate the time and effort required to perform a thorough mitigation investigation.

Bill Montgomery submitted his comments and a proposal for a new Rule 16.2(c) (attachment B) requiring the court to advise the defendant of the need to cooperate in mitigation.

Treasure VanDreumel distributed her revised Rule change petition addressing the 18 month presumptive trial date in Rule 8.2. She filed the petition August 10th.

The proposals from Mr. Montgomery and Ms. VanDreumel will be placed on the September meeting agenda.

V. Adjournment

The meeting was adjourned at 12:08 PM.

NEXT MEETING

Friday, September 7, 2007

10:00 am – 2:00 pm

State Courts Building, Conference Room 230

(lunch will be provided)

[Submitted by Mary Durand 8/10/07]

Comment on New Death Penalty Rules RE: Time required to complete proper mitigation
As the oldest mitigation specialist in the state, in training, experience and age, I am compelled to express to this committee the essence of mitigation and why the time requirements some members of this commission have requested for death penalty cases are unreasonable, and unfair, not only to the defendant, but to the victims. When a loved one is killed, the first question that the remaining family members ask is why. Why him? Why me? How could this have happened? And why did it happen?

Prosecutors can't answer that question. A mitigation investigation, done properly, can.

Given the plethora of mitigation cases that have come down from the US Supreme Court and the Circuit Courts, (some of which are listed below without citations) it is clear that the work required to investigate, develop and present mitigation has expanded greatly and this burden is placed squarely on the shoulders of defense counsel. The ABA standards, which Arizona has adopted, require a mitigation specialist to assist counsel in completing a comprehensive social history to provide all available information to a jury and, and thereby, to the victims family and friends.

Currently, there are very few mitigation specialists working in Maricopa County and the State of Arizona that are qualified to do a constitutionally competent mitigation investigation. At this juncture, the reasons for this failure are not the issue. The lack of competent mitigation specialists is the issue; and, in my opinion, the most important issue.

Competent mitigation is an incredibly difficult task that requires skill sets that are developed over time. Since all available evidence of mitigation must be uncovered, evaluated, and presented to the jury for their consideration, the client's entire life history is now relevant at both the guilt and penalty phase. The mitigation specialist must uncover a massive amount of information, assess it, integrate it and present it to the experts, the attorney and the jury in a coherent and meaningful way.

To do this type of a life history requires staff that possesses special skills in interviewing across the social spectrum. The attached declaration will give you an idea of the amount of work required. It takes time to acquire the skills and time to train someone to apply them in this arena. Sadly, that has not been done in our state and the quality of mitigation is well below any standard required by the ever growing number of court opinions addressing ineffective assistance of counsel for not doing proper mitigation.

The mitigation specialist is, generally, the person who, as required by the ABA guidelines, is "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." Guideline 4.1 (A) (2)
Once these skills are acquired, there are two great challenges facing the mitigation specialist: collecting documents and dealing with the client.

As to the documentation issue, the most time consuming task is obtaining documents that are critical to both the guilt and penalty phase. Social Security records and military records routinely take well over a year to obtain and they are critical in developing a complete and accurate social history. Here in Arizona, the biggest obstacle to gathering critical records turns out to be the state agencies whose records often hold the most information about the life of our client -- The Department of Corrections, the Department of Economic Security, specifically Child Protective Services, Vital Records and the Department of Public Safety. They routinely object to release of the records we need to comply with U.S. Supreme Court requirements in death cases. They almost always go to court to object to release and the issue most often raised is security, yet there is not one case that I am aware of that release of these records led to anyone being harmed. These records should be in our hands and thoroughly reviewed before we interview our client and key informants about substantive issues.

In the case of Damon Kerl, 25 family members were interviewed before receipt of the social security documents; a full year after the notice of death had been filed. Not one family member interviewed revealed that Damon's father was mentally retarded and had been receiving SS benefits since reaching the age of emancipation. Once this information was garnered from the Social Security records, the expert was able to explain so many issues that the state dropped the notice of intent to seek death.

The second critical issue in terms of the amount of time we need to do these cases properly is the long, difficult journey into the archeology of our clients' lives: death penalty clients tend to be people who do not trust, are fearful, are reticent to relive the trauma of their lives and who are often traumatically bonded to those who heaped abuse, neglect and deprivation on them to the point that they will not "talk bad" about them. Getting to the truth of their lives takes time, patience and faith. It is not done by questionnaire. That approach only serves to drive the truth deeper into the complex inner life of our clients and extends the amount of time and effort necessary to extract the truth. It's done by spending hours and hours with the client, answering their questions, being truthful, building rapport and establishing trust. Only then will a client even consider sharing the deepest and most painful "secrets" of his or her life. If they continue to deny that they were abused in any way and you have the CPS and the medical records, or the admission of abuse by a responsible adult, you can share them with the client and make them aware that the family "secrets" are secret no more.

Additionally, it is important to realize that even though our client's are charged with the ultimate crime, they do retain a need for dignity and do not want the most intimate and humiliating facts of their lives laid bare before the world. As we judge others by what we know of ourselves, it follows that most of you have no idea the extent of damage and trauma inflicted upon our clients and what it has done to their souls. It takes time to break through barriers that have been in place for many, many years.

A common misconception in the performance of mitigation investigation is that interviews can be done on the phone. While I understand that travel to visit family members, friends, teachers, coaches, neighbors and other key informants who often live

all over our country and, sometimes, other countries is time consuming and expensive, it is critical to do these interviews face to face, and, often, more than one interview is required. One has to see the witnesses, their demeanor, their dress, their body language, their environment and their community. If the interview is done over the phone, how can the mitigation specialist know if the person being interviewed has a facial tic consistent with Tourette's, a grimace consistent with medication use, rotten teeth consistent with malnutrition or addiction? How would the mitigation specialist know the condition of the home, the community, the availability of services in the area, if there are telling photographs on the walls, or not, or the condition of family pets, etc.? One can hide shame and embarrassment on the phone, but not in person. Police officers do not investigate telephonically; medical doctors do not diagnose telephonically—and for good reason: To truly understand the individual and family dynamics, an interpersonal relationship must be established. Simply put, telephone interviews cripple the mitigation specialist's effort to complete a reliable social history that will be used by those experts selected to assist counsel.

Another issue that affects the time allowed to investigate, develop and present mitigation is one involving experts. *Caro v. Calderon* requires not only that defense counsel obtain the services of an expert, but that the person chosen have expertise in the issues the client presents. This requires abiding by *Clabourne v. Lewis* that requires defense counsel to give the expert all the information one has gathered concerning the client. Ergo, the majority of the mitigation investigation must be done prior to choosing the experts that will testify as educational or fact experts. Finding an expert and arranging for appropriate interviews, testing and consultation requires complex coordination and adding this scheduling nightmare can add time to the process of completing mitigation investigation significantly.

In the 25 years I have been training and providing mitigation, I can state affirmatively that the average amount of time it takes to do a constitutionally competent mitigation runs between 800 and 1500 hours. I worked a case where over 1500 hours have been expended and it is expected that another 500 hours will be required to complete a competent mitigation investigation. While this is the exception, the requirements for the time required and the reasons for same are delineated in the attached declaration, which is comprehensive in describing the tasks that must be done to do a proper mitigation. You will note that the 800 hours are required for the "average" case. Given that there are only 2080 work hours in a year, and approximately 200 to 300 hours are vacation time, sick time, court time and conferences, that leaves between 1780 and 1880 hours to complete cases. Given that fact, it dictates that any given mitigation specialist can properly provide services in only 3 to 4 cases at a time.

If there are 130 active death cases in Maricopa County, over 30 qualified mitigation specialists are required to work with qualified capital attorneys in order to ensure that the case is done right the first time, thereby protecting the victim's family and friends from the pain and stress of returning to court year after year as the result of reverse and remand decisions. Additionally, victim's families have reported that they have been assisted by the mitigation case presentation as it has helped them understand why.

Given Arizona's reversal rate in death cases, not to mention the over one hundred persons released from death row nationwide based on actual innocence, it seems logical that the entire system would be dedicated to everything possible to ensure that the cases are done right the first time, no matter the time nor the cost.

If we really care about victim's rights and justice for all parties, and I believe we all do, it seems that the most appropriate way to deliver justice for all is to inform all affected parties that this process will take, on average, two to three years to complete. If a victim is aware of the vagaries of the process from the beginning and all sides are diligent in "working the case" and the resources to do the work are provided without extended delay, the issue of time should be moot.

The cases listed below are a random selection of the many cases that control capital mitigation.

Cases:

Rompilla v Beard Circuit	S.Ct.	Caro v Calderon	9 th
Wiggins v Smith	S.Ct.	Atkins v Virginia	S.Ct.
Calbourne v Lewis Circuit	9 th Circuit	Hendricks v Calderon	9 th
Lockett v Ohio Circuit	S.Ct.	Smith v Stewart	9 th
Wallace v Stewart Circuit	9 th Circuit	Correll v Stewart	9 th
Gerlaugh v Stewart Circuit	9 th Circuit	Stankewitz v Woodford	9 th
Hitchcock v Dugger	S.Ct.	Woodson v North Carolina	S.Ct.
Skipper v South Carolina	S.Ct.	Penry v Lynaugh	S.Ct.
Eddings v Oklahoma Circuit	S.Ct.	Wai Silva v Woodford	9 th
Garceau v Woodford Circuit	9 th Circuit	Douglas v Woodford	9 th
Jennings v Woodford Circuit	9 th Circuit	Turner v Calderon	9 th
Karis v Calderon Circuit	9 th Circuit	Visciotti v Woodford	9 th
Bean v Calderon Circuit	9 th Circuit	Jackson v Calderon	9 th
Lambright v Stewart	S.Ct.	Williams v Calderon	S.Ct.

Declaration of Mitigation Specialist

1. As a mitigation specialist, I conduct investigation relevant to the guilt and penalty phase of capital trials. This investigation includes gathering documents pertaining to the client and his family members, of the kind described in paragraph 5 below. These records must then be carefully reviewed, organized and summarized. The investigation also entails identifying, locating, and interviewing witnesses who have been involved in the client's lives, including all family members, spouses, friends, employers, doctors, and many other categories of witnesses, which are listed in paragraph 6 below.
2. The information obtained from documents and interviews is the basis for the construction of a social history of the client. This consists of verifiable, accurate information about the client for use by the attorneys who represent him and by the mental health professionals who evaluate him and may be asked to testify on his behalf.
3. The importance of mitigation investigations flows from the constitutional requirement that there be an individualized determination as to whether death is the appropriate penalty in any given capital case. In making this determination, the jury must consider the circumstances of the offense and all aspects of the client's life and personal attributes. Matters germane to penalty determination include the environment in which the defendant was raised and the effects of this environment upon the individual's development and mental status; the defendant's abilities and/or contributions to society; the nature and extent of any mental and medical impairments from which the defendant may suffer and which may have influenced his perception, judgment and behavior at the time of the offense; and any other factors that may militate against the imposition of a sentence of death.
4. A central feature of a competent social history is an exhaustive review of records

and documents that trace the client's life and shed light on his level of functioning across time. Historical information can reveal patterns of impairments and other factors that contributed to the circumstances of the offense. Necessary social history records include those regarding the client, his immediate family and relevant extended family members. Records that should be obtained in any capital case include but are not limited to:

- 1) Birth certificate and hospital birth records for the client and relevant family members.
- 2) All medical records from private physicians, clinics, emergency rooms and hospitals and any other institutions in which the client may have been assessed or treated. All evaluations, treatments, tests, lab reports, x-rays, EEG's, PET scans, MRI's, SPECT scans, medication logs, nurse, physician, social worker and other treatment personnel notes, proof of immunizations, and pathology reports;
- 3) All school records, including transcripts, health records, standardized testing, attendance, special education testing and/or classes, individualized evaluations plans, teacher notes and recommendations, psychological testing and/or referrals, and disciplinary action reports for every school attended, including adult education and vocational schools, GED programs, colleges and Job Corps;
- 4) All social service records, including food stamps; Aid to Families with Dependent Children; welfare check disbursement records; counseling records; social worker and/or case worker notes; referrals and recommendations for testing, evaluation and therapy; records of all medical and mental health treatment; records associated with foster homes, battered women shelters and adoption agencies, including placement and discharge reports, progress notes, and medical, educational, mental health and intelligence evaluations;
- 5) All juvenile records, including those from public defender and prosecutor files, juvenile assessment and referral centers, juvenile drug and alcohol treatment centers, pre-trial intervention programs, community control and probation programs, and juvenile detention centers, to include all medical, educational and intelligence evaluations and individualized treatment plans, field and progress notes and referrals, and court files;
- 6) All adult criminal records, including all police, sheriff and FBI records; jail and prison records to include all psychological, educational, psychiatric, and medical evaluations, treatment, medications, and notes;

daily progress notes; disciplinary reports, classification officer notes and recommendations; records of participation in all vocational, educational, religious and honor programs, religious reports and visitation logs; all court records; all public defender and/or private attorney records; and all state attorney and other investigating agency files;

- 7) All probation and parole records, including pre-sentence investigations and sentencing reports; case worker narrative notes, family and social history information, conditions of supervision and any record of violations, and conditions of release from supervision;
 - 8) All employment records, including applications, attendance, job assignments and performance evaluations, medical and psychological evaluations, relocations, pay records, documentation of accidents and/or injuries, medical treatment, referrals for psychological and/or psychiatric treatment;
 - 9) All psychological, psychiatric and social worker records, including community mental health clinics, private doctors and counselors, hospitals and substance abuse evaluation and treatment facilities, to include intake evaluations, observation notes, medical and psychiatric treatment, all medication logs, notes of changes in medications, physician, nurse and social worker notes and diagnoses, referrals for additional testing and/or treatment, all medical tests and evaluations performed, and discharge reports;
 - 10) All military records, including application, intake testing, interview notes, locations of all assignments, rank and job duties, attendance, medical records, referrals for medical, psychological or psychiatric evaluations and/or treatment, special commendations, and disciplinary records;
 - 11) All housing authority records, including application for eligibility for indigent housing, locations of all residents, referrals for counseling by social workers, records of upkeep of all locations, records of any crimes and/or offenses that occurred in the homes, records of numbers of people living in each apartment, notices of evictions, and records of discontinuation of utilities and/or phone services;
 - 12) All family birth and death records;
 - 13) All marriage and divorce records for the client and relevant family members; and
 - 14) All adoption records for the client and relevant family members.
5. In addition to obtaining records, the mitigation investigator conducting the social

history must complete in-depth interviews with the client and as many individuals as can be located who have known the defendant throughout his life. Individuals who should be interviewed include but are not limited to:

- 1) Biological family members, both immediate and extended;
 - 2) All other persons, not related, with whom the client lived;
 - 3) Friends, neighbors, landlords in all locations in which the client has lived;
 - 4) Teachers, counselors, coaches, tutors, psychologists, principals, and any other personnel with whom the client may have interacted;
 - 5) Church members, ministers, Sunday School teachers, youth leaders;
 - 6) Co-workers and employers;
 - 7) Girlfriends, ex-girlfriends, wives, ex-wives;
 - 8) Physicians, nurses, technicians, and other treatment personnel;
 - 9) Mental health and social services counselors and providers;
 - 10) Military peers, subordinates and superiors;
 - 11) Probation and parole officers and related counselors;
 - 12) Prior attorneys and paralegals; and
 - 13) Police and sheriff officers, department of corrections personnel, pastors, counselors, medical and psychiatric personnel.
6. Records, interviews and other psychosocial research reveal the following kinds of information:
- 1) Fetal and birth trauma, including prenatal malnutrition, prenatal exposure to alcohol, drugs and toxins, maternal medical conditions, such as diabetes, liver and thyroid problems and toxemia, and complications of delivery, such as anoxia;
 - 2) Problems in early physical, emotional, mental and social development;
 - 3) Physical illnesses and impairments, such as chronic infections, high fevers that compromise organic function, traumatic injuries, infectious diseases, nutritional deficiencies and/or imbalances, inadequate medical attention;
 - 4) Evidence of early or adolescent signs of mental illness or deficiencies, including mental retardation, pervasive developmental disorders and major mental illnesses, such as major depression, schizophrenia and bipolar

disorder; evidence of the onset and course of childhood, adolescent or adult mental illnesses; interventions prescribed and/or obtained; and subtle signs of disturbance, including self medication;

- 5) Educational history, including when and where client attended school; how many times the client changed schools; patterns of tardiness and absences; indications of learning disorders, such as low performance, low intelligence and/or performance testing; special education referrals and/or programs; individualized educational plans; referrals for psychological and/or psychiatric evaluations;
- 6) Patterns of social behavior, including acting out in anxiety and/or tendencies toward isolation; changes in mood and behavior; problems with hygiene and incontinence; self-destructive behaviors; impulse control problems; low self esteem; poor verbal skills; unusual fears and phobias;
- 7) History, nature and extent of psychological, physical, and sexual abuse, including molestation and rape, premature exposure to sexual behaviors, isolation, degradation, rejection, abandonment, shunning, terrorization, and exposure to criminal activities; failure to help the child develop age-appropriate skills and competencies; failure to provide appropriate evaluations and treatment; destruction of treasured objects or ideals; prevention and/or destruction of important nurturing relationships; emotional and financial exploitation; exposure to consistently high levels of stimuli and anxiety; failure to soothe the child and teach the child to self soothe;
- 8) History and course of self-medicating behaviors and subsequent drug and alcohol dependence, including the presence of traumatic experiences, exposure to older individuals who introduced and/or encouraged the child to use drugs and alcohol; patterns of self-medication to regulate undiagnosed mental illnesses, such as paranoia's and hallucinations; information regarding all treatment facilities, diagnoses offered, interventions prescribed, degree of support of family members and others; history of overdoses and suicide attempts
- 9) Nature of relationships with parents, nuclear family and extended family, including whether or not client knew both parents, whether he later learned someone that he thought was a biological parent was in fact not, or whether the client's true heritage was learned in the course of the investigation; the degree of consistency and support provided by caring adults in the home; whether parents or caretakers were physically or mentally impaired and the effects on the child's development of these conditions; traumatic losses through death, divorce, incarcerations or other disruptions involving important caretakers;

- 10) Residential history, including housing projects, foster homes, juvenile settings, patterns of evictions, institutional settings and community violence;
- 11) Presence or absence of social and community support systems, including social groups such as Boy Scouts, little league, and summer camp and/or vacations, religious and/or spiritual activities, extended family relationships, neighborhood associations, and access to medical, psychological, legal and law enforcement assistance;
- 12) Nature and extent of poverty, including substandard living conditions, presence and quantity of environmental toxins, lack of proper nutrition, medical and dental care, inadequate heat and air conditioning, overcrowding, inadequate clothing and other basic needs, and infestations of rodents and insects;
- 13) Number and nature of traumatic events, including the death, illness or injury of loved ones or important caretakers, being a victim or witness of violence, loss of home and/or possessions, acute or prolonged illnesses and/or hospitalizations, experiencing accidents or natural disasters,
- 14) Employment history, including childhood jobs to help support the family and/or quitting school to help support the family, patterns of jobs skills and/or lack of skills, job related injuries and/or illnesses, traumatic loss of employment, and exposure to toxins;
- 15) Juvenile and adult criminal history, including the influence of co-defendants, experiences with law enforcement, juvenile detention centers, courts, parole and probation offices, prisons and work release programs, rapes and assaults during incarceration; adequacy of care while institutionalized, including violence, gang tensions, overcrowding, lack of appropriate educational, vocational and recreational activities, diagnoses and medications provided while incarcerated, and/or failure by institutions to provide adequate mental and physical care and/or medication;
- 16) Military history, including the location and nature of combat experiences; illnesses and accidents, evaluations, interventions and medications prescribed, nature of job assignments, special commendations, promotions and training, Article 15's and other disciplinary actions, patterns of alcohol and drug abuse, any indications of untreated mental illness including traumatic stress reactions;
- 17) Patterns of all significant relationships and any indications of attachment disorders, continuity and quality of relationships with family, friends, spouses, co-workers, military cohort, effects of loss or perceived loss of these relationships on the client's mood and judgment; and

- 18) Physical, mental health, social, educational, substance abuse, and employment histories of parents, caretakers, siblings, and other significant individuals.
7. The completion of a social history for a capital defendant involves thoroughness, precision and attention to all aspects of all persons' lives who touch upon the client's life, since the evidence presented in court must be an accurate representation of the client and the factors that affect his judgment and behavior as well as those factors that militate against a death sentence. This requires the combined tasks of working with the client, working with the attorneys, and working with the selected lay and expert witnesses over an extended period of time, usually for a period of time extending to two years. The length of time also depends upon the ability to locate and interview witnesses, number of investigators working to collect documents, and many other factors unique to each case.
 8. Capital trials require a significant amount of investigative work in order to inform the capital jury during the penalty phase of all the circumstances of the defendant's life in order to ensure that the sentencing phase is reliable, as required by law.
 9. Based on my experience and training in providing mitigation investigation in numerous cases, I believe that to investigate and develop mitigation evidence in capital cases may well require between 800 and 1300 hours. A breakdown of the time required follows:
 - 1) 100 - 200 hours to interview, review and consult with the client.
 - 2) 300 - 500 hours to identify, locate and interview lay and expert witnesses who have knowledge of the clients life, including his relationships with government witnesses.
 - 3) 300 – 400 hours to identify, locate, collect and process pertinent records for the client and relevant family members.

- 4) 100 - 200 hours to prepare a competent life history based on the investigation results and to consult with educational, mental health and other experts.

MARY PATRICIA DURAND

[Proposal from Bill Montgomery]

Amend Rule 16.2 adding a subparagraph (c) to the effect:

Within 30 days after a death penalty notice has been filed in a case, the court shall personally address the defendant and explain the purpose of presenting mitigating evidence in a capital proceeding and the need for the defendant to cooperate with his counsel in developing mitigation. Additionally, the court shall inform the defendant of the limited time in which counsel has to develop and notice information developed from the investigation. If the defendant advises the court that he does not want to cooperate with counsel in developing mitigation, then the court shall question the defendant concerning his understanding of mitigation, and make a finding that the defendant knowingly, intelligently and voluntarily waived assisting any investigation into mitigation by his counsel.

Comment: The greatest delay in capital cases appears to be the investigation by defense counsel of possible mitigating evidence. Initially defendants are reluctant to cooperate with counsel concerning the need for a mitigation investigation. This advisement of the need to assist in developing mitigating evidence is to impress upon the defendant that it is in his best interest to cooperate with counsel and immediately assist counsel in gathering mitigation. Like any constitutional right, a defendant can knowingly, intelligently, and voluntarily waive assisting in the investigation. Because of the significance of the death penalty, this waiver should be on the record and should be a knowing, intelligent and voluntary waiver.