

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
November 13, 2008**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Anna Baca
Hon. Ronald Reinstein
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
Phil MacDonnell
Paul Prato
(All members present)

Guests:

Hon. Gary Donahoe
James Beene
Patricia Nigro
Robert Shutts
John Pressley Todd

Staff: Mark Meltzer, Lorraine Nevarez

=====

1. Call to Order and Approval of the Meeting Minutes. The meeting was called to order at 12:45 p.m. The minutes of the October 8, 2008, Committee meeting were unanimously approved.

2. Discussion of the draft Committee report. The Chair asked the members to comment on the revisions to the draft report and the accompanying rules.

a) Proposed Rule 32.7 concerning informal conferences in post-conviction relief proceedings. The draft report included a proposed amendment to Rule 32.7, Arizona Rule of Criminal Procedure, adding new sections (a) and (b) regarding mandatory and discretionary conferences for initial and successive PCR petitions in capital cases.

Mr. Lieberman opened the discussion by stating his objections to the proposed rule. He believed that at 90 days after appointment, PCR counsel was not ready to discuss preliminary legal issues, as proposed by the draft rule, or to discuss an estimated time when the petition might be filed. He stated that the proposed rule would impose micromanagement on the process.

Members questioned a written comment submitted by the PCR Defender Office, specifically, whether the 3000 attorney hours a Florida study indicated was necessary for PCRs was too high. Mr. Lieberman conceded that this might be high, but this was Florida's experience. He added that the time required by defense counsel for a PCR proceeding was dependent on what the investigation revealed. Mr. Cattani responded that he had spoken with Florida agencies about this study, and he noted that the study was done in 1998. He believed that at that time, two defense attorneys were not required for trial. Mr. Cattani added that with two qualified defense

attorneys, which the Arizona Rules of Criminal Procedure currently require, along with a proper investigation and the appropriate experts, a defendant should receive a fair trial, and a PCR investigation requiring thousands of hours should not be needed. Mr. Lieberman replied that the standards in Arizona require a re-investigation, not a new investigation.

Mr. Cattani went on to state that in the Florida system, the state's PCR office also handles federal habeas proceedings, with federal court compensation. Inasmuch as there is no right to effective assistance of PCR counsel, there is no conflict of interest in this arrangement. Because the same attorneys handle the state PCR and the federal habeas, counsel are already familiar with the facts. It is logical not to have different people re-doing the investigation, especially because there are no new issues in the federal habeas proceeding. Mr. Cattani requested that Arizona explore having PCR counsel also doing the habeas proceedings.

Mr. Lieberman stated that California has a habeas corpus resource center. The center's attorneys do capital appeals, PCRs, and habeas petitions. Mr. Lieberman is open to discussion of such an arrangement, although it requires much further consideration. He expressed concern about opt-in issues. Ms. Hallam suggested speaking with the federal public defender in Arizona, inasmuch as early appointment of habeas counsel is being discussed at that office. Mr. Cattani also indicated that the views of capital PCR defenders in other states should be solicited.

The members returned to the discussion of the proposed amendments to Rule 32.7. Mr. Lieberman suggested that the biggest problem in the area of PCRs was getting counsel appointed, rather than processing the petitions. Ms. Hallam did not believe that the proposed rule would have an adverse impact on the appointment of counsel. Mr. Cattani and Judge Reinstein added that it was important to get the PCR proceeding in front of the court rather than letting the matter languish for an extended period. Mr. Cattani noted that the intent of the PCR proceeding was not to retry every case, but rather to remedy those rare situations where justice went awry.

The Committee proceeded to address three specific issues arising from the proposed amendments to Rule 32.7. What is the appropriate time after appointment of PCR counsel when an informal conference could be conducted? What should be discussed at an informal conference? Do the defendant and the victim have a right to be present at an informal conference?

Mr. Todd believed that prior to an informal conference, PCR counsel should have had an opportunity to read the record and to speak with trial counsel, and to identify areas that could be at issue. Mr. Lieberman cautioned against having to disclose in open court areas of investigation, and he noted a potential need to obtain ex parte orders. Mr. Logan stated that every capital case is different, and that it is difficult to fashion a rule that applies to all capital cases. Mr. Cattani replied that these cases are all similar because every case involves a defendant who was convicted and who was represented by two qualified attorneys. The Chair suggested taking out language in the proposed rule that would require counsel to be prepared to discuss preliminary legal issues. This suggestion was adopted by the members.

On the issue of when the conference would occur, Mr. Levey noted that from the perspective of the victim, there was value for the case to go before a judge, even if the case was then continued.

Mr. Lieberman stated that on his current petitions, he is filing motions to continue every sixty days. Mr. Beene proposed having both sides agree about when to schedule an informal conference. Mr. Beene and Mr. Cattani also stated that as with the federal model, a conference, although not definitive, would get the case moving and keep it from stagnating. Judge Reinstein felt that the benefit of the conference was to keep the case from falling through the cracks, as well to have a discussion of pertinent issues. He added that if an informal PCR conference in capital cases is discretionary with the court, some judges may not schedule them.

A suggestion was made that when the prosecutor wants to move a PCR petition along, the prosecutor could make a unilateral request for an informal conference with the court. Judge Donahoe, who now serves as the Rule 32 unit judge, responded that he is not seeing such requests being made. He also noted that the PCR is not assigned to a trial judge until after the PCR pleadings have closed; and that the original trial judge is not always available for the PCR assignment because of the lapse of years since sentencing.

Judge Baca inquired of Mr. Lieberman at what point would he be able to meaningfully discuss a PCR case with the court? Mr. Lieberman stated that ninety days from the date of appointment would be reasonable, but that he nonetheless opposed the proposed rule. Mr. Todd added that in federal court, the conferences are set about thirty days after appointment.

The Committee's consensus was that the informal conference on a capital case PCR should be held within 90 days after the appointment of counsel.

It was also the consensus of the Committee that preparation of the petition should be included as a subject for discussion at the informal conference.

Mr. Levey inquired whether under this proposed rule the victim would have a right to be present at an informal conference. It was his belief that the victim had that right. Mr. Lieberman objected to the defendant not having a right to be present if the victim was present. Mr. Cattani felt that that was no requirement that anyone other than counsel be present at an informal scheduling conference. Judge Reinstein concurred, and added that informal scheduling conferences are typically held in chambers.

Mr. Lieberman advised that while the PCR defendant usually waives his presence, the proposed rule should state only that the defendant "may waive his presence". A discussion ensued about the costs and security concerns of transporting death row inmates to the superior court for an informal scheduling conference on a PCR proceeding. Mr. Logan stated that because the conference would be mandatory, and because orders would be entered at the informal conference, the defendant would have a right to be present.

Mention was made that the victim is often endorsed on minute entries setting scheduling conferences, and if the victim does appear at the informal conference, it's unlikely that the judge would deny the victim access to the proceeding. It was noted that other than in Rule 39, the rules generally do not specify that the victim has a right to be present at a particular proceeding, and that such language should not be added to the proposed rule under discussion. It was the

consensus of the members that it was up to the prosecutor to explain the informality of the conference to the victim, and the lack of a need for the victim to be present.

Mr. MacDonnell made the following suggestions: that sections (a) and (b) of the proposed Rule 32.7 be deleted; and that the existing, two-sentence Rule 32.7 simply be modified by adding a sentence between the two existing sentences which would provide that on a first petition for post conviction relief in a capital case, the court would hold an informal conference within 90 days after the appointment of counsel. The defendant's presence would be addressed by the last sentence of existing Rule 32.7.

Mr. MacDonnell's suggestion was then made in the form of a motion.

Motion: That Rule 32.7 as it is currently stated be amended by adding the following sentence between the two existing sentences: "In a capital case, the court shall hold an informal conference within 90 days after the appointment of counsel on a first petition for post conviction relief."

The **motion passed**, eight in favor, none opposed, with two abstentions.

Judge Reinstein noted that the particulars of what should be discussed at an informal PCR conference in a capital case could be a matter of judicial education. The Chair suggested that the draft of the earlier version of Rule 32.7(a) might be used as a template. Staff will forward a copy of that draft version to the Judicial Education Center.

b) PCR data. Ms. Hallam provided updated PCR data, as follows.

- The number of defendants awaiting appointment of PCR counsel has changed from seventeen to fifteen, effective as of November 17, 2008.
- Two of the defendants awaiting counsel have been on the appointment list for more than a year-and-a-half.
- One petition for review of a capital case was denied by the Arizona Supreme Court on October 28, 2008.
- As of November 17, 2008, there will be eleven "first" PCR petitions pending in the superior court.

The Committee's report to the Arizona Judicial Council will be revised to reflect these updates.

c) Capital Data Management. Staff advised that a new case termination event needed to be added to Appendix B of the Committee report concerning capital data management. The new termination event would be when a notice of intent to seek the death penalty was not filed within the time period specified in a Rule 15.1(i)(1) stipulation. It was also noted during the ensuing discussion that a new active event needed to be added for those situations in which a petition for post-conviction relief in a capital case was granted. The Committee report will be revised to reflect these two additions, and the Maricopa County Superior Court's statistician will be notified of these changes.

d) Other revisions to the draft report. The following further revisions to the draft report were discussed:

- 1) It was noted that mitigation discovery conferences, which were implemented in 2007, were still too new to declare that these were “productive” proceedings. Accordingly, that word was removed from page 14 of the draft report.
- 2) Judge Baca and Judge Reinstein advised that the grant training program mentioned at page 16 might not be open to judges, although judges might be facilitators, and descriptive language of the program in the report was modified accordingly.
- 3) The statement at page 19 of the draft report, stating that the PCR cap was “archaic, unreasonable, and unrealistic” was deleted.
- 4) Language at page 20 which stated that a proposed rule for PCR case management conferences had been prepared by Task Force members representing “the prosecution and defense” was deleted.
- 5) A phrase at page 21 which stated that the time required to prosecute a capital case “deprives victims’ families of closure within a reasonable time” was deleted.

There were no further comments or revisions concerning the draft report, and the report will be submitted to the Arizona Judicial Council for consideration at its next meeting on December 2, 2008.

3. Other business. Judge Baca formally introduced Judge Gary Donahoe to the Committee members. Judge Donahoe will be succeeding Judge Baca as the presiding criminal judge upon her retirement in January, 2009.

The members briefly discussed the budget crisis. Prosecution as well as defense agencies are or will be affected by the ongoing financial situation. It is yet unknown if or how this will impact the appointment of defense counsel.

The Chair reminded the members that an administrative order would be issued extending the term of the Oversight Committee. The current members of the Oversight Committee all agreed to continue as members during an extended term. The Chair thanked the members for their service on the Oversight Committee.

4. Call to the Public; Adjournment.

There was no response to the call to the public.

The meeting was adjourned at 2:45 p.m.