

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

February 23, 2007

Phoenix, AZ

MEMBERS PRESENT:

Hon. Michael Ryan
James P. Beene
James Belanger
Kent Cattani
Donna Hallam
Mark Kennedy
Dan Levey

Hon. Stephen M. McNamee
Paul Prato
Hon. Ronald Reinstein
Robert J. Shutts
Hon. Ann Scott Timmer
MEMBER ABSENT:
Hon. James Keppel

GUESTS:

Shirley Hanson
Bill Montgomery
Treasure Van Dreumel
Christine Powell
Jim Dodger
Beth Hendrickson
Rudy & Sandra Padilla
Steve Twist
Hon. Mary Murguia
Kristine Fox
Deborah Bigley
Duane Lynn
Jo Anna R. Lynn
Kris Eberle
Amy Bjelland
Jessica Funkhouser

Katy Proctor
Rick Unklesbay
David Berkman
Phil McDonnell
John Rood
Pollyanna Wedra
Christian Palmer
Paul Davenport
Ben Varbil
Jen Bowser
Theresa Barrett

STAFF:

Jennifer Greene
Kim Ruiz
Lorraine Nevarez

I. Call to Order

A. Opening Remarks by Chief Justice Ruth McGregor

Justice Ryan called the meeting to order at 10:00 am and introduced Chief Justice Ruth McGregor who explained the Court's reasons for convening the task force. She stated that the Supreme Court is willing to consider any solutions proposed by the task force, and emphasized that any solution must take into consideration all aspects of the system.

B. Introductions

The members introduced themselves and described their professional experience with capital cases.

Justice Ryan reviewed the operating rules for the task force covering quorum requirements, attendance and proxy restrictions.

II. Stages of the Capital Case Process

Members enumerated the stages of capital case processing and identified the following points at which a case might typically be delayed and some of the practices in place to reduce delay:

The three legal defender agencies in Maricopa County have a centralized system for assigning capital cases among qualified defense counsel. Efforts are made to identify which homicide cases are likely to become capital cases as early as possible. One of these offices, the Maricopa Public Defender's Office has 12 capital-qualified attorneys who work in six teams. Each team includes a mitigation specialist, an investigator, and a paralegal. The office has three investigators. Each team handles as many as four to six cases at a time. The office lost four mitigation specialists in the past year and has not been able to fill the vacancies. Team assignments are permanent to avoid scheduling conflicts among co-counsel. The other two public defender offices are believed to have similar staffing levels.

If a case cannot be assigned to one of the legal defender offices because of a conflict or unavailability of counsel, the matter is sent to the Office of Contract Counsel (OCC) for assignment to a qualified private attorney. The Office has approximately 20 first-chair attorneys and 30 second-chair attorneys available to handle capital cases. The more senior defense lawyers are handling up to six cases at a time. Less experienced attorneys are not expected to handle as many cases at one time. These lawyers have immediate access to mitigation specialists and mental health experts. The OCC currently has 16 capital cases awaiting assignment for which there are no lead attorneys available.

The rules of criminal procedure prescribe that the pre-trial discovery phase be completed within eight months of initial appearance; in the first two months the prosecutor is required to produce its evidence and in the next 180 days the defense is to share its evidence. In recent years, development of mitigating evidence has become a much more important focus of the defense team's trial preparation. Ineffective assistance of counsel relating to mitigation and newly discovered mitigating evidence are now the primary grounds for reversal on appeal. Much of a defense lawyer's trial strategy – including jury selection -- will be dictated by the mitigation evidence planned for the penalty phase of the sentencing proceedings. Defense lawyers spend as much as 80 percent of their time developing the mitigation side of the case.

This reality delays trial preparation, at least in part, because a capital defendant must be willing to disclose a lot personal history information to the defense team before the mitigation specialists, investigators, and mental health experts can begin to gather relevant evidence. Often defendants are reluctant to be candid with their defense team members until a relationship of trust has been established. There is nothing routine about this work, every case is unique. Unlike the prosecution, the defense team is basically starting from square one in developing its evidence – especially the mitigation evidence, and pre-trial preparation often requires 24 to 30 months to

complete, although some cases are less complicated. Some have noted that the cases in which the parties took longer to prepare for trial are less likely to be overturned in the appellate courts.

Victims' families are generally contacted by the county attorney's victim services office either at the scene of the crime or immediately after charges are filed, and a victims' advocate follows them all the way through to execution.

Cases are assigned to judges in the criminal court based primarily on judges' caseloads. There are 24 judges in the court and 26 commissioners who handle less serious felony matters. A judge serving for the first time on a criminal assignment is not likely to be assigned a capital case until that judge has served at least a year on the criminal bench. Last year, the superior court processed 16 capital cases.

Capital cases proceed automatically from the superior court directly to the Supreme Court. Once the notice of appeal is filed, the focus is on compiling the record of the case from the trial court, including transcripts of all hearings. This work generally takes more than 40 days, and is handled by a member of the Supreme Court Staff Attorney's Office. Occasionally, some portion of the trial court proceedings must be reconstructed due to a missing record or court reporter. Once the record is complete, a briefing schedule is set. Continuances were not commonly requested by attorneys on appeal until recently. Capital case appeals usually raise twenty or more issues that must be analyzed by the court.

After the initial appeal, an automatic first-time petition for post-conviction relief is automatically instituted in the trial court. Delays are routine at this point because of difficulties finding defense lawyers willing to handle these cases ("Rule 6.8 list"). The situation can be attributed at least in part to an on-going controversy surrounding certain provisions in the Patriot Act (AEDPA) that has reduced the number of lawyers willing to take these cases. The fees attorneys receive (\$100 per hour) may also factor into the number of attorneys willing to do this work.

The original trial judge hears the post-conviction (PCR) case, even if the judge has rotated to another department. If post-conviction relief is denied at the trial court, which is the norm, the matter goes to the Supreme Court for discretionary review. All justices are involved in reviewing these matters. Most are denied, occasionally an issue will be returned to the trial court for an evidentiary hearing. This denial marks the end of the state court proceedings in a capital case. On average, the state court process takes approximately six years to complete.

The next step involves the case proceeding to the federal system. Generally an initial request to stay a warrant of execution will be granted pending habeas corpus proceedings in the federal district court. There are often more than 50 grounds alleged, all of which must be considered. The U.S. District Court in Arizona currently has a pending caseload of 56 petitions for habeas relief from state capital cases. The relatively recent availability of law clerks dedicated to death penalty cases has permitted the federal trial courts to move cases along more expeditiously. Factors leading to delay in the federal courts include:

- Turn over in attorneys and availability of substitute counsel
- The need to assign the case to a visiting judge because of conflicts of interest
- Evidentiary hearings may be needed on specific issues

- Decisions made in other criminal cases sometimes provide new legal grounds for challenging a conviction or a sentence or lead to a stay on processing cases until an issue potentially impacting many different cases is definitively resolved.
- The sheer number of cases considered by the Ninth Circuit Court of Appeals which has 24 judges and more than 10,000 case filings each year. There are 22 Arizona capital cases pending at the Ninth Circuit currently.
- Logistical problems associated with making a defendant or incarcerated witness available for an interview or a hearing.
- On-going mental health issues.
- The record in a capital case at the federal court can contain as much as 30,000 pages

As the execution date approaches, defense counsel often file multiple petitions raising new issues that can lead to further delay up and down the line. The leading cause for reversal and therefore the most commonly raised issue is ineffective assistance of counsel at sentencing. On average, a capital case requires 12 years to complete in the federal courts.

III. Report on Maricopa County’s Current Case Backlog

Jessica Funkhouser, Special counsel to the Judicial Branch in Maricopa County, explained that there are 133 pending capital cases in the Superior Court in Maricopa County. The criminal department of the court handled 39,000 felony cases last year with 24 judges and 26 commissioners. Last year the court tried 16 capital cases. The court has established an in-house committee chaired by Judge Anna Baca who is the in-coming Presiding Criminal Division Judge. The committee has recommended changes to the way the court manages capital cases to bring more resources and eliminate unnecessary delay. Presiding Judge Barbara Mundell has issued Administrative Order No. 2007-112, dated February 23, 2007, that establishes a criminal complex and capital case designation and management plan. The plan establishes a number of standards for processing capital cases, including:

- Mandatory scheduling conference within 60 days from arraignment,
- Mandatory case management conferences every 30-45 days,
- For any continuance that is granted, the clerk will create a minute entry detailing the factual basis for the order, and the parties’ respective positions on the motion.
- The Presiding Criminal Judge will rule on any request for continuance that would cause the trial date to be extended beyond 18 months from arraignment.

Ms. Funkhouser noted that the county has been trying to address funding issues for some time. Presiding Criminal Judge James Keppel has scheduled a hearing for March 2nd at which county budget representatives and defense and prosecuting attorneys will be asked to report on resources and expenditures.

In conjunction with the Administrative Office of the Courts and the Judicial College in Reno, NV, the court is planning a capital case management training conference for its judges in the fall.

The Maricopa Public Defender’s Office has never set a standard for how many capital cases can be handled by one attorney, but the average is four to six, depending upon complexity. The most

the office can reasonably handle is 28 cases. The Office of Contract Counsel is short by 16 first-chair qualified defense attorneys.

The Supreme Court will need additional resources to handle the backlog as cases move up the pipeline. One possibility is to expand the jurisdiction of the court of appeals to allow that court to hear capital appeals and create a special panel to hear them supported by appropriate staffing levels.

IV. Patriot Act Update and the 2006 ABA Arizona Death Penalty Assessment Report

Mr. Cattani provided background on recent revisions to the Antiterrorism and Effective Death Penalty Act of 1996, and the subsequent amendments contained in the Patriot Act. The provisions of both Acts that were intended to encourage states to provide high-quality legal representation for capital defendants at the post-conviction and federal habeas corpus stages have not met their intended goal in many jurisdictions. The goal was to provide more experienced counsel earlier in the case and curtail the federal appellate options and timeframes for those states that were able to muster sufficient legal defenders. An unintended consequence of the statutory scheme has been the refusal on the part of some lawyers to take these cases as a means of ensuring defendants are processed under the older, more time-consuming arrangement.

Congress amended the Act last year to make more states eligible for the new expedited review process. The revision gives the U.S. Attorney General authority to handle some of the procedural aspects of the law in place of the courts. The Department of Justice will issue new guidelines in the near future that hopefully will resolve the stalemate. In Arizona, approximately 12 months are needed to find counsel willing to represent defendants in PCR cases.

Mr. Cattani explained that the 2006 American Bar Association's Arizona Death Penalty Assessment Report derived from the ABA Death Penalty Moratorium Implementation Project, and was funded by the European Union. The Arizona members of the workgroup that drafted the report voted against recommending a moratorium on the death penalty in Arizona – even the defense attorneys. However, the group did identify several areas needing attention that pertain to the work the task force has undertaken:

- More decentralized defense services (concern about representation in rural counties)
- Compensation for defenders and experts
- Proportionality review is needed to promote uniform application of the death penalty statewide and to avoid having one person decide whether to seek the death penalty in an individual case.
- A new jury instruction on the cruel-heinous aggravator is needed because of perceived ambiguities in this statute.

A new statewide office of capital case post conviction relief counsel will begin operating in the near future. Governor Napolitano is expected to appoint a director in the next month. The office will initially employ three attorneys, including the director, along with support staff. This agency will take over the work currently done by the Supreme Court Staff Attorney's Office in assigning qualified lawyers to represent defendants in PCR's.

V. Subcommittees

Justice Ryan asked for volunteers to work in subcommittees that will focus on trial and appellate case processing issues and develop strategies for the full committee to consider. The following membership and chairs were agreed on:

Trial Subcommittee

Hon. James Keppel (Chair)
Mark Kennedy
Paul Prato
James Belanger
Bob Shutts
Dan Levey
Hon. Ronald Reinstein

Appellate Subcommittee

Hon. Ann Timmer (Chair)
Hon. Stephen McNamee
Jim Beene
Kent Cattani
Donna Hallam
Hon. Michael Ryan

VI. Call to the Public

A number of homicide victims' family members recounted their frustration with the current system of handling capital cases.

A member of the Pima County Attorney's Office asked for the opportunity to comment on any proposals coming out of the task force. Pima County is not experiencing a backlog of capital cases, most cases are tried within the 18 month timeframe established by the rules of criminal procedure. There are also far fewer capital cases on file in Pima County compared with Maricopa County. The task force was asked to be mindful of the impact on other counties of any recommended changes to rules or statutes.

VII. Adjournment

Meeting adjourned at 12:30 p.m.

NEXT MEETING

Friday, March 23, 2007, 10:00 am – 12:00 pm, location to be announced.

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

March 23, 2007

Judicial Education Center, Phoenix, AZ

MEMBERS PRESENT:

Hon. Michael Ryan

James Belanger

Kent Cattani

Donna Hallam

Honorable James Keppel

Hon. Ann Scott Timmer

Mark Kennedy

Martin Lieberman

Dan Levey

James P. Beene

Hon. Ronald Reinstein

Robert J. Shutts

Hon. Stephen M. McNamee by Deborah Bigbee

Paul Prato

STAFF:

Theresa Barrett

Lorraine Nevarez

GUESTS:

Jessica Funkhouser

Jim Haas

Tom Irvine

Phil MacDonnell

Jeremy Mussman

I. Call to Order

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

II. Approval of the Minutes

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

III. Subcommittee Updates

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

A. Trial Court Subcommittee

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

(1) Maricopa County Management – Tom Irvine

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

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

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

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

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

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

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

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

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

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

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

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

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

(2). Superior Court Administration – Jessica Funkhouser

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

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

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

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

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

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

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

(3) Possible Amendments to the Death Penalty Statute

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

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

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

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

B. Appellate Court Subcommittee Report

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

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

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

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

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

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

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

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

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

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

IV. Maricopa County Attorney's Office

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

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

V. Call to the Public

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

VI. Adjournment

Meeting adjourned at 12:20 PM.

NEXT MEETING

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

**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.

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

June 15, 2007

Supreme Court Building, Phoenix, AZ

MEMBERS PRESENT:

Hon. Anna Baca
James Beene
Kent Cattani
Donna Hallam
Dan Levey
Martin Lieberman
Paul Prato
Hon. Ron Reinstein
Hon. Michael Ryan, Chair
Bob Shutts
Hon. Ann Timmer

MEMBERS ABSENT:

Jim Belanger
Hon. James Keppel
Jim Logan
Hon. Stephen McNamee

GUESTS:

Phil MacDonnell
John Todd

STAFF:

Jennifer Greene
Lorraine Nevarez

I. Call to Order & Approval of the Minutes

Justice Ryan called the meeting to order at 10:10 AM. The Task Force approved the minutes of the May 18th meeting with modifications.

II. Subcommittee Updates & Proposals

Subcommittee chairs were asked to update the Task Force on their recent meetings and proposals.

A. Trial Subcommittee Proposals

Judge Reinstein, standing in for Judge Keppel, reviewed the June 11 Trial Court Subcommittee meeting notes attached hereto.

1. Stipulated extension of death notice filing deadline (Rule 15.1(i)) – Appendix B to subcommittee’s meeting notes

This proposal would give the attorneys an unspecified amount of time, to be determined based on the facts of the case, to identify mitigation early on. The prosecution would still be able to file the capital case notice at the 60-day point, but in a given case, perhaps ten percent, there are mitigating circumstances relatively easily gathered that would keep the case from being misguidedly labeled a capital case. Under the proposal, the filing of the stipulation would be equivalent to filing the notice of intent to seek death for purposes of committing resources to the

case. As they do now, the investigators and attorneys would undertake an immediate effort to secure mitigating evidence. The advantages to be gained from this proposal are:

- Faster resolution of those cases that might be mischaracterized as capital cases;
- Avoid committing the parties and victims' family members to believing the case to be a capital case;
- Facilitate working toward an agreed outcome short of trial.

The task force agreed to add language to the proposal to specify that:

- The stipulation be filed in writing and approved by the court or noticed for hearing;
- The prosecutor should consult with the victim's family; and
- The stipulation will trigger Rule 6.8 as well as the other administrative measures that normally follow upon the filing of the death notice.

2. Proposed statutory requirements for meeting speedy trial deadline (ARS §13-4435.01) – Appendix A to the subcommittee's meeting notes

This proposal, drafted by the Maricopa County Attorney's Office was originally part of SB1286. Judge Reinstein reviewed the concerns raised about the proposal at the subcommittee meeting. Judge Baca reminded the Task Force that the trial court's standards for pre-trial management of capital cases (Judge Mundell's Administrative Order No. 2007-023) will eliminate delays caused by prolonged mitigation investigations. Additionally real-time case monitoring by the trial court's new Capital Case Manager, combined with efforts by the County Attorney and the Defender agencies to limit the caseloads of capital attorneys, should alleviate delays caused by scheduling conflicts as much as is possible given the resources available to the court. The other commonly-cited reason for continuances involves forensic lab work; that obstacle may be overcome to some degree by closer judicial oversight envisioned by the new pre-trial management standards.

Pursuant to A.O. 2007-023, Judge Baca and Judge Tim Ryan now rule on all motions to continue a case beyond the 18-month deadline. The decision no longer rests with the trial judge. The consistency and efficiency sought by the proposed statute will be accomplished without involving the Supreme Court in motions to continue.

3. Amending the 18-months presumptive trial date (Rule 8.2(a)(4))

The Task Force discussed whether to recommend changing the 18-month deadline for capital trials. There was general recognition of the fact that, given available resources, a standard setting the presumptive trial date at 24-30 months better reflects current reality. Judge Baca explained that at least half the pending inventory in Maricopa County is more than 18 months old. The trial court has asked for six new judges, yet the county Office of Management and Budget is now indicating only one new judgeship will be added, despite its earlier representations that more would be made available. The Board of Supervisors has not yet been asked to vote on the issue. The court also lacks enough courtrooms to conduct the lengthy trials that will be required to keep pace with new case filings and dispose of the backlog – projections

range from 20 to 30 trials per year -- assuming retired judges can be persuaded to return to help deal with the backlog. The new downtown courthouse will not be built for another several years.

Members discussed changing the current standard to two years, or a range of 18 to 30 months, or deciding on a case-by-case basis. However, if the problem derives from a lack of resources, extending the 18-month deadline will not resolve the problem, although it could help to avoid raising unrealistic expectations on the part of victims' families. Other counties are able to comply with the 18-month standard, albeit for a lot fewer capital cases. Justice Ryan suggested the Task Force could recommend adoption of a longer time standard applicable only in Maricopa County and only while the current situation exists rather than changing the statewide policy. However, the consensus of the Task Force was to leave the current standard of 18 months in place. Extending the time would not address the problem of delay.

4. Modification to the judicial rotation policy in Maricopa County

There was general agreement that the trial court's policy of rotating criminal judges every two or three years complicates the timely disposition of capital cases. Among the options discussed were:

- Create a dedicated core of experienced judges to handle capital cases and/or capital trials who would rotate less frequently, perhaps only after five years.
- As judges rotate to new assignments, they would retain their capital cases rather than handing them off to in-coming criminal judges.
- Assign capital cases only to those judges who are not approaching the end of their criminal assignments.
- Rotate experienced criminal judges to a "special assignment" calendar, rather than a high volume department such as juvenile or family law so they can follow through on the capital cases they would be taking with them.

Judge Baca explained that six of the nine judges who will be rotating into the criminal department in July have enough experience to handle capital cases immediately. She may assign complex capital cases to the other three newer judges after they receive more training in September. Mr. Levey asked whether civil department judges could be enlisted to handle some capital cases. Judge Baca and Reinstein explained that the civil department traditionally has handled overflow criminal cases, but there are disadvantages to deferring too many civil trials in favor of criminal cases. Civil cases often have their own "victims;" and the court's ability to resolve civil disputes in a timely fashion is a fundamental feature of Arizona's business climate that can make a difference to corporate decision-makers who must choose where to locate their companies. Delays in civil case processing can negatively impact the economy.

5. Reconsidering the statutory aggravators (A.R.S. §13-703)

The subcommittee asked the Task Force to consider recommending that the legislature reduce the number of aggravators to better identify the "worst of the worst" first degree murder cases, reduce the number of cases eligible for capital status, and alleviate jurors' confusion. Comparing Arizona's list of fourteen aggravators with six other Southwestern States showed that Arizona has fewer aggravators than four of those states, California, Colorado, Nevada, and Utah. It is

possible that inviting legislative review of the issue could backfire. It was generally recognized that this recommendation does not fall within the scope of the Task Force's assignment, but a review by the legislature may be appropriate.

B. Subcommittee on Appeals Report & Discussion

Judge Timmer reviewed the subcommittee report, attached hereto.

(1) Proposals relating to court reporting – Appendix A to the subcommittee report

The subcommittee drafted a proposed administrative order to address verbatim records and transcript production. The Committee on Superior Court has reviewed the draft and suggested it be circulated to the presiding superior court judges at their meeting on June 19.

The subcommittee also recommends an increase in the statutory per page rates for transcripts. Arizona currently pays \$2.50/page. Information on similar statutes from 15 other jurisdictions shows Arizona is among the lowest-paying jurisdictions, other than Oregon (\$2.50) and Colorado (\$2.35). In Seattle and Houston, reporters earn \$4.00/page. California is considering a statewide increase to \$3.57/page. The Superior Court in Maricopa County has only 65 reporters on staff, compared with the 80 it employed just a couple of years ago, and a number of those reporters are nearing retirement age. Filling vacancies has been difficult.

Appellate rules require reporters to file transcripts 45 days after the notice of appeal is filed. However in recent years, the average transcript preparation time in capital cases is five months. Unlike virtually all other case types, capital case appeals require that all trial court proceedings be transcribed. Paying more for transcripts would help ensure more court reporting resources and a more timely production of transcripts. It was noted that the counties can be expected to oppose an increase in the per page rate.

(2) Proposals relating to Post-Conviction Relief counsel (A.R.S. §§13-4041 & 41-4301)

Currently, post-conviction relief representation is conducted by private attorneys selected from the list maintained by the Supreme Court. The list contains 12 to 14 names, but some of those people are no longer actively taking these cases. There were 20 lawyers on the list a few years ago. Ten cases are awaiting assignment. The Public Defender agencies often have conflicts that prevent them from representing petitioners in PCR matters. They also do not have enough lawyers on staff to handle PCR's. The new State Capital Post-Conviction Defender's Office will alleviate some of the backlog.

(a) A.R.S. §13-4041- attorney fees in PCR

Private attorneys may be avoiding this area of practice because the fees established by A.R.S. § 13-4041 appear to limit what a lawyer can earn in a PCR case, even though the reality is that the statute has not been interpreted as placing a cap on attorneys' fees. A public education effort could help disabuse lawyers of the false perception that they cannot receive adequate compensation for their work in PCR cases. The subcommittee recommends this project be

undertaken by the Criminal Justice Section of the State Bar and that the hourly rate set by this statute should be increased from \$100 to \$125.

(b) §41-4301 State Capital Post-conviction Public Defender's Office – Appendix C to the subcommittee report

Given the expected caseload and lack of additional resources, the State Capital Post-Conviction Defender's Office will need more funding to employ more attorneys and support staff. This office can be expected to perform its function more efficiently than private contract lawyers. The subcommittee recommends the statute be amended to remove the cap on staffing, currently set at one director, three deputies and not more than four other employees. Also the subcommittee could find no basis for prohibiting members of the office from training lawyers with respect to issues that may arise in petitions for post-conviction relief, so long as they do not provide consulting services in trial or appellate cases. And the office should be allowed to consult in other PCR cases. General training and consulting are distinctly different types of activities, and the statutory proscription on training should be lifted.

(3) Proposed Rule 6.9 - defense file repository – Appendix B to the subcommittee report

Mr. Lieberman has revised his draft proposal based on comments received at the Task Force meeting in May. The draft will be circulated for comment during July.

(4) Case management conferences for PCR's

The 120-day deadline set by Rule 32.4 for filing the PCR petition is rarely met. An early case management conference would assist the parties to identify scheduling, discovery and other necessary orders. Kent Cattani and Jim Beene offered to draft a rule for the Task Force to review in August.

(5) Prosecutorial disclosure for PCR's - Appendix D to the subcommittee report

Both North Carolina and Mississippi require prosecutors to disclose certain portions of their case files early in the PCR case process. The subcommittee recommends a similar rule be adopted that would require bates-stamping of the entire County Attorney's file, including privileged documents, and opening the non-privileged material in the file for inspection and copying by defense counsel. Mr. Lieberman stated that disclosure issues are common in PCR cases, and delay could be reduced by adopting this practice. Other members questioned whether this issue in fact has led to delays. Mr. Beene opposed the proposal as unfair, pointing out that prosecutors do not receive any such disclosure from the defense in defending against ineffective assistance of counsel. In his view, disclosure challenges are best handled through the adversarial process. Mr. Cattani offered to contact North Carolina and Mississippi to see how their rules operate. Justice Ryan asked the Task Force to review this issue at the next meeting.

(6) Proposed Rule 32.8 - PCR discovery rule – Appendix E to the subcommittee report

Mr. Beene presented a proposed new rule that would establish disclosure deadlines in PCR proceedings. He explained the rule is intended to impose a structure and efficiencies for PCR cases similar to Rule 15 and applies only to “colorable” claims. Some questioned whether the proposal would address the underlying source of delay in PCR cases, which is the investigation that precedes the filing of the petition. Mr. Beene will work with Mr. Cattani and Mr. Lieberman to revise the proposal for August and also develop case management procedures for PCR cases in which a notice has been filed but more investigation is needed before a petition can be filed. All agreed that the longest delay in processing PCR cases occurs during the investigative phase of the case.

(7) Proposed revision to Rule 32.1(h) – “actual innocence”

Judge McNamee and Kristine Fox have suggested that state courts are applying the actual innocence exception inconsistently in PCR cases, which can create unnecessary delays in the federal courts. There was general agreement that more information is needed from the federal court before the Task Force could identify an approach to resolving the issue. Mr. Cattani will work with Judge McNamee on identifying how the rule could be amended to reduce delay. It was also agreed that the Judicial College should design a training segment for judges to clarify issue preclusion under Rule 32.2. The attorneys in the Arizona Death Penalty Judicial Assistance Program are very well informed and should be called upon for assistance in this area.

(8) Staffing increase for the Supreme Court – Appendices F & G to the subcommittee report

Judge Timmer described the subcommittee’s recommendation to add two staff attorneys to the Supreme Court to assist with the expected increase in direct appeals from Maricopa County. This appears to be more cost-effective than the other options considered, such as adding two justices, adding a panel of judges to Division I, or creating a new criminal court of last resort. The case projections developed by the AOC indicate two staff attorneys will likely be sufficient to handle the anticipated increase in capital case volume, assuming the continued use of law clerks by the justices. Dedicated staff attorneys will provide expertise in capital case issues; and more continuity and efficiency than law clerks. The benefits of using staff attorneys in this manner have been proven in other jurisdictions, including the federal district court and the Texas Court of Criminal Appeals. Depending on the rate of direct appeal filings, the justices may need to enlist one or more members of the Court of Appeals to work with the staff attorneys from time to time.

The subcommittee also recommends adding a deputy attorney general and a public defender to handle direct appeals.

V. Adjournment

The meeting was adjourned at 2:00 PM.

NEXT MEETING

Friday, August 10, 2007

10:00 am – 12:00 pm
State Courts Building, Conference Room 230

**Capital Case Task Force
Trial Court Subcommittee
Notes of Meeting
June 11, 2007, 11:30 – 1:30PM**

Hon. Ron Reinstein, Acting Chair
James Logan
Dan Levey
Jim Belanger

Hon. Anna Baca
Paul Prato
Bob Shutts

Also present:
Mark Malone
Jennifer Greene

A. New Policy (Statute or Rule) Governing Processing Contested Motions for Continuance beyond the Presumptive Trial Date (18 months from arraignment)

Bob Shutts presented the County Attorney's proposal for a new A.R.S. §13-4435.01 governing time limits in capital cases, precedence of capital cases, extensions beyond the presumptive trial date and processing contested motions for continuance beyond the presumptive trial date. A copy is attached as **Appendix A**.

Mr. Shutts stated that the proposal is intended to govern only contested motions to continue and involves the Supreme Court -- or the Court's designated special master -- in making these rulings instead of the trial judge, to provide more oversight, consistency, and finality.

Objections to this proposal included:

- The proposal is framed as a statute rather than a rule, and as such appears to infringe on the Supreme Court's rule-making authority.
- Is it appropriate for the proposal to state that capital cases take precedence over "all other cases, both criminal and civil" when the Supreme Court has already rule that juvenile cases should have top priority?
- The proposal does not address the types of requests for continuance the trial court is currently seeing. The superior court is working out a new process whereby a special continuance panel will resolve these motions. Recently, the grounds cited in requests for continuance have not been related to mitigation investigation; instead the parties are citing either the need to await forensics lab results or a scheduling conflict, especially from prosecutors. The superior court committee in Maricopa County is considering whether it would be feasible to have another prosecutor step in with a 30-

day continuance if the assigned attorney has a trial conflict. When consulted, one victim's family objected to having the case re-assigned to another prosecutor because they felt the current prosecutor was their attorney and they didn't want to see him replaced. The court has also seen some OCAC defense lawyers ask for more time because of caseload pressures and some of these attorneys have asked to be relieved from a case because of their caseloads (OCAC lawyers are handling just over four cases each, on average, some Deputy County Attorneys are handling far more than that).

- Some of the practitioners suggested there is a need for more consistency by the criminal bench on what constitutes "extraordinary circumstances" justifying a continuance. There is an apparent need for judicial education on extending the time for trial even if a defendant refuses to waive time, if both counsel agree that extraordinary circumstances are present.
- Should victims have to file a notice of appearance to be eligible to weigh in on these continuances?
- The proposal lacks a provision for a hearing on these motions.
- The 60-day limit on granting a continuance provided by subsection (D) seems arbitrary; these issues need to be considered on a case-by-case basis.

B. Amendment to A.R.Crim.P. 15.1(i) to Give More Time for Defense Input into Death Notice Determination

The general consensus was that delaying the determination to proceed with a case as a capital case might lead to earlier resolution for perhaps 10 percent of what would otherwise be pursued as capital cases. The amendment could reduce the amount of anguish victims' family members may experience when a death notice is withdrawn because of mitigation evidence revealed relatively early in a case. As explained by Jim Logan, the key is that everyone proceeds from the beginning as if it were a capital case. Accordingly, the amendment needs to specify that the case be treated for administrative purposes as if the death notice had been filed. Mr. Logan's suggested amendment is attached as **Appendix B**.

C. Revise the Rule 8.2 18-Months Standard Applicable in Capital Cases.

Members debated whether 18 months is realistic given the competition for resources and the rate at which the County Attorney has filed capital cases in recent years. Half the capital case inventory in Maricopa County is more than 18 months from arraignment. To set an 18-months standard that the system cannot meet sends the wrong message to victims' families. If cases cannot reach trial in that time frame, it may be better to extend the time frame to something more realistic. The general consensus was

that 24 months may be too short as well under current circumstances, but a majority of the subcommittee wants the full Task Force to consider changing the 18-months standard of Rule 8.2 to two years. A comment could be added to the amended rule to put parties on notice that only truly extraordinary circumstances will qualify for any extensions beyond two years.

D. Reconsider Aggravators

The sheer volume of new cases is preventing the court from meeting the 18-months standard. Some members believe the County Attorney needs to do a better job of reserving the capital case designation for the truly meritorious cases. Given that the Task Force cannot directly influence the way the County Attorney exercises his discretion, it may be appropriate to recommend revisions to the list of aggravators that would reduce the number of cases filed as capital cases. Additionally, some aggravators could be narrowed to avoid overbreadth. It was noted that Arizona has fourteen aggravators while Texas has nine. The subcommittee will provide information on other states' aggravators for consideration by the full Task Force.

PROPOSAL FOR ADDRESSING PRE-TRIAL DISCOVERY DELAYS IN CAPITAL CASES

§ 13-4435.01. Speedy Trial Requirements in Capital Cases.¹

- A. Time limits in Capital Cases.** Subject to the provisions of this section, every person against whom a notice of intent to seek the death penalty has been filed, shall be tried by the court having jurisdiction of the offense within eighteen months from arraignment.² The date eighteen months from arraignment shall be the presumptive trial date, and all discovery, and disclosures thereof,³ shall take place within this eighteen month period.
- B. Precedence of Capital Cases.** Capital cases shall have precedence over all other cases, both criminal and civil, pending before the court having jurisdiction.
- C. Extensions Beyond the Presumptive Trial Date.** Any party seeking a contested extension of time for compliance with the discovery disclosure deadlines pursuant to Rule 15 of the Arizona Rules of Criminal Procedure, or any other reason, that will necessitate an exclusion of time resulting in an extension of the presumptive trial date, must promptly file a written application to the Chief Justice of the Arizona Supreme Court for an extension of the presumptive trial date. Upon filing of an application to extend the presumptive trial date, simultaneous notice of the application to extend the presumptive trial date must be provided to the superior court, the opposing party, and any victims who have entered a notice of appearance. The opposing party, and any victims who have

¹ The legislative history should be sure to include a reference to the Victim's Bill of Rights, and the legislature's power pursuant to Art. 2. § 2.1(12)(D) of the Arizona Constitution "to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims." Additionally, this proposed statute could alternatively, or even additionally, appear at A.R.S. § 13-114.01, following the statutory codification of a defendant's right to a speedy trial.

² As provided in Rule 8.2(a)(4) of the Arizona Rules of Criminal Procedure and Maricopa County Superior Court Administrative Order No. 2007-023.

³ As provided in Rules 15.1(i), 15.2(h) and 15.6 of the Arizona Rules of Criminal Procedure.

entered a notice of appearance, shall have five days from the filing of the application within which to file a response objecting to the application. A reply, if any, shall be filed within three days of the filing of any response.

D. Grounds for Extension of Presumptive Trial Date. An application to extend the presumptive trial date may only be granted if extraordinary circumstances exist and the delay is indispensable to the interests of justice. Within five days of the filing of a reply, or the expiration of the time within which to file a reply, the Chief Justice, or its designee, must issue a written ruling on the application. The ruling must contain a consideration of the rights of any victim and the defendant to a speedy disposition of the case and must state the specific reasons why the delay is indispensable to the interests of justice. The maximum amount of time that may be granted in a continuance is 60 days, however, multiple continuances may be granted if each request meets the required standards.

Rule 15. Disclosure

Rule 15.1. Disclosure by state.

* * *

i. Additional disclosure in a capital case.

(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~~ upon stipulation of counsel. In the event such a stipulation is filed, the case shall be considered a capital case for all administrative purposes including, but not limited to, scheduling, assignment of counsel, and assignment of a mitigation specialist. ~~Additional extensions may be granted upon motion of the state and approval of the court.~~

Capital Case Task Force Subcommittee on Appeals

Final Report to the Task Force June 15, 2007

The Task Force's Subcommittee on Appeals held three meetings on May 25, June 1, and June 8, 2007. This report outlines the Subcommittee's final recommendations to the Task Force concerning issues in post-conviction and appellate proceedings.

A. Communication with court reporters

The subcommittee recommends issuance by the supreme court of an administrative order (attached as **Appendix A**) 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.

The subcommittee additionally recommends raising the minimum pay for court reporters for all cases in an amount that would attract court reporters to fill out pools of reporters. The statutory rate is currently \$2.50 per page and has not changed since 1987. The Board of Certified Court Reporters (the entity that regulates court reporters) has recently recommended an

increase to \$3.25 per page. Although the subcommittee is not currently in a position to recommend a particular raise, it suggests that the Task Force do so after consideration of recommendations from the various counties and other interested parties.

The committee on court reporters has approved the above-described recommendations. The committee on superior courts has reviewed the draft administrative order and suggested that we provide it to the presiding judges in order to receive their comments. Members of the group also provided some comment to the language used in the proposed order. In response, we revised the order slightly in order to clarify the language .

B. Defense attorney file repository

The subcommittee recommends filing a petition to add Arizona Rules of Criminal Procedure 6.9 to establish a Central Capital Case Repository for defense files. A form of the proposed rule is attached as **Appendix B**.

C. Assignment of PCR counsel

The subcommittee recommends that the legislature increase the funding for the Office of the State Capital Post Conviction Defender ("PCD") to permit it to hire the requisite number of attorneys and staff persons to enable it to handle an increased number of capital PCRs. As a corollary, the subcommittee recommends removing a prescribed number of attorneys from A.R.S. § 41-4301, which establishes that agency, in order to permit the PCD to increase the number of attorneys and staff persons the PCD can hire. Currently, the PCD can hire

3 attorneys, in addition to the Director of the PCD, and 4 staff persons.

The subcommittee additionally recommends eliminating the statutory limitation on training and assistance that the PCD can conduct.

A copy of § 41-4301 is attached as **Appendix C** with strikeouts showing the proposed changes.

The subcommittee additionally recommends increasing the hourly rate in A.R.S. section 13-4041(g) from \$100 to \$125 per hour to attract more private counsel. The subcommittee also recommends asking the Criminal Justice Section of the Arizona Bar Association to educate defense counsel that the 200-hour threshold amount of attorney time set forth in section 13-4041(g) is not an absolute bar to payment over that amount. Rather, PCR counsel must simply apply for additional funding from the court after expending 200 hours in representing the defendant. To accomplish this task, we should obtain historical data showing the amount capital PCR attorneys have been paid.

D. Counteracting delay in PCR proceedings

The subcommittee recommends creation of a rule stating that upon the filing of a notice of post-conviction relief in a capital case, the superior court shall conduct a case management conference to discuss scheduling, discovery, and other issues and to enter appropriate orders.

The subcommittee recommends consideration of a rule stating that upon the filing of a notice of post-conviction relief in a capital case, the prosecutor must make its file, excepting

privileged documents, available for inspection and copying by the defense. The entire file, including privileged documents, should be bate-stamped. Copies of authorities from North Carolina and Mississippi are attached herein as **Appendix D**.

E. Discovery in PCR proceedings

The subcommittee discussed whether a new rule is needed to govern discovery in post-conviction relief proceedings. The subcommittee is divided on whether the Task Force should involve itself in recommending such a rule. Specifically, many on the subcommittee do not believe that discovery issues contribute to the delay currently experienced in PCR proceedings. Others who support a rule acknowledge that any delay due to discovery is minimal.

The subcommittee recommends that the Task Force consider whether it should recommend a rule for discovery issues and, if so, what the rule should provide. A draft rule proposed by Jim Beene is attached as **Appendix E**.

F. Amendment to ARCRP 32.1(h) - the "actual innocence" exception

The federal court representatives to the subcommittee report delays in habeas proceedings due to an inconsistent application of the actual innocence exception set forth in Rule 32.1. Rule 32.1(h) provides post-conviction relief for defendants who demonstrate facts by clear and convincing evidence that "would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty." Among the issues is whether the

defendant has the ability to return to state court to attempt to gain relief for newly discovered mitigation evidence or whether the claim is precluded.

A majority could not be reached on whether the rule needs clarification or, if so, how this should be accomplished. Thus, the subcommittee recommends that the Task Force consider the issue and decide whether and/or to what extent the rule should be clarified.

G. Training of Superior Court Judges

The subcommittee recommends that the Judicial College undertake a regular course of training for superior court judges assigned for the first time to conduct capital trials and capital post-conviction relief proceedings.

H. Supreme Court Review

The subcommittee reviewed statistical analysis under differing scenarios in order to project the number of capital case appeals from FY 2007 through FY 2012. Bert Cisneros from the AOC ran projections based on four scenarios, which are attached as **Appendix F**. Essentially, the four scenarios assumed (1) no change in the capital case filings or trial rate, (2) increased new case filing rate, (3) increased trial rate, and (4) increased new filing rate and increased trial rate. The range of anticipated direct appeals was 4 - 17 in varying years.

The subcommittee discussed the following alternatives for the processing of direct appeals: (1) hire two capital case staff attorneys for the supreme court to assist in these appeals; (2) use court of appeals judges to fill in on panels if the supreme

court experiences a heavier-than-usual volume of appeals in any given year; (3) create a new panel of three court of appeals judges in division one and send direct appeals of capital cases to that court in the first instance with discretionary review by the supreme court; (4) form a separate criminal court of appeals; (5) increase of the number of supreme court justices from 5 to 7.

The subcommittee asked Kevin Kluge, CFO for AOC, to provide projected annual costs for alternatives (1), (3), and (5). Mr. Kluge reported that the projected cost of adding two staff attorneys is \$228,800, the projected cost of adding a panel to the court of appeals, with attendant staff, is \$1,994,400, and the projected cost of adding two justices to the supreme court, with attendant staff, is \$905,400. Mr. Kluge's figures are attached as **Appendix G**.

The subcommittee recommends that the supreme court hire two capital case staff attorneys to assist in the consideration of capital case appeals. The federal district court representatives to the subcommittees reported that when they employed such attorneys it assisted greatly in the dispensation of the backlog of cases and has added to the continuity of capital case decisions. These attorneys have also been a good resource for judges and law clerks working on such cases. The subcommittee anticipates a similar result if such attorneys are employed by the supreme court. Additionally, the subcommittee anticipates that such a system would allow for quicker adjustment should the number of direct appeals spike in given years.

The subcommittee additionally recommends adding one attorney each in the capital case appeal divisions of the Attorneys General's Office and one public defender agency, which handles such appeals.

The subcommittee additionally recommends that the Capital Case Manager from the superior court work with the supreme court in monitoring the number of capital cases likely to complete trial and proceed to appeal in a given year. This way, the supreme court will be better equipped to anticipate staffing needs in advance of a direct appeal.

DRAFT

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
ESTABLISHING STANDARDS FOR) Administrative Order
VERBATIM REPORTING IN) No. 2007 - _____
CAPITAL CASE PROCEEDINGS)
)
)
_____)

In capital cases, all pre-trial and trial proceedings shall be transcribed within 45 days after the filing of the notice of appeal pursuant to Rule 31.8(b)(3) and (d)(3), Arizona Rules of Criminal Procedure. Not uncommonly, appellate briefing is substantially delayed when transcripts are not promptly prepared due to the unavailability of the court reporter or the reporter's notes.

More reporters are moving to computer-assisted technology for note-taking and no longer produce paper notes. Business practices are needed to ensure these records are refreshed and continue to be readable despite changes in the technology required to read and retrieve such records, as required by ACJA §1-602(D)(6). Recently-enacted timelines for preserving reporters' notes appearing in ACJA §3-402(C)(2)(b)(1) require courts to maintain readable notes for 50 years after sentencing in capital cases.

NOW THEREFORE, IT IS ORDERED THAT superior courts establish standards to ensure reporters' notes in capital cases are available and can be transcribed by another party should the original reporter become unavailable. The standards shall provide at a minimum the following:

1. Providing for substitute records. In the event a court reporter's original notes are unavailable for transcription, an electronic audio or audio/video recording, if made by the court, may be used to reconstruct the verbatim record of the hearing. Accordingly, where practicable, courts shall schedule capital case hearings and trials in courtrooms equipped with an electronic recording system as a backup to the live court reporter.

2. Managing court reporter assignments. Courts shall assign reporters to capital case trials in a manner that will promote timely transcript preparation for capital case appeals, giving consideration to the volume of transcript orders outstanding for a particular reporter. Suggested methods for encouraging timely transcription of capital case hearings include:

- a. Assign two reporters to cover capital case trial proceedings, one in the morning and the other in the afternoon, and rotate these reporters to other types of hearings less likely to generate transcript orders for the remainder of the reporters' work day to reduce the likelihood that the reporters will be faced with competing transcript deadlines.
- b. Promote reporters' use of subcontractors, as permitted by A.R.S. §12-225(A).
- c. Require per diem reporters to file transcripts of any pretrial proceedings they report in capital cases within a specified time after the hearing.
- d. Avoid assigning any reporter to cover a capital case hearing who routinely seeks extensions of time to file appeal transcripts.

3. Record management considerations. Courts shall ensure that reporters who report capital case proceedings comply with the note storage standards as provided herein and as established by ACJA §1-602(D)(6)(a)&(b) (Digital Recording of Court Proceedings) and ensure that capital case notes are preserved in such a way as to permit the 50-year retention requirement set forth in ACJA §3-402 (C)(2)(b)(1)(Superior Court Records Retention and Disposition). These notes shall be segregated and stored so as to facilitate retrieval by case number.

(a). Labeling. Whether paper or electronic, the reporter shall label capital case notes with the reporter's name, the case number, the case name, and the date of the proceeding.

(b). Segregation and storage format for original notes. Reporters shall provide the court with a copy of the reporter's dictionary not less than once a year. Reporters shall ensure the notes of any capital case hearing are filed with the court clerk or designee in a timely fashion, but not later than ten days after the date of the proceeding reported. Paper notes shall be stored in a manner approved by the court separate from the reporter's notes in other case types. Electronic notes shall be stored along with the reporter's translated version of the proceeding on approved storage media or saved to an approved server.

(c). Notice to court reporter. When the prosecutor files a notice of intent to pursue the death penalty, the court shall provide prompt notice to any reporter

who has reported any proceeding in the capital case prior to or after the filing of the prosecutor's notice. When a notice of appeal has been filed in a capital case, the court shall provide prompt notice to all court reporters who have reported proceedings in the capital case.

(d). Per diem reporters. Reporters working in courts on a contract basis who report capital case proceedings shall deposit their capital case notes and a copy of their dictionaries with the clerk or a designee in the manner required by subsection (3)(b), not later than ten business days following the proceeding.

Dated this _____ day of _____, 2007.

RUTH V. MCGREGOR
Chief Justice

Rule 6.9 Central Capital Case Repository

a. Definitions. For purposes of this section:

(1) “Original Records” means the entirety of the file maintained by counsel for the defendant concerning the representation, including records in the court file.

(2) “Imaged Records” means an electronically reproduced copy of Original Records, except any records filed with the Court.

(3) “Privileged Records” means those records that are part of the Original Records and determined by counsel for the defendant to be privileged.

(4) “Counsel for the Defendant” means any attorney representing the defendant in a capital case except attorneys employed by a public agency during the representation, and includes attorneys who have contracted with a public agency to provide representation.

b. Initial Deposit. At the conclusion of the representation of any person sentenced to death, Counsel for the Defendant shall cause the Original Records to be electronically imaged. The Original Records and the Imaged Records shall be separately sealed by Counsel for the Defendant and deposited with the Office of the State Capital Post Conviction Defender.

Privileged Records. Privileged Records shall be separately sealed and denominated as such before they are deposited with the Office of the State Capital Post Conviction Defender. Privileged Records shall not be released or unsealed except upon either:

(i) written waiver of the defendant, to the extent authorized by the waiver, or

(ii) an order of a court of competent jurisdiction, to the extent specifically required by court order, after all parties have had an opportunity to be heard.

c. Subsequent Counsel. Upon appointment or retention of new counsel, the Office of the State Capital Post Conviction Defender shall release the sealed Original Records to new counsel who, unless employed by a public agency during the representation, shall, upon the conclusion of the representation, comply with subsection (b) should the defendant still be under sentence of death. Privileged Records shall not be released or unsealed except as provided in subsection (b).

d. Preservation. All records received and maintained by the Office of the State Capital Post Conviction Defender pursuant to this Rule shall be preserved as long as the defendant is under a sentence of death.

Public Agencies. All Original Records maintained by a public agency and not deposited with the Office of the State Capital Post Conviction Defender pursuant to this Rule shall be preserved by the agency as long as the defendant is under a sentence of death.

e. Federal Counsel. Upon appointment or retention of counsel in federal court, the Office of the State Capital Post Conviction Defender shall release the sealed Original Records to such counsel. Privileged Records shall not be released or unsealed except as provided in subsection (b).

f. Imaged Records. Imaged Records deposited in the Office of the State Capital Post Conviction Defender shall not be released or unsealed except upon Order of a Court of competent jurisdiction, and then only to the extent specifically required by court order, after all parties have had an opportunity to be heard.

COMMENT

Each counsel representing capital defendants shall make every effort to ensure that successor counsel is provided with a complete copy of the file consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.13 (2003). The purpose of this rule is to provide a mechanism for the transfer of files and to ensure, to the extent possible, the integrity of the files. Because public agencies have their own retention mechanisms, the depository only applies to private counsel, whether appointed or retained. The entirety of the attorney's files, including, but not limited to, notes shall be deposited although privileged materials shall be segregated.

In the event of a need to review Imaged Records, the Court shall make orders appropriate to resolving the dispute. This rule shall apply to all counsel representing the defendant at any stage of the proceedings.

In the event of a dispute regarding Privileged Records, any party may petition the Court for an order to unseal the records. The Court shall hear from all parties and may inspect the materials *in camera*.

ARS Sec. 41-4301:

.....

F. The state capital postconviction public defender shall:

1. Represent any person who is not financially able to employ counsel in postconviction relief proceedings in state court after a judgment of death has been rendered. Notwithstanding section 11-584, subsection A, paragraph 1, subdivision (g), after a judgment of death has been rendered, a county employed indigent defense counsel shall not handle postconviction relief proceedings in state court unless a conflict exists with the state capital postconviction public defender and a county employed indigent defense counsel is appointed.

2. Supervise the operation, activities, policies and procedures of the state capital postconviction public defender office.

3. Beginning in fiscal year 2007-2008, submit an annual budget for the operation of the office to the legislature.

4. Not engage in the private practice of law ~~or provide outside counsel to any other attorney outside of the state capital postconviction public defender office.~~

~~5. Not sponsor or fund training for any other attorney outside of the state capital postconviction public defender office.~~

6 5. Not provide trial or direct appeal assistance to attorneys outside of the state capital postconviction public defender office OTHER THAN GENERAL TRAINING.

~~7.~~ 6. Not lobby, during working hours, the state legislature or the Congress of the United States, except as provided by paragraph 3 of this subsection.

~~8.~~ 7. Allocate personnel and resources to postconviction relief proceedings so long as there are no conflicts of interest in representation and all state capital postconviction public defender attorneys are appointed to postconviction relief cases that are eligible for appointment of counsel under section 13-4041.

G. The state capital postconviction public defender may:

1. Accept and spend public and private gifts and grants for use in improving and enhancing the ability to perform the responsibilities of the state capital postconviction public defender office pursuant to this chapter.

2. Employ ~~not more than three deputies and not more than four other employees~~ SUFFICIENT DEPUTIES AND EMPLOYEES and establish and operate any offices as needed for the proper performance of the duties of the office.

PCR Disclosure Policies – North Carolina & Mississippi

North Carolina General Statutes

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.

* * *

(e) Where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, he shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

(f) In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial or appellate counsel shall make available to the capital defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the capital defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

* * *

Mississippi Rules of Appellate Procedure

RULE 22. APPLICATION FOR POST-CONVICTION COLLATERAL RELIEF IN CRIMINAL CASES

(C)(4)(ii) Upon appointment of counsel, or the determination that the petitioner is represented by private counsel the petitioner's prior trial and appellate counsel shall make available to the petitioner's post-conviction counsel their complete files relating to the conviction and sentence. The State, to the extent allowed by law, shall make available to post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner. If the State has a reasonable belief that allowing inspection of any portion of the files by post-conviction counsel for the petitioner would not be in the interest of justice, the State may submit for inspection by the convicting court those portions of the files so identified. If upon examination of the files, the court finds that such portions of the files could not assist the capital petitioner in investigating, preparing, or presenting a motion for post-conviction relief, the court in its discretion may allow the State to withhold that portion of the files. Discovery and compulsory process may be allowed the petitioner from and after the appointment of post-conviction counsel or the determination that the petitioner is represented by private counselor or is proceeding pro se, but only upon motion indicating the purpose of such discovery and that such discovery is not frivolous and is likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question and proper for post-conviction relief, and order entered in the sound discretion of the court. Upon determination that the petitioner has elected to proceed pro se, such files and discovery shall be made available as provided in subsection (2)(iii) above.

* * *

**PROPOSED AMENDMENT TO RULE 32.8, ARIZONA RULES OF
CRIMINAL PROCEDURE – DISCOVERY/DISCLOSURE IN CAPITAL
PCR EVIDENTIARY HEARING**

Rule 32.8. Evidentiary hearing

* * *

f. Disclosure in capital evidentiary hearing.

- i. Discovery.** Discovery shall be limited to any matter relevant to one or more of the grounds specified in Rule 32.1 and A.R.S. § 13-4231 that the trial court has found to be colorable. Any victim who has entered a notice of appearance as specified in A.R.S. § 13-4234.01 must be noticed on all discovery requests.
- ii. Disclosure by Defendant.** Within 10 days of the trial court finding any claims that present a material issue of fact pursuant to Rule 32.6(c) and A.R.S. § 13-4236(C), the defendant shall provide to the prosecutor:

 - (1)** The names and addresses of all persons whom the defendant intends to call as witnesses in any post-conviction relief hearing, together with their relevant written or recorded statements,
 - (2)** The names and addresses of experts whom the defendant intends to call as a witness in any post-conviction relief hearing who have personally examined the defendant subsequent to trial and imposition of the death penalty, together with the results of physical and/or mental examinations and of scientific tests, experiments or comparisons that have been completed,
 - (3)** A list of all papers, documents, photographs or tangible objects that the defendant intends to use at any post-conviction hearing or which were obtained from or purportedly belong to the defendant.
- ii. Disclosure by the State.** Within 10 days of the filing of disclosure by the defendant, the prosecutor shall provide to the defendant:

 - (1)** The names and address of all persons whom the prosecutor intends to call as witnesses at any post-conviction relief hearing together with their written or recorded statements,
 - (2)** The names and addresses of experts who have personally examined the defendant subsequent to trial and imposition

of the death penalty, together with the results of physical and/or mental examinations and of scientific tests, experiments or comparisons that have been completed,

- (3) A list of all papers, documents, photographs or tangible objects that the prosecutor intends to use at any post-conviction hearing or which were obtained from or purportedly belong to the defendant, including any electronic surveillance of any conversations to which the defendant was a party.

- iii. **Continuing Duties.** The duties prescribed in this rule shall be continuing duties and each party shall make additional disclosure, seasonably, whenever new or different information subject to disclosure is discovered. All disclosure required by this rule shall be completed at least seven days prior to any hearing. A party seeking to use material and information not disclosed at least ten days prior to any hearing shall obtain leave of court by motion, supported by affidavit, to extend the time for disclosure and use the material or information. If the court finds that the material or information could not have been discovered or disclosed earlier even with due diligence and the material or information was disclosed immediately upon its discovery, the court shall grant a reasonable extension to complete the disclosure and grant leave to use the material or information. Absent such a finding, the court may either deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information, and if granted the court may impose any sanction other than preclusion or dismissal listed in Rule 15.7.
- iv. **Extensions of Disclosure Deadlines.** Either party may request one 30-day extension of time within which to comply with the disclosure requirements of this rule. Additional 30-day extensions may only be granted if the prosecutor and the defendant agree to an additional 30-day extension of time.

Note: In order to give both parties adequate time in which to interview witnesses prior to the evidentiary hearing, Rule 32.6(c) should also be amended. Pursuant to Rule 32.6(c), the trial court must set a hearing date “within thirty days on those claims that present a material issue of fact or law.” With the proposed disclosure deadlines in contained in Rule 32.8(f), Rule 32.6(c) should be amended allowing the trial court to set a hearing date within sixty days on those claims that present a material issue of fact or law.

Scenario 1.

Capital Case Filings/Dispositions Projections

	FY* 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Cases Pending At beginning of fiscal year *Number of pending cases in July FY07 was estimated	115	123	102	84	69	70
New Case Filings Based on last 4 fiscal years & MCAO projections for future case filings	30	35	38	41	45	49
Total Cases on File Cases pending plus new case filings	145	158	140	125	114	119
Terminations (A) Termination rate based on average rate of terminations for the last 40 months	22	24	24	24	24	24
(B) Additional cases that need to be adjudicated to reduce 60-case backlog by 20 per year plus keep pace with new filings	0	32	32	32	20	25
Total Cases Terminated (A+B)	22	56	56	56	44	49
Cases Pending On-going inventory at end of fiscal year (70=optimal #)	123	102	84	69	70	70
Cases Requiring Trial – 30% Assumption is based on last 40 months	7	17	17	17	13	15
Direct Appeals Results of last 40 months - 17% of all terminations or 57% of all trials resulted in death sentence	4	10	10	10	7	9

Scenario 2.

Capital Case Filings/Dispositions Projections w/ Increased New Case Filing Rate

	FY* 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Cases Pending At beginning of fiscal year *number of pending cases in July FY07 was estimated	115	123	105	87	69	69
New Case Filings Based on MCAO projections for future case filings	30	45	45	45	45	45
Total Cases on File Cases pending plus new case filings	145	168	150	132	114	114
Terminations (A) Termination rate based on average rate of terminations for the last 40 months	22	24	24	24	24	24
(B) Additional cases that need to be adjudicated to reduce 60-case backlog by 20 per year plus keep pace with new filings	0	39	39	39	21	21
Total Cases Terminated (A+B)	22	63	63	63	45	45
Cases Pending On-going inventory at end of fiscal year (70 = optimal #)	123	105	87	69	69	69
Cases Requiring Trial – 30% Assumption is based on last 40 months	7	19	19	19	14	14
Direct Appeals Results of last 40 months - 17% of all terminations or 57% of all trials resulted in death sentence	4	11	11	11	8	8

Scenario 3.

Capital Case Filings/Dispositions Projections w/ Increased Number of Cases Requiring Trial

	FY* 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Cases Pending At beginning of fiscal year *number of pending cases in July FY07 was estimated	115	123	102	84	69	70
New Case Filings Based on last 40 months & MCAO projections for future case filings	30	35	38	41	45	49
Total Cases on File Cases pending plus new case filings	145	158	140	125	114	119
Terminations (A) Termination rate based on average rate of terminations for the last 40 months	22	24	24	24	24	24
(B) Additional cases that need to be adjudicated to reduce 60-case backlog by 20 per year plus keep pace with new filings	0	32	32	32	20	25
Total Cases Terminated (A+B)	22	56	56	56	44	49
Cases Pending On-going inventory at end of fiscal year (70 = optimal #)	123	102	84	69	70	70
Cases Requiring Trial – 47% Assumption is based on 1995-1999 experience	10	26	26	26	21	23
Direct Appeals Results of last 40 months - 17% of all terminations or 57% of all trials resulted in death sentence	6	15	15	15	12	13

Scenario 4.

Capital Case Filings/Dispositions Projections w/ Increased New Case Filing Rate and Trial Rate

	FY* 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Cases Pending At beginning of fiscal year *number of pending cases in July FY07 was estimated	115	123	105	87	69	69
New Case Filings Version 2 Based on MCAO projections for future case filings	30	45	45	45	45	45
Total Cases on File Cases pending plus new case filings	145	168	150	132	114	114
Terminations (A) Termination rate based on average rate of terminations for the last 40 months	22	24	24	24	24	24
(B) Additional cases that need to be adjudicated to reduce 60-case backlog by 20 per year plus keep pace with new filings	0	39	39	39	21	21
Total Cases Terminated (A+B)	22	63	63	63	45	45
Cases Pending On-going inventory at end of fiscal year (70 = optimal #)	123	105	87	69	69	69
Cases Requiring Trial – 47% Assumption is based on 1995-1999 experience	10	30	30	30	21	21
Direct Appeals Results of last 40 months - 17% of all terminations or 57% of all trials resulted in death sentence	6	17	17	17	12	12

Costs Associated with Additional Resources for Capital Appeals

Source: CFO, Administrative Office of the Courts

#1. Add two Supreme Court staff attorneys

FTE's	2
Salary	\$166,700
ERE	\$46,700
Total Salary/ERE	\$213,400
Travel	\$3,000
Operating Expenses	
On-Going	\$4,400
One-Time	\$8,000
Total Operating	\$12,400
Total Projected Cost	\$228,800

#2. Add two Supreme Court Justices w/ supporting staff (two JA's, four law clerks and two deputy clerks)

	Justices	Jud. Assistants	Law Clerks	Deputy Clerk	Total
FTE's	2	2	4	2	10
Salary	\$310,000	\$101,400	\$207,900	\$78,600	\$697,900
ERE	\$55,800	\$28,400	\$37,400	\$22,000	\$143,600
Total Salary/ERE	\$365,800	\$129,800	\$245,300	\$100,600	\$841,500
Travel	\$7,300				\$7,300
Operating Expenses					
On-Going	\$10,900	\$4,100	\$6,000	\$3,600	\$24,600
One-Time	\$16,000	\$4,000	\$8,000	\$4,000	\$32,000
Total Operating	\$26,900	\$8,100	\$14,000	\$7,600	\$56,600
Total Projected Cost	\$400,000	\$137,900	\$259,300	\$108,200	\$905,400

#3. Add a new panel of three judges to the Court of Appeals with supporting staff (three JA's, six law clerks, three staff attorneys, and three deputy clerks (that is the full complement of staff within existing panels).

	Judges	Jud. Assistants	Law Clerks	Deputy Clerk	Staff Attorneys	Total
FTE's	3	3	6	3	3	18
Salary	450,000	152,200	311,800	117,900	250,000	\$1,281,900
ERE	81,000	42,600	56,100	33,000	70,000	\$282,700
Total Salary/ERE	531,000	194,800	367,900	150,900	320,000	\$1,564,600
Travel	29,300		-		3,000	\$32,300
Operating Expenses						
On-Going	16,400	6,100	9,000	5,400	6,600	\$43,500
One-Time (Build Out)						\$300,000
One-Time	8,000	6,000	12,000	6,000	12,000	\$54,000
Total Operating	34,400	2,100	21,000	11,400	18,600	\$397,500
Total Projected Cost	594,700	206,900	388,900	162,300	341,600	\$1,994,400

**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.

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

MINUTES

September 7, 2007

Supreme Court Building, Phoenix, AZ

MEMBERS PRESENT:

Hon. Anna Baca
James Beene
Jim Belanger
Kent Cattani
Donna Hallam
Hon. James Keppel
Dan Levey
Martin Lieberman
Jim Logan
Paul Prato
Hon. Ron Reinstein
Hon. Michael Ryan, Chair
Bob Shutts
Ann Scott Timmer
STAFF: Jennifer Greene and Lorraine Nevarez

MEMBERS ABSENT:

Hon. Stephen McNamee

GUESTS:

Michele Balmer
Denise Sanders Couvaras
Chris Dupont
Jessica Funkhouser
Jerry Landau
Elva Cruz-Lauer
Cindy Lineburg
Salm Matha
Diane Meyers
Bill Montgomery
Katy Proctor

I. Call to Order

Justice Ryan called the meeting to order at 10:08 AM.

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

The Maricopa County Trial Court Commission is taking applications for the new judicial division the county has requested the Governor to appoint.

The superior court is advertising for the new Capital Case Manager position. Judge Baca provided copies of the position description. She also provided copies of the materials presented to County OMB by court administration earlier this year to seek additional judgeships. She pointed out that the assumptions used by the county in its projections diverge significantly from the court's assumptions in several respects.

The newly-instituted resolution conferences appear to be improving the rate of case dispositions, but without a concomitant reduction in the overall list of pending cases. The number of pending cases has not changed significantly in the last six months. Given the current trend, it does not appear likely that the county's projections will be realized. The county predicted a few months ago that the case inventory would be reduced to 75 by March, 2008.

The county's plan to employ retired judges to conduct capital case trials has run afoul of the compensation issue. The constitutional and statutory limit on how much a retired judge can be paid translates to \$13/hour. At this rate, it may be possible to enlist retired judges to handle pre-trial matters in capital cases, but not for a long-term, full-time commitment to a lengthy trial. The county has provided some money for retired judges' pay, and the court is now seeking to use these funds to pay commissioners so the court can move some judges to a special assignment calendar to handle capital trials.

The members discussed the possibility of paying experienced former prosecutors or defense attorneys to conduct capital trials as pro tem judges. They could receive the same pay as an active duty judge. Commissioners are not qualified for this duty. There is some question whether such pro tem judges would be vulnerable to a notice of change of judge for cause under Rule 10.1, in other words former public defenders and county prosecutors may have substantial conflicts that would prevent them from hearing criminal cases.

III. Determination of Final Recommendations

Proposed A.R.S. §13-4435.01

It was determined to take no action at this time on this proposal. Justice Ryan stated that the planned Supreme Court oversight committee could revisit the proposal if the new case management practices instituted by the superior court prove ineffective. The case resolution conferences, mitigation discovery masters, determination of motions to continue by the Presiding Criminal Judge, and the new Capital Case Manager all should be given time to determine if they have an impact before deciding whether a need exists that the proposed statute would remedy.

Extending the 18-month presumptive trial deadline in Rule 8 to 30 months

A motion to reject this proposal was approved unanimously. The reasons for the proposal include:

- The 18 month presumptive standard was set before *Ring II*; those involved in proposing that standard were "guessing" it would be achievable.
- The proposal would adapt the rule to reflect current realities.
- According an in-depth study reported in the ABA Guidelines, total defense attorney hours in capital cases that proceed through trial average 1,889. Compressing this number of hours into an 18-month timeframe severely limits the number of cases an attorney can handle at one time.
- Given current resources, the criminal justice system in Maricopa County cannot meet this standard.
- The standard is misleading for victims, they need to be informed that it will take longer than 18 months to get their cases to trial.

Nevertheless, the proposal runs contrary to the mission of the Task Force. Extending the deadline might encourage more delay. Accordingly, the Task Force decided to reject the proposal.

Mitigation cooperation advisement proposal – Rule 16.2 amendment

The proposal is intended to shorten the time required to enlist a defendant's cooperation in the mitigation investigation. Concerns were expressed about the portion of the proposal that would require a defendant who does not want to cooperate to waive that defendant's assistance on the record. Judges should not encourage defendants to not cooperate, and the waiver might have that effect. Other concerns were expressed about the timing of the proposed hearing; it may come too early before a need for such an advisement could be identified. Also a mandatory advisement is unnecessary because a defense lawyer is already obligated to ask for this type of assistance from the court if and when the need arises.

A motion to reject the proposal as an amendment to Rule 16.2 passed unopposed.

A motion passed, with two members opposing, to recommend that the first two sentences of the proposal, describing the advisement but without the proposed waiver:

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.

be incorporated into the Mitigation Discovery Master's duties as established in the superior court's recent Administrative Order No. 2007-050, and that the advisement be made at the first scheduling conference the Mitigation Master holds.

Removing limits on retired judges compensation.

The members reviewed the constitutional and statutory provisions limiting retired judges to the amount a regular judge is paid minus what their pensions, which is currently \$13/hour. Given the county's plan to fill the need for more judges by recruiting retired judges, this limitation needs to be overcome.

The members unanimously approved the following motion: Recommend that the judicial branch support efforts to amend Article 6, §20 of the Arizona Constitution and A.R.S. §38-813 to permit retired judges to be called back to active duty for reasonable compensation.

Proposed administrative order governing court reporting in capital cases.

Several court reporters assisted the Task Force with suggestions for identifying how reporters' notes can be stored that will allow someone other than the original reporters to prepare a transcript, if need be. As amended during the meeting (see attached Exhibit A), the motion to recommend that the Supreme Court issue the proposed administrative order passed unanimously.

Per page and copy rate increase for transcripts provided by A.R.S. §12-224

Ms. Michele Balmer, President of the Arizona Court Reporters Association, provided the Task Force with a compilation of per page rates from other states indicating Arizona's rates are below the national averages. ACRA is considering whether to seek a statutory amendment in the 2008 legislative session. The statutory rate has not been changed for 20 years. At the current level, reporters have little incentive to subcontract transcript preparation to proofreaders, which can lead to delays in transcript production. Also, transcript fees represent a significant portion of any official reporter's pay, and the current level is an obstacle to hiring official reporters. The cost of transcripts for criminal cases is normally a county expense.

The Task Force unanimously approved a motion to recommend that the judicial branch actively support a legislative proposal to increase the rate to at least \$3.25 per page for the original and 0.50¢ per page for a copy.

Recommendations on staffing increases

Based on caseload projections previously reviewed by the Task Force, a motion was approved to recommend the addition of two staff attorneys and one deputy clerk at the Supreme Court to handle the expected increase in direct appeals from Maricopa County. At least one attorney at the Attorney General's Capital Appeals Unit and one appellate attorney in the Maricopa County Public Defense Services will also be required to process appeals in a timely fashion.

Mr. Cattani reported that his office recently requested two new positions as part of their annual budget proposal.

Amendment to A.R.S. §13-4041 establishing rates for PCR attorneys

There are fourteen PCR capital cases waiting for assignment of an attorney. The new State Capital Postconviction Defender Office will not have enough staff to handle all of these assignments in a reasonable time frame, so the private bar needs more incentives to take on these cases. The federal rate is \$150/hour; the current statutory rate is \$100/hour.

A motion to recommend the judicial branch support a legislative proposal that would increase the hourly rate these lawyers are paid to \$125 per hour and that the 200 hour cap be removed from the statute was unanimously approved (Exhibit B).

Amendment to A.R.S. §41-4301(F) establishing the State Capital Postconviction Defender Office

Mr. Lieberman explained the intent of the amendment is to increase the number of cases this office can handle. At the current staffing level, he can take only a handful of assignments. The other change permits the office to confer with other attorneys handling PCRs, which would offer the opportunity to share research and expertise.

Mr. MacDonnell stated that the county attorney opposes removing any restrictions from the statute out of concern that members of the office might engaging in activities that fall outside the legislative mandate of this office such as lobbying against the death penalty. Also the office is new, and any change is premature.

Justice Ryan stated he would welcome training or consulting by the PCR office that would improve the professionalism of contract PCR attorneys, because issues that are missed at the PCR stage lead to delays in federal court. The proposal would not change the existing prohibitions against lobbying and against entering appearances in outside cases. The statute also limits the cases the office can take to those assigned to it by the Supreme Court.

To further specify the restriction on whom the office can represent, language was proposed for subsection (F)(4) that the office not “represent individuals other than those assigned by the Supreme Court.”

Mr. Lieberman reported that contrary to the intent of the original drafters of this program, the money counties are supposed to contribute to support the office is going to the general fund, not to the office.

The proposal was moved and approved, as amended, with two members voting in opposition, to recommend that the judicial branch support legislative efforts to increase the budget for this office and to amend the statute as suggested in Exhibit C.

Proposed Rule 32.8 establishing discovery timeframes in PCR proceedings

The Task Force made no recommendation on this proposal. Mr. Beene indicated his office may file a rule change petition on this topic. Mr. Lieberman stated this proposal does not directly address delay.

Proposed Rule 32.4 case management conference for PCR proceedings

Mr. Beene explained this proposal is intended to emulate the process used in federal courts in habeas proceedings.

The Task Force voted to approve in concept the adoption of a policy for case management conferences in Rule 32 proceedings. Mr. Lieberman, Mr. Cattani, and Mr. Beene will refine the proposal, and the issue will be revisited by the on-going workgroup that will succeed the Task Force.

Proposed policy requiring disclosure of prosecutors' files

Mr. Lieberman noted that the *Walton* case out of Tucson raised the issue of an inadvertent failure to disclose notes of a witness interview, and led to a Ninth Circuit ruling sending the case back for an evidentiary hearing. This is the kind of situation the proposal is intended to prevent.

Mr. Beene reported the North Carolina policy has led to hearings over handwritten notes, and has had a chilling effect on witnesses and victims willingness to cooperate. Mr. Cattani stated that in his ten years of representing the state in PCR matters, he is not aware of any *Brady* issues. He suggested the proposal would lead to more delay. The county attorney bates-stamps its files to avoid the type of omissions that arose in *Walton*. The Attorney General already has open file policy. In North Carolina there have been issues raised about the scope of the required disclosure, for example FBI or out-of-state agencies' files. In Mississippi, the court reviews the materials in camera, and the policy has reportedly worked well there.

Mr. Montgomery pointed out that the North Carolina and Mississippi policies do not appear to comply with recent Arizona legislation protecting disclosure of victim contact information.

A motion to recommend adoption of a rule similar to the Mississippi or North Carolina statute was defeated, with two members voting to approve.

Proposed Rule 6.9 or 32.4(g) addressing defense file repository

Mr. Lieberman withdrew both proposals; logistical challenges relating to the technological aspects of the Rule 6.9 proposal appeared to go beyond the limits of office's budget. Mr. Logan expressed concern about ethical implications of handling privileged materials. Mr. Belanger pointed out that the defense lawyer is already under an obligation to provide access, which makes the proposed 32.4(g) redundant.

Proposed clarification to Rule 32.1(h) and judicial training on Rule 32

Justice Ryan read a letter from Judge McNamee indicating his preference not to propose any amendments to the "actual innocence" provision of the rule. It was agreed that the Task Force members would not reach consensus on language for a substantive change to the Rule, and it should be left to the Attorney General's Office or another prosecution office to propose a rule change in the future.

Judge Baca reported that the superior court plans to develop training on Rule 32 and settlement. Mr. Cattani reported that his office sees a need for statewide training on this topic. The Task Force unanimously approved a recommendation that the Judicial College to develop statewide training on PCRs.

Judge Reinstein suggested retired judges could be enlisted to handle PCRs in those cases they heard before retirement. Judge Baca indicated the court was doing that in some cases.

Recommendation for a new Supreme Court workgroup

Justice Ryan explained the concept is to create an on-going workgroup consisting of some or all of the original Task Force members to monitor the capital caseload in Maricopa County and address any other issues that may arise relating to the Task Force's mission. This workgroup would meet quarterly, barring some sort of emergency. Members were asked to let staff know of their willingness to serve.

The Task Force unanimously approved this recommendation.

IV. Approval of the Minutes.

The August 10th meeting minutes were approved as proposed.

V. Call to the public

No response

VI. Adjournment

The meeting was adjourned at 2:00 PM.

PROPOSED
IN THE SUPREME COURT OF THE STATE OF ARIZONA

(changes approved 9/7/07 indicated by ~~strike through~~ or underlining)

In the Matter of:)	
)	
ESTABLISHING STANDARDS FOR)	Administrative Order
VERBATIM REPORTING IN)	No. 2007 - _____
CAPITAL CASE PROCEEDINGS)	
)	
_____)	

In capital cases, all pre-trial and trial proceedings shall be transcribed within 45 days after the filing of the notice of appeal pursuant to Rule 31.8(b)(3) and (d)(3), Arizona Rules of Criminal Procedure. Appellate briefing is substantially delayed when transcripts are not promptly prepared.

More reporters are moving to computer-assisted technology for note-taking and no longer produce paper notes. Business practices are needed to ensure these records are refreshed and continue to be readable despite changes in the technology required to read and retrieve such records, as required by ACJA §1-602(D)(6). Recently-enacted timelines for preserving reporters' notes appearing in ACJA §3-402(C)(2)(b)(1) require courts to maintain readable notes for 50 years after sentencing in capital cases.

NOW THEREFORE, IT IS ORDERED THAT superior courts establish standards to ensure reporters' notes in capital cases are available and can be transcribed by another party should the original reporter become unavailable. The standards shall provide at a minimum the following:

1. Providing for substitute records. In the event a court reporter's original notes are unavailable for transcription, an electronic audio or audio/video recording, if made by the court, may be used to reconstruct the verbatim record of the hearing. Accordingly, where practicable, courts shall schedule capital case hearings and trials in courtrooms equipped with an electronic recording system as a backup to the live court reporter.

2. Managing court reporter assignments. Courts shall assign reporters to capital case trials in a manner that will promote timely transcript preparation for capital case appeals, giving consideration to the volume of transcript orders outstanding for a particular reporter. Suggested methods for encouraging timely transcription of capital case hearings include:

- a. Assign two or more reporters to cover capital case trial proceedings, one in the morning and the other in the afternoon, and rotate these reporters to other types of hearings less likely to generate transcript orders for the remainder of the reporters' work day when possible, to reduce the likelihood that the reporters will be faced with competing transcript deadlines.
- b. Promote reporters' use of subcontractors ~~as permitted by A.R.S. §12-225(A)~~.
- c. Require per diem reporters to file transcripts of any pretrial proceedings they report in capital cases within a specified time after the hearing or within a specified time after the notice of intent to seek the death penalty has been filed.
- d. Avoid assigning any reporter to cover a capital case hearing who routinely seeks more than one extension of time to file appeal transcripts.

3. Record management considerations. Courts shall ensure that reporters who report capital case proceedings comply with the note storage standards as provided herein and as established by ACJA §1-602(D)(6)(a)&(b) (Digital Recording of Court Proceedings) and ensure that capital case notes are preserved in such a way as to permit the 50-year retention requirement set forth in ACJA §3-402 (C)(2)(b)(1)(Superior Court Records Retention and Disposition). These notes shall be segregated and stored so as to facilitate retrieval by case number.

(a). Labeling. Whether paper or electronic, the reporter shall label capital case notes with the reporter's name, the case number, the case name, and the date of the proceeding.

(b). Segregation and storage format for original notes. Reporters shall provide the court with a copy of the reporter's dictionary not less than once a year. Reporters shall ensure the notes of any capital case hearing are filed with the court clerk or designee in a timely fashion, but not later than ten days after the date of the proceeding reported. Paper notes shall be stored in a manner approved by the court separate from the reporter's notes in other case types. ~~Electronic notes~~ All Computer Aided Transcription software and files shall be stored along with the reporter's translated version of the proceeding on approved storage media or saved to an approved server.

(c). Notice to court reporter. When the prosecutor files a notice of intent to pursue the death penalty, the court shall provide notice within ten days to any reporter who has reported any proceeding in the capital case prior to or after the filing of the prosecutor's notice. When a notice of appeal has been filed in a capital case, the clerk shall provide notice within ten days to all court reporters who have reported proceedings in the capital case.

(d). Per diem reporters. Reporters working in courts on a contract basis who report capital case proceedings shall deposit a "translated" or real-time version of their capital case notes in their original format and in Adobe PDF format and a copy of their dictionaries and all associated computer aided transcription files for that case with the clerk or a designee in the manner required by subsection (3)(b), not later than ten business days following the proceeding.

Dated this ____ day of _____, 2007.

RUTH V. MCGREGOR
Chief Justice

PROPOSED A.R.S. §13-4041. Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in postconviction relief proceedings; reimbursement.

A. through E [no changes]

F. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred TWENTY-FIVE dollars per hour ~~for up to two hundred hours of work~~, whether or not a petition is filed. Monies shall not be paid to court appointed counsel unless either:

1. A petition is timely filed.
2. If a petition is not filed, a notice is timely filed stating that counsel has reviewed the record and found no meritorious claim.

G. On a showing of good cause, the trial court shall compensate appointed counsel from county funds in addition to the amount of compensation prescribed by subsection F of this section by paying an hourly rate in an amount that does not exceed one hundred TWENTY-FIVE dollars per hour. ~~The attorney may establish good cause for additional fees by demonstrating that the attorney spent over two hundred hours representing the defendant in the proceedings.~~ The court shall review and approve ~~additional~~ reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent ~~over the two hundred hour threshold~~ are unreasonable, the attorney may file a special action with the Arizona supreme court. If counsel is appointed in successive postconviction relief proceedings, compensation shall be paid pursuant to section 13-4013, subsection A.

H and I [no changes]

PROPOSED A.R.S. §41-4301. State capital postconviction public defender; office; appointment; qualifications; powers and duties

A. through E. [no changes]

F. The state capital postconviction public defender shall:

1. Represent any person who is not financially able to employ counsel in postconviction relief proceedings in state court after a judgment of death has been rendered. Notwithstanding section 11-584, subsection A, paragraph 1, subdivision (g), after a judgment of death has been rendered, a county employed indigent defense counsel shall not handle postconviction relief proceedings in state court unless a conflict exists with the state capital postconviction public defender and a county employed indigent defense counsel is appointed.
2. Supervise the operation, activities, policies and procedures of the state capital postconviction public defender office.
3. Beginning in fiscal year 2007-2008, submit an annual budget for the operation of the office to the legislature.
4. Not engage in the private practice of law ~~or provide outside counsel to any other attorney outside of the state capital postconviction public defender office~~ OR REPRESENT INDIVIDUALS OTHER THAN THOSE ASSIGNED BY THE SUPREME COURT.
- ~~5. Not sponsor or fund training for any other attorney outside of the state capital postconviction public defender office.~~
- 6 5. Not provide trial or direct appeal assistance to attorneys outside of the state capital postconviction public defender office OTHER THAN GENERAL TRAINING.
- ~~7~~ 6. Not lobby, during working hours, the state legislature or the Congress of the United States, except as provided by paragraph 3 of this subsection.
- ~~8~~ 7. Allocate personnel and resources to postconviction relief proceedings so long as there are no conflicts of interest in representation and all state capital postconviction public defender attorneys are appointed to postconviction relief cases that are eligible for appointment of counsel under section 13-4041.

G. The state capital postconviction public defender may:

1. Accept and spend public and private gifts and grants for use in improving and enhancing the ability to perform the responsibilities of the state capital postconviction public defender office pursuant to this chapter.
2. Employ ~~not more than three deputies and not more than four other employees~~ SUFFICIENT DEPUTIES AND EMPLOYEES and establish and operate any offices as needed for the proper performance of the duties of the office.

H. [no changes]