

**ARIZONA SUPREME COURT
CAPITAL CASE TASK FORCE**

**REPORT OF RECOMMENDATIONS
TO THE
ARIZONA JUDICIAL COUNCIL**

September 2007



CAPITAL CASE TASK FORCE
September 2007

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RECOMMENDATIONS OF THE ARIZONA SUPREME COURT CAPITAL CASE TASK FORCE

I. INTRODUCTION

Chief Justice Ruth McGregor issued an administrative order (No. 2007-18) establishing the Capital Case Task Force in February 2007 to address the unprecedented number of capital cases awaiting trial in Maricopa County. The order directed the Task Force to:

[E]xamine the issues relevant to ensuring the availability of adequate resources for processing capital cases in Maricopa County and in the appellate courts of Arizona and make recommendations for rule and statutory amendments that would promote efficient resolution of these cases in light of the pending caseload, including consideration of case management practices, and judicial, clerk, and defense team staffing levels.

During the following eight months, the Task Force examined the capital case process for common sources of delay that could be eliminated or reduced through changes in rules, statutes, and administrative practices, with due consideration for the rights of victims and defendants. The Task Force formed two subcommittees, one on trial court processes and procedures and another on appellate and post-conviction processes and procedures. These subcommittees developed proposals for the full Task Force. The Task Force itself held seven plenary meetings and voted to support the following subcommittee recommendations.

II. FINDINGS AND RECOMENDATIONS

A. BACKGROUND FINDINGS

1. Introduction

Death penalty cases are among the most complicated and lengthy in the criminal justice system. From arraignment to execution, an Arizona capital case typically lasts eighteen years. Proceedings in the state courts last about seven years and consist of trial in the superior court, a direct mandatory appeal to the Arizona Supreme Court, a petition for certiorari to the United States Supreme Court, and a return to the superior court for an automatic post-conviction relief proceeding, which is reviewed by the Arizona Supreme Court on a discretionary basis. Not uncommonly, a defendant may file multiple post-conviction proceedings in superior court.

After their state court proceedings are concluded, capital defendants typically spend another eleven or twelve years in the federal court system pursuing *habeas corpus* relief in the United States District Court and appeals to the Ninth Circuit Court of Appeals and the United States Supreme Court. Before a capital sentence finally can be carried out, a case may pass between the state and federal court systems several times.

This lengthy process begins at the outset of a capital case because such cases are less likely than other criminal actions to be resolved without trial. Typically, fewer than four percent of criminal cases are resolved by trial. In contrast, between January 2004 and April 2007, thirty percent of capital cases in Maricopa County were resolved by trial.

Death penalty cases place numerous demands on public resources. For example, the Maricopa County Attorney has approximately sixteen capital case prosecutors who work with qualified second-chair lawyers. A defendant facing the death penalty is

similarly entitled to be represented by a team of no less than two lawyers with supporting investigators and mitigation specialists. There are approximately sixteen teams of defense lawyers in the three county defender offices. Maricopa County's Office of Contract Counsel had approximately twenty qualified lead attorneys and another thirty second-chair lawyers on its list of attorneys willing to take the overflow from the public defender agencies. However, at the time the Task Force began working, fourteen cases were awaiting appointment of a defense lawyer.¹

The length and complexity of capital cases affect all participants in the criminal justice system: judges and attorneys, defendants and victims. Both victims of crime and defendants have important interests in the efficient resolution of capital cases. Ariz. Const., art. 2, § 2.1(A)(10) (victim's rights to "a speedy trial or disposition" in criminal matters); Ariz. Const., art. 2, § 24 (defendant's right to a "speedy public trial"); *see also* U.S. Const. amend. VI ("accused shall enjoy the right to a speedy and public trial"). Although Ariz. R. Crim. P. 8.2(a)(4) establishes that a presumptive trial date be set for capital cases within eighteen months of arraignment, in light of the current level of resources devoted to processing capital cases in Maricopa County, and significant shifts in the law since the rule's adoption, this standard is unattainable for most cases.

2. Maricopa County capital caseload

a. Current status

As of August 27, 2007, there were 149 pending capital cases in Maricopa County, up from 133 in February. The pending cases include 125 active cases, nine cases in

¹ In Arizona, appointed counsel must meet the standards for appointment and performance of counsel in capital cases listed in Ariz. R. Crim. P. 6.8 and be guided by the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003). Ariz. R. Crim. P. 6.8, cmt.

which the defendant has pled guilty but has not been sentenced, nine cases that are in post-conviction relief proceedings, and nine cases on remand after appeals to the Supreme Court. County administrators maintain that approximately half of this caseload is part of a temporary backlog that will be resolved in the near future. However, judges, prosecutors, and defense lawyers disagree with this characterization and believe the pending case list is likely to expand in the absence of more resources.

b. Causes and implication of current caseload

Maricopa County's capital caseload is driven by a confluence of factors including dramatic shifts in the legal rules on capital cases and an increase in the number of new capital cases filed in fiscal year 2006, combined with insufficient judicial, prosecutorial, and indigent defense resources for processing capital cases.

The legal changes that followed a 2002 United States Supreme Court decision on the death penalty are a primary factor behind the Maricopa County caseload. In *Ring v. Arizona*, 536 U.S. 584 (2002) ("*Ring II*"),² the court ruled that, under the United States Constitution, a defendant is entitled to have a jury rather than a judge find the facts making the defendant eligible for a death sentence. Although *Ring II* did not require that

² The case is designated *Ring II* because it ruled on a petition for certiorari from an opinion of the Arizona Supreme Court, known as *Ring I*. See *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001) ("*Ring I*"). The *Ring II* decision vacated the death sentence imposed by an Arizona trial judge in *Ring I*. Subsequent to *Ring II*, the Arizona Supreme Court consolidated Ring's case with twenty-nine other death penalty cases in which the defendants' appeals had not become final, and ruled on numerous issues, including the applicability of the new statutory scheme the legislature enacted in the wake of *Ring II*. See *State v. Ring*, 204 Ariz. 534, 545-47, ¶¶ 15-24, 65 P.3d 915, 926-28 (2003) ("*Ring III*"). The Court concluded that it would review each death sentence in the consolidated cases to determine if the judge-imposed death sentence was harmless. See *id.* at 565, ¶¶ 102-04, 65 P.3d at 946. In its review of the death sentences in light of *Ring III*, the Court remanded all but two of the thirty cases for resentencing. See *State v. Sansing*, 206 Ariz. 232, 241, ¶ 39, 77 P.3d 30, 39 (2003) (finding *Ring II* error harmless); *State v. Murdaugh*, 209 Ariz. 19, 37, ¶ 91, 97 P.3d 844, 862 (2004) (same). Thus more than two dozen cases were remanded for resentencing.

a jury, in addition to its fact finding role, also decide whether to impose the death penalty, the Arizona legislature added this task to a jury's responsibilities when it amended Arizona's death penalty statutes in the wake of *Ring II*.³ The Maricopa County Attorney's Office, meanwhile expects to file thirty-five to forty-five new capital cases each year, a relative increase from past years.⁴

The new role juries play in capital case trials has significantly extended the time required to prepare and try a capital case. In Maricopa County, on average, capital case trials now take more than two months to complete, which is considerably longer than capital trials in the pre-*Ring II* era. Lengthy trials complicate the effort to schedule a block of time when court resources, attorneys, and witnesses can all be available. Because of these changes, the superior court has conducted an average of only eight capital trials per year in recent years. Thus, the court's recent rate of dispositions will not keep pace with the predicted rate of new case filings nor can it reduce the number of pending cases within a reasonable time. Further, given that resolution of capital cases involves considerable appellate and post-conviction proceedings, the current number of capital cases will have a ripple effect on the criminal justice system as these cases move out of the superior court.

³ See 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

⁴ There has been an increase in the number of criminal case filings overall, and the number of death penalty notices issued in Maricopa County. In fiscal year 2006, the court saw a nine percent increase in felony case filings and a forty-six percent increase in capital cases. Although the County Attorney's Office filed death penalty notices in forty-six cases in FY 2006, that number declined to thirty-four in FY 2007. By comparison, the Pima County Attorney filed three capital cases in FY07 and one in FY06.

B. RECENT STEPS TAKEN TO ADDRESS REDUCTION OF THE TRIAL COURT CAPITAL CASE INVENTORY

During the past year, the Superior Court in Maricopa County has been working with county administration, public defender agencies, and the County Attorney's Office to remedy staffing shortages and to develop administrative policies and case management practices needed to address the capital caseload.

1. Steps taken by the superior court

The court has instituted several of programs to address the caseload with available resources. The impact of these programs cannot yet be definitively measured, although they appear to be moving the court forward.

In February 2007, the Maricopa County Presiding Judge issued Administrative Order No. 2007-023 establishing uniform case management practices to ensure judicial oversight of all capital cases. The order reaffirms the court's commitment to enforce the eighteen month presumptive trial date required by Ariz. R. Crim. P. 8.2. It applies a differentiated case management approach for early identification of death-eligible cases, provides for assignment to a "complex" track featuring early and on-going scheduling and case management conferences, and creates centralized handling of all requests for continuance beyond the Rule 8.2 trial date.

The Presiding Judge has asked a number of retired judges for assistance in reducing the capital case inventory, and several such judges have expressed a willingness to help on a part-time basis. However, courtroom availability limits the number of hearings and trials that could be handled by retired judges. Experienced criminal judges currently on civil assignment may also be assigned to handle some death penalty trials, as has been done in the past.

The court also established a new capital case manager position to work with the Presiding Criminal Judge to oversee the progress of capital cases and eliminate avoidable pre-trial delays. Enhancements to the court's case management system will provide real-time data to assist the capital case manager in tracking each case. The superior court also coordinated a grant-funded multi-day training on capital case management by the National Judicial College in September 2007 for its criminal bench.

Since the beginning of 2007, the Presiding Criminal Judge has been leading a committee of judges in an effort to further refine capital case management practices to eliminate pre-trial delays whenever possible. The committee has created two major programs, one to promote timely completion of mitigation investigations through increased judicial oversight of the defense team, and the other designed to facilitate early case disposition through resolution conferences. This report discusses these programs and makes recommendations to enhance their effectiveness in Section III. A. below.

2. Steps taken by county administration

In March, Maricopa County implemented salary incentives for public defense agencies and prosecutors handling capital cases. The pay increases attracted enough qualified lawyers to create four more capital defense teams for the indigent defense agencies. A new pay package for contract defense attorneys raised the hourly rate they receive from \$100 to \$125 for lead counsel, \$95 for second-chair attorneys, and \$55 for mitigation specialists. The county will also pay team members at more frequent intervals and is modifying its procurement practices to facilitate contracting with expert witnesses. These incentives encouraged six capital mitigation specialists and four or five additional private attorneys to join the list of contract defenders.

The county has also established an Office of Public Defense Services to coordinate expeditious assignment of capital defenders to new cases. Public defense agencies and the County Attorney's Office are establishing case load limits for capital case lawyers in part to reduce scheduling conflicts, which is one of the leading causes for continuances.

The county is building a significant number of new courtrooms, some of which will be ready next year, and all are planned to be in place by 2011.

In July, the Board of Supervisors asked the Governor to appoint one new judge for the superior court, effective September 1, 2007. The county has also set aside funding for more temporary judges to process capital cases. Projections made by the county budget office indicate that, with one new division and three full-time retired judges, the court can keep pace with new case filings and reduce the pending caseload in a reasonable time. The budget office projects the court will have reduced the pending case list to ninety or less by June 2008. The county plans to review the court's need for permanent divisions on a quarterly basis.

III. SPECIFIC FINDINGS AND RECOMMENDATIONS

The Task Force's Background Findings demonstrate that a significant capital caseload is likely to remain in Maricopa County for some time. Thus, in conjunction with the ongoing efforts undertaken by the superior court and the county, the Task Force has developed recommendations that will enhance the steps already taken to address pre-trial delays, and improve state and federal appellate and post-conviction relief procedures.

A. PRE-TRIAL IMPROVEMENTS

Apart from the steps taken locally to address delay before and during trial, the Task Force recommends implementation of the following changes to assist in resolving capital cases efficiently and effectively. These recommendations focus on improving the collection and assessment of mitigation evidence and the efficient use of judicial resources.

1. Mitigation Improvements
 - a. Amend Ariz. R. Crim. P. 15.1 (i)
 - b. Include a mandatory mitigation cooperation advisement in the first scheduling conference held by a Mitigation Discovery Master in Maricopa Superior Court
2. Judicial Resources
 - a. Support efforts to amend Article 6, Section 20 of the Arizona Constitution and A.R.S. § 38-813
 - b. Modify the superior court's judicial rotation policy for the criminal bench
 - c. More judges are needed for the superior court
 - d. Conduct periodic formal training in capital case management

1. Mitigation improvements

The largest single block of time required to process a capital case at the trial court level is the time devoted by the defense team to investigating mitigation. The mitigation investigation typically requires twenty-four to thirty months to complete, although some cases are less complicated. Defense lawyers can spend as much as eighty percent of their time developing the mitigation side of their cases. Trial strategy, including jury selection, may well be dictated primarily by the mitigation evidence planned for the penalty phase. This reality often leads to delay because a capital defendant must be willing to disclose personal information to the defense team to assist mitigation specialists, investigators, and mental health experts in gathering relevant admissible evidence. Until a relationship of trust has been established, however, a defendant is often reluctant to provide the necessary information to his own lawyers. Claims of ineffective assistance of counsel relating to mitigation and newly-discovered mitigating evidence are among the primary causes of reversal on appeal or the granting of relief in post-conviction relief proceedings.

a. Amend Ariz. R. Crim. P. 15.1 (i) [Appendix A]

Already, superior court judges have proposed early resolution conferences for capital cases. These conferences will provide an opportunity for the parties and victims' families to meet with a judge to explore the possibility of resolving the case without a trial. A judge's perspective about the facts or likely outcome of a case can sometimes encourage the parties to agree to a resolution that conserves judicial resources. The proposed amendment to Rule 15.1(i) dovetails with the court's efforts to support efficient resolution of cases. Under the proposed rule, the time for the prosecutor's office to give notice that the death penalty will be sought is extended. This additional time offers

prosecutors and defense attorneys the opportunity to identify mitigation that may prompt the prosecution to forgo filing a death notice.

Under the proposal, the filing of the stipulation would be equivalent to filing the notice of intent to seek the death penalty 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 prosecution could still file the capital case notice after sixty days. However, when mitigating circumstances become apparent relatively quickly, fewer cases would be mislabeled as capital cases. The Task Force believes this could remove as many as ten percent of the cases from the capital case inventory.

b. Include a mitigation cooperation advisement in the first scheduling conference held by Mitigation Discovery Masters

The Superior Court has taken steps to address delays in developing mitigation evidence. The Task Force recommends further steps to assist defense counsel in ensuring client cooperation with mitigation investigation.

The Superior Court's Administrative Order no. 2007-050, issued on April 17, 2007, establishes a Capital Case Mitigation Discovery Master, who is an experienced criminal judge, other than the judge assigned to the case. This judge will facilitate mitigation investigations with appropriate orders and ensure avoidable delays connected with mitigation do not force a continuation of the trial date beyond the eighteen month presumptive date established in Rule 8.2. The Capital Case Mitigation Discovery Master will confer *ex parte* with defense counsel and defendant's mitigation specialist on a periodic basis to eliminate obstacles to uncovering mitigating evidence when possible.

The Task Force⁵ recommends that the administrative order be amended to add the following requirement:

At the first mitigation scheduling conference held by the Capital Case Mitigation Discovery Master, the Discovery Master 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 Discovery Master shall inform the defendant of the limited time which counsel has to develop and disclose information developed from the investigation.

The advisement is designed to assist those defense counsel who have a client who is reluctant to divulge information or actively blocks counsel's efforts to uncover mitigation evidence.

2. Judicial resources

a. Support efforts to amend Article 6, Section 20 of the Arizona Constitution and A.R.S. § 38-813

As noted above, the Presiding Judge in Maricopa County has attempted to engage experienced, retired trial judges to address the county capital case inventory. The Arizona Constitution, governing the judicial pension program, however, limits what a retired superior court judge can be paid:

A retired judge who is temporarily called back to the active duties of a judge is entitled to receive the same compensation and expenses as other like active judges less any amount received for such period in retirement benefits.

Ariz. Const. art. 6, § 20; *see also* A.R.S. § 38-813. Under this formula, a returning retired judge will earn only \$13 per hour for his or her judicial work. In contrast, the pre-retirement pay of a superior court judge is \$135,843 annually, or \$65 per hour. These

⁵ One member of the Task Force believes this advisement should only occur at defense counsel's request.

provisions present a substantial impediment to Maricopa County's plan to temporarily fill the gap in judicial resources with retired judges. The Task Force recommends the judicial branch support efforts to amend these provisions to provide reasonable compensation for retired judges who assist in reducing the capital case inventory in Maricopa County.

b. Modify the superior court's judicial rotation policy for the criminal bench

Under current court policy, judges are rotated among assignments every two or three years. This policy substantially aggravates the shortfall in judicial resources.

The current rotation policy is counterproductive for several reasons. First, the level of scrutiny focused on capital case trials makes it more likely that a judge's decision-making will be examined and re-examined for error. Thus, while capital trials should be assigned to the more experienced members of the criminal bench, a number of experienced criminal judges are rotated off the criminal bench each year.

Additionally, both victims' family members and criminal defendants have expressed frustration with the judicial rotation system. Victims' family members told the Task Force that their interests were impacted negatively when the assigned judge was removed before trial. Several defense counsel advised the Task Force that their clients experience frustration when the judge they have become comfortable appearing before is rotated to another assignment.

For the time being, the Task Force *strongly* encourages the superior court to employ one or more of the following management practices in place of the normal rotation policy:

- Create a dedicated core of experienced judges to handle capital cases and/or capital trials whose presumptive rotation schedule would be no less than five years.
- As judges rotate to new assignments, they would retain their capital cases rather than having them reassigned 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.

c. More judges are needed for the superior court

In recent years, the superior court has resolved twenty-four capital cases per year on average, including eight by trial. This rate of dispositions has not kept pace with new case filings, and the list of pending cases has grown over this time. To reduce the number of pending cases to a manageable level, statistical projections developed for the Task Force indicate that the court will need sufficient resources to resolve more than sixty cases per year, with approximately half of these case terminations requiring lengthy jury trials.⁶ These projections are admittedly based on a number of assumptions that could prove to be erroneous, including future new case filings and the number of cases that will need to be resolved through jury trials. Nevertheless, it appears likely that even with the anticipated improvements provided by new case management practices and additions to the ranks of capital defenders and prosecutors, the court will need to allocate significantly more judges to resolving capital cases.

Arizona law provides that counties should have one superior court judge for every 30,000 inhabitants. *See* A.R.S. § 12-121. According to U.S. Census data, the 2006 population in Maricopa County is estimated to be 3.77 million, which, under the statutory formula, would result in a staffing level of 126 judges. Maricopa County has ninety-four superior court judges. In the past five years, the court saw nearly a twenty percent

⁶ Projections indicate the court will need to dispose of sixty-three cases in each of the next three years to reduce the backlog and arrive at a level that will permit the court to dispose of as many cases as the county expects to file each year, which the Maricopa County

increase in the total number of new case filings, but only a three percent increase in the number of judges (ninety-one to ninety-four). The County Board of Supervisors recently agreed to seek the addition of one new judgeship. The court has long tried to fill the gap by employing commissioners and by enlisting the aid of experienced attorneys as judges *pro tempore*. One new judgeship is simply not enough. The court has asked the county to approve the creation of at least six new judicial positions to facilitate a reduction in the capital case caseload. The Task Force concurs with this request.

d. Conduct periodic formal training in capital case management

The Supreme Court funds two capital law clerks who assist judges statewide on a case-by-case basis with research and writing memoranda in capital cases. These two attorneys also publish annual training materials on recent death penalty case law for judges around the state. Apart from this one-on-one assistance, judicial training in capital case management has been a low priority for most counties because Maricopa and, to a lesser extent, Pima are the only counties that have a significant number of capital cases. However, to encourage the development of judicial resources and the efficient resolution of cases, additional training on this and related issues should be incorporated into the Judicial College's regular curriculum to ensure that the judges who hear capital cases and post-conviction petitions are thoroughly prepared to handle them.

Attorney has estimated to be between thirty-five and fifty. To accomplish the goal in less time will obviously require an even higher rate of dispositions.

B. DIRECT APPEAL IMPROVEMENTS

While there is no current backlog of capital cases at the Arizona Supreme Court,⁷ the time necessary for resolving appeals currently appears to include avoidable delay. The Task Force recommends the following steps to promote efficient resolution of direct appeals and to ensure that the Court has the necessary resources to handle the anticipated increase in the number of direct appeals as the superior court works through the current caseload.

1. Establish minimum standards for managing transcript production
2. Support legislation to amend A.R.S. § 12-224 to increase the per page rate for transcripts prepared for appeals
3. Increase staffing at the Supreme Court, Attorney General and Maricopa County Public Defense Services to avoid conflicting deadlines and accommodate increased appeal volume

1. Establish minimum standards for managing transcript production **[Appendix B]**

Capital case appeals are frequently delayed due to three problems concerning the preparation of trial transcripts for use by appellate counsel and the Supreme Court. First, court reporters routinely ask for multiple extensions of time to submit transcripts because of their schedules. Second, court reporters' notes are sometimes lost, requiring the Supreme Court to remand the case to the superior court to reconstruct the missing portions of the record. Third, despite rules and policies prohibiting court reporters from taking their notes with them when they leave superior court employment, some reporters

⁷ According to a recent multi-state study of time elapsed in the direct appeal of capital cases, the Arizona Supreme Court is more efficient than many courts in disposing of capital appeals. In recent years, the average time elapsed from the filing of the notice of appeal to issuance of the Court's written opinion was 870 days. The median time to disposition among the fourteen states in the study was 966 days. Latzer, B. & Cauthen, J., (March 2007) *Justice Delayed? Time Consumption in Capital Appeals: A Multi-state*

do so. As a result, the Supreme Court must spend time and effort finding these court reporters and entering orders to compel preparation of transcripts. By rule, reporters are to file transcripts within six weeks of the notice of appeal; in recent cases, reporters have taken an average of five months to complete their transcripts.

The Task Force has drafted a proposed administrative order for the Chief Justice that establishes minimum standards for managing court reporting resources in capital cases, attached as Appendix B. 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.

2. Support legislation to amend A.R.S. § 12-224 to increase the per page rate for transcripts prepared for appeals

The statutory per page rate for a transcript in a criminal proceeding is currently \$2.50 and has not changed since 1987. Comparable rates in many other states are \$0.75 to \$1 more. Data compiled by the Arizona Court Reporters Association for the Task Force shows Arizona's per page rate is significantly lower than twenty-four of the thirty-three states surveyed. The Task Force recommends raising the minimum pay for court reporters for all cases in an amount that would attract court reporters to work in superior court. An increase in minimum pay would also make reporters more efficient by allowing them to employ subcontractors to prepare initial transcript drafts, as permitted by statute.⁸ The current Arizona rate is clearly a disincentive to using subcontractors.

Study, John Jay College of Criminal Justice, City Univ. of New York, www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf.

The Board of Certified Court Reporters (the entity that regulates court reporters) has recently recommended an increase to \$3.25 per page. The Arizona Court Reporters Association reported that the organization is considering whether to seek legislation addressing this change. The Task Force recommends that the judicial branch support efforts to amend A.R.S. § 12-224 to at least \$3.25 per page and \$0.50 per copy.

3. Increase staffing at the Supreme Court, Attorney General and Maricopa Public Defense Services to avoid conflicting deadlines and accommodate increased appeal volume

Another source of avoidable appellate delay stems from the lack of attorneys available to represent capital defendants on appeal. Capital case appeals are often delayed by requests for extensions of time to file appellate briefs. Attorneys in Maricopa County often obtain extensions beyond 120 days because of caseload concerns. The addition of at least one new attorney position at Maricopa County's Public Defense Services and the Attorney General's capital appeals unit will be needed to reduce this source of delay and accommodate the expected increase in capital appeals during the next several years.⁹

The Task Force struggled to estimate the impact on case volume at the Supreme Court that will result from the superior court's reduction of its inventory of capital cases over the next several years. Although the estimate is admittedly subject to a number of variables that are very difficult to quantify with confidence, it appears that the Supreme Court will see a period in which the number of capital case direct appeals will, from Maricopa alone, be double the typical volume. With current resources, the Court can

⁸ A.R.S. § 12-225.

⁹ The Capital Litigation Unit at the Office of Attorney General currently has ten lawyers, including the director, who can each reasonably handle no more than eleven to fourteen cases at a time. Because this unit represents the state throughout the post-conviction life of a case, cases remain with the unit for an average of fifteen to eighteen years.

handle up to ten cases per year. Depending on how quickly the Maricopa County Superior Court processes the capital case inventory, the Supreme Court may see as many as seventeen new cases a year. Consequently, the year-to-year increase in volume anticipated by the Maricopa County Attorney's Office would lead to approximately twelve new direct capital case appeals per year.

The Task Force discussed several alternatives that would allow for processing direct appeals more efficiently: (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 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, followed by discretionary review by the Supreme Court; (4) form a separate criminal court of appeals; (5) increase the number of Supreme Court justices from five to seven.

The Task Force recommends that the Supreme Court hire two capital case staff attorneys to assist in the processing of capital case appeals. Federal district court representatives reported that dedicated capital case staff attorneys assisted greatly in the reduction of their case inventory and in the continuity of capital case decisions. These attorneys have also been a good resource for judges and law clerks working on capital cases. The Task Force anticipates that creating these positions, along with an additional deputy clerk, would allow for quick adjustment should the number of direct appeals spike in the near future.

The Task Force also recommends coordination between the new superior court capital case manager and the Supreme Court to monitor the number of capital cases likely

to complete trial and proceed to appeal in a given year. As a result, the Supreme Court will be better equipped to anticipate staffing needs in advance of a direct appeal.

C. POST-CONVICTION RELIEF PROCEEDINGS IMPROVEMENTS

1. Amend A.R.S. § 13-4041 to increase hourly rate for Post-Conviction Relief counsel and remove 200 hour “cap”
2. Support legislation to amend A.R.S. § 41-4301 to remove training prohibition and increase staff for State Capital Postconviction Public Defender’s Office
3. Support a rule change to institute mandatory case management conferences in all post-conviction relief cases

1. Amend A.R.S. § 13-4041 to increase hourly rate for post-conviction relief counsel and remove 200 hour “cap” [Appendix C]

Currently, post-conviction relief (“PCR”) representation is conducted by private attorneys selected from the list of qualified counsel maintained by the Supreme Court. However, only a few of those attorneys are still accepting cases. As of September 2007, fourteen cases are awaiting assignment. The public defender agencies often have conflicts that prevent them from representing defendants in PCR matters. They also do not have enough lawyers on staff to handle capital PCRs. The new State Capital Post-conviction Public Defender’s Office will alleviate some of the backlog, but cannot be expected to handle all of these cases with its current budget and staffing restrictions. Each attorney team in this office is expected to handle two to three cases at a time; the current statute limits the number of attorneys in the office to three plus the director.

According to the Arizona Capital Representation Project, the typical post-conviction relief capital case consumes 800 to 1,200 hours of attorney time. Private attorneys may be avoiding this area of practice because the fees established by A.R.S. § 13-4041 appear to limit a lawyer’s billable hours to 200 in a PCR case. The reality is that the statute has not been interpreted as placing a cap on attorneys’ fees. Rather, PCR

counsel must simply apply for additional funding from the court after expending 200 hours in representing the defendant. 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 Task Force recommends that the Criminal Justice Section of the Arizona Bar Association be asked to educate defense counsel that the 200-hour threshold amount of attorney time set forth in A.R.S. § 13-4041(g) is not an absolute bar to payment over that amount. Alternatively, the statute should be amended to eliminate the 200-hour cap. A proposed amendment is attached as Appendix C.

The Task Force also recommends increasing the hourly rate set forth in A.R.S. § 13-4041(g) from \$100 to \$125 per hour to attract more private counsel to represent defendants in capital case post-conviction relief proceedings. In contrast, the federal rate is \$153 per hour.

2. Support an amendment to A.R.S. § 41-4301 to remove training prohibition and increase staff for State Capital Postconviction Public Defender's Office [Appendix D].¹⁰

Given the expected caseload and lack of additional resources, the State Capital Postconviction Public 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. Recognizing that it may not be appropriate for the judiciary to propose legislation to expand an executive branch agency, the Task Force nevertheless recommends the judicial branch support efforts to amend this statute to remove the cap on staffing, currently set at one director, three deputies, and not more than four other employees. In addition, there appears to be no reason for prohibiting members of the office from conducting training and consulting with other lawyers representing

capital case defendants in state post-conviction proceedings with respect to issues that may arise in such proceedings, so long as the members of the office do not provide consulting services in individual trial or appellate cases or represent clients others than those assigned to the office by the Supreme Court. These lawyers possess specialized skills in Arizona PCR law and as such represent a rich source of expert knowledge and information from which other professionals can and should benefit. A suggested amendment to this statute is attached as Appendix D.

3. Support a rule change to institute mandatory case management conferences in all post-conviction relief cases

The Task Force recommends creation of a rule to ensure early and periodic case management conferences are held in PCR cases. The addition of a mandatory case management conference in PCR cases will promote active judicial management of these cases and in turn process them more expeditiously. The concept is derived from the process used by the district courts in federal *habeas* proceedings. Task Force members from the Attorney General's Office, the County Attorney's Office, and the State Capital Postconviction Public Defender's Office will draft a specific proposal and present their draft to the on-going workgroup that will succeed the Task Force.

D. FEDERAL COURT IMPROVEMENTS

Establish periodic training on Rule 32 for trial judges

Many criminal convictions, and all capital case convictions which are affirmed on appeal, lead to *habeas corpus* proceedings in the federal courts. At the time the Task Force began meeting, there were fifty-six *habeas* proceedings pending in the United

¹⁰ Task Force members representing the Maricopa County Attorney's Office voted against this recommendation.

States District Court and twenty-two cases from Arizona pending in the federal court of appeals. Although many factors accounting for lengthy federal court proceedings are the domain of the federal government, the Task Force recommends steps be taken at the state court level to facilitate effective processing in the federal courts.

The federal district courts reportedly experience delays in *habeas corpus* cases because of the lack of evidentiary hearings held in some state post-conviction relief proceedings and the lack of detail in the trial court's final rulings. The federal district court is willing to assist in continuing education training activities for state judges to outline the pertinent federal *habeas corpus* principles and explain their relevance as a case proceeds through state appeal and post-conviction. The superior court in Maricopa County is developing future training on related topics for its criminal bench. The Task Force recommends that the Arizona Judicial College incorporate formal training relating to PCR matters into the regular training schedule offered to superior court judges.

E. OTHER RECOMMENDATIONS

Establish a committee to monitor capital caseload reduction efforts in Maricopa County and other issues that may arise relating to the Task Force's mission

The Task Force recommends that the Supreme Court establish a group to provide on-going monitoring of Maricopa County's efforts to reduce its capital case inventory over the next few years. The current situation did not happen overnight and is not likely to be resolved to the satisfaction of all stakeholders in the next few months. Improvements to case management and data collection and sharing are in development now and will require input from the various stakeholders, including the Supreme Court. The Task Force envisions that this group will hold quarterly meetings to assure interested

parties that there will be a cooperative environment in which to share information, air concerns, and facilitate development of any formal policies deemed necessary.

Appendices

- A. Proposed amendment to Ariz. R. Crim. Pro. 15.1 (i)
- B. Proposed administrative order governing court reporting in capital cases
- C. Proposed amendment to A.R.S. § 13-4041
- D. Suggested amendment to A.R.S. § 41-4301

APPENDIX A

Proposed Ariz. R. Crim. P. 15.1 Disclosure by state

(a) through (h) [no changes]

(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~~ 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.

(2) through (5) [no changes]

(j) [no changes]

COMMENT

Rule 15.1(i)(1). 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.

APPENDIX B

PROPOSED
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. 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 Arizona Code of Judicial Administration (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, when 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 proceedings 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.
 - 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 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. 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 before 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

APPENDIX C

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 FROM COUNTY FUNDS 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 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. The county shall request reimbursement for fees it incurs pursuant to subsections F, G and I of this section arising out of the appointment of counsel to represent an indigent capital defendant in a state postconviction relief proceeding. The state shall pay fifty per cent of the fees incurred by the county out of monies appropriated to the supreme court for these purposes. The supreme court shall approve county requests for reimbursement after certification that the amount requested is owed.

I. The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by section 13-4232.

APPENDIX D

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]

SUPPLEMENTAL TO TASK FORCE REPORT

In addition to the recommendations in the report, there were proposals considered and rejected by the Task Force. This supplement describes two of them.

1. Defense File Repository

The Appellate Subcommittee recommended the creation of a defense file repository so that successor counsel would not be unduly delayed as a result of the inability to obtain prior counsel's file. The proposal included a provision for an electronic back up file to ensure the integrity of the repository.

The task force determined that the public agencies have their own file retention mechanisms; accordingly, they would be excepted from the repository. Additionally, the technical issues surrounding the creation of an electronic back-up proved formidable. The selected repository situs, the State Capital Post Conviction Public Defender, does not have the resources to develop a technically competent back-up system.

Upon consideration of the technical problems, the task force determined that the delay caused by the difficulty in obtaining a file in the occasional case did not warrant the resources necessary to create the depository and the proposal was withdrawn.

2. Prosecutor's files

The task force considered the disclosure of prosecutor and police files in post conviction proceedings as is done in North Carolina, by statute, and Mississippi, by rule. The task force rejected this proposal; two task force members were in favor.

Marty Lieberman
Jim Belanger

COMMENTS OF MARICOPA COUNTY ATTORNEYS' OFFICE

The Maricopa County Attorneys' Office (MCAO) hereby comments on the Report of Recommendations to the Arizona Judicial Council by the Arizona Supreme Court Capital Case Task Force, September 2007.

Introduction

MCAO appreciates the Arizona Supreme Court's involvement in the effort to eliminate the backlog of capital cases in Maricopa County by establishing the Task Force and permitting MCAO staff to participate in its meetings. The Task Force took extensive testimony, considered existing and newly created data, and made some valuable recommendations. On each recommendation there was extensive discussion. MCAO will not here reiterate all the Task Force recommendations or MCAO's comments on each. Rather, MCAO will only comment on aspects of the Report that need clarification, amplification or correction.

Overall, MCAO comments that the Task Force has had a positive impact and gives promise of beginning to implement a series of measures to require Maricopa County Superior Court to reduce the backlog of capital cases and come into compliance with the Rules of Criminal Procedure.

Victims

The Task Force provided an important forum for victims to speak to leaders of the judiciary, prosecution, and defense offices. At the first hearing of the Task Force on February 23, 2007, numerous citizens appeared and told their stories of how they became unwilling participants in the capital case backlog in Maricopa County Superior Court. They related their frustration and emotional turmoil in dealing with unending delays in the criminal justice system. In one case, seven judges had been assigned to the trial of a single capital case. Each related their helpless feelings as cases ground on, hearing after hearing, judge after judge. In another case there have been three sets of defense lawyers. The human cost of trial court delay was clear from this compelling testimony.

Unfortunately, the Task Force Report gives insufficient attention to the enormous impact of continued and prolonged delay on victims. MCAO submits these comments to correct this deficiency.

Statistical Issues

In Footnote 4, the Report discusses some statistics regarding the number of capital cases filed in Maricopa County. The Report states, "In fiscal year 2006, the court saw a nine percent increase in felony case filings and a forty-six percent increase in capital cases." This creates the impression that there has been a marked increase in capital cases in Maricopa County. However, this is misleading.

Comparing small numbers over short periods of time distorts percentage increases and decreases by portraying inaccurately dramatic highs and lows. For example, the Task Force Report in Footnote 4 points out that MCAO filed only 34 capital case notices in fiscal year 2007. That is a twenty-six percent *decrease* from fiscal year 2006, which the Report did *not* note—though it commented on a percent increase in another year. Capital case notices are filed after careful, individual consideration of the facts, victims, and defendants by a highly experienced and thoughtful group of MCAO attorneys. Artificial statistics add little meaning or explanation to this important process.

MCAO estimates that there are likely to be 35-45 new capital cases each year, after taking into account the number of first degree murders that are committed in Maricopa County historically, and assuming a capital filing rate in the 40-49% range. This is not a significant change in the number of new capital cases filed in Maricopa County over the past decade. The Superior Court needs to plan to process that number of new cases each year. The current backlog is *not* due to new capital case filings, but the inability and/or unwillingness of Maricopa County Superior Court to require litigants to comply with the time limits provided by the Arizona Rules of Criminal Procedure.

Supreme Court Oversight of Continuances

The Task Force hearings established there is an enormous backlog of capital cases in Maricopa County – over three-years’ worth of cases are now awaiting resolution. MCAO proposed solutions to Maricopa County Superior Court’s inability to enforce Rule 8.2—which dictates an 18-month deadline for capital cases to begin trial. This included suggesting that the Arizona Supreme Court—consistent with its supervisory power of all lower courts—directly supervise Maricopa County Superior Court and bring it into compliance with Rule 8.2.

MCAO acknowledges that there were not sufficient votes in the Task Force to adopt any of the various proposals that the Supreme Court assume oversight authority. But the Task Force Report is deficient in not creating some mechanism that requires Maricopa County Superior Court judges to comply with Rule 8.2. Compliance is not impossible—nor is more time in Rule 8.2 necessary—as some argued before the Task Force. At the February 23, 2007 Task Force hearing there was testimony that in Pima County most capital cases complied with the 18-month deadline. That demonstrates that the 18-month deadline can be met. Uniform and consistent enforcement of the time deadlines in the Arizona Rules of Criminal Procedure is necessary, and if that does not happen, this issue will have to be revisited.

Oversight Group

The Task Force was specifically charged with *reducing* delay in the resolution of capital cases in Maricopa County, yet it remains to be seen whether this goal was achieved. The Task Force’s recommendation of continued oversight by a panel to be appointed by the Supreme Court will hopefully supervise the successful implementation of the recommendations of the Task Force. The new oversight panel must keep close

watch on the implementation of the recommendations of the Task Force and should re-examine creation of a mechanism to require compliance with Rule 8.2 by Maricopa County Superior Court judges. Arizona's violent crime victims deserve no less.

Robert J. Shutts
James P. Beene
Maricopa County Attorneys Office