

C. Direct Appeal/Post-Conviction Relief Subcommittee

1. Purpose

The Direct Appeal and Post-Conviction Relief Subcommittee worked on issues affecting the appeals process in capital cases. The Subcommittee considered appellate defense counsel qualifications and availability, the appointment process for post-conviction relief (PCR) defense attorneys, the need for a state-wide trial and appellate capital public defender to conduct indigent representation, the prolonged time intervals in the direct appeal, post-conviction relief proceedings and federal habeas proceedings. The Subcommittee worked to draft a capital defender bill, to reduce the time intervals in the appeal and PCR process, and to study Ariz. R. Crim. P. 31 and 32.

2. Issues for consideration

The Subcommittee reviewed the following issues:

1. Does it take too long to process capital appeals in Arizona? If so, what reforms would reduce the time necessary to process these cases?
2. Are the qualifications for appellate defense counsel now specified in Ariz. R. Crim. P. 6.8(c)?
3. Does the State provide sufficient funding for indigent defendant's defense on direct appeal?
4. Are there possible ways to ensure adequate funding for defense counsel on direct appeal?
5. Would a state-wide capital appellate defender's office be a better means to provide counsel for direct appeal and/or Ariz. R. Crim. P. 32 proceedings?
6. Are there possible ways to improve the existing Ariz. R. Crim. P. 31.13(f) for briefing on direct appeal?
7. Does it take too long to process a capital post-conviction (Ariz. R. Crim. P. 32) proceeding in Arizona? If so, what reforms would reduce the delay?
8. Are there ways to improve the manner of appointing counsel under Ariz. R. Crim. P. 32.4(c)?

9. Are the qualifications of defense counsel now specified in Ariz. R. Crim. P. 6.8(c) sufficient?
10. Should the identified grounds for relief in Ariz. R. Crim. P. 32.1 be amended to reflect concerns unique to capital cases?
11. As currently drafted, does Ariz. R. Crim. P. 32 provide a sufficient way to present newly discovered evidence that may show innocence of the underlying crime?
12. Does existing Ariz. R. Crim. P. 32.8 provide a sufficient opportunity for an evidentiary hearing? Is it desirable to expand the availability of hearings or to alter the manner in which they are conducted?
13. Does Arizona need to change its procedures to qualify as an “opt-in” State under the AEDPA?
14. Are there identifiable reforms that Arizona could adopt to reduce the time necessary to process federal habeas corpus petitions (e.g., preparing or scanning the State court record on CD-ROM)?
15. Are there identifiable ways to improve the existing statutes or procedures regarding the determination of competency to be executed or the restoration of competency after a death row prisoner has been deemed incompetent? (A.R.S. § 13-4501 et seq.)
16. What is the appropriate role of the Board of Executive Clemency in capital cases? Are there desirable reforms to the statutory provisions in A.R.S. § 41-301 et seq., specific to capital cases?

3. Discussion and Recommendations

a) Statewide Appellate and Trial Indigent Defense

The Subcommittee debated the issue of indigent defense in capital cases in the October and November meetings, and concluded the principal problem in appellate practice was the lack of PCR counsel. Direct appeal counsel is largely supplied by the County Public Defenders. The issue of the lack of PCR counsel remains a problem even though the state pays for one-half of the cost of PCR counsel under A.R.S. §13-4041. Trial defense attorneys noted at all the meetings that a statewide trial capital defender program was needed to provide indigent representation in rural Arizona. Nevertheless, the current backlog of defendants who are completely unrepresented is at the PCR stage.

On November 14, 2000, the Subcommittee debated a proposed bill to be sent to the Arizona Legislature, and agreed to send to the full Commission, a draft statewide appellate defender bill which would create a statewide office to do only PCR appeals for capital defendants. On December 14, 2000, the Commission approved the statewide appellate defender bill and sent it to the Arizona Legislature recommending its passage.

On January 18, 2001, the Subcommittee reconsidered the statewide appellate defender bill and heard argument on the need for a trial defender program in addition to an appellate defender.

On January 30, 2001, the Commission considered the trial defender/appellate defender issue and agreed to amend the bill to add both a trial and appellate defender office to the Commission's recommendation to the Legislature. A drafting Subcommittee of Judge Michael Ryan, former Yavapai County Attorney Charles Hastings and defense attorney Mr. John Stookey was appointed and met on January 31, 2001 to draft the bill. The amended bill was sent to the legislature the week of February 5, 2001, and became S.B. 1486. At this writing, SB 1486 has passed the Senate and one Subcommittee in the House of Representatives.

b) Prolonged Time Intervals in Direct Appeal Proceedings.

On February 20, 2001, the Subcommittee debated the problem of a median time of nine (9) months between completion of the record and filing of the defense opening brief in direct appeals of capital cases. Exhibit 27 of the Data Set I Research Report sets forth the time intervals the Data/Research Subcommittee found for direct appeal cases in studying the 230 Arizona capital cases in which the death penalty was imposed from 1974 to 2000.

Ariz. R. Crim. P. 31.13(f)(1) requires that the opening brief in a capital case be filed within seventy days of receiving notice of completion of the record. Thus, the data show that it is taking nearly four times as long as the rule specifies to file an opening brief in most cases.

During its deliberations the Subcommittee learned that over four years ago the Arizona Supreme Court instituted an internal policy to track the processing of capital cases on appeal in an effort to reduce delay. When the clerk's office determines that the record on appeal appears complete, a staff attorney schedules a conference with attorneys from both sides to establish a briefing schedule. At this conference, counsel for the defendant provides his or her best estimate when the opening brief can be filed. Usually, this is set three or four months from the date of the conference. Common reasons given for this extension in which to file the opening brief is the attorney's workload and the complexity of the case. The State normally agrees to the briefing schedule.

But after this schedule has been agreed upon and ordered, in many cases further extensions are requested. Three factors account for most of these subsequent extensions. These are the following:

- Attorney discovers the record is not complete, *i.e.*, there are missing transcripts, documents or pleadings are not in the superior court file, or some documents are sealed, requiring a court order to unseal.
- Attorney's schedule requires an extension. Such motions are made because of workload, illness, emergencies, etc.
- Withdrawal of appellate counsel and remand to the superior court to appoint new appellate counsel.

Requests to supplement or complete the record appears to be the primary reason for extensions beyond the deadline set by the conference. Appellate counsel often discovers that certain records, pleadings or transcripts have not been filed or submitted with the record on appeal. To track down these materials requires time and necessarily delays the filing of the opening brief. Missing transcripts account for a substantial percentage of these requests. A secondary reason, but one that also accounts for a fair number of extensions is the workload of attorneys doing capital appeals. According to the practitioners, capital appeals require an extraordinary time to review the record, identify issues, and draft the brief. Current caseloads result in the attorneys having to request extensions of the time previously agreed upon in which to file the opening brief.

The Subcommittee discussed several recommendations to address some of the issues raised by these discussions.

- There is a continuing problem with court reporters completing the transcripts and also transcribing all the proceedings. There is an obvious resource problem with respect to court reporters. It is suggested that the Commission meet with court reporter representatives to discuss this problem and identify resources they need.
- There is a problem with some courts and court clerks not properly filing documents, pleadings, and other exhibits. Contact should be made with representatives of the various Court Clerks for their input on addressing this problem. One suggestion is that a separate tracking system be developed for capital cases. But this could create problems for the clerk's offices in the larger counties. Thus, before any recommendations are formally issued, it is proposed that a representative for the various clerk's offices be contacted.
- Attorney workload and discovery of conflicts after the briefing scheduling has been set account for some delay in the filing of the opening brief. Pima county has an Indigent Defense Services office that assigns a capital case appeal once the notice is filed. That office initially determines if the office or attorney assigned to handle the case has any obvious conflicts and if the current workload permits them to handle the case. In Maricopa County, the practice is to assign every capital case appeal to the public

defender's office. Only after the office has received the case is a conflicts check conducted. It may be beneficial if Maricopa County had a similar procedure as Pima County. Finally, it is clear that more qualified appellate attorneys are needed to handle these cases, particularly in the rural areas.

At the February meeting, the Subcommittee recommended a meeting with the State's Court Reporters in order to seek solutions to delays in transcribing proceedings and in ensuring that all hearings are transcribed. The Subcommittee also recommended a meeting with Arizona's Clerks of Court to explore whether all three types of records in a capital case, transcripts, exhibits, and instruments/pleadings, could be stored in the same area.

In order to assess the reasons for the time interval in the preparation of the opening brief on direct appeal in capital cases, members of the Direct Appeal - Post Conviction Relief Subcommittee including the Attorney General, Judge Michael Ryan, Judge Cindy Jorgenson, and Charles Krull, met with the elected court clerks and court reporters from around Arizona on March 20, 2001. At the meeting with court reporters, the following issues were discussed relating to the preparation of trial proceedings in capital case direct appeals and post-conviction relief proceedings.

- The participants discussed whether a trial court, at the time of a guilty verdict in a first degree murder case, could order the clerk to compile transcripts and pleadings from all of the hearings conducted in that case up to the verdict. The participants discussed that such an order would facilitate the clerk being able to find all the court reporters who reported each of the proceedings, and would assist the court reporters in getting early notice to begin their transcription.
- The participants discussed whether the clerks of court could provide notice to the court reporters earlier in the 45 day record assembling process so that the court reporters would have time to transcribe all proceedings.
- The court reporters believe that notification from the clerk is sometimes delayed because the court reporter has reported only a short hearing or has been involved only in isolated hearings throughout the process.
- The participants discussed whether segregation of notes was a difficulty for court reporters and the reporters related that segregation of notes and retrieval of those notes should be a matter that could be handled within 30 minutes of notification from the court's office.
- The participants discussed whether the calendars in superior court could provide notice in writing as to each case that is a capital or first degree murder case so that the reporter would be on notice to segregate the notes, to keep the death penalty case records handy, and to be prepared to transcribe those proceedings at the jury verdict of guilty.

- The participants discussed whether the notice from the clerk of the court to all court reporters to provide records could be provided within 5 days of sentencing so that the court reporters would have a period of days to prepare the transcript and provide them to the clerk on the 45th day as required by the rule. The court reporters reported that they have received notice on isolated hearings on the 40th day or the 42nd day because that court reporter took only a small portion of the hearings in that long proceeding.
- The participants discussed whether the courtroom clerk or the criminal clerk could provide a running inventory of all hearings transcribed in every first degree murder case so that at the time of verdict the courtroom clerk or the criminal clerk would have a reliable inventory of all such proceedings. This inventory would provide swifter notice to the court reporters and put the onus on the court reporters to begin their transcripts in a timely fashion and to complete them by the 45th day.

In the meeting with the Court Clerks the following issues were discussed:

- The court clerks and members of the Commission discussed recent difficulties in assembling complete records in capital cases which have caused time intervals to lengthen in capital case processing.
- The court clerks reported that it takes nearly all of the 45 days allowed by rule for the court clerks to gather the pleadings, transcripts and exhibits in capital cases from the courtroom, court reporter, and the storage areas that the clerk uses for the various documents. The clerk must prepare a separate special index in capital cases listing each of the documents and each of the proceedings. The parties discussed the possibility of separating all first degree murder cases in a separate filing system and the difficulties of having a parallel system for some cases.
- The participants discussed whether a hearing (held 10 days after sentencing or 10 days after the verdict) on the status of the file with the judge, the court clerk, the courtroom clerk, the defense attorneys and the prosecutors might be helpful in establishing a complete index and cataloging all of the transcribed hearings and the salient documents.
- The participants discussed whether scanning of all documents in capital cases would facilitate record keeping and the preparation of a complete record for appeal.
- The participants discussed a possible rule change in which all original pleadings in criminal or capital cases would go to the clerk and a copy would go to the judge's courtroom to ensure that all original pleadings are in the possession of the clerk at all times.

- The participants discussed whether scanning equipment could be purchased at the state level and supplied to the individual county at the time of the verdict in the first degree murder case so that all the documents could be scanned and available for assembly by the time the sentencing is completed.
- The participants discussed whether a separate filing mechanism, including colored files for first degree murder cases, would be helpful at all.

On March 22, 2001, the Direct Appeal and Post-Conviction Relief Subcommittee met to discuss the problems raised by the clerks and the court reporters in managing capital case records. Based on those discussions and the subcommittee's deliberations, the following recommendations are submitted to the Commission:

1. A Petition to amend Ariz. R. Crim. P. 31.9 should be filed with the Arizona Supreme Court regarding the transmission of the record in criminal cases to the appellate court. In all capital cases, the rule should require the clerk of court to notify all court reporters within ten days after filing of the notice of appeal that the court reporters are required to compile all the transcripts in the capital case pursuant to Ariz. R. Crim. P. 31.8(b)(2), and that those transcripts should be submitted to the clerk of the supreme court.
2. The Commission should recommend as a best practice in Arizona that all trial judges order the transcription of all trial proceedings in all first degree murder cases at the time a guilty verdict is returned. This will cause reporters and clerks to begin the transcription process and the gathering of exhibits, pleadings and minute entries at the time the verdict is entered. This practice will expedite the transmission of the records in a capital case.
3. The Commission should also recommend as a best practice that the court clerks in superior court enter a code on all criminal calendars that clearly identifies all first degree murder cases. However the local court clerk decides to identify first degree murder cases, every calendar in every court should notify the court reporter that a case is potentially a capital case. The Subcommittee believes that such notification will alert the court reporters to take due care to keep the notes on those cases readily available for transcription upon entry of a guilty verdict. This practice would also aid the clerks' offices in maintaining the exhibits, pleadings and minute entries in these cases.

c) Prolonged Time Intervals in Post-Conviction Relief Proceedings.

The Subcommittee debated the issue of delays in PCR proceedings and on January 18, 2001, the Subcommittee debated the creation of a Court of Appeals Division for expedited review of capital cases, which is a reform Oklahoma has implemented. This new Division would handle all PCR petitions filed and remand only the ones needing a hearing to the Superior Court. The Division would also work exclusively on the direct appeals from capital cases. For a variety of reasons the Subcommittee rejected the idea, which they thought would cause more delay, not less delay.

On February 20, 2001, the Subcommittee also debated the problem of delay in filing of the first Petition for Post Conviction Relief resulting in an interval of 1.2 years between denial of certiorari jurisdiction by the U.S. Supreme Court and filing of the first petition for post conviction relief. Exhibit 28 of the Data Set I Research Report sets forth the time intervals for the post-conviction relief process in Arizona capital cases between 1974 and 2000.

Data from the Supreme Court demonstrated that the primary reason for the length of the interval before filing an initial petition for post-conviction relief is the lack of qualified counsel to handle these proceedings. At the February meeting, the Subcommittee made two recommendations to solve the problem. First, it recommended that Arizona create a repository in each county for all trial and appellate defense counsel files so that PCR counsel may find them all in one location. The repository must be controlled by the defense team and strict confidentiality maintained. Second, the Subcommittee recommended the passage of S.B. 1486 which would enable PCR counsel to be appointed as soon as the Arizona Supreme Court affirms the conviction. Today, the Court cannot appoint PCR counsel because there are no qualified counsel available for six capital cases which have been affirmed by the Arizona Supreme Court. In addition, two other cases had counsel appointed in January, 2001, after an interval of 18 months.

d) Proposed Reforms in Ariz. R. Crim. P. 31 and 32

The Subcommittee discussed Ariz. R. Crim. P. 31 and 32 on March 22, 2001, focusing on proposed amendments to Ariz. R. Crim. P. 31 and 32 submitted by Steve Twist. The amendments were proposed to reduce some time intervals in capital case processing on direct appeal and in post-conviction relief proceedings. The Subcommittee continues to work on these rules because the Arizona Supreme Court has acknowledged in its rulemaking that further work may need to be done. The Comment to the most recent amendment to Ariz. R. Crim. P. 32.1, states the following:

In approving the 2000 amendments to Ariz. R. Crim. P. 32, the Arizona Supreme Court did not have the benefit of the comments of a statewide commission which was empaneled that year by the Attorney General of Arizona to investigate and assess the administration of the death penalty in the State of Arizona. Accordingly, further amendments to Ariz. R. Crim. P. 32 may be necessary following the issuance of that commission's recommendations. In particular, the topics of deadlines and victims' rights may need to be addressed at that time.

Not only do the rule changes affect deadlines in the system, but some Subcommittee members also believe that in view of the victim's right to a "prompt and final conclusion of the case after conviction and sentence," Ariz. Const. Art. 2 § 2.1(10), that court rules should consider this constitutional right of the victim. This right may give the victim some input into the extensions granted by appellate courts, particularly with respect to granting extensions of time in which to file briefs, petitions for review, and conduct investigation. The Subcommittee debated whether Ariz. R. Crim. P. 31 and 32 should be changed in only capital cases or whether changes should

be implemented for all criminal appeals and post-conviction relief proceedings. After discussion, the Subcommittee proposed that the Commission recommend that the Arizona Supreme Court adopt an amendment to Ariz. R. Crim. P. 31 and 32 embodying the following principle:

The Arizona Supreme Court and Court of Appeals shall accord and safeguard the victim's right in criminal cases to a prompt and final conclusion of the case after conviction and sentence. Arizona courts shall consider the victim's rights to a prompt and final conclusion of the case along with the defendant's constitutional rights when ruling on all motions to extend time in appellate and post-conviction relief proceedings.

On May 3 and 14, 2001, the Subcommittee deliberated on the additional issue of whether this principle should include a right for the victim to be heard on the issue of individual extensions of time. The Subcommittee voted 5 to 3 against endorsing the following rule change proposed by Mr. Steve Twist which would have accorded victims a right to be heard in all requests for lengthy appellate extensions:

In any capital case, in ruling on any second or subsequent request for an extension by a party of more than 30 days, the court, after giving any victim who has filed a request pursuant to A.R.S. 13-4411, the opportunity to be heard in writing, shall consider the rights of the defendant and the rights of any victim to a prompt and final conclusion of the case.

Comment: To implement the victim's right to a prompt and final conclusion to their case, see Ariz. Const. Art. 2, § 2.1(A)(10), the victim, upon request, shall be permitted to be heard in writing with respect to any lengthy or repetitive extensions or the victim can request that the prosecutor's office communicate the victim's views to the court concerning any extensions.

The Subcommittee unanimously approved the following alternative rule change requiring the Court to consider victims rights in any motion for extension of time:

In any capital case, in ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final resolution of the case.

Comment: To implement the victim's right to a prompt and final conclusion of the case, see Ariz. Const. Art. 2, § 2.1(A)(10), the victim shall be permitted to file a statement with the court, at the inception of the proceeding, which expresses their views with respect to any extensions. Or, the victim can request, pursuant to A.R.S. § 13-4411, that the prosecutor's office communicate the victim's views to the court concerning any extensions.