

COURT EN BANC MINUTES
Monday, June 9, 2020, at 5:00 p.m.
Ceremonial Courtroom
3rd Floor Boone County Courthouse
And Over Zoom Video Conference

Judges Present: Judges Kevin Crane, Brouck Jacobs, Jeff Harris, Jodie Asel, Kimberly Shaw, Carol England, Sue Crane, Tracy Gonzalez, Leslie Schneider, Stephanie Morrell, Commissioners Sara Miller and Casey Clevenger and Columbia Municipal Judge Cavanaugh Noce.

Others Present: Boone County Circuit Clerk Christy Blakemore, Unit Manager Sherry Seiling and Deputy Clerk Rachel Allen, Adult Court Services Supervisor Brandon Walker, State Public Defender Mary Fox, 13th District Defender Sarah Aplin and Assistant District Defender Jeremy Pilkington, 12th District Defender Kathryn Benson, Callaway Prosecuting Attorney Chris Wilson, Boone County Assistant Prosecuting Attorney Roger Johnson, Defense Attorney Kevin Lorenz, Court Marshal Ben Pruett, Court Reporter Julia Paulus, Court Administrator Mary Epping and Deputy Court Administrator Cindy Garrett

1. Call to Order/Welcome

The meeting was called to order by Judge Kevin Crane at 5:00 p.m.

2. Introduction of Guests

Judge Kevin Crane welcomed guests.

3. Approval of the May 12, 2020 Minutes

Judge Stephanie Morrell moved to accept the May 12, 2020 minutes. Second: Judge Kimberly Shaw. The motion passed unanimously.

4. Public Defender Waitlist

Judge Kevin Crane said he recently met with State Public Defender Mary Fox and since then the public defender has reduced the Boone County waitlist by roughly one half using additional funding to assign all misdemeanor cases to panel attorneys. Judge Crane said Mary has requested assistance to keep the waitlist numbers to a minimum.

Mary said having 1,000 person waitlist does not benefit anyone. In addition to being assigned the 10 oldest cases, she reviewed the list and found a large number of misdemeanor, probation violation and traffic cases. Through savings from lack of travel due to Covid, the Public Defender's Office contracted with private attorneys to take all misdemeanor and probation violation cases that did not have an additional felony case,

through bulk assignments. Mary said that reduced the waitlist by half and they had additional funds to contract out some individual felony cases. Mary said they want to ensure they are providing good services to every person who qualifies but they do not want to represent anyone who does not qualify.

a. *MSPD Centralized Indigency Determination Program – Guidelines for Determination of Indigency*

Mary Fox said the Missouri State Public Defender has been cited twice by the State Auditor for not having a consistent indigence determination program across the state. Mary met with all the district defenders across the state and created a centralized indigence program for every trial office. She said they plan to only take eligible cases and only take the applicants that are indigent with the same qualifications being used across the state.

b. *Capias Warrant Cases Being Removed from PD Waitlist after 90 days*

Mary Fox said the waitlist included many defendants with a capias. She said the local office is checking the list every 30 days to verify those on the list should be there. Individuals with a capias for 90 or more days will be removed from the waitlist and be required to reapply for services upon being taken into custody.

c. *PD Misdemeanor Eligibility – Administrative Order for Misdemeanor Eligibility, Order of Appeal*

Mary Fox said indigent clients with felony cases are eligible and misdemeanor cases are eligible if the misdemeanor will probably result in confinement in the county jail upon conviction. For those cases that normally result in a fine or no jail time, they will not be deemed eligible. 13th District Defender Sarah Aplin said she and Jeremy Pilkington reviewed all disposed misdemeanor cases from January through August 2019 and broke them down by disposition, noting if they had private attorney, public defender or were pro se. They found a substantial number of cases resulted in a fine, suspended imposition of sentence or suspended execution of sentence. Mary said the statute states that indigent clients qualify for a misdemeanor case which will result in confinement in the county jail upon conviction. She said constitutionally someone charged with a misdemeanor facing jail time is entitled to counsel, but the state legislature has limited the cases the public defender system should take. She said between the data Sarah has gathered and what the court has seen over the years, it is fairly clear what misdemeanor cases should qualify for public defender representation. Mary reiterated the goal of these changes is they want to be certain they are doing a really good job for the people they represent and they want to eliminate the waitlist.

d. *PD Representation on Probation Violations – Due Process Order*

Mary said the other difference from what our court has typically seen are probation violations. She said in 2012 the Missouri Legislature changed the public defender statute, section 600.042, RSMo. The changes took away parole violations and limited probation violations to those where there has been a judicial

finding that due process required counsel to be present. Based on this, the public defender created forms for the court to use, as applicants have the right to appeal the public defender's decision and the state and can also appeal the public defender's decision. If the applicant wants to appeal the decision, Mary has recommended to Judge Crane that there be an indigency docket, where anyone that wants to appeal the public defender's determination is assigned to the docket, once a month. This will be heard by one judge so there is consistency across the circuit. Judge Stephanie Morrell voiced concerns for those people in custody who are denied representation and want to appeal, as they cannot wait a month for an appeal docket. She also said 90% of the defendants denied representation by the public defender are due to the applications being incomplete. Mary said the public defender has created an online application which can be completed and submitted online and it cannot be submitted until all questions are answered. Mary said the public defender can give the court tablets with the application on them if that will resolve the issue. It was noted there might be an issue of having access to WiFi at the jail; however, it would be helpful for out of custody clients. It was agreed for in custody defendants denied representation who desire to appeal, the cases can be set on Judge Crane's next law day docket at 2:30 p.m. Out of custody cases will be set once a month on a designated docket by Judge Crane. Mary said if there is an incomplete application and the defendant is in the courtroom, the defendant can complete a new application in the courtroom. Judge Morrell said in the past defendants were unable to complete a second application if the first one was denied due to being incomplete. It was agreed, they are now able to complete a new application and it will be accepted if it was originally denied due to being incomplete. The public defender said they will communicate to the court and the defendant regarding denied applicants and it will note if the denial is due to an incomplete application, they can submit a fully completed one for reconsideration. Judge Crane said he will do appeals in Callaway County on his Friday docket once a month. On page 8 of the Court en Banc packet the form was reviewed and it was noted individuals could still go on the waitlist if they are found eligible for public defender representation. Judge Crane said pages 9 - 11 of the Court en Banc's packet is an example of an order used in St. Louis. Mary said page 12 of the packet is an example of an order on the misdemeanor eligibility status. She said this form would apply on cases where the public defender declines representation of a defendant on a misdemeanor case, such as a traffic case, and if the defendant wants to appeal the court can use this form on the appeal docket. Sarah Aplin said they will provide us with updated forms. It was noted the defendant is informed of this process in a letter sent to them by the public defender. Mary said they have a form affidavit they are willing to provide to the court that defendants can complete. It was noted the form has to be notarized. Judge Crane inquired about the form on page 13 of the Court en Banc packet. Mary recommended the court read related case law on the language on page 13 comes straight out of a case. Mary said if a defendant is on an SIS, they are entitled to counsel. It was agreed probationers have the right to voluntarily agree to do their time on an SES, without representation. Mary believes if judges have conversations with probationers there would be fewer people revoked.

Mary said at the last criminal justice task force meeting, Julie Kempker, from Probation and Parole, said due to Covid, probation officers are having Zoom meeting with their probationers and their relationships improved substantially as the probation officers are seeing their clients in the home setting and getting to see them as real people. Commissioner Casey Clevenger asked if the application process applies to people who are at risk of losing their liberty due to termination from treatment court. Sarah Aplin said treatment court participants are set for a termination hearing to determine if they will be terminated from treatment court. If treatment court is a condition of probation and if terminated from treatment court they will be facing a revocation hearing. It was agreed the public defender representation would apply to the hearing in front of the probation judge but not to the termination hearing from treatment court. For cases where clients enter treatment court as a diversion they remain a client of the public defender, therefore the public defender does their best to appear for termination hearings on those cases. If defendants enter treatment court as a condition of probation, they are no longer a client of the public defender. Judge Jeff Harris asked if page 13 of the Court en Banc's packet is suggested language or if he can continue to make his docket entry. Mary said they are requesting this form be used or a form as created by the circuit as they need the specific data as to why they are being asked to represent the client. Mary said if the court is not wanting to complete the form then she is asking that the order list specific as to what the due process is. Judge Stephanie Morrell said she is willing to create a macro to be used by judges, where they would just delete the language not needed.

Judge Crane said he believes we need to review the forms, other than the appeal order. He said we will need to tailor the other orders specific to our jurisdiction. Judge Crane said we will start the appeal process immediately. Mary said for in custody defendants they plan to get the applications approved so it will be known by the 7 day hearing if they qualify for public defender representation.

5. Return to Jail after ROR

Judge Stephanie Morrell said she, Detention Director Keith Hoskins and Jail Captain Jenny Atwell have been working to modify the Boone County jail's request on the return on own recognizance (ROR) form. They are creating the form to distinguish between a pure ROR, where the jail gives a bond return date versus a medical ROR, where the ROR is revoked upon release/discharge from hospital. On medical ROR's the defendant signs a HIPAA release and then a medical ROR is signed. It has recently been learned defendants can revoke the HIPAA release at any time at which time the hospital refuses to provide any information to the jail. On a recent case the defendant revoked the HIPAA release and then left the hospital against medical advice and his whereabouts are unknown. Judge Stephanie Morrell moved to approve the proposed form on page 14 of the Court en Banc packet. Second: Judge Tracy Gonzalez. The motion passed unanimously.

6. **Community Service Work Credit**

Court Administrator Mary Epping said on page 15 of the Court en Banc's packet is the current Administrative Order of Community Service Work which credits defendants \$10 per hour which was based on minimum wage in 2007 being \$5.85. Mary said by the year 2023 minimum wage will be \$12 an hour, however there is movement nationally for it to be raised to \$15 an hour. Mary said Adult Court Services Supervisor Brandon Walker proposed the administrative order be updated for defendants to receive \$20 an hour for each hour of community service work performed. It was also noted juveniles are often given credit of minimum wage and Mary asked if the order should be updated regarding the wage and to include juveniles. Judge Kimberly Shaw moved to approve updating the administrative order to \$20 an hour and for the order to include juveniles. Second: Judge Stephanie Morrell. The motion passed unanimously.

7. **COVID Update**

a. *Phase 3*

Court Administrator Mary Epping said the court started Phase 2 on June 1 and we have to be in a phase for at least 14 days per the Supreme Court Order, before moving to the next phase, therefore June 15 is the earliest we could move to Phase 3. Before moving to the next phase we have to consider, pursuant to the Missouri Supreme Court guidelines that 1) we have no confirmed Covid case in the court for 14 days; 2) that there is a recession or lack of stay at home orders (in Boone County we are currently in Phase 2, Step 2 where locally we can have up to 50 people, but per Phase 2 of Supreme Court guidelines we can only have 25 people); 3) improving Covid health conditions over the 14 day period (in Boone County the active cases are increasing with 40 active cases as of today); 4) consult with health officials or department concerning changes to levels of courthouse activity (Mary said she has been in continuous communication with the health department as there is a 2:00 p.m. call every Tuesday and Thursday that she and Court Marshal Ben Pruett participate in regarding what is going on in our community regarding Covid); 5) consultation with local judiciary partners such as Children's Division, Juvenile Office, local bar members, Prosecutor, Public Defender, law enforcement and Probation and Parole (Mary said in an effort to consult with our partners, she sent out the survey, which is also part of the agenda.) Mary said these are the totality of things the court should take into consideration to decide whether to move to Phase 3 on June 15. Mary said Phase 3 still notes the court should continue to do telephone and video for court and for staff meetings as much as possible. The next phase eliminates the prohibition of the number of people that can be in any one spot, however we still have local rules, where Boone County limits it to 50 people. Phase 3 also contemplates having jury trials.

b. *Attorney Survey*

Judge Kevin Crane said the attorney survey has been provided as a handout. Judge Crane said the main take away was there are a number of attorneys that

want to appear remotely. Judge Crane would like to provide ongoing video capabilities however there is an issue as to feasibility and the workload that is places on other staff members in the courthouse. Judge Crane proposed a committee be established to look at the technology and personnel aspects of ongoing video conferencing. Judge Crane suggested the following for the committee: Court Administrator Mary Epping, Deputy Court Administrator Cindy Garrett, Technology Services Supervisor Chris Fishman-Weaver, Judge Leslie Schneider, a member of the bar and anyone else interested. Mary said she would reach out to the local bar presidents for recommendations. This committee will report back at the next Court en Banc meeting.

c. *Jury Survey*

Judge Kevin Crane said grand jury is scheduled in Boone and Callaway counties in July, with approximately 40 people each. Judge Crane said these will be test pilots for a petit jury. He said the safety measures currently in place are social distancing, hand sanitizer being available, cleaning public areas, masks made available, limiting number of trials, and limiting the number of people in the courtroom for voir dire, as much as possible. He said when the jury survey went out a lot of people felt temperatures should be taken. He is not sure we can feasibly do this, however we could look to pay for a health care professional to be present to take temperatures. Judge Crane said our court marshals currently advise people not to come in if they are not feeling well. Judge Crane said personally, he would consider August as the soonest for a jury trial. Court Administrator Mary Epping said Jury Supervisor Gloria Schaefer pointed out that the jury survey we received from OSCA was completed mostly by people from St. Louis City, St. Louis County and Jackson County. She said we are trying to get specific information as to jurors from our circuit. Mary said Public Defender Sarah Aplin suggested sending out own survey to jurors who were recently scheduled to serve on jury duty.

8. Legislation

Court Administrator Mary Epping provided an update on the following bills:

- HB1414 & SB653 both modifies provisions as to child protection.
- SB569 modifies provisions relating to victims of sexual offenses and creates justice for survivors act.
- SB591 modifies provisions relating as to civil actions including punitive damages and unlawful merchandising practices.
- SB600 modifies provisions relating dangerous felonies and adding a definition of dangerous felony.

9. Annual Report on Time Standards

Court Administrator Mary Epping provided a handout. She said this report is provided each year. In the report we compare ourselves to circuits with a population of more than 200,000. Mary said we look at time standards and disposition to filing ratio for the past

three year. This past year we met 2 of the 10 time standards, Domestic Relations at 90% in 10 months and Associate Civil at 96% in 12 months. Mary said most concerning was circuit felony and associate all decreased; however, she was expecting this due to the public defender waitlist. Mary said she next compared our circuit, including the 17th Circuit (Cass & Johnson Counties) and the 26th Circuit (Jefferson County). She said when comparing to circuits more similar in size, we were the highest in five of the categories. For FY19, we were below state average in four categories. Overall circuit filings were up 2.21%, with the biggest changes being Boone Misdemeanor filings and then Callaway Probate filings.

10. Other

Circuit Clerk Christy Blakemore said sometimes judges make changes to their entries on the H: drive after court. She asked that judges send an email to the criminal or civil inbox to let them know when they are done with the docket. Christy also advised Diane Begemann is retiring and her last day will be June 30.

Judge Kevin Crane said Judge Stephanie Morrell has requested to move to Judge Asel's office and he wanted to verify there were no other requests.

Judge Jeff Harris said he wanted to begin the discussion of either eliminating, for circuit felony, deferred plea or modifying it substantially. He believes the process is ambiguous and creates unnecessary uncertainty. He believes we are the only circuit that has the process in place and therefore believes we should reexamine the process. He welcomes comments from the prosecuting attorney, public defender, and criminal defense bar. Suggestions/thoughts they may have about getting rid of deferred plea or modifying it to get to a system of a plea bargain where it is clear what the agreement is or it is completely the judge's discretion. Judge Kevin Crane said he thinks it is important once an agreement is reached with the state and defense that we modify this to have some uniformity within the circuit.

Judge Kevin Crane said this is Judge Jodie Asel's last day as Division 4. He said this meeting was set up for her to be present and it ends her decorated career as a circuit judge and a former associate circuit judge. Judge Crane congratulated Judge Asel on a great career, stating she will be missed.

11. Comments from the Public

No Comments.

12. Next Meeting Date

The next meeting is scheduled for July 7, 2020 at 5:00 p.m. in Callaway County with the following Court en Banc being on July 28, 2020 at 5:00 p.m. in the Ceremonial Courtroom of Boone County, when the budget will be presented. Judge Kimberly Shaw

moved to adjourn. Second: Judge Jodie Asel. The motion passed unanimously. The meeting adjourned at 6:25 p.m.

Prepared and Submitted by: Cindy Garrett
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