

Capital Punishment Reform Study Committee
Minutes of Subcommittee No. 3 meeting

December 12, 2006

On December 12, 2006, at 12 p.m., a meeting of Subcommittee 3 was held. Attending were Jeffrey M. Howard, Boyd J. Ingemunson, Edwin R. Parkinson and Randolph N. Stone.

Minutes of the October 16, 2006 Subcommittee meeting were approved.

Interview of Judge Stephen H. Peters.

Mr. Howard reported that the Subcommittee could not meet as scheduled on December 11th with Judge Stephen H. Peters (6th Judicial Circuit) (DeWitt County) because he was presiding over a murder trial that had not ended at the time anticipated. The Subcommittee agreed to reschedule the meeting based upon the Judge Peters' unavailability for January 30, 2007 at 11:30 a.m., at the DeWitt County Courthouse in Clinton, Illinois.

Responses of Judge Shore.

Mr. Howard also reported that a written questionnaire was filled out by Judge Shore and his responses to the Subcommittee 3 questionnaire would be made part of the minutes of the next Subcommittee meeting. See Attachment 1.

Other judges to interview.

Mr. Howard suggested two other down state judges that the Subcommittee should interview. First is Judge Cini who presided over the recent capital case of *People v. Mertz*. Mr. Parkinson indicated that he would contact Judge Cini to see if he would agree to meet with the Subcommittee. The other judge Mr. Howard suggested the committee meet with is Judge Gamber who presided over the recent capital case of *People v. Sutherland*. Mr. Parkinson also indicated that he would contact Judge Gamber to see if he would agree to meet with the Subcommittee.

The Subcommittee adjourned at 12:35 p.m.

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ATTACHMENT 1

Capital Punishment Reform Study Committee Subcommittee #3 – Trial Proceedings

Questions for Judge Scott A. Shore And Answers Thereto

Trial court proceedings to determine mental retardation. 725 ILCS 5/114-15.

- 1) Ever preside over a capital case in which mental retardation was an issue?
No
- 2) Who put you on notice that mental retardation was an issue in the case?
N/A
- 3) When during the pendency of the case did you receive notice that mental retardation was an issue in the case? Before the filing of any Motion to Quash and Suppress or Motion to Suppress?
N/A
- 4) Did you ascertain how long the party had known that mental retardation was an issue before the party brought the issue to your attention?
N/A
- 5) After the other party in the case learned that mental retardation was an issue, what steps, if any, did that other party take to insure that the defendant was mentally retarded?
N/A
- 6) After mental retardation was placed in issue, did the State withdraw its notice of intent to seek death?
N/A
- 7) What steps, if any, did the State take before deciding whether or not to withdraw its notice of intent to seek death after mental retardation was placed in issue?
N/A
- 8) Was a pretrial hearing held on the mental retardation issue?
N/A
If answer is yes, did both the defense and State utilize an expert at the pretrial hearing?
N/A
If answer is yes, was that expert a psychologist? If not, what type of expert was used?
N/A
- 9) In your opinion, is a pretrial hearing the best place to determine whether the defendant is mentally retarded?
I would need to research this issue.

If answer is no, when should that determination be made and by whom?

- 10) Should the defendant have a right to a jury determination at the pretrial hearing?

I would need to research this issue.

If the answer is yes, should the burden of proof be more than a preponderance? If yes, what should the burden of proof be?

- 11) If you made a finding at the pretrial hearing that the burden had not been met to show that defendant was mentally retarded, did the defense introduce the mental retardation evidence at the sentencing hearing?

N/A

- 12) If you rule against the mental retardation issue at the pretrial hearing, do you believe the better stage for the defense to raise this issue is at the eligibility stage of the sentencing hearing or at the aggravation-mitigation stage of the sentencing hearing?

I would need to research this issue.

For either stage you believe it best to allow defense to raise the issue of mental retardation, please explain the basis for your opinion.

- 13) Are you satisfied with the factors utilized in the Illinois statute to determine mental retardation?

Yes

If not, please explain.

- 14) Please give any suggestions about how the statute regarding mental retardation can be changed to improve the process for determining mental retardation.

I would need to research this issue.

- 15) Please give any suggestions about how the statute regarding mental retardation can be changed to improve the way the issue of mental retardation is used procedurally in a capital case.

I would need to research this issue.

- 16) Have you received any training on the issue of mental retardation? If yes, please describe the training you received.

No, other than undergraduate minor in psychology / sociology; experience as legislative advocate for community mental health while an undergraduate; law school class on mental health law; family experience as parent of a multiply handicapped child. No specific training on the issue of mental retardation.

Assignment of qualified prosecution and defense counsel from capital litigation bar. Sup. Ct. R. 416(d);

**Case management conferences to ensure competence of counsel and disclosure requirements in capital cases. Sup. Ct. R. 416(f); and
Respective certifications of readiness by prosecution and defense counsel before trial in capital cases. Sup. Ct. R. 416(g) and (h).**

- 1) How many days after arraignment elapse before you hold a capital case management conference?
I suggest frequent (monthly) case management conferences in any case suggestive of possible qualification as a capital case, with any / all motions automatically scheduled for the next case management conference so that court scheduling, parties, family, public and media can rely upon firm schedule for raising and resolution of pretrial issues.
- 2) Do you hold a case management conference in all murder cases to ascertain if the case is capital or not?
No. See above.
- 3) Does the State's notice of its intent to seek death impact when you hold a case management conference? If so, how?
Yes. See above.
- 4) Do you hold more than one case management conference during the pendency of a capital case? If so, how many? What is accomplished at the subsequent conferences that cannot be accomplished at the first conference?
Yes. See above.
- 5) Do you hold the case management conference in open court? If so, why? If not, why not?
Yes. All proceedings should occur in open court unless a full record is shown as to why a specific issue might be addressed in camera, eg security or 402 conference.
- 6) Do you hold the case management conference on the Record? If so, why? If not, why not?
Yes. All proceedings should occur in open court unless a full record is shown as to why a specific issue might be addressed in camera, eg security or 402 conference.
- 7) At what point during the pendency of a murder case do you determine whether counsel is a member of the Capital Litigation Trial Bar (CLTB)? How do you determine if counsel is a member? Do you check the Illinois Supreme Court's website? Do you rely on the representation of counsel?
Confirmed at first CMC. AOIC provides list of those qualified. Web list was not available when I was last required to consult printed list.
- 8) If privately retained counsel says funds for his/her services have run out, do you appoint that same attorney, if the attorney is a member of the CLTB?
I would presume so, though the issue has not arisen.
- 9) If privately retained counsel is not a member of the CLTB and the case is capital, do you appoint the Public Defender or private counsel who is a

member of the CLTB? For either situation, why? What factors do you take into account?

Private counsel would be required to attain qualified status within short date or if defendant is indigent, PD or qualified private counsel would need to be appointed and defendant's chosen counsel would be permitted to "third-chair."

- 10) If privately retained counsel is a member of the CLTB but does not have a second chair, who do you appoint - the Public Defender or private counsel? For either, why?

It is my understanding that a second chair is not required if counsel is privately retained. This issue has not arisen in my court.

- 11) Do you have any problems finding members of the CLTB to appoint on capital cases? If yes, please explain.

Yes. Qualified counsel are far and few between in smaller downstate counties, and it is virtually impossible to qualify due to the lack of cases in which to gain the required experience. The most effective and experienced criminal defense attorney in town is likely NOT qualified. Exceptions may be made, but the process has been laborious in the past. This is not to suggest a lowered standard, but reflects a reality that forces the court to seek and/or beg an attorney, possibly from an inconvenient distance away, to take a notorious case.

- 12) When the Public Defender is appointed to represent a capital defendant, what steps do you take to insure that the Public Defender assigns two "qualified" Public Defenders to handle the case? At what point do you make this determination?

See answer to 11 above; Appointments would be confirmed at CMC.

- 13) During the case management conference(s), do you determine whether discovery has been completed? By the State? By the defense? If discovery has not been completed by either side, what measures do you take to insure that discovery is completed before trial? Has either party tendered discovery after filing the appropriate documents under Rule 416 (g) or (h)? If yes, how did you handle the situation?

Confirmed at CMC, directives issue to correct deficits, sanctions may follow on graduated basis if necessary. Late discovery would be addressed per each situation as in all cases.

- 14) At the case management conference, do you ask the State if it has listed all of its aggravating factors upon which it is relying in its Notice of Intent to Seek Death? Has the State ever attempted to amend its Notice of Intent to Seek Death by adding an aggravating factor? If so, did you allow the amendment?

Confirmed at CMC. Late disclosures would be addressed per each situation, as in all cases.

- 15) Do you ask about completion and tendering of Rule 417 (DNA) evidence at the case management conference? If it is not complete, what steps do you insure that such evidence is completed before trial?

Confirmed at CMC, directives issue to correct deficits, sanctions may follow on graduated basis if necessary. Late disclosure would be addressed per each situation as in all cases.

- 16) Other than dealing with the issues listed in Rule 416() at the case management conference(s), is there a better way of addressing any of these issues in your opinion? If so, how?
That would seem to suffice.
- 17) What "other" orders have you entered or steps have you taken to insure the matters contained in Rule 416() are accomplished?
CMC orders would address any issues that arise.
- 18) When the State files its certificate under Rule 416(), do you ask the State any questions on the Record about its certificate? If so, what?
This would depend on the nature of the case and the certificate.
- 19) When the defense files its certificate under Rule 416(), do you ask any questions on the Record of defense counsel about the certificate? If so, what? Do you ask any questions of the defendant or give the defendant any admonishments concerning the contents of the certificate filed by defense counsel? If so, what?
This would depend on the nature of the case and the certificate. The defendant would be admonished
- 20) Should such certificates be required?
Yes.

New mitigating factor for mental/physical abuse and diminished mental capacity. 720 ILCS 5/9-1(c)(6)&(7).

- 1) Have you been involved in any capital cases in which mental/physical abuse or reduced mental capacity have been asserted as a mitigating factor?
Yes.
- 2) If so, was the sentencing hearing before a judge or a jury?
Judge.
- 3) What testimony or evidence was offered to the jury to establish the abuse or reduced mental capacity?
N/A
- 4) Were any experts retained to offer opinion testimony? What type of expert?
Yes, Psychiatrists.
- 5) Did the Judge limit in any way the evidence which was to be presented regarding mental/physical abuse or reduced mental capacity?
The law limits the use of reduced mental capacity at trial; wider range is allowed for sentencing.
- 6) Did the Judge instruct the jury regarding the mitigating factor?
N/A

Judicial decision to non-concur with a jury verdict of death. 720 ILCS 9-1(g).

- 1) Have you been involved in any capital case in which the Court has non-concurred with the jury verdict of death?
No.
- 2) If so, what reasons did the Court set forth in its non-concurrence?
What facts and circumstances were relied on?
What documents were attached if any to the non-concurrence?
N/A

Trial Court decertification of capital case. 720 ILCS 9-1(h-5).

- 1) Have you been involved in any capital case in which the Court has decertified the case as a death penalty case?
If so, did the Court act on its own motion or upon defendant's motion?
No.
- 2) Did the Court conduct a pre-trial hearing regarding the admissibility of the informant testimony?
N/A
- 3) What basis did the Court rely on in the decertification?
N/A
- 4) Did the State choose to appeal the decertification?
N/A

Use of the Capital Litigation Trust Fund at trial. 730 ILCS 5/5-4-3.

- 1) Have you in the course of litigating a capital case attempted to utilize the Capital Litigation Trust Fund?
Yes.
- 2) In what capacity were you involved in the case?
As Judge.
- 3) Which expenses did you include in your petition to the Court?
Defense attorney fees and expenses, State expenses
- 4) Did the Court grant your petition?
I did.
- 5) Did the Court deny payment of any expenditure?
I gave guidance and also questioned some expenses before submission to the State.
- 6) What reasons did the Court cite in the order granting or denying payment from the fund?
We followed State standards, likely on the conservative side.
- 7) Was the initially approved budget of expenditures ample to cover all the costs of litigation?
If not, did the Court order additional expenses be covered from the trust fund?
My experience pre-dated the changes requiring budget pre-approval.

- 8) Did the trust fund alter in any way your ability to litigate the capital case?
If so, did it aid or hinder your litigation?
Yes. The trust fund for defense costs was depleted before trial and coverage of defense costs became totally uncertain, hampering all aspects of pretrial scheduling and preparation, and requiring an inordinate amount of the Court's time in discussion with AOIC, the State Treasurer's Office, legislative leadership, and county officials whose very limited county resources were potentially liable for unfunded expenses. The matters were eventually resolved, but at the expense of much time and effort.
- 9) Have you been involved in a capital case in which the case was subsequently decertified?
If so, how did the decertification impact the course of the litigation in conjunction with the loss of funding from the Capital Litigation Trust Fund?
Was the defendant able to keep previously appointed counsel?
Was defendant's case compromised at all because of the decertification?
N/A
- 10) Have you been a party in a capital case in which any other party has attempted to utilize the Capital Litigation Trust Fund?
If so, what was the basis of the request?
Both parties accessed the fund.
- 11) Have you experienced any party's abuse if the Capital Litigation Trust Fund?
If so, how was the fund abused?
No. I have heard, however, that there is no uniformity in use of the Fund by different jurisdictions, eg whether the Fund is tapped for pre-certification expenses, and no specific instructions have been provided to insure uniformity. One would not use the word "abuse" unless such guidelines are clearly set and then violated.

Redefinition of witness murder aggravating factor. 720 ILCS 5/9-1 (b)(8).

- 1) Have you been involved in any capital case where the aggravating factor was the murder of a witness/participant in a prior criminal proceeding?
No.
- 2) If so, was the sentencing hearing before a judge or jury?
N/A
- 3) Did the murder involve a witness or participant?
N/A
- 4) Please describe the role of the witness or participant.
N/A
- 5) What testimony or evidence was used to establish the aggravating factor?
N/A

Specific description and disclosure of Brady material by the prosecution. S. Ct. R. 412(c).

- 1) Have you been involved in any capital case where *Brady* material was a contested issue?
No.
- 2) Was a hearing held?
N/A
- 3) Please describe the nature of the *Brady* issue.
N/A
- 4) What, if any, sanctions were imposed?
N/A

Discovery depositions in capital cases S. Ct. R. 416 (e).

- 1) Have you been involved in any capital case where discovery depositions have been sought?
Not that I recall.
- 2) Who requested that a deposition be taken?
N/A
- 3) What was the role of the witness whose deposition was sought?
N/A
- 4) Was there a hearing held to determine “good cause”?
N/A
- 5) What testimony or evidence was presented to establish “good cause”?
N/A
- 6) If depositions were allowed, have you encountered any practical problems such as obtaining court reporters, videotaping, or selecting locations? If so, please describe.
N/A
- 7) Have you encountered any issues with opposing counsel regarding objections to questions at the deposition? If so, how were these issues resolved? Please describe.
N/A

Jury Selection.

- 1) In the past few years, have you noticed any changes in the jury selection process in capital cases? If so, please describe.
No, based on my limited experience in selecting / qualifying one such jury.
- 2) In your recent experience in capital cases, are jurors more often questioned individually, or in groups? Please describe.
I question jurors individually in such cases.
- 3) On the *Witherspoon* question, are jurors more often questioned individually or in groups? Please describe.
I question jurors individually in such cases.
- 4) In your recent experience, have you noticed a difference in the use of sequestered jurors in capital cases? Please describe.

No, based on my limited experience in selecting / qualifying one such jury. I sequester throughout the day and during lunch in such cases, but not overnight (thus far).

- 5) In your recent experience have you noticed a change in the inclusion or exclusion of racial minorities in jury service in capital cases? Please describe.

No, based on my limited experience in selecting / qualifying one such jury.