

**SPECIAL STUDY SESSION  
October 31, 2002**

The Board of Supervisors of Maricopa County, Arizona, convened at 1:30 p.m., October 31, 2002, in the Supervisors' Conference Room, Tenth Floor, 301 W. Jefferson, Phoenix, Arizona, with the following members present: Don Stapley, Chairman; Fulton Brock, Vice Chairman; Andy Kunasek (entered late), Max W. Wilson and Mary Rose Wilcox. Also present: Norma Risch, Deputy Clerk of the Board; Shirley Million, Executive Assistant; David Smith, County Administrative Officer; and Paul Golab, Deputy County Attorney. Votes of the Members on action items will be recorded as follows: (aye-no-absent-abstain).

**PRESENTATION AND DISCUSSION: PROBABLE FISCAL IMPACT TO COUNTY DUE TO SUPREME COURT'S DECISION**

Item: Departments anticipating a fiscal impact due to Ring v. Arizona and requests of additional funding. Discussion will also include Rule 8 and Rule 15 which are revised rules of Criminal Procedure related to speedy trial and pre-trial discovery. (C49030118) (ADM1825)

Sandi Wilson, Deputy County Administrator, said that she and Chris Bradley would open the discussion with an overview of the issue and how it would affect Arizona and Maricopa County, including the fiscal impact in lieu of the financial crises now facing the County and other local governments in the state.

Chris Bradley, Deputy Budget Director, said that there are three issues the biggest one being the Ring Decision, which will change the penalty phase in a death penalty case from judicial decision to jury determination. This will drastically change both the legal and court processes because attorneys will now be forced to prepare the sentencing phase prior to trial even though, in some cases, the trial may not proceed to sentencing, i.e., because a settlement or plea bargain is reached or the defendant is found to be innocent, etc. This decision is expected to be retroactive, which would affect pending cases as well as older cases where the defendant may have been on death row for dozens of years. He said that some of these older cases will have to be retried, witnesses will have to be found, evidence will have to be tracked down, etc. all within a narrow time limit. The other two issues are changes to Rule 8 and Rule 15 in an effort to improve the amount of time spent on criminal cases and imposing a strict time limit on certain types of discovery. All of this will have a heavy one-time impact on the budget as well as a continuing, long-term impact on legal system and court costs.

Supervisor Wilson asked if the courts, or any other source, had offered any funding to help resolve these additional costs. Mr. Bradley responded that there had been no outside offers of aid, which is really the crux of the problem.

Mr. Bradley continued that the total financial impact to Maricopa County and the various criminal justice agencies involved (County Attorney, Indigent Representation Offices, Legal Defender, Superior Court, Sheriff's Office, Clerk of Court and Medical Examiner) and including Remands, Ongoing, Start-up cases, Rule 8 and Rule 15, etc., is estimated to be \$9.8M for FY 2002-03 mid-year, and \$16.6M annualized for FY 2003-04. He indicated that the General Fund Operating Contingency is only \$20 million. Other unknown factors impacting the budget include a continuing impact from the State's deficit budget crisis, a potential shortfall in tax revenue, the failing MIHS healthcare system and the election outcome of Proposition 411 for the Sheriff's jail-tax extension (unknown until the general election results). He said that this decision deepens the already grave concern over the budget.

Ms. Wilson spoke on possible strategy approaches but said that an analysis has not been completed and it is still too soon for a plan to have been developed. She cautioned that the numbers presented are not recommendations from OMB and that any recommendation may take a month or longer to determine. She said, "Given the overall fiscal situation for the County, which is very serious at this point, we will

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recommend postponing the implementation of Rule 8 and Rule 15 until after we have a much better idea of what might happen to us as a result of the state budget balancing issues this fall, as well as next spring when the legislature meets to balance the next fiscal budget for the state." She continued, "The County is facing a very difficult fiscal situation and there are very few things that we will have any control over." She indicated that management had chosen to budget the more pessimistic numbers projected by Elliott Pollack and said that this decision was a very good one because it is "right on," whereas departments who budgeted from other, more optimistic, estimates may now be forced to make cut-backs.

Ms. Wilson declared that Maricopa Integrated Health Systems (MIHS) will continue to be a big concern in many areas and solutions needed to balance that budget will be forthcoming shortly. She indicated that management had hoped to be able to use the contingency monies to "bail us out on whatever State issues might come our way." She stated that there had been no forewarning that a \$10M expense would suddenly hit the County when the budget was being discussed last spring, and assured the Board that management would continue to take the most conservative approach possible in moving forward.

Supervisor Wilson asked if the dollars saved by shortening the time prisoners would be in custody had been considered. Ms. Wilson responded that any monies saved would be incremental increases (variable costs) because the cost of running the facility (food, laundry, utilities, etc.), would remain relatively stable, especially since crime is on the increase and the jails are filled on a continuing basis. She did indicate that they wanted to guard against hiring attorneys and other support staff and then have to riff later in the year and this is why they recommend postponing any action on Rule 8 and Rule 15. They need time to find the best solutions for all areas of concern.

Rick Romley, County Attorney, Paul Ahler, Chief Deputy and Carol McFadden, Executive Chief for the County Attorney's Office presented information on the history of Arizona's death penalty and the impact of the Ring decision on that office. Mr. Romley said that the case of the State vs. Timothy Ring rose from an armored car robbery in 1994 in which Mr. Ring and two other individuals committed the robbery and killed the driver. Mr. Ring was sentenced to death in 1997. Mr. Romley said, "The Ring Decision basically overturns the procedure by which the death penalty is imposed in Arizona." He added that in 1991, the U.S. Supreme Court validated the death penalty procedure that Arizona used (Walton vs. the State of Arizona) and most thought there was a very good likelihood that the state's procedure would continue to be held as constitutional when the Ring case was presented since relatively little time had passed. "But this did not happen," he said. "Arizona was immediately thrown into turmoil over the trial procedures of all past, present and future death penalty cases when this decision was handed down."

Mr. Romley explained the methods used in the application of the death penalty prior to the Ring Decision as follows: When a jury returned a verdict of first degree murder the case would then proceed to the sentencing stage before the trial judge. Preparation for this phase could take an additional time frame of one to two years. Both sides presented the judge with additional evidence to consider in weighing aggravation against mitigation before making his determination of the proper sentence for the guilty party.

Mr. Romley said that the Ring decision determined that a judge was not the proper entity to pass sentence on a defendant in a first degree murder, death penalty conviction, and that this would be more properly done by a jury of his peers after first considering new aggravating and mitigating evidence. If it is not a death sentence trial the judge will continue to make the sentencing determination.

After the Supreme Court's decision the Arizona State Legislature met in emergency session to take up the task of modifying state statute to conform with that decision, and these modified statutes took effect

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on August 1, 2002. The Arizona Supreme Court also had to revise their rules on the death penalty and these became effective on October 11, 2002.

Procedures, as changed by Ring, require that once the death penalty is alleged by the County Attorney's Office, preparation must now be made for both the trial and the sentencing portions to be completed prior to opening arguments, even if the jury eventually finds the defendant to be innocent.

Mr. Romley said that in all fairness, one of the enhancements of the new system comes if the jury does hand down a first degree murder charge because the case will immediately go to determination of aggravation and mitigation with no delay. He stated that additional and/or expanded evidence may be presented in aggravation and mitigation portions that could not be presented during the trial but time and expenses will be conserved by using the same jury because that jury will be familiar with all the evidence and circumstances presented during the trial. He added, "But that will only affect new cases and so it has to be considered as a long-term advantage. Meanwhile there will be much short-term pain felt by all."

However, this advantage does not hold true for older cases, with sentences determined months or years earlier and prisoners still sitting on death row. In those cases a new jury must be impaneled before a trial judge who may be almost as unfamiliar with the case as the jury. The evidence and testimony from the trial will have to be given again to inform the jury of all pertinent information in order to prepare them to impart the death sentence if deemed appropriate. Witnesses may have moved away or died, evidence could have been lost, the ability to do modern DNA testing may be impossible and many other difficult and extenuating circumstances would all impact the efficacy and fairness of the re-sentencing portion of these trials. The prime factor of guilt has already been established at an earlier date and this must form the basis from which the jury will begin their re-sentencing deliberations.

Paul Ahler said there are four groups of cases that must be considered, a number of which are affected in each category. These include capital cases pending trial, (61 cases); capital cases pending sentencing, (10 cases - which will have to be retried to a new jury); convicted defendants on death row with cases on direct appeal, (16 convictions in Maricopa County that will come back to be retried); and convicted death row inmates with cases on collateral review, a convict's second round of appeals filed this time in federal courts, (40 Maricopa County cases, some of which date to the late 1970's). He said the latter cases may not be retroactive – the decision is still pending. Mr. Ahler indicated that the County Attorney's Office does not allege the death penalty in every first degree murder case but it is alleged in approximately 30% of them. He said that no one in Arizona has ever tried a death penalty case to a jury and there will be some huge training issues needed to offset this deficiency. He did say that there are still some decisions to be made by the AZ. Supreme Court regarding this issue and this delay has caused a backlog of cases to build which should hopefully break soon. But the resulting pressure is being felt by both defense and prosecuting attorneys.

Discussion ensued on those cases where prisoners have already been on death row for a number of years. Mr. Romley said he would have to withdraw any case if the probability of presenting sufficient evidence in the aggravation portion of a trial (because witnesses or evidence had "disappeared" or there were other time-related deficiencies) would not warrant a possible death penalty sentence by a new jury. The judge would then sentence the prisoner depending on what the law was at the time the crime was committed. In 1994, sentencing in criminal law cases was changed with an option to the court to impose a natural life sentence in first degree murder cases rather than the death penalty. This sentence would not have been available to prisoners sentenced prior to that change. This 1994 change could also make some prisoners available for instant parole after serving 25 years in a 25 to life sentencing done prior to

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that time. Such possible releases of guilty parties who murdered a loved one has several victim's families extremely upset, a fact that must be taken into consideration when determining this matter.

Rule 8 was briefly discussed. A case must now be ready for trial in 18 months. This would put a tremendous strain on law enforcement and especially medical examiners to have to complete their tests and submit their reports in such a short time frame because they always have a large backlog, much of which is caused by having to wait for information from outside sources. Mr. Romley is very concerned about this issue because if the time frame cannot be met, attorneys could be found in contempt, cases could be dismissed, evidence excluded and criminals set free. Rule 15 deals with how quickly attorneys must turn certain kinds of discovery over to the other side. Decision on it is in a state of flux at this time, which has delayed its application.

Discussion ensued on this, and also on further information and additional numbers given by County Attorney Romley and Paul Ahler, including questions of constitutionality and legality of laws made by other than the state legislature. Mr. Romley said, "In the rule-making process the Constitution gives that authority to the Arizona Supreme Court." He said that the level of concern has become so great that "law enforcement is looking at getting a constitutional amendment to give such decision making power to the senate, just as the United States Senate decides for federal courts." He added that this decision may be considered laudable in the long run "but right now it's a huge burden and the timing is horrible. But, we have to comply with it or face heavy sanctions." In response to a question from the Chairman on what can be done to change the legislature's decisions, Mr. Romley urged a meeting with the Arizona Supreme Court Presiding Judge, Justice Jones, who he said was very open to discussing these issues. He was asked to try and arrange such a meeting.

Carol McFadden outlined their department's emergency budget request of \$1,496,501 for six months of the current fiscal year. This was submitted in September to address projected cost increases and additional staffing due to the Ring decision and Rule 8 and 15 changes. She said that funding for costs in the collateral review cases was not included in the budget request but may necessitate additional budget requests during the next fiscal year.

Mr. Smith said that all of these additional costs would be phased in as the need arises rather than to impact the budget all at once. He reported that a rough estimate of costs for the 128 cases now under discussion would be \$80,460 per case, just for the sentencing phase. He said that the Supreme Court's decision coupled with the action taken by the legislature has caused a great deal of stress to a law enforcement system that is already under pressure in trying to cope with an increase in the volume of criminal cases since crime is again on the rise in the County. Mr. Romley interjected, "So far this year indications are that filings are up 13%."

The Chairman asked the indigent defense staff to report next, Jim Haas, Public Defender, Bob Briney, Legal Defender, Mark Kennedy, Administrator for the Office of Contract Counsel and Susan Sherwin, Public Advocate came to the dais. Mr. Haas said they have been meeting to try to determine their legal, ethical and constitutional responsibilities in death penalty cases under the new statute. He indicated that they had been very mindful that this is the worst possible time for this to happen when they put their proposal together, and they had done their best to hold the cost down when setting their two primary goals. Their goals are to do these cases right the first time, and to try to prevent as many cases as possible from going to the office of contract counsel (who collect higher fees) by handling as many of them in their three offices as possible.

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He said that from a defense perspective there is no other case quite like a death penalty case. Arizona statute requires that two attorneys be appointed to every such case and they must have special qualifications involving a lot of prior experience in death penalty cases. Mr. Haas indicated that expenses for the mitigation phase make the biggest difference in these cases. He said, "Case law requires that no stone be left unturned in acquiring evidence that could save a client's life." Therefore, the number of expert witnesses, travel expenses, etc., are increased dramatically.

He indicated there are few attorneys who are qualified, willing and able to handle a death penalty case as they are so pressurized, time consuming and difficult, and no one wants to make a mistake that will cost a life. He said that everything a defense lawyer does in a capital case is scrutinized in great detail by teams of attorneys for up to 20 years looking, for the slightest mistake that the attorney may have made on which to file an appeal. There are three levels of review in this kind of case, direct state appeal, state post conviction relief, and federal habeas corpus. He cited the Leadman report which found that 68% of death penalty cases were reversed in an appellate court decision over a period of 20 years because of serious error. (It was subsequently pointed out that some of these reversals resulted from procedural errors and had nothing to do with the convicted person's guilt or innocence.)

Supervisor Kunasek asked Mr. Haas if, as a public defender, he would be more comfortable turning his case over to a jury or to a judge.

Mr. Haas replied that this is a subject of great debate in the defense community. He mentioned that statistics across the country indicate that juries hand out fewer death penalties than do judges but no one ever knows what will happen. He said he felt there could be an increase in hung juries because of the Ring decision, causing another jury to be brought in at any of the three trial stages. It only takes one out of the twelve jurors to hang a jury and this can be done in any phase, the guilt phase the aggravation phase or the penalty phase. He said they have been speculating on how many of the juries might hang and explained that there is a potential for six trials in any one death penalty case, potentially expending an excessive amount of time and money for that case.

Mr. Haas said that since the Ring decision things that have always been done by a judge will now be done by a jury, and juries always take longer than judges do. Juries have to be instructed on the law, receive definitions of legal terms and other factors that are not necessary with judges. He said that other states have reported that jury selection in death penalty cases can take up to two weeks and he is currently used to selecting a jury in a few days. He indicated that they hope to be able to do up to 15 cases a year in each of their three offices, or three cases a year for each attorney plus some additional work. He added that it is important to recognize that cases don't take a year but more like 18 months, so there will be an overlap.

Judge O'Toole, Presiding Judge of the Criminal Court and his staff came forward to report on the impact he believes these changes will have on the criminal court system. He said the court will be impacted by the increase in time to pick a jury however, he didn't believe it would take two weeks to pick a death-qualified jury in Arizona. He estimated that it might take two to four days to do so. He reiterated much of the same information given earlier and said, "The guilt phase of the trial will now be longer and the jury will be impaneled for a longer time to reach the sentencing phase." If there is a hung jury and a second jury is impaneled that also cannot reach a decision, the judge would have to impose a life sentence, either natural life or the 25 year to life sentence. He stated, "The justice system demands speedy trials. Memories do not get any better, witnesses do not remain around any longer, and the sooner the case is tried, consistent with due process, the more likely the verdict is going to be correct."

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Gordon Griller, Court Administrator and Jury Commissioner, said that from his perspective the courts would be affected in two ways, neither to the financial level of the two public attorney offices. He said it would definitely take more judge-time to deal with death penalty cases now, approximately 75% longer for each case. They estimate that the criminal courts will have 25 death penalty cases in the next 12 months - there were 21 such cases over the past year. This increase would ordinarily be equivalent to acquiring at least two more judges, but the State has said they cannot afford their cost-portion for any new judges. Therefore, the court plans to hire Commissioners as judge pro-tems to free up sitting criminal judges for the longer trials necessary for death penalty cases. With regards to juries under these new changes, he indicated that in questioning other state's methods they have determined that the heavy involvement of juries as established for Arizona by state statute seems to be unique. Other states have jury involvement but not to the extent of the Arizona approach in giving juries a number of new responsibilities. He estimated that out of the 25 expected death penalty cases six of the juries will "hang" and new juries will have to be impaneled. Jury expenses for Maricopa County now run about \$2 million a year. He estimated that annual costs would increase by approximately \$640,000 a year for jury and staffing changes. A one-time-only impact cost on cases now "in the pipeline" is expected to be \$330,000. Most of this is expected to hit by the 4<sup>th</sup> quarter of this fiscal year raising the cost for the current fiscal year to \$490,000. At this time they do not believe that the increase in case load will require additional courtroom space prior to the court's additions already planned for the future. He explained that a jury trial is held only four days out of the week and the average length expected for the guilt phase in the future will be 19-20 days total, and an additional 15 days in the aggravation/penalty phase. These estimates change if the first jury "hangs," adding another 19 trial days.

**~ Supervisor Brock left the meeting, not to return ~**

Supervisor Wilson asked, "Doesn't anybody pay for their own defense any more? We're paying for both sides of every case, plus all the expenses." He was told by Judge O'Toole that "Those are the old days. Today it's probably less than one or two percent who pay." He explained that most of the defendants are indigent today and can't afford legal fees.

Discussion ensued on the possibility of repaneling the same jury in recent cases. (The answer was "not feasible".) Also of going back to the state legislature to find out the reasoning behind their decision to burden Arizona with "a process that is unique in this nation." It was thought that when the legislators better understood the enormous cost in time and money they might reexamine the matter. It was said that most states (37) that have the death penalty actually do have jury sentencing and only five had judge sentencing. In addition, it was said that the Ring decision did not specifically state that a judge had to do the sentencing but defense lawyers have long held that "judge sentencing in capital cases is unconstitutional" and it is felt that the next step will be to take this question to the Supreme Court for a decision. Board members felt that this had impacted the legislature's decision and that the financial impact had not been adequately considered by them.

David Smith indicated that when the legislature was considering this question in special session he did not recall anyone asking him for a cost estimate on what their decision would cost the County. He pointed out that cost is a reality that must be dealt with in a civilized society. He would be interested to learn of any studies done on this matter by the other 37 states that have the death penalty.

Supervisor Kunasek asked if inmates will be brought up from Florence for the entire length of the new trials and if the County would be responsible for all of the costs of housing, food and medical expenses for them during that time.

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Bill Williams, Sheriff's Office, came forward to reply, "Yes, the longer someone is in custody to attend a trial the more it's going to cost us." He said that another important consideration is that, "These are types of inmates that you can't put in with the general population. They must be kept secured in 23-hour lockdown. Which entails more staff for that duty plus the additional staff to transport them to and from court." He said there would undoubtedly be other additional costs as well.

**SUPERVISORS' COMMENTS**

Supervisor Wilcox said she wants to conserve money and recognizes that OMB is recommending to "hold off" on implementing this but she also does not want to incur any penalties if the County does not fully comply, "because that could be even more onerous."

Supervisor Wilson observed that "This is ridiculous. There is no way that small cities, small counties or even Maricopa County can afford this kind of unexpected expense. Something's got to be done to adjust this down the line."

Chairman Stapley agreed and said that with 37 other states using the death penalty there had to be a way to streamline this using what those states have learned from experience and the decisions made for their courts. He repeated his request to Mr. Ahler to meet with Chief Justice Jones, Arizona Supreme Court, as soon as possible with a group of appropriate representatives to discuss this issue.

**DIES & HILE AS OUTSIDE COUNSEL IN BANKRUPTCY SUIT – W.R. GRACE & CO.**

Motion was made by Supervisor Kunasek, seconded by Supervisor Wilson, and unanimously carried (4-0-1) to approve the outside counsel agreement with the law firm Dies & Hile, to represent Maricopa County and file all appropriate pleadings in the actions of, In Re: W.R. Grace & Co., et al., case No. 01-01139 (JJF) in the United States Bankruptcy Court for the District of Delaware, and all related matters, concerning the pursuit of recovery from manufactures and former manufactures of ACSTM. (Discussed in Executive Session on September 30, 2002.) (C19030160)

**AUCTION SALE OF REAL PROPERTY IN FLORIDA**

Motion was made by Supervisor Kunasek, seconded by Supervisor Wilcox, and unanimously carried (4-0-1) to approve the auction sale of real property located in Rolling Ranch Estates (Tax Assessor Parcel Nos. 3529-038-012 to 3529-038-019), Marion County, Florida. (This was Addendum item A-1.) (C1902054801) (ADM400)

**MEETING ADJOURNED**

There being no further business to come before the Board, the meeting was adjourned.

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Don Stapley, Chairman of the Board

ATTEST:

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Norma Risch, Deputy Clerk of the Board