Office of the Attorney General
State of Arizona

Capital Case Commission
Interim Report

The Commission acknowledges the many dedicated staff members who worked on this Interim Report including Patrick Cunningham, Diane Saunders, Timothy Geiger, Kent Cattani, Monica Beerling Klapper, Robert Ellman, Michael Haener, Marty Buck, Scott Bales and Dennis Burke.

Janet Napolitano
Attorney General

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I. Introduction

During the past two years, events across the country have raised the public's awareness of the death penalty and its administration. Since January, 1999, Arizona has executed 10 inmates and more than 100 prisoners are now on Arizona's death row. Recognizing the need for a comprehensive study of the death penalty process in Arizona, Attorney General Janet Napolitano formed the Attorney General's Capital Case Commission to make recommendations to ensure that the death penalty process in Arizona is fair to defendants and victims. The Capital Case Commission was formed in the summer of 2000 and, after one year of study and research, releases this Interim Report. After additional research, the Commission will reconvene.

Commission Membership

The Capital Case Commission brings together persons with varied experience and distinct perspectives regarding the capital case pre-trial, trial, sentencing and appeal processes. Commission members include Arizona Supreme Court Justice, the Honorable Stanley G. Feldman; former Arizona Supreme Court Justice, the Honorable James Moeller; Arizona Court of Appeals member, the Honorable Michael Ryan; and three members of the Arizona Superior Court, the Honorable Dave Cole, the Honorable Steven Conn and the Honorable Cindy Jorgenson. Four members of the Arizona Legislature serve on the Commission, the Assistant Floor Leader in the Senate, Senator Chris Cummiskey; Majority Whip in the House of Representatives, Representative Marilyn Jarrett; Mr. John Loredo of the House of Representatives and Mr. Tom Smith of the Senate. Five current or former prosecutors serve on the Commission including Attorney General Janet Napolitano; the elected county attorney from Yuma County, the Honorable Patricia Orozco; former Yavapai County Attorney, the Honorable Charles Hastings; Mr. Paul Ahler of the Maricopa County Attorney's Office; and Mr. Rick Unklesbay of the Pima County Attorney's Office. Seven members of the Arizona Defense Bar join the Commission including private and public defense attorneys and trial and appellate specialists: Mr. Harold Higgins of the Pima County Assistant Public Defender's Office; Mr. Chris Johns of the Maricopa County Public Defender's Office; Mr. Michael Kimerer of Kimer & LaVelle; Mr. Charles Krull of the Maricopa County Public Defender's Office; Mr. Lee Stein of Fennemore Craig; Mr. John Stookey of Osborn Maledon; and Ms. Lois Yankowski of the Pima County Legal Defender's Office. The Governor's Executive Assistant for Law Enforcement and Criminal Justice, Special Agent George Weisz, is a member of the Commission, along with members representing crime victims in Arizona, Mr. Steven Twist and Ms. Gail Leland. The Commission has citizen membership from Mr. Jaime Gutierrez, a former State Senator from Tucson; Dr. Peg Bortner from Arizona State University; Mr. Jose Cardenas of Lewis and Roca; and Mr. Tom LeClaire of Snell & Wilmer. Finally, the Honorable Paul Babbitt, a member of the Coconino County Board of Supervisors, represents the county perspective and Mr. James Bush, Chair of the Governor's Mental Health Task Force and attorney, provides perspective on mental health issues. Short biographies of each member appear in Appendix E.

The Objective

The objective of the Commission is to review the capital punishment process in Arizona in its entirety to ensure that it works in a fair, timely and orderly manner. To that end, the Commission examined the current system beginning with the pre-trial process, and continuing through the trial process and the completion of the appellate process.

The Structure and Research

The structure of the Commission is designed to encourage full debate and to enable the subcommittees of the Commission to work through the intricacies of death penalty litigation in Arizona. The Commission met seven times beginning in September, 2000 through May, 2001. The Commission will meet again when additional research has been completed. The Commission's meetings are open to the public and the Commission has received written input from the public. The Commission subcommittee meetings were open and members of the public were allowed to speak and/or present written materials. Beginning in September, 2000, the subcommittees met more than 30 times collectively.

The Subcommittees

Data/Research Subcommittee:

Peg Bortner, Chair
Michael D. Ryan
Rick A. Unklesbay
Janet Napolitano
John A. Stookey

The Data/Research Subcommittee, chaired by Dr. Peg Bortner of the Center for Urban Inquiry in the College of Public Programs at Arizona State University, began meeting in the summer of 2000, and devised three areas of empirical research to be completed:

- Data Set I profiles all Arizona capital cases for individuals sentenced from 1974 through July 1, 2000. This study profiles all defendants and victims in those cases, summarizes the processing of capital cases in Arizona, sets forth time intervals between major decision points and studies all of the cases requiring corrective appellate action. The Center for Urban Inquiry presented an Interim Report to the Commission on Data Set I entitled "Summary of Death Sentence Process: Data Set I Research Report to Arizona Capital Case Commission, March 2001" (hereinafter referred to as Data Set I Research Report). That report is attached to this Interim Report for easy reference.

- The Center for Urban Inquiry is now working on Data Set II, which is the study of all first degree murder cases charged during a five-year period, January 1, 1995 through December 31, 1999 for Maricopa, Pima, Coconino and Mojave counties. This data will be used for a comparative analysis to Data Set I and will focus on the differences between a capital murder case and a non-capital murder case in the four counties.

- Work on Data Set III has begun using a representative sample from cases in Data Set II to determine the incremental additional costs of prosecuting, defending and appealing a capital murder case as compared to a non-capital murder case.

Pre-Trial Issues Subcommittee:

Thomas L. LeClaire, Chair	Jose Cardenas
Paul W. Ahler	Harold L. Higgins, Jr.
James M. Bush	Cindy K. Jorgenson
John A. Loredo	Lee Stein
Patricia A. Orozco	George Weisz

Issues:

- how prosecutors identify cases in which to seek the death penalty;
- the statutory scheme of aggravating circumstances that define which defendants are death eligible;
- the minimum age for imposing the death penalty;
- the issue of mental retardation as it applies to eligibility for the death penalty;
- residual doubt as a mitigating factor; and
- the time lines for filing a notice of intent to seek the death penalty.

Trial Issues Subcommittee:

Dave R. Cole, Chair	Charles R. Hastings
Steven F. Conn	Marilyn Jarrett
Jaime Gutierrez	Christopher Johns
Michael D. Kimerer	John A. Stookey
Gail Leland	Rick A. Unklesbay

Issues:

- the issues of trial defense attorney competence;
- time lines for disclosure of intent to seek the death penalty;
- conduct of an aggravation/mitigation hearing and death penalty sentencing;
- the use of mitigation experts in preparation of the defense case;
- the need for adequate trial defense attorneys for indigent defendants in Arizona; and
- the issue of delay in investigating and trying a capital case in the trial courts.

Direct Appeal/PCR Subcommittee:

Michael D. Ryan, Chair	Chris Cummiskey
Paul J. Babbitt, Jr.	Stanley G. Feldman
Peg Bortner	Lois Yankowski
Charles Krull	Tom Smith
James Moeller	Steven J. Twist

Issues:

- the issues of qualifications for an appellate defense attorney;
- the need to provide an adequate number of attorneys to handle PCR proceedings in Arizona capital cases;
- the long time intervals in processing capital appeals in Arizona;
- the need for a trial and appellate public defender office in Arizona;
- Ariz. R. Crim. P. 32 governing PCR proceedings; and
- the issue of whether Arizona needs to change its procedures to be able to “opt in” under the Federal Anti-Terrorism and Effective Death Penalty Act of 1996.

The subcommittees made recommendations for consideration by the full Commission.

The Interim Report

This report will first review the history of capital punishment in Arizona, summarize the research completed to date by the Center for Urban Inquiry, and then discuss the issues reviewed and the recommendations returned by the Pre-Trial Issues Subcommittee, the Trial Issues Subcommittee, and the Direct Appeal/PCR Subcommittee. This report will summarize the recommendations of the entire Commission, and list reforms proposed by the Commission for the capital litigation system in Arizona.

II. Capital Punishment in Arizona

History

In *Furman v. Georgia,* 408 U.S. 238 (1972), the United States Supreme Court held that the death penalty as administered violated the United States Constitution Eighth Amendment prohibition against cruel and unusual punishment. A majority of the court found that the sentencing authority was not adequately guided in its discretion when imposing the death penalty, resulting in the death penalty being meted out in "arbitrary and capricious" ways. The decision effectively declared death penalty laws in 32 states unconstitutional and removed over six hundred prisoners from death rows around the country, including Arizona.

The following year, the Arizona legislature enacted A.R.S. § 13-454, setting forth a new procedure for death penalty cases. The new statute provided for a separate sentencing hearing to be held by the trial court, rather than a jury, and enumerated six aggravating circumstances that could be considered in deciding whether to impose a death sentence: (1) prior conviction for which a sentence of life imprisonment or death was imposable; (2) prior serious offense involving the use or threat of violence; (3) Grave risk of death to others; (4) Procurement of murder by payment or promise of payment; (5) Commission of murder for pecuniary gain; and (6) Murder committed in an especially heinous, cruel or depraved manner. The Legislature subsequently added the following aggravating circumstances: (7) Murder committed while in custody (effective Oct. 1, 1978); (8) Multiple homicides (effective Sept. 1, 1984); (9) Murder of a victim under 15 years of age (effective May 16, 1985) or of a victim 70 years of age or older (effective July 17, 1993); and (10) Murder of a law enforcement officer (effective Sept. 30, 1988).

The State was required to prove at least one of these aggravating circumstance beyond a reasonable doubt for the defendant to be eligible for the death penalty. If the State proved at least one of the aggravating circumstances, the defense was permitted to try to establish one of four statutory mitigating circumstances which were enacted in 1973: (a) the defendant's capacity to appreciate the wrongfulness of his conduct was impaired; (b) the defendant was under unusual and substantial duress; (c) the defendant's participation in the crime was minor; or (d) the defendant could not reasonably foresee that his conduct would cause the death of another person. The court was then required to issue a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in the statute. The trial court then weighed the proven aggravating and mitigating circumstances and sentenced the defendant to death if the mitigation did not outweigh the proven aggravation.

In 1976, the United States Supreme Court decided three landmark cases relating to the constitutionality of post-*Furman* death penalty statutes. In *Gregg v. Georgia,* 428 U.S. 153 (1976), the Court upheld Georgia's new statute, which included statutory aggravating circumstances and required specific findings as to the circumstances of the crime and the character of the defendant. The Court also found that the new Georgia

statute provided the sentencer with "adequate information and guidance." In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court rejected North Carolina's mandatory imposition of the death penalty for any first degree murder convictions. The Court found that the imposition of a mandatory death sentence without consideration of the circumstances of the crime and the character and record of the defendant violated the Eighth Amendment's proscription against cruel and unusual punishment. However, the United States Supreme Court rejected the argument that the death penalty was *per se* cruel and unusual punishment in *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Proffitt*, the Court ruled that the aggravating factor of "especially heinous, atrocious or cruel" was valid as applied, upheld Florida's statutory procedures that required the consideration of specific aggravating and mitigating factors by the court, and the imposition of the death penalty only when aggravating factors outweigh mitigating factors. The Arizona death penalty statute, which provided for a procedure similar to that in Florida (separate guilt and penalty phases of the capital trial) was upheld as constitutional by the Arizona Supreme Court in 1976 in *State v. Richmond*, 114 Ariz. 186, 560 P.2d. 41 (1976).

In 1978 the Arizona Supreme Court in *State v. Bishop*, 118 Ariz. 263, 576 P.2d 122 (1978), construed the list of mitigating circumstances enumerated in A.R.S. § 13-703(G) to be exclusive. Shortly after the Arizona Supreme Court decision in *Bishop*, the Ohio statutory scheme limiting the presentation of mitigation was found to be improper by the United State Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978). The Court held that the Eighth and Fourteenth Amendments required that the sentencer not be precluded from considering as mitigation any aspect of the defendant's character or record, and any circumstance of the offense argued by the defendant as mitigating the sentence to less than death. Consequently, the Arizona Supreme Court in *State v. Watson*, 120 Ariz. 441, 586 P.2d. 1253 (1978), held Arizona's death penalty statute to be unconstitutional due to its limitation on the presentation of mitigation. However, the Court found that the unconstitutional portion of the statute (limiting mitigation) was severable from the constitutional portion, and remanded the case to allow the defendant to present any circumstance showing why the death penalty should not be imposed. After the Court's decision in *Watson*, all prisoners on death row were remanded for new sentencing hearings to allow presentation of any evidence tending to mitigate the sentence.

In 1979, following the Arizona Supreme Court's decision in *Watson*, the Arizona legislature amended A.R.S. § 13-703(G) to allow for the admission into evidence by either the defendant or the State of any factor relevant in determining whether to impose a sentence less than death. In 1993, A.R.S. § 13-703(A) was amended to provide for a sentence of natural life, in addition to life imprisonment with the opportunity for parole after 25 years in prison.

In 1988, in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the United States Court of Appeals for the Ninth Circuit ruled that the Arizona death penalty statute was unconstitutional as imposed. The court's ruling was based on the defendant being denied his right to jury sentencing, the aggravating circumstance of "especially heinous, cruel or depraved" being too arbitrary, the sentencing court's consideration of mitigating circumstances was improperly limited, and the statute imposed a presumption of death. The United States Supreme Court denied *certiorari* review on *Adamson*, but granted review in *Walton v. Arizona*, 497 U.S. 639 (1990), to address similar issues. In the *Walton* opinion the Court upheld Arizona's death penalty statute and specifically ruled that a judge, rather than a jury, can find aggravating circumstances and that the "especially heinous, cruel or depraved" circumstance provided sufficient guidance to satisfy the Eighth and Fourteenth Amendments.

The Capital Case

In Arizona, the death penalty may only be imposed for first degree, premeditated or felony murder. The prosecuting agency handling the case must, within thirty days of the arraignment of the defendant, file a notice of intent to seek the death penalty under Ariz. R. Crim. P. 15.1(g)(1).

In determining whether to seek the death penalty the prosecutor may weigh many factors. These include the apparent existence of any of the statutory mitigating factors enumerated in A.R.S. § 13-703(G); any information offered by the victim's family; information offered by the defendant, his family or his counsel; and any other information the prosecutor believes relevant in a given case.

Trial Process

The trial of a capital case is divided into two separate proceedings. The first is the guilt phase of the trial, at which the prosecutor presents factual evidence as to the defendant's guilt for the murder. The second phase is the sentencing proceeding, called the aggravation and mitigation hearing. During the aggravation and mitigation hearing, the prosecutor presents evidence as to the existence of aggravating circumstances, and the defense (or the prosecution) presents evidence as to the existence of mitigating circumstances. Both parts of the trial are presided over by the same judge, however, the finder of fact at the guilt phase is a jury, and the finder of fact at the sentencing phase is the trial court judge.

Capital murder trials are similar to any other felony trial, however there are some distinct differences.

Guilt Phase

Once the prosecuting agency has filed the notice of intent to seek the death penalty, the defendant is assigned a second defense counsel under Ariz. R. Crim. P. 6.2. Only attorneys meeting a heightened experience and skill standard set forth in Ariz. R. Crim. P. 6.8 may be appointed to represent a defendant in a capital case. However, the defendant is free to retain counsel of his own choosing, and such counsel need not meet the qualifications of Ariz. R. Crim. P. 6.8.

One difference in a capital trial is that jurors may be "death qualified". This refers to the process of questioning jurors on their views of the death penalty and their ability to follow the trial court's instructions in light of those views. In this process, jurors may be removed for cause if their opposition to the death penalty will not allow them to apply the law or view the facts impartially. Jurors who are opposed to the death penalty will not be removed for cause if they avow that they will nevertheless conscientiously apply the law to the facts of the case.

Once the capital murder trial has begun, it proceeds much like any other first degree murder trial. The rules of criminal procedure and the rules of evidence apply the same way they do in all other criminal trials.

Sentencing Phase

If the defendant is convicted of first degree murder, the court will set a date for the aggravation and mitigation hearing. The same judge that presided over the trial, or before whom a guilty plea was entered, generally

conducts the aggravation and mitigation hearing. Another judge may conduct the hearing in the event of the death, resignation, incapacity or disqualification of the judge who presided at trial.

The presentation of evidence at the aggravation and mitigation hearing follows much the same format as during the guilt phase of the trial. Witnesses testify under oath and are cross-examined, evidence is admitted for the court's consideration, and counsel for the State and the defense give oral argument.

The decision to present evidence to the court in aggravation is the sole responsibility of the prosecutor. The admissibility of evidence in support of the aggravating circumstances is governed by the rules of evidence. Evidence in mitigation may be offered by the defense or the State regardless of its admissibility under the rules of evidence. Once the prosecution has presented evidence supporting aggravating circumstances and either side has presented mitigating circumstances, the court decides whether to impose the death penalty, regardless of the views of the prosecutors.

At the aggravation and mitigation hearing, the statutory victims under A.R.S. § 13-4401(19) have the right under the Victim's Bill of Rights (Ariz. Const. Art. 2, § 2.1(A)(4)) to address the court. Outlined in A.R.S. § 13-703(D), the victim(s) may testify as to the emotional, financial and psychological impact the murder has had on the survivors of the victim. The sentencing judge cannot, however, consider a sentencing recommendation by the victim(s) in determining whether to impose the death penalty.

Trial Court's Decision to Impose the Death Penalty

After the sentencing hearing, the trial court sets a date for the rendering of sentence and the reading of the special verdict. In the special verdict, as provided for in A.R.S. § 13-703(D), the court sets forth its findings as to the existence or non-existence of each of the aggravating circumstances set forth in A.R.S. § 13-703(F) and any mitigating circumstances included in A.R.S. § 13-703(G).

As a preliminary matter at sentencing in felony murder cases, the trial court must first determine if the facts of the offense met the *Enmund/Tison* standard. Under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), the death penalty should not be imposed unless the defendant killed, intended to kill, or attempted to kill. If that criterion is not met, the defendant is not eligible to be sentenced to death unless he or she was a major participant in the underlying felony and acted with reckless disregard for human life. If the trial court determines that the facts of the crime meet the *Enmund/Tison* standard, it then decides the existence or non-existence of aggravating and mitigating circumstances.

In deciding whether to impose the death penalty the trial court must determine if the State has established beyond a reasonable doubt at least one of the ten statutory aggravating circumstances set forth in A.R.S. § 13-703(F):

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable;
2. The defendant was previously convicted of a serious offense, whether preparatory or completed;

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense;
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;
6. The defendant committed the offense in an especially heinous, cruel or depraved manner;
7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the State Department of Corrections, a law enforcement agency or a county or city jail;
8. The defendant has been convicted of one or more other homicides, as defined in §13-1101, which were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older; and
10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

If the court determines that the State has proven at least one of the ten aggravating circumstances beyond a reasonable doubt it next turns to deciding the existence of mitigating circumstances. In deciding the mitigating circumstances the trial court must determine if the defendant has proven, by a preponderance of the evidence, any factors that are relevant in determining whether to impose the death penalty. This determination includes any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to, the following factors listed in A.R.S. § 13-703(G):

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution;
3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution;
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing death to another person; and
5. The defendant's age.

In balancing the proven aggravating and mitigating circumstances the trial court "shall take into account the aggravating and mitigating circumstances... and shall impose a sentence of death if the court finds one or more of the aggravating circumstances ... and that there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(E)

The court must, in each particular case, weigh the facts of the crime and the background of the defendant, recognizing that the death penalty is limited to only particularly aggravated first-degree murders.

If the trial court decides that the State has proven beyond a reasonable doubt at least one of the statutory aggravating circumstances, and that there are no mitigating circumstances sufficiently substantial to call for leniency, the court shall impose the sentence of death. Immediately following the rendering of the special verdict and sentence of death, the court shall file the defendant's notice of appeal and the case is automatically appealed to the Arizona Supreme Court.

Appeals Process

Direct Appeal

In the automatic appeal, the Arizona Supreme Court independently reviews the death sentence. Although the Court does not defer to the trial court's decision to impose the death penalty, it does give deference to the factual findings underlying the trial court's decision. When the Arizona Supreme Court has doubt about the imposition of the death penalty, the Court will resolve the doubt in favor of a life sentence.

Before *State v. White,* 168 Ariz. 500, 815 P.2d. 869 (1991), the Arizona Supreme Court engaged in a proportionality review of each case to determine whether the death penalty was excessive or disproportionate. This review is not constitutionally required and the Court no longer conducts such a review. The Court instead focuses on the facts and circumstances of the crime at issue and the character and record of the defendant.

To the extent that the ruling of the Arizona Supreme Court addresses a federal constitutional issue, either of the parties can appeal a decision of the Arizona Supreme Court directly to the United States Supreme Court by petitioning for a writ of certiorari. Immediately following the final conclusion of the direct appeal to the Arizona Supreme Court, post-conviction relief proceedings are initiated.

Post-Conviction Relief

As soon as the mandate is issued affirming the defendant's conviction and sentence, the Arizona Supreme Court automatically initiates a post-conviction relief proceeding. Post-conviction relief proceedings allow the defendant to raise claims relating primarily to whether: (1) trial counsel provided effective representation during the trial or sentencing hearing; (2) there is "newly-discovered" evidence that would have changed the verdict or sentence had it been presented at the time of trial; and (3) a change in the law that applies retroactively would probably change the conviction or sentence.

The trial court's decision on the post-conviction relief claims can be appealed to the Arizona Supreme Court by either party, and the parties may file a petition for certiorari requesting the United States Supreme Court to review the decision of the State Supreme Court.

Federal Habeas Corpus

Under 28 U.S.C. 2254, a state prisoner may seek relief in federal district court for claims that his federal constitutional rights were violated at trial or at sentencing. A federal constitutional claim can only be raised in federal court if it has first been raised in a procedurally appropriate manner in state court. During the federal habeas corpus proceeding, the federal court decides if the state court ruling conflicts with controlling United States Supreme Court authority.

If the prisoner's claim was not properly presented in state court, he can still pursue the claim in federal court if he establishes "cause and prejudice" for his failure to present the claim in state court or that failure to consider the claim would result in a "fundamental miscarriage of justice" (actual innocence or ineligibility for the death penalty).

The decision of the United States District Court on the habeas corpus petition may be appealed by either party. The appeal from the United States District Court is taken to the United States Court of Appeals for the Ninth Circuit, and the parties may seek review of the decision of that court by filing a petition for writ of certiorari with the United States Supreme Court.

Click here to view the Death Penalty Procedure

Execution

The initial warrant for execution is issued by the Arizona Supreme Court to the Director of the Department of Corrections after the Court has affirmed the death sentence and either the first PCR proceeding is concluded or the period of time to file the PCR petition has expired. The warrant designates a twenty-four hour period for execution of the sentence between thirty-five and sixty days following the issuance of the warrant. If the initial warrant is stayed by any court, the Arizona Supreme Court is required to issue subsequent warrants upon the State's request after the stay is lifted. Stays of execution will not be issued upon the filing of subsequent PCR petitions, except upon separate application for a stay made to the Arizona Supreme Court. The separate application must set forth particular issues appropriate for subsequent post-conviction relief.

In 1992, a constitutional amendment was passed by the Arizona voters changing the method of execution from lethal gas to lethal injection. Prisoners sentenced before November 23, 1992, have the choice of either lethal gas or lethal injection.

Competency to be Executed

In Arizona, the prisoner is not subject to execution if found to be mentally incompetent or pregnant. A prisoner is not competent to be executed unless he understands (1) that he is being punished for murder, and (2) the punishment is death.

If the court finds that the prisoner is incompetent, he remains in the custody of the Department of Corrections until the Arizona Supreme Court reviews the trial court's finding. If the Supreme Court upholds the finding of the trial court, the prisoner is transferred to a licensed behavioral health or mental health facility operated by the Department of Corrections for competency restoration treatment. While the prisoner is being treated, the sentence is suspended.

The Department of Health Services is responsible for the restoration of competency treatment of the prisoner. During treatment, the chief medical officer of the State Hospital is required to file status reports with the Superior Court at sixty day intervals until competency is restored. When the prisoner's competency is restored, the individual who supervised the treatment must submit a report to the Superior Court, the Attorney General, and the prisoner's attorney, stating that they have determined the prisoner's competency restored. In addition to the report written by the treating individual, the chief medical officer certifies to the Arizona Supreme Court that the prisoner is competent to be executed. The Arizona Supreme Court will then order the issuance of the death warrant.

Clemency

The Arizona Board of Executive Clemency has authority to review all death sentences and determine whether there are grounds for reprieve, commutation or pardon. The Board of Executive Clemency is a five member panel appointed by the Governor and confirmed by the State Senate. The Board reviews all death sentences and determines whether to recommend reprieve, commutation or pardon, or to make no recommendation at all.

The Board of Executive Clemency conducts a hearing to determine whether to make a recommendation to the Governor. At the hearing the defendant and his attorney, the State's attorneys, and the victim are allowed to participate and provide statements regarding the prisoner and the crime.

If the Board decides to recommend reprieve, commutation or pardon, the Governor then has constitutional authority to grant the recommended relief to the prisoner. The Governor can only take such action upon a recommendation by the Board.

III. Data/Research Subcommittee

Purpose

At the inception of the Capital Case Commission, the Data/Research Subcommittee was established to work in consultation with the Center for Urban Inquiry, College of Public Programs at Arizona State University to compile empirical data about the death penalty process in Arizona. The Subcommittee designed a three stage process for compiling data. Data Set I includes all capital cases for individuals sentenced from 1974 through July 1, 2000. Data Set I profiles all defendants and victims and summarizes the processing of capital cases in Arizona, including time intervals between major decision points, analysis of statutes and rules governing the litigation of death penalty cases in Arizona, and in-depth study of all cases in which there have been conviction-related or sentence-related reversals, remands or modifications.

The Center for Urban Inquiry began by compiling the complete appellate history of each death penalty case in Arizona since *Furman v. Georgia* 408 U.S. 238 (1972). The Subcommittee was then charged with providing available information to the Capital Case Commission, responding to Commission requests for relevant information, maintaining a record of research projects suggested by Commission deliberations, assessing the feasibility of further research, and assisting in the preparation of Commission recommendations.

Dr. Peg Bortner, Director of the Center for Urban Inquiry at Arizona State University, chairs the Data/Research Subcommittee for the Commission and has designed the research methods for the study of Arizona's capital cases in Data Sets I and II. To date, the work on Data Sets I and II has been performed through services provided without charge by Dr. Bortner, Dr. Andy Hall, and their colleagues at the Center for Urban Inquiry. The Attorney General and the Commission are deeply grateful for these services and for the assistance the Center for Urban Inquiry continues to provide.
Data Set II is well underway and includes all first degree murder cases charged between January 1, 1995 and December 31, 1999 in Maricopa, Pima, Coconino, and Mohave counties. Data Set II will profile defendants and victims in these cases using data points from Data Set I and will review aggregate data from these cases including the number of first degree murder prosecutions, the number of convictions and the results. Finally, Data Set II will be used to identify differences between capital murder cases and a non-capital murder cases.

Data Set III will use a representative sample of cases defined by the Data/Research Subcommittee, and will utilize data from Data Sets I and II, when possible, to estimate the incremental additional costs, if any, of prosecuting, defending and appealing a capital murder case compared to a non-capital murder case. Data Set III is currently underway and is being performed by The Williams Institute of Tempe.

IV. Commission Deliberations and Recommendations

Capital Litigation Resources Legislation

On December 14, 2000, the Commission endorsed draft legislation creating a statewide capital public defender office to represent indigent capital defendants in post-conviction relief proceedings. The Direct Appeal/ PCR Subcommittee presented information to the Commission showing that 8 capital cases had been in a holding pattern at the PCR stage because no lawyers were available to represent the defendants. Some of those defendants had been waiting for over 18 months for a lawyer to be appointed to represent them at the PCR stage. Final appeals in federal court can not go forward until the PCR stage of appeals is complete in Arizona state courts. Exhibit 28 of the Data Set I Research Report shows time intervals for the PCR process.

On January 30, 2001, the Commission considered information provided by the defense bar, trial judges on the Commission, and prosecutors regarding the need for a statewide trial public defender office for capital cases. Commission members made clear that capital defense at the trial stage in rural Arizona needed assistance because of the difficulty recruiting public defenders in the rural counties and the issue of adequate compensation for lawyers coming from urban areas to do capital defense work in rural areas. At that meeting the Commission approved an amendment to the draft bill to include both a trial defender for rural Arizona and a PCR defender for all of Arizona. A drafting Subcommittee composed of Judge Michael Ryan, former Yavapai County Attorney Charles Hastings and Phoenix defense attorney John Stookey was appointed to redraft the bill. The Subcommittee met on January 31, 2001 to redraft the bill, and the amended bill was sent to the Legislature the week of February 5, 2001. The bill became Senate Bill 1486, passed the Senate (27 to 2) and the Judiciary Committee of the House (9 to 0), but was not heard in the House Appropriations Committee. The bill died when the legislative session ended on May 10, 2001.

The Commission, in a meeting on May 15, 2001, to consider this Interim Report and the issue of Capital Litigation Resources, issued this statement:

> The Commission unanimously agrees that additional resources must be made available for capital cases and it deeply regrets the Legislature did not resolve this need this year. The objective of the Capital Case Commission "is to review the capital punishment process in Arizona in its entirety to ensure that it works in a fair, timely and orderly manner." A necessary condition of a "fair" capital system is competent defense representation. A necessary condition of a "timely and orderly" capital system is adequate resources for defense counsel and for prosecutors in cases where the death penalty is sought. The needs are particularly acute for defense counsel in all post-conviction relief proceedings, and for prosecutors and defense counsel at the trial level in the rural counties. The Commission therefore urges the Legislature to consider and pass legislation appropriating monies for capital litigation resources at the earliest possible opportunity.

Notice of Intent to Seek the Death Penalty Under Ariz. R. Crim. P. 15.1(g)(1)

On January 30, 2001, the Commission heard reports from both the Pre-Trial Issues Subcommittee and the Trial Issues Subcommittee recommending amendment of Ariz. R. Crim. P. 15.1(g)(1) to extend the time for prosecutors to file notices of intent to seek the death penalty in Arizona. The Commission agreed and recommends that Ariz. R. Crim. P. 15.1 be amended to extend the time for filing of death penalty notices to 60 days after arraignment with an additional extension of time available by stipulation from the parties and approval of the Superior Court Judge. This rule change is intended to allow the prosecutor to consider mitigating evidence presented by the defense before filing the notice and to allow prosecutor more time to deliberate over the decision of whether to seek the death penalty.

Jury Deliberation in Capital Cases

On January 30, 2001, the Commission considered the Trial Issues Subcommittee's recommendation to oppose a pending Petition to Amend Ariz. R. Crim. P. 19.4 that would allow jurors in criminal cases to deliberate before receiving final instructions by the trial judge at the close of the case. The Trial Issues Subcommittee reasoned that the sequence alone may give the prosecution an unfair advantage, and further, the United States Supreme Court had not yet approved such early deliberations in criminal cases. The Commission concurred with the recommendation of the Trial Issues Subcommittee and instructed the Attorney General's Office to submit comments opposing the Petition to Amend Ariz. R. Crim. P. 19.4. Comments were filed and appear in Appendix D of this Interim Report.

Mental Retardation

On January 30, 2001, the Commission debated whether Arizona needed a statute prohibiting execution of defendants with mental retardation. At that meeting, the Pre-Trial Issues Subcommittee recommended, with some dissent, a law prohibiting the application of the death penalty to persons with mental retardation. The Subcommittee also recommended that the Commission consider and debate adopting specific standards for determining who has mental retardation.

At the February 28, 2001 meeting, the Commission considered Senate Bill 1551 which sought to prohibit the imposition of the death penalty on a defendant that has mental retardation. The Commission debated whether current law, e.g., competence to stand trial, the insanity defense, a rigorous mitigation hearing and the competence to be executed statute, provided adequate safeguards to ensure that a person with mental retardation person would not be executed in Arizona. The Subcommittee also discussed a proposed striker that would amend Senate Bill 1551 to ensure that both prosecution and defense interests are balanced. At the February 28th meeting, the Commission reached consensus that as a matter of public policy Arizona should not execute a defendant who has mental retardation. The Commission directed the Subcommittee to consider and make recommendation on the following issue:

Should the Arizona Legislature enact a statute to ensure a mentally retarded defendant is not executed or are current safeguards in the law sufficient?

On March 28, 2001, the Commission received the Pre-Trial Issues Subcommittee report recommending that Arizona enact a statute to ensure a mentally retarded defendant is not eligible for the death penalty. The Commission accepted the Subcommittee's recommendation and noted that the Subcommittee's recommendation was a "grudging" one approved by a 6 to 4 vote. Some members believe that there are adequate safeguards and procedures in place in Arizona law to ensure that a mentally retarded defendant would not be executed.

A strike-everything amendment which attempted to balance the interests of prosecutors, advocates for persons with mental retardation, and defense attorneys passed the House after amendment and was signed into law by Governor Jane Dee Hull on April 26, 2001. The version of the bill signed into law by Governor Jane Dee Hull on April 26, 2001 is attached as Appendix D, paragraph 4.

Aggravating Factors in Arizona Law and Defining Eligibility for Capital Punishment

On March 28, 2001, the Commission heard a report from the Pre-Trial Issues Subcommittee regarding aggravating factors. The Subcommittee reported that the current statute provides for the possibility of capital punishment only in those cases in which "the murdered person was an on duty peace officer who was killed in the course of performing his official duties. . . ." A.R.S. § 13-703(F)(10). If a police officer were murdered because of his status as a police officer and the officer was in an off-duty capacity, current law would not authorize capital punishment. By a vote of 7 to 1, the Subcommittee recommended extending the aggravating factor to include peace officers killed while not performing official duties as long as the murder was motivated by the peace officer's status. The Commission approved the recommendation. See Appendix D for proposed language.

Selection of Capital Cases by Prosecutors and Defense Input

On March 28, 2001, the Commission received and approved the Pre-Trial Issues Subcommittee's unanimous recommendation that all prosecutors involved in capital case prosecution adopt a written policy for identifying cases in which to seek the death penalty, and such policies shall include soliciting or accepting defense input before deciding to seek the death penalty.

Residual Doubt in Sentencing

On March 28, 2001, the Commission received and approved the Pre-Trial Issues Subcommittee's report stating that residual doubt should not be added to Arizona's list of statutory mitigators found in A.R.S. § 13-703(G), largely because the strength of the government's proof of guilt may already be considered by the courts in Arizona during the sentencing phase of a capital case.

Competency to be Executed

The Commission first heard a report on the issue of competency to be executed on January 30, 2001, from Mr. James Bush on behalf of the Pre-Trial Issues Subcommittee. The Commission considered Mr. Bush's written recommendations and heard a three-part recommendation from the Pre-Trial Issues Subcommittee. First, the Pre-Trial Issues Subcommittee recommended that the Commission consider and debate a proposal that defendants found mentally incompetent after the issuance of a death warrant have their sentences converted to life imprisonment. The Subcommittee reported that this factual scenario would arise in the context of a judicial competency hearing in which the defendant is found incompetent and unlikely to regain competency except through involuntary medical treatment. Second, the Subcommittee recommended that the Commission consider and debate the current standards applicable to incompetence to determine if the standards as currently applied require modification. Third, the Subcommittee recommended that the Commission consider changes to the statute under which Arizona conducts restoration to competency, A.R.S. § § 13-4021 through 4024.

On February 28, 2001, the Commission again discussed the issue of competency to be executed. The Commission asked the Pre-Trial Issues Subcommittee to reconsider the issue and make a recommendation.

On March 28, 2001, the Commission heard the report from the Pre-Trial Issues Subcommittee which reflected substantial debate at two meetings on March 13 and March 20, 2001. The Subcommittee reported that it had debated the Maryland statute which narrowed the definition of incompetence to be executed by eliminating from that definition any defendants who were on medication before sentencing. The Subcommittee also considered whether Arizona doctors should be prohibited from treating any defendant facing capital punishment so that Arizona policy would reflect that no restoration to competency may take place. The Subcommittee voted 6 to 3 with one abstention to present the following recommendation to the Commission.

> The Pre-Trial Issues Subcommittee recommends to the Commission that Arizona change its legislation to require the commutation of a death sentence to the maximum sentence lawfully imposeable when the defendant is found incompetent after the issuance of a death warrant.

After deliberation, the Commission voted 12 to 8 with one abstention to accept the subcommittee's recommendation.

Minimum Age For Capital Punishment.

On March 28, 2001, the Pre-Trial Issues Subcommittee reported to the Commission that it was continuing to consider this important issue, and on May 15, 2001, the Subcommittee submitted the issue to the Commission for debate. The Subcommittee did not recommend a minimum age for capital punishment eligibility. After considerable debate, the Commission heard a motion to recommend that the death penalty in Arizona not apply to defendants who were under the age of 18 at the time of the crime. The Commission approved the motion by a vote of 15 to 8.

Competence of Counsel

The Commission deliberated extensively on the competence of counsel in capital cases. The Data/Research Subcommittee identified the number of cases that were overturned based on ineffective assistance of counsel from 1974 through 2000. The Center for Urban Inquiry reported in Exhibit 24 of the Data Set I Research Report that 19 defendants received a reversal, remand, or modification in their case based on ineffective assistance of counsel. Of the 19, 13 were granted resentencings and 6 defendants were granted new trials. In those 19 cases, two defense attorneys were court appointed, one was a public defender, and one was privately retained. For a review of the issues cited as the basis for reversals, remands and modifications for all 230 cases in Data Set I, see Exhibit 14 of the Data Set I Research Report and Section III of this Interim Report.

In discussing this issue, Commission members noted that early support for a peer review program for capital defense attorneys had lessened because of the subjectivity of peer review. Further, the members urged Superior Court judges to verify early in a capital case that counsel are competent under the standards in Ariz. R. Crim. P. 6.8 and that judges should hold a hearing if necessary to advise defendants regarding competency of counsel much like hearings on conflict of interest are held under Arizona law. The Commission then turned to whether a finding of ineffective assistance of counsel should result in the mandatory reporting of that attorney to the State Bar, the mandatory removal of that attorney from the list of eligible attorneys to be appointed under Ariz. R. Crim. P. 6.8, or reporting to the county's appointing authority for indigent defense.

On March 28, 2001, the Trial Issues Subcommittee recommended to the Commission that there should be no mandatory reporting of defense attorneys when there is a finding by a court of ineffective assistance of counsel. Because those cases are taken on a case-by-case basis and because there is such a variety of holdings from trial and appellate courts in this matter, the Subcommittee believed that the criminal justice system in the State of Arizona may rely on the duty incumbent on lawyers and judges to report ethical violations under Ethical Rule 8.3 of the Rules of Professional Responsibility. The Subcommittee stressed to the Commission that the reporting under Ethical Rule 8.3 is done on a case-by-case basis, and that a particular finding by a trial or appellate court may well be inadequate to support a report of an ethical violation to the State Bar. The Commission approved this recommendation.

The Trial Issues Subcommittee further recommends that Ethical Rule 1.1 be amended to include a provision regarding the competence of lawyers representing capital defendants. The Subcommittee recommended, and the Commission approved on March 28, 2001, and May 15, 2001, that Ethical Rule 1.1 be amended to read as follows:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A LAWYER WHO REPRESENTS A CAPITAL DEFENDANT SHALL COMPLY WITH THE STANDARDS SET FORTH IN Ariz. R. Crim. P. 6.8 REGARDING STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES.

The Subcommittee also recommended and the Commission approved on March 28, 2001, and May 15, 2001, that the Comment to Ethical Rule 1.1 be amended to include this best practice advice:

> BECAUSE THE AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES RECOMMEND TWO LAWYERS BE ASSIGNED TO EVERY CAPITAL CASE, LAWYERS SHALL ENSURE THAT TWO LAWYERS REPRESENT EVERY CAPITAL DEFENDANT WHENEVER FEASIBLE IN TRIAL PROCEEDINGS.

Aggravation/Mitigation and Sentencing Hearings, and Victim Impact Evidence In Capital Cases

The Commission deliberated on the capital sentencing process and the need to ensure that victim impact evidence is presented to the court along with the defendant's allocution at a time when the court may thoughtfully consider such evidence prior to sentencing. On January 18, 2001, the Trial Issues Subcommittee recommended to the Commission that trial judges hear victim impact evidence during the aggravation and mitigation hearing before sentencing the defendant using the special verdict form. In addition, on March 28, and May 15, 2001, the Trial Issues Subcommittee recommended an amendment to Ariz. R. Crim. P. 26.3, the Comment to that Rule, and Administrative Order 94-16, to ensure that capital case sentencing is conducted in a proper sequence. The Subcommittee's proposed rule, comment, and order appear in Appendix B of this Interim Report.

On May 15, 2001, the Commission edited the proposed amendments to Rule 26.3 to allow the victim to "be heard" at the aggravation and mitigation hearing, to allow the defendant the right of allocution and to require the court to set a sentencing date no earlier than seven (7) days after the aggravation/mitigation hearing in order to properly reflect on the events of the hearing.

After the May 15, 2001 meeting, the Attorney General's Office rewrote the Comment to Rule 26.3 and sent it to every member of the Commission. No objections to the Comment were lodged. The Comment is intended to ensure an orderly pre-sentencing hearing, and the careful adherence to A.R.S. § 13-703 and the holding in *Payne v. Tennessee*, 501 U.S. 808 (1991), so that victims are allowed to be heard regarding the murdered person and the impact of the murder on the victim and other family members. Victims are instructed not to make sentencing recommendations as to capital counts. In the Comment, trial judges are reminded not to infer from a victim's silence either acquiescence in, or opposition to, a capital sentence. Victims are reminded that they may comment and make sentencing recommendations on all non-capital counts. The Commission's proposed Rule 26.3 and Comment are reprinted in Appendix D, paragraph 9.

Pursuant to the Commission's decision on May 15, 2001, the portions of the Supreme Court's Administrative Order 94-16 providing guidance on the conduct of capital sentencing will be included in Rule 26.3 and the Comment in the Attorney General's Petition to amend the Rules of Criminal Procedure.

The Use of Mitigation Specialists and Standards for Mitigation Specialists

On March 28, 2001, the Commission approved the Trial Issues Subcommittee's recommendation to amend Ariz. R. Crim. P. 15 to provide for the appointment of investigators and expert witnesses for indigent defendants. The Commission envisions that this rule will be used by capital defendants to obtain mitigation specialists at county expense in all capital cases at the beginning of the case. The text of the rule, as approved by the Commission, reads as follows:

Ariz. R. Crim. P. 15.9 Appointment of Investigators and Expert Witness for Indigent Defendants

a. An indigent defendant may apply for the assistance of an investigator, expert witness, or mitigation specialist to be paid by the county if the defendant can show that such assistance is reasonably necessary to adequately present a defense at trial or sentencing.

b. An application for the appointment of investigators or expert witnesses pursuant to this Rule shall not be made ex parte.

c. As used in the Rule, a "mitigation specialist" is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigating evidence.

Audio or Video Recording of Interviews

On March 28, 2001, the Trial Issues Subcommittee recommended and the Commission approved the recommendation that the Attorney General develop a protocol for all law enforcement agencies in Arizona for the recording by law enforcement of all advice of rights, waiver of rights, and questioning of suspects in criminal cases when feasible to do so.

Review of Capital Cases in Which Convictions Were Reversed, Or Sentences Were Remanded or Modified By the Appellate Court

In December 2000 and January 2001, the Commission agreed on a strategy for the review of those cases in which substantive errors were found by reviewing appellate courts in Arizona. The cases of conviction and sentence related reversals, remands and modifications are set forth in Exhibit 22 of the Data Set I Research Report.

Of the 141 decisions resulting in a reversal, remand or modification, the Trial Issues Subcommittee decided to review the 7 cases in which not guilty verdicts were returned upon retrial and to review the 71 cases in which the defendant was sentenced to life imprisonment or a term of years after retrial or resentencing. The Commission established a uniform set of guidelines to assist in examining these cases. Commission members were asked to consider issues such as why the conviction or sentence was reversed; whether the error is likely to reoccur; whether safeguards were in place at the time of the original trial or have since been adopted; and whether Commission members recommend changes based on the cases reviewed.

The Trial Issues Subcommittee has invited Commission members to join them this summer for an in-depth study of the 78 cases. The goal of the study is to determine whether additional recommendations for reform are needed. The issues which formed the basis for reversals, remand or modification for these cases are depicted in Exhibits 14 through 19 of the Data Set I Research Report.

Prolonged Time Intervals in Direct Appeal Proceedings

In its February and March, 2001 meetings, the Commission considered the prolonged time intervals in the direct appeal process for capital cases. These time intervals are depicted in Exhibits 25, 27 and 30 of the Data Set I Research Report. The Commission heard a report from the Direct Appeal/PCR Subcommittee regarding delays in the system due to missing court documents, pleadings and exhibits, and the difficulties in obtaining transcripts in trial proceedings. The Subcommittee met with elected court clerks and with court reporters from around Arizona.

On March 28, the Direct Appeal/PCR Subcommittee made three recommendations which were approved by the Commission. First, the Commission recommends amending Ariz. R. Crim. P. 31.9 so that the clerk of the court in capital cases will be required to notify all court reporters, within ten days of the filing of the notice of appeal, to compile all transcripts for submission to the Clerk of the Supreme Court. This rule change is designed to give the court reporters more timely notice and to expedite preparation of transcripts. Secondly, the Commission recommends as a best practice that trial judges order the transcription of all trial proceedings in every first degree murder case at the time a guilty verdict is returned. This will cause reporters and clerks to begin the transcription process and the process of gathering exhibits, pleadings and minute entries well before the sentencing date. This practice will expedite transmission of records in a capital case, and will hopefully preserve records in this cases in a more disciplined fashion.

Thirdly, the Commission recommends as a best practice that Superior Court clerks enter a code on all criminal calendars that clearly identifies all first degree murder cases for use by reporters and court clerks. No matter what ultimate code the local clerk selects, the calendar will communicate to the court reporter and to the court room clerks that the matter is potentially a capital case and that records should be assembled early and safeguarded with the utmost

care. Court reporters will then know that transcripts must be readily available immediately after sentencing because the capital case must be sent to the Supreme Court within 45 days after the filing of the notice of appeal. The courtroom clerks will be put on notice that because this is a capital case, the attorneys will later request every piece of paper, pleading and minute entry in the case to ensure that the law was followed in the litigation of the case. The Commission concluded that these reforms will go a long way in removing some of the prolonged time intervals in capital case appellate process.

The Commission's proposed Rule 31.9 is reprinted in Appendix D, paragraph 11.

The Prolonged Time Intervals in Post-Conviction Relief Proceedings

The Commission debated the issues of prolonged intervals in PCR proceedings (depicted in Exhibits 25, 28 and 31 of the Data Set I Research Report), and adopted two recommendations in this regard. The Commission recommends that a repository be created in each county for all trial and appellate defense files so that PCR counsel can readily locate files from one location. The repository must be controlled by the defense team, and strict confidentiality must be maintained. Secondly, the Commission strongly recommended that Senate Bill 1486 be enacted so that PCR counsel could be appointed as soon as possible to represent capital defendants. Today, the Arizona Supreme Court cannot appoint PCR counsel for many defendants because no qualified counsel are available. The Commission recognized that 6 defendants were awaiting PCR counsel and that many of those defendants had been waiting for over 22 months. The Commission concluded that this is one of the principal causes of delay in processing capital cases in Arizona.

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

On March 28, 2001, the Commission considered reforms to Ariz. R. Crim. P. 31 and 32 to eliminate some of the prolonged time intervals in these appellate proceedings. The Commission has noted that the Supreme Court's latest changes to Ariz. R. Crim. P. 32 included a Comment in the rule-making specifically stating that

> "The 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."

The Commission also considered victim's right to a "prompt and final conclusion of the case after conviction and sentence" under the Arizona Constitution in Article 2, Section 2.1(10).

The Commission tried to balance the victim's right with the defendant's right to a fair appellate process, including adequate preparation time. The Commission did not reach consensus on this matter and asked the Direct Appeal/PCR Subcommittee to reconvene on the issue of the victim's right to a prompt and final conclusion of criminal cases and to debate any other rule changes in Ariz. R. Crim. P. 31 and 32 which specifically relate to the death penalty and which could reduce time intervals in the appellate process.

On May 3 and 14, 2001, the Subcommittee deliberated on the additional issue of whether a victim should have an opportunity to be heard in all appellate proceedings where there is a request for an extension of time. On May 15, 2001, the Commission deliberated on two proposed rules to be added in Rule 31.27 for Direct Appeals and Rule 32.10 for Post-Conviction Relief proceedings.

First, the Commission considered Mr. Steve Twist's substitute motion for the passage of a rule creating a right to be heard in appellate motions for lengthy extensions. The Commission defeated the following proposed rule by a vote of 11 to 8.

> *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.*

Secondly, the Commission considered the Subcommittee's recommended rule change on appellate extensions and unanimously recommended the following language for passage by the Supreme Court:

> *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.

Commission Comments

Copies of the draft of this Interim Report were sent to Commission members for comment. Paul W. Ahler, Chief Deputy to the Honorable Richard M. Romley, Maricopa County Attorney, filed these comments on the issue of minimum age as a bar to the death penalty and restoration to competency:

The Maricopa County Attorney's representative on the Capital Case Commission voted against the recommendation to prohibit the use of the death penalty on those

Richard M. Romley Comment (continued)

defendants that commit their crimes when they are under the age of 18; and the recommendation that if a capital inmate is deemed incompetent to be executed that the death sentence would be vacated for a life sentence rather than attempting to restore the inmate to competency. This is an explanation of the position of the Maricopa County Attorneys Office and why the office believes that the recommendations of the Commission on these two points are not good public policy.

THE AGE OF 18 AS AN ABSOLUTE BAR TO THE DEATH PENALTY

A.R.S. § 13-703(G)(5) provides that the trial court shall consider whether the defendant's age at the time he committed the offense is a mitigating factor. Arizona's courts have continuously recognized that the young age of a defendant convicted of first degree murder is "a substantial and relevant factor" to be given "great weight," although they have also acknowledged that age alone will not act to require life imprisonment in every case of first degree murder by a minor. State v. Valencia, 132 Ariz. 248, 250 (1982). The United States Supreme Court has also found a minor's age to be "a relevant mitigating factor of great weight." Eddings v. Oklahoma, 455 U.S. 104, 117, 102 S.Ct. 869, 877 (1982). The United States Supreme Court, consistent with the Arizona statute, found that while the imposition of the death penalty on those that committed their crimes while 15 or younger violated the Eighth Amendment, that imposition of the death penalty on defendants for crimes committed at age 16 or 17 did not violate the prohibition against cruel and unusual punishment. Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969 (1989); Cf. Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687 (1988) (eighth amendment prohibits imposition of death penalty on defendant who committed first degree murder at age 15).

So while the age of a defendant may be a mitigating circumstance, in assessing age as a mitigator, courts also consider intelligence, State v. Laird, 186 Ariz. at 209; level of maturity, id.; judgment, Jackson, 186 Ariz. at 31; past experience, id. at 30; criminal history, Murray, 184 Ariz. at 43; and involvement in the crime, Jackson, 186 Ariz. at 30. In short, Arizona law recognizes the obvious--not all 16 and 17 year olds are equal in maturity, judgment, and the like. The application of the statute has worked very well. There have only been a handful of defendants who were under 18 and who actually had the death penalty imposed by the trial court. Even fewer had their death sentences affirmed by the Arizona Supreme Court. In looking at each one of the cases where the death sentence was affirmed, not one case stands out as an aberration. In fact, in the debate before the Commission not one example was used to identify a problem with the present system.

The primary evidence submitted on this issue was a claim that MRI studies showed lack of brain development in people under the age of 18. This use of MRI technology

Richard M. Romley Comment (continued)

to explain behavior is similar in character to PET scan images in criminal cases which have been discredited as "junk science." PET scan images have been banned by the California courts for not being generally accepted in the medical community. In short, the Commission wants to solve a problem that does not exist; to draw a bright line that would exclude individuals who commit heinous crimes from receiving what society believes is the appropriate punishment; all in the name of a study where the author herself recognizes that the study cannot prove the explanation the Commission wishes to draw. The Maricopa County Attorneys Office disagrees with this recommendation and contends that the current law in this area is better public policy.

RESTORATION TO COMPETENCY V. REDUCING A DEATH SENTENCE TO LIFE

The Commission voted to recommend that the law in Arizona be changed to have a death sentence vacated whenever a defendant is determined to be incompetent to be executed. The present law, A.R.S. § 13-4023, requires the state mental hospital to treat and restore inmates who are determined to be incompetent to be executed. Under the present law, there is no real incentive to attempt to fake incompetency. If an inmate succeeds in delaying a scheduled execution because he finds a doctor who will certify his incompetency, such a reprieve will be short lived because he will be quickly "restored" by the state hospital. In the history of Arizona's law, and it has been in existence since territorial days, only a few

inmates have been found to be incompetent. Clearly, the incentive to use the law is lacking for the nefarious, but available to those who truly need it.

If the Commission's recommendation comes to fruition, then we can expect a slew of petitions in every capital case near the end of the already long appellate process. It will be the inmates' last shot at trying anything to get off of death row.

And what problem with the current law is the Commission trying to solve? Proponents of this position claim that it is unethical for doctors to treat inmates to be executed. The law is clear that the personal ethical considerations of a state employee do not interfere with the state law he/she is obligated to carry out. If the doctors at the state hospital believe that moral and ethical considerations of restoring someone to competency are too onerous, perhaps they should get a new job and let others take their place. The simple fact that the doctors at the state hospital do not want to treat these inmates should not establish policy for the state. The Maricopa County Attorney Office finds it inconsistent with sound public policy that the Commission is attempting to bow to the views of these doctors, state employees nonetheless, and create a system that will cost the state thousands of dollars as each inmate avails himself of the possibility of reprieve.

Richard M. Romley Comment (continued)

In addition, proponents claim that it is unconstitutional to force treatment on an inmate who does not want it. The federal constitution does appear to prohibit the forced treatment of those who are not a danger to themselves or others. However, courts that have looked at the issue have found that inmates that are so incompetent as to not be competent for execution are, in fact, a danger to themselves, if not staff. If, in that rare situation where an inmate deteriorates to the point where he is not competent, and competency can never be restored, current law would allow a petition to the Board of Executive Clemency for commutation of the death sentence. Again, there is no sound public policy for the recommended change and it would encourage even more delay in the system.

V. Attorney General's Closing Remarks and Future Considerations

This Interim Report of the Capital Case Commission represents twelve months of study of the capital litigation system in Arizona and the 230 capital cases which are included in Data Set I. The Center for Urban Inquiry, College of Public Programs at Arizona State University continues to compile empirical data about defendants and victims, as well as the process itself.

The Commission made several recommendations for reforms in capital litigation from the selection of cases, to trial counsel competence, to the appellate process. These reforms are designed to improve the quality of justice administered in Arizona.

Of course, further study by the Commission is well under way. The Trial Issues Subcommittee will study 78 of the 230 cases from Data Set I in which a reversal, remand or modification was ordered by a reviewing court and a sentence other than death was rendered upon retrial or resentencing. The Subcommittee will study the cases in order to determine whether additional improvements to the system are needed. The Pre-Trial Issues Subcommittee will study two of the most frequently used aggravating factors (murder committed in an especially heinous, cruel or depraved manner, and murder committed for pecuniary gain) after Data Set II is completed. Data Set II will study all first degree murder cases in four counties from 1995 to 1999, and will attempt to discern differences between capital murder cases and non-capital murder cases. The Data/Research Subcommittee will advise the Center for Urban Inquiry throughout the summer on this important research.

Data Set III is proceeding as well and will focus on the incremental additional costs, if any, of prosecuting, defending and appealing a capital murder case compared to a non-capital murder case. Additional considerations for the Commission may include the need for proportionality review of prosecutors' decisions to seek the death penalty, and the review of perceived disparity among the counties in which the death penalty is sought.

Finally, the Commission will reconvene in the Fall of 2001 to consider Data Sets II and III and the work of the Subcommittees done throughout the Summer.

VIII. Appendices

A. Pre-Trial Issues Subcommittee

1. Purpose

The Pre-Trial Issues Subcommittee worked on issues such as Arizona's statutory scheme for determining death eligible cases, the actual process Arizona prosecutors use to determine whether to seek the death penalty, and the pre-trial timetable Arizona uses. The Subcommittee met five times and debated the issues thoroughly. In the end, the Subcommittee decided to widen its scope to consider the issues of competence to be executed and the adequacy of pre-trial notice to the defense of which aggravating factors the government will rely on during sentencing.

2. Issues for Consideration

The Subcommittee identified these issues for exploration:

1. How does Arizona's statutory scheme for determining death eligibility in first-degree murder cases compare with that of other states?

2. How do prosecutors in Arizona identify cases in which to seek the death penalty? Is the process in Arizona different than other states?

3. Do Arizona prosecutors ask for defense input before a case is identified as one where the death penalty will be sought? What do other states do?

4. How does Arizona compare nationally regarding the eligibility of minors for the death penalty?

5. How do other states handle the eligibility of the mentally retarded to be executed?

6. Do other states have a mitigator of "residual doubt"?

7. Have Arizona's capital procedures produced a race neutral implementation of the death penalty? If not, what additional procedures should be adopted? See the Trial Issues Subcommittee discussion of this issue in Section 3(g) of Appendix B and Exhibits 35 and 36 of the Data Set I Research Report.

8. Are the existing rules of filing the notification of intent to seek the death penalty sufficient? Should the timetables be altered?

The Subcommittee decided to add several issues for consideration:

1. How are defense counsel selected for indigent defendants?

2. Should the prosecutor be required to provide notice of potential aggravating factors before trial, rather than after the verdict as is now required by Ariz. R. Crim. P. 15.2(g)?

3. As a sub-issue to issue number 2: What is the process by which prosecutors, county by county, determine to seek the death penalty? Are there differences?

4. As a sub-issue to issue number 5: How do other states handle the eligibility of the mentally incompetent to be executed?

3. Discussion and Subcommittee Recommendations

a) Mental Retardation

On December 19, 2000 and again on January 19, 2001, the Subcommittee debated this issue extensively and considered the recommendations of Mr. Bush that mentally retarded persons should not be subject to execution in Arizona. On January 19, 2001, the Subcommittee voted 6 to 2 to recommend the Commission as a whole consider these issues.

On February 28, 2001, the Commission debated the issue and reached a consensus that, as a matter of public policy, Arizona should not execute a defendant who is mentally retarded. The Commission referred a final issue to the Subcommittee for its recommendation:

> Should the Arizona Legislature enact a statute to ensure a mentally retarded defendant is not executed or are current safeguards in law enough?

On March 13, 2001, the Pre-Trial Issues Subcommittee deliberated the issue that the Commission had identified. The Subcommittee concluded, by a vote of 6 to 4, that the Arizona legislature should enact a statute to ensure a mentally retarded defendant is not executed.

b) Minimum Age for Capital Punishment

The Subcommittee debated the issue of a minimum age for imposing the death penalty at the December and January meetings, and elected not to make a recommendation to the commission until a final report was prepared.

The Subcommittee debated minimum age on March 20, 2001, at the end of its meeting and received comments from Dr. Mark Welleck, a psychiatrist in Phoenix and a member of the American Society for Adolescent Psychiatry. The Subcommittee voted 7 to 1 to recommend to the Commission that the issue of minimum age should be studied further before any recommendation is made to change Arizona's current law.

On May 8, 2001, the Subcommittee recommended that the issue of minimum age be debated by the Commission. The Subcommittee provided relevant materials to the Commission but did not recommend a minimum age.

c) Aggravating Factors in Arizona Law and Defining Eligibility for Capital Punishment

At its December and February meetings, the Subcommittee debated the issue of adequacy of aggravating factors in Arizona law. The consensus was that no additional factors are needed.

On March 20, 2001, the Subcommittee again debated the issue of aggravating factors and the Subcommittee specifically debated the issue of whether the aggravating factor for law enforcement victims is sufficient. By a vote of 7 to 1, the Subcommittee recommended extending the aggravating factor in A.R.S. § 13-703(F)(10) to include peace officers killed while not performing official duties, but whose murder was motivated by the peace officer's status.

Dr. Bortner and her colleagues at the Center for Urban Inquiry reviewed all 230 cases in Data Set I in order to determine which aggravating factors have been found by the sentencing judges in Arizona from 1974 to 2000. The results of this research are displayed in Exhibits 7, 8, 9 and 10 of the Data Set I Research Report.

d) Selection of Capital Cases by Prosecutors and Defense Input

On January 19, 2001 the Subcommittee discussed the selection process by which prosecutors decide whether to seek the death penalty. The Subcommittee received a written and oral briefing from the Maricopa County Attorneys Office on the processes used in Arizona and around the country. The debate centered upon whether the prosecutor should be compelled by rule to seek or accept input from the defendant prior to deciding whether to seek the death penalty.

On March 13, 2001, the Subcommittee deliberated on what kind of policies Arizona prosecutors should have in place to select cases for seeking the death penalty and for receiving defense input. The Subcommittee unanimously recommended that all prosecutors involved in capital case prosecution adopt a written policy for identifying those cases in which to seek the death penalty and

that such policy will include soliciting or accepting defense input before deciding to seek the death penalty.

e) Residual Doubt in Sentencing

On February 22, 2001, the Subcommittee debated the issue of residual doubt and whether it should be considered by the judge in sentencing or made an explicit mitigating factor in Arizona law. As background, Arizona now has five statutory mitigating factors. Exhibit 10 of the Data Set I Research Report shows which mitigating factors have been found by trial court judges.

On March 20, 2001, the Subcommittee deliberated on residual doubt in sentencing, i.e., the issue of whether a judge may consider the strength of the government's case of the defendant's guilt during the sentencing phase of a capital case. The Subcommittee considered the Arizona Supreme Court's action in *State v. Verdugo*, 112 Ariz. 288, 541 P2d 388 (1975), in which the court reduced the death sentence to life in prison based on residual doubt. In about ten other cases the Arizona Supreme Court has discussed residual doubt, but declined to reduce the sentence. By a vote of 5 to 2 with one abstention, the Subcommittee defeated a motion to recommend to the Commission that residual doubt be added to the Arizona list of statutory mitigators found in A.R.S. § 13-703(G).

f) Competency to be Executed

The Subcommittee added competency to be executed to its issues list at its first meeting, and debated the issue often. The issue was debated on December 19, 2000, and again on January 19, 2001 when the Subcommittee considered the recommendation of Mr. Bush that mentally incompetent persons not be executed and that Arizona not require physicians to restore prisoners to competency for the purpose of execution.

On January 19, 2001, by a vote of 7-1, the Subcommittee recommended that the Commission consider a proposal to commute to life imprisonment the sentence of any death row inmate who is found incompetent to be executed, consider the current standards of incompetence, and consider changes in Arizona law requiring competence assessment of defendants.

On January 30 and February 28, the full Commission debated the issue of competency and asked the Pre-Trial Issues Subcommittee for a more specific recommendation.

The Subcommittee deliberated on competency at both the March 13 and March 20, 2001, meetings, and specifically debated the issue of the Maryland statute, the issue of commutation to a life sentence or something less than life under Arizona's pre-1992 law, the need for a board of mental health professionals versus one mental health professional making the diagnosis, and the Arizona law on giving consent for mental health treatment while the person is not competent. By a vote of 5 to 3 with one abstention, the Pre-Trial Issue Subcommittee passed the following recommendation:

The Pre-Trial Issues Subcommittee recommends to the Commission that Arizona require the commutation of a death sentence to the maximum sentence lawfully imposable if the defendant is found incompetent after the issuance of a death warrant.

To put mental health issues in context for the 230 cases in which the defendant was sentenced to death from 1974 to 2000, Appendices A and B from the Data Set I Research Report provide every mental health condition which was found by the Court to have been proved as statutory or non-statutory mitigation.

g) Notices under Ariz. R. Crim. P. 15.1 (g)

The Subcommittee discussed two kinds of notice under Ariz. R. Crim. P. 15. First, the Subcommittee considered whether the prosecution's mandatory notice on intent to seek the death penalty should be extended from the current 30 days after arraignment. On January 19, 2001, the Subcommittee voted unanimously to recommend that the Rule be modified to extend the time of the notice of seeking the death penalty from 30 days after arraignment to 60 days after arraignment with further extensions of time permitted by order of the court.

Second, the Subcommittee considered whether the prosecution should be required to provide notice of the aggravating factors it intends to prove before trial, rather than within 10 days of verdict as now required. The Subcommittee elected not to recommend any change.

B. Trial Issues Subcommittee

1. Purpose

The Trial Issues Subcommittee considered issues related to trials in capital cases. The Subcommittee considered qualifications for trial defense counsel, the need for state-wide trial and appellate public defender offices to represent indigent capital defendants, later notice by the prosecution of intent to seek the death penalty to give both the defense and prosecution time to submit and review evidence, and the procedure for conducting the aggravation/mitigation and sentencing hearings. At the request of defense attorneys, the Subcommittee also considered whether law enforcement officers should be required to electronically record statements made to them by suspects in capital cases.

2. Issues for Consideration

The Subcommittee identified these issues for study:

1. Are the qualifications for trial counsel, as specified in Ariz. R. Crim. P. 6.8 sufficient?

2. Are the disclosure requirements imposed on the State by Ariz. R. Crim. P. 15.1(g)(2) sufficient?

3. Are the disclosure requirements imposed on the defense by Ariz. R. Crim. P. 15.2(g)(1) sufficient?

4. Are there ways to improve the existing procedures for the aggravation/mitigation hearing – Ariz. R. Crim. P. 26.3(c)?

5. Does the existing system adequately provide for mitigation experts?

6. Are there possible way to improve the manner of funding the costs of lawyers and experts for both the prosecution and the defense?

7. Are statutory or rule changes desirable to better implement the rights of victims under Article II, Section 2.1, Arizona Constitution, and A.R.S. § 13-4401 et seq., in capital cases?

8. Are victims adequately heard at trial and sentencing?

9. Does it take too long to investigate and try a capital case? If so, what reforms would reduce the time necessary to process these cases?

The Subcommittee decided to add several issues to its consideration:

1. Should all statements taken in capital cases be recorded?

2. Should Ariz. R. Crim. P. 19.4 be amended to permit jury deliberation prior to the close of evidence?

3. Discussion and Recommendations

a) Competence of Counsel

The issue of trial defense counsel competence and the proposal for a statewide capital trial defender office was debated at every meeting of the Subcommittee. The qualifications for appointed and retained counsel were also debated at length. The need for qualified public defenders for capital cases in rural Arizona was well documented by Subcommittee members, and the problem of inadequate funding was restated as the obvious roadblock to the availability of counsel. Rural county members agreed that Ariz. R. Crim. P. 6.8 required two qualified counsel in every capital case, but made clear that recruiting such counsel from an urban area cost the rural counties a lot of money in fees, travel and expenses. Local defense counsel is preferred by the Subcommittee.

On November 14, 2000, the Subcommittee reached a consensus that there is a need for a state-wide capital trial defense office in Arizona to serve the rural counties especially. This recommendation was communicated to the Commission and the Direct Appeal and Post-conviction Relief Subcommittee.

In January 2001 the Subcommittee debated a peer review process to ensure competent trial counsel on the defense side. The Subcommittee concluded that, by and large, Ariz. R. Crim. P. 6.8 ensured competent trial defense attorneys in capital cases, but that the Subcommittee should explore a peer review program to ensure competence of retained and appointed counsel. After the February and March meetings, the Subcommittee concluded that peer review was not workable, and declined to endorse a peer review program for capital cases. The Subcommittee recommended that the trial judge should set a status conference early in the trial preparation stage in the case in order to assess whether the defense attorneys are qualified under Ariz. R. Crim. P. 6.8. This status conference should also be used to ensure schedules are being met to protect the victim's right to a speedy trial.

The Data and Research Subcommittee reported the following data regarding the defense attorneys who appeared in the 230 capital cases from 1974 through July 1, 2000. The attorneys included public defenders, court appointed private counsel, and retained counsel. The number of remands and reversals or modifications in these cases are also reported and these data appear in Exhibit 24 of the Data Set I Research Report.

In the March 22, 2001 meeting the Subcommittee again deliberated on the issue of competency of defense attorneys and in particular dealt with issues raised by the full Commission in its previous meeting. In particular, the Commission raised the following four questions for debate:

1. Should an attorney whose performance is found to have been inadequate or deficient in a capital case by any court be removed from the list of eligible counsel under Ariz. R. Crim. P. 6.2 and 6.8?

2. Should an attorney whose performance is found to have been inadequate or deficient not be appointed under Ariz. R. Crim. P. 6.2 or 6.8 until the attorney completes 12 hours of continuing legal education on capital litigation?

3. Should an attorney whose performance is found to have been inadequate or deficient be reported to the Arizona Supreme Court, the Presiding Judges of the Superior Court in each County, and the State Bar of Arizona?

4. Should attorneys who admit that they performed inadequately in a capital case be reported to the Arizona Supreme Court, the Presiding Judges of the Superior Court in each County, and the State Bar of Arizona?

The Subcommittee concluded that, as to questions 1 through 4, an attorney whose performance has been inadequate should not automatically be removed from the list of eligible counsel, or automatically required to undergo continuing legal education. Judges and lawyers in such a case should comply with their duties under Ethical Rule 8.3 which requires reporting of another lawyer's conduct to the State Bar when the reporting lawyer has actual knowledge of a violation of the Rules of Professional Conduct, and that violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The Subcommittee believes that the Bar and the criminal justice system may properly rely on the duty to report imposed by the ethical rules. The Subcommittee believes there is no duty to report inadequate or deficient performance in a capital case or any other criminal case to the county authority which appoints and employs counsel representing indigent defendants. The Subcommittee does not believe that there needs to be any recommendation to judges or attorneys that they report such conduct to the county's indigent defense authorities.

5. What role should the state public capital defender play in evaluating the performance of private and public defense counsel in capital cases?

As to question 5, the Subcommittee believed that the State Capital Public Defender should play no role in evaluating the performance of private and public defense counsel, and that the reporting requirements under Ethical Rule 8.3 are more than adequate to ensure that lawyers who do not render competent representation are reported to the Bar, disciplined where appropriate, undergo continuing legal education where appropriate, and that their future employment should be left in the hands of the appointing authorities in each of the counties.

The Subcommittee emphasized to the Commission that the reporting under Ethical Rule 8.3 should be on a case-by-case basis, and that a particular finding by a trial or appellate court that an attorney's performance may have been inadequate does not in and of itself require reporting under ER 8.3.

Nevertheless, the Subcommittee did fashion a recommendation for the full Commission which addresses competence of trial defense counsel in capital cases. The Subcommittee recommends that Ethical Rule 1.l, Competence, be amended to specifically require attorneys to meet the standards set forth in Ariz. R. Crim. P. 6.8. Because the standards in Ariz. R. Crim. P. 6.8 have gained universal acceptance by the courts and criminal bar as necessary to ensure adequate representation of capital defendants, these standards should apply to all counsel in capital cases and not just counsel appointed by the court under Ariz. R. Crim. P. 6.8 to conduct indigent defense. The Subcommittee recommends Ethical Rule 1.1 be amended to read:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A LAWYER WHO REPRESENTS A CAPITAL DEFENDANT SHALL COMPLY WITH THE STANDARDS SET FORTH IN ARIZ. R. CRIM. P. 6.8 REGARDING STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES.

The Subcommittee also recommended that the Comment to ER 1.1 be amended to include this best practice advice:

> BECAUSE THE AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES RECOMMENDS TWO LAWYERS BE ASSIGNED TO EVERY CAPITAL CASE, LAWYERS ARE ADVISED TO ENSURE THAT TWO LAWYERS REPRESENT EVERY CAPITAL DEFENDANT WHENEVER FEASIBLE [IN TRIAL PROCEEDINGS].

b) Notice of Intent to Seek the Death Penalty under Ariz. R. Crim. P. 15.1(g)

The Subcommittee considered extending the time for notice of intent to seek the death penalty and recommended on November 14, 2000 to the Commission that the time for filing the notice be extended to 90 days after arraignment with stipulations by the parties to extend the time further if approved by the trial court.

c) Aggravation/Mitigation and Sentencing Hearings in Capital Cases

At five meetings, the subcommittee debated extensively the proper role of victim impact evidence. On January 18, 2001, the Subcommittee recommended to the Commission that trial judges hear victim impact evidence during the aggravation and mitigation hearing well before sentencing the defendant using the special verdict form. To provide context for the victim impact evidence in capital cases, the victims in the 230 cases in which the death penalty was imposed from 1974 to

2000 have been profiled. The findings are reported in Exhibit 33 of the Data Set I Research Report.

After further meetings in February, March and May, the Subcommittee refined its recommendations and recommended that the Commission approve a proposed amendment to Ariz. R. Crim. P. 26.3. The rule will outline the sequence of the aggravation/mitigation and final sentencing hearings, and specify that the victim will be heard along with the defendant's allocution at the aggravation/mitigation hearing. The rule will state that the completion of the sentencing process will take place at the final sentencing hearing, and that hearing will occur no earlier than 7 days after the aggravation/mitigation hearing is held.

The proposed rule change recommended by the Subcommittee reads:

Ariz. R. Crim. P. 26.3. Date of Sentencing; Extension

(Proposed language appears in uppercase)

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c. Capital Case.

(1) Upon a determination of guilt in a capital case, the trial court shall set a date for the aggravation/mitigation hearing if the state, pursuant to Ariz. R. Crim. P. 15.1(g)(4), is not precluded from and is seeking the death penalty. The penalty hearing shall be held not less than 60 days nor more than 90 days after the determination of guilt unless good cause is shown. Upon a showing of good cause, the trial court may grant additional time for the hearing subject to the limitation of subparagraph (2) below.

(2) A pre-aggravation/mitigation conference shall be held after the return of a guilty verdict of first degree murder in a capital case no more than 10 days before the aggravation/mitigation hearing.

(3) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE VICTIM, AS DEFINED IN A.R.S. §13-703(H)(2), TO PRESENT TESTIMONY OR INFORMATION REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS. THE TRIAL COURT SHALL CONSIDER THE INFORMATION PRESENTED BY THE VICTIM IN ACCORDANCE WITH THE PROVISIONS OF A.R.S. §13-703(D).

Ariz. R. Crim. P. 26.3 (continued)

(4) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE DEFENDANT THE RIGHT OF ALLOCUTION.

(5) UPON COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL SET A DATE FOR THE RETURN OF THE SPECIAL VERDICT AND SENTENCING. THE RETURN OF THE SPECIAL VERDICT AND SENTENCING SHALL OCCUR NO EARLIER THAN 7 DAYS AFTER THE COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, TO ENSURE THAT THE TRIAL COURT HAS

ADEQUATE TIME PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT TO CONSIDER THE EVIDENCE, INFORMATION, AND ARGUMENTS PRESENTED AT THE AGGRAVATION/MITIGATION HEARING.

The Rule comment will set forth in detail a procedure which should be employed in a capital case sentencing to ensure that victims' rights are accorded and that the defendant's constitutional rights under *Payne v. Tennessee*, 501 U.S. 808 (1991), are fully accorded. Finally, on this topic, the subcommittee recommends that the Supreme Court's Administrative Order 94-16 be amended to provide to probation officers and pre-trial service officers appropriate guidance as to how to conduct interviews of victims in capital cases when the statements of victims are precisely delineated in A.R.S. § 13-703. The purpose of amending the Administrative Order 94-16 is to ensure that probation officers and pre-trial services officers do not raise unrealistic expectations for the victim's families in capital cases when the Eighth Amendment of the United States Constitution and the decisions of the United States Supreme Court limit some recommendations that the victim may make regarding the sentence in a capital case. Taken together, the Comment and Administrative Order 94-16 will ensure an orderly sentencing procedure in a complicated and emotionally difficult area of the law.

The proposed Comment will state:

Proposed Comment to 2001 Amendment to Rule 26.3 (c)
(This portion of the comment contains all new language)

THE 2001 AMENDMENT ADDED SUBSECTION (3), (4), AND (5) TO RULE 26.3(C) REGARDING CAPITAL CASES. RULE 26.3(C)(3) IS INTENDED TO CLARIFY THAT VICTIMS IN A CAPITAL CASE HAVE A RIGHT TO PRESENT TESTIMONY AND INFORMATION AT THE AGGRAVATION/MITIGATION HEARING REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIMS, AND TO HAVE THAT INFORMATION CONSIDERED BY THE COURT IN MAKING THE CAPITAL SENTENCING DECISION. RULE 26.3(C)(3) IS INTENDED TO BE CONSISTENT WITH THE 1999 AMENDMENT TO A.R.S. § 13-703, AND WITH *PAYNE V. TENNESSEE*, 501 U.S. 808, 111 S.CT. 2597 (1991), HOLDING THAT THE EIGHTH AMENDMENT DOES NOT PROHIBIT

Ariz. R. Crim. P. 26.3 (continued)

STATES FROM ALLOWING EVIDENCE AT THE SENTENCING PHASE ABOUT THE MURDER VICTIM AND THE IMPACT OF THE CRIME ON THE VICTIM'S FAMILY. *PAYNE* OVERRULED *BOOTH V. MARYLAND*, 482 U.S. 496, 505 (1987), IN WHICH THE COURT HELD THAT THE INTRODUCTION OF VICTIM IMPACT EVIDENCE DURING THE SENTENCING PHASE OF A CAPITAL CASE VIOLATED THE EIGHTH AMENDMENT. *PAYNE* DID NOT, HOWEVER, OVERRULE *BOOTH* TO THE EXTENT *BOOTH* PROHIBITED EVIDENCE REGARDING FAMILY MEMBERS' OPINIONS ABOUT THE DEFENDANT OR WHETHER A DEATH SENTENCE SHOULD BE IMPOSED.

UNDER RULE 26.3(C)(3), THE COURT MUST ALLOW THE VICTIM IN A CAPITAL CASE, AS DEFINED IN A.R.S. §13-703(H)(2), TO PRESENT INFORMATION AT THE

AGGRAVATION/MITIGATION HEARING REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS. THE COURT MUST CONSIDER THE INFORMATION PRESENTED BY THE VICTIM IN EVALUATING THE MITIGATING CIRCUMSTANCES, AS PROVIDED IN A.R.S. §13-703(D). BECAUSE OF EIGHTH AMENDMENT CONCERNS, HOWEVER, COURTS CANNOT CONSIDER VICTIM'S RECOMMENDATIONS [Committee's Minority Language would read: VICTIMS SHOULD NOT MAKE ANY RECOMMENDATION] WITH RESPECT TO THE CAPITAL SENTENCING DECISION. IF THE DEATH PENALTY IS NOT IMPOSED, VICTIMS MAY COMMENT ON, SPEAK TO , OR MAKE RECOMMENDATIONS REGARDING THE APPROPRIATE SENTENCING OPTION UNDER A.R.S. §13-703, NATURAL LIFE OR LIFE WITH THE POSSIBILITY OF PAROLE. LIKEWISE, VICTIMS MAY COMMENT ON, SPEAK TO , OR MAKE RECOMMENDATIONS REGARDING THE APPROPRIATE SENTENCE ON THE NON-CAPITAL COUNTS.

UNDER RULE 26.3(C)(4), THE DEFENDANT SHOULD BE AFFORDED THE RIGHT OF ALLOCUTION AT THE AGGRAVATION/MITIGATION HEARING TO ALLOW THE COURT AN OPPORTUNITY TO CONSIDER THE DEFENDANT'S STATEMENT PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT.

UNDER RULE 26.3(C)(5), THE COURT MAY NOT PROCEED TO SENTENCING IMMEDIATELY UPON CONCLUSION OF THE AGGRAVATION/MITIGATION HEARING. RULE 26.3(C)(5) WAS INTENDED TO ALLOW SUFFICIENT TIME PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT FOR THE COURT TO CONSIDER ALL THE INFORMATION PRESENTED AT THE AGGRAVATION/MITIGATION HEARING, INCLUDING ANY VICTIM IMPACT INFORMATION PROVIDED FOR IN SUBSECTION (C)(3) AND THE DEFENDANT'S STATEMENT PROVIDED FOR IN SUBSECTION (C)(4).

The Subcommittee also recommended that Administrative Order 94-16 be amended to conform to the proposed Rule 26.3 and the new Comment. Administrative Order 94-16 with proposed amendments appears at Appendix D, paragraph 9.

d) The Use of Mitigation Specialists and Standards for Mitigation Specialists

The Subcommittee discussed the use of mitigation specialists and mitigation evidence in general at each of its meetings. The Subcommittee reached a consensus early on that the development of mitigation evidence should begin as soon as the attorneys are appointed or retained for the capital case. The Subcommittee believed that the defense team cannot wait for a guilty verdict to begin this important work. On January 30, 2001, the Subcommittee recommended that the Commission issue best practice advice to the bar which encourages the defense to start gathering mitigation evidence immediately after appointment both to eliminate some of the delay in the system and to ensure the defense could use the evidence at sentencing and in discussions with the prosecutor about seeking the death penalty.

At its February and March, 2001 meetings, the Subcommittee discussed the need for appointment of mitigation specialists in capital cases, and the need for standards for such specialists. The Subcommittee encouraged the defense bar to use such an expert in every capital case, and encouraged the defense bar to report any trial court's denial of a motion to appoint a mitigation specialist in a capital case to the elected County Attorney responsible for the prosecution.

Finally, on March 22, 2001, the trial subcommittee deliberated on the appointment of mitigation specialists and their qualifications, and the Subcommittee decided to recommend that the full Commission support an amendment to Ariz. R. Crim. P. 15. The proposed rule provides that indigent defendants may apply for the assistance of investigators, expert witnesses, or mitigation specialists to be paid at county expense when reasonably necessary. The proposed rule change also defines mitigation specialist and the rule as proposed reads as follows:

Ariz. R. Crim. P. 15.9 Appointment of Investigators and Expert Witness for Indigent Defendants

a. An indigent defendant may apply for the assistance of an investigator, expert witness, or mitigation specialist to be paid at county expense if the defendant can show that such assistance is reasonably necessary to adequately present a defense at trial or sentencing.

b. An application for the appointment of investigator or expert witnesses pursuant to this Rule shall not be made ex parte.

c. As used in the Rule, a "mitigation specialist" is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigating evidence.

e) Audio or Video Recording of Interrogations

In October of 2000, the Arizona Attorneys for Criminal Justice identified 30 issues to the Subcommittee for discussion. One of the issues was the recording of all interrogations, statements or confessions by law enforcement officials. After extended debate, the Subcommittee recommended on February 22, 2001 to the Commission that all law enforcement agencies in Arizona be encouraged to record all statements by suspects when feasible. Finally, the Subcommittee noted in its March meeting that the Attorney General has already met with her law enforcement advisory Subcommittee to raise the issue. The Attorney General will work with her law enforcement advisory Subcommittee and develop a protocol which recommends recording by law enforcement in all criminal cases of all advice of rights, waiver of rights, and questioning of suspects when feasible to do so.

f) Jury Deliberation in Criminal Trials before Evidence is Closed

The Subcommittee discussed a pending Petition to Amend Ariz. R. Crim. P. 19.4 on jury deliberations. The Subcommittee noted that deliberations prior to instructions by the judge has not yet been approved by the United States Supreme Court and that the jury would discuss the prosecution evidence first because of the sequence of the criminal trial. The sequence alone may give the prosecution an unfair advantage. The Subcommittee quickly reached a consensus and on

January 18, 2001, recommended that the Commission oppose the Petition to Amend Ariz. R. Crim. P. 19.4. The Subcommittee opposes any rule which allows jury deliberation in criminal cases before all evidence is closed and final arguments are made.

g) Race as a factor in Selecting Death Penalty Cases

The Subcommittee requested data from the Data and Research Subcommittee on the issue of race as it related to the 230 cases in which the death penalty was imposed since 1974. The results are found in Exhibits 35 and 36 of the Data Set I Research Report. The Subcommittee issued no recommendations on this topic pending review of Data Set II which will allow a comparison of capital and non-capital cases.

h) Other Issues

Throughout its deliberations the Subcommittee addressed these issues:

1. Jury sentencing.

2. Recruiting public defenders in the rural counties.

3. Review of the 7 capital cases which resulted in acquittal on retrial. These cases are the only ones out of 230 cases from 1974 to 2000 in which the defendant was found not guilty on retrial.

4. Residual doubt as a mitigating circumstance.

5. Ongoing Review by Commission members of the 71 cases in which there were remands, reversals, or modifications resulting in life sentences or a term of years. Cases in which the defendant was resentenced to death after a retrial or resentencing are now being reviewed by the Commission.

6. Whether A.R.S. § 13-703 should be expanded to add mitigating circumstances to those that currently exist.

7. A judge selection panel which would approve death penalty notices filed by prosecutors.

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.

One 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.

D. Reforms Recommended by the Commission

1. Capital Litigation Resources, Senate Bill 1486.

On January 30, 2001 the Commission approved the following draft bill to provide adequate resources for Capital Litigation in Arizona:

Strike Everything Amendment to SB1486

P 1, Line 2, strike everything after the enacting clause and insert:

Sec. 1. Title 11, chapter 3, article 11, Arizona Revised Statutes, is amended by adding sections11-589.01, 11-589.02, and 11-589.03, to read:

11-589.01. <u>State capital trial public defender; office; appointment qualifications; duties</u>

A. BEGINNING ON JULY 1, 2001, THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER IS ESTABLISHED. THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER IS A SEPARATE AGENCY WITHIN THE EXECUTIVE BRANCH OF STATE GOVERNMENT.

B. THE STATE IS RESPONSIBLE FOR FUNDING THE STATE CAPITAL TRIAL PUBLIC DEFENDER OFFICE INCLUDING ONETIME START-UP COSTS.

C. THE GOVERNOR SHALL APPOINT THE STATE CAPITAL TRIAL PUBLIC DEFENDER AND FILL ANY VACANCY IN THE OFFICE ON THE BASIS OF MERIT ALONE WITHOUT REGARD TO POLITICAL AFFILIATION FROM THE LIST OF NAMES SUBMITTED PURSUANT TO SECTION 11-589.03 AND PURSUANT TO SECTION 38-211. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SERVES A FOUR YEAR TERM AND SERVES UNTIL THE APPOINTMENT AND QUALIFICATION OF A SUCCESSOR IN OFFICE. AFTER APPOINTMENT, THE STATE CAPITAL TRIAL PUBLIC DEFENDER IS SUBJECT TO REMOVAL FROM OFFICE ONLY FOR GOOD CAUSE AS DETERMINED BY A MAJORITY VOTE OF THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE. A VACANCY SHALL BE FILLED FOR THE BALANCE OF THE UNEXPIRED TERM.

D. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SHALL MEET ALL OF THE FOLLOWING CRITERIA:

1. BE A MEMBER IN GOOD STANDING OF THE STATE BAR OF ARIZONA OR BECOME A MEMBER OF THE STATE BAR OF ARIZONA WITHIN ONE YEAR AFTER APPOINTMENT,
2. HAVE BEEN A MEMBER OF THE STATE BAR OF ARIZONA, OR ADMITTED TO PRACTICE IN ANY OTHER STATE, FOR THE FIVE YEARS IMMEDIATELY PRECEDING THE APPOINTMENT,

S.B. 1486 (continued)

3. HAVE HAD SUBSTANTIAL EXPERIENCE IN THE REPRESENTATION OF ACCUSED OR CONVICTED PERSONS IN CRIMINAL OR JUVENILE PROCEEDINGS,
4. MEET OR EXCEED THE STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES UNDER RULE 6.8, ARIZONA RULES OF CRIMINAL PROCEDURE, AS DETERMINED BY THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE.

E. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SALARY SHALL EQUAL THE ANNUAL SALARY OF THE CHIEF COUNSEL OF THE CAPITAL LITIGATION SECTION IN THE OFFICE OF THE ATTORNEY GENERAL.

F. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SHALL:

1. SUPERVISE THE OPERATION, ACTIVITIES, POLICIES AND PROCEDURES OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER OFFICE.
2. BEGINNING IN FISCAL YEAR 2002-2003, SUBMIT AN ANNUAL BUDGET FOR THE OPERATION OF THE OFFICE TO THE LEGISLATURE.
3. NOT ENGAGE IN THE PRIVATE PRACTICE OF LAW.
4. APPOINT AND COMPENSATE AN ATTORNEY TO REPRESENT EVERY PERSON WHO IS NOT FINANCIALLY ABLE TO EMPLOY COUNSEL IN PROCEEDINGS IN STATE COURT IN WHICH THE STATE HAS SERVED NOTICE OF ITS INTENT TO SEEK THE DEATH PENALTY IN COUNTIES WITH A POPULATION LESS THAN FIVE HUNDRED THOUSAND PERSONS ACCORDING TO THE MOST RECENT UNITED STATES DECENNIAL CENSUS. ALLOCATE PERSONNEL AND RESOURCES, IN CONSULTATION WITH THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER, TO BOTH POST-CONVICTION RELIEF PROCEEDINGS AND TRIAL PROCEEDINGS SO LONG AS THERE ARE NO CONFLICTS OF INTEREST IN REPRESENTATION. MAKE EVERY EFFORT TO REDUCE THE BACKLOG OF CASES PENDING APPOINTMENT OF POST-CONVICTION RELIEF COUNSEL UNDER SECTION 13-4041.
5. ACT AS A COORDINATOR FOR CAPITAL TRIAL REPRESENTATION THROUGHOUT ARIZONA.
6. PROVIDE OTHER INDIGENT CAPITAL DEFENSE SERVICES IN COUNTIES WITH A POPULATION LESS THAN FIVE HUNDRED

THOUSAND PERSONS ACCORDING TO THE MOST RECENT DECENNIAL CENSUS, INCLUDING BUT NOT LIMITED TO, INVESTIGATION, MITIGATION SPECIALISTS, AND EXPERT WITNESSES.

S.B. 1486 (continued)

G. THE DUTIES OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER ARE LIMITED TO REPRESENTING ANY PERSON WHO IS NOT FINANCIALLY ABLE TO EMPLOY COUNSEL IN PROCEEDINGS IN STATE COURT IN WHICH THE STATE HAS SERVED NOTICE OF ITS INTENT TO SEEK THE DEATH PENALTY IN COUNTIES WITH A POPULATION LESS THAN FIVE HUNDRED THOUSAND PERSONS ACCORDING TO THE MOST RECENT UNITED STATES DECENNIAL CENSUS, AND THE DUTIES ENUMERATED IN SUBSECTION F OF THIS SECTION. ANY COUNTY IN WHICH THE STATE CAPITAL TRIAL PUBLIC DEFENDER REPRESENTS A DEFENDANT IN A CAPITAL CASE SHALL APPOINT A SECOND ATTORNEY TO REPRESENT THAT DEFENDANT AND THE COUNTY SHALL COMPENSATE THAT SECOND ATTORNEY.

H. THE STATE CAPITAL TRIAL PUBLIC DEFENDER MAY:

1. ACCEPT AND EXPEND PUBLIC AND PRIVATE GIFTS AND GRANTS FOR USE IN IMPROVING AND ENHANCING CAPITAL INDIGENT DEFENSE REPRESENTATION.
2. EMPLOY DEPUTIES AND OTHER EMPLOYEES AND MAY ESTABLISH AND OPERATE ANY OFFICES AS NEEDED FOR THE PROPER PERFORMANCE OF THE DUTIES OF THE OFFICE.

11-589.02. <u>State capital post-conviction public defender; office; appointment qualifications; duties</u>

A. BEGINNING ON JULY 1, 2001, THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER IS ESTABLISHED. THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER IS A SEPARATE AGENCY WITHIN THE EXECUTIVE BRANCH OF STATE GOVERNMENT.

B. THE STATE IS RESPONSIBLE FOR FUNDING THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER OFFICE INCLUDING ONETIME START-UP COSTS FOR THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER OFFICE.

C. THE GOVERNOR SHALL APPOINT THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER AND FILL ANY VACANCY IN THE OFFICE ON THE BASIS OF MERIT ALONE WITHOUT REGARD TO POLITICAL AFFILIATION FROM THE LIST OF NAMES SUBMITTED PURSUANT TO SECTION 11-589.03 AND PURSUANT TO SECTION 38-211. THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER SERVES A FOUR YEAR TERM AND SERVES UNTIL THE APPOINTMENT AND QUALIFICATION OF A SUCCESSOR IN OFFICE. AFTER APPOINTMENT, THE STATE CAPITAL

POST-CONVICTION PUBLIC DEFENDER IS SUBJECT TO REMOVAL FROM OFFICE ONLY FOR GOOD CAUSE AS DETERMINED

S.B. 1486 (continued)

BY A MAJORITY VOTE OF THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE. A VACANCY SHALL BE FILLED FOR THE BALANCE OF THE UNEXPIRED TERM.

D. THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER SHALL MEET ALL OF THE FOLLOWING CRITERIA:

1. BE A MEMBER IN GOOD STANDING OF THE STATE BAR OF ARIZONA OR BECOME A MEMBER OF THE STATE BAR OF ARIZONA WITHIN ONE YEAR AFTER APPOINTMENT,
2. HAVE BEEN A MEMBER OF THE STATE BAR OF ARIZONA OR ADMITTED TO PRACTICE IN ANY OTHER STATE FOR THE FIVE YEARS IMMEDIATELY PRECEDING THE APPOINTMENT,
3. HAVE HAD SUBSTANTIAL EXPERIENCE IN THE REPRESENTATION OF ACCUSED OR CONVICTED PERSONS IN CRIMINAL OR JUVENILE PROCEEDINGS,
4. MEET OR EXCEED THE STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES UNDER RULE 6.8, ARIZONA RULES OF CRIMINAL PROCEDURE, AS DETERMINED BY THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE.

E. THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER SALARY SHALL EQUAL THE ANNUAL SALARY OF THE CHIEF COUNSEL OF THE CAPITAL LITIGATION SECTION IN THE OFFICE OF THE ATTORNEY GENERAL.

F. THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER SHALL:

1. SUPERVISE THE OPERATION, ACTIVITIES, POLICIES AND PROCEDURES OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER OFFICE.
2. BEGINNING IN FISCAL YEAR 2002-2003, SUBMIT AN ANNUAL BUDGET FOR THE OPERATION OF THE OFFICE TO THE LEGISLATURE.
3. NOT ENGAGE IN THE PRIVATE PRACTICE OF LAW.
4. ALLOCATE PERSONNEL AND RESOURCES TO POST-CONVICTION RELIEF PROCEEDINGS SO LONG AS THERE ARE NO CONFLICTS OF INTEREST IN REPRESENTATION AND SO LONG AS ALL STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER ATTORNEYS ARE APPOINTED TO POST-CONVICTION RELIEF CASES WHICH ARE ELIGIBLE FOR APPOINTMENT OF COUNSEL UNDER SECTION 13-4041.

G. THE DUTIES OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER ARE LIMITED TO REPRESENTING ANY PERSON WHO IS NOT FINANCIALLY ABLE TO EMPLOY COUNSEL IN POST-CONVICTION RELIEF

PROCEEDINGS IN STATE COURT AFTER A JUDGMENT OF DEATH HAS BEEN RENDERED AND THE DUTIES ENUMERATED IN SUBSECTION F OF THIS SECTION. NOTWITHSTANDING SECTION 11-584, SUBSECTION A, PARAGRAPH 1, SUBDIVISION (g), AFTER A JUDGMENT OF DEATH HAS BEEN RENDERED THE COUNTY PUBLIC DEFENDER SHALL NOT HANDLE POST-CONVICTION RELIEF PROCEEDINGS IN STATE COURT UNLESS A CONFLICT EXISTS WITH THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER AND THE COUNTY PUBLIC DEFENDER IS APPOINTED.

H. THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER MAY:

1. ACCEPT AND EXPEND PUBLIC AND PRIVATE GIFTS AND GRANTS FOR USE IN IMPROVING AND ENHANCING CAPITAL INDIGENT DEFENSE REPRESENTATION.
2. EMPLOY DEPUTIES AND OTHER EMPLOYEES AND MAY ESTABLISH AND OPERATE ANY OFFICES AS NEEDED FOR THE PROPER PERFORMANCE OF THE DUTIES OF THE OFFICE.

11-589.03. Nomination, retention and standards commission on indigent defense; membership; duties

A. THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE IS ESTABLISHED CONSISTING OF THE FOLLOWING MEMBERS:

1. TWO COUNTY PUBLIC DEFENDERS WHO ARE APPOINTED BY THE GOVERNOR, ONE OF WHOM IS FROM A COUNTY WITH A POPULATION OF FIVE HUNDRED THOUSAND PERSONS OR MORE AND ONE OF WHOM IS FROM A COUNTY WITH A POPULATION OF LESS THAN FIVE HUNDRED THOUSAND PERSONS.
2. ONE CRIMINAL DEFENSE ATTORNEY APPOINTED BY THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE.
3. ONE CRIMINAL DEFENSE ATTORNEY WHO IS APPOINTED BY THE STATE BAR OF ARIZONA.
4. TWO PRIVATE CITIZENS WHO ARE APPOINTED BY THE GOVERNOR, NEITHER OF WHOM IS A JUDGE, LAW ENFORCEMENT OFFICER, PROSECUTOR OR COURT APPOINTED EMPLOYEE.
5. ONE PRIVATE DEFENSE ATTORNEY WHO IS APPOINTED BY THE GOVERNOR.

B. AT ALL TIMES DURING THEIR TERMS COMMISSION MEMBERS SHALL MAINTAIN THE OCCUPATIONAL STATUS UNDER WHICH THEY WERE APPOINTED OR SHALL BE REPLACED BY A PERSON QUALIFYING FOR SUCH AN OCCUPATIONAL STATUS.

C. COMMISSION MEMBERS SERVE THREE YEAR TERMS AND UNTIL A SUCCESSOR IS APPOINTED. AN APPOINTMENT TO FILL A VACANCY THAT RESULTS OTHER THAN FROM THE EXPIRATION OF A TERM IS FOR THE UNEXPIRED PORTION OF THE TERM ONLY.

D. THE GOVERNOR SHALL APPOINT A MEMBER IF THE PERSON WHO IS DESIGNATED TO APPOINT A MEMBER FAILS TO APPOINT THE MEMBER.

E. ON THE ORIGINAL NOMINATION OF, OR WITHIN THIRTY DAYS BEFORE THE STATE CAPITAL TRIAL PUBLIC DEFENDER OR THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER VACATES THE OFFICE, OR WITHIN THIRTY DAYS AFTER ANY UNEXPECTED VACANCY IN EITHER OFFICE, THE COMMISSION SHALL SUBMIT TO THE GOVERNOR THE NAMES OF AT LEAST THREE PERSONS WHO ARE NOMINATED TO FILL THE VACANCY, AND THESE PERSONS SHALL MEET OR EXCEED THE CRITERIA PRESCRIBED IN SECTIONS 11-589.01 OR 11-589.02. NO MORE THAN TWO-THIRDS OF THE NOMINEES MAY BE MEMBERS OF THE SAME POLITICAL PARTY.

F. THE COMMISSION SHALL STUDY AND MAKE RECOMMENDATIONS ON THE FOLLOWING ISSUES:

1. THE DELIVERY OF INDIGENT SERVICES.
2. A DETERMINATION OF INDIGENCE AND ELIGIBILITY FOR LEGAL REPRESENTATION.

Sec. 2. Title 41, chapter 12, article 9, Arizona Revised Statutes, is amended by adding section 41-191.09, to read:

41-191.09. State aid for capital prosecution

BEGINNING ON JULY 1, 2001, A COUNTY WITH A POPULATION OF LESS THAN FIVE HUNDRED THOUSAND PERSONS IS ELIGIBLE TO RECEIVE FUNDS AND LITIGATION ASSISTANCE FROM THE STATE OUT OF FUNDS APPROPRIATED UNDER THIS SECTION FOR THE COSTS AND EXPENSES THAT THE COUNTY INCURS AND THAT ARISE OUT OF OR IN CONNECTION WITH PROSECUTION IN CAPITAL CASES. THE FUNDS MAY BE USED FOR PROSECUTORS, EXPERT WITNESSES, INVESTIGATORS, PERSONNEL COSTS, OR OTHER COSTS RELATED TO THE PROSECUTION OF CAPITAL CASES IN ANY COUNTY COVERED IN THIS SECTION. THE ATTORNEY GENERAL SHALL ADMINISTER THE FUNDS TO ACHIEVE THE PURPOSES OF THIS SECTION.

Sec. 3. Title 41, chapter 27, article 2, Arizona Revised Statutes, is amended by adding section 41-3011.01, to read:

S.B. 1486 (continued)

41-3011.01. Office of the state capital trial public defender; termination July 1, 2011

A. THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER TERMINATES ON JULY 1, 2011.

B. SECTIONS 11-589.01 THROUGH 11-589.03 ARE REPEALED ON JANUARY 1, 2012.

Sec. 4. Title 41, chapter 27, article 2, Arizona Revised Statutes, is amended by adding section 41-3011.02, to read:

41-3011.02. Office of the state capital post-conviction public defender; termination July 1, 2011

A. THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER TERMINATES ON JULY 1, 2011.

B. SECTIONS 11-589.01 THROUGH 11-589.03 ARE REPEALED ON JANUARY 1, 2012.

Sec. 5. Title 13, chapter 38, article 18, section 13-4041, Arizona Revised Statutes, is amended to read:

§ 13-4041. Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in post-conviction relief proceedings; reimbursement; definitions

A. Except pursuant to subsection G of this section, if counsel is appointed by the court to represent the defendant in either a criminal proceeding or insanity hearing on appeal, the county in which the court from which the appeal is taken presides shall pay counsel, except that in those appeals where the defendant is represented by a public defender or other publicly funded office, compensation shall not be set or paid. Compensation for services rendered on appeal shall be in an amount as the supreme court in its discretion deems reasonable, considering the services performed.

B. After the supreme court has affirmed a defendant's conviction and sentence in a capital case, the supreme court, or if authorized by the supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state post-conviction relief proceeding AND MAY APPOINT COUNSEL FROM THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER OR THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER. Counsel shall meet the following qualifications:

S.B. 1486 (continued)

1. Membership in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.

2. Practice in the area of state criminal appeals or post-conviction proceedings for at least three years immediately preceding the appointment.

3. No previous representation of the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.

C. The supreme court shall establish and maintain a list of qualified candidates. In addition to the qualifications prescribed in subsection B of this section, the supreme court may establish by rule more stringent standards of competency for the appointment of post-conviction counsel in capital cases. The supreme court may refuse to certify an attorney on the list who meets the qualifications established under subsection B of this section or may remove an attorney from the list who meets the qualifications established under subsection B of this section if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant. The court shall appoint counsel pursuant to subsection B of this section from the list.

~~D. Notwithstanding subsection C of this section, the court may appoint counsel pursuant to subsection B of this section from outside the list of qualified candidates if either:~~

~~1. No counsel meets the qualifications under subsections B and C of this section.~~

~~2. No qualified counsel is available to serve.~~

E. Before filing a petition, the capital defendant may personally appear before the trial court and waive counsel. If the trial court finds that the waiver is knowing and voluntary, appointed counsel may withdraw. The time limits in which to file a petition shall not be extended due solely to the change from appointed counsel to self-representation.

F. If at any time the trial court determines that the capital defendant is not indigent, appointed counsel shall no longer be compensated by public monies and may withdraw.

S.B. 1486 (continued)

G. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state post-conviction relief proceedings shall be paid an hourly rate of not to exceed one hundred 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.

H. 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 G 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 post-conviction relief proceedings, compensation shall be paid pursuant to § 13-4013, subsection A.

I. The county shall request reimbursement for fees it incurs pursuant to subsections G, H and J of this section arising out of the appointment of counsel to represent an indigent capital defendant in a state post-conviction 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.

J. 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 § 13-4232.

RE: LETTER TO CONFORM

Sec. 6. Appointment of initial state capital trial public defender

S.B. 1486 (continued)

The initial state capital trial public defender shall be appointed for a term beginning on July 1, 2001 and ending on the third Monday in January, 2005. Thereafter, all appointments shall be made pursuant to statute.

Sec. 7. Appointment of initial state capital post-conviction public defender

The initial state capital post-conviction public defender shall be appointed for a term beginning on July 1, 2001 and ending on the third Monday in January, 2005. Thereafter, all appointments shall be made pursuant to statute.

Sec. 8. Initial terms of members of the nomination, retention and standards commission on indigent defense

A. Notwithstanding section 11-589.03, Arizona Revised Statutes, as added by this act, the initial terms of members are:

1. Three terms ending on January 31, 2004 for appointments under section 11-589.03, subsection A, paragraphs 1 and 2, Arizona Revised Statutes.
2. Four terms ending on January 31, 2005 for appointments under section 11-589.03, subsection A, paragraphs 3, 4 and 5, Arizona Revised Statutes.

B. The appropriate appointing official shall make all subsequent appointments as prescribed by statute.

Sec. 9. Nomination, retention and standards commission on indigent defense report

By September 1, 2002 the nomination, retention and standards commission on indigent defense established by section 11-589.03, Arizona Revised Statutes, as added by this act, shall prepare a report of its findings and recommendations and submit the report to the governor, president of the senate, speaker of the house of representatives, chief justice of the supreme court, director of the county supervisors' association and director of the Arizona association of counties.

Sec. 10. Purpose

Pursuant to section 41-2955, subsection E, Arizona Revised Statutes, the offices of the state capital trial public defender and state capital post-conviction public defender are established to represent any person who is not financially able to employ counsel in post-conviction relief proceedings in state court after a judgment of death has been rendered and any person in a county with a population less than five hundred thousand persons according to the most recent United States decennial census who is not financially able to employ counsel in any prosecution in which the state has served notice of its intent to seek the death penalty.

S.B. 1486 (continued)

Sec. 11. Appropriations; purpose

A. The sum of $981,250 is appropriated from the state general fund in each of the fiscal years 2001-2002 and 2002-2003 to the office of the state capital trial public defender to carry out the duties prescribed in section 11-589.01, Arizona Revised Statutes, as added by this act, including hiring nine full-time employees.

B. The sum of $700,000 is appropriated from the state general fund in each of the fiscal years 2001-2002 and 2002-2003 to the office of the state capital post-conviction public defender to carry out the duties prescribed in section 11-589.02, Arizona Revised Statutes, as added by this act, including hiring six full-time employees.

C. The sum of $686,500 is appropriated from the state general fund in each of the fiscal years 2001-2002 and 2002-2003 to the department of law for the purposes prescribed in section 41-191.09, Arizona Revised Statutes, as added by this act, including hiring three full-time employees.

Sec. 12. Retroactivity

This act is effective retroactively to from and after June 30, 2001.

2. Notice of Intent to Seek the Death Penalty Under Ariz. R. Crim. P. 15.1 (g).

On January 30, 2001, the Commission recommended to the Supreme Court that Rule 15.1 be amended to extend the time for filing of death penalty notices to 60 days after arraignment by rule, with an additional extension of time available by stipulation from the parties and approval of the Superior Court Judge. The proposed rule would read:

> g. Additional Disclosure in a Capital Case.
>
> > (1) The prosecutor, no later than ~~30~~ 60 days after the arraignment in superior court, shall provide to the defendant notice of whether the prosecutor intends to seek the death penalty. THE 60 DAY TIME PERIOD MAY BE EXTENDED BY STIPULATION OF THE PROSECUTION AND DEFENSE IF APPROVED BY THE COURT.

3. Jury Deliberation in Capital Cases

On January 30, 2001, the Commission agreed to oppose a pending Petition to Amend Rule 19.4 of the Rules of Criminal Procedure which would allow jury deliberations in criminal cases before instructions by the Court. The Commission instructed the Attorney General's Office to submit comments opposing the Petition to Amend Rule 19.4. The comments were subsequently filed, and are reprinted here:

> The Arizona Attorney General and the Attorney General's Capital Case Commission oppose the proposed amendment to Rule 19.4 of the Arizona Rules of Criminal Procedure, which would permit jurors in criminal cases to discuss the evidence "amongst themselves in the jury room during recesses from trial, when all are present, as long as they reserve judgment concerning the guilt or innocence of the defendant," before deliberations commence.
>
> As the State's chief legal officer, the Attorney General is directly interested in the development and application of Arizona's rules of criminal procedure. Capital Case Commission members, which include several judges, retired judges, prosecutors, defense attorneys, and members of the community, are similarly interested in the development and application of the rules of criminal procedure, particularly with regard to their application in capital cases. The Attorney General and Commission members object to the proposed amendment because: (1) the proposed Rule may ultimately be found unconstitutional, and the risks involved in enacting a constitutionally questionable procedure outweigh the perceived benefits of pre-deliberation jury discussions; (2) pre-deliberation discussions in criminal cases are likely to reflect a bias against the defendant because of the order in which evidence is presented; and (3) recently enacted Rules permitting jurors to submit questions to the court already provide a viable mechanism for averting juror confusion

during trial. Accordingly, and based on the following Discussion, the Attorney General and the Capital Case Commission object to the proposed amendment to Rule 19.4.

DISCUSSION

On May 17, 2000, four members of the Supreme Court Committee on the More Effective Use of Juries petitioned the Arizona Supreme Court to amend Rule 19.4 of the Arizona Rules of Criminal Procedure. If the supreme court grants the petition, Arizona will become the only state to permit pre-deliberation discussions by jurors in a criminal jury trial. Arizona is presently the only state that permits such discussions in civil cases. *See* Ariz. R. Civ. P. (eff. Dec. 1,1995). The Attorney General and the Capital Case Commission recommend against the enactment of proposed Rule 19.4.

I. *The Proposed Rule May Be Rejected by State or Federal Courts.*

> "The sixth amendment guarantees every defendant in a criminal prosecution the right to trial by 'an impartial jury.' Any discussion among jurors of a case prior to formal deliberations certainly endangers that jury's impartiality."

Comment to Proposed Amendment to Ariz. Crim. P. 19.4 (continued)

United States v. Yonn, 702 F.2d 1341, n.1 (11th Cir. 1983) (citing *United States v. Edwards*, 696 F.2d 1277, 1282 (11th Cir. 1983), and *Winebrenner v. United States*, 147 F.2d 322 (8th Cir. 1945)).

In *Winebrenner*, the Eighth Circuit Court of Appeals reversed a criminal conviction after the trial court instructed the jurors that they could discuss the case among themselves before deliberating. 147 F.2d at 327–29. The trial court had also admonished the jurors to "be careful not to make up your mind finally and definitely about it," and not to discuss it "to such an extent that you form definite, fixed ideas that would prevent you from changing after you had heard all of the evidence in the case." *Id.* Nevertheless, the Eighth Circuit found that the trial court's admonition did not prevent a juror from forming and expressing an opinion to fellow jurors, and held that "premature" discussion undermined the constitutional guarantee of an impartial jury. *Id.* at 327–29. The court also held that discussion of "only a part" of the evidence "in effect shifted the burden of proof and placed upon the defendants the burden of changing by evidence the opinion thus formed." *Id.* at 328; *see also Hunt v. Methodist Hospital*, 485 N.W.2d 737, 744 (Neb. 1991) ("As confirmed by case law, the constitutional right in both civil and criminal cases protects parties from juror discussions prior to deliberations. Anything short of silence is juror misconduct, and at some point, non-deliberation dialogue prejudices a party and voids the trial."); *State v. Hunter*, 121 N.W.2d 442, 447–48 (Mich. 1963) (citing *Winebrenner*); *but see Wilson v. State*, 242 A.2d 194, 198 (Md. App. 1968) ("We do not agree that it necessarily follows that an accused is denied a fair trial and due process of law because of the absence of an

admonition not to discuss the case before its final submission to them or because they are told, in effect, that they may so discuss it.").

In *State v. Washington*, 438 A.2d 1144, 1148–49 (Conn. 1980), the Connecticut Supreme Court noted that "without exception, where the issue has been properly raised, every court has held that jury instructions permitting jurors to discuss a case before its submission to them constitutes reversible error." The court held that instructing jurors that they could discuss evidence during trial violated the defendant's federal due process rights under the Sixth and Fourteenth Amendments because it undermined the jury's impartiality, shifted the burden of proof, and encouraged jurors to consider evidence unaided by final instructions on applicable law. 438 A.2d at 1147–48.

Several courts have rejected the pre-deliberation discussion approach on non-constitutional grounds. The South Carolina Supreme Court found reversible and "inherently prejudicial" a judge's comments implying that pre-deliberation discussion

was permissible as long as the jurors did not "start making up [their] minds about what [the] verdict should be." *State v. Pierce*, 346 S.E.2d 707, 709–10 (S.C. 1986), *overruled in part on other grounds*, *State v. Torrence*, 406 S.E.2d 315, n.5 (S.C. 1991). The Pennsylvania Supreme Court similarly reversed a conviction where the trial judge gave an "experimental" instruction permitting jurors to discuss the evidence prior to deliberating, and further found that defense counsel was ineffective for consenting to the instruction. *Commonwealth v. Kerpan*, 498 A.2d 829 (Pa. 1985); *see also United States v. Wiesner*, 789 F.2d 1264, 1269 n.3 (7th Cir. 1986) ("Admonishing the jury [regarding premature deliberations] is a critical and important duty and cannot be over-emphasized.").

If the proposed rule is adopted, court challenges will be inevitable, and there is a significant possibility that the courts will find that the rule is unconstitutional or violates principles of general fairness. *See V.* P. Hans, P. L. Hannaford, and G. T. Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. Mich. J.L. Ref. 349, 352–53 (1999) ("[T]he primary debate among appellate courts is whether an instruction permitting juror discussions is reversible or merely harmless error.") Accordingly, the proposed rule is ill-advised.

II. *Pre-Deliberation Discussions Are Likely to Reflect A Bias Against The Defendant.*

Because of the structure of a criminal trial, pre-deliberation discussions by jurors raise concerns different than those present in a civil case. In *United States v. Resko*, 3 F.3d 684, 689–90 (3rd Cir. 1993), the Third Circuit Court of Appeals

reversed the defendant's convictions because of premature jury discussions, reasoning as follows:

1. Because the prosecution presents its evidence first, any premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason.

2. Once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion. Consequently, the mere act of openly expressing his or her views may tend to cause the juror to

approach the case with less than a fully open mind and to adhere to the publicly expressed viewpoint.

3. The jury system is meant to involve decision making as a collective, deliberative process and premature discussions among individual jurors may thwart that goal.

4. Juries that engage in premature deliberations do so without the benefit of the court's instructions. Although the trial court gives preliminary instructions dealing with the reasonable doubt standard and burden of proof, the parties and trial court do not even settle instructions until the evidence is presented.

5. Premature deliberations may effectively shift the burden of proof to the defendant.

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4. Mental Retardation

On March 28, 2001, the Commission received the Pre-Trial Issues Subcommittee report recommending that Arizona enact a statute to ensure a mentally retarded defendant is not eligible for the death penalty. The Commission accepted the Subcommittee's recommendation and noted that the Subcommittee's recommendation was a "grudging" one approved by a 6 to 4 vote, and that there was dissent on the Commission as to whether Arizona needed such a statute. S.B. 1551, previously drafted and introduced in the State Senate, prohibited the execution of persons with mental retardation. The Attorney General's Office participated in drafting a stike-everything amendment to S.B. 1551. The version of the bill signed into law on April 26, 2001 is as follows:

House Engrossed Senate Bill

State of Arizona
Senate

Forty-fifth Legislature
First Regular Session
2001

SENATE BILL 1551

AN ACT

S.B. 1551 (continued)

AMENDING SECTION 13-703, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 7, ARIZONA REVISED STATUTES, BY ADDING SECTION 13-703.02; RELATING TO CAPITAL PUNISHMENT.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 13-703, Arizona Revised Statutes, is amended to read:

13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definitions

A. A person guilty of first degree murder as defined in section 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G H of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

B. IN ANY CASE IN WHICH THE STATE FILES A NOTICE OF INTENT TO SEEK THE DEATH PENALTY AFTER THE EFFECTIVE DATE OF THIS SUBSECTION, THE COURT SHALL NOT IMPOSE THE DEATH PENALTY ON A PERSON WHO IS FOUND TO HAVE MENTAL RETARDATION PURSUANT TO SECTION 13-703.02, BUT INSTEAD SHALL SENTENCE THE PERSON TO LIFE IMPRISONMENT PURSUANT TO SUBSECTION A OF THIS SECTION.

B. C. When a defendant is found guilty of or pleads guilty to first degree murder as defined in section 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was

entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F G and G H of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all

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factual determinations required by this section or the constitution of the United States or this state.

C. D. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. A victim may submit a written victim impact statement, an audio or video tape statement or make an oral impact statement to the probation officer preparing the presentence report for the probation officer's use in preparing the presentence report. The probation officer shall consider and include in the presentence report the victim impact information regarding the murdered person and the economical, physical and psychological impact of the murder on the victim and other family members. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F G or G H of this section. Any information relevant to any mitigating circumstances included in subsection G H of this section may be presented by either the prosecution or the defendant, regardless
of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F G of this section shall be governed by the rules of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The victim has the right to be present and to testify at the hearing. The victim may present information about the murdered person and the impact of the murder on the victim and other family members. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F G and G H of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F G of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G H of this section is on the defendant.

D. E. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F G of this section and as to the existence of any of the circumstances included in subsection G H of this section. In evaluating the mitigating circumstances, the court shall consider any information presented by the victim regarding the murdered person and the impact of the murder on the victim and other family members. The court shall not consider any recommendation made by the victim regarding the sentence to be imposed.

E. F. In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F G and G H of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F G of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. G. The court shall consider the following aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

G. H. The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

H. I. As used in this section:

1. "MENTAL RETARDATION" HAS THE SAME MEANING AS IN SECTION 13-703.02.

1. 2. "Serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:

(a) First degree murder.

(b) Second degree murder.

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(c) Manslaughter.

(d) Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.

(e) Sexual assault.

(f) Any dangerous crime against children.

(g) Arson of an occupied structure.

(h) Robbery.

(i) Burglary in the first degree.

(j) Kidnapping.

(k) Sexual conduct with a minor under fifteen years of age.

2. 3. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.

Sec. 2. Title 13, chapter 7, Arizona Revised Statutes, is amended by adding section 13-703.02, to read:

13-703.02. Evaluations of capital defendants; prescreening evaluation; hearing; mental retardation; appeal; definitions; prospective application

A. IF THE STATE FILES A NOTICE OF INTENT TO SEEK THE DEATH PENALTY, THE COURT SHALL APPOINT
A PRESCREENING PSYCHOLOGICAL EXPERT IN ORDER TO DETERMINE THE DEFENDANT'S INTELLIGENCE QUOTIENT USING CURRENT COMMUNITY, NATIONALLY AND CULTURALLY ACCEPTED INTELLIGENCE TESTING PROCEDURES. THE PRESCREENING PSYCHOLOGICAL EXPERT SHALL SUBMIT A WRITTEN REPORT OF THE INTELLIGENCE QUOTIENT DETERMINATION TO THE COURT WITHIN TEN DAYS OF THE TESTING OF THE DEFENDANT.

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B. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS HIGHER THAN SEVENTY-FIVE, THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY SHALL NOT BE DISMISSED ON THE GROUND THAT THE DEFENDANT HAS

MENTAL RETARDATION. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS HIGHER THAN SEVENTY-FIVE, THE REPORT SHALL BE SEALED BY THE COURT AND BE AVAILABLE ONLY TO THE DEFENDANT. THE REPORT SHALL BE RELEASED UPON MOTION OF ANY PARTY IF THE DEFENDANT INTRODUCES THE REPORT IN THE PRESENT CASE OR IS CONVICTED OF AN OFFENSE IN THE PRESENT CASE AND THE SENTENCE IS FINAL. A PRESCREENING DETERMINATION THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS HIGHER THAN SEVENTY-FIVE DOES NOT PREVENT THE DEFENDANT FROM INTRODUCING EVIDENCE OF THE DEFENDANT'S MENTAL RETARDATION OR DIMINISHED MENTAL CAPACITY AS A MITIGATING FACTOR AT ANY SENTENCING PROCEEDING PURSUANT TO SECTION 13-703.

C. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS SEVENTY-FIVE OR LESS, THE TRIAL COURT SHALL APPOINT ONE OR MORE ADDITIONAL PSYCHOLOGICAL EXPERTS TO INDEPENDENTLY DETERMINE WHETHER THE DEFENDANT HAS MENTAL RETARDATION. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS SEVENTY-FIVE OR LESS, THE TRIAL COURT SHALL, WITHIN TEN DAYS OF RECEIVING THE WRITTEN REPORT, ORDER THE STATE AND THE DEFENDANT TO EACH
NOMINATE THREE PSYCHOLOGICAL EXPERTS, OR JOINTLY NOMINATE A SINGLE PSYCHOLOGICAL EXPERT. THE TRIAL COURT SHALL APPOINT ONE PSYCHOLOGICAL EXPERT NOMINATED BY THE STATE
AND ONE PSYCHOLOGICAL EXPERT NOMINATED BY THE DEFENDANT, OR A SINGLE PSYCHOLOGICAL EXPERT JOINTLY NOMINATED BY THE STATE AND THE DEFENDANT, NONE OF WHOM MADE THE PRESCREENING DETERMINATION OF THE DEFENDANT'S INTELLIGENCE QUOTIENT. THE TRIAL COURT MAY, IN ITS DISCRETION, APPOINT AN ADDITIONAL PSYCHOLOGICAL EXPERT WHO WAS NEITHER NOMINATED BY THE STATE NOR THE DEFENDANT, AND WHO DID NOT MAKE THE PRESCREENING DETERMINATION OF THE DEFENDANT'S INTELLIGENCE QUOTIENT. WITHIN FORTY-FIVE DAYS AFTER THE TRIAL COURT ORDERS THE STATE AND THE DEFENDANT TO NOMINATE PSYCHOLOGICAL EXPERTS, OR UPON THE APPOINTMENT

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OF SUCH EXPERTS, WHICHEVER IS LATER, THE STATE AND THE DEFENDANT SHALL PROVIDE TO THE PSYCHOLOGICAL EXPERTS AND THE COURT ANY AVAILABLE RECORDS THAT MAY BE RELEVANT TO THE DEFENDANT'S MENTAL RETARDATION STATUS. THE COURT MAY EXTEND THE DEADLINE FOR PROVIDING RECORDS UPON GOOD CAUSE SHOWN BY THE STATE OR DEFENDANT.

D. NOT LESS THAN TWENTY DAYS AFTER RECEIPT OF THE RECORDS PROVIDED PURSUANT TO SUBSECTION E OF THIS SECTION, OR TWENTY DAYS AFTER THE EXPIRATION OF THE DEADLINE FOR PROVIDING SUCH RECORDS, WHICHEVER IS LATER, EACH PSYCHOLOGICAL EXPERT SHALL EXAMINE THE DEFENDANT USING CURRENT COMMUNITY, NATIONALLY AND CULTURALLY ACCEPTED PHYSICAL, DEVELOPMENTAL, PSYCHOLOGICAL AND INTELLIGENCE TESTING PROCEDURES, FOR THE PURPOSE OF DETERMINING WHETHER THE DEFENDANT HAS MENTAL RETARDATION. WITHIN FIFTEEN DAYS OF EXAMINING THE DEFENDANT, EACH PSYCHOLOGICAL EXPERT SHALL SUBMIT A WRITTEN REPORT TO THE TRIAL COURT THAT INCLUDES THE EXPERT'S OPINION AS TO WHETHER THE DEFENDANT HAS MENTAL RETARDATION.

E. IF THE SCORES ON ALL THE TESTS FOR INTELLIGENCE QUOTIENT ADMINISTERED TO THE DEFENDANT ARE ABOVE SEVENTY, THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY SHALL NOT BE DISMISSED ON THE GROUND THAT THE DEFENDANT HAS MENTAL RETARDATION. THIS DOES NOT PRECLUDE THE DEFENDANT FROM INTRODUCING EVIDENCE OF THE DEFENDANT'S MENTAL RETARDATION OR DIMINISHED MENTAL CAPACITY AS A MITIGATING FACTOR AT ANY SENTENCING PROCEEDING PURSUANT TO SECTION 13-703.

F. NO LESS THAN THIRTY DAYS AFTER THE PSYCHOLOGICAL EXPERTS' REPORTS ARE SUBMITTED TO THE COURT AND BEFORE TRIAL, THE TRIAL COURT SHALL HOLD A HEARING TO DETERMINE IF THE DEFENDANT HAS MENTAL RETARDATION. AT THE HEARING, THE DEFENDANT HAS THE BURDEN OF PROVING MENTAL RETARDATION BY CLEAR AND CONVINCING EVIDENCE. A DETERMINATION BY THE TRIAL COURT THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS SIXTY-FIVE OR LOWER ESTABLISHES A REBUTTABLE PRESUMPTION THAT THE DEFENDANT HAS MENTAL RETARDATION. NOTHING IN THIS SUBSECTION SHALL PRECLUDE A DEFENDANT WITH AN

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INTELLIGENCE QUOTIENT OF SEVENTY OR BELOW FROM PROVING MENTAL RETARDATION BY CLEAR AND CONVINCING EVIDENCE.

G. IF THE TRIAL COURT FINDS THAT THE DEFENDANT HAS MENTAL RETARDATION, THE TRIAL COURT SHALL DISMISS THE INTENT TO SEEK THE DEATH PENALTY, SHALL NOT IMPOSE A SENTENCE OF DEATH ON THE DEFENDANT IF THE DEFENDANT IS CONVICTED OF FIRST DEGREE MURDER AND SHALL DISMISS ONE OF THE ATTORNEYS APPOINTED UNDER RULE 6.2, ARIZONA RULES OF CRIMINAL PROCEDURE UNLESS THE COURT FINDS THAT THERE IS GOOD CAUSE TO RETAIN BOTH

ATTORNEYS. IF THE TRIAL COURT FINDS THAT THE DEFENDANT DOES NOT HAVE MENTAL RETARDATION, THE COURT'S FINDING DOES NOT PREVENT THE DEFENDANT FROM INTRODUCING EVIDENCE OF THE DEFENDANT'S MENTAL RETARDATION OR DIMINISHED MENTAL CAPACITY AS A MITIGATING FACTOR AT ANY SENTENCING PROCEEDING PURSUANT TO SECTION 13-703.

H. WITHIN TEN DAYS AFTER THE TRIAL COURT MAKES A FINDING ON MENTAL RETARDATION, THE STATE OR THE DEFENDANT MAY FILE A PETITION FOR SPECIAL ACTION WITH THE ARIZONA COURT OF APPEALS PURSUANT TO THE RULES OF PROCEDURE FOR SPECIAL ACTIONS. THE FILING OF THE PETITION FOR SPECIAL ACTION IS GOVERNED BY THE RULES OF PROCEDURE FOR SPECIAL ACTIONS, EXCEPT THAT THE COURT OF APPEALS SHALL EXERCISE JURISDICTION AND DECIDE THE MERITS OF THE CLAIMS RAISED.

I. FOR PURPOSES OF THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "ADAPTIVE BEHAVIOR" MEANS THE EFFECTIVENESS OR DEGREE TO WHICH THE DEFENDANT MEETS THE STANDARDS OF PERSONAL INDEPENDENCE AND SOCIAL RESPONSIBILITY EXPECTED OF THE DEFENDANT'S AGE AND CULTURAL GROUP.

2. "MENTAL RETARDATION" MEANS A CONDITION BASED ON A MENTAL DEFICIT THAT INVOLVES SIGNIFICANTLY SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING, EXISTING CONCURRENTLY WITH SIGNIFICANT IMPAIRMENT IN ADAPTIVE BEHAVIOR, WHERE THE ONSET OF THE FOREGOING CONDITIONS OCCURRED BEFORE THE DEFENDANT REACHED THE AGE OF EIGHTEEN.

S.B. 1551 (continued)

3. "PRESCREENING PSYCHOLOGICAL EXPERT" OR "PSYCHOLOGICAL EXPERT" MEANS A PSYCHOLOGIST LICENSED PURSUANT TO TITLE 32, CHAPTER 19.1 WITH AT LEAST TWO YEARS EXPERIENCE IN THE TESTING, EVALUATION AND DIAGNOSIS OF MENTAL RETARDATION.

4. "SIGNIFICANTLY SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING" MEANS A FULL SCALE INTELLIGENCE QUOTIENT OF SEVENTY OR LOWER. THE COURT IN DETERMINING THE INTELLIGENCE QUOTIENT SHALL TAKE INTO ACCOUNT THE MARGIN OF ERROR FOR THE TEST ADMINISTERED.

J. THIS SECTION APPLIES PROSPECTIVELY ONLY TO CASES IN WHICH THE STATE FILES A NOTICE OF INTENT TO SEEK THE DEATH PENALTY AFTER THE EFFECTIVE DATE OF THIS ACT.

Sec. 3. Legislative intent

It is the intent of the legislature that in any case in which this state files a notice of intent to seek the death penalty after the effective date of this act, a defendant with mental retardation shall not be executed in this state.

The version of the bill approved by the legislature

5. Proposed Amendment of the Aggravating Factor When a Peace Officer is Murdered

On March 28, 2001, the Commission recommended extending the aggravating factor regarding peace officers to include peace officers killed while not performing official duties as long as the murder was motivated by the peace officer's status.

ARS 13-703 (F) (10).

The court shall consider the following aggravating circumstances:

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10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties ~~and the defendant knew, or should have known, that the murdered person was a peace officer~~ , OR THE MURDERED PERSON WAS A PEACE OFFICER NOT ON DUTY AND THE DEFENDANT WAS MOTIVATED BY THE MURDERED PERSON'S STATUS AS A PEACE OFFICER WHEN THE DEFENDANT COMMITTED THE OFFENSE.

6. Selection of Capital Cases by Prosecutors and Defense Input

On March 28, 2001, the Commission received and approved the Pre-Trial Issues Subcommittee's unanimous recommendation that all prosecutors involved in capital case prosecution adopt a written policy for identifying cases in which to seek the death penalty, and such policies shall include soliciting or accepting defense input prior to deciding whether to seek the death penalty.

7. Competence to be Executed

On March 28, 2001, the Commission recommended that Arizona change its legislation to require the commutation of a death sentence to the maximum sentence lawfully possible when the defendant is found incompetent after the issuance of a death warrant. The recommendation passes by a margin of 12 to 8 with one abstention.

8. Competence of Defense Counsel

On March 28, 2001, the Commission recommended that Ethical Rule 1.1 be amended to read as follows:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A LAWYER WHO REPRESENTS A CAPITAL DEFENDANT SHALL COMPLY WITH THE STANDARDS SET FORTH IN RULE 6.8, ARIZONA RULES OF CRIMINAL PROCEDURE, REGARDING STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES.

The Commission went on to recommend that the Comment to Ethical Rule 1.1 be amended to include this best practice advice:

BECAUSE THE AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES RECOMMEND TWO LAWYERS BE ASSIGNED TO EVERY CAPITAL CASE, LAWYERS SHALL ENSURE THAT TWO LAWYERS REPRESENT EVERY CAPITAL DEFENDANT WHENEVER FEASIBLE.

9. Aggravation/Mitigation and Sentencing Hearings, and Victim Impact Evidence In Capital Cases

On March 28, May 15, 2001, and after reviewing the text provided Commission members, the Commission recommended an amendment to Rule of Criminal Procedure 26.3, the Comment to that Rule, and creation of a new Rule to ensure that capital case sentencing is conducted in a proper sequence and in compliance with the United States Constitution and Arizona law. The proposed rule change recommended by the commission read:

Rule 26.3. Date of Sentencing; Extension
(Proposed language appears in uppercase)
****

a. Capital Case.

(1) Upon a determination of guilt in a capital case, the trial court shall set a date for the aggravation/mitigation hearing if the state, pursuant to Rule 15.1(g)(4), is not precluded from and is seeking the death penalty. The penalty hearing shall be held not less than 60 days nor more than 90 days after the determination of guilt unless good cause is shown. Upon a showing of good cause, the trial court may grant additional time for the hearing subject to the limitation of subparagraph (2) below.

(2) A pre-aggravation/mitigation conference shall be held after the return of a guilty verdict of first degree murder in a capital case no more than 10 days before the aggravation/mitigation hearing.

(3) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE VICTIM, AS DEFINED IN A.R.S. §13-703(H)(2), TO BE HEARD REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS. THE TRIAL COURT SHALL CONSIDER THE INFORMATION PRESENTED BY THE VICTIM IN ACCORDANCE WITH THE PROVISIONS OF A.R.S. §13-703(D).

(4) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE DEFENDANT THE RIGHT OF ALLOCUTION.

(5) UPON COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL SET A DATE FOR THE RETURN OF THE SPECIAL VERDICT AND SENTENCING. THE RETURN OF THE SPECIAL VERDICT AND SENTENCING SHALL OCCUR NO EARLIER THAN 7 DAYS AFTER THE COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, TO ENSURE THAT THE TRIAL COURT HAS ADEQUATE TIME PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT TO CONSIDER THE EVIDENCE, INFORMATION, AND ARGUMENTS PRESENTED AT THE AGGRAVATION/MITIGATION HEARING.

Proposed Comment to 2001 Amendment to Rule 26.3(c)

UNDER RULE 26.3(C)(3), THE COURT MUST ALLOW THE VICTIM IN A CAPITAL CASE, AS DEFINED IN A.R.S. §13-703(H)(2), TO BE HEARD AT THE

Rule 26.3 (continued)

AGGRAVATION/MITIGATION HEARING REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS. THE COURT MUST CONSIDER THE INFORMATION PRESENTED BY THE VICTIM IN EVALUATING WHETHER TO IMPOSE A CAPITAL SENTENCE.

CONSISTENT WITH *BOOTH V. MARYLAND*, 482 US 496 (1987) AND *PAYNE V. TENNESSEE*, 502 US 808 (1991), THE VICTIM SHOULD BE INSTRUCTED NOT TO MAKE ANY RECOMMENDATIONS WITH RESPECT TO THE CAPITAL SENTENCING DECISION. SHOULD THE VICTIM MAKE ANY RECOMMENDATION REGARDING CAPITAL SENTENCING, THE COURT MUST DISREGARD IT. IN LIGHT OF THIS RESTRICTION, THE COURT SHALL NOT CONSTRUE A VICTIM'S SILENCE AS EITHER ACQUIESCENCE IN, OR OPPOSITION TO, A CAPITAL SENTENCE. NOTHING IN THIS RULE PROHIBITS VICTIMS FROM COMMENTING ON, SPEAKING TO, OR MAKING RECOMMENDATIONS REGARDING THE APPROPRIATE SENTENCING OPTION UNDER A.R.S. §13-703, NATURAL LIFE OR LIFE WITH THE POSSIBILITY OF PAROLE. LIKEWISE, VICTIMS MAY COMMENT ON, SPEAK TO, OR MAKE RECOMMENDATIONS REGARDING THE APPROPRIATE SENTENCE ON ANY NON-CAPITAL COUNTS.

UNDER RULE 26. 3(C)(4), THE DEFENDANT SHOULD BE AFFORDED THE RIGHT OF ALLOCUTION AT THE AGGRAVATION/MITIGATION HEARING TO ALLOW THE COURT AN OPPORTUNITY TO CONSIDER THE DEFENDANT'S STATEMENT PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT.

UNDER RULE 26.3(C)(5), THE COURT MAY NOT PROCEED TO SENTENCING IMMEDIATELY UPON CONCLUSION OF THE AGGRAVATION/MITIGATION HEARING. RULE 26.3(C)(5) IS INTENDED TO ALLOW SUFFICIENT TIME PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT FOR THE COURT TO CONSIDER ALL THE INFORMATION PRESENTED AT THE AGGRAVATION/MITIGATION HEARING, INCLUDING ANY VICTIM IMPACT INFORMATION PROVIDED FOR IN SUBSECTION (C)(3) AND THE DEFENDANT'S STATEMENT PROVIDED FOR IN SUBSECTION (C)(4).

The commission also recommended that the portions of the Supreme Court's Administrative Order 94-16 which provide guidance on the conduct of capital sentencing hearings in Arizona courts be incorporated into Rule 26.3. Those changes appear in all capital letters in the following redraft of the Order and will be incorporated into the Attorney General's Petition to amend the rules of Criminal Procedure. Changes will be made consistent with the Rule and Comment as approved by the Commission.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: ADMINISTRATIVE REQUIREMENTS FOR VICTIMS' RIGHTS IMPLEMENTATION PROCEDURES FOR USE BY THE SUPERIOR COURT, JUSTICE COURTS AND MUNICIPAL COURTS

Admin. Order 94-16

A. Pursuant to Article 6 of the Arizona Constitution and pursuant to A. R. S. §13-4401 et seq., as amended by Laws 1991, Chapter 229, and Laws 1993, Chapter 243, it is ordered that the following administrative requirements are issued to govern the procedures for administration of Victims' Rights Implementation Procedures for use by the superior courts and municipal courts. This order supersedes Administrative Order 91-35.

1. Prompt Restitutions

Monies received from the defendant each month for each case shall be applied first to satisfy any ordered periodic restitution payment and any restitution payments in arrears in that case. Any remaining balance paid each month for each case may be applied to satisfy penalty assessments, fees and fines in that case. If the order does not indicate a specific periodic restitution payment, the entire amount of any payment received for each case shall be applied to satisfy the restitution obligation until that obligation is paid in full.

All monies collected for restitution payments shall be processed by the court within fifteen days unless the amount of any single disbursement is less than $10. In those instances where a single disbursement is less than $10, restitution may be held by the court until a minimum of $10 is collected, but in no event, beyond 90 days following receipt of payment.

A probation office or the assigned agent or agency monitoring payment, upon finding that the defendant has become in arrears in an amount totaling two full court-ordered monthly payments of restitution, shall notify the supervising court. This notification may consist of either a petition to modify, a petition to revoke or a memorandum to the court outlining the reasons for the delinquencies and expected duration thereof. A copy of the memorandum shall be provided to the victim if the victim has requested notice of restitution modifications.

Each court in conjunction with the probation office or other agency monitoring payments shall develop a system by which the court will receive timely notice of delinquencies in restitution payments.

Admin. Order 94.16 (continued)

~~3.~~ 2. Notice to Prosecutor

Criminal proceedings, for criminal offenses as defined by A. R. S. §13-4401 and indicated by a prosecutor by information, complaint or indictment, with the exception of initial appearances and arraignments shall be scheduled at least five days in advance of the date of the proceeding unless it is unreasonable to do so and the court states the basis of this determination on the record.

Notice to the Prosecutor may be any written document, telephonic transmission followed up with a written confirmation, facsimile transmission or any other electronically transmitted message or document containing the following minimum information: the transmittal date; case number, defendant's name; type of hearing; and the date, time and place of next hearing. The court may agree to provide additional information. If notice is initially given by telephonic transmission, the name of the person receiving notice shall be recorded and noted on the confirming written notice.

~~4.~~ 3. Change of Plea/Victim Statements

The changing of a plea minute entry shall state whether the victim was given the opportunity to address the court and whether any statements submitted by the victim have been reviewed by the court prior to accepting the plea.

~~5.~~ 4. Sentencing/Victim Statements

The sentencing minute entry shall state whether the victim was given the opportunity to address the court and whether any statements submitted by the victim have been reviewed by the court prior to the sentencing.

I. CAPITAL CASE/VICTIM STATEMENTS

THE COURT SHALL ADVISE THE VICTIM AT THE AGGRAVATION / MITIGATION HEARING AND THE SENTENCING HEARING IN A CAPITAL CASE, THAT THE COURT WILL CONSIDER THE INFORMATION PRESENTED BY THE VICTIM REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS, FOR THE PURPOSE OF EVALUATING MITIGATING CIRCUMSTANCES. THE COURT SHALL FURTHER ADVISE THE VICTIM THAT THE COURT BY LAW CANNOT CONSIDER THE VICTIM'S VIEWS WITH RESPECT TO THE SENTENCE IN A CAPITAL CASE. THE MINUTE ENTRIES FROM THESE HEARINGS

Admin. Order 94.16 (continued)

SHALL STATE WHETHER THE VICTIM WAS SO ADVISED, AND SHALL STATE PRIOR TO THE RENDERING OF A SPECIAL VERDICT, WHETHER THE VICTIM WAS GIVEN THE OPPORTUNITY TO ADDRESS THE COURT AT THE AGGRAVATION / MITIGATION HEARING AND THE SENTENCING HEARING. IF THERE IS A PORTION OF THE VICTIM'S IMPACT STATEMENT, NOT CONSIDERED BY THE COURT, THE MINUTE ENTRY SHALL REFLECT SAME.

IF THE DEFENDANT IN A CAPITAL CASE IS ADDITIONALLY CONVICTED ON NON-CAPITAL COUNTS FOR WHICH THE COURT WILL HEAR AGGRAVATION / MITIGATION AND PRE-SENTENCE TESTIMONY, THE COURT SHALL SIMILARLY ADVISE THE VICTIM THAT THE COURT CAN CONSIDER THE VICTIM'S ADDITIONAL INPUT REGARDING *THE DEFENDANT, THE SENTENCE AND THE NEED FOR RESTITUTION*, BUT THAT THIS INFORMATION WILL NOT BE HEARD AND CONSIDERED UNTIL AFTER THE SPECIAL VERDICT IS RENDERED.

6. Victim's Statements

Victim statements may be submitted in writing, orally, or on audiotape or videotape where legally permissible and in the discretion of the court.

7. Receipt of Victim's Statements

Court agencies shall make reasonable efforts to forward victim requests and victim statements to the appropriate court or agency.

8. Inspection of Presentence Report

Each court in conjunction with the prosecutor shall develop a plan and procedures to comply with A. R. S. §13-4425 (i.e., to allow the victim to inspect the presentence report, if the presentence report is available to the defendant).

9. Criminal History Information - Presentence Reports

All criminal history obtained during the presentence investigation will be handled as a addendum to the presentence report and distributed only to the court, the prosecutor, the defense and other authorized criminal justice agencies. Such information will not be made available for review to the victim. The copy provided to the victim by the prosecutor will not include this addendum.

Admin. Order 94.16 (continued)

The court upon filing this document will maintain this information as confidential. The public record will not include this addendum. The clerk's office will maintain a filing system which will insure that none of the confidential criminal history information will become part of the public record and that it will be made available only to authorized criminal justice agencies.

II VICTIM INFORMATION - PRE-SENTENCE REPORTS IN CAPITAL CASES

IN A CAPITAL CASE, THE PROBATION OFFICER SHALL NEITHER SOLICIT NOR INCLUDE THE VICTIM'S VIEWS REGARDING THE SENTENCE, IN THE PRE-SENTENCE REPORT. THE PROBATION OFFICER SHALL EXPLAIN THAT THE COURT WILL CONSIDER THE VICTIM'S VIEWS REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS, FOR THE PURPOSE OF EVALUATING MITIGATING CIRCUMSTANCES, BUT THAT THE COURT BY LAW CANNOT CONSIDER THE VICTIM'S VIEWS WITH RESPECT TO THE SENTENCE IN A CAPITAL CASE.

HOWEVER, IF NON-CAPITAL COUNTS ARE INCLUDED IN THE CAPITAL CASE THAT IS THE BASIS FOR THE PRE-SENTENCE REPORT, THE PROBATION OFFICER MAY FURTHER EXPLAIN TO THE VICTIM THAT

THE VICTIM'S RIGHT TO PROVIDE ADDITIONAL INPUT REGARDING *THE DEFENDANT, THE SENTENCE AND THE NEED FOR RESTITUTION*, CAN BE HEARD AND CONSIDERED BY THE COURT AFTER THE SPECIAL VERDICT IS RENDERED, BUT THAT BECAUSE THE PRE-SENTENCE REPORT IS FILED WITH THE COURT PRIOR TO THE SPECIAL VERDICT, THE VICTIM'S VIEWS REGARDING NON-CAPITAL COUNTS (EXCEPT AS RELATED TO THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS) WILL NOT BE INCLUDED IN THE REPORT.

~~10.~~11. Victim Notices Regarding Probation Modifications, Revocation Dispositions and Terminations, and Discharges

The court shall provide to those victims who have requested notice of 1)probation or intensive probation revocation disposition proceedings; 2)any request to the Court to terminate probation or intensive probation; 3)any request to the Court to modify the conditions of probation or intensive probation that affect restitution or incarceration status or that substantially affect the probationer's contact with the

victim or the victim's safety. The court shall provide victims who appear at probation hearings an opportunity to be heard. If the victim does not appear, the court may proceed with the matter.

Each court in conjunction with the probation office or other agency providing notice shall develop a system by which victims who have requested notice receive the requested notice in a timely fashion

~~11.~~12. Minimize Contact Between Victim and Defendant

The court shall work closely with law enforcement officials, prosecutors, and defense attorneys to assist with separation of defendant(s) and defendant's family and victims and victim's family or representative. Before any court proceedings, the court and court staff shall, to the extent possible, maintain separate waiting areas for the victims and victim's family or representative and the defendant(s) and defendant's family. Court personnel shall not show particular deference to any of the parties.

When new court facilities are constructed or renovated, provisions shall be made for separation of the victim and victim's family from the defendant and the defendant's family.

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Each court shall develop a plan to minimize contact between the victims and victim's family or representative and defendant(s) and defendant's family.

~~12.~~13. Victim's right to privacy

A victim shall not be compelled to testify regarding the victim's addresses, telephone numbers, place of employment, or other locating information absent an order by the court to reveal such information based upon a finding of a compelling need for the information.

DATED this 14th day of March, ~~1994.~~, 2001

ARIZONA SUPREME COURT
(SIGNATURE ON ORIGINAL)
STANLEY G. FELDMAN, CHIEF JUSTICE

10. The Use of Mitigation Specialists and Standards for Mitigation Specialists

On March 28, the Commission approved an amendment to Rule 15 to provide for the appointment of investigators and expert witnesses for indigent defendants. The Commission envisions that this rule will be used by capital defendants in particular to obtain a mitigation specialist at county expense in all capital cases at the beginning of the case. The text of the rule, as approved by the Commission, reads as follows:

Rule 15.9 APPOINTMENT OF INVESTIGATORS AND EXPERT WITNESS FOR INDIGENT DEFENDANTS

A. AN INDIGENT DEFENDANT MAY APPLY FOR THE ASSISTANCE OF AN INVESTIGATOR, EXPERT WITNESS, OR MITIGATION SPECIALIST TO BE PAID AT COUNTY EXPENSE IF THE DEFENDANT CAN SHOW THAT SUCH ASSISTANCE IS REASONABLY NECESSARY TO ADEQUATELY PRESENT A DEFENSE AT TRIAL OR SENTENCING.

B. AN APPLICATION FOR THE APPOINTMENT OF INVESTIGATOR OR EXPERT WITNESSES PURSUANT TO THIS RULE SHALL NOT BE MADE EX PARTE.

C. AS USED IN THE RULE, A “MITIGATION SPECIALIST” IS A PERSON QUALIFIED BY KNOWLEDGE, SKILL, EXPERIENCE, OR OTHER

TRAINING AS A MENTAL HEALTH OR SOCIOLOGY PROFESSIONAL TO INVESTIGATE, EVALUATE, AND PRESENT PSYCHO-SOCIAL AND OTHER MITIGATING EVIDENCE.

11. Prolonged Time Intervals in Direct Appeal Proceedings

First, the Commission recommends an amendment to Ariz. R. Crim. P. 31.9 such that in capital cases the clerk of the court will be required to notify all court reporters within ten days of the filing of the notice of appeal that the court reporters are required to compile all transcripts in the capital case and to submit those transcripts to the clerk of the superior court. The rule would read:

Rule 31.9. Transmission of the record

a. Time for Transmission. Within 45 days after the filing of the notice of appeal, the clerk of the superior court shall transmit to the appellate court a copy of the pleadings, documents, and minute entries, and the original paper and photographic exhibits of a manageable size filed with the clerk of the

Rule 31.9 (continued)

superior court. WITHIN 10 DAYS AFTER THE FILING OF THE NOTICE OF APPEAL IN ANY CASE IN WHICH CAPITAL PUNISHMENT HAS BEEN ADJUDGED, THE CLERK OF THE SUPERIOR COURT SHALL NOTIFY ALL COURT REPORTERS WHO REPORTED ANY PORTION OF THE RECORD THAT THE REPORTERS ARE REQUIRED TO TRANSMIT THEIR PORTION OF THE RECORD TO THE CLERK OF SUPREME COURT.

b. Duty to Certify and Transmit the Record. After certifying that it is true, correct, and complete as ordered, the clerk of the trial court and the court reporter or reporters shall transmit to the clerk of the Appellate Court the portions of the record on appeal for which they are responsible. Each shall number the items comprising his or her portion of the record and shall transmit with that portion a list of the items so numbered.

c. Extension and Reduction of Time for Transmission of the Record. The Appellate Court, on a showing of good cause, may grant one extension of the time for transmitting the record which shall not exceed 20 days or it may require the record to be transmitted at any time within the prescribed period. A copy of any order issued under this section shall be sent to the parties, the clerk of the trial court, and to the appropriate court reporter or reporters.

d. Transmission of Other Exhibits. The court, or any party upon motion made to the appellate court, may request the transmission of exhibits not automatically transmitted under Rule 31.9(a) when such are necessary to the determination of the appeal.

Second, as best practice advice, the Commission recommends that trial judges order the transcription of all trial proceedings in every first degree murder case at the time a guilty verdict is returned, and that court clerks in superior court enter a code on all criminal calendars that clearly identifies all first degree murder cases for the use of reporters and court clerks.

12. The Prolonged Time Intervals in Post-Conviction Relief Proceedings

First, the Commission recommends that a repository be created in each county for all trial and appellate defense files so that PCR counsel may find them all in one location. The repository must be controlled by the defense team, and strict confidentiality must be maintained. Second, the Commission strongly recommended that Senate Bill 1486 be enacted so that post conviction relief counsel may be appointed as soon as possible to represent capital defendants in post conviction relief proceedings.

13. Audio or Video Recording of Interrogations

On March 28, 2001, the Commission recommended that the Attorney General develop a protocol for all law enforcement agencies in Arizona which recommends the recording by law enforcement of all advice of rights, waiver of rights, and questioning of suspects in criminal cases when feasible to do so.

14. Proposed Reforms on Appellate Extensions of Time; Ariz. R. Crim. P. 31 and 32.

On March 28 and May 14, 2001, the Commission deliberated on the issue of appellate extensions of time and the victim's right to be heard on such matters. The Commission unanimously approved the following proposed Rules 31.27 and 32.10:

> 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.

15. Minimum Age for Capital Punishment

On May 15, 2001, the Commission recommended that Arizona not apply capital punishment to defendants who are under the age of 18 at the time of the crime. The vote was preceded by considerable debate and the recommendation was approved on a 15 to 8 vote.

E. The Attorney General's Capital Case Commission

Janet Napolitano, Chair
Arizona Attorney General

Janet Napolitano began serving a four year term as Arizona Attorney General in January 1999. During her term she has concentrated on issues that make meaningful differences in the lives of Arizonans. She established the Child and Family Protection Division to better serve children who fall victim to abuse and neglect. The Elder Affairs Unit has combated fraud schemes aimed at seniors through litigation and public awareness. The new Computer Crimes Unit has trained law enforcement in the identification and investigation of cybercrimes and has successfully prosecuted some of the first cybercrime cases in Arizona. One of Ms .Napolitano's major achievements was the drafting and passage of the Computer Crimes Act of 2000, which puts Arizona in the forefront of the battle against cybercrime. Ms. Napolitano brings to the position more than four years experience as the United States Attorney for Arizona. During her tenure as a federal prosecutor from 1993-1997, she oversaw the prosecution of more than six thousand cases. Before being appointed U. S. Attorney in 1993, Ms. Napolitano was a partner in the law firm of Lewis and Roca. Early in her career in 1983, she served as a law clerk for the Honorable Mary Schroeder on the U. S. Court of Appeals for the Ninth Circuit.

Pre-Trial Issues Subcommittee Members

Thomas LeClaire, Chair
Snell & Wilmer LLP

In June 2000, Tom LeClaire joined the Indian Law Practice Group of Snell & Wilmer, specializing in economic development in Indian country. In 1996, he was appointed by Attorney General Janet Reno as the Director of the Office of Tribal Justice to serve as her senior advisor for Indian affairs, to act as the Department of Justice's liaison to the 558 federally recognized tribes and to coordinate Indian policy within the Department of Justice and with other agencies. As Assistant United States Attorney for more than ten of his nineteen years of law practice, he prosecuted violent crimes and corruption matters affecting Indian country. Mr. LeClaire testified frequently before the United States Senate regarding the Department of Justice's Indian policies, is a frequent lecturer on Indian and criminal law issues, was an adjunct professor of Criminal Law and Procedure at American University and served as a trial techniques instructor at the Attorney General's Advocacy Institute. He also served as the Chief Defense Counsel for the United States Navy in Europe.

Paul Ahler
Maricopa County Attorney's Office

Paul Ahler was appointed Chief Deputy of the Maricopa County Attorney's Office in 1993. He is responsible for reviewing all first-degree murder cases that have been staffed by the Office's Capital Review Committee, and for supervising the Division Chief's staff and special assistants on the County Attorney's staff. Mr. Ahler chairs the Attorney Hiring Board and the Incident Review Board. Prior to serving as Chief Deputy, he served the Criminal Trial Division, Trial Bureau D, the Homicide Bureau, Division Chief for the Criminal Trial Division, and Division Chief at the Southeast Facility of the Maricopa County Attorney's Office. Mr. Ahler was an Assistant City of Phoenix Prosecutor for more than four years, assigned as a trial attorney, training attorney and Team Leader.

James Bush
Fennemore Craig

(Chair, Governor's Mental Health Task Force)

James Bush is a private practice attorney with extensive experience in legislative and governmental affairs, including the areas of financial institutions, taxation, mining, water, health care, franchising, petroleum and environmental matters. He was the principal lobbyist behind the adoption of the Arizona Interstate Bank and Saving and Loan Association Act and the Arizona Credit Union Conversion Act. He was an active participant in drafting the Arizona Groundwater Management Act; served on the Governor's 1972 and 1973 Task Forces on Education; and the Governor's 1986 Task Force on Water Quality. Mr. Bush has also served in the following positions: president of the Arizona Chamber of Commerce, vice chairman of the Indian Reserved Water Rights Committee of the Western Regional Council, chairman of the Governmental Relations Committee of the Arizona Mining Association and president of the National Conference of Commissioners on Uniform State Laws.

Jose Cárdenas
Lewis and Roca LLP

Jose Cárdenas is the Managing Partner at the law firm of Lewis and Roca, primarily practicing in the areas of commercial and civil litigation. He has been involved in death penalty litigation since joining the firm in 1978. Mr. Cárdenas is active in the community and in the Bar Association. Among other things, he is the current president of the Arizona-Mexico Commission, and a member of the American Law Institute.

Harold Higgins
Pima County Assistant Public Defender

Harold Higgins has served as the Assistant Pima County Public Defender since 1995. He was a Prosecutor and Chief of the Civil Division in the Pima County Attorney's Office for eleven years before entering private practice in 1984. In 1987, Mr. Higgins became the Director of the Pima County Public Defender's Office, a position he held for two years before returning to private practice.

Cindy Jorgenson
Pima County Superior Court Judge

Cindy Jorgenson was appointed Pima County Superior Court Judge in 1996. She was assigned to the Criminal Bench from April 1996 to February 1998, and has served as Associate Presiding Judge of the Domestic Bench since then. From 1986 to 1996, Judge Jorgenson served as an Assistant U.S. Attorney where she prosecuted federal offices, defended medical malpractice cases, supervised the forfeiture unit, and briefed and argued criminal and civil appeals before the Ninth Circuit. From 1977 to 1986, Judge Jorgenson was a Deputy Pima County Attorney, starting in the Criminal Division, and later supervising the Sex Crimes Unit and the Felony Trial Team.

John Loredo
Arizona House of Representatives

John Loredo was first elected in 1997 and reelected in 1999 to the Arizona State House of Representatives. He is now serving in House Leadership as the Democratic Whip for the 44th Legislative Session. His standing committee memberships include Judiciary, and Health and Human Services. Representative Loredo became involved in politics while attending Phoenix College. He was elected President of M.E.Ch.A. (Movimento Estudiant Chicano de Aztlan), and was the first President and Founding member of LULUC Young Adult Council (League of United Latin American Citizens). Representative Loredo worked with Cesar Chavez organizing marches, rallies and boycotts. And, his first political campaign was the "NO on 106 (English only) committee.

Patricia Orozco
Yuma County Attorney

In 1999 Patricia Orozco was appointed Yuma County Attorney, the first Hispanic and first woman to hold the position in Arizona. The State Bar of Arizona, Committee on Minorities and Women in the Law awarded her for outstanding achievement advancing equal opportunities in the legal profession. Prior to her appointment, Ms. Orozco was in private practice in Arizona for eight years. She was named Outstanding Young Lawyer by the Arizona Bar Association Young Lawyers Division, and in 1994, she opened her own practice handling family law, juvenile dependency and delinquency, bankruptcy and landlord/tenant matters. Ms. Orozco also served as Judge Pro Tem for the Cocopah Tribal Court for five years.

Lee Stein
Fennemore Craig

Lee Stein practices in the areas of criminal law, governmental investigations and compliance planning. He also represents business entities in criminal investigations and prosecutions. Mr. Stein has significant experience in the prosecution of criminal fraud, public corruption, and environmental cases as well as professional malpractice, antitrust, securities fraud, licensing and appellate law matters.

George Weisz
Executive Assistant to the Governor

George Weisz has served as an Executive Assistant to Governor Jane Dee Hull since September 1997, and as the Governor's policy advisor on criminal justice and law enforcement. He is also the Governor's liaison with the Department of Public Safety, Department of Corrections, Department of Juvenile Corrections, State Liquor Department, the Arizona Lottery, and a number of commissions and legislative committees. Mr. Weisz served for many years as a Special Agent for the Attorney General's Office where he spearheaded investigations into organized crime, corruption, and financial fraud. He also served in the Arizona House of Representatives. Mr. Weisz is a member of the Arizona Juvenile Justice Commission and serves on the Board of Directors of the Arizona Voice for Crime Victims and the Anti-defamation League.

Trial Issues Subcommittee Members

David R. Cole, Chair
Maricopa County Superior Court Judge

David R. Cole, Judge of the Superior Court of Arizona, Maricopa County, currently presides over a criminal calendar, as well as the Maricopa County Superior Court's special "DUI Court." He previously presided over criminal, civil, domestic relations, and special assignment calendars. Before his 1989 appointment to the bench, Judge Cole served as Clerk of the Arizona Supreme Court, Assistant Arizona Attorney General, Deputy County Attorney for Pima and Maricopa Counties, and Associate Professor of Law at Pepperdine University. In the early 1990s, Judge Cole served as an editor for the Capital Cases Bench Book, published by the National Judicial College. He is a former certified specialist in criminal law, and is licensed to practice law in all Arizona courts, the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. District Court, District of Arizona. Judge Cole is a frequent presenter for judicial and legal education programs. In 1995, the Maricopa County Bar Association presented Judge Cole with the Hon. Henry S. Stevens Award for "Outstanding Service to the Legal Profession."

Steven Conn
Mohave County Superior Court Judge

Seven Conn has served as a judge of the Mohave County Superior Court Division 3 since 1985, and is assigned 44% of all felony criminal cases in Mohave. Judge Conn has presided over 267 felony jury trials, of which 18 were first degree murder cases. From 1977 to 1985, Judge Conn was a prosecuting attorney with the Mohave County Attorney's Office and served as Chief Deputy County Attorney for the last four of those years. As a prosecuting attorney, he tried 88 felony jury trials, of which 3 were first degree murder cases.

Jaime Gutierrez
Former Arizona State Senator

Jaime Gutierrez currently serves as Assistant Vice President for Community Relations at the University of Arizona. Prior to this latest appointment, he served as Special Assistant to the President and served on the President's Cabinet and assisted the President in a variety of administrative functions, including legislative lobbying. Mr. Gutierrez served as an Arizona State Senator for 14 years and was elected to several leadership positions including Minority Whip and Assistant Minority Leader. He served on a number of interim legislative committees dealing with juvenile delinquency and dependency matters and developed a reputation as an advocate for children's issues. During his final two years in the Legislature, Mr. Gutierrez served as chairman of the Senate Appropriations Committee, as well as chair of the Joint Legislative Budge Committee and Senate Ethics Committee. Prior to joining the legislature, he worked for over seven years at the Pima County Juvenile Court Center, starting as a juvenile probation officer in 1971 and leaving in 1978 as Deputy Director of Court Services.

Charles "Chick" Hastings
Yavapai County Attorney (former)

Chick Hastings served as Yavapai County Attorney from 1981 through 2000. He is the current Chairman of the Arizona Prosecuting Attorney's Advisory Council and was appointed six times to the Arizona Criminal Justice Commission by the State Legislature and the Governor, where he served as past Vice Chairman and Chairman. Mr. Hastings served as Deputy District Attorney for Monterey County, California from 1972 to

1975. He was in private practice in Prescott, Arizona for five years, before becoming the Prescott City Prosecutor.

Marilyn Jarrett
Arizona House of Representatives

Marilyn Jarrett, an Arizona native, was elected to the House of Representatives in 1994 and reelected in 1996 and 1998. She serves on the following committees: Human Services; Ways and Means; Rules; Ethics, Chairman; and Judiciary, Chairman. Bills she has sponsored include regulation of sexually oriented businesses; establishing the auto theft authority; requiring parental consent of a minor before abortions; banning partial birth abortions; resolutions to the federal government to bring vehicles into compliance with Arizona clean air laws; requiring government to comply with clean air regulations; providing funding for incentives; and lowering vehicle license tax. Ms. Jarrett is a retired business owner and owned an orthodontics lab.

Christopher Johns
Maricopa County Deputy Public Defender – Appeals Division

Christopher Johns joined the Maricopa County Public Defender's Office in 1988 as a trial attorney, then served as the Training Director from 1990 until 1996. He presently serves in the Office's Appellate Division. Mr. Johns was an adjunct faculty member for the ASU Justice Studies Department, the Institute of Criminal Advocacy at San Diego Western Law School, the National Institute of Trial Advocacy's Southern California Regional training at Loyola Law School, and the Arizona State Bar's College of Trial Advocacy. He also served on the State Bar's Criminal Rules Committee for several years and was the recipient of the Bar's 1996 Award of Special Merit.

Michael Kimerer
Kimerer & LaVelle

Michael Kimerer is a leading Arizona criminal defense attorney. He is the managing partner of Kimerer & LaVelle, a law firm specializing in criminal and civil litigation. Mr. Kimerer is listed in "Best Lawyers in America" and has served as past President of the Arizona State Bar, American Board of Criminal Lawyers for the United States and Arizona Attorneys for Criminal Justice. He has also served as a member of the Arizona Judicial Counsel from 1991 to 1997.

Gail Leland
Director, Homicide Survivors

Gail Leland is the director of the Homicide Survivors Victim Assistant Program in Tucson, Arizona, and president and founder of the National Coalition of Homicide Survivors, Inc. She founded the Tucson Chapter of Parents of Murdered Children, now called Homicide Survivors, after the disappearance and brutal murder of her 14 year old son, Richard, in 1981. Ms. Leland was one of the driving forces that led to the creation of the Crime Victim Compensation Program in Arizona and the Arizona Constitutional Amendment for Crime Victim Rights. She is a member of NOVA, serves on the editorial board of the National Center for Victims of Crime, the Arizona VOCA Advisory Board, Arizona's Voice for Crime Victims, Pima County Crime Victim Compensation Board, and Crime Victim Assistance League.

John Stookey
Osborn Maledon PA

John Stookey is a criminal defense attorney with the law firm of Osborn Maledon in Phoenix. He is also a Ph.D. in Political Science and taught at Arizona State University for 20 years before beginning the full-time practice of law. Mr. Stookey practices in the area of white collar crime as well as capital case defense. In 2001, he received a Presidential Commendation from the Arizona Attorneys for Criminal Justice for his work in studying the death penalty in Arizona. He is the author of two books and more than 30 articles on the American Legal System.

Rick A. Unklesbay
Pima County Attorney's Office

Rick Unklesbay is currently the Chief Criminal Deputy Attorney with the Pima County Attorney's Office. Since joining the County Attorney's Office in 1981, Mr. Unklesbay has tried about 200 felony jury cases including 80 homicides and about 12 death penalty cases.

Direct Appeal and PCR Subcommittee Members

Michael Ryan, Chair
Arizona Court of Appeals Judge

Michael Ryan was appointed to the Arizona Superior Court bench in June 1986. He previously served as a Deputy County Attorney with the Maricopa County Attorney's Office where he handled major felonies and was a trial group supervisor and sex crimes unit coordinator. Since his appointment to the Bench, Judge Ryan has handled both a civil and criminal calendar. He was appointed the associate presiding judge of the criminal department in 1994. Among his duties was chairmanship of the court's Probation-Court Liaison Committee. He was also a member of Maricopa County's Intermediate Sanctions Committee and the court's Judicial Executive Committee. In 1996, Judge Ryan was appointed to Division One of the Arizona Court of Appeals, and in 1997, he was appointed by the Chief Justice of the Arizona Supreme Court to chair the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases.

Paul Babbitt
Coconino County Board of Supervisors

Paul Babbitt, District 1 Supervisor, has served the Coconino County Board of Supervisors for twelve years, currently in the capacity of Chairman of the Board. His previous political experience includes four years as Mayor of Flagstaff and four years as a member of the Flagstaff City Council. He currently serves on the Arizona Conservation Corps Commission, Arizonans for Cultural Development, Civilian Aide to the Secretary of the Army, Director of Banc One Arizona, Flagstaff Symphony Association, the Governor's Grand Canyon Airport Commission, and the Lowell Observatory Advisory Committee.

Peg Bortner
Center for Urban Inquiry, College of Public Programs

Arizona State University

Dr. Peg Bortner is the Director of the Center for Urban Inquiry in the College of Public Programs at ASU. She has conducted extensive research in juvenile justice and criminal justice. She is the author of *Inside a Juvenile Court: The Tarnished Ideal of Individualized Justice; Youth and Justice: An Age of Crisis*; and *Youth in Prison: We the People of Unit Four*. Dr. Bortner holds a PhD in Sociology and has been a member at ASU for 20 years. She is the chair of the Data/Research Subcommittee of the Attorney General's Capital Case Commission.

Chris Cummiskey
Arizona State Senator

Chris Cummiskey is a member of the Arizona State Senate, currently serving as the Assistant Senate Floor Leader, previously serving as Assistant Senate Minority Leader. He was a member of the State House of Representative from 1991 to 1994 and has been a member of the State Senate since. Senator Cummiskey serves on the Finance, Judiciary, Rules and Joint Legislative Tax committees; and is a member of the Democratic Leadership Council National Advisory, the Udall Forum, the National Conference of State Legislatures, Valley Leadership Board of Directors, and Valley Citizen League.

Stanley G. Feldman
Arizona Supreme Court Justice

Stanley Feldman was appointed as Justice of the Arizona Supreme Court in 1982, and served as Chief Justice from 1992 to 1997. He serves on the Board of Directors for the Conference of Justices, and is a member of the Arizona Judges Association, Board of Editors of the State Constitutional Commentary, National Advisory Council of the American Committee for the Weizmann Institute of Science, and the Northern Advisory Board of the Arizona Cancer Center. Justice Feldman's previous associations include: Anti-Defamation League of Tucson and B'nai B'rith; Tucson Jewish Community council Board; Pima County Bar Association Board President; State Bar of Arizona Board of Governors President; American Board of Trial Advocates President; Supreme Court Committees on Rules and Civil Procedure and Uniform Instructions; and the Arizona Advisory Committee to the United States Commission on Civil Rights.

Charles Krull
Maricopa County Deputy Public Defender, Appeals Division

Charles Krull was in private practice for three years before joining the Maricopa County Public Defender's Office in 1975, where he served as a trial attorney for ten years. For the past 15 years, Mr. Krull has been a member of the appeals division with the primary responsibility of reviewing and assigning all post-conviction relief cases, and writing criminal appeals. He was co-chair of the 1992 Rule 32 committee and currently serves on the 1996 Rule 32 committee. Mr. Krull lectures on post-conviction relief issues each year at the Judicial College of Arizona (a new judge orientation for recently appointed/elected superior court judges), at in-house, local and state-wide CLE seminars, and acts as a post-conviction relief resource for public and private attorneys who have Rule 32 practices.

James Moeller
Former Arizona Supreme Court Justice

James Moeller was in private law practice from 1959 to 1977. He is a former Director of the Foundation for Blind Children and a founding director of the Arizona Society for the Prevention of Blindness. Judge Moeller was appointed to the Maricopa County Superior Court in 1977, and served as a judge of that Court until 1987, serving in criminal, civil, and special assignment and appellate assignments. In 1987 he was appointed to the Arizona Supreme Court where he served until retiring in 1998. From 1992 to 1996 he served as Vice Chief Justice of the Court.

Tom Smith
Arizona State Senate

Tom Smith has been a member of the Arizona State Legislature for eight years. A member of the House of Representatives from 1993 to 1998, he was elected to the State Senate in 1999. Since his election to the Senate, he has served as Chairman of the Rules Committee, Vice Chairman of the Judiciary Committee, member and Chairman of both Appropriations Subcommittee, and member of the Education Committee. Prior to joining the Legislature, Senator Smith was a teacher and school principal for 17 years.

Steven Twist
Viad Corp
(Founder, Arizona Voice for Crime Victims)

Steve Twist has served as Assistant General Counsel for Viad Corporation since February 1996. From 1978 to 1990, he served as the Chief Assistant Attorney General for the State of Arizona. He is the principal author of the Arizona Criminal Code and the author of the Arizona Constitution's Victims' Bill of Rights. Mr. Twist serves as Chief Counsel for the National Victims' Constitutional Amendment Network, and on the Board of Directors of the National Organization for Victim Assistance. He is a founder and Vice President of Arizona Voice for Crime Victims.

Lois Yankowski
Pima County Assistant Legal Defender

Lois Yankowski joined the Office of the Pima County Legal Defender in 1995, is now a senior counsel in the appellate division, and represents defendants on appeal, including death penalty cases. She received her JD from Georgetown University Law School in 1975 and was admitted to the D.C. Bar that year. She was a Prettyman Fellow at Georgetown from 1975 to 1977 and received her LL.M in 1979. From 1980 to 1988, Ms. Yankowski was a professor of law at Antioch University Law School. For several years prior to joining the Pima County Legal Defender, Ms. Yankowski practiced private criminal law in Tucson.

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