Defending Liberty
Pursuing Justice

EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Arizona Death Penalty Assessment Report

An Analysis of Arizona's Death Penalty Laws, Procedures, and Practices

"A system that takes life must first give justice."
John J. Curtin, Jr., Former ABA President

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Lastly, in this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Arizona death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

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EXECUTIVE SUMMARY

INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles in all cases. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine a number of U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Arizona assessment, the Project has released state assessments of Alabama and Georgia and is conducting state assessments and releasing reports in, at a minimum, Florida, Indiana, Ohio, Pennsylvania, Tennessee, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

These assessments examine the above-mentioned jurisdictions' death penalty systems, using as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus, clemency proceedings, jury instructions, an independent judiciary, the treatment of racial

and ethnic minorities, and mental retardation and mental illness. Additionally, the Project includes for review five new areas associated with the administration of the death penalty, including the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each state's assessment has been or is being conducted by a state-based assessment team, which is comprised of or has access to current or former judges, state legislators, current or former prosecutors and defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings provide information about how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law of the land in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the death penalty in Arizona. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Arizona Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team believes that the body of recommendations as a whole would, if implemented, significantly improve Arizona's capital punishment system.

I. HIGHLIGHTS OF THE REPORT

A. Overview

To assess fairness and accuracy in Arizona's death penalty system, the Arizona Death Penalty Assessment Team researched twelve issues: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. The Arizona Death Penalty Assessment Report summarizes the research on each issue and analyzes the State's level of compliance with the relevant ABA Recommendations.

B. Areas Needing Attention

The assessment findings indicate a need to reform a number of areas within Arizona's death penalty system to ensure that it provides a fair and accurate system for every person who faces the death penalty. While the following issues are some of the most serious problems facing Arizona's death penalty system, the danger we face, at its core, is cumulative. The capital system has many interconnected moving parts, any one (or more) of which is capable of failing in any given case. Furthermore, many of the issues and recommendations discussed in this assessment are applicable to the criminal justice system as a whole and are not limited to the capital system. With that in mind, the Arizona Death Penalty Assessment Team finds the following problem areas most in need of reform:

- ***Decentralized Defense Services*** – Although the State of Arizona provides indigent defendants with counsel at trial, on direct appeal, and in state post-conviction proceedings, Arizona's indigent defense services is a mixed and uneven system that lacks level oversight and standards and does not provide uniform, quality representation to indigent defendants in all capital proceedings. With the exception of the newly-established state capital post-conviction public defender office, the State has failed to adopt a statewide public defender office, mandate the establishment of public defender offices providing coverage within each county, adequately fund indigent defense services in each county, or implement close oversight of indigent legal services at the county level.
- ***Insufficiently Compensated Appointed Counsel*** – The compensation paid to appointed attorneys who represent capital defendants is insufficient for counsel to meet their obligations under the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*Guidelines*), despite the fact that the Arizona Rules of Criminal Procedure require defense counsel to be familiar with the *Guidelines* and that the Arizona Supreme Court may mandate compliance with portions of the *Guidelines*.
- ***Lack of a Mechanism to Ensure Proportionality*** – While proportionality review is the single best method of protecting against arbitrariness in capital sentencing, the Arizona Supreme Court is not required to undertake a proportionality review

in capital cases. Since 1992, the Arizona Supreme Court has rejected any arguments that the absence of proportionality review denies capital defendants equal protection and due process of law, or that it is tantamount to cruel and unusual punishment.

- ***Lack of Effective Limitations on the "Especially Cruel, Heinous, or Depraved" Aggravating Circumstance*** – In 2002, the Arizona Capital Case Commission expressed concerns regarding the ambiguity of the (F)(6) statutory aggravating circumstance (a murder committed in an "especially cruel, heinous or depraved manner"), but no changes have yet been made. Currently, the courts, in determining the constitutionality of jury instructions used to explain this aggravating circumstance, require the instructions to contain "essential narrowing factors" and provide "specificity and direction" to the jury, but do not mandate that a uniform and specific definition be used. Given the inherent vagueness of this aggravating circumstance, it is of utmost importance that the State of Arizona adopt a uniform and specific definition of this aggravating circumstance when instructing jurors during the aggravation phase of a capital trial. We note that while the State Bar of Arizona Criminal Jury Instruction Committee has discussed a proposed jury instruction defining this factor, it has not yet been submitted to the State Bar Board of Governors for approval.

C. Arizona Death Penalty Assessment Team Recommendations

In addition to endorsing the recommendations found in each section of this Report, the Arizona Death Penalty Assessment Team makes the following recommendations:

(1) The State of Arizona should create an adequately funded statewide public defender office for capital cases. As with the Arizona Capital Case Commission, the Arizona Death Penalty Assessment Team is most concerned with the availability and quality of trial counsel.

(2) In order to protect against arbitrariness in capital sentencing, the State of Arizona should ensure proportionality in capital cases. Because proportionality is better achieved at the front end rather than the back end, a capital case review committee housed in the Arizona Prosecuting Attorneys' Advisory Council should exercise final discretion as to whether the death penalty may be sought. The County Attorney may choose not to seek death, but if s/he desires that capital charges be filed, a capital case review committee must make the final decision as to the appropriateness of capital charges. Alternatively, the Arizona Supreme Court should conduct a comparative proportionality review during the direct appeal stage of capital cases in which it compares the death sentence under review with sentences imposed on similarly situated defendants.

(3) Pursuant to the Arizona Capital Case Commission recommendation about the importance of continued data collection, the State of Arizona should establish and fund a clearinghouse to collect data on first-degree murder cases. At a minimum, this clearinghouse should collect data on each county's provisions of defense services in capital cases. Relevant information on all death-eligible cases should be made available to the Arizona Supreme Court for use in any proportionality review.

(4) To encourage transparency and the even application of the death penalty, the State of Arizona should require that all prosecuting agencies involved in capital case prosecutions have written policies for identifying cases in which to seek the death penalty. As recommended by the Arizona Capital Case Commission, these policies should require the solicitation or acceptance of defense input before deciding to seek the death penalty.

(5) The State of Arizona should provide funding for the completion and public release of a study of the administration of its death penalty system to determine the existence or non-existence of unacceptable disparities, socio-economic, racial, geographic, or otherwise.

(6) The State of Arizona should conduct a study of the Maricopa County's Public Defender's Office, Legal Defender's Office, Legal Advocate's Office, and Office of Contract Counsel to determine if any discrepancies in average expenditures on capital cases are problematic and signal differences in the quality of representation.

(7) Crime labs and forensic investigations should be adequately funded so that biological evidence may be tested quickly and accurate determinations as to likely guilt or innocence may be made as early in the investigation process as possible.

Despite the best efforts of a multitude of principled and thoughtful actors in the Arizona criminal justice system, our research establishes that at this point in time, the State of Arizona cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Because of that, the members of the Arizona Death Penalty Assessment Team, strongly recommend that the State address the issues identified throughout this Report, and in particular the Executive Summary.

II. SUMMARY OF THE REPORT

Chapter One: An Overview of Arizona's Death Penalty System

In this Chapter, we examined the demographics of Arizona's death row, the statutory evolution of Arizona's death penalty scheme, and the progression of an ordinary death penalty case through Arizona's system from arrest to execution.

Chapter Two: Collection, Preservation and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the State's laws and on its law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. In this Chapter, we examined Arizona's laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and we assessed whether Arizona complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Arizona's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the chart below.[1]

Collection, Preservation, and Testing of DNA and Other Types of Evidence					
Recommendation / ***Compliance***	***In Compliance***	***Partially in Compliance***[2]	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***[3]	***Not Applicable***
Recommendation #1: Preserve all biological evidence for as long as the defendant remains incarcerated.		X			
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.				X	
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure preparedness and accountability.		X			
Recommendation #5: Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
Recommendation #6: Provide adequate funding to ensure the proper preservation and testing of biological evidence.				X	

While the State of Arizona has "a duty, in the interest of justice, to act in a timely manner to ensure the preservation of evidence it is aware of[,] where that evidence is obviously material and reasonably within its grasp," there is no statewide requirement that all biological evidence be preserved for as long as the defendant remains incarcerated. Prosecutors and law enforcement agencies are allowed– and in some circumstances, compelled– to dispose of items that were seized or otherwise obtained for use in a criminal prosecution once the legal proceeding is no longer "subject to modification." While the statute broadly defines "subject to modification" to include all judicial outlets for relief, there is no requirement that biological evidence be preserved through the

[1] Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the Analysis section of each chapter.

[2] Given that a majority of the ABA's recommendations are composed of several parts, we used the term "partially in compliance" to refer to instances in which the State of Arizona meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

[3] In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Arizona death penalty. The Project would welcome notification of any omissions in this report so that they may be corrected in any future reprints.

clemency process and up until execution. Despite this, the Arizona Capital Case Commission reported in December 2002 that Arizona law enforcement officials do retain evidence in all capital cases indefinitely.

Notably, in capital cases, the clerk of the Superior Court is required to permanently retain the entire case file, which includes all original documents and evidence filed with the court. While the clerk is not mandated to retain all biological evidence, s/he is required to retain all biological evidence filed with the court for as long as the defendant remains incarcerated. Lastly, if the defendant files a petition for post-conviction DNA testing, the State must preserve throughout the entire proceeding all evidence in its possession or control that could be subject to DNA testing and, in addition, the court may order the preservation of some available biological evidence to replicate post-conviction DNA testing.

To eliminate some of the identified problems in the collection and preservation of biological evidence, the State of Arizona should require that law enforcement agencies establish and enforce written procedures and policies governing the preservation of biological evidence, as well as require that evidence be preserved for as long as the defendant/inmate remains incarcerated.

To its credit, the State of Arizona has enacted a broad post-conviction DNA testing statute, which has likely reduced the risk of executing innocent persons.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Incorrect identifications and confessions can mislead police, prosecutors, defense attorneys, judges and juries into focusing the case on one person, too often resulting in an erroneous conviction. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this Chapter, we reviewed Arizona's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies on law enforcement identifications and interrogations.

A summary of Arizona's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the following chart.

Law Enforcement Identifications and Interrogations					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar Associations' Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.		X			
Recommendation #3: Law enforcement agencies and prosecutors offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
Recommendation #4: Videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.		X			
Recommendation #5: Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.				X	
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.	X				
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.		X			

We commend the State of Arizona for taking certain measures which likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Arizona are required to complete a basic training course that includes instruction on interviewing and questioning techniques;
- At least twenty-eight police departments in Arizona regularly record the entirety of custodial interrogations; and

- Arizona courts have created an instruction that provides the jury with factors to consider when determining the reliability of eyewitness identifications.

Despite these measures, the State of Arizona does not require law enforcement agencies to adopt procedures on identifications and interrogations. The Commission on Law Enforcement Accreditation Standards for Law Enforcement Agencies, Inc. (CALEA), however, provides a framework for law enforcement agencies to adopt procedures on identifications and interrogations. A number of law enforcement agencies in Arizona have obtained accreditation under CALEA, which requires agencies to establish written directives on "conducting follow-up investigations," including identifying suspects. CALEA does not require these agencies to adopt specific procedures on conducting lineups and photospreads, however. It is possible that in complying with CALEA, an agency could create specific procedures for lineups and photospreads that are in compliance with the ABA's Recommendations, but we were unable to obtain the written directives adopted by law enforcement agencies statewide to assess whether they comply with the Recommendations. In the four law enforcement manuals we did obtain, none of the law enforcement agencies appear to mandate compliance with the ABA Recommendations, despite evidence that some or all of these agencies comply in practice.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Arizona should require all law enforcement agencies to adopt procedures on lineups and photospreads that are consistent with the ABA's Recommendations.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts' increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be understated. In this Chapter, we examined these issues as they pertain to Arizona and assessed whether Arizona's laws, procedures, and practices comply with the ABA's policies on crime laboratories and medical examiner offices.

A summary of Arizona's overall compliance with the ABA's policies on crime laboratories and medical examiner offices is illustrated in the following chart

Crime Laboratories and Medical Examiner Offices					
Recommendation / *Compliance*	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.		X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.				X	

Arizona does not require crime laboratories or medical examiner offices to be accredited, but all crime laboratories in the Department of Public Safety Scientific Criminal Analysis Bureau (Bureau), in addition to the Mesa Police Department Crime Laboratory, Phoenix Police Department Laboratory Services Bureau, Scottsdale Police Department Crime Laboratory, and the Tucson City-County Crime Laboratory, are accredited and are required by the accrediting body to adopt written standards and procedures on handling, preserving, and testing forensic evidence. Neither the accrediting body nor Arizona statutory law, however, require Bureau crime laboratories to publish these standards and procedures, nor must they be published or made available for inspection before becoming effective. Therefore, the contents of the Bureau standards and procedures, along with those of other crime laboratories around the State, are unknown.

In addition to the mystery surrounding the Bureau's standards and procedures, the adequacy of the funding provided to Bureau crime laboratories also is in question. According to the staff of the Arizona legislature's Joint Legislative Budget Committee, the Bureau's staffing increases have not kept pace with this increasing caseload. As of May 2004, the Bureau had 60,000 samples waiting to be analyzed. It is estimated that between two and ten years may be needed for crime-lab technicians to process the backlog and keep pace with the new samples that arrive for processing.

The Bureau laboratories are not the only ones with backlog problems. For example, as of June 2004, the Tucson laboratory took 119 days to process evidence in its high-priority cases that include murders, sexual assaults, and cases going to trial. As the Tucson Police Department Crime Lab Superintendent explained, "We really aren't staffed right and don't have the resources available."

Lastly, not only does Arizona fail to require that county medical examiners be accredited, but the State, while generally requiring county medical examiners to be "licensed physician[s] in good standing certified in pathology and skilled in forensic pathology," allows each county board of supervisors to decide against appointing a county medical examiner and instead establish a list of licensed physicians available to perform a county medical examiner's duties. Unfortunately, should a county board of supervisors decide

against appointing a county medical examiner, the physicians appointed to the list are not required to be certified in pathology or skilled in forensic pathology.

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where the prosecutor has enormous discretion in deciding whether or not to seek the death penalty. In this Chapter, we examined Arizona's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism.

A summary of Arizona's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the chart below.

Prosecutorial Professionalism					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Each prosecutor's office should have written polices governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.				X	
Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.			X		
Recommendation #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.		X			
Recommendation #4: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.		X			
Recommendation #5: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.				X	

Prosecutorial Professionalism (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.	X				

The State of Arizona does not require county attorney's offices to establish policies on the exercise of prosecutorial discretion or on the evaluation of cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit. The State of Arizona, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The State of Arizona has entrusted the State Bar of Arizona and the Disciplinary Commission of the Arizona Supreme Court with investigating grievances and disciplining members of the State Bar of Arizona, including prosecutors.
- The Arizona Supreme Court has established the Arizona Rules of Professional Conduct, which addresses prosecutorial discretion in the context of the role and responsibilities of prosecutors.
- The State of Arizona has established the Arizona Prosecution Attorneys' Advisory Council to assist prosecuting attorneys throughout the State in a number of ways, including: preparing manuals of procedure; assisting in the preparation of trial briefs, forms, and instructions; conducting research and studies that would be of interest and value to all prosecuting attorneys and their staffs; providing training programs for prosecuting attorneys and other criminal justice personnel; maintaining liaison contact with study commissions and agencies of all branches of local, state, and federal government that will be of benefit to law enforcement and the fair administration of justice in the State; and establishing training standards for prosecuting attorneys and assisting in meeting those standards by promulgating rules and procedures relating to such standards.
- The Arizona Supreme Court has stated by rule and through case law that prosecutors are responsible for disclosing not only evidence of which they are aware, but also material evidence known to others acting on the State's behalf.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, as well as full and fair compensation to defense attorneys and resources for investigators and experts. Individual jurisdictions must address representation issues in a way that will ensure all capital defendants receive effective representation during all stages of their cases. In this

Chapter, we examined Arizona's laws, procedures, and practices relevant to defense services and assessed their compliance with the ABA's policies on defense services.

A summary of Arizona's overall compliance with the ABA's policies on defense services is illustrated in the chart below.

Defense Services					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Guideline 4.1 of the ABA *Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA *Guidelines*)—The Defense Team and Supporting Services		X			
Recommendation #2: Guideline 5.1 of the ABA *Guidelines*—Qualifications of Defense Counsel		X			
Recommendation #3: Guideline 3.1 of the ABA *Guidelines*—Designation of a Responsible Agency			X		
Recommendation #4: Guideline 9.1 of the ABA *Guidelines*—Funding and Compensation				X	
Recommendation #5: Guideline 8.1 of the ABA *Guidelines*—Training			X		

Arizona's indigent defense services is a mixed and uneven system that lacks level oversight and standards and that does not provide uniform, quality representation to indigent defendants in all capital proceedings across the State. The State's failure to adopt a statewide public defender office for anything other than state post-conviction proceedings, mandate the establishment of public defender offices providing coverage within each county, adequately fund indigent defense services in each county, or to implement close oversight of indigent legal services at the county level has resulted in the State being incapable of delivering quality counsel in all capital cases.

In addition, Arizona's indigent capital defense system falls short of complying with the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (*Guidelines*) for a number of reasons:

- The State of Arizona does not guarantee counsel in clemency proceedings. Indigent defendants charged with a capital felony for which the death penalty is being sought have a right to appointed counsel at trial, on direct appeal, in state post-conviction proceedings, and in federal habeas corpus. However, indigent death-sentenced inmates are not entitled to appointed counsel for clemency proceedings.
- The State of Arizona has failed to remove the judiciary from the process of appointing counsel.

- The State of Arizona does not require that indigent defendants charged with or convicted of a capital felony be appointed two attorneys at any stage of the proceedings other than at trial.
- Requests for experts are not *ex parte* unless "a proper showing is made concerning the need for confidentiality."
- Despite the fact that the Arizona Capital Case Commission unanimously recognized that "establishing a statewide public defender office for capital cases would be the best and most effective way to improve death penalty trials in Arizona," the State of Arizona still does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony pre-trial, at trial, on appeal, or in state post-conviction proceedings.
- The State of Arizona provides only one to two percent of the funding for the cost of capital representation, significantly underfunding these indigent defense services.

Chapter Seven: The Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion. One of the best ways to ensure that the direct appeal process works as it is intended is through meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. In this Chapter, we examined Arizona's laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with the ABA's policies on the direct appeal process.

A summary of Arizona's overall compliance with the ABA's policies on the direct appeal process is illustrated in the following chart.

The Direct Appeal Process					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.			X		

The Arizona Supreme Court is not required to undertake a proportionality review in capital cases. As late as 1991, the Court would determine whether a death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In 1992, however, the Arizona Supreme Court held that proportionality reviews were not mandated by statute or by the United States or Arizona Constitutions. Since then, the Court has rejected any arguments that the absence of proportionality review denies capital defendants equal protection and due process of law, or that it is tantamount to cruel and unusual punishment.

Today, Arizona has no codified procedures, nor any other binding authority, to help ensure proportionate death sentencing. To ensure that a sentence of death is not excessively severe or an abuse of discretion and that prosecutorial discretion to seek the death penalty is evenhandedly exercised across the State, Arizona should immediately implement meaningful proportionality review that includes a review of cases in which the death penalty was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. In this Chapter, we examined Arizona's laws, procedures, and practices relevant to state post-conviction proceedings and assessed their compliance with the ABA's policies on state post-conviction.

A summary of Arizona's overall compliance with the ABA's policies on state post-conviction proceedings is illustrated in the chart below.

State Post-Conviction Proceedings					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.				X	
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.				X	
Recommendation #3: Judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.				X	
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.			X		
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.			X		
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.			X		
Recommendation #7: The state should establish post-conviction defense organizations to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.		X			
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the ABA *Guidelines on the Appointment and Performance of Death Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.		X			

State Post-Conviction Proceedings (Con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.		X			
Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.		X			
Recommendation #11: State courts should apply the harmless error standard of *Chapman v. California*, requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.	X				
Recommendation #12: During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.					X

The State of Arizona has adopted some laws and procedures that facilitate the adequate development and judicial consideration of claims—for example, courts permit second and successive petitions under certain circumstances. Furthermore, we applaud the recent creation of a state capital post-conviction public defender office. Some laws and procedures do not facilitate the adequate development and judicial consideration of claims, however, such as:

- Post-conviction cases in Arizona usually are assigned to the original trial-level sentencing judge. Although the sentencing judge has knowledge of relevant facts and issues in the case, a potential for or the appearance of bias exists under this scenario, as post-conviction proceedings stem from a decision in which the same judge presided. A judge's ability to exercise independent judgment, therefore, may or may appear to be compromised, resulting in a petitioner not being afforded adequate judicial consideration of his/her claims; and
- Arizona law only applies the "knowing, understanding, and voluntary" standard to waivers of constitutional and state law claims that are of "sufficient constitutional magnitude," meaning that the review of potentially viable claims can be barred even without the petitioner's "knowing, understanding, and voluntary" waiver of those claims.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision making. In this Chapter, we reviewed Arizona's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Arizona Board of Executive Clemency's criteria for considering and deciding petitions and inmates' access to counsel, and assessed whether they comply with the ABA's policies on clemency.

A summary of Arizona's overall compliance with the ABA's policies on clemency is illustrated in the chart below.

Clemency					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.				X	
Recommendation #2: The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.				X	
Recommendation #3: Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction.				X	
Recommendation #4: Clemency decision makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about inmate's guilt.				X	
Recommendation #5: Clemency decision makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.				X	
Recommendation #6: Death row inmates should be represented by counsel and such counsel should have qualifications consistent with the ABA *Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases*.			X		
Clemency (Con't.)					

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation and access to investigative and expert resources and provided with sufficient time to develop claims and to rebut state's evidence.		X			
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.		X			
Recommendation #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.		X			
Recommendation #10: Clemency decision makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.		X			
Recommendation #11: Clemency determinations should be insulated from political considerations or impacts.				X	

The Arizona Board of Executive Clemency (the Board) is not required to conduct any specific type of review in considering petitions for commutations. No statutory restrictions exist regarding what the Board may consider in making its recommendation to the Governor and according to the current Board Chair, the Board will consider everything the applicant submits. Thus, while the Board clearly is not required to consider any of the factors included in Recommendations #2 through #5, it is unclear whether this information is being considered in practice.

In conducting commutation reviews, the Board will hold a one or two-part public hearing on the merits of an inmate's request for clemency. The Phase I hearing, which the Board may waive for death-row inmates, will be held without the inmate being present, although anyone can submit relevant written materials or testify orally. The Phase II hearing consists of, among other things, an interview of the applicant and a review of "all relevant information." Upon the conclusion of the Phase II hearing, the Board will render a "final decision" as to whether to recommend clemency to the Governor, but the power to grant or deny clemency lies with the Governor, who, in making this decision may grant or deny clemency for any reason s/he "deems proper." If the Governor grants clemency, s/he must publish the reasons for the clemency grant in a newspaper of general circulation and a copy of the Governor's rationale also must be filed with the Secretary of State. In addition, the Governor must provide the legislature with the details of each case in which clemency was granted at the start of each regular legislative session. There is no requirement that the Governor explain his/her reasoning for denying clemency.

Not only are the criteria considered by the Board and the Governor unknown, but other parts of the clemency decision-making process are problematic as well. For example:

- Once a recommendation is made by the Board, the Governor's process for granting or denying clemency appears to be shielded from public scrutiny, particularly in clemency denials.
- There is no requirement that the Board or the Governor (or his/her representative) meets with the petitioning inmate.

Given this, the State of Arizona should adopt more explicit factors to guide the consideration of clemency petitions and open the decision making process to ensure transparency.

Chapter Ten: Voir Dire and Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the "awesome responsibility" of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jurors about the applicable law and the extent of their responsibilities. In this Chapter, we reviewed Arizona's laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA's policies on capital jury instructions.

A summary of Arizona's overall compliance with the ABA's policies on capital jury instructions is illustrated in the chart below.

Capital Jury Instructions					
Recommendation / ***Compliance***	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Jurisdictions should work with certain specialists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.			X		
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.	X				
Recommendation #3: Trial courts should respond meaningfully to jurors' requests for clarification of instructions.				X	

Capital Jury Instructions (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state.			X		
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.			X		
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		

The U.S. Supreme Court's 2002 decision in *Ring v. Arizona* invalidated Arizona's capital sentencing scheme and required the State to use juries, instead of judges, in capital sentencing. Because Arizona did not use jury sentencing prior to the *Ring* decision, the State consequently did not have pattern jury instructions regarding capital sentencing. While the Criminal Jury Instruction Committee of the Arizona State Bar currently is working to draft pattern jury instructions for death penalty cases and expects to have instructions drafted and promulgated by October 2006, the content and future efficacy of these pattern jury instructions are unknown. In the meantime, judges have been largely on their own in deciding what jury instructions to give in capital cases. While there is case law on jury instructions that can help instruct individual judges as to the legality or illegality of individual instructions, Arizona case law does not provide an appropriate level of guidance.

Some additional problems include:

- As the Arizona Supreme Court's Committee on More Effective Use of Jurors noted in 1993, jurors too often have difficulty understanding jury instructions. The Committee went on to recognize the "failure of too many judges to fully and fairly respond to questions" from the jury and recommended that judges receive instructions on how best to respond to jury questions. Given the awesome responsibility of deciding between life and death that was given to Arizona juries in 2002, this has taken on an increased importance, yet it does not appear that Arizona has taken steps to provide judges any additional guidance;

- Arizona law provides three sentencing options for people convicted of a capital crime: death, imprisonment for life, and imprisonment for natural life. Currently, Arizona law does not require courts to instruct the jury on the definitions of "imprisonment for life" or "imprisonment for natural life." In order to enable capital jurors to make informed sentencing decisions and in light of the fact that capital jurors generally underestimate the total number of years defendants convicted of capital murder, but not sentenced to death, spend in prison, the State of Arizona should provide definitions of the various sentencing options.

Chapter Eleven: Judicial Independence

With increasing frequency, judicial elections, appointments, and confirmations are being influenced by consideration of judicial nominees or candidates' purported views of the death penalty and/or of judges' decisions in capital cases. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment. In this Chapter, we reviewed Arizona's laws, procedures, and practices on the judicial election/appointment and decision making processes and assessed whether they comply with the ABA's policies on judicial independence.

A summary of Arizona's overall compliance with the ABA's policies on judicial independence is illustrated in the chart below.

Judicial Independence					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.		X			
Recommendation #2: A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.				X	

Judicial Independence (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.				X	
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.				X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.				X	

The Arizona judicial selection process reflects a blend of two systems. On one hand, the Arizona Constitution requires all state appellate court judges and Superior Court judges for counties with a population of 250,000 or more (presently only Maricopa and Pima counties) to be appointed by the Governor on the basis of merit from a list of nominees compiled by a nominating commission. On the other hand, the State Constitution requires Superior Court judges from counties with a population of fewer than 250,000 to be elected in nonpartisan elections, unless voters select the merit selection system.

The State of Arizona has taken measures to promote judicial independence, for example:

- Arizona's predominant reliance on a merit-based judicial appointment system has insulated the judicial process from political pressures and campaign demands, and in turn, protected the independence of the judiciary;
- The State of Arizona has tried to limit the effects of politics in its judicial selection process by regulating the political composition of both the nominating commissions and the judicial nominees referred to the Governor for appointment; and

- The Arizona Commission on Judicial Conduct recently opened its disciplinary process, making complaints filed against judges public as of January 1, 2006.

Chapter Twelve: Racial and Ethnic Minorities

A pattern of racial discrimination persists today, in part because courts tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can infect the entire trial process with a racial impact. To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root out discriminatory practices. In this Chapter, we examined Arizona's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

A summary of Arizona's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the chart below.

Racial and Ethnic Minorities					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.		X			
Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.		X			
Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.		X			
Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.			X		

Racial and Ethnic Minorities (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a *prima facie* case is established, the state should have the burden of rebutting it by substantial evidence.			X		
Recommendation #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.		X			
Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.			X		
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.		X			
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.				X	
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.			X		

Whatever the cause, Arizona's death penalty system reflects racial disparities, particularly those associated with the race of the victim. For instance, the Arizona Capital Case Commission reported that from 1995 through 1999, the percentage of

indictments resulting in death sentences for cases in which both the defendant and the victim were white was *nearly eight times higher* than those cases in which both the defendant and the victim were minorities. During this same period, the percentage of indictments resulting in death sentences for cases consisting of a minority defendant and a white victim was *five times higher* than those cases consisting of a white defendant and a minority victim. According to the Commission's own data, prosecutors statewide also opted to seek the death penalty less frequently when the homicide victim was a minority, more frequently when the victim was white. Judges also opted to impose the death penalty less frequently when the homicide victim was a minority, more frequently when the homicide victim was white.

Furthermore, while the Arizona Capital Case Commission has the data necessary to conduct a more statistically sophisticated study of possible racial disparities in capital sentencing and the Commission recognized the need for additional study, no further studies have been released.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the U.S. Supreme Court held the execution of mentally retarded offenders to be unconstitutional. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to adopt its own rules for determining whether a capital defendant is mentally retarded. This discretion includes, but is not limited to, the ability to define mental retardation and the burden of proof for mental retardation claims. In this Chapter, we reviewed Arizona's laws, procedures, and practices pertaining to mental retardation and the death penalty and assessed their compliance with the ABA's policies on mental retardation and the death penalty.

A summary of Arizona's overall compliance with the ABA's policies on mental retardation and the death penalty is illustrated in the following chart.

Mental Retardation and Mental Illness					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.		X			

Mental Retardation and Mental Illness (Con't.)					
Recommendation / ***Compliance***	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.		X			
Recommendation #3: Jurisdictions should ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their clients' mental limitations. These attorneys should have sufficient training, funds, and resources.				X	
Recommendation #4: For cases commencing after *Atkins v. Virginia* or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.	X				
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.			X		
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.				X	
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.			X		

The State of Arizona enacted a statute prohibiting the execution of mentally retarded offenders in 2001, a year before the U.S. Supreme Court decided *Atkins v. Virginia*. Because the original Arizona statute only dealt with prospective cases of mentally retarded defendants, the legislature amended the statute in 2002 to comply with the retroactive nature of the *Atkins* decision. Some of the procedures adopted by the State of Arizona to determine mental retardation are particularly problematic.

- While Arizona's statutory and case law definition of mental retardation is similar to the American Association of Mental Retardation's (AAMR) definition, its definition of subaverage general intellectual functioning appears to be more

restrictive. In reliance on *Atkins*, the Arizona Supreme Court has stated that an "IQ below 70-75 indicates subaverage intellectual functioning." However, if each IQ test is administered as dictated by Arizona statute, the defendant will not be immune from execution on the grounds that s/he has mental retardation if the defendant has an IQ score higher than seventy on each test. It consequently is unclear whether the State of Arizona considers IQ scores between seventy and seventy-five to indicate significantly subaverage intellectual functioning. Furthermore, the statute allows for a determination of mental retardation to be made solely on the basis of an IQ score.

- The State of Arizona places the burden of proving mental retardation on the defendant by "clear and convincing evidence," rather than requiring the prosecution to disprove the defendant's substantial showing of mental retardation, as required by Recommendation #5. Only if the trial court determines that the defendant has an IQ of sixty-five or below is the defendant entitled to a rebuttable presumption of mental retardation.

INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles in all cases. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine a number of U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Arizona assessment, the Project has released state assessments of Alabama and Georgia and is conducting state assessments and releasing reports in, at a minimum, Florida, Indiana, Ohio, Pennsylvania, Tennessee, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies. This assessment of Arizona is the third in this series.

These assessments examine the above-mentioned jurisdictions' death penalty systems, using as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus, clemency proceedings, jury instructions, an independent judiciary, the treatment of racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project includes for review five new areas associated with death penalty administration,

including the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each state's assessment has been or is being conducted by a state-based Assessment Team, which is comprised of or has access to current or former judges, state legislators, current or former prosecutors and defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings provide information about how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law of the land in each of the assessment states and because the ABA has no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Arizona death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Arizona Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team believes that the body of recommendations as a whole would, if implemented, significantly improve Arizona's capital punishment system.

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Professor Popko is currently a Legal Writing Professor at the Sandra Day O'Connor College of Law at Arizona State University. Prior to joining the faculty in October 2001, Professor Popko served as an Assistant Federal Public Defender for the District of Arizona from 1994 to 2001. From May to October 2000, Professor Popko served a temporary detail as a visiting Assistant Federal Public Defender to the General Counsel of the United States Sentencing Commission. Before entering public service, Professor Popko was an associate at the Phoenix law firm of Meyer, Hendricks, Victor, Osborn & Maledon. He also clerked for the Honorable Stanley G. Feldman, Vice Chief Justice for the Arizona Supreme Court from 1988 to 1989. Prior to his clerkship, Professor Popko worked at a criminal defense firm in Tucson, Arizona. Professor Popko is currently a member of the Board of Governors of Arizona Attorneys for Criminal Justice (AACJ) and serves as the Editor of the AACJ's quarterly publication, *The Defender*. Professor Popko also sits as a *pro tem* judge in the Tempe Municipal Court. Professor Popko received his B.A. *magna cum laude* from the University of Arizona and his J.D. *summa cum laude* from the University of Arizona College of Law.

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Kent has co-authored an article on the interplay between the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and indigent representation in capital cases, and he has provided testimony to United States Senate and House of Representatives subcommittees regarding federal habeas and capital litigation issues. Kent obtained a law degree from the University of California at Berkeley in 1986, and has worked at the Attorney General's Office since 1991. In 1997, he became a Unit Chief/Supervising Attorney, and in January 2000, he was appointed to his current position. In 2002, he received the Attorney General's Statewide Impact Award for his work with the Attorney General's Capital Case Commission.

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Mr. Chaudhuri recently formed the Chaudhuri Law Office, PLLC, in Tempe, Arizona and serves as Associate Justice on the Yavapai-Apache Nation Court of Appeals. From 2001 to 2006, Mr. Chaudhuri practiced in the Phoenix office of Snell & Wilmer L.L.P., focusing on Indian law, business and finance, and commercial litigation. Prior to entering private practice, he served as Judicial Clerk to Arizona Court of Appeals Judges Noel Fidel and James M. Ackerman. Mr. Chaudhuri is the State Bar representative to the State, Tribal, and Federal Court Forum and has clerked for various courts and offices in all three court systems, including the Federal Public Defender's Office in Phoenix. Mr. Chaudhuri is the immediate past Chair of the State Bar of Arizona Indian Law Section Executive Council and also serves on various community boards and committees, including the Phoenix Indian Center Board. Mr. Chaudhuri has also served as Adjunct Professor at Phoenix College, where he taught Indian Gaming, Practice Court, and Federal, State and Tribal Courts. Mr. Chaudhuri is a member of the Muscogee (Creek) Nation of Oklahoma, and is also East Indian (Bengali). Mr. Chaudhuri graduated from Dartmouth College and received his law degree from Cornell Law School.

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Thomas A. Zlaket

Justice Zlaket is a former Justice of the Arizona Supreme Court. He was appointed Associate Justice in 1992, and served on the court until 2002. During his tenure on the court, he served a five-year term as Chief Justice from 1997 to 2002. After his service on the Arizona Supreme Court, Justice Zlaket returned to private practice and is currently a solo practitioner in Tucson, Arizona. Justice Zlaket received his undergraduate degree from the University of Notre Dame and his L.L.B. from the University of Arizona, where he was Editor-in-Chief of the *Arizona Law Review*. He received an L.L.M. in 2001 from the University of Virginia. In May of 2002, Justice Zlaket was awarded an honorary degree of Doctor of Laws from the University of Arizona.

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CHAPTER ONE

AN OVERVIEW OF ARIZONA'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF ARIZONA'S DEATH ROW

A. Historical Data

After *Furman v. Georgia*[4] effectively abolished the death penalty in Arizona in 1972, the Arizona legislature enacted section 13-454 of the Arizona Revised Statutes (A.R.S.), outlining a new procedure by which the State could seek to impose the death penalty.[5] Following a nearly thirty year hiatus, that the State of Arizona resumed executions of death-row inmates in 1992.[6]

1. First-Degree Murder Indictments and Death Sentences from 1995 through 1999

Of those cases from 1995 through 1999 in which the State of Arizona provided notice of its intent to seek the death penalty, 11.2% of capital defendants received a sentence of death, 24.3% received a sentence of life with the possibility of parole, 31.5% received a sentence of natural life, 32.6% received a prison term of years, and 0.4% received probation.[7]

Between 1995 and 1999, the majority of first-degree murder indictments and death sentences in Arizona stemmed from proceedings in Maricopa and Pima Counties, which accounted for 837 of the 971 first-degree murder indictments in Arizona and twenty-four of the thirty-one death sentences.[8]

a. The Age and Sex of Individuals Indicted for First-Degree Murder and Sentenced to Death

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[4] 408 U.S. 238 (1972) (finding the imposition of the death penalty as practiced violated the Eighth and Fourteenth Amendments of the U.S. Constitution).

[5] *See* 1973 Ariz. Sess. Laws 138, §5; Office of the Attorney General, Capital Case Commission Final Report, at 3 (Dec. 2002). Specifically, the new statute called for a separate sentencing hearing to be conducted before a judge and for the finding of at least one of six aggravating circumstances before the judge could decide to impose a sentence of death. *See* Office of the Attorney General, Capital Case Commission Final Report, at 3 (Dec. 2002).

[6] Ariz. Dep't of Corr., Arizona Death Penalty History, *at* http://www.azcorrections.gov/DeathRow/DeathRowGeneral.asp?topic=DeathPenaltyHistory (last visited May 22, 2006).

[7] Arizona First-degree Murder Cases Summary of 1995-1999 Indictments: Data Set II Research Report to Arizona Capital Case Commission, at 9 (June 2002). The individuals in these cases were convicted of first-degree murder or a lesser offense. *Id.* Although 298 individuals had been provided notice of the State's intent to seek the death penalty, twenty-one of the individuals had sentences pending and one was with incomplete data. *Id*.

[8] *Id*. at 30. Maricopa County accounted for 524 of the indictments and Pima for 313 of the indictments, while Maricopa County accounted for thirteen death sentences and Pima for eleven. *Id.*

From 1995 to 1999, 872 out of the 971 individuals indicted for first-degree murder in Arizona were male.[9] Of the 872 indictments rendered, thirty resulted in a sentence of death.[10] The remaining ninety-nine individuals indicted for first-degree murder were female; of those, only a single female received a death sentence.[11]

Defendants indicted for first-degree murder in Arizona ranged in age, from younger than seventeen to older than sixty-six years of age.[12] However, defendants between the ages of twenty to twenty-five comprised the highest percentage (30.2%) of individuals indicted for first first-degree murder.[13] Similarly, defendants between the ages of twenty and twenty-five received the greatest percentage (32.3%) of death sentences.[14]

b. The Race of Defendants Indicted for First-Degree Murder and Sentenced to Death and Their Victims

During the period of 1995 through 1999, twenty death sentences resulted from 403 first-degree murder indictments involving a white[15] defendant.[16] Five death sentences resulted from 347 first-degree murder indictments involving a Hispanic defendant.[17] Of the 166 blacks[18] indicted for first-degree murder, four received the death penalty, and of the twenty-six Native Americans[19] indicted for first-degree murder, only one received the death penalty.[20] Likewise, only one of the eight Asians[21] indicted for first-degree murder received a death sentence.[22]

At the same time, the percentage of indictments resulting in death sentences for cases in which both the defendant and the victim were white was nearly eight times higher than those cases in which both the defendant and the victim were minorities.[23] The percentage of indictments resulting in death sentences for cases comprised of a minority defendant and a White victim was five times higher than those cases comprised of a white defendant and minority victim.[24] Prosecutors statewide also opted to seek the death penalty less frequently when the homicide victim was a minority and more frequently when the victim was white.[25] Judges, likewise, imposed the death penalty less frequently

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[9] *Id.*
[10] *Id*.
[11] *Id*.
[12] *Id.* at 31. Note that the ages of fourteen individuals were unknown. *Id.*
[13] *Id*.
[14] *Id.* at 33.
[15] *Id*. at 34. We have employed the term "White" although the Report uses the term "White/Anglo."
[16] *Id*. at 34. The race/ethnicity of nineteen individuals indicted for first-degree murder was unknown. *Id.*
[17] *Id.* We have employed the term "Hispanic" in place of "Hispanic/Mexican American" as noted in the Report.
[18] We have employed the term "Black" in place of "Black/African American" as noted in the Report.
[19] Instead of "American Indian/Native American," we have used the term "Native American."
[20] *Id.*
[21] In place of "Asian/Asian American," we have used the term "Asian."
[22] *Id.*
[23] *Id*. at 15. In Arizona, where a White defendant was indicted for killing a White individual, the percentage of indictments resulting in death sentences was 9.1%. Whereas, where a minority was indicted for killing another minority, the percentage of indictments resulting in death sentences was 1.2%. *Id*.
[24] *Id*. (noting that the percentage of indictments resulting in death sentences for minority defendant-White victim cases was 10.3%, while the percentage for White defendant-minority victim cases was 2.0%).
[25] *Id*.

when the homicide victim was a minority and more frequently when the homicide victim was white.[26] Only one of the 316 first-degree murder indictments in which the victim was Hispanic led to a death sentence.[27]

2. Death Sentences from 1974 to July 1, 2000

From 1974 through July 1, 2000, Arizona imposed 230 death sentences.[28] Forty-seven point four percent of these cases originated in Maricopa County, 27.8% in Pima County, 6.1% in Mohave County, 4.8% in Yavapi County, and 4.8% in Yuma County.[29] However, 141 of these 230 cases in which the death penalty had been imposed resulted in a remand, reversal, and/or modification at some point in the appellate proceedings.[30] Fifty-one point one percent of these remands, reversals, and modifications resulted from proceedings in Maricopa County, 27.7% in Pima County, and 6.4% in Mohave County.[31] Fifty-five of the remands, reversals, and modifications related to the defendant's conviction while eighty-six of them related to the defendant's sentence.[32]

a. The Race, Sex, and Age of Defendants Sentenced to Death and Their Victims

Approximately 69% of the 230 individuals sentenced to death in Arizona from 1974 through July 1, 2000 were white, 15.7% were Hispanic, 11.3% were black, 1.7% were Native American, and 2.2% were biracial.[33] Seventy-nine point eight percent of their victims were white, 11.8% Hispanic, 3.9% black, 3.5% Asian, and 0.9% Native American.[34] Only two of the defendants sentenced to death during this period were female, while nearly half (49.2%) of all victims were female.[35]

One hundred twenty-two of the capital defendants who received a sentence of death were between the ages of twenty-six and forty, eighty-one were between the ages of eighteen and twenty-five, twenty-two were between the ages of forty-one and sixty-five, four were under the age of eighteen, and only one was sixty-six years old or older.[36]

b. Education and Employment Status of Defendants Sentenced to Death

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[26] *Id*. (denoting the percentage of cases in which the judge decided to impose the death penalty on the basis of the defendant and victim's race/ethnicity).

[27] *Id.* at 16; *see also* Office of the Attorney General, Capital Case Commission Final Report, at 29 (Dec. 2002).

[28] *See* Summary of Death Sentence Process: Data Set I Research Report to Arizona Capital Case Commission, at v, 1 (March 2001).

[29] *Id.* at 4. These counties represent the five counties with the greatest percentage of death sentences. *Id.*

[30] *See id*.

[31] *Id*. These counties represent the three counties with the greatest percentage of remands, reversals, and/or modifications. *Id.*

[32] *Id* at 12.

[33] *Id.* at 37.

[34] *Id*. There appears to be a discrepancy between the percentages of the victims' race/ethnicity within the Research Report. *See id*. at 36. This discrepancy appears to be a result of the total number of victims accounted for in the analysis of the data. *See id.* at 36, 37. (using a victim pool of 219 in comparison to a victim pool of 228).

[35] *Id*.

[36] *Id*.

At least fifty-three of the defendants sentenced to death in Arizona from 1974 through July 1, 2000 attained their GED; forty-two completed the tenth or eleventh grade; thirty-nine completed the seventh, eight, or ninth grade; eight completed the third, forth, fifth, or sixth grade; and twenty-nine graduated high school.[37] Only four individuals were known to have attained their bachelor's degree, although thirty-one had enrolled or completed some sort of post-high school education, such as a community college or university.[38] The education level of twenty-four individuals sentenced to death was unknown.[39]

Over half of those defendants sentenced to death (146 individuals) were unemployed.[40] Sixty-five individuals were employed on some sort of basis.[41] Another six were among students, retired, or disabled.[42] The employment status of thirteen individuals sentenced to death was unknown.[43]

c. Citizenship and Language of Defendants Sentenced to Death

Two hundred four of the defendants sentenced to death possessed United States citizenship.[44] Four possessed Mexican citizenship and another four possessed German citizenship.[45] One individual sentenced to death held Honduran citizenship.[46] The nationalities of seventeen defendants who received the death penalty were unknown.[47]

Additionally, two hundred ten defendants sentenced to death specified English as their first language, followed by Spanish, with seven defendants, and German, with four defendants.[48] The native language of nine individual sentenced to death was unknown.[49]

d. Trial Composites for Defendants Sentenced to Death

i. Aggravating and Mitigating Circumstances

From 1974 through July 1, 2000, of those defendants sentenced to death, judges found two aggravating circumstances in 35.7% of the cases, one aggravating circumstance in 25.2% of the cases, three in another 25.2% of the cases, four in 10.4%, and five aggravating circumstances in 2.6% of the cases.[50] In no case was more than five

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37 *Id*. at 39.
38 *Id*.
39 *Id*.
40 *Id*.
41 *Id*.
42 *Id*.
43 *Id*.
44 *Id*.
45 *Id*.
46 *Id*.
47 *Id*. This number includes two defendants who were cited as a resident alien and illegal alien in the Report.
48 *Id*.
49 *Id*.
50 *Id*. at 7. Note that data is missing from two cases for this time period.

aggravating circumstances found.[51] The aggravating circumstance most frequently established was that the offense was committed in an especially heinous, cruel or depraved manner; this aggravator was found in 76.5% of death penalty cases.[52]

Sentencing judges failed to find any statutory mitigating circumstances in 81.7% of those cases in which a defendant was sentenced to death, found one in 16.5% of cases, and two in 0.9% of cases.[53] The most common mitigating circumstance found to exist by trial court judges was the defendant's age, having been found in 10.9% of death penalty cases.[54]

ii. Defense Attorneys

On average, only 3.2% of capital defendants were represented by a privately-obtained attorney through the trial, direct appeal, post-conviction relief, and/or habeas proceedings.[55] The remaining 96.8% of Arizona's capital defendants were either represented by the public defender or a court-appointed attorney.[56]

3. Executions and Exonerations

Since 1992, Arizona has executed twenty-two individuals.[57] Of these, seventeen were white, four were Hispanic, and one was Native American.[58] Twenty of the twenty-two individuals were sentenced to death for the murder of a white victim.[59] The State of Arizona has yet to execute any women; all individuals executed have been male, three of whom were foreign nationals.[60]

According to the Death Penalty Information Center, eight death-row inmates have been exonerated since 1973.[61]

B. A Current Profile of Arizona's Death Row

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[51] *Id.*

[52] *Id.* at 8.

[53] *Id*. at 7. Note that data is missing from two cases for this time period. Judges also failed to find any non-statutory mitigating factors in 53% of death cases. *Id*.

[54] *Id.* at 10.

[55] *Id*. at 26.

[56] *Id.*

[57] *See* Ariz. Dep't of Corr., Inmates Executed since 1992, *at* http://www.azcorrections.gov/DeathRow/ExecutedGallery.htm (last visited May 22, 2006) (using the terms "Caucasian" and "American Indian").

[58] *See id*.

[59] *See id*. (including the case of Jose Jesus Ceja whose victims included a white individual and Hispanic individual).

[60] *Id.; see also* Death Penalty Information Center, Foreign Nationals, Part II, *at* http://www.deathpenaltyinfo.org/article.php?scid=31&did=582#executed (last visited May 23, 2006).

[61] *See* Death Penalty Information Center, Innocence: List of Those Freed From Death Row, *at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last visited May 22, 2006). The eight freed individuals are: Jonathan Treadway, Jimmy Lee Mathers, James Robison, Robert Charles Cruz, David Wayne Grannis, Christopher McCrimmon, Ray Krone, and Lemuel Prion. *Id*.

As of January 31, 2006, there were 108 inmates on Arizona's death row.[62] According to the Arizona Department of Corrections, seventy-five of them are white, fourteen Hispanic, eleven black, and four Native American.[63] One of the death-row inmates is a Mexican citizen, one a German citizen, and one is of other race/national origin.[64] Only two of the 108 death-row inmates are female.[65]

These 108 death-row inmates represent nine of the fifteen counties in Arizona.[66] Fifty-seven of whom were sentenced to death in Maricopa County and twenty-five of whom were sentenced to death in Pima County.[67]

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[62] Ariz. Dep't of Corr., Death Row Information, *at* http://www.azcorrections.gov/DeathRow/DeathRowMain.asp#number (last visited May 22, 2006).

[63] *Id.*

[64] *Id*.

[65] *Id.*

[66] *See* Ariz. Dep't of Corr., County Breakdown, *available at* http://www.azcorrections.gov/DeathRow/DeathRowGeneral.asp?topic=county (last visited May 22, 2006).

[67] *Id*. The following Arizona counties also have imposed the death penalty on individuals who are currently awaiting execution on death row: Cochise (2 inmates), Coconino (2 inmates), La Paz (1 inmate), Mohave (8 inmates), Pinal (4 inmates), Yavapai (5 inmates), and Yuma (4 inmates). *See id*.

II. THE STATUTORY EVOLUTION OF ARIZONA'S DEATH PENALTY SCHEME

A. Arizona's Post-Furman Death Penalty Scheme

In the wake of the United States Supreme Court's decision in *Furman v. Georgia*[68] finding the imposition of the death penalty as practiced violated the Eighth and Fourteenth Amendments of the United States Constitution, the Arizona Legislature passed a new death penalty law in 1973.[69] The new law affected three Arizona statutes: the murder statute, section 13-452 of the Arizona Revised Statutes (A.R.S) was amended; the first-degree murder penalty statute, section 13-453 of the Arizona Revised Statutes was amended; and section 13-454 was replaced with a new statute, "Proceedings for determining sentence upon the finding or admitting or guilt in cases of murder in the first degree."[70]

The new murder statute defined first-degree murder as "a murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years."[71]

Pursuant to the new death penalty statutes, upon conviction for first-degree murder, the defendant would be sentenced to death or life imprisonment without parole for twenty-five years.[72] Although the sentencing phase was held separately from the guilt/innocence phase of the death penalty trial,[73] it was conducted before the same judge that presided over the guilt/innocence phase. No jury was to be present during the sentencing proceeding.[74]

During the sentencing hearing, the court would disclose to the defendant all material contained in any pre-sentence report.[75] In addition, the State and defendant were authorized to present any evidence that the court deemed relevant to any of the statutory aggravating and mitigating circumstances.[76] The statutory aggravating circumstances were:

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[68] Furman v. Georgia, 408 U.S. 238 (1972).
[69] 1973 Ariz. Sess. Laws 138, § 5.
[70] 1973 Ariz. Sess. Laws 138, §§ 1, 2, 4, 5.
[71] 1973 Ariz. Sess. Laws 138, § 1.
[72] 1973 Ariz. Sess. Laws 138, § 2.
[73] 1973 Ariz. Sess. Laws 138, § 5.
[74] *Id.*
[75] 1973 Ariz. Sess. Laws 138, § 5. The court could withhold materials for the protection of human life, but any presentence information withheld from the defendant could not be considered in determining the existence or nonexistence of aggravating or mitigating circumstances.
[76] *Id*. Admissibility of information relevant to aggravating circumstances was governed by the rules governing the admission of evidence at criminal trials. These rules did not govern admissibility of information relevant to mitigating circumstances, however.

(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 felony in the United States involving the use or threat of violence on another person;
(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 victim 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; and
(6) The defendant committed the offense in an especially heinous, cruel, or depraved manner.[77]

The statutory mitigating factors were:

(1) The defendant's capacity to appreciate the wrongfulness of his/her conduct or to conform his/her 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 a principal in the offense, which was committed by another, but his/her 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/her conduct in the course of the commission of the offense for which s/he was convicted would cause, or would create a grave risk of causing, death to another person.[78]

Under this scheme, the prosecution had the burden of proving the existence of any aggravating factors and the defense had the burden of proving the existence of any mitigating factors.[79]

After hearing the evidence presented, the court was required to impose either a sentence of death or life imprisonment without parole until the defendant had served twenty-five years, taking into account the enumerated aggravating and mitigating circumstances. A death sentence was required when the court found one or more aggravating circumstances and no mitigating circumstances that were sufficiently substantial to call for leniency.[80] The court was required to return a special verdict setting forth its findings as to the existence or nonexistence of each statutory aggravating and mitigating circumstance.[81]

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[77] 1973 Ariz. Sess. Laws 138, § 5.
[78] 1973 Ariz. Sess. Laws 138, § 5.
[79] 1973 Ariz. Sess. Laws 138, § 5.
[80] 1973 Ariz. Sess. Laws 138, § 5.
[81] 1973 Ariz. Sess. Laws 138, § 5.

B. *Amendments to Arizona's First-Degree Murder Statute, Section 13-452 of the A.R.S., and the Death Penalty Statute, Section 13-454 of the A.R.S.*

Between 1973 and 2005, the Arizona Legislature amended its death penalty scheme, including Arizona's first-degree murder and death penalty statutes, on several occasions. In addition to shifting the authority to impose a death sentence from judge to jury, the State of Arizona has provided significantly more detail as to process in capital cases, has exempted mentally retarded offenders from the death penalty, provided for the involvement of victim's family members, and expanded the number of aggravating circumstances from six to fourteen.[82]

1. Changes to Arizona's First-Degree Murder Statute, Sections 13-452, 13-453 and 13-1105 of the A.R.S.

In 1977, the Arizona legislature repealed and replaced the earlier murder and first-degree murder penalty statutes, sections 13-452 and 13-453, with section 13-1105.[83] The new statute defined first-degree murder as:

> (1) S/he, knowing that his/her conduct will cause death or serious physical injury, causes the death of another with premeditation; or
>
> (2) Acting alone or with one or more other people commits or attempts to commit "first or second-degree rape, sexual assault, child molestation, lewd and lascivious acts committed with force, the infamous crime against nature committed with force, narcotics offenses, kidnapping, burglary, arson of an occupied structure, robbery, escape, aggravated assault, and in the cause [sic] of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person."[84]

The punishment for first-degree murder was designated as life imprisonment or death.[85]

The legislature made several amendments to the first-degree murder statute in 1978 including (1) limiting murder to situations where the person knew his/her conduct would cause death, instead of allowing first-degree murder charges where the person only knew his/her conduct would cause serious physical injury; and (2) removing murder during the commission of or attempted commission of first and second-degree rape, lewd and lascivious acts committed with force, the infamous crime against nature committed with force, and aggravated assault from the definition of first-degree murder.[86]

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[82] ARIZ. REV. STAT. § 13-703(F) (2005).

[83] Sections 452 and 453 repealed by Act of Oct. 1, 1977, ch. 142, § 15; section 1105 created by Act of Oct. 1, 1977, ch. 142, § 60.

[84] Act of Oct. 1, 1977, ch. 142, § 60.

[85] *Id*.

[86] Act of Oct. 1, 1978, ch. 201, § 127. The 1978 amendments also fixed a typo in the second part of the first-degree murder definition, changing the word, "cause" to "course" ("in the cause of and in furtherance of such offense …" changed to "in the course of and in furtherance of such offense …" Act of Oct. 1, 1978, ch. 201, § 127.

Two years later, the legislature added an intent allowance, so that the statute read: "A person commits first degree murder if (1) *intending or* knowing that his conduct will cause death, such person causes the death of another with premeditation[.]"[87]

Between 1983 and 1993, the legislature added several new crimes that could render an individual eligible for the charge of first-degree murder.[88] Causing the death of any person in the course of and in furtherance of, or in immediate flight from, sexual conduct with a minor was added in 1983;[89] causing the death of a person in the course of and in furtherance of, or in immediate flight from, child abuse was added in 1986;[90] and murder in course of an in furtherance of, or in immediate flight from, marijuana offenses was added in 1993.[91] In 1993, the legislature also amended the provision allowing for a first-degree murder charge for murder in the commission of narcotics offenses to require that the narcotics offenses must "equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses."[92]

The following year, the legislature removed the requirement that to be eligible for a first-degree murder charge, murder committed during an arson must have been an arson of an occupied dwelling.[93] Also in 1994, the legislature added murder during the "unlawful flight from a pursuing law enforcement vehicle" to the list of eligible crimes.[94]

In addition to making slight stylistic changes in 1996, the legislature added: "Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty" as a crime rendering an individual eligible to be charged with first-degree murder.[95]

In 2002, the legislature added premeditated murder in the course of terrorism to the list of crimes constituting first-degree murder.[96] Most recently, in 2005, the legislature amended the statute to include within the definition of first-degree murder the death of an unborn child "at any stage of development" in the womb.[97]

Today, the statue reads:

> (1) Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child;

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[87] Act of Apr. 23, 1980, ch. 229, § 14 (emphasis added to new language).

[88] The legislature made additional, non-substantive changes in 1981, 1987, and 2000. Act of Sept. 1, 1981, ch. 264, § 5; Act of 1987, ch. 307, § 7; Act of 2000, ch. 50, § 2.

[89] Act of 1983, ch. 202, § 4.

[90] Act of May 16, 1985, ch. 364, § 13.

[91] Act of Jan. 1, 1994, ch. 255, § 20.

[92] *Id*.

[93] Act of 1994, ch. 150, § 1.

[94] Act of Apr. 19, 1994, ch. 200, § 10.

[95] Act of 1996, ch. 343, § 2.

[96] Act of May 15, 2002, ch. 219, § 8.

[97] Act of Apr. 25, 2005, ch. 188, § 7.

(2) Acting alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, molestation of a child under section 13-1410, terrorism under section 13-2308.01, marijuana offenses under section 13-3405, subsection A, paragraph 4, dangerous drug offenses under section 13-3407, subsection A, paragraphs 4 and 7, narcotics offenses under section 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under section 13-3409, kidnapping under section 13-1304, burglary under section 13-1506, 13-1507 or 13-1508, arson under section 13-1703 or 13-1704, robbery under section 13-902, 13-1903 or 13-1904, escape under section 13-2503 or 13-2504, child abuse under section 13-3623, subsection A, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under section 28-622.01 and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person; or

(3) Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.[98]

2. Changes to Arizona's Death Penalty Statute: Sections 13-454, 13-902, and 13-703 of the A.R.S.

In 1977, the legislature transferred, renumbered, and amended the 1973 death penalty statute. The changes were predominantly stylistic, renumbering section 13-454 as 13-902,[99] but they did reword the third mitigating circumstance to read: "The defendant was legally accountable for the conduct of another . . . , but his participation was relatively minor, although not so minor as to constitute a defense to prosecution."[100] The amendment also added a fifth mitigating circumstance: "the defendant's age."[101]

The legislature again revised the death penalty statute in 1978, renumbering the statute as section 13-703[102] and including a seventh aggravating circumstance: "The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail."[103]

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[98] ARIZ. REV. STAT. § 13-1105(A) (2005). A person, however, will not be prosecuted for an offense under the statute if (1) "the person was performing an abortion for which the consent of the pregnant woman, or a person authorized by law to act on the pregnant woman's behalf, has been obtained or for which the consent was implied or authorized by law," (2) "the person was performing medical treatment on the pregnant woman or the pregnant woman's unborn child," or (3) "the person was the unborn child's mother." ARIZ. REV. STAT. § 13-1105(C) (2005).

[99] 1977 Ariz. Sess. Laws 142 § 58.

[100] *Id.*

[101] *Id.*

[102] Ariz. Sess. Laws 201, § 104.

[103] Ariz. Sess. Laws 215, § 2.

In 1978, as a result of the United States Supreme Court's decisions in *Lockett v. Ohio*[104] and *Bell v. Ohio*[105] holding death penalty statutes restricting the right of defendants to show mitigating evidence unconstitutional, the Arizona Supreme Court found portions of the State's death penalty statute unconstitutional in *State v. Watson*, "insofar as it limits the right of the defendant to show additional mitigating circumstances."[106] After the Court's decision in *Watson*, all death-row inmates were granted new sentencing hearings to allow full presentation of mitigating evidence.

The legislature responded to *Watson* by amending the statute in 1979 to read that "mitigating circumstances shall be any factors proffered by the defendant or the [S]tate 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 limited to" the enumerated list of mitigating factors previously described."[107]

In 1982, the legislature added a provision to the death penalty statute expressly authorizing that the victim's immediate family be allowed to express their opinion regarding the crime and the defendant at the sentencing hearing. The court was then obligated to consider the immediate family's opinion during the defendant's sentencing.[108]

The legislature added an eighth aggravating circumstance in 1984: "The defendant has been convicted of one or more other homicides. . . which were committed during the commission of the offense."[109]

The following year, the legislature clarified the range of possible sentences for first-degree murder. If the victim was fifteen or older, the defendant could receive (1) a death sentence or (2) a life sentence without the possibility of release for twenty-five years. If the victim was younger than fifteen, the defendant could receive (1) a death sentence or (2) a life sentence without the possibility of release for thirty-five years.[110] The legislature also added a ninth aggravating circumstance: "The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age."[111]

In 1988, the legislature added a tenth aggravating circumstance: "The murdered individual was an on duty peace officer who was killed in the course of performing his[/her] official duties and the defendant knew, or should have known, that the victim was a peace officer."[112]

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[104] Lockett v. Ohio, 438 U.S. 586 (1978).
[105] Bell v. Ohio, 438 U.S. 637 (1978).
[106] State v. Watson, 586 P.2d 1253, 1257 (Ariz. 1978).
[107] 1979 Ariz. Sess. Laws 1444, § 1.
[108] 1982 Ariz. Sess. Laws 325 § 5.
[109] 1984 Ariz. Sess. Laws 66 § 1.
[110] 1985 Ariz. Sess. Laws 364 § 8.
[111] *Id.*
[112] 1988 Ariz. Sess. Laws 155 § 1.

The legislature made a number of changes to the death penalty statute in 1993. Most notably, the statute was amended to provide for the additional sentencing option of life in prison without the possibility of parole.[113] Additionally, the statute was changed to expand upon the requirement that the judge make all sentencing decisions and required that s/he make all factual determinations required by the death penalty statute and/or the United States or Arizona Constitutions.[114]

The 1993 amendment also made changes to three aggravating circumstances. In the second aggravating circumstance, the language was changed to read: "The defendant was previously convicted of a serious offense, whether preparatory or completed."[115] The statute defined the term "serious offense" as including the following crimes:

(1) First-degree murder;
(2) Second degree murder;
(3) Manslaughter;
(4) Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument;
(5) Sexual assault;
(6) Any dangerous crime against children;
(7) Arson of an occupied structure;
(8) Robbery;
(9) Burglary in the first-degree;
(10) Kidnapping; and
(11) Sexual conduct with a minor under fifteen years of age.[116]

The legislature also added language to the seventh aggravating circumstance, to read: "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."[117]

Lastly, the legislature added language to the ninth aggravating circumstance, to read: "The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age *or was seventy years of age of older*."[118]

The legislature made a series of changes to the death penalty statute in 1999, in large part to ensure that victims' family members were allowed to participate in the trial and sentencing process. The amendments added language allowing the victim's family to submit a written or oral victim impact statement for use in preparing the presentence

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[113] 1993 Ariz. Sess. Laws § 1.
[114] *Id.*
[115] *Id.* The aggravator previously read: "The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." ARIZ. REV. STAT. § 13-703(F)(2) (1993).
[116] 1993 Ariz. Sess. Laws § 1.
[117] *Id*. emphasis added to new language).
[118] *Id*. (emphasis added to new language).

report.[119] It additionally allowed for the victim's family to be present and testify at the sentencing hearing.[120] Today, the court may consider any information provided about the victim and the impact of the murder on the victim's family, but not the family's recommendation as to sentencing.[121]

In 2001, the legislature exempted individuals with mental retardation from the death penalty. However, mentally retarded offenders were still eligible for life or natural life imprisonment.[122]

On June 24, 2002, in *Ring v. Arizona*, the United States Supreme Court invalidated Arizona's death penalty statute by holding that the Constitution requires that juries, not judges, determine the facts that precondition a defendant's eligibility for a death sentence.[123] Consequently, death sentences imposed after a judge's finding of aggravating factors violate a defendant's Sixth Amendment right to trial by jury.[124] Justice Ginsburg, writing for the majority, explained that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[125] "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both."[126]

Justice Scalia, in a concurring opinion, further explained:

> [O]ur people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.[127]

As a result of the United States Supreme Court's decision in *Ring v. Arizona*, the Arizona legislature made significant changes to the death penalty statute in 2002, and added a new statute, section 13-703.01.[128] Most importantly, the new and amended statutes changed Arizona's capital sentencing scheme to allow for jury sentencing.[129] While juries are now the default triers of fact, judges may still impose a death sentence upon agreement of

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[119] 1999 Ariz. Sess. Laws. 104 § 1.
[120] *Id*.
[121] *Id*.
[122] 2001 Ariz. Sess. Laws 260 § 1.
[123] Ring v. Arizona, 536 U.S. 584 (2002).
[124] *Id*.
[125] *Id*. at 589.
[126] *Id*. at 609.
[127] *Id*. at 612 (Scalia, J., concurring).
[128] 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch.1 §§ 2, 3.
[129] 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 §§ 1, 3.

both parties.[130] The statute also provided more detail about Arizona's death penalty scheme. For example, prior to a capital trial, the State must file a notice of intent to seek the death penalty[131] and must provide notice of the aggravating circumstances upon which it is relying to seek the death penalty.[132]

If, at the end of the guilt/innocence phase of the trial, the trier of fact finds the defendant guilty of first-degree murder, the defendant then proceeds to the sentencing proceeding. The first phase of this proceeding, the aggravation phase, takes place immediately following a verdict of guilty. The trier of fact's sole directive during this phase is to determine whether the prosecution has proven any of the aggravating circumstances beyond a reasonable doubt.[133] The State carries the burden of proving aggravating factors beyond a reasonable doubt.[134] A special finding must be made as to each alleged aggravating circumstance found unanimously to be present or absent, based on evidence presented at the guilt/innocence phase and/or the aggravation phase.[135]

If the trier of fact is a jury, it must unanimously decide that an aggravating circumstance has been proven. The jury cannot sentence the defendant to death if it fails to find at least one aggravating circumstance.[136] If the jury is unable to reach a unanimous verdict as to the presence of at least one aggravating circumstance, the judge must dismiss the jury and impanel a new one. If the second sentencing jury is unable to reach a unanimous verdict as to the presence of one or more aggravating circumstances, the death penalty ceases to be an available sentencing option.[137]

If the trier of fact finds that one or more aggravating circumstance has been proven, the trier of fact then must decide the defendant's sentence.[138] The penalty phase of the sentencing proceeding, designed to determine the appropriate punishment, is held immediately after the trier of fact finds the existence of at least one aggravating circumstance.[139]

At this phase, the defendant and the State may present any evidence relevant to determining whether mitigation evidence substantial enough to call for leniency exists.[140] The burden of proving mitigation is on the defense, who must prove the existence of any mitigating circumstances by a preponderance of the evidence.[141] In determining the appropriate sentence, if the trier of fact is a jury, each juror may consider any mitigating circumstances s/he believes has been proven; jurors need not unanimously agree on the existence of individual mitigating circumstances.[142]

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130 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1, § 3.
131 *Id.*
132 *Id.*
133 *Id.*
134 2002 Ariz. Leg. Serv. 5th Sp. Sess. Ch. 1, § 1.
135 2002 Ariz. Leg. Serv. 5th Sp. Sess. Ch. 1, § 3.
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 2002 Ariz. Leg. Serv. 5th Sp. Sess. Ch. 1, § 1.
142 *Id.*

The jury must unanimously agree that a death sentence is appropriate before it may be imposed.[143] If the jury determines that death is not appropriate, the judge must then decide between imposing a sentence of life or natural life.[144] If the jury is unable to reach a verdict, the court must dismiss the jury and impanel a new one.[145] If the second jury is unable to reach a unanimous verdict, the judge will sentence the defendant to life or natural life.[146]

The 2003 amendment reiterated the need for the State to file a notice of intent to seek the death penalty in capital cases,[147] and expanded upon two aggravating circumstances. The second aggravating circumstance was amended to read: "The defendant *has been or* was previously convicted of as serious offense, whether preparatory or completed. *Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph*."[148] The seventh aggravating circumstance was amended to read: "The defendant committed the offense while (a) 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, [or] (b) *on probation for a felony offense*."[149]

In 2005, the legislature once again enacted numerous changes to the death penalty statute.[150] Most significantly, Arizona enlarged the scope of the death penalty by adopting the following four statutory aggravating circumstances:

(1) The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street grant or criminal syndicate or to join a criminal street gang or criminal syndicate.
(2) The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.
(3) The offense was committed in a cold, calculated manner without pretense of moral or legal justification.[151]
(4) The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.[152]

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143 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1, § 3.
144 *Id*.
145 *Id*.
146 *Id.*
147 2003 Ariz. Sess. Laws 255 § 1.
148 *Id*. (emphasis added to new language).
149 *Id*. (emphasis added to new language). The amendment also makes other non-substantive changes. *See* id.
150 2005 Ariz. Sess. Laws 166 § 2; 2005 Ariz. Sess. Laws 188 § 3; 2005 Ariz. Sess. Laws 325 § 2.
151 2005 Ariz. Sess. Laws 325 § 2.
152 2005 Ariz. Sess. Laws 166 § 2.

The legislature also added language to the ninth aggravating circumstance in order to allow the imposition of the death penalty when the victim is "an unborn child in the womb at any stage of its development."[153]

In regards to the second aggravating circumstance, the definition of a "serious offense" was expanded to include the offenses of burglary in the second degree and terrorism.[154] Additionally, for the "serious offense" of "any dangerous crime against children," the legislature added language to include an "unborn child" in the protected class of victims.[155]

The legislature also amended the death penalty statute to provide for a life sentence without the possibility of release for thirty-five years if the victim is an unborn child.[156] In fact, "for purposes of punishment," the legislature added language to the death penalty statute to ensure that an unborn child would be treated as a minor under the age of twelve.[157]

In 2005, the legislature also clarified the point at which factual determinations must be made in a death penalty trial: "If the defendant bears the burden of proof, the issue shall be determined in the penalty phase. If the [S]tate bears the burden of proof, the issue shall be determined in the aggravation phase."[158]

Lastly, Arizona expanded the definition of a victim to encompass "any other person related to the murdered person by consanguinity or affinity to the second degree."[159]

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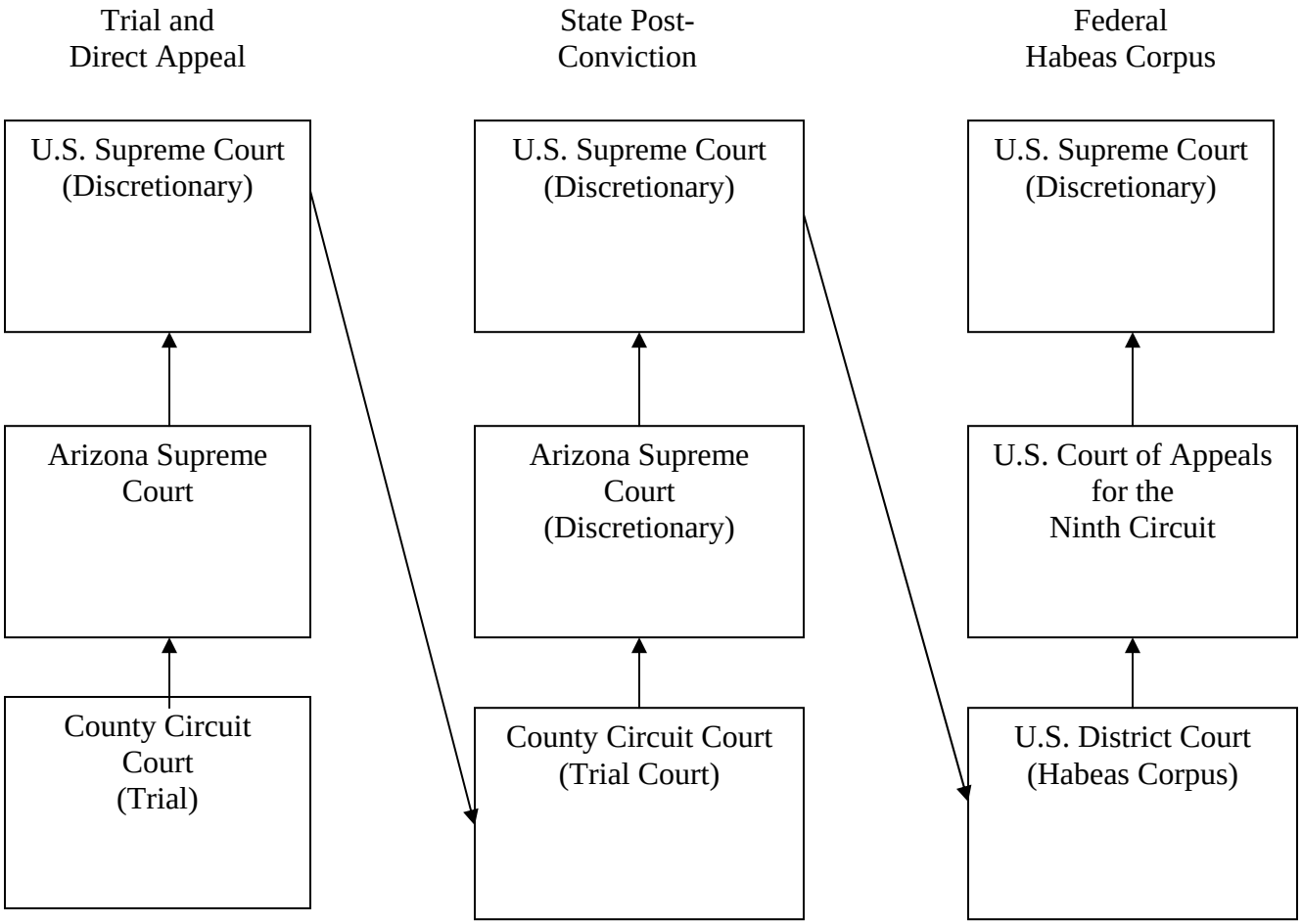
[153] 2005 Ariz. Legis. Serv. Ch. 188 § 3.
[154] 2005 Ariz. Legis. Serv. Ch. 325 § 2.
[155] 2005 Ariz. Legis. Serv. Ch. 188 § 3.
[156] *Id.*
[157] *Id.*
[158] 2005 Ariz. Legis. Serv. Ch. 325 § 3.
[159] *Id.*

III. Progression of An Arizona Death Penalty Case



A. Pretrial Process

1. Commencement of a Felony Action

In order to prosecute an individual accused of a capital felony, a grand jury[160] must determine that the evidence justifies an indictment.[161] An indictment is a plain, concise statement of facts sufficiently definite to inform the defendant of the offense charged,[162] and identifies the statute, rule, regulation, and/or other provision of law that the defendant is alleged to have violated.[163]

Alternatively, a felony action may be commenced by filing a complaint.[164] If a complaint is made under oath before a magistrate, the magistrate must decide whether there is probable cause to believe that an offense has been committed by the defendant. If the magistrate does not find probable cause, s/he will dismiss the complaint.[165] If the magistrate finds probable cause, s/he then issues an arrest warrant, summons or notice of a supervening indictment. If the complaint is signed by a prosecutor, the magistrate will issue a summons to appear or notice of a supervening indictment.[166]

In Arizona, a person is eligible for the death penalty only if s/he is found guilty of first-degree murder. Murder in the first-degree consists of the following enumerated offenses:

(1) Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child;

(2) Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor, sexual assault, molestation of a child, terrorism, marijuana offenses, dangerous drug offenses, narcotics offenses that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses, kidnapping, burglary, arson, robbery, escape, child abuse, or unlawful flight from a pursuing law enforcement vehicle and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person; or

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[160] A grand jury is composed of not less than twelve nor more than sixteen people. ARIZ. REV. STAT. § 21-101 (2006). An indictment cannot be returned without the concurrence of at least nine grand jurors. ARIZ. R. CRIM. P. 12.7(a).

[161] An indictment is a written statement charging the commission of a public offense, presented to the court by a grand jury, endorsed "A True Bill," and signed by the foreman. ARIZ. R. CRIM. P. 13.1(a).

[162] ARIZ. R. CRIM. P. 13.2(a)

[163] ARIZ. R. CRIM. P. 13.2(b).

[164] ARIZ. R. CRIM. P. 2.2(b). A complaint in felony cases is a written statement of the essential facts constituting a public offense, that is either signed by a prosecutor, or made upon oath before a magistrate. ARIZ. R. CRIM. P. 2.3.

[165] ARIZ. R. CRIM. P. 2.4(a).

[166] ARIZ. R. CRIM. P. 3.1(a).

(3) Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.[167]

2. Initial Appearance, Preliminary Hearing, Arraignment, Notice of Intent to Seek the Death Penalty, Mental Evaluations, and Plea Agreements

Once a defendant has been arrested, s/he must be taken before a magistrate judge.[168] At this initial appearance, the magistrate will, among other things, inform the defendant of the charges against him/her, inform the defendant of his/her rights to counsel and to remain silent, determine whether probable cause exists for the purpose of release from custody, and appoint counsel if the defendant is eligible and requests counsel.[169]

If the defendant was charged by complaint, the magistrate also will inform the defendant of his/her right to a preliminary hearing and, unless the hearing is waived, set the hearing date.[170] The trial judge may hold the arraignment in conjunction with the defendant's initial appearance.[171] If the defendant was charged by a grand jury indictment, the magistrate may also conduct the arraignment.[172]

When the defendant is charged by complaint, the magistrate will conduct a preliminary hearing within ten (if the defendant is in custody) or twenty (if the defendant is not in custody) days of the initial appearance.[173] The preliminary hearing is designed for the magistrate to determine whether probable cause exists to hold the defendant for trial.[174] The finding of probable cause must be based on "substantial evidence."[175] If probable cause does not exist, the magistrate will dismiss the complaint and release the defendant.[176] The defendant may waive the preliminary hearing.[177]

Within ten (if the defendant is in custody) or thirty (if the defendant is not in custody) days of filing the indictment or complaint, the trial court will arraign the defendant.[178] At the arraignment, the court will: (1) ascertain the defendant's plea; (2) hear and decide motions concerning the conditions of release; (3) set the date for trial or pretrial conference; (4) advise the parties in writing of the dates of further proceedings and other important deadlines; and (5) advise the defendant of his/her right to a jury trial.[179] At the arraignment, the defendant may plead guilty, not guilty, or no contest to the charges.[180]

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[167] ARIZ. REV. STAT. § 13-1105(A) (2006).
[168] ARIZ. R. CRIM. P. 4.1(a).
[169] ARIZ. R. CRIM. P. 4.2(a).
[170] ARIZ. R. CRIM. P. 4.2(c).
[171] ARIZ. R. CRIM. P. 14.1(e).
[172] ARIZ. R. CRIM. P. 4.2(b).
[173] ARIZ. R. CRIM. P. 5.1(a).
[174] ARIZ. R. CRIM. P. 5.3(a).
[175] ARIZ. R. CRIM. P. 5.4(c).
[176] ARIZ. R. CRIM. P. 5.4(d).
[177] ARIZ. R. CRIM. P. 5.1(b).
[178] ARIZ. R. CRIM. P. 14.1(a).
[179] ARIZ. R. CRIM. P. 14.3.
[180] ARIZ. R. CRIM. P. 14.3(a).

The court may accept a plea of guilty or no contest only if it is made voluntarily and intelligently.[181] Before accepting a plea of guilty or no contest, the court must address the defendant and inform him/her (1) of the nature of the charge to which the plea is offered; (2) of the nature and range of possible sentences; (3) of the constitutional rights which the defendant forgoes by pleading guilty or no contest; (4) of the right to plead not guilty; and (5) that the plea may have immigration consequences for non-citizen defendants.[182]

If the State intends to seek the death penalty, it must file a notice of intent to seek the death penalty within 60 days of arraignment [183] and must at the same time provide notice of the aggravating circumstances upon which it is relying to seek the death penalty.[184] When the State files a notice of intent to seek the death penalty, the court must appoint a psychologist or psychiatrist to conduct a prescreening evaluation, unless the defendant objects.[185] In this evaluation, the psychologist or psychiatrist will determine if reasonable grounds exist to conduct an additional examination regarding the defendant's competency to stand trial and if the defendant was sane at the time s/he allegedly committed the offense.[186]

If the court determines that reasonable grounds for a psychological examination exist, it will appoint two or more mental health experts to examine the defendant and testify as to the defendant's mental condition.[187] Within thirty days of receiving the experts' reports, the court will hold a hearing to determine the defendant's competency.[188] If the court determines that the defendant is competent, the proceedings continue uninterrupted.[189] If the court finds that the defendant is not competent and there is no substantial probability that the defendant will regain competency in the next twenty-one months, it may begin civil commitment proceedings, order the appointment of a guardian, or release the defendant from custody and dismiss the charges without prejudice.[190] If the court finds the defendant not competent, it shall order competency restoration treatment unless there is clear and convincing evidence that the defendant will not regain competency within fifteen months. The court must determine whether the defendant should be subject to involuntary treatment.[191] Upon receipt of an official report that the defendant has become competent during inpatient services, motion of the defendant, expiration of the maximum period set by the court to reestablish competency, or the court's motion, the court will hold a subsequent hearing to re-determine the defendant's competency.[192]

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[181] ARIZ. R. CRIM. P. 17.3.
[182] ARIZ. R. CRIM. P. 17.2.
[183] ARIZ. R. CRIM. P. 15.1(i).
[184] *Id.*; ARIZ. REV. STAT. § 13-703.01(B) (2006).
[185] ARIZ. REV. STAT. § 13-703.03(A) (2006).
[186] *Id.*
[187] ARIZ. R. CRIM. P. 11.3(a).
[188] ARIZ. R. CRIM. P. 11.5(a).
[189] ARIZ. R. CRIM. P. 11.5(b)(1).
[190] ARIZ. R. CRIM. P. 11.5(b)(2).
[191] ARIZ. R. CRIM. P. 11.5(b)(3).
[192] ARIZ. R. CRIM. P. 11.6(a).

In addition, a psychological expert will prescreen the defendant to determine his/her intelligence quotient.[193] If the expert determines that the defendant's IQ is seventy-five or less, the court must appoint additional psychological experts to independently determine whether the defendant has mental retardation.[194] If the experts all agree that the defendant has an IQ above seventy, the notice of intent to seek the death penalty will not be dismissed.[195] If all the experts do not agree that the defendant's IQ is above seventy, the court will hold a hearing to determine if the defendant has mental retardation. At this hearing, the defendant has the burden of proving mental retardation by clear and convincing evidence. There is a rebuttable presumption that the defendant has mental retardation if the trial court determines that the defendant's IQ is sixty-five or lower.[196] If the court finds that the defendant has mental retardation, the court will dismiss the notice of intent to seek the death penalty and will not impose a sentence of death if the defendant is found guilty of first-degree murder.[197] Either side may appeal this decision with the Arizona Court of Appeals.[198]

The parties may negotiate and reach agreement on any aspect of the case.[199] The terms of a plea agreement must be put into writing and signed by the defendant, the defendant's counsel, if any, and the prosecutor.[200] The court will then determine whether the defendant understands and agrees with the plea agreement terms and, taking into account the victim's view, either accept or reject the plea agreement.[201] If the defendant pleaded guilty to a capital offense but did not enter into a plea bargain as to sentence, the case proceeds to the sentencing phase of the capital trial. If the defendant pleaded guilty to a capital offense and entered into a plea bargain as to sentence, the defendant will begin serving the agreed upon sentence.

B. The Capital Trial

Capital trials are heard in circuit court and are conducted in two phases: the guilt/innocence phase and, if the defendant is found guilty, the sentencing proceeding, which is further divided into an aggravation phase and a penalty phase.[202]

1. Guilt/Innocence Phase

All individuals charged with a capital felony possess the right to a trial by jury,[203] although the defendant may waive this right with the consent of the prosecutor and the court.[204] A capital jury is comprised of twelve individuals.[205] The State may dismiss

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193 ARIZ. REV. STAT. § 13-703.02(B) (2006).
194 ARIZ. REV. STAT. § 13-703.02(D) (2006).
195 ARIZ. REV. STAT. § 13-703.02(F) (2006).
196 ARIZ. REV. STAT. § 13-703.02(G) (2006).
197 ARIZ. REV. STAT. § 13-703.02(H) (2006).
198 ARIZ. REV. STAT. § 13-703.02(I) (2006).
199 ARIZ. R. CRIM. P. 17.4(a).
200 ARIZ. R. CRIM. P. 17.4(b).
201 ARIZ. R. CRIM. P. 17.4(c), (d).
202 ARIZ. REV. STAT. § 13-703.01 (2006).
203 ARIZ. CONST. art. II, § 23; ARIZ. REV. STAT. § 13-703.01(S)(1) (2006).
204 ARIZ. REV. STAT. § 13-3983 (2006); ARIZ. R. CRIM. P. 18.1(b).
205 ARIZ. CONST. art. II, § 23; ARIZ. REV. STAT. § 21-102(A) (2006).

potential jurors from the jury pool if there are reasonable grounds to believe that a potential juror entertains conscientious opinions about the death penalty that would preclude his/her finding the defendant guilty[206] or that would prohibit the potential juror from rendering a "fair and impartial verdict."[207]

During the guilt/innocence phase of the trial, the jury must decide whether the prosecution has proved that the defendant is guilty of capital murder or some lesser included offense or offenses beyond a reasonable doubt.[208] Both the State and defense may present opening and closing arguments, as well as witnesses and other types of evidence. After both sides have presented their closing arguments, the court will instruct the jury as to the law of the case.[209]

To render a verdict, the jury must be unanimous.[210] If the defendant is found not guilty of any charge, s/he will be released from state custody. If the defendant is found not guilty of the capital crime, but is found guilty of a lesser-included offense, he/she will proceed to a non-capital sentencing proceeding. If the defendant is found not guilty by reason of insanity or guilty except insane, the court should commit the defendant to a secure mental health facility.[211] If the defendant is found guilty of the capital offense, s/he proceeds to the aggravation phase of the capital trial.[212]

After the defendant is found guilty, but before sentencing, the court must have a pre-sentence report prepared.[213]

2. Sentencing Phase

a. Aggravation Phase

To impose a death sentence, the State must prove the existence of at least one statutory aggravating factor beyond a reasonable doubt.[214] If the defendant is death-eligible as a result of a felony murder conviction, the State also must prove that the defendant killed, attempted to kill or intended to kill, or was a major participant in the underlying felony and acted with reckless disregard for human life.[215]

Under current law, the statutory aggravating factors are defined as:

(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;

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206 ARIZ. R. CRIM. P. 18.4(b) cmt., 14.
207 ARIZ. R. CRIM. P. 18.4(b).
208 ARIZ. REV. STAT. § 13-115(A); *see also* Everett v. State, 88 Ariz. 293, 297 (1960).
209 ARIZ. R. CRIM. P. 19.1(a).
210 ARIZ. CONST. art. II, § 23; *see also* State v. Counterman, 8 Ariz. App. 526, 531 (1968).
211 ARIZ. R. CRIM. P. 25.
212 ARIZ. REV. STAT. § 13-703.01(C) (2006); ARIZ. R. CRIM. P. 19.1(c).
213 ARIZ. R. CRIM. P. 26.4(a).
214 ARIZ. REV. STAT. § 13-703(B) (2006).
215 Tison v. Arizona, 481 U.S. 137 (1987); Edmund v. Florida, 458 U.S. 782 (1982).

(2) The defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense;

(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 or on probation for a felony offense;

(8) The defendant has been convicted of one or more other homicides that 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, was an unborn child in the womb at any stage of its development 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 the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer;

(11) The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street grant or criminal syndicate or to join a criminal street gang or criminal syndicate;

(12) The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding;

(13) The offense was committed in a cold, calculated manner without pretense of moral or legal justification; and

(14) The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.[216]

Opening statements, evidence in support and against the existence of the alleged aggravator(s), and closing arguments are then presented to the trier of fact.[217] The State

[216] ARIZ. REV. STAT. § 13-703(F) (2006).

[217] ARIZ. R. CRIM. P. 19.1(c)(2)-(7). A "trier of fact" is defined as meaning a jury unless the defendant and the State waive a jury, in which case the "trier of fact" is a judge. ARIZ. REV. STAT. § 13-703.01(S)(1) (2006). *See also* ARIZ. REV. STAT. § 13-703(D) (2006).

carries the burden of proof during the aggravation phase.[218] A victim[219] also has the right to be present and, if s/he chooses, to present any relevant information.[220]

The trier of fact must make a special finding as to whether each alleged aggravating circumstance has been proven based on the evidence presented at trial or during the aggravation phase.[221] If the trier of fact is the same judge or jury from the prior phase of the trial, evidence that was admitted at trial and that relates to any aggravating circumstances is considered admitted.[222] If the trier of fact is a jury, its decision must be unanimous.[223] The defendant is entitled to a special finding that an aggravating circumstance was not proven if the trier of fact unanimously finds that it was not proven.[224] If the jury unanimously decides that no aggravating circumstances exist, the death penalty is removed as a sentencing option.[225]

If a jury is unable to reach a decision as to one or more of the alleged aggravating circumstances and has been unable to find at least one aggravator beyond a reasonable doubt, the court will dismiss the jury and impanel a new one.[226] The new jury will not retry the defendant's guilt or any aggravating circumstance the previous jury unanimously found not proven.[227] If the new jury also is unable to reach a unanimous verdict, the death penalty is removed as a sentencing option.[228]

If the jury finds one or more aggravating circumstances proven, the trial moves to the penalty proceeding.[229]

b. Penalty Phase

At the penalty phase of a capital trial, the defendant and the State may present evidence that is relevant to whether there is mitigating evidence that is sufficiently substantial to call for leniency.[230]

The penalty hearing begins with opening statements by the defense and the State.[231] Following opening statements, the victim's survivors are allowed to make a statement relating to the victim and the impact of the crime on their family.[232] Currently, a victim's

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[218] ARIZ. REV. STAT. § 13-703.01(P) (2006).
[219] A victim may be the murdered's individual's spouse, parent, child, grandparent, sibling, or any other person related by consanguinity or affinity to the second-degree or any other lawful representative, unless that person is in custody for an offense or is the accused. ARIZ. REV. STAT. § 13-703.01(S)(2) (2006).
[220] ARIZ. REV. STAT. § 13-703.01(R) (2006).
[221] ARIZ. REV. STAT. § 13-703.01(E) (2006).
[222] ARIZ. REV. STAT. § 13-703(D) (2006).
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] ARIZ. REV. STAT. § 13-703.01(J) (2006); *see also* ARIZ. REV. STAT. § 13-703(D) (2006).
[227] ARIZ. REV. STAT. § 13-703.01(J) (2006); *see also* ARIZ. REV. STAT. § 13-703(D) (2006).
[228] ARIZ. REV. STAT. § 13-703.01(J) (2006); *see also* ARIZ. REV. STAT. § 13-703(D) (2006).
[229] ARIZ. REV. STAT. § 13-703.01(F) (2006); ARIZ. R. CRIM. P. 19.1(D).
[230] ARIZ. REV. STAT. § 13-703.01(G) (2006).
[231] ARIZ. R. CRIM. P. 19.1(D)(1), (2).
[232] ARIZ. REV. STAT. § 13-703.01(R) (2006); ARIZ. R. CRIM. P. 19.1(D)(3).

family member is not allowed to advocate for any particular sentence.[233] However, a conditional law has been enacted allowing for victims' sentencing recommendations if "on or before June 30, 2013, the Arizona [S]upreme [C]ourt or the [S]upreme [C]ourt of the United States rules that it is constitutional for a crime victim in a capital case to make a sentencing recommendation."[234]

The defense may then present evidence in support of mitigation.[235] The trier of fact will consider any factors proffered by the defendant or the State that are relevant in determining whether to impose a death sentence, including any aspect of the defendant's character, propensities, or record and any of the circumstances of the offense.[236] If the trier of fact is the same judge or jury that determined the defendant's guilt, evidence admitted at any stage of the trial will be deemed admitted in this penalty phase.[237] While mitigating circumstances are not limited to the following, statutory mitigating factors are defined as:

(1) The defendant's capacity to appreciate the wrongfulness of his/her conduct or to conform his/her 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, but his/her 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/her 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.[238]

The defendant has the burden of proving the existence of any and all mitigating circumstances by a preponderance of the evidence.[239]

Upon the close of evidence, the defendant may make a statement of allocution to the jury, the State and defense may make closing arguments, and the judge will instruct the jury as to the law governing the case.[240]

If the trier of fact is a jury, unanimity is not required for individual mitigating circumstances and each juror is entitled to consider any mitigation s/he believes has been

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[233] ARIZ. R. CRIM. P. 19.1(D)(3); Lynn v. Reinstein, 68 P. 3d 412 (Ariz. 2003).
[234] ARIZ. REV. STAT. § 13-4426 (2006); 2003 Ariz. Sess. Laws 255 § 8. *But see Lynn*, 68 P. 3d at 412.
[235] ARIZ. R. CRIM. P. 19.1(d)(4).
[236] ARIZ. REV. STAT. § 13-703(G) (2006).
[237] ARIZ. REV. STAT. § 13-703(D) (2006).
[238] ARIZ. REV. STAT. § 13-703(G) (2006).
[239] ARIZ. REV. STAT. §§ 13-703(C), 13-703.01(P) (2006).
[240] ARIZ. R. CRIM. P. 19.1(d)(7)-(9).

proven.[241] However, the jury must unanimously decide that death is the appropriate sentence.[242] In making that determination, the jury must determine whether there is mitigation sufficiently substantial to call for leniency.[243] If the jury unanimously decides that death is not appropriate, the court will decide whether to impose a sentence of life or natural life.[244]

If the jury is unable to reach a verdict, the court will dismiss the jury and impanel a new one.[245] This new jury will not retry the issue of guilt or aggravation and is only impaneled to determine the appropriate sentence.[246] If the new jury cannot reach a unanimous decision, the court will impose a sentence of life or natural life.[247]

If the defendant is convicted of first-degree murder or sentenced to death, the defendant may request a new trial, aggravation, or penalty proceeding.[248] The court may grant a new trial or aggravation or penalty hearing for the following reasons:

(1) The verdict is contrary to law or to the weight of the evidence;
(2) The prosecutor has been guilty of misconduct;
(3) A juror or jurors have been guilty of misconduct;
(4) The court has erred in the decision of a matter of law, or in the instruction of the jury on a matter of law to the substantial prejudice of a party; and
(5) For any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial or capital sentencing.[249]

In addition, either party may move to vacate the judgment. The court may vacate the judgment if (1) the court was without jurisdiction; (2) newly discovered material facts exist; or (3) the conviction was obtained in violation of the United States or Arizona Constitutions.[250]

After imposing a sentence of death, or after denial of the motion to vacate judgment, the court clerk will file an automatic notice of appeal from the judgment and sentence.[251]

C. The Direct Appeal

An individual convicted of capital murder may have his/her conviction reviewed in the Arizona Supreme Court and/or the United States Supreme Court. The Arizona Supreme Court has exclusive state court jurisdiction and is obligated to review all cases in which

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[241] ARIZ. REV. STAT. § 13-703(C) (2006).
[242] ARIZ. REV. STAT. § 13-703.01(H) (2006).
[243] ARIZ. REV. STAT. § 13-703.01(G) (2006).
[244] ARIZ. REV. STAT. § 13-703.01(H) (2006).
[245] ARIZ. REV. STAT. § 13-703.01(K) (2006)
[246] *Id.*
[247] *Id.*
[248] ARIZ. R. CRIM. P. 24.1(a).
[249] ARIZ. R. CRIM. P. 24.1(c).
[250] ARIZ. R. CRIM. P. 24.2(a).
[251] ARIZ. R. CRIM. P. 26.15; ARIZ. R. CRIM. P. 24.2(d).

the defendant has been convicted of capital murder and sentenced to death.[252] The United States Supreme Court may hear an appeal, but is not required to do so.

A person who is convicted of capital murder and sentenced to death receives an automatic appeal to the Arizona Supreme Court,[253] even if s/he pleads guilty to capital murder.[254] Upon entering a sentence of death, the Superior Court clerk will file a notice of appeal on the defendant's behalf.[255] Within forty-five days of the filing of that notice, the Superior Court clerk will send the trial court record to the Arizona Supreme Court.[256] Once the complete record has been filed, notice is given to all parties.[257] The appellant (formerly, the defendant) then has seventy days from the mailing of that notice to file an opening brief.[258] The State's answering brief is due forty days after service of the opening brief, and appellant's reply brief is due twenty days after service of the State's brief.[259]

In this appeal, the Arizona Supreme Court independently reviews the case to determine whether the trier of fact abused its discretion in finding the aggravating circumstances and imposing a sentence of death.[260] If the Court determines that a sentencing error occurred, it must then determine if the error was harmless beyond a reasonable doubt. If the error was harmless beyond a reasonable doubt, the Court will uphold the sentence. If the Court cannot determine whether the error was harmless beyond a reasonable doubt, the Court will remand the case for a new sentencing proceeding.[261]

When trial counsel is allowed to withdraw from representing the defendant on appeal, the trial or appellate court must appoint new counsel for a defendant legally entitled to such representation on appeal.[262]

In reviewing the case, the Court has at its disposal a copy of the trial transcript, all documents, papers, books and photographs introduced into evidence, and all pleadings and documents in the file besides subpoenas and praecipes not specifically designated.[263] In addition, both parties may submit briefs.[264] Either party may request that oral arguments be held on the issues raised in their briefs.[265] However, the Court may decide the case without holding oral arguments if it determines that (1) the appeal is frivolous; (2) the dispositive issue or set of issues presented has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and

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[252] ARIZ. REV. STAT. §§ 13-703.04(A), 12-120.21(A)(1); 13-4031 (2006); ARIZ. R. CRIM. P. 26.15.
[253] ARIZ. REV. STAT. §§ 13-4031, 13-703.05(A) (2006); ARIZ. R. CRIM. P. 26.15.
[254] State v. Cropper, 68 P.3d 407, 408 (Ariz. 2003).
[255] ARIZ. R. CRIM. P. 26.15; *see also* ARIZ. R. CRIM. P. 31.2(b).
[256] ARIZ. R. CRIM. P. 31.9(A).
[257] ARIZ. R. CRIM. P. 31.10.
[258] ARIZ. R. CRIM. P. 31.13(f)(1).
[259] *Id.*
[260] ARIZ. REV. STAT. § 13-703.05(A) (2006).
[261] ARIZ. REV. STAT. § 13-703.05(B) (2006).
[262] ARIZ. R. CRIM. P. 6.6.
[263] ARIZ. R. CRIM. P. 31.8(a).
[264] ARIZ. R. CRIM. P. 31.13(f).
[265] ARIZ. R. CRIM. P. 31.14(a).

record and the decision-making process would not be significantly aided by oral arguments.[266]

The Arizona Supreme Court may "reverse, affirm, or modify the action of the lower court and issue any necessary and appropriate orders."[267] Additionally, if "an illegal sentence has been imposed upon a lawful verdict or finding of guilty by the trial court, the [S]upreme [C]ourt shall correct the sentence to correspond to the verdict or finding."[268] In addition, if the court finds that the evidence introduced at trial is not legally sufficient to establish the defendant's guilt, but is legally sufficient to establish the defendant's guilt as to a necessarily included offense, it may modify the judgment to one of conviction for the lesser offense and remand to the trial court for re-sentencing.[269] Upon announcing its decision, the Court may issue an opinion that addresses the facts of the case and issues of law.[270]

Either party may, but is not required to, file for reconsideration of an appellate court's decision in order to raise specific points or matters of fact or law in which it is claimed that the appellate court erred in determination.[271]

Either party then may file a writ of *certiorari* with the United States Supreme Court. The United States Supreme Court either may deny or accept appellant's case for review. If the United States Supreme Court accepts the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.

If the United States Supreme Court does not accept the case for review, or accepts the case but either (1) does not overturn the appellant's conviction and/or sentence or (2) reinstates the appellant's conviction and/or sentence, the appellant's conviction and sentence are considered final. Alternatively, if neither party files a writ of *certiorari* with the United States Supreme Court, the conviction and sentence becomes final once the time to file a writ of *certiorari* has expired. If the appellant wishes to continue challenging the conviction and/or sentence, s/he may file a petition for post-conviction relief.

D. State Post-Conviction

A defendant under sentence of death is entitled to file a collateral appeal.[272] Once the Supreme Court affirms the conviction and sentence on direct appeal, the Arizona Supreme Court clerk files a notice of post-conviction relief with the trial court.[273] The Supreme Court or if authorized by the Supreme Court, the presiding judge of the county in which the case originated appoints counsel for the defendant,[274] if the defendant is

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[266] *Id.*
[267] Ariz. R. Crim. P. 31.17(b).
[268] ARIZ. REV. STAT. § 13-4037(a) (2006).
[269] ARIZ. R. CRIM. P. 31.17(d).
[270] ARIZ. R. CRIM. P. 31.17(e).
[271] ARIZ. R. CRIM. P. 31.18.
[272] ARIZ. REV. STAT. §§ 13-4231 *et seq.*, 13-4121 *et seq.* (2006).
[273] ARIZ. REV. STAT. § 13-4234(D) (2006); *see also* ARIZ. R. CRIM. P. 32.4(a).
[274] ARIZ. REV. STAT. § 13-4041(B) (2006).

determined to be indigent.[275] The defendant must then file a post-conviction relief petition within 120 days of the filing of the notice.[276]

The post-conviction petition should include every possible ground known for vacating, reducing, correcting, or changing the conviction and/or death sentence.[277] The defendant cannot dispute the conviction or sentence directly, but can allege state and federal constitutional violations, such as whether defense counsel was constitutionally effective.[278] Potential grounds for relief include:

(1) The conviction or the sentence was in violation of the United States or Arizona Constitutions;
(2) The court was without jurisdiction to render judgment or impose sentence;
(3) The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
(4) The person is being held in custody after the sentence imposed has expired;
(5) Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if: (a) the facts were discovered after the trial; (b) the defendant exercised due diligence in securing the newly discovered material facts; and (c) the newly discovered material facts are not merely cumulative or used for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.
(6) The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part;
(7) There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or
(8) The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found the defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.[279]

Petitions that were not filed in a timely manner may raise claims four (4) through eight (8), but may not raise claims one (1) through (3).[280]

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[275] ARIZ. R. CRIM. P. 32.4(c)(1).
[276] *Id.*; ARIZ. REV. STAT. § 13-4122 (2006). *See also*, State ex. rel. Napolitano v. Brown, 982 P.2d 815 (1999) (en banc) (holding that the Arizona code provision allowing a defendant only sixty days to file a post-conviction relief petition was unconstitutional under the separation of powers doctrine because it conflicted with the court rule allowing 120 days).
[277] ARIZ. R. CRIM. P. 32.5.
[278] ARIZ. R. CRIM. P. 32.1.
[279] *Id.*
[280] ARIZ. R. CRIM. P. 32.4(a).

Claims that could have been raised on direct appeal or on post-trial motion, that were finally adjudicated on the merits on appeal or in any previous collateral proceeding, or that were waived at trial, on appeal, or in any previous collateral proceeding are not eligible for relief.[281] The State has the burden of proving by a preponderance of the evidence any ground of preclusion asserted,[282] but the court also may find preclusion *sua sponte*.

The State must file its response to the defendant's petition within forty-five days.[283] The defendant may file a reply within fifteen days after receipt of the State's response.[284] The court then reviews the petition and identifies all procedurally defaulted claims. The court will dismiss the petition if, after identifying all precluded claims, the court determines that no remaining claim presents a material issue of law or fact.[285] If claims that present material issues of law or fact remain, the court will hold an evidentiary hearing within thirty days.[286]

In an evidentiary hearing, the court hears arguments to determine issues of material fact.[287] The petitioner has the burden of proving the allegations of fact by a preponderance of the evidence.[288] If a constitutional defect is proven, the state must prove that the defect was harmless beyond a reasonable doubt.[289]

Once the court hears oral arguments and reviews the case, it must issue a ruling either granting or denying petitioner's motion.[290] If the court finds in favor of the defendant, it will enter an appropriate order with respect to the conviction, sentence or detention, any further proceedings, including a new trial and conditions of release, and other necessary matters.[291] In issuing the order, the court will make specific findings of fact and expressly state its conclusions of law. [292]

If either party believes that the court erred in its decision, it may move for a rehearing.[293] If the motion for a rehearing is granted, the court may amend its previous ruling without a hearing or grant a new hearing and either amend or reaffirm its previous ruling. If the court amends its previous ruling, it must explain its reasoning.[294]

Either party may appeal the Rule 32 decision to the Arizona Supreme Court within thirty days after the final decision of the trial court on the petition for post-conviction relief or the motion for rehearing.[295] The other party may file a cross-petition for review within

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[281] ARIZ. REV. STAT. § 13-4232(A) (2006); ARIZ. R. CRIM. P. 32.2(a).
[282] ARIZ. REV. STAT. § 13-4232(C) (2006); ARIZ. R. CRIM. P. 32.2(c).
[283] ARIZ. R. CRIM. P. 32.6(a).
[284] ARIZ. R. CRIM. P. 32.6(b).
[285] ARIZ. R. CRIM. P. 32.6(c); *see also* ARIZ. REV. STAT. § 13-4130 (2006).
[286] ARIZ. R. CRIM. P. 32.6(c).
[287] ARIZ. R. CRIM. P. 32.8(a).
[288] ARIZ. R. CRIM. P. 32.8(c).
[289] *Id.*
[290] ARIZ. R. CRIM. P. 32.8(d).
[291] *Id.*; ARIZ. REV. STAT. § 13-4131 (2001).
[292] ARIZ. R. CRIM. P. 32.8(d).
[293] ARIZ. R. CRIM. P. 32.9(a).
[294] ARIZ. R. CRIM. P. 32.9(b).
[295] ARIZ. R. CRIM. P. 32.9(c).

fifteen days after service of a petition for review.[296] The petition and/or cross-petition should include a discussion of the issues that were decided by the trial court and which the defendant wishes to present for review, the facts material to a consideration of those issues, and the reasons why the petition should be granted.[297] Failure to raise any issue in the petition or cross-petition that could be raised for review constitutes waiver of appellate review of that issue.[298] Responses to the petition and cross-petition may be filed within thirty days from the date upon which the petition/cross-petition is served.[299]

The Arizona Supreme Court is not required to hear the appeal. If the court grants review, it may order oral arguments and may issue such orders and grant such relief as it deems necessary and proper.[300]

If the Arizona Supreme Court declines to hear the appeal or affirms the lower court's decision, the petitioner may file a request for *certiorari* with the United States Supreme Court. If the United States Supreme Court declines to hear the appeal or affirms the lower court decision, the collateral appeal is complete.

E. Federal Habeas Corpus

After the collateral appeal is finished, a petitioner (previously called the defendant) wishing to challenge his/her conviction and/or sentence as being in violation of federal law may file a petition for a writ of *habeas corpus* with a federal court. By filing the petition, the warrant of execution for the petitioner will be stayed.

Prior to filing the petition, the petitioner must have raised all relevant federal claims in state court.[301] In fact, a federal court could deny the petition on the merits despite the petitioner's failure to exhaust all state remedies.[302]

In a petition for a writ of *habeas corpus*, the petitioner must identify and raise all possible grounds of relief and summarize the facts supporting each ground.[303] If the petitioner challenges a state court's determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the federal law presumption that state court factual determinations are correct.[304] Additionally, if the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court's decision of the claim was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in light of the evidence presented.[305] In addition to the petition, the petitioner may, but is not required to, attach certified copies of the indictment, plea, and judgment to the petition.[306] If the petitioner

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[296] *Id.*
[297] ARIZ. REV. STAT. § 13-4239(C) (2006); ARIZ. R. CRIM. P. 32.9(c)(1).
[298] *Id.*
[299] ARIZ. R. CRIM. P. 32.9(c)(2).
[300] ARIZ. R. CRIM. P. 32.9(f).
[301] 28 U.S.C. § 2254(b)(1) (2006).
[302] 28 U.S.C. § 2254(b)(2) (2006) .
[303] RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[304] 28 U.S.C. § 2254(e)(1) (2006).
[305] 28 U.S.C. § 2254(d) (2006).
[306] 28 U.S.C. § 2249 (2006).

does not include these documents with the petition, the respondent must promptly file copies of those documents with the court.[307]

The petition must be filed in the federal district court for the district wherein the petitioner is in custody or in the district where the petitioner was convicted and sentenced.[308] Arizona has one United States District Court that hears cases in Phoenix, Tucson, Flagstaff, Yuma, and Prescott.[309]

There are two different sets of deadlines for filing a federal habeas petition. Petitioners must follow one set of deadlines if the state has "opt-ed in" to the "Special Habeas Corpus Procedures in Capital Cases,"[310] and another if it has not. "Opting in," among other things, allows the state to use expedited procedures, but a state may only "opt-in" to these expedited procedures if (1) the Attorney General of the United States certifies that the state has established a mechanism for providing counsel in post-conviction proceedings as provided in 28 U.S.C. § 2265; and (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.[311] The state must provide, either through court rule or statute, standards for appointing, compensating, and reimbursing competent counsel.[312] This mechanism must:

(1) Offer counsel to all state prisoners under capital sentence; and
(2) Provide the court of record the opportunity to enter an order—(a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable completely to decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent.[313]

In states that have "opted in," the deadline for federal habeas corpus petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired.[314] In states that have not "opted in", the deadline for filing the petition is one year from the date on which: (1) the judgment became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.[315] The one-year time

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[307] *Id*.
[308] 28 U.S.C. § 2241(d); Rule 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. PROC. 22(a).
[309] *See* United States District Court, District of Arizona, *at* http://www.azd.uscourts.gov/ (last visited July 5, 2006).
[310] 28 U.S.C. §§ 2261-2266 (2006).
[311] 28 U.S.C. § 2261(b) (2006).
[312] 28 U.S.C. § 2261(c) (2006).
[313] *Id.*
[314] 28 U.S.C. § 2263(a) (2006).
[315] 28 U.S.C. § 2244(d)(1) (2006).

limitation may be tolled if the petitioner is pursing a properly filed application for state post-conviction relief or other collateral review.[316]

There is some question as to whether Arizona is or is not qualified as an "opt in" state. While the United States Court of Appeals for the Ninth Circuit stated in *Spears v. Stewart* that Arizona qualifies to "opt in," the statement was contained in dicta and the court held that the "opt in" procedures did not apply to the case in question, due to the state's failure to adhere to its procedures requiring the timely appointment of counsel in state post-conviction proceedings.[317] To date, no federal court has applied the opt-in procedures to an Arizona *habeas* petitioner and the United States Department of Justice has not yet published regulations regarding the circumstances under which the Attorney General of the United States will certify that a state has established a mechanism for providing counsel in post-conviction proceedings.

Regardless of whether Arizona is considered to be an "opt in" state or not, once the petition is filed, a district court judge reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.[318] If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.[319] In contrast, if the judge finds that the petitioner may be entitled to district court relief, the judge will order the respondent (the state) to file an answer replying to the allegations contained in the petition.[320] In addition to the answer, the respondent must furnish all portions of the state court transcripts it deems relevant to the petition.[321] The judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be provided to the parties.[322]

Additionally, either party may submit a request for the invocation of the discovery process.[323] The judge may grant such request if the requesting party establishes "good cause."[324] The judge also may direct the parties to expand the record by providing additional evidence relevant to the merits of the petition.[325] This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.[326]

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing to address some or all of the petitioner's claims is required.[327] The judge may not hold an evidentiary hearing on a claim for which the applicant failed to develop any factual basis during the state court proceedings unless (1) the claim is based on newly recognized constitutional law or newly discovered,

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316 28 U.S.C. § 2244(d)(2) (2006).
317 Spears v. Stewart, 267 F.3d 1026 (9th Cir. 2001).
318 RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
319 *Id.*
320 RULES 4 and 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
321 RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
322 *Id.*
323 RULE 6(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
324 RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
325 RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
326 RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
327 RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

previously unavailable evidence; or (2) the facts underlying the claim would be sufficient to establish that but for constitutional error no reasonable fact finder would have found the applicant guilty of the underlying offense.[328] If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional evidence.[329] However, if an evidentiary hearing is required, the judge should appoint counsel to the petitioner[330] and conduct the hearing as promptly as possible.[331]

During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner's claims. Based on the evidence presented, the judge may grant the petitioner a new guilt/innocence or sentencing proceeding or a new appeal, or leave the conviction and sentence intact.

In order to appeal the district court judge's decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.[332] If the petitioner seeks the appeal, s/he must also request a "certificate of appealability" from either a district or circuit court judge.[333] A judge may issue a "certificate of appealability" only if the petitioner makes a substantial showing of the denial of a constitutional right in the request for the certificate.[334] If the "certificate of appealability" is granted, the appeal will proceed to the Ninth Circuit Court of Appeals.

In appealing to the United States Court of Appeals, an appellant (defendant/petitioner) files a brief arguing that the district court erred in denying relief. The Office of the Attorney General, representing the State of Arizona, files a brief in response. The court generally holds oral arguments before a three-judge panel, although the judges of the court may agree to hear a case *en banc* in some situations. After oral arguments, the court considers the briefs and the arguments and issues a written opinion either affirming or reversing the district court's decision. In rendering its decision, the Ninth Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments, if permitted. Based on the evidence, the Ninth Circuit may order a new appeal in the federal district court or the state court, or a new guilt/innocence or sentencing proceeding.

Both parties may then seek review of the Ninth Circuit Court's decision by filing a petition for a writ of *certiorari* in the United States Supreme Court.[335] The United States Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition it may deny the petitioner relief or order a new guilt/innocence or sentencing trial or a new appeal.

If the petitioner wishes to file a second or successive habeas corpus petition, s/he must submit a motion to the Ninth Circuit Court of Appeals requesting an order authorizing the

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[328] 28 U.S.C. § 2253(e)(2) (2006).
[329] RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[330] RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; 18 U.S.C.A. § 3006A(g) (2006) (denoting the qualifications for federal habeas corpus counsel).
[331] RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[332] FED. R. APP. PROC. 4(a)(1)(A).
[333] 28 U.S.C.A. § 2253(c)(1) (2006); FED. R. APP. PROC. 22(b)(3).
[334] 28 U.S.C.A. § 2253(c)(2) (2006)
[335] 28 U.S.C.A. § 1254(1) (2006).

petitioner to file and the district court to consider the petition.[336] A three-judge panel of the Ninth Circuit must consider the motion.[337] The panel specifically must assess whether the petition makes a *prima facie* showing that the claims presented in the second or successive petition were not previously raised and that the new claims rely on a new, previously unavailable constitutional rule or newly discovered, previously unascertainable facts that, if proven, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[338] Any second or successive petition that presents a claim raised in a prior petition will be dismissed.[339]

If the Ninth Circuit denies the motion, the petitioner may not seek appellate review of such decision.[340] If the Ninth Circuit grants the motion, then the second or successive motion will continue through the same process as the initial petition.

The petitioner may seek final review of his/her conviction and sentence by filing a petition for clemency. [341]

F. Clemency

Under the Arizona Constitution, the Governor is given clemency powers in accordance with the conditions, restrictions, and limitations provided by law.[342] Arizona law permits the granting of reprieves, commutations, and pardons to individuals under a sentence of death.[343]

The Arizona legislature created the Board of Executive Clemency (Board) to oversee the clemency process. The Board must recommend a reprieve, commutation, parole, or pardon before the Governor may grant or deny such a request.[344]

To initiate the clemency process, the inmate must complete and sign an application for commutation.[345] At least ten days before the Board acts upon an application, the applicant must notify the county attorney of his/her intent to apply. Unless the Governor waives this requirement, a copy of the notice must be published for thirty days in a paper in the county where the conviction occurred. These provisions do not apply if the applicant is in imminent danger of death or is within ten days of execution.[346]

For an inmate who committed a capital offense before January 1, 1994, all applications for reprieves, commutations, and pardons made to the Governor are transmitted

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[336] 28 U.S.C.A. § 2244(a)(3)(A) (2006).
[337] 28 U.S.C.A. § 2244(b)(3)(B) (2006).
[338] 28 U.S.C.A. § 2244(b)(2) (2006).
[339] 28 U.S.C.A. § 2244(b)(1) (2006).
[340] 28 U.S.C.A. § 2244(b)(3)(E) (2006).
[341] ARIZ. REV. STAT. § 31-443 (2006).
[342] ARIZ. CONST. art. v, § 5.
[343] ARIZ. REV. STAT. § 31-443 (2006).
[344] ARIZ. REV. STAT. § 31-402 (A), (C) (2006).
[345] Ariz. Bd. of Exec. Clemency Pol'y 400.13(A).
[346] ARIZ. REV. STAT. § 31-442 (2006).

immediately to the Chairman of the Board. Once received, the Board will consider the application and return the application with its recommendation to the Governor.[347]

For an inmate who committed a capital offense on or after January 1, 1994, the Board will hold a hearing in which the victim, county attorney, and presiding judge are given the opportunity to be heard. After the hearing, the Board may recommend that the Governor commute the death sentence after finding clear and convincing evidence that (1) the sentence imposed is excessive given the nature of the offense and the offender's record; and (2) there is a substantial probability that when released the offender will conform the offender's conduct to the requirements of law.[348]

Only eligible applicants, as deemed by the Department of Corrections, will be scheduled for a hearing.[349]

Commutation hearings generally occur in two phases. During the first phase, the Board will review the application, as well as applicant files, letters, and all relevant information. Family, friends, victims, other witness, and legal counsel may submit written information or provide oral testimony. At the conclusion of the hearing, the Board may find by majority vote that there is no basis for further consideration or that there are sufficient reasons to warrant further investigation. If further investigation is warranted, the Board will hold a phase two hearing.[350] If the inmate is in imminent danger of death or is the subject of a warrant of execution, the first hearing phase may be waived.[351]

At the phase two hearing, the Board interviews the applicant, reviews all relevant information, including a report prepared by Board staff, and takes testimony from family, friends, victims, other witnesses, and legal counsel. At the end of the hearing, the Board issues a final decision to recommend or not recommend clemency to the Governor.[352]

When the Board recommends a commutation of sentence, it must send a letter to the Governor explaining its reasoning. Board members may also send letters of dissent.[353] The case materials considered by the Board also are sent to the Governor.[354]

If the Board recommends clemency, the Governor has great discretion in deciding whether to accept or reject that recommendation.[355] When the Governor does grant a commutation, pardon, reprieve or stay, or suspends the execution of sentence, however, s/he must publish the reasons for granting the clemency request in a newspaper of general circulation within ten days.[356]

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[347] ARIZ. REV. STAT. § 31-402(B) (2006).
[348] ARIZ. REV. STAT. § 31-402(C)(2) (2006).
[349] Ariz. Bd. of Exec. Clemency Pol'y 400.13(B).
[350] Ariz. Bd. of Exec. Clemency Pol'y 400.13(F)(1).
[351] Ariz. Bd. of Exec. Clemency Pol'y 400.13(F).
[352] Ariz. Bd. of Exec. Clemency Pol'y 400.13(F)(2).
[353] Ariz. Bd. of Exec. Clemency Pol'y 400.13(G).
[354] Ariz. Bd. of Exec. Clemency Pol'y 400.13(H).
[355] United States Court of Appeals for the Ninth Circuit, *Ninth Circuit Capital Punishment Handbook*, *at* http://www.ce9.uscourts.gov/web/sdocuments.nsf/3779242195bb2339882568480080d277.
[356] ARIZ. REV. STAT. § 31-445 (2006).

Any unanimous recommendation for commutation by the present and voting Board members not acted on by the Governor within ninety days automatically becomes effective.[357]

G. Execution

Once the Arizona Supreme Court has affirmed the death sentence and the first post-conviction relief proceeding has finished, or the period of time available to file a post-conviction petition has expired, the Court will issue a warrant of execution to the Director of the Department of Corrections.[358] The warrant authorizes the Director of the Department of Corrections to carry out the execution between thirty-five and sixty days after the Arizona Supreme Court's mandate or order denying review or upon the State's motion.[359] If a court grants a stay of execution, the Arizona Supreme Court will grant subsequent execution warrants upon motion by the State.[360]

For offenses committed on or after November 23, 1992, lethal injection is the only legal method of execution. For offenses committed before November 23, 1992, the inmate may choose to be executed by lethal injection or lethal gas.[361]

The Director of the Department of Corrections or the director's designee must attend the execution. In addition, the Director will invite the Attorney General and at least twelve other witnesses of his/her choice to attend the execution. At the request of the defendant, the Director will allow up to two clergy people and up to five relatives or friends to attend. Peace officers also may be invited. Minors are prohibited from witnessing an execution.[362]

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[357] ARIZ. REV. STAT. § 31-402(D) (2006).
[358] ARIZ. REV. STAT. §§ 13-706(A), 13-4040 (2002).
[359] ARIZ. R. CRIM. P. 31.17(C)(3).
[360] ARIZ. REV. STAT. § 13-706(A) (2002).
[361] ARIZ. CONST. art. xxii, § 22; ARIZ. REV. STAT. § 13-704(A), (B) (2006).
[362] ARIZ. REV. STAT. § 13-705 (2006).

CHAPTER TWO

COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.[1] Since then, over thirty-five jurisdictions have adopted laws concerning post-conviction DNA testing.[2] However, the standards for preserving biological evidence and for seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence. Written procedures for collecting, preserving and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.[3] The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state officials responsible for handling or testing biological evidence, and should be enforceable through the agency's disciplinary process.[4]

Accuracy in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,[5] and through the priorities and practices of other police oversight groups.[6]

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[1] *See* ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* http://www.abanet.org/crimjust/policy/cjpol.html#am00115 (last visited on May 22, 2006).

[2] *See* National Conference of State Legislatures, DNA & Crime, *at* http://www.ncsl.org/programs/health/genetics/dna.htm (last visited on May 22, 2006); *see also* Innocence Project, Legislative Page, *at* http://www.innocenceproject.org/docs/Model_DNA_Factsheet.pdf (last visited on May 22, 2006).

[3] *See* 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-4.3) ("Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies."); *Id.* (Standard 1-5.1) (stating that police should be "made fully accountable" to their supervisors and to the public for their actions).

[4] *See id.* (Standard 1-5.3(a)) (identifying "[c]urrent methods of review and control of police activities").

[5] Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

[6] Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) is an independent peer group that has accredited law enforcement agencies in all fifty states. Similarly, state-based organizations exist in many places, as do government-established independent monitoring agencies. *See* CALEA Online, *at* http://www.calea.org/ (last visited on May 22, 2006). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD-LAB) or the National Forensic Science Technology Center (NFSTC).

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical or unprofessional behavior led to the arrest, prosecution or conviction of an innocent person.[7]

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or law are unavailable.[8] Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy, or sound professional practice calls for them.[9]

ASCLD-LAB, *at* http://www.ascld-lab.org/ (last visited on May 22, 2006); NFSTC, *at* http://www.nfstc.org/ (last visited on Jan. 6, 2006).

[7] Standard 1-7.3 provides:

> (a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
>
> (b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-7.3); *see also id.* (Standard 1-5.2(a)) (noting the value of "education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society").

[8] *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) ("Adequate Police Resources").

[9] *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

I. FACTUAL DISCUSSION

A. Preservation of DNA Evidence and Other Types of Evidence

In capital cases, the clerk of the superior court is obligated to permanently retain the entire case file, which includes all original documents and evidence filed with the court.[10] Prosecutors and law enforcement agencies do not have the same preservation requirements, however, and are allowed to dispose of any items which were seized or obtained for use in a criminal prosecution, in accordance with statutory and rule-based procedures.[11] In some situations, prosecutors and law enforcement agencies are even compelled to dispose of evidence.[12] Most notably, a prosecutor or law enforcement agency generally must dispose of any item within thirty days after the case is no longer "subject to modification."[13]

Before a law enforcement agency disposes of any item, however, it must notify the prosecutor and the Office of the Attorney General.[14] The prosecutor or the Attorney General, in turn, may: (1) have the item photographed, reproduced, or otherwise identified; (2) transcribe all serial numbers, identification numbers, or other identifying marks; and/or (3) prepare, or have prepared by an expert, a report identifying the item.[15] If the item was used or may be used as evidence against the defendant, the defendant and his/her counsel must be given notice at least ten days before the disposal.[16] The defendant may then request a stay of disposal until after trial or may ask to examine, test, analyze, or otherwise make a record of the item.[17] The prosecutor may impose any "reasonable" conditions on this examination, testing, or analysis.[18] A court with jurisdiction may stay the disposal of any item for a "reasonable time."[19] Any records of disposal are admissible in later court proceedings for any purpose for which the item would have been admissible.[20]

To ensure that "the police are neither intentionally selective or elusive, nor careless, negligent, or lazy, in seizing and assuring the preservation of material evidence," the

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[10] ARIZ. CODE OF JUD. ADMIN. § 3-402(A), (C)(1)(b)(2) (2006). Under the Code, "case file" is defined as "the original documents or other material, regardless of physical form filed in an action or proceeding in a court, either in paper or electronic format." ARIZ. CODE OF JUD. ADMIN. §3-402(A) (2006).

[11] ARIZ. R. CRIM. P. 28.2(a).

[12] ARIZ. R. CRIM. P. 28.2(b).

[13] *Id.* A case is no longer "'subject to modification': (1)([a]fter the defendant has been acquitted or the charges dismissed with prejudice; (2) [s]ixty days after judgment and sentence have been entered, unless a notice of appeal or a post-trial motion have been filed; (3) [n]inety days after denial of a post-trial motion or receipt of the mandate of the appellate court affirming a conviction, unless a petition for writ of certiorari has been filed with the United States Supreme Court; (4) [t]wenty-five days after a denial of certiorari or the mandate of the United States Supreme Court affirming a conviction, unless a petition for rehearing has been filed; (5) [r]eceipt of a denial by the United States Supreme Court of a petition for rehearing; (6) [o]ne year after exhaustion of all state remedies if no petition for habeas corpus is filed or after the exhaustion of all federal remedies if a petition for a writ of habeas corpus has been filed. ARIZ. R. CRIM. P. 28.1(b).

[14] ARIZ. R. CRIM. P. 28.2(d).

[15] *Id.*

[16] ARIZ. R. CRIM. P. 28.2(e).

[17] *Id.*

[18] *Id.*

[19] ARIZ. R. CRIM. P. 28.2(f).

[20] ARIZ. R. CRIM. P. 28.2(g).

Arizona Supreme Court has held that the State has "a duty, in the interest of justice, to act in a timely manner to ensure the preservation of evidence it is aware of[,] where that evidence is obviously material and reasonably within its grasp."[21] If, before or during trial, the State "destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue"[22] and the defendant can show s/he was prejudiced by this act,[23] the judge should provide a *Willits*[24] instruction to the jury explaining that it "may infer that the true fact is against [the State's] interest."[25]

In addition, the court may order the preservation of some biological evidence in order to replicate a post-conviction DNA test.[26] If the defendant files a petition for post-conviction DNA testing, the State must preserve for the entirety of the proceeding all evidence in its possession or control that could be subject to DNA testing.[27]

1. Law Enforcement Procedures for the Pre-Trial Preservation of Evidence

All police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Arizona that are certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)[28] are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on the collection, preservation, and use of physical evidence.[29] CALEA further requires a written directive establishing guidelines and procedures for collecting, processing, and preserving physical evidence in the field.[30]

In addition to the requirements for law enforcement agency certification, individual law enforcement officers (peace officers[31]) are statutorily required to meet certain criteria[32]

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[21] State v. Perez, 687 P.2d 1214, 1218-19 (Ariz. 1984) (en banc).
[22] *Id*. at 1216.
[23] *Id*. at 1219.
[24] State v. Willits, 393 P.2d 274 (Ariz. 1964) (en banc).
[25] *Perez*, 687 P.2d at 1216.
[26] ARIZ. REV. STAT. § 13-4240(I)(3) (2005).
[27] ARIZ. REV. STAT. § 13-4240(H) (2005).
[28] Eighteen police departments, university/college law enforcement agencies, and county attorney office investigation divisions have been accredited or are in the process of obtaining accreditation by CALEA. *See* CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on June 12, 2006) (use second search function, designating "U.S." and "Arizona" as search criteria). *See also* CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited on June 12, 2006) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: the International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). The accreditation process consists of five phases: (1) application; (2) self-assessment; (3) on-site assessment; (4) commission review; and (5) maintaining compliance and reaccreditation. *See* CALEA Online, The Accreditation Process, *at* http://www.calea.org/newweb/accreditation%20Info/process1.htm (last visited on June 12, 2006).
[29] COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES 42-2 (4th ed. 2001) (Standard 42.2.1) [hereinafter CALEA STANDARDS].
[30] *Id.* at 83-1(Standard 83.2.1).
[31] "Peace officers" are defined, as "sheriffs of counties, constables, marshals, policemen of cities and towns, commissioned personnel of the [D]epartment of [P]ublic [S]afety, personnel who are employed by the [S]tate [D]epartment of [C]orrections and the [D]epartment of [J]uvenile [C]orrrections who have received a certificate from the Arizona [P]eace [O]fficer [S]tandards and [T]raining [B]oard, peace officers who are appointed by a multicounty water conservation district and who have received a certificate from

and complete a basic course of training.[33] The basic training requirements course for full-authority peace officers[34] consists of 585 hours of training, including instruction in such relevant areas as crime scene management and death investigations.[35] Specifically, the course provides training regarding preliminary investigation and crime scene management, crime scene investigation, and physical evidence procedures.[36]

Lastly, all laboratories in Arizona that are accredited by the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directions/Laboratory Accreditation Board (ASCLD/LAB) are required to adopt or abide by certain procedures relating to the preservation of evidence.[37] For example, the

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the Arizona [P]eace [O]fficer [S]tandards and [T]raining [B]oard, police officers who are appointed by community college district governing boards and who have received a certificate from the Arizona [P]eace [O]fficer [S]tandards and [T]raining [B]oard, police officers who are appointed by the Arizona [B]oard of [R]egents and who have received a certificate from the Arizona [P]eace [O]fficer [S]tandards and [T]raining [B]oard and police officers who are appointed by the governing body of a public airport pursuant to § 28-8426 and who have received a certificate from the Arizona [P]eace [O]fficer [S]tandards and [T]raining [B]oard. *See* 2006 Ariz. Leg. Serv. Ch. 245 (H.B. 2793) (West).

[32] *See* ARIZ. REV. STAT. § 41-1822(A)(3) (2005). In addition, one must (1) be a United States citizen; (2) be at least twenty-one years of age, except that a person may attend an academy if the person will be twenty-one before graduating; (3) be a high school graduate or have successfully completed a General Equivalency Development examination; (4) undergo a complete background investigation; (5) undergo a medical examination; (6) not have been convicted of a felony or any offense that would be a felony if committed in Arizona; (7) not have been dishonorably discharged from the U.S. Armed Forces; (8) not have been previously denied certified status, have certified status revoked, or have current certified status suspended; (9) not have illegally sold, produced, cultivated, or transported marijuana for sale; (10) not have illegally used marijuana for any purpose within the past three years; (11) not have ever illegally used marijuana other than for experimentation; (12) not have ever illegally used marijuana while employed or appointed as a peace officer; (13) not have illegally sold, produced, cultivated, or transported for sale any dangerous drug or narcotic, other than marijuana; (14) not have illegally used a dangerous drug or narcotic, other than marijuana, for any purpose within the past seven years; (15) not have ever illegally used a dangerous drug or narcotic other than for experimentation; (16) not have ever illegally used a dangerous drug or narcotic while employed or appointed as a peace officer; (17) not have a pattern of abuse of prescription medication; (18) undergo a polygraph examination; (19) not have been convicted of or adjudged to have violated traffic regulations governing the movement of vehicles with a frequency within the past three years that indicates a disrespect for traffic laws or a disregard for the safety of other persons on the highway; and (20) read the code of ethics and affirm by signature the person's understanding and agreement to abide by the code. *See* ARIZ. ADMIN. CODE R13-4-105(A)(1)-(20) (2006).

[33] ARIZ. ADMIN. CODE R13-4-110(A) (2006).

[34] A "full-authority peace officer" is a "peace officer whose authority to enforce the laws of [Arizona] is not limited" by this chapter of the Arizona Administrative Code. *See* ARIZ. ADMIN. CODE R13-4-101 (2006). The other peace officer categories are a "specialty peace officer" ("a peace officer whose authority is limited to enforcing specific sections of the Arizona Revised Statutes or Arizona Administrative Code, as specified by the appointing agency's statutory powers and duties"), a "limited-authority peace officer" ("a peace officer who is certified to perform the duties of a peace officer only in the presence and under the supervision of a full-authority peace officer"), and a "limited correctional peace officer" ("a peace officer who has authority to perform the duties of a peace officer only while employed by and on duty with the Arizona Department of Corrections, and only for the purposes of guarding, transporting, or pursuing persons under the jurisdiction of the Arizona Department of Corrections"). *See* ARIZ. ADMIN. CODE R13-4-101; 13-4-103(D)(2)-(4) (2006).

[35] ARIZ. ADMIN. CODE R13-4-116(E)(1)(e) (2006).

[36] *Id.*

[37] Eight Arizona laboratories are currently accredited through the ASCLD/LAB program, including the (1) Arizona Department of Public Safety, Central Regional Laboratory; (2) Arizona Department of Public Safety, Northern Regional Laboratory; (3) Arizona Department of Public Safety, Western Regional Laboratory; (4) Arizona Department of Public Safety, Southern Regional Laboratory; (5) Mesa Police

ASCLD/LAB specifically requires each crime laboratory to have a written or secure electronic chain of custody record with all necessary data, which provides for the complete tracking of all evidence, and to have a secure area for overnight and/or long-term storage of evidence.[38] All evidence must also be marked for identification, stored under proper seal, meaning that the contents cannot readily escape, and protected from loss, cross-transfer, contamination and/or deleterious change.[39]

2. Court Procedures for Preservation of Evidence During and After Trial

In capital cases, the clerk of the superior court is obligated to retain permanently the entire case file, including all original documents and evidence filed with the court.[40]

B. Post-Conviction DNA Testing

Pursuant to section 13-4240 of the Arizona Revised Statutes (A.R.S.), an individual convicted of and sentenced for a felony offense may request post-conviction DNA testing of any evidence "that is in the possession or control of the court or the [S]tate, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence."[41]

The motion requesting post-conviction DNA testing must be filed with the trial court that entered the inmate's judgment of conviction. Once a petition has been filed pursuant to section 13-4240 of the A.R.S., the court must order the State to preserve for the pendency of the proceedings all evidence in its possession or control that could be subject to DNA testing.[42] The State must prepare an inventory of the evidence and submit a copy to both the defense and the court.[43] If evidence is intentionally destroyed after the court orders its preservation, the court may impose "appropriate" sanctions for a knowing violation, including criminal contempt.[44]

After the prosecutor is given notice of the petition and has an opportunity to respond, the court *must* order DNA testing if:

(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;
(2) The evidence is still in existence and is in a condition that allows DNA testing to be conducted; and

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Department Crime Laboratory; (6) Phoenix Police Department, Laboratory Services Bureau; (7) Scottsdale Police Department Crime Laboratory; and (8) Tucson City-County Crime Laboratory. *See* Laboratories Accredited by ASCLS/LAB, American Society of Crime Laboratories Directors, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#AZ (last visited on June 12, 2006).

[38] AM. SOC'Y OF CRIME LABS. DIRS., LAB ACCREDITATION BD., LABORATORY ACCREDITATION BOARD 2003 MANUAL 20-23 (Standards 1.4..1.1; 1.4.1.5) [hereinafter ASCLD/LAB 2003 MANUAL].

[39] *Id.* at 21-22 (Standards 1.4.1.2-4).

[40] *See supra* note 10.

[41] ARIZ. REV. STAT. § 13-4240(A) (2005).

[42] ARIZ. REV. STAT. § 13-4240(H) (2005).

[43] *Id.*

[44] *Id.*

(3) The evidence was not previously subjected to DNA testing or was not subjected to the testing that is now requested and may resolve an issue not previously resolved by the prior testing.[45]

After the prosecutor is given notice of the petition and has an opportunity to respond, the court *may* order DNA testing if:

(1) A reasonable probability exists that either (a) the petitioner's verdict or sentence would have been more favorable if the results of DNA testing had been available at the trial leading to the judgment of conviction; or (b) DNA testing will produce exculpatory evidence;
(2) The evidence is still in existence and is in a condition that allows DNA testing to be conducted; and
(3) The evidence was not previously subjected to DNA testing or was not subjected to the testing that is now requested and may resolve an issue not previously resolved by the prior testing.[46]

If the court orders DNA testing, the court also must order the production of any laboratory reports prepared in connection with the testing and may order the production of any underlying data and laboratory notes.[47] If either party previously subjected the evidence to DNA testing, the court may order the prosecutor or defense counsel to provide each party and the court access to the laboratory reports prepared in connection with the testing and may order the production of the underlying data and laboratory notes.[48]

If the results of the DNA test are not favorable to the petitioner, the court must dismiss the petition and may make any additional orders that it deems appropriate, including:

(1) Notifying the Board of Executive Clemency or a probation department;
(2) Requesting that the petitioner's sample be added to the federal combined DNA index system offender database; and
(3) Providing notification to the victim or his/her family.[49]

If the results of the DNA test are favorable to the petitioner and there is no other provision of law that would bar a hearing as untimely, the court will order a hearing and make any further required orders.[50]

C. Method of and Funding for Post-Conviction DNA Testing

If the defendant is indigent, the court may appoint investigators and expert witnesses that are "reasonably necessary to adequately present a defense at trial and at any subsequent

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45 ARIZ. REV. STAT. § 13-4240(B)(1)-(3) (2005).
46 ARIZ. REV. STAT. § 13-4240(C)(1)-(3) (2005).
47 ARIZ. REV. STAT. § 13-4240(G) (2005).
48 *Id*.
49 ARIZ. REV. STAT. § 13-4240(J) (2005).
50 ARIZ. REV. STAT. § 13-4240(K) (2005).

proceeding."[51] If the court orders post-conviction DNA testing under section 13-4240(B) of the A.R.S., the court must order the method and responsibility for payment, if necessary.[52] If the court orders post-conviction DNA testing under section 13-4240(C) of the A.R.S., the court may require the petitioner to pay testing costs.[53] The court may make any other orders it deems appropriate, including:

(1) Specifying the type of DNA analysis to be used;
(2) Specifying the procedures to be followed during the testing;
(3) Ordering the preservation of some of the sample for replicating the testing; and
(4) Ordering elimination samples from third parties.[54]

D. Location of Post-Conviction DNA Testing

If the judge orders post-conviction DNA testing, the court must select a laboratory that meets the standards established by the Deoxyribonucleic Acid Advisory Board to conduct the testing.[55] Eight Arizona laboratories are currently accredited through the ASCLD/LAB program and consequently meet the standards established by the Deoxyribonucleic Acid Advisory Board, including the:

1. Arizona Department of Public Safety, Central Regional Laboratory;
2. Arizona Department of Public Safety, Northern Regional Laboratory;
3. Arizona Department of Public Safety, Western Regional Laboratory;
4. Arizona Department of Public Safety, Southern Regional Laboratory;
5. Mesa Police Department Crime Laboratory;
6. Phoenix Police Department, Laboratory Services Bureau;
7. Scottsdale Police Department Crime Laboratory; and
8. Tucson City-County Crime Laboratory.[56]

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[51] ARIZ. REV. STAT. § 13-4013(B) (2005).
[52] ARIZ. REV. STAT. § 13-4240(D) (2005).
[53] *Id.*
[54] ARIZ. REV. STAT. § 13-4240(I) (2005).
[55] ARIZ. REV. STAT. § 13-4240(F) (2005). The 1994 DNA Identification Act (codified, in part, at 42 U.S.C. § 14131(a)(1)) authorized the Federal Bureau of Investigation (F.B.I.) to establish and appoint individuals to a DNA advisory board, charged with creating standards of quality assurance for DNA testing. The "Quality Assurance Standards for Forensic DNA Testing Laboratories" became effective on October 1, 1998. *See* DNA Advisory Board, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, 2 FORENSICS SCI. COMM. 3 (July 2000), *available at* http://www.fbi.gov/hq/lab/fsc/backissu/july2000/codis2a.htm (last visited on Jun. 12, 2006). The DNA Advisory Board disbanded in 2000, but the F.B.I. and ASCLD/LAB have formally agreed upon a joint use of the audit document. *See Quality Assurance Audit for Forensic DNA and Convicted Offender DNA Databasing Laboratories*, 3 FORENSICS SCI. COMM. 1 (Jan. 2001), *available at* http://www.fbi.gov/hq/lab/fsc/bakissu/jan2001/dnaaudit.htm (last visited on June 12, 2006); Karen Cormier, Lisa Calandro, and Dennis Redder, *Evolution of the Quality Assurance Documents for DNA Laboratories*, FORENSIC MAGAZINE, *available at* http://www.forensicmag.com/articles.asp?pid=30 (last visited June 12, 2006).
[56] *See supra* note 37.

For a detailed discussion of Arizona's crime laboratories and the ASCLD/LAB accreditation program, see the Crime Laboratories and Medical Examiner Offices Chapter.

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence[57] for as long as the defendant remains incarcerated.

While the State of Arizona has "a duty, in the interest of justice, to act in a timely manner to ensure the preservation of evidence it is aware of[,] where that evidence is obviously material and reasonably within its grasp,"[58] there is no statewide requirement that all biological evidence be preserved for as long as the defendant remains incarcerated.

Prosecutors and law enforcement agencies are allowed– and in some circumstances, compelled– to dispose of items that were seized or otherwise obtained for use in a criminal prosecution.[59] A prosecutor or law enforcement agency generally must dispose of any item within thirty days after the case is no longer "subject to modification."[60] While the statute broadly defines "subject to modification" to include all judicial outlets for relief, there is no requirement that biological evidence be preserved through the clemency process and up until execution. Despite this, the Trial Issues Subcommittee of the Arizona Capital Case Commission reported in December 2002 that Arizona law enforcement officials retained evidence in all capital cases indefinitely.[61]

Notably, in capital cases, the clerk of the superior court is required to permanently retain the entire case file, which includes all original documents and evidence filed with the court.[62] While the clerk is not mandated to retain all biological evidence; s/he is required to retain all biological evidence filed with the court for as long as the defendant remains incarcerated.[63]

Lastly, if the defendant files a petition for post-conviction DNA testing, the State must preserve throughout the entire proceeding all evidence in its possession or control that could be subject to DNA testing[64] and, in addition, the court may order the preservation of some available biological evidence to replicate post-conviction DNA testing.[65]

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[57] "Biological evidence" includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. *See* INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* http://www.innocenceproject.org/legislation/index.php (last visited on May 22, 2006).

[58] State v. Perez, 687 P.2d 1214, 1218-19 (Ariz. 1984) (en banc).

[59] ARIZ. R. CRIM. P. 28.2(a), (b).

[60] *See supra* note 13.

[61] OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT 24-25 (2002). It is unclear what the term "indefinite" means in this circumstance.

[62] ARIZ. CODE OF JUD. ADMIN. §3-402(A), (C)(1)(b)(2) (2006). Under the Code, "case file" is defined as "the original documents or other material, regardless of physical form filed in an action or proceeding in a court, either in paper or electronic format." ARIZ. CODE OF JUD. ADMIN. §3-402(A) (2006).

[63] *See* ARIZ. CODE OF JUD. ADMIN. §3-402(A), (C)(1)(b)(2) (2006).

[64] ARIZ. REV. STAT. § 13-4240(H) (2005).

[65] ARIZ. REV. STAT. § 13-4240(I)(3) (2005).

Because there is no statutory requirement that all biological evidence be preserved through the entire legal process, the Arizona Capital Case Commission (Commission) recommended that legislation be enacted to require the preservation of all biological materials in capital cases until a defendant has an opportunity to request DNA testing of that evidence.[66] Notwithstanding resource concerns, the Attorney General's Law Enforcement Advisory Board did not oppose this recommendation.[67] The Commission reported that it planned to recommend this course of action to the Arizona Criminal Justice Commission.[68] It is unclear whether this recommendation was ever made, but no statute regarding the preservation of biological evidence has been enacted since the Commission's report was released in December of 2002.

Arizona, through a number of statutes and rules, appears to require the preservation of biological evidence while state and federal judicial remedies are still available and the preservation of all biological evidence filed with the court. However, Arizona law does not mandate the preservation of all biological evidence for the entire duration of a capital defendant's incarceration. Accordingly, the State of Arizona is only in partial compliance with Recommendation #1.

B. Recommendation #2

> **All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.**

The State of Arizona provides an avenue for defendants to obtain physical evidence for DNA testing during pre-trial discovery and for inmates to seek post-conviction DNA testing.

The prosecutor, unless otherwise ordered by the court or provided by local rule, must make available at the arraignment or preliminary hearing to any defendant in a felony case (1) all original and supplemental reports prepared by a law enforcement agency in connection with the defendant's alleged offense; and (2) the names and addresses of experts who personally examined the defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments, or comparisons that have been completed.[69] The prosecutor has a supplemental duty to disclose material within the prosecutor's possession or control.[70] Again, unless otherwise

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66 CAPITAL CASE COMMISSION, *supra* note 61.

67 *Id*. at 25.

68 *Id*.

69 ARIZ. R. CRIM. P. 15.1(a), (b)(3),(4).

70 *See* ARIZ. R. CRIM. P. 15.1(b). "Except as provided by Rule 39(b), the prosecutor shall make available to the defendant the following material and information within the prosecutor's possession or control:

(1) The names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements,

(2) All statements of the defendant and of any person who will be tried with the defendant,

(3) All then existing original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged,

ordered by the court, the prosecutor must make available to the defendant for examination, testing, and reproduction within thirty days of a written request "a list of all papers, documents, photographs, or tangible objects that the prosecutor intends to use at trial or which were obtained from or purportedly belong to the defendant," along with any completed written reports, statements and examination notes made by the prosecution experts.[71] Based on this rule, it appears that all biological evidence is made available to a defendant pre-trial.

Additionally, Arizona law, pursuant to section 13-4240 of the A.R.S., authorizes certain inmates to move the court for and/or obtain a post-conviction order for DNA testing. Under the post-conviction DNA statute, a "person who was convicted and sentenced for a felony offense and who meets the [statutory] requirements. . . may request [DNA] testing of any evidence that is in the possession or control of the court or the [S]tate, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence" at any time.[72]

Based on this information, the State of Arizona is in partial compliance with Recommendation #2.

C. Recommendation #3

Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

Arizona law does not require law enforcement agencies to establish and/or enforce written procedures and policies governing the preservation of biological evidence. It appears, however, that, in practice, law enforcement agencies may preserve biological evidence in capital cases indefinitely.[73] In addition, individual peace officers are required to receive basic training regarding preliminary investigation and crime scene management, crime scene investigation, and physical evidence procedures[74] and many

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(4) The names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons that have been completed,
(5) A list of all papers, documents, photographs or tangible objects that the prosecutor intends to use at trial or which were obtained from or purportedly belong to the defendant,
(6) A list of all prior felony convictions of the defendant which the prosecutor intends to use at trial,
(7) A list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial[,]
(8) All then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor[,]
(9) Whether there has been any electronic surveillance of any conversations to which the defendant was a party, or of the defendant's business or residence[,]
(10) Whether a search warrant has been executed in connection with the case[,]
(11) Whether the case has involved an informant, and, if so, the informant's identity, if the defendant is entitled to know either or both of these facts under Rule 15.4(b)(2)."

Id.

[71] ARIZ. R. CRIM. P. 15.1(e).

[72] ARIZ. REV. STAT. § 13-4240(A) (2005).

[73] CAPITAL CASE COMMISSION, *supra* note 61.

[74] *See* ARIZ. ADMIN. CODE R13-4-110; R13-4-116(E)(1)(e)(i)-(iii) (2006).

Arizona crime laboratories have established or adopted procedures pertaining to the preservation of biological evidence in order to obtain CALEA accreditation.

CALEA requires certified law enforcement agencies to adopt a written directive establishing procedures to be used in criminal investigations, including procedures on the collection, preservation, and use of physical evidence.[75] Similarly, all of Arizona's crime laboratories accredited by the ASCLD/LAB are required to adopt specific procedures relating to the preservation of evidence.[76]

Although it appears that certified law enforcement agencies in Arizona have adopted procedures on the preservation of evidence, we were unable to confirm the existence of these procedures or obtain sufficient information to assess whether the procedures adopted by these agencies and crime laboratories as well as other Arizona law enforcement agencies and crime laboratories comply with Recommendation #3.

D. Recommendation #4

Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.

Arizona law mandates that every law enforcement officer complete a basic training course,[77] which includes instruction on preliminary investigation and crime scene management, crime scene investigation, and physical evidence procedures.[78]

Arizona law enforcement agencies certified under CALEA also are required to establish written directives requiring a training program[79] and an annual, documented performance evaluation of each employee.[80]

According to the 2004 Department of Public Safety Annual Report, the Criminal Justice Support Division "[p]rovides instruction to investigative officers in the proper identification, collection, and packaging of evidence."[81] Similarly, all Arizona crime laboratories accredited by ASCLD/LAB are required to create training programs relevant to the tasks required of the laboratory personnel.[82] The content of these training programs is unknown.

Based on this information, it appears that law enforcement investigative personnel in Arizona receive mandatory basic training on the preservation of evidence. Furthermore, certified law enforcement agencies and crime laboratories may have training programs and/or disciplinary procedures. However, the extent to which the basic training courses,

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[75] CALEA STANDARDS, *supra* note 29, at 42-2 (Standard 42.2.1).
[76] ASCLD/LAB 2003 Manual, *supra* note 38, at 1, 20-23.
[77] ARIZ. ADMIN. CODE R13-4-110 (2006).
[78] ARIZ. ADMIN. CODE R13-4-116(E)(1)(e)(i)-(iii) (2006).
[79] CALEA STANDARDS, *supra* note 29, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2).
[80] *Id*. at 35-1 (Standard 35.1.2).
[81] 2004 ARIZ. DEP'T OF PUBLIC SAFETY ANN. REP. *available at* http://www.azdps.gov/reports/annualreport/AzDpsArFy2004.pdf (last visited on June 13, 2006).
[82] ASCLD/LAB 2003 Manual, *supra* note 38, at 19 (Standard 1.3.3.1).

certification programs, and standard operating procedures comply with Recommendation #4 by ensuring that investigative personnel are prepared and accountable for their performances is unknown. Arizona, therefore, is only in partial compliance with Recommendation #4.

E. Recommendation #5

Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Arizona certified under CALEA are required to establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.[83] It appears, therefore, that certified law enforcement agencies may have adopted written directives governing complaints against the agency and/or its employees, but the extent to which these procedures comply with Recommendation #5 is unknown.

F. Recommendation #6

Provide adequate funding to ensure the proper preservation and testing of biological evidence.

The amount of funding dedicated to the preservation and testing of biological evidence is unknown, rendering it impossible to assess its adequacy.

It appears that the costs associated with storing evidence may be absorbed by the agency designated by the court to store the evidence. The court also has discretion to determine whether the inmate or the State is responsible for the costs of post-conviction DNA testing.[84] If the court orders testing pursuant to section 13-4240(B) of the A.R.S., the court will order the method and responsibility for payment, if needed.[85] The language of the statute is unclear as to whether the court can require the defendant to pay some or all of the costs in this circumstance, however. If the court orders DNA testing pursuant to section 13-4240(C) of the A.R.S., the court may require the petitioner to pay the associated costs.[86] The language of the statute again is unclear as to the exact meaning of this provision and whether the court *must* order the method of payment in this circumstance or whether it is within the court's discretion to stipulate the method of payment.

It also appears that there has been a funding shortfall that has made the timely testing of DNA evidence difficult, if not impossible. As of January 1, 2004, all felons were required to submit DNA samples within thirty days of their sentencing.[87] Because of

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[83] CALEA STANDARDS, *supra* note 29 at 52-1 (Standard 52.1.1).
[84] *See* ARIZ. REV. STAT. § 13-4240(D) (2005).
[85] *Id.*
[86] *Id.*
[87] *See* Judi Villa, *DNA samples taxing Arizona*, THE ARIZ. REP., May 10, 2004, *available at* http://www.azcentral.com/specials/special21/articles/0510DNA10.html (last visited June 12, 2006).

state budget cuts, however, the Arizona Department of Public Safety received only $1.6 million during the 2003 and 2004 fiscal years to fund DNA testing, despite an initial legislative appropriation of $2 million a year.[88] As a result, the Department of Public Safety had only enough funds to purchase collection kits, hire some necessary staff, and preserve and store the DNA samples.[89] As of May 2004, approximately 60,000 samples were waiting to be analyzed.[90] Full funding was supposed to be restored on July 1, 2004,[91] and Arizona received an additional $1.3 million in September 2004 from the federal government "to eliminate casework and the convicted offender backlog[,] improve crime lab capacity[,] provide DNA training[,] provide for post-conviction DNA testing[,] and conduct testing to identify missing persons."[92] Despite this additional money, it was estimated that between two and ten years may be needed for crime-lab technicians to process the backlog and keep pace with new samples arriving for processing.[93] We were unable to confirm whether the State of Arizona has since been able to eliminate this backlog, however.

Even though it appears that we know which agency or party may be responsible for absorbing the costs associated with storing and testing DNA evidence, and that the State has a significant backlog in processing DNA samples, we are unable to assess whether the State of Arizona provides adequate funding to ensure the proper preservation and testing of DNA evidence.

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[88] *Id*.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Press Release, United States Department of Justice Office of Justice Programs, *Department of Justice Awards $2.5 Million to Arizona for President's DNA Initiative and Crime-Solving Forensic Services* (Sept. 21, 2004).
[93] *See supra* note 87.

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1983 and 2003, approximately 199 previously convicted "murderers" were exonerated nationwide.[1] In about 50% of these cases, there was at least one eyewitness misidentification, and 21% involved false confessions.[2]

Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, the lineup should include foils who resemble the suspect, and the administering officer should be unaware of the suspect's identity. Caution in administering lineups and show-ups is especially important because flaws can easily taint later lineup and at-trial identifications.[3]

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.[4] In the sequential approach, the witness views one person at a time and is unaware of the number of individuals s/he will see.[5] As each person is presented, the eyewitness states whether or not that person is the perpetrator.[6] Once an identification is made in a sequential procedure, the procedure stops.[7] The witness thus is encouraged to compare the features of each person viewed to the witness' recollection of the perpetrator rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the "best match."

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness' statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

Audio or Videotaping of Custodial Interrogations

Electronically recording interrogations from their outset– not just from when the suspect has agreed to confess– can help avoid erroneous convictions. Complete recording is on

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1 *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003* (2004), *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf (last visited on May 22, 2006).
2 *See id.*
3 *See* BRYAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESSES 13-17, 42-44 (2002).
4 *Id.* at 39.
5 *Id.*
6 *Id.*
7 *Id.*

the increase in this country and around the world. Those police departments who make complete recordings have found the practice beneficial to law enforcement.[8]

Complete recordings may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

[8] *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

I. FACTUAL DISCUSSION

The State of Arizona does not require law enforcement agencies to adopt special procedures on identifications and interrogations. However, it does require all law enforcement officials to take a basic training course, regulated by the Arizona Peace Officer Standards and Training Board. This Section will discuss the requirements of the basic training course, along with the standards that law enforcement agencies must comply with to obtain certification by the Commission on Accreditation for Law Enforcement Agencies (CALEA). Lastly, given that Arizona case law governs all pre-trial identifications and interrogations, this Section also will discuss judicial determinations regarding the propriety of certain law enforcement actions.

A. Arizona Peace Officer Standards and Training Board

The Arizona Peace Officer Standards and Training Board (POST Board) is the regulatory body authorized by the legislature to, among other things: (1) prescribe reasonable minimum qualifications for officers to be appointed to enforce the laws of Arizona and its political subdivisions and certify officers in compliance with the qualifications; (2) prescribe minimum courses of training and minimum standards for law enforcement training facilities; (3) recommend curricula for advanced courses and seminars in law enforcement and intelligence training in universities, colleges, and community colleges; (4) make inquiries to determine whether the State or its political subdivisions are adhering to the standards for recruitment, appointment, retention, and training; and (5) make recommendations on all matters relating to law enforcement and public safety.[9]

A "peace officer" is defined, for the purposes of this Section, as "sheriffs of counties, constables, marshals, policemen of cities and towns, police officers who are appointed by community college district governing boards and who have received a certificate from the [Post Board]," and "police officers who are appointed by the Arizona [B]oard of [R]egents and who have received a certificate from the [Post Board]."[10] To obtain

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[9] ARIZ. REV. STAT. § 41-1822(A) (2005). The POST Board consists of thirteen members appointed by the Governor. ARIZ. REV. STAT. § 41-1821(A) (2005).

[10] 2006 Ariz. Leg. Serv. Ch. 245 (H.B. 2793) (approved May 2006). There are other law enforcement officials included in the definition of a "peace officer" that are not relevant to this discussion. The full definition of "peace officer" is as follows: "sheriffs of counties, constables, marshals, policemen of cities and towns, commissioned personnel of the department of public safety, personnel who are employed by the state department of corrections and the department of juvenile corrections who have received a certificate from the Arizona peace officer standards and training board, peace officers who are appointed by a multicounty water conservation district and who have received a certificate from the Arizona peace officer standards and training board, police officers who are appointed by community college district governing boards and who have received a certificate from the Arizona peace officer standards and training board, police officers who are appointed by the Arizona board of regents and who have received a certificate from the Arizona peace officer standards and training board and police officers who are appointed by the governing body of a public airport pursuant to § 28-8426 and who have received a certificate from the Arizona peace officer standards and training board. In addition, Arizona has several categories of peace officers. A "full-authority peace officer" is a "peace officer whose authority to enforce the laws of [Arizona] is not limited" by this chapter of the Arizona Administrative Code. S*ee* 2006 Ariz. Leg. Serv. Ch. 245 (H.B. 2793). The other peace officer categories are "specialty peace officer" ("a peace officer whose authority is limited to enforcing specific sections of the Arizona Revised Statutes or Arizona Administrative Code, as specified by the appointing agency's statutory powers and duties."), "limited-authority peace officer" ("a peace officer who is certified to perform the duties of a peace officer only in

certification as a peace officer, one normally must satisfy the minimum qualifications[11] and complete the training requirements[12] at an academy that meets the standards prescribed by the POST Board.[13] The POST Board may waive the training requirement for a person whose certified status has lapsed or a person who has functioned in the capacity of a peace officer in another state or a federal law enforcement agency, who the POST Board determines does not jeopardize the public welfare and safety, and whose certification serves the best interests of the law enforcement profession.[14] Sheriffs, elected officials in Arizona, are not required to obtain certified status.[15]

The POST Board provides law enforcement academies with a mandatory curriculum outline for the basic training course, which consists of 585 hours of instruction, including training on interviewing and questioning.[16] In addition, peace officers are required to complete eight hours of continuing training each year. Continuing training courses include advanced or remedial instruction in one or more of the areas covered in the basic training course.[17]

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the presence and under the supervision of a full-authority peace officer"), and "limited correctional peace officer" ("a peace officer who has authority to perform the duties of a peace officer only while employed by and on duty with the Arizona Department of Corrections, and only for the purposes of guarding, transporting, or pursuing persons under the jurisdiction of the Arizona Department of Corrections."). *See* ARIZ. ADMIN. CODE R13-4-101, 13-4-103 (2002).

[11] S*ee* ARIZ. ADMIN. CODE R13-4-105 (2003). A peace officer must (1) be a United States citizen; (2) be at least twenty-one years of age, except that a person may attend an academy if the person will be twenty-one before graduating; (3) be a high school graduate or have successfully completed a General Equivalency Development examination; (4) undergo a complete background investigation; (5) undergo a medical examination; (6) not have been convicted of a felony or any offense that would be a felony if committed in Arizona; (7) not have been dishonorably discharged from the U.S. Armed Forces; (8) not have been previously denied certified status, have certified status revoked, or have current certified status suspended; (9) not have illegally sold, produced, cultivated, or transported marijuana for sale; (10) not have illegally used marijuana for any purpose within the past three years; (11) not have illegally used marijuana other than for experimentation; (12) not have ever illegally used marijuana while employed or appointed as a peace officer; (13) not have illegally sold, produced, cultivated, or transported for sale any dangerous drug or narcotic, other than marijuana; (14) not have illegally used a dangerous drug or narcotic, other than marijuana, for any purpose within the past seven years; (15) not have ever illegally used a dangerous drug or narcotic other than for experimentation; (16) not have ever illegally used a dangerous drug or narcotic while employed or appointed as a peace officer; (17) not have a pattern of abuse of prescription medication; (18) undergo a polygraph examination; (19) not have been convicted of or adjudged to have violated traffic regulations governing the movement of vehicles with a frequency within the past three years that indicates a disrespect for traffic laws or a disregard for the safety of other persons on the highway; and (20) read the code of ethics and affirm by signature the person's understanding and agreement to abide by the code. *Id*.

[12] ARIZ. ADMIN. CODE R13-4-110 (2003).

[13] ARIZ. ADMIN. CODE R13-4-116 (2003).

[14] ARIZ. ADMIN. CODE R13-4-103(F), R13-4-110(D) (2003).

[15] ARIZ. ADMIN. CODE R13-4-103(B) (2003).

[16] ARIZ. ADMIN. CODE R13-4-116(E) (2003). The curriculum outline for this training course is required to be taught at POST Board-certified training academies. Based on the curriculum outline, this basic training course does not appear to include any instruction on conducting pre-trial identification procedures. *See id*.

[17] ARIZ. ADMIN. CODE R13-4-111(A) (2003). In addition, peace officers below the first level supervisory position within the peace officer's appointing agency must complete eight hours of proficiency training every three years. Proficiency training is training that requires the physical demonstration of one or more performance objectives included in the basic training course and also requires the demonstration of the use of judgment in the application of that physical act. Peace officers who are authorized to carry firearms also

B. Selected Arizona Law Enforcement Operations Manuals

Because individual law enforcement agencies create, maintain, and update their own operations manuals, we are unable to draw conclusions as to how law enforcement agencies across the state handle particular issues. We did obtain the relevant portions of operations manuals from the Pinal County Sheriff's Office, the Phoenix Police Department, the Tucson Police Department, and the Yavapai County Sheriff's Office, however. While these four operational manuals help in determining what regulations, if any, specific law enforcement agencies have adopted in regards to lineups, photo arrays, showups, and confessions and interrogations, they do not allow us to draw any statewide conclusions.

1. Lineups

The Phoenix Police Department Operations Orders (Phoenix OO) requires that all lineups consist of at least four persons, in addition to the suspect,[18] and that lineup participants have similar physical characteristics and factors, such as age, height, weight, hair length, hair color, and physical build.[19] Participants' sex and race also must be the same, except in unusual cases where these characteristics are hard to determine.[20] The suspect may choose his/her initial position in the lineup and the position may be changed after each viewing.[21] Officers are not to say or do anything to distinguish the suspect from other lineup participants.[22] Photographs or video recordings are to be made of all lineups.[23]

The Pinal County Sheriff's Office Manual (PCSO Manual) addresses the various principles to be used in all sorts of identifications, but does not include rules specific to lineups.

The Tucson Police Department General Operating Procedures (Tucson GOP) requires that physical lineups consist of at least six persons, including the suspect.[24] All participants in physical or photo lineups must have similar physical characteristics;[25] the participants' age, height, weight, hair length and color, and physical build all will be considered relevant factors in this determination.[26] Sex and ethnicity, if obvious, should be identical.[27] The suspect may choose his/her initial position in the lineup and the position may be changed after each viewing.[28] Officers must neither say nor do anything to set a suspect apart from the other lineup participants, or "in any way indicate the

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must be reauthorized to carry a firearm once per calendar year. *See* ARIZ. ADMIN. CODE R13-4-111(B), (C) (2003).

18 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(1) (1999).

19 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(2)(a) (1999).

20 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(2)(b) (1999).

21 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(3) (1999).

22 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(4) (1999).

23 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(9) (1999).

24 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.1 (2005).

25 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES §§ 2134.1, 2135.1 (2005).

26 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.1 (2005).

27 *Id.*

28 *Id.*

identity of the suspect."[29] Photographs or video recordings must be made of all lineup proceedings.[30]

The Yavapai County Sheriff's Office Manual (YCSO Manual) provides that while "eyewitness identifications generally do not provide reliable evidence during criminal investigations," lineups are allowed and should be conducted using a minimum of six people who have similar physical characteristics as the suspect.[31] All lineups must be documented to include the date, time, place, the participants and witnesses' names, and the location of the suspects/participants.[32]

2. Photo Arrays

The Phoenix OO states that the "use of photographs, composites, and sketches to identify criminal suspects is permissible only when a live identification procedure is impractical."[33] Photographic lineups are to be arranged at random with, if possible, four or more photographs of different people[34] of "similar general appearance."[35] The use of a "mug book" also is allowable when there is no specific suspect, but a "reasonable number" of photographs must be shown to the witness.[36] Adequate records of each photograph shown in a display must be made and preserved. [37] Where there is no suspect and the use of a mug book has been or is likely to be unsuccessful, a non-photographic pictorial representation may be used. [38]

The Pinal County Sheriff's Office also allows the use of photographs, composites, or sketches to identify suspects when a live identification procedure is impractical.[39] Six photographs of different individuals, including the suspect, must be used and the photographs must be arranged at random.[40] Additionally, individuals depicted in a photo display must be of "similar general appearance," and no dates may appear on the photographs.[41]

The Tucson GOP states that the use of "photographs, photo books, sketches, or composite drawings to identify criminal suspects is permissible when a live identification procedure is impractical or not possible."[42] Whenever a photograph depicting an identified suspect is shown to a victim or eyewitness, it must be arranged at random with five or more photographs of different individuals who are of "substantially similar general appearance."[43] In addition, if the photographs are shown sequentially instead of

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29 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.6 (2005).
30 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.7 (2005).
31 YAVAPAI COUNTY SHERIFF'S OFFICE MANUAL § 2-1-12 (2001).
32 *Id.*
33 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 10(A) (2003).
34 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, §§ 9(B)(1), 10(F) (2003).
35 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, §§10 (G) (2003).
36 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 10(H)(1) (2003).
37 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 10(I) (2003).
38 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 10(J) (2003).
39 PINAL COUNTY SHERIFF'S OFFICE PROCEDURES MANUAL § 3.4.2.3 (2002).
40 *Id.*
41 *Id.*
42 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES 2133.1 (2005).
43 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES 2134.1 (2005).

simultaneously, the victim or witness must view the entire series, even if the suspect already has been identified from the series. Only the face of each subject will be shown; the shirt, name, and other information on each photograph will be covered.[44] Mug or ID folders will not be used. If multiple suspects are involved, only one suspect may appear on each lineup display. If there is a single picture of a lineup that includes the suspect, it may be shown without any additional photographs.[45] Officers conducting the photographic lineup must note their initials and payroll numbers on the back of the photographs, along with the date and time the photos were shown to the victim or witness. The officer should observe the victim or witness carefully and document any reactions. If the suspect is identified from the photograph, the officer must note the date and time of the identification on the back of the suspect's picture.[46] Adequate records of each photograph shown in a display must be made, even if a suspect was not identified. Photos should be preserved so that the display can be reconstructed at trial. Photo books and group pictures must be accurately described and then preserved.[47]

The YCSO simply allows photo lineups to be used and considers between six and eight photographs to be "reasonable."[48]

3. Showups

The Phoenix OO allows for an identification procedure, called a "confrontation," in which "a suspect is presented singularly to the witness."[49] As a general rule, these "confrontations" should occur within two hours of the crime.[50]

The PCSO Manual also allows for an identification procedure, again termed a "confrontation," in which "a suspect is singularly presented to a witness." A confrontation may be arranged whenever the suspect is arrested or temporarily detained within a reasonable time of the offense (usually within two hours), and the witness is cooperative and states that [s/]he might recognize the person who committed the offense."[51]

The Tucson GOP allows the police to create "a confrontation between witnesses and an arrestee, or between witnesses and a suspect, if the suspect/arrestee is detained/arrested within a short time of the offense (generally within two hours)."[52]

The YCSO Manual also has a confrontation procedure, but it is referred to as a "one-on-one identification." The time between offense and identification must be "reasonable," defined by the YCSO as between one to three hours from the crime.[53]

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44 *Id.*
45 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES 2134.1 (2005).
46 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES 2134.2 (2005).
47 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES 2134.3 (2005).
48 YAVAPAI COUNTY SHERIFF'S OFFICE MANUAL § 2-1-12 (2001).
49 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 6(A) (1999).
50 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 6(A)(2) (1999).
51 PINAL COUNTY SHERIFF'S OFFICE PROCEDURES MANUAL § 3.4.2.2. (2002).
52 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2132 (2005).
53 YAVAPAI COUNTY SHERIFF'S OFFICE MANUAL § 2-1-12 (2001).

4. Documenting Confessions and Interrogations

The Phoenix OO does not require the recording of interrogations and confessions, but does require that police officers "document everything said by the suspect."[54] In addition, "when officers tape record an interrogation or an interview with a suspect, witness, or victim in the course of an investigation, the tapes will be preserved for trial by impounding them."[55]

The YCSO Manual suggests that "detailed notes or a recorded tape be made of the interrogation for court use giving time, date, location, officers present, waiver of rights if applicable, time interrogation began/ended."[56]

The Tucson GOP and the PSCO Manual do not appear to address the video or audio taping of interrogations and/or confessions.[57]

C. Law Enforcement Accreditation Programs

1. Commission on Accreditation for Law Enforcement Agencies, Inc.

Eighteen[58] police departments, sheriff departments, state law enforcement agencies, transportation police departments, and university police departments in Arizona have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), which is an independent accrediting authority established by the four major law enforcement membership associations in the United States.[59]

To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (5) undergoing an on-site assessment by a team selected by the Commission to determine compliance who, in turn, will submit a compliance report to the Commission; and (6) participating in a hearing where a final decision on accreditation is rendered.[60] The CALEA standards are used to "certify various functional components

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[54] PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, §3(C) (1999).

[55] PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, §3(D)(1) (2003).

[56] YAVAPAI COUNTY SHERIFF'S OFFICE MANUAL § 2-13-6 (2002).

[57] Despite not requiring the recording of interrogations, both the Tucson GOP and the PSCO are said to record interrogations and confessions in practice. *See* Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 Center on Wrongful Convictions Spec. Rep., at A1 (2004).

[58] CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited May 12, 2006) (using second search function and designating "U.S." and "Arizona" as search criteria).

[59] CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited Nov. 3, 2005) (noting that the Commission was established by the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), and Police Executive Research Forum (PERF)).

[60] CALEA Online, The Accreditation Process, *at* http://www.calea.org/newweb/accreditation%20Info/process1.htm (last visited Nov. 3, 2005).

within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training."[61] Specifically, CALEA Standard 42.2.3 requires the creation of a written directive that "establishes steps to be followed in conducting follow-up investigations . . . [including] identifying and apprehending suspects."[62]

D. Constitutional Standards Relevant to Identifications

Pre-trial witness identifications, such as those occurring during lineups, showups, and photo arrays, are governed by the constitutional due process guarantee of a fair trial.[63] The United States Supreme Court has held that a due process violation occurs if, when the trial court allows testimony concerning pre-trial identification of the defendant, (1) the identification procedure employed by law enforcement was impermissibly suggestive,[64] and (2) under the totality of the circumstances,[65] the suggestiveness gave rise to a very substantial likelihood of irreparable misidentification.[66]

A court need only consider whether there was a very substantial likelihood of irreparable misidentification if it first determines that the pre-trial identification procedures used by law enforcement officers were unduly suggestive.[67] In determining whether, under the totality of the circumstances, the use of an impermissibly suggestive pre-trial identification procedure would lead to a very substantial likelihood of irreparable misidentification, the court should consider the following factors: "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation."[68] Absent a substantial likelihood of irreparable misidentification, pre-trial identification evidence is for the jury to weigh,

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[61] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

[62] *Id.* at 42-3 (standard 42.2.3).

[63] *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 196-99 (1972); State v. Prion, 52 P.3d 189 (Ariz. 2002); State v. Lehr, 38 P.3d 1172, 1183 (Ariz. 2002).

[64] *Neil*, 409 U.S. at 196-97. The Arizona Supreme Court phrases this requirement as "whether the method or procedure used was unduly suggestive." *Lehr*, 38 P.3d at 1183.

[65] *Neil*, 409 U.S. at 196 (noting that whether the impermissible suggestiveness of a pre-trial identification gave rise to a very substantial likelihood of misidentification must be "determined 'on the totality of the circumstances'"); State v. Smith, 707 P.2d 289, 294 (Ariz. 1985).

[66] The U.S. Supreme Court has stated that, for testimony regarding the pre-trial procedure to be excluded, its impermissible suggestiveness should give rise to a very substantial likelihood of "irreparable" misidentification. *See, e.g.*, *Neil*, 409 U.S. at 196-97; Simmons v. United States, 390 U.S. 377, 384 (1968). However, the Arizona Supreme Court uses this standard without including the word "irreparable" and without having provided an explanation for the omission. *See, e.g.*, Lehr, 38 P.3d at 1183. This may best be explained by a remark in *Neil* where the U.S. Supreme Court stated that "[w]hile the [very substantial likelihood of irreparable misidentification] . . . standard . . . determin[es] whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of the word 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." *Neil*, 409 U.S. at 198.

[67] *See, e.g.*, *Lehr*, 38 P.3d at 1183.

[68] *See, e.g.*, State v. Alvarez, 701 P.2d 1178 (Ariz. 1985) (*quoting Neil*, 409 U.S. at 199).

even if the procedure was impermissibly suggestive.[69] The questions of suggestibility and reliability are factual questions that are within the trial court's discretion[70] and are reviewable under a clear abuse of discretion standard.[71]

E. Constitutional Standards and Statutory Law Relevant to Interrogations

In Arizona, courts presume that confessions are involuntary. The State must prove by a preponderance of the evidence that the defendant confessed "voluntarily and freely."[72] In determining voluntariness, the court will "look to the totality of the circumstances surrounding the confession and determine whether the will of the defendant has been overborne."[73] To be voluntary, a confession "must not be induced by threats or promises of benefit or leniency, no matter how slight."[74] "Before a statement will be considered involuntary because of a 'promise,' evidence must be established that (1) a promise of benefit or leniency was in fact made, and (2) the suspect relied on that promise in making the statement."[75]

Section 13-3988 of the A.R.S. also requires that confessions be voluntary to be admissible.[76] In determining voluntariness, the trial judge is statutorily mandated to consider all of the circumstances surrounding the confession, including, but not limited to:

(1) The time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment;
(2) Whether the defendant knew the nature of the offense with which s/he was charged or of which s/he was suspected at the time of making the confession;
(3) Whether or not the defendant was advised or knew that s/he was not required to make any statement and that any such statement could be used against him/her;
(4) Whether or not the defendant had been advised prior to questioning of his/her right to the assistance of counsel; and
(5) Whether or not the defendant was without the assistance of counsel when questioned and when giving the confession.[77]

The presence or absence of the factors listed above is not necessarily conclusive of the issue of voluntariness.[78]

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69 *See* State v. Nordstrom, 25 P.3d 717 (Ariz. 2001).
70 *See, e.g.*, State v. Chapple, 660 P.2d 1208 (Ariz. 1983) (en banc).
71 State v. Atwood, 832 P.2d 593, 620 (Ariz. 1992).
72 *See, e.g.*, State v. Doody, 930 P.2d 440, 445 (Ariz. 1997).
73 *Id.* (*quoting* State v. Lopez, 847 P.2d 1078, 1084 (Ariz. 1992)).
74 *Doody*, 930 P.2d at 447.
75 *Id.* (*quoting Lopez*, 847 P.2d at 1085).
76 ARIZ. REV. STAT. § 13-3988(A) (2005).
77 ARIZ. REV. STAT. § 13-3988(B) (2005).
78 *Id.*

II. ANALYSIS

A. Recommendation #1

Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (which has been reproduced below, in relevant part and with slight modifications).

Eighteen Arizona law enforcement agencies have been accredited or are in the process of obtaining CALEA certification. CALEA does not require certified law enforcement agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy, however. For example, Standard 42.2.3 of CALEA merely requires law enforcement agencies to create a written directive that "establishes steps to be followed in conducting follow-up investigations," including identifying suspects. Certainly, Arizona law enforcement agencies in compliance with the CALEA standards could create guidelines for conducting lineups and photospreads that comply with the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices).

While individual law enforcement agencies can and have created specific guidelines that mirror the requirements of the ABA Best Practices and, in some cases, comply with Standard 42.2.3 of CALEA, we were unable to obtain sufficient information to ascertain the extent to which law enforcement agencies statewide, certified or otherwise, are in compliance with the ABA Best Practices.

In the course of our research, we obtained copies of the operating procedures for the Phoenix Police Department, Tucson Police Department, Yavapai County Sheriff's Office, and Pinal County Sheriff's Office. Each system has operating procedures that prescribe specific actions to be taken and avoided by law enforcement officials while conducting pre-trial identification procedures. Some of these actions are specific and responsive to the following ABA Best Practices, but some are not. Significantly, the adoption of relevant standard operating procedures by individual law enforcement agencies is not mandatory under Arizona law.

Regardless of whether a law enforcement agency has obtained certification or has adopted relevant standard operating procedures, all pre-trial identification procedures administered by law enforcement agencies ultimately are subject to constitutional due process limitations.

1. General Guidelines for Administering Lineups and Photospreads

a. The guidelines should require, whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is

constitutionally required) should be unaware of which of the participants is the suspect.

Numerous law enforcement agencies in Arizona are certified by CALEA, which requires these agencies to create a written directive that "establishes steps to be followed in conducting follow-up investigations," including identifying suspects.[79] Although the CALEA standards do not specifically require that all those present at a pre-trial identification be unaware of which participant is the suspect, a law enforcement agency complying with the CALEA standards certainly could create a guideline that requires all those present at a lineup to be unaware of which participant is the suspect.

In reviewing the policies of the Phoenix Police Department, Tucson Police Department, Yavapai County Sheriff's Office, and Pinal County Sheriff's Office, none appear to require those present at a lineup to be unaware of which participant is the suspect. The two law enforcement agencies that address this issue at all– the Phoenix Police Department and the Tucson Police Department– do so only obliquely. In the Phoenix OO, officers are instructed not to say or do anything to distinguish the suspect from other lineup participants[80] and in the Tucson GOP, officers are told to neither say nor do anything to set a suspect apart from the other lineup participants, or "in any way indicate the identity of the suspect."[81] Both of these regulations, however, insinuate that the officers know the identity of the suspect and certainly do not *require* otherwise.

While (1) there are no statewide guidelines for conducting lineups and photospreads, and (2) none of the four law enforcement agencies whose operating procedures we reviewed follow this ABA Best Practice, we cannot conclude whether other state law enforcement agencies, certified by CALEA or otherwise, require that the officer conducting the lineup or photospread be unaware of the suspect's identity. We are thus unable to ascertain whether law enforcement agencies in the State of Arizona are in compliance with this ABA Best Practice.

b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures instruct eyewitnesses that the perpetrator may or may not be in the lineup, that they should not assume the official administering the lineup knows who is the suspect, and that, although they need not identify anyone, the certainty of any identification must be in their own words. A law enforcement agency complying with the CALEA standards, requiring the agency to establish steps for identifying suspects, could certainly create a guideline that complies with this ABA Best Practice. Our review

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[79] CALEA STANDARDS, *supra* note 61, at 42-3 (standard 42.2.3).
[80] PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(4) (1999).
[81] TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.6 (2005).

of the Phoenix Police Department, Tucson Police Department, Yavapai County Sheriff's Office, and Pinal County Sheriff's Office did not uncover any relevant standard operating procedures, however.

On the issue of stating that the perpetrator may or may not be in the lineup, the Arizona Supreme Court, in finding that a lineup was not unduly suggestive, has commented that "[w]e see no reason why the police should not suggest that they have a man whom they suspect of being the guilty party. Anyone called to witness a lineup would naturally assume so. He would hardly be summoned to a lineup if there were no suspect."[82] As to whether witnesses must state in their own words the certainty of their identification, numerous cases in Arizona contain examples of witnesses stating either a percentage or general level of certainty in their identification.[83]

Based on Arizona case law and a review of the four law enforcement agency operating manuals, it appears that those conducting lineups in Arizona are not required to instruct the witness that the lineup may or may not contain the suspect, and witnesses generally indicate their level of confidence in their identification. We were, however, unable to ascertain whether Arizona case law or the relevant CALEA standard requires full compliance with this ABA Best Practice.

2. Foil Selection, Number, and Presentation Methods

a. The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.

b. The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.

The CALEA standards do not require certified agencies conducting pre-trial identification procedures to adopt written directives specifically requiring the use of a sufficient number of foils that are chosen for their similarity with a witness' description of the perpetrator in order to reduce the risk of eyewitness guessing.

However, the four law enforcement manuals in our possession touch upon this ABA Best Practice. While the Pinal County Sheriff's Office does not appear to have procedures regulating lineups, it does allow the use of photographs, composites, or sketches in identifying suspects when a live identification procedure is impractical.[84] Suspect photographs must be arranged at random with five photographs of different people[85] who are of "similar general appearance."[86]

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[82] State v. McClure, 488 P.2d 971, 972 (Ariz. 1971).

[83] *See, e.g.*, State v. Lehr, 38 P.3d 1172, 1184 (Ariz. 2002); State v. Dixon, 735 P.2d 761 (Ariz. 1987).

[84] PINAL COUNTY SHERIFF'S OFFICE PROCEDURES MANUAL § 3.4.2.3 (2002).

[85] *Id.*

[86] *Id.*

The Phoenix OO requires that all lineups consist of at least five individuals, including the suspect[87] and that lineup participants have similar physical characteristics, such as age, height, weight, hair length and color, and physical build.[88] Participants' sex and race also must be the same, except for unusual cases where these characteristics are hard to determine.[89] Furthermore, the Phoenix OO requires that photographic lineups be arranged at random with, if possible, four or more photographs of different people[90] with "similar general appearance." [91] The use of a "mug book" is permitted when there is no specific suspect, but a "reasonable number" of photographs must be shown to the witness.[92]

The Tucson GOP requires that a physical lineup consist of at least six persons, including the suspect,[93] who share similar physical characteristics.[94] The participants' age, height, weight, hair length and color, and physical build all will be considered relevant factors.[95] The sex and ethnicity of the participants, if obvious, should be identical.[96] In addition, when a live identification procedure is impractical or not possible, the Tucson GOP permits the use of photographs, photo books, sketches, or composite drawings to identify criminal suspects.[97] Whenever a photograph depicting an identified suspect is shown to a witness, it must be arranged at random with five or more photographs of different people. The people shown in the photo display must be of "substantially similar general appearance." If a single picture of a lineup includes the suspect, it may be shown without any additional photographs.[98]

The YCSO Manual provides that lineups should be conducted using a minimum of six people who have similar physical characteristics to the suspect.[99] The YCSO also allows the use of photo lineups and considers six to eight photographs to be "reasonable."[100]

Beyond these four examples, however, we were unable to determine the extent to which these sort of procedures have been adopted by individual law enforcement agencies in Arizona.

The Arizona Supreme Court has explained that "lineups need not and usually cannot be ideally constituted. Rather, the law only requires that they depict individuals who basically resemble one another such that the suspect's photograph does not stand out."[101] The Arizona Court of Appeals has gone further and held that there is "no set number of photographs which must be exhibited to an identification witness. . . . The question is not

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87 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(1) (1999).
88 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(2)(a) (1999).
89 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(2)(b) (2003).
90 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, §§ 9(B)(1), 10(F) (2003).
91 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, §§ 10(G) (2003).
92 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 10(H)(1) (2003).
93 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.1 (2005).
94 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES §§ 2134.1, 2135.1 (2005).
95 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.1.
96 *Id.*
97 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2133.1 (2005).
98 TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2134.1 (2005).
99 YAVAPAI COUNTY SHERIFF'S OFFICE MANUAL § 2-1-12 (2001).
100 *Id.*
101 State v. Alvarez, 701 P.2d 1178, 1181 (Ariz. 1985) (en banc).

how many photographs were exhibited, but rather was the procedure used unduly suggestive."[102]

Specifically, Arizona courts have found certain pre-trial identification procedures not impermissibly suggestive, such as where the lineup participants had subtle differences in age,[103] height, weight, hair length,[104] amount of facial hair, [105] eye color,[106] or where the defendant had subtle distinguishing characteristics such as small moles[107] or a small tattoo on the face.[108] Additionally, subtle discrepancies, such as the photo of a defendant containing differences in lighting or distance, do not render the lineup impermissibly suggestive.[109] The placement of the defendant's photo in the lineup does not render the lineup impermissibly suggestive either, so long as the placement was "random."[110] And while the Arizona Supreme Court disapproves of the practice of "showing witnesses multiple lineups having only the prime suspect's photograph in common," "the fact that a defendant's photograph was the only one to appear twice was not necessarily fatal. Under the 'totality of the circumstances,' a witness' identification of a defendant can be reliable despite suggestive pretrial identification procedures."[111]

Based on this information, we were unable to ascertain whether Arizona case law or the relevant CALEA standards as adopted by Arizona law enforcement agencies require full compliance with this ABA Best Practice, or whether individual law enforcement agencies across the State have adopted mandatory internal procedures which meets this ABA Best Practice. We note, however, that a review of the four law enforcement agency operating manuals demonstrates a commitment to the principles underlying the ABA Best Practice.

3. Recording Procedures

a. The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.

b. The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures video or digitally record the witness's confidence statement

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[102] State v. Rood 510 P.2d 66, 68 (Ariz. Ct. App. 1973).
[103] State v. Hooper, 703 P.2d 482 (Ariz. 1985), *cert. denied*, 474 U.S. 1073 (1986).
[104] State v. Perez, 690 P.2d 71, 75 (Ariz. 1973); State v. Money, 514 P.2d 1014 (Ariz. 1973).
[105] State v. Gonzales, 892 P.2d 839 (Ariz. 1995) (en banc).
[106] State v. Martinez, 588 P.2d 355, 357-58 (Ariz. Ct. App. 1978).
[107] State v. Alvarez, 701 P.2d 1178, 1180 (Ariz. 1985) (en banc).
[108] State v. Perea, 690 P.2d 75 (Ariz. 1984).
[109] State v. Phillips, 46 P.3d 1048 (Ariz. 2002); *Gonzales*, 892 P.2d at 845.
[110] *Perea*, 690 P.2d at 75.
[111] *Alvarez*, 701 P.2d at 1180.

and any law enforcement statements made to witnesses or, in the absence of video recording, that law enforcement officials photograph the lineup. A law enforcement agency complying with the CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this best practice, however.

While some form of documentation of pre-trial identification procedures is required by all four law enforcement agencies, the specifics vary among the agencies. For example, the Phoenix OO requires that photographs or video recordings be made of all lineups.[112] The PSCO Manual provides that "[a] complete record of each identification procedure will be made. The time, location, and the identity of those present (including persons viewed other than the suspect) will be noted. . . Photographic, sound and video recording devices will be used whenever practicable."[113] The Tucson GOP also requires that photographs or video recordings be made of all lineup proceedings.[114] Meanwhile, the YCSO Manual mandates that for all lineups, the date, time, place, name of participants and witnesses, and location of the suspects/participants be documented,[115] but it does not require that audio or video recordings be made.

The United States Court of Appeals for the Ninth Circuit has ruled that the failure to record a lineup does not constitute a due process violation unless (1) the evidence not preserved is potentially exculpatory; and (2) that the police acted in bad faith.[116] While Arizona courts do not appear to have considered this issue directly, in at least one case, the lack of a lineup proceeding record did not render the resulting identification as unusable.[117]

Ultimately, it does not appear that Arizona law, the relevant CALEA standards, or two of the four law enforcement agencies, require compliance with this ABA Best Practice.

> **c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures request, in a non-suggestive manner, that the witness indicate their level of confidence in any identification and document that statement accurately. Our review of the Phoenix Police Department, Tucson Police Department, Yavapai County Sheriff's Office, and Pinal County Sheriff's Office also did not uncover

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[112] PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(9) (1999).
[113] PINAL COUNTY SHERIFF'S OFFICE PROCEDURES MANUAL § 3.4.2.1(4) (2002).
[114] TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.7 (2005).
[115] YAVAPAI COUNTY SHERIFF'S OFFICE MANUAL § 2-1-12 (2002).
[116] United States v. Watson, 66 F.3d 337 (9th Cir. 1995) (unpublished).
[117] State v. Caldwell, 573 P.2d 854 (Ariz. 1977) (en banc).

any guidelines that comply with this best practice in any of the relevant procedure manuals. However, a review of Arizona case law does indicate numerous cases in which witnesses indicated a percentage or general level of confidence in their identification.[118]

Nonetheless, we were unable to ascertain whether Arizona case law, the relevant CALEA standards as adopted by accredited law enforcement agencies, or individual law enforcement operating procedures across the State of Arizona require full compliance with this ABA Best Practice.

4. Immediate Post-Lineup or Photospread Procedures

a. The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man"—the person believed by law enforcement to be the culprit.

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures avoid giving the witness feedback on whether s/he selected the proper suspect.

The Phoenix OO instructs officers not to say or do anything to distinguish the suspect from other lineup participants.[119] The Tucson GOP requires that officers neither say nor do anything to set a suspect apart from the other lineup participants, or "in any way indicate the identity of the suspect."[120]

More specifically, the PCSO Manual provides that "[p]olice actions which suggest the guilt of a suspect to a victim or any eyewitness are improper and must be avoided even when thee (sic) is other evidence to connect the suspect with the crime. The witness' recollection, unaided by outside influence, must govern the identification."[121] As part of this, "[d]eputies will not by word or gesture suggest their opinion to any witness that the suspect committed the crime. Witnesses making inquiries about a deputy's opinion will be informed of this restriction."[122]

The YCSO Manual does not appear to deal with this issue.

We were, however, unable to ascertain whether Arizona case law or the relevant standards require full compliance with this ABA Best Practice, or whether individual law enforcement agencies statewide, outside of the four discussed, have adopted mandatory internal procedures which meet this ABA Best Practice.

In conclusion, even though numerous law enforcement agencies should have adopted written directives to be in compliance with CALEA, the CALEA standards do not require agencies to adopt written directives as specific as the ABA Best Practices outlined in

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[118] *See, e.g.*, State v. Lehr, 38 P.3d 1172, 1184 (Ariz. 2002); State v. Dixon, 735 P.2d 761 (Ariz. 1987).
[119] PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 9(B)(4) (1999).
[120] TUCSON POLICE DEPT. GEN. OPERATING PROCEDURES § 2135.6 (2005).
[121] PINAL COUNTY SHERIFF'S OFFICE PROCEDURES MANUAL § 3.4.2.1(1) (2002).
[122] PINAL COUNTY SHERIFF'S OFFICE PROCEDURES MANUAL § 3.4.2.1(1)(c) (2002).

Recommendation #1. Furthermore, despite obtaining the relevant Standard Operating Procedures of four law enforcement agencies in Arizona, we were unable to obtain the written directives of *all* law enforcement agencies to assess whether the State as a whole is in compliance with Recommendation #1. We are, therefore, unable to conclude whether the State of Arizona meets the requirements of Recommendation #1.

B. Recommendation #2

> **Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.**

The POST Board's basic training course outline provides for instruction on interviewing and questioning,[123] but this basic training outline does not appear to include any instruction on conducting pre-trial identification procedures.

While the CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures receive periodic training on the implementation of such guidelines, including training on non-suggestive techniques for interviewing witnesses, a law enforcement agency complying with the CALEA standards, requiring the agency to establish "a written directive that requires each sworn officer [to] receive annual training on legal updates"[124] could create a training program that complies with Recommendation #2. Notably, the POST Board requires that in addition to its basic training requirements, peace officers complete eight hours of continuing training each year of advanced or remedial instruction in one or more of the areas covered in the basic training course.[125] There appears to be a regularly-offered sixteen-hour continuing training course on interviews and interrogations that is intended to help law enforcement officers "to recognize the value, impact, use, and importance of statements from victims, witnesses, and perpetrators" and to teach law enforcement officers to learn "how to prepare for, obtain, and use statements, admissions and confessions for investigative and court purposes."[126]

Despite this, we were unable to sufficiently ascertain whether law enforcement agencies, certified by CALEA or otherwise, are complying with this particular Recommendation.

Because we can only conclude with certainty that law enforcement officials are required to receive basic training on interviewing techniques and that continuing education on this

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[123] ARIZ. ADMIN. CODE R13-4-116(E) (2003).

[124] CALEA STANDARDS, *supra* note 61, at 33-4 (standard 33.5.1).

[125] ARIZ. ADMIN. CODE R13-4-111(A) (2003). In addition, peace officers below the first level supervisory position within the peace officer's appointing agency must complete eight hours of proficiency training every three years. Proficiency training is training that requires the physical demonstration of one or more performance objectives included in the basic training course and also requires the demonstration of the use of judgment in the application of that physical act. Peace officers who are authorized to carry firearms also must be reauthorized to carry a firearm once per calendar year. *See* ARIZ. ADMIN. CODE R13-4-111(B), (C) (2003).

[126] Arizona Peace Officer Standards and Training Board, *Training Calendar* (July-Dec. 2005 edition) (on file with author).

topic is offered, but not necessarily required, the State of Arizona only partially meets the requirements of Recommendation #2.

C. Recommendation #3

> **Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.**

We were unable to obtain sufficient information to assess whether law enforcement agencies and prosecutors in Arizona periodically update their guidelines for conducting pre-trial identifications and, therefore, we were unable to conclude whether the State of Arizona meets the requirements of Recommendation #3.

D. Recommendation #4

> **Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.**

The State of Arizona does not require that interrogations and confessions be audio or videotaped, but as of February 6, 2006, twenty-eight law enforcement agencies in Arizona— Casa Grande Police Department, Chandler Police Department, Coconino County Sheriff's Office, El Mirage Police Department, Flagstaff Police Department, Gila County Sheriff's Office, Gilbert Police Department, Glendale Police Department, Marana Police Department, Maricopa County Sheriff's Office, Mesa Police Department, Oro Valley Police Department, Payson Police Department, Peoria Police Department, Phoenix Police Department, Pima County Sheriff's Office, Pinal County Sheriff's Office, Prescott Police Department, Scottsdale Police Department, Somerton Police Department, South Tucson Police Department, Surprise Police Department, Tempe Police Department, Tucson Police Department, Yavapai County Sheriff's Office, Yuma County Sheriff's Office, and the Yuma Police Department—regularly record the entirety of custodial interrogations.[127] These police departments use either audio or video recording equipment to record interviews of individuals under arrest in a police facility from the moment *Miranda*[128] warnings are given until the interview ends.[129]

Despite evidence that these twenty-eight law enforcement agencies record interrogations, including the Phoenix Police Department, the Tucson Police Department, the Pinal County Sheriff's Office, and the Yavapai County Sheriff's Office, the relevant operating

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[127] Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 Center on Wrongful Convictions Spec. Rep., at A1 (2004).

[128] Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

[129] *See* Sullivan, *supra* note 127. This report, however, does not include departments that conduct unrecorded interviews followed by recorded confessions or recordings made outside a police station or lockup, such as at crime scenes or in squad cars. *Id.* at 5.

procedures of these four agencies do not appear to mandate the recording of interrogations. The Phoenix OO states only that the police officer must "document everything said by the suspect."[130] In addition, the Operation Order states that "*when* officers tape record an interrogation or an interview with a suspect, witness, or victim in the course of an investigation, the tapes will be preserved for trial by impounding them."[131] The YCSO Manual suggests that "detailed notes or recorded tape be made of the interrogation for court use giving time, date, location, officers present, waiver of rights if applicable, time interrogation began/ended"[132] and does not otherwise appear to deal with the recording of interrogations. In addition, the Tucson GOP and the PSCO Manual do not appear to address video or audio taping of interrogations at all.[133]

Notably, there has been some movement toward a statewide rule on the issue of recording interrogations and confessions. Upon recommendation from the Arizona Capital Case Commission, the Arizona Attorney's General's Office drafted a protocol that states:

> The Attorney General and the Capital Case Commission strongly recommend that law enforcement officers in Arizona record with audio tape or video tape the process of informing a suspect of his constitutional rights, the waiver of those rights by the suspect, and all questions and answers of that suspect during interrogation whenever feasible.[134]

The protocol was considered and discussed by the Attorney General's Law Enforcement Advisory Board. The Board agreed to submit the protocol to the Arizona Criminal Justice Commission for consideration,[135] but to the best of our knowledge, there has been no follow-up legislative action on the matter.

The Arizona Supreme Court has agreed with this recommendation and emphasized that "[r]ecording the entire interrogation process provides the best evidence available and benefits all parties involved."[136]

Although most of the law enforcement agencies in Arizona videotape or audiotape the entirety of custodial interrogations, not all appear to be doing so. Therefore, the State of Arizona only partially meets the requirements of Recommendation #4.

E. Recommendation #5

> **Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.**

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130 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 3(C)(b) (1999).
131 PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 3(D)(1) (2003) (emphasis added).
132 YAVAPAI COUNTY SHERIFF'S OFFICE MANUAL § 2-13-6 (2002).
133 Despite not requiring the recording of interrogations, both the Tucson GOP and the PSCO are said to record interrogations and confessions in practice. *See* Sullivan, *supra* note 127.
134 OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, at 15 (Dec. 2002).
135 *Id.*
136 State v. Jones, 49 P.3d 273, 279 (Ariz. 2002).

We were unable to ascertain whether the State of Arizona provides adequate funding to ensure the proper development, implementation and updating of procedures for identifications and interrogations and, therefore, we cannot determine whether the State of Arizona meets the requirements of Recommendation #5.

F. Recommendation #6

> **Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.**

The Arizona Supreme Court has held that the trial court has discretion in determining the admissibility of expert testimony on eyewitness identification[137] and that its determination will not be overturned absent an abuse of discretion.[138] Specifically, in determining admissibility of such testimony, the court should consider the following criteria: whether the expert is qualified, whether the subject is a proper subject of expert testimony, whether the opinion conforms to an appropriate scientific explanatory theory, and whether the unfair prejudicial effect does not outweigh the probative value.[139] If the testimony is allowed, it must be "limited to an exposition of the factors affecting reliability" and the "expert witnesses should not be allowed to give their opinion of the accuracy or credibility of a particular witness."[140] The State of Arizona, therefore, meets the requirements of Recommendation #6.

G. Recommendation #7

> **Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.**

The Arizona Standard Criminal Instructions include an instruction that provides juries with factors to consider when determining the reliability of eyewitness identification.[141] The text of the instruction is as follows:

> The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as:
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> (1) The witness' opportunity to view the defendant at the time of the crime;
> (2) The witness' degree of attention at the time of the crime;
> (3) The accuracy of any descriptions the witness made prior to the pretrial identification;

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137 State v. Chapple, 660 P.2d 1208, 1224 (Ariz. 1983).
138 *Id.* at 1224.
139 *Chapple*, 660 P.2d at 1218.
140 State v. Nordstrom, 25 P.3d 717, 730-31 (Ariz. 2001) (*quoting in part Chapple*, 660 P.2d at 1222).
141 REVISED ARIZ. JURY INSTRUCTIONS (CRIMINAL 3RD) 39 (1996).

(4) The witness' level of certainty at the time of the pretrial identification;
(5) The time between the crime and the pretrial identification;
(6) Any other factor that affects the reliability of the identification.

If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.[142]

This instruction must be given, if requested, when the court has concluded that the pretrial identification procedures were unduly suggestive, but that the proposed in-court identification has been shown by clear and convincing evidence to be reliable and derived from an independent source.[143]

Because the pattern jury instruction only applies to in-court identifications and is given only when the pretrial identification is determined to have been unduly suggestive, the State of Arizona only partially meets the requirements of Recommendation #7.

[142] *Id.*
[143] State v. Dessureault, 453 P.2d 951, 955 (Ariz. 1969).

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited crime laboratories have increasingly been called into serious question.[1] While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing to properly analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to lack of proper training and supervision, lack of testing procedures or the failure to follow procedures, and inadequate funding.

In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

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[1] *See* Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

I. FACTUAL DISCUSSION

The Arizona Revised Statutes (A.R.S.) provide for the Department of Public Safety Scientific Criminal Analysis Bureau (Bureau) to assist law enforcement officers in Arizona[2] and for the appointment of a county medical examiner.[3] The Bureau provides scientific analysis of evidence, technical crime scene assistance, secure storage of evidentiary items, training, and expert testimony to all state criminal justice agencies.[4]

The A.R.S. also allow each county board of supervisors to appoint a county medical examiner. Each county medical examiner must be a "licensed physician in good standing certified in pathology and skilled in forensic pathology."[5]

A. Crime Laboratories

1. The Bureau's Statewide System of Crime Laboratories

The Bureau's statewide system of crime laboratories is designed to "assist the Department [of Public Safety], the Arizona Criminal Justice Community, and the public in the timely investigation and adjudication of criminal cases by utilizing state-of-the-art analytical techniques; providing the most accurate scientific analysis of evidence; and presenting expert court testimony."[6] To accomplish this, the Bureau "provides scientific analysis of evidence, technical crime scene assistance, secure storage of evidentiary items, training, and expert testimony to all Criminal Justice Agencies in the State. Scientific and technical services are provided in the areas of DNA, Serology, Toxicology, Controlled Substances (Drugs), Firearms and Toolmarks, Trace Evidence (Explosives, Arson, Hairs, Fibers, Paint, Glass, etc.), Latent Fingerprints, Questioned Documents, Breath Alcohol, and Photography."[7]

The Bureau's statewide system of crime laboratories includes four regional laboratories in the following locations:

(1) Phoenix (Central Regional Laboratory);
(2) Flagstaff (Northern Regional Laboratory);
(3) Lake Havasu City (Western Regional Laboratory);
(4) Tucson (Southern Regional Laboratory).[8]

These four labs provide complete crime lab services to 295 criminal justice agencies in Arizona, including municipal, tribal, county, state and federal users.[9] The four

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[2] ARIZ. REV. STAT. §§ 41-1712(A), 41-1771 (2006).
[3] ARIZ. REV. STAT. § 11-591 (2006).
[4] Scientific Analysis Bureau, Department of Public Safety, *at* http://www.azdps.gov/agency/criminaljusticesupport/scientific/default.asp (last visited on Jan. 5, 2006).
[5] ARIZ. REV. STAT. § 11-591 (2006).
[6] Scientific Analysis Bureau, *supra* note 4.
[7] Scientific Analysis Bureau, Overview, *at* http://www.azdps.gov/agency/criminaljusticesupport/scientific/default.asp (last visited on Jan. 5, 2006).
[8] Laboratories Accredited by ASCLS/LAB, American Society of Crime Laboratories Directory, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#AZ (last visited on Jan. 20, 2006).

laboratories each provide a range of laboratory services, including: DNA, Serology, Toxicology, Controlled Substances (Drugs), Firearms and Tool marks, Trace Evidence (Explosives, Arson, Hairs, Fibers, Paint, Glass, etc.), Latent Fingerprints, Questioned Documents, Breath Alcohol, and Photography.[10] Services provided at each laboratory vary, but each region has access to the services offered by the three other regional laboratories.[11]

Because the procedures for the collection, preservation, and/or testing of evidence adopted by the Bureau do not have to be "published or made available for public inspection," it is instructive to review the requirements of the accreditation programs through which Bureau laboratories have obtained accreditation to understand the procedures, guidelines, standards, and methods used by the Bureau laboratories.[12]

2. ASCLD/LAB Accreditation

"The Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) is a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and personnel safety procedures meet established standards."[13] According to the ASCLD/LAB website, all four of the Bureau's laboratories are currently accredited through the ASCLD/LAB program, including: (1) the Arizona Department of Public Safety's Central Regional Laboratory in Phoenix, A.Z.; (2) the Arizona Department of Public Safety's Northern Regional Laboratory in Flagstaff, A.Z.; (3) the Arizona

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[9] 2004 ARIZ. DEP'T OF PUBLIC SAFETY ANN. REP. 62, *available at* http://www.azdps.gov/reports/annualreport/AzDpsArFy2004.pdf (last visited on June 13, 2006).

[10] Scientific Analysis Bureau, Department of Public Safety, *at* http://www.azdps.gov/agency/criminaljusticesupport/scientific/default.asp (last visited on Jan. 5, 2006).

[11] STAFF OF JOINT LEGISLATIVE BUDGET COMMITTEE, ARIZ. LEG., PROGRAM SUMMARY, DEP'T OF PUBLIC SAFETY, SCIENTIFIC ANALYSIS (CRIME LABS), *at* http://www.azleg.gov/jlbc/psdpssa.pdf (last visited on Feb. 15, 2006).

[12] *See, e.g.*, AM. SOC'Y OF CRIME LAB. DIRS., LAB. ACCREDITATION BD., LABORATORY ACCREDITATION BOARD 2003 MANUAL 3, app. 1 (on file with author). It should be noted that laboratories receiving federal funding must also comply with the Federal Bureau of Investigation's DNA Quality Assurance Standards, requiring periodic external audits to ensure compliance with the required quality assurance standards. *See* 42 U.S.C. § 14131(a)(1) (2006); DNA Advisory Board, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, 2 FORENSICS SCI. COMM. 3 (July 2000). While we do not know the extent of any federal funding of Bureau laboratories, we do know that the Bureau's crime laboratory signed a "cooperative agreement" with the FBI in 2004 to become "one of four facilities nationwide, and the only one in the western United States, to develop a mitochondrial DNA (MtDNA) laboratory." This two-year agreement enables the Bureau to establish MtDNA capabilities for all criminal justice agencies in the State and it will assist the FBI in analyzing cases from agencies throughout the western United States. The FBI provided approximately $753,000 per year for two years for personnel, supplies, and training. In addition, the Bureau received approximately $500,000 from the National Institute of Justice to purchase MtDNA equipment and make laboratory space renovations that are required to start the program. The Bureau also received a $3.2 million grant from the National Institute of Justice to be used for the processing of DNA "no suspect" cases. The funding allows all crime laboratories in Arizona to process evidence from violent crimes where there is no suspect and will allow almost 3,000 unsolved crimes (mostly sexual assaults and homicides) to be reviewed and compared to state and national DNA databases. *See* ARIZ. DEP'T OF PUBLIC SAFETY, *supra* note 9.

[13] American Society of Crime Laboratory Directors, Accreditation, *at* http://www.ascld.org/accreditation.html (last visited on Oct. 5, 2005).

Department of Public Safety's Western Regional Laboratory in Lake Havasu City, A.Z.; and (4) the Arizona Department of Public Safety's Southern Regional Laboratory in Tucson, A.Z. In addition, the Mesa Police Department Crime Laboratory, the Phoenix Police Department Laboratory Services Bureau, the Scottsdale Police Department Crime Laboratory, and the Tucson City-County Crime Laboratory, also are accredited through the ASCLD/LAB program.[14]

i. Application Process for ASCLD/LAB Accreditation

To obtain accreditation by the ASCLD/LAB, a laboratory must submit an "Application for Accreditation," which requests information on the qualifications of staff, laboratory quality manual(s), procedures for handling and preserving evidence, procedures on case records, and security procedures.[15] In addition to the application, the laboratory must also submit a "Grade Computation/Summation of Criteria Ratings," which is based on the laboratory's self-evaluation of whether it is in compliance with all of the criteria contained in the ASCLD/LAB Laboratory Accreditation Board Manual.[16]

ii. ASCLD/LAB Accreditation Standards and Criteria

The ASCLD/LAB Laboratory Accreditation Board 2003 Manual (Manual) contains various standards and criteria and each criterion has been assigned a rating of Essential, Important, or Desirable.[17] In order to obtain accreditation through ASCLD/LAB, "[the] laboratory must achieve not less than 100% of the Essential,[18] 75% of the Important,[19] and 50% of the Desirable[20] criteria."[21] Some of the Essential criteria contained in the Manual require:

(1) Clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, and for maintenance and calibration of equipment and instruments;[22]
(2) A training program to develop the technical skills of employees in each applicable functional area;[23]
(3) A chain of custody record that provides a comprehensive, documented history of evidence transfer over which the laboratory has control;[24]

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[14] American Society of Crime Laboratories Directors, Laboratories Accredited by ASCLD/LAB, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#AZ (last visited on Jan. 20, 2006).
[15] AM. SOC'Y OF CRIME LAB. DIRS., LAB. ACCREDITATION BD., LABORATORY ACCREDITATION BOARD 2003 MANUAL 3, app. 1 (on file with author).
[16] *Id.* at 3.
[17] *Id.* at 2.
[18] The Manual defines "Essential" as "[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence. *Id.*
[19] The Manual defines "Important" as "[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence. *Id.*
[20] The Manual defines "Desirable" as "[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory. *Id.*
[21] *Id.* (emphasis omitted).
[22] *Id.* at 14.
[23] *Id.* at 19.

(4) The proper storage of evidence to protect the integrity of the evidence;[25]
(5) A comprehensive quality manual;[26]
(6) The performance of an annual review of the laboratory's quality system;[27]
(7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;[28]
(8) The performance and documentation of administrative reviews of all reports issued;[29]
(9) The monitoring of the testimony of each examiner at least annually;[30] and
(10) A documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.[31]

The Manual also contains Essential criteria on personnel qualifications, requiring examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments and methods and procedures.[32] Additionally, examiners must successfully complete a competency test prior to assuming casework and thereafter successfully complete annual proficiency exams.[33]

Once the laboratory has assessed its compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.[34]

iii. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of interviewing analysts and reviewing a sample of case files, including all notes and data, generated by each analyst.[35] The inspection team will also interview all trainees to evaluate the laboratory's training program.[36] At the conclusion of the inspection, the inspection team will meet with the laboratory director to review the findings and discuss any deficiencies.[37]

The inspection team must provide a draft inspection report to the Executive Director of the ASCLD/LAB, who will then distribute the report to the "audit committee," which is comprised of a ASCLD/LAB Board member, the Executive Director, at least three staff

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[24] *Id.* at 20.
[25] *Id.* at 21.
[26] *Id.* at 23.
[27] *Id.* at 27.
[28] *Id.* at 27.
[29] *Id.* at 31.
[30] *Id.* at 32.
[31] *Id.* at 33-34.
[32] *Id.* at 38-45.
[33] *Id.*
[34] *Id.* at 5.
[35] *Id.*
[36] *Id.* at 6.
[37] *Id.*

inspectors, and a team captain.[38] Accreditation decisions must be made within twelve months of "the date of the laboratory's first notification of an audit committee's consideration of the draft inspection report."[39] During that time period, the laboratory may correct any deficiencies identified by the inspection team during the on-site inspection.[40]

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be effective for five years "provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs."[41] After the five-year time period, the laboratory must apply for reaccredidation and undergo another on-site inspection.[42]

B. Medical Examiner Offices

1. County Medical Examiner Offices

a. Qualification Requirements for County Medical Examiners

The State of Arizona does not have a chief medical examiner, but instead allows each county to appoint "a qualified person" to be the county medical examiner.[43] To be eligible for the position, the individual must be a "licensed physician in good standing certified in pathology and skilled in forensic pathology."[44] If the county board of supervisors determines that the appointment of a county medical examiner is not practical, it may establish a list of licensed physicians who will be available to perform the duties required of a county medical examiner. Licensed physicians on the list do not need to be residents of the county, nor do they need to be certified in pathology or skilled in forensic pathology. Instead, they must agree to perform medical examinations or autopsies to determine the cause and manner of death on behalf of the county on a contractual basis.[45]

b. Powers and Duties of County Medical Examiners

The county medical examiner or licensed physician must:

(1) Be responsible for medical examination or autopsy of a human body when death occurred under certain specified circumstances;
(2) Take charge of the dead body of which the medical examiner is notified and, after making inquiries regarding the cause and manner of death, examine the body;

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38 *Id.*
39 *Id.* at 7.
40 *Id.*
41 *Id.* at 1.
42 *Id.*
43 ARIZ. REV. STAT. § 11-591 (2006).
44 *Id.* For a list of the American Board of Pathology requirements for certification and re-certification, see American Board of Pathology, Requirements for Primary and Subspecialty Certifications, *at* http://www.abpath.org/ReqForCert.htm (last visited on Oct. 5, 2005).
45 ARIZ. REV. STAT. § 11-592(A) (2006).

(3) Certify the cause and manner of death following a medical examination or an autopsy, or both;
(4) Make inquiries regarding the cause and manner of death, reduce the findings to writing and promptly make a full report on forms prescribed for that purpose;
(5) Execute a death certificate provided by the state registrar of vital statistics indicating the cause as well as the manner of death for those bodies on which a medical examination or autopsy is performed;
(6) Notify the county attorney when death is found to be from other than natural causes;
(7) Notify the appropriate city, town, county or state law enforcement agency if further investigation by such agency appears necessary;
(8) Carry out the duties specified in 28-668;[46]
(9) Carry out the duties specified under the Revised Arizona Anatomical Gift Act.[47]

The county medical examiner also may (1) appoint qualified professional, technical and clerical personnel as necessary for the administration of the office, subject to the approval of the board of supervisors; and (2) authorize qualified practicing physicians in local areas to perform medical examinations required of the county medical examiner.[48]

The county medical examiner or a licensed physician employed to perform these functions also may (1) "authorize the taking of anatomical gifts as they prove to be usable for transplants or other treatment or therapy" if certain requirements are met; (2) "authorize licensed or authorized physicians, surgeons or trained technicians who remove parts of bodies to perform any part of a necessary medical examination provided they follow a protocol established by the medical examiner or a person authorized to act as the medical examiner"; and (3) "limit the removal of organs or tissues for transplants or other therapy or treatment if, based on a physical examination of the body within a time that permits a medically viable donation, their removal would interfere with a medical examination, autopsy or certification of death."[49]

Among the county medical examiner's responsibilities is investigating or causing to be investigated the facts and circumstances of deaths under the following circumstances:

(1) Death when not under the current care of a physician or nurse practitioner for a potentially fatal illness or when an attending physician or nurse practitioner is unavailable to sign the death certificate;
(2) Death resulting from violence;
(3) Death occurring suddenly when in apparent good health;
(4) Death occurring in a prison;
(5) Death of a prisoner;

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[46] ARIZ. REV. STAT. § 28-668 discusses accidents involving driver deaths and the testing of alcohol concentration.
[47] ARIZ. REV. STAT. § 11-594(A) (2006). ARIZ. REV. STAT. §§ 36-841–850 is the Revised Arizona Anatomical Gift Act and deals with organ donation.
[48] ARIZ. REV. STAT. § 11-594(B) (2006).
[49] ARIZ. REV. STAT. § 11-594(C) (2006).

(6) Death occurring in a suspicious, unusual, or unnatural manner;
(7) Death from disease of accident believed to be related to the deceased's occupation or employment;
(8) Death believed to present a public health hazard; and
(9) Death occurring during anesthetic or surgical procedures.[50]

Each county must provide the Department of Public Safety with the fingerprints of all deceased people whose deaths require investigation. The fingerprints must be on a form provided by the Criminal Identification Section (Section) and will be accompanied by other information the Section requires, including a physical description of the deceased and the date and place of death. Fingerprints taken under this statutory authority must only be used for the purpose of purging criminal history files. All information and data provided under this authority is confidential and may be disclosed only upon written approval of the Director of Public Safety to the juvenile court, social agencies, public health and law enforcement agencies, licensed or regulated by the State.[51]

If a dispute arises over the findings of the medical examiner's report, the medical examiner, upon an order of the superior court, must make available for examination all of the evidence and documentation to a court-designated licensed forensic pathologist. The results of this examination must be reported to the Superior Court of the county issuing the order.[52]

In conducting an inquiry, the medical examiner or person performing the duties of a medical examiner may enter any place in which the body or evidence of the circumstances of the death may be found, so long as an investigating law enforcement agent obtains a search warrant for private property not in the immediate location of where the body was found.[53] The county medical examiner or person performing the duties of a county medical examiner may, with the permission of the investigating law enforcement agent, take into his/her possession any object found on the deceased or in the deceased's immediate vicinity which may aid in the determination of the deceased's identity or the cause or manner of death. Upon completion of the examiner's findings, s/he must deliver such object to the appropriate law enforcement agency, the legal representative of the deceased, or to the county treasurer within thirty days.[54] If the death requires investigation, no human body or body suspected of being human may be removed from the place where the death occurred without first obtaining permission from the county medical examiner or the person performing the duties of a county medical examiner. Embalming, cleansing, or other alteration of the state or appearance of the body is not allowed before official permission is obtained. No one, except a law enforcement agent in the performance of his/her duties, may remove any effects of the deceased or any instruments or weapons that may have been used in the death from the place of death or the body unless s/he obtains prior permission from the county medical examiner, the

[50] ARIZ. REV. STAT. § 11-593(A), (B) (2006).
[51] ARIZ. REV. STAT. § 11-593(F) (2006).
[52] ARIZ. REV. STAT. § 11-594(D) (2006).
[53] ARIZ. REV. STAT. § 11-595(A) (2006).
[54] ARIZ. REV. STAT. § 11-595(B) (2006).

person performing the duties of a county medical examiner, or the investigating law enforcement agent.[55]

After conducting the requisite investigation, the county medical examiner or person performing the duties of a county medical examiner must determine whether the public interest mandates an autopsy or other special investigation. In making this determination, the county medical examiner or person performing the duties of a county medical examiner may consider any autopsy request made by private persons or public officials. An autopsy must be performed if the county attorney or a superior court judge of the county where the death occurred requests that one be performed.[56]

If an autopsy is performed, a full record or report of the facts must be made and filed in the Office of the County Medical Examiner of the Board of Supervisors. The report may be forwarded to the county attorney where the death occurred or the county where any injury contributing to or causing the death was sustained, if the person who conducted the autopsy thinks that it should be.[57] Upon the county attorney's request, s/he must receive a copy of the autopsy report.[58] The county medical examiner or the person performing the duties of a county medical examiner may perform other necessary tests to determine identity, cause and manner of death, and may retain tissues, specimens, and other biological materials for subsequent examination.[59]

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[55] ARIZ. REV. STAT. § 11-596 (2006).
[56] ARIZ. REV. STAT. § 11-597(A) (2006).
[57] ARIZ. REV. STAT. § 11-597(C) (2006).
[58] ARIZ. REV. STAT. § 11-597(D) (2006).
[59] ARIZ. REV. STAT. § 11-597(E) (2006).

II. ANALYSIS

A. Recommendation #1

> **Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.**

The State of Arizona does not require crime laboratories or medical examiner offices to be accredited. All of the crime laboratories of the Department of Public Safety Scientific Criminal Analysis Bureau (Bureau), however, have been accredited by the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) since 1982.[60] In addition, the Mesa Police Department Crime Laboratory, the Phoenix Police Department Laboratory Services Bureau, the Scottsdale Police Department Crime Laboratory, and the Tucson City-County Crime Laboratory, also have obtained accreditation through ASCLD/LAB.[61]

The ASCLD/LAB accreditation program requires laboratory personnel to possess certain qualifications.[62] For example, the ASCLD/LAB Laboratory Accreditation Board 2003 Manual requires the examiners to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments and methods and procedures.[63] The examiners must also successfully complete a competency test prior to assuming casework responsibility and annual proficiency tests.[64]

In an effort to ensure that crime lab employees possess the knowledge and skills necessary to perform the required tasks, the Arizona Revised Statutes provide funds to the Department of Public Safety, the Phoenix Police Department, the Tucson Police Department, the Mesa Police Department, and the Scottsdale Police Department from the Crime Lab Assessment Fund to educate and train forensic scientists in crime laboratories.[65]

According to the Joint Legislative Budget Committee (JLBC) Staff Program Summary of the Bureau, all scientific analysis employees received one training session in the 2004 fiscal year and nearly half (49%) of employees received two. The estimate for the 2006 fiscal year is that 100% of employees will continue to receive one training session and 67% will receive two.[66]

While we have very little data regarding whether the training provided by crime laboratories does, in fact, ensure the valid, reliable, and timely analysis of forensic evidence, the JLBC Staff Program Summary reports that 6.3%, or approximately 2,655 of

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60 STAFF OF JOINT LEGISLATIVE BUDGET COMMITTEE, *supra* note 11.
61 American Society of Crime Laboratories Directors, *supra* note 14.
62 *See supra* notes 36-37, 60.
63 AM. SOC'Y OF CRIME LAB. DIRS., *supra* note 15, at 23-24.
64 *Id.*
65 ARIZ. REV. STAT. § 41-2415 (2006).
66 STAFF OF JOINT LEGISLATIVE BUDGET COMMITTEE, *supra* note 11.

the cases submitted to the Bureau crime lab system during the 2004 fiscal year were over 30 days old. The Bureau anticipated lowering that percentage to 2.5%, or approximately 1,298 cases, in the 2006 fiscal year.[67] As the JLBC acknowledges, however, "this amount doesn't include cases not processed in prior year(s)" and "[w]hile knowing the quantity or percentage of cases in excess of 30 days old is helpful, it doesn't correspond to deficiencies within the program, given the time to complete the examination varies substantially depending on the type of analysis being done."[68] According to Todd Griffith, the person who oversees the Bureau's four crime labs, agencies who use their labs can expect to wait two to four weeks for evidence to be processed in top-priority cases. Lower-priority cases take even longer to process.[69]

The ASCLD/LAB accreditation program also requires laboratories to have clearly written procedures for handling and preserving the integrity of evidence; preparation, storage, security and disposition of case records and reports; and for maintenance and calibration equipment.[70] The program requires these procedures to be included in the laboratory's quality manual.[71] The program does not explicitly require the laboratory to publish its procedures, however.

Despite the written procedures requirement, the June 2005 Audit Report by the U.S. Department of Justice's Office of the Inspector General, which analyzed the compliance of the Bureau's Phoenix DNA Laboratory with the standards governing combined DNA index system activities, indicated that quality assurance problems exist in at least limited circumstances.[72] For example, at the time of the audit, the laboratory found that there were "no access restrictions limiting non-DNA laboratory personnel from accessing the DNA laboratory, including after hours when no DNA personnel may be present," "freezers used for short-term evidence storage were not secured," and the laboratory used "open space within the laboratory for storage of convicted offender samples that could not be stored within a locked sample storage room." Some of the samples stored in open space were sealed, but others awaiting analysis were not.[73] It is unclear if these problems have been fixed, although the audit report indicates movement by the laboratory toward fixing the identified quality assurance problems.[74]

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[67] *Id.*

[68] *Id.*

[69] Arek Sarkissian II, *Evidence Delay*, Tucson Weekly, June 10, 2004.

[70] AM. SOC'Y OF CRIME LAB. DIRS., *supra* note 15, at 21.

[71] The ASCLS/LAB program requires the quality manual to contain or reference the documents or policies/procedures pertaining, but not limited to, the following: (1) control and maintenance of documentation of case records and procedure manuals, (2) validation of test procedures used, (3) handling evidence, (4) use of standards and controls in the laboratory, (5) calibration and maintenance of equipment, (6) practices for ensuring continued competence of examiners, and (7) taking corrective action whenever analytical discrepancies are detected. *Id.* at 23-24.

[72] Office of the Inspector General, Executive Summary, Compliance with Standards Governing Combined DNA Index System Activities at the Arizona Department of Public Safety, Scientific Analysis Bureau DNA Laboratory, Phoenix, Arizona, *available at* http://www.usdoj.gov/oig/grants/g6005009.htm (last visited on June 12, 2006).

[73] *Id.*

[74] *Id.*

In addition to problems at the Bureau's labs, the Phoenix Police Department laboratory was found to have made errors in the DNA analysis of nine cases between August 2001 and May 2003. "Insufficiently trained lab technicians" were blamed for the errors.[75]

It is clear that crime laboratories can and do make critical errors. Congress enacted The Paul Coverdell Forensic Sciences Improvement Grant Program ("Coverdell Grant Program") to "improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes."[76] Under the authority of the Coverdell Grant Program, the Department of Justice provides funds to state and local governments to assist crime laboratories and medical examiner offices with improving the following areas: Education and Training, Accreditation/Certification, Equipment/Supplies, Facilities/Renovation, and Staffing.[77] As enacted, the Coverdell Grant Program imposed certain requirements on state and local governments seeking grant funds. For example, in order to qualify for Coverdell funds, state or local governments had to show they had "developed a program for improving the quality and timeliness of forensic science or medical examiner services."[78] In addition, applicants had to use "generally accepted laboratory practices and procedures as established by accrediting organizations or appropriate certifying bodies."[79]

To further ensure the reliability and credibility of forensic tests conducted by Coverdell grant recipients,[80] Congress added a further eligibility requirement in 2004 when it passed the Justice for All Act, which amended the Coverdell Grant Program and required grant applicants to certify that:

> [A] government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic

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[75] Carlos Miller, *Phoenix Police Lab Errs on DNA 9 Cases Under Review After Mistakes Found*, THE ARIZ. REPUBLIC, May 6, 2003.

[76] Paul Coverdell National Forensic Sciences Improvement Act of 2000, Pub. L. No. 106-561, codified at 42 U.S.C. 3797(j), *et. seq*.

[77] National Institute of Justice, Coverdell National Forensic Sciences Improvement Grant Program, *available at* http://www.ojp.gov/nij/topics/forensics/nfsia/welcome.html (last visited July 7, 2006).

[78] *Id.*

[79] *Id.*

[80] Indeed, the legislative history of the Justice for All Act reveals testimony before Congress in which Peter Neufeld of The Innocence Project argued for independent external investigation mechanisms and observed:

> One way vigilance can be achieved is by utilizing some of the same quality assurance measures we employ in other institutions where health, safety, and security are at stake. When the Challenger crashed and NASA initially suggested an internal audit, Congress would not allow it. When the Enron scandal broke, the nation would not accept yet another audit from Arthur Anderson. In fact, whenever there is evidence of serious misconduct affecting the public, an independent external audit is obligatory. One of the few notable exceptions to this fundamental principle, I am afraid, has been the state and local criminal justice system.

Advancing Justice Through Forensic DNA Technology, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, Serial No. 46, 108th Cong. 36 (2003) (statement of Peter Neufeld, Co-Founder and Director of The Innocence Project).

> laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.[81]

Nevertheless, a 2005 review conducted by the Department of Justice Office of the Inspector General (OIG) concluded that the National Institute of Justice (NIJ), the DOJ agency tasked with administering the grant program, did not enforce the independent external investigation requirement.[82] So long as grant applicants signed the certification that there was a government entity or process in place to conduct independent external investigations into allegations of misconduct, the NIJ disbursed the funds.[83] The OIG criticized the NIJ for failing to instruct the grant applicants on what kinds of agencies or processes would suffice under the requirement.[84]

The state administering agency for Coverdell grants is the Arizona Criminal Justice Commission (ACJC). According to the NIJ website the ACJC received S207,752 in FY 2004 and $66,351 in FY 2003 in Coverdell funds.[85] Arizona received these funds even though there is no government entity or process in place in Arizona to conduct independent external investigations into crime laboratory misconduct or negligence.

As noted above, the State of Arizona is no stranger to crime laboratory testing errors. Indeed, Ray Krone was convicted of first degree murder in 1992 and served ten years in prison, in part, because a Phoenix Police Department (PPD) employee failed to test crucial evidence that subsequently helped to exonerate Krone.[86] These failures also contributed to the several million dollar settlement of Mr. Krone's post-exoneration civil rights suit.[87] Contamination from an unknown source of DNA surfaced in cases handled by the Tucson Police Department Laboratory.[88] By no means exhaustive, the foregoing examples illustrate the kinds of laboratory conduct that command independent oversight of crime laboratories so that corrective action can be taken, improvements made, and wrongful convictions avoided.

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[81] Justice for All Act of 2004, Pub. L. No. 108-405.

[82] United States Department of Justice, Office of the Inspector General, Review of the Office of Justice Programs' Forensic Science Improvement Grant Program, at i, 21, (Dec. 2005), *available at* http://www.usdoj.gov/oig/reports/OJP/e0602/final.pdf.

[83] *Id.*

[84] *Id.* at 9, 21.

[85] *See* National Institute of Justice, NIJ Awards in 2003, NIJ Awards in 2004, *available at* http://www.ojp.usdoj.gov/nij/funding.htm (last visited July 10, 2006). Additionally, according to the U.S. Department of Justice, it awarded the Arizona Criminal Justice Commission in 2004 $376,622 for DNA capacity enhancement programs and $430,047 for DNA forensic casework backlog reduction. National Institute of Justice, NIJ Awards in 2004, *available at* http://www.ojp.usdoj.gov/nij/awards/2004.htm (last visited July 10, 2006). Lastly, the Department of Justice reports that it provided the Phoenix Police Department $993,500 in 2004 grants to improve criminal justice forensic services. *See* Press Release, United States Department of Justice Office of Justice Programs, *Department of Justice Awards $2.5 Million to Arizona for President's DNA Initiative and Crime-Solving Forensic Services* (Sept. 21, 2004).

[86] City Auditor Department Final Report, Police Crime Laboratory Review Observation No. 8—Forensic Biology/DNA, July 9, 2004, at 13.

[87] Paul Davenport, *Arizona Lawmakers Apologize to Exonerated Man*, THE PHILADELPHIA INQUIRER, Feb. 21, 2006, at B5.

[88] Robert Anglin, *DNA Reliability Under Fire*, THE ARIZ. REPUBLIC, Dec. 12, 2005, *available at* http://www.azcentral.com/specials/special21/articles/1212dna12.html.

In the wake of well-publicized crime laboratory problems that have led to wrongful convictions around the country, such as those in the Houston Police Department laboratory,[89] states have began to respond by introducing legislation that creates crime laboratory oversight commissions comprised of defense attorneys, prosecutors, judges, forensic scientists, academics, and members of law enforcement.[90] Indeed, the Texas legislature responded to its state crime lab problems by creating the Texas Forensic Science Commission, "an example for the nation" according to the Innocence Project.[91] In the absence of state action, one state high court has gone so far as to suggest, in an opinion that addressed misconduct in the West Virginia police crime lab, that the state remove the crime laboratory from the supervision of law enforcement and develop an independent agency to oversee the crime lab.[92] To minimize the risk that wrongful convictions occur, the State of Arizona should create an independent agency to oversee its crime laboratories. The Arizona Criminal Justice Commission (ACJC) has suggested that it could serve as the independent oversight body contemplated by the Coverdell Grant Program. At present, however, the ACJC has no personnel qualified to perform independent audits or reviews of crime laboratories. In addition, in order to comply with the spirit of the Grant Program it would also be necessary to broaden the membership of ACJC to include other interested stakeholders, including the public defender organizations. Both steps could significantly improve public confidence in the operation of Arizona's crime laboratories.

With respect to medical examiner offices, we were unable to obtain sufficient information to state with any degree of certainty whether any medical examiner officers are currently accredited or have adopted standardized procedures for medical examinations. Arizona law, however, requires that every medical examiner must be a "licensed physician in good standing certified in pathology and skilled in forensic pathology."[93] Alternatively, if the county board of supervisors determines that the appointment of a county medical examiner is not practical, it may establish a list of licensed physicians who will be available to perform the duties required of a county medical examiner, but the licensed physicians on the list do not need to be certified in pathology nor skilled in forensic pathology.[94]

Based on this information, the State of Arizona is only in partial compliance with Recommendation #1.

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[89] *See, e.g.,* Roma Khanna, *Tests Find HPD's Lab Data Wrong Once Again, Houston Chronicle*, Feb. 15, 2005.

[90] *See, e.g.,* Missouri S.B. 768 (introduced 2006) *at* http://www.senate.mo.gov/06info/bts_web/Bill.aspx?SessionType=R&BillID=6677 (creating an independent Laboratory Oversight Committee with the power to investigate allegations of crime lab misconduct).

[91] Innocence Project, Junk Science, *at* http://www.innocenceproject.org/causes/junkscience.php

[92] In the Matter of Renewed Investigation of the State Police Crime Laboratory, Serology Division, No. 32885, 2006 W. Va. LEXIS 51, n.12. Also available at http://www.state.wv.us/wvsca/docs/spring06/32885.pdf.

[93] AM. SOC'Y OF CRIME LAB. DIRS., *supra* note 15, at 23-24. For a list of the American Board of Pathology requirements for certification and re-certification, see Requirements for Primary and Subspecialty Certifications, American Board of Pathology, *at* http://www.abpath.org/ReqForCert.htm (last visited on Oct. 5, 2005).

[94] ARIZ. REV. STAT. § 11-592(A) (2006).

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

The Bureau's Scientific Analysis Program receives funding from twelve sources, seven of which are appropriated by the State and five of which are not. The appropriated funding sources include the General Fund, State Highway Fund, Crime Lab Assessment Fund, DNA Fund, Highway User Revenue Fund, Highway Patrol Fund, and the Criminal Justice Enhancement Fund.[95] Between fiscal year 2000 and fiscal year 2005, total funding for the Scientific Analysis Program increased by 68.2%, from $8,429,600 to $18,274,700. That funding was expected to increase an additional 8.9% in fiscal year (FY) 2006 to $19,325,300.[96]

Despite these funding increases, it appears that there has been a funding shortfall that has made the timely testing of DNA evidence difficult, if not impossible. The number of cases submitted for analysis to the Bureau increased 56% between FY 2000 and FY 2005, from 29,425 submissions to 45,916 submissions. Since FY 2000, there has been an average increase of 9.31% per year in case submissions.[97] At the same time, between FY 2000 and FY 2006, the number of appropriated positions allocated to crime labs has increased by 30.7%, or thirty-one positions. When the new positions that have been added to address new programs are excluded, the Bureau received an additional twenty-one positions, or 20.8%, to address the increase in crime lab submissions.[98] Consequently, while the Bureau's caseload has increased by 56%, staff has increased only by 20.8%. The Bureau requested funding for an additional eleven positions in FY 2007 "to address the dramatic growth in submissions." The Bureau identifies this as a "modest request," due to the fact that submissions likely will continue to increase at a pace equal to or faster than the staffing level, but does not request more because "it would be very challenging to recruit, hire, and train more than 11 new criminalists in each year"[99] and because the increase in staff should allow the Bureau to "stem the tide" as it "seeks to deploy new technologies that will allow [it] to operate more efficiently."[100]

In addition, as of June 2004, the Tucson laboratory had serious backlog in processing evidence, including evidence relating to murder cases, sexual assault cases, and cases going to trial. These high-priority cases took an average of 119 days to process. Susan Shankes, the Tucson Police Department Crime Lab Superintendent, claimed that "We really aren't staffed right and don't have the resources available."[101]

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[95] STAFF OF JOINT LEGISLATIVE BUDGET COMMITTEE, *supra* note 11.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] ARIZ. DEP'T OF PUBLIC SAFETY, FY 2007 DECISION PACKAGES, *at* http://www.azdps.gov/news/DecisionPackagesFY2007.pdf (last visited Feb. 15, 2006).
[100] Ariz. Dep't of Public Safety, Fiscal Year 2007 Budget Request, *available at* http://www.azdps.gov/news/decisionPackages.asp (last visited Feb. 15, 2006).
[101] Sarkissian, *supra* note 69.

As of January 1, 2005, all felons are required to submit DNA evidence for submission to Arizona's DNA database.[102] Because of state budget cuts, however, the Arizona Department of Public Safety received only $1.6 million during the 2003 and 2004 fiscal years to fund DNA testing, despite an initial legislative appropriation of $2 million a year. As a result, the Department of Public Safety had only enough money to purchase collection kits, hire some of the necessary staff, and have the DNA samples preserved and stored.[103] In May 2004, approximately 60,000 samples were waiting to be analyzed. Full funding was restored on July 1, 2004,[104] and Arizona received an additional $1.3 million in September 2004 from the federal government to eliminate casework and the convicted offender backlog, improve crime lab capacity, provide DNA training, provide post-conviction DNA testing, and conduct testing to identify missing persons.[105] Despite this additional money, it is estimated between two and ten years may be needed for crime-lab technicians to process the backlog and keep pace with the new samples that arrive for processing.[106] We were unable to confirm whether the State of Arizona has since been able to eliminate the backlog.

Given this information, it does not appear as if crime labs in the State of Arizona are adequately funded. We were, however, unable to obtain sufficient information to appropriately assess the adequacy of the funding provided to both crime laboratories and medical examiner offices.

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[102] Judi Villa, *DNA samples taxing Arizona* , THE ARIZ. REPUBLIC, May 10, 2004.

[103] *Id.*

[104] *Id. See also Program Summary Department of Public Safety Scientific Analysis (Crime Lab)* (Sept. 19, 2005) (on file with author).

[105] *See* Press Release, United States Department of Justice Office of Justice Programs, *Department of Justice Awards $2.5 Million to Arizona for President's DNA Initiative and Crime-Solving Forensic Services* (Sept. 21, 2004).

[106] Judi Villa, *supra* note 102.

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous additional discretion deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.[1]

Prosecutorial misconduct can encompass various actions, including but not limited to failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.[2] The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and to reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

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[1] *See* STEVE WEINBERG, CENTER FOR PUBLIC INTEGRITY, BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT? (2004), *available at* http://www.publicintegrity.org/pm/default.aspx?act=main (last visited on July 7, 2006).

[2] *Id.*; *see also* Innocence Project, Police and Prosecutorial Misconduct, *at* http://www.innocenceproject.org/causes/policemisconduct.php (last visited on July 7, 2006).

I. FACTUAL DISCUSSION

A. Prosecution Offices

1. County Attorneys

The State of Arizona is divided into fifteen counties,[3] each of which has an elected county attorney[4] who serves as the county's public prosecutor.[5] To be eligible for the office of county attorney, one must be an attorney at law who is licensed and in good standing in the State of Arizona.[6] County attorneys are required to, among other things:

(1) Attend the superior and other courts within the county and conduct, on behalf of the State, all prosecutions for public offenses;
(2) Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when the county attorney has information that the offenses have been committed;
(3) When not engaged in criminal proceedings in the superior court, attend upon the magistrates in cases of arrest when required by them, and attend before and give advice to the grand jury;
(4) Draw indictments and informations, defend actions brought against the county and prosecute actions to recover recognizances forfeited in courts of record and actions for recovery of debts, fines, penalties, and forfeitures accruing to the State or county;
(5) Keep a register of all official business, and enter in it every action prosecuted, criminal or civil, and of the proceedings therein;
(6) Upon receipt of an appellant's brief in a criminal appeal, furnish the attorney general with a true statement of the facts in the case, together with the available authorities and citations that are responsive to the assignments or specifications of error.[7]

If the county attorney fails to attend any session of the Superior Court at which a criminal action is to be tried, either in person or by deputy, the court may designate a different person to perform the county attorney's duties in his/her absence.[8]

Although there are no statewide procedures that govern the operation of county attorneys' offices beyond those discussed above, the State of Arizona has established the "Arizona Prosecuting Attorneys' Advisory Council"[9] "to assist in the coordination of the duties of the prosecuting attorneys . . . and their staffs."[10]

2. Office of the Attorney General

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[3] *See* U.S. Census Bureau, Arizona County Map, *available at* http://quickfacts.census.gov/qdf/maps/arizona_map.html (last visited July 7, 2006).
[4] ARIZ. CONST. art. XII, § 3 (2006).
[5] ARIZ. REV. STAT. § 11-532(A) (2006).
[6] ARIZ. REV. STAT. § 11-531(A) (2006).
[7] ARIZ. REV. STAT. § 11-532(A), (B) (2006).
[8] ARIZ. REV. STAT. § 11-534 (2006).
[9] *See infra* page 103 for additional information on The Prosecuting Attorneys' Advisory Council.
[10] ARIZ. REV. STAT. § 41-1830.01 (2006).

The State of Arizona elects an Attorney General every four years.[11] To be eligible to serve as Attorney General, one must have been a United States citizen for at least ten years, resided in the State of Arizona for at least five years preceding the election, and be at least twenty-five years old when elected.[12] Further, the Attorney General must have been a practicing attorney before the Arizona Supreme Court for at least five years prior to taking office.[13] The Attorney General and his/her assistants must work for the Office of the Attorney General full-time and may not engage in the private practice of law or in any other occupation that conflicts with their duties.[14]

The Attorney General serves as the State of Arizona's chief legal officer and is in charge of and directs the Department of Law.[15] The Attorney General must, among other things, establish administrative and operational policies and procedures within his/her department and approve long-range plans for departmental programs and coordinate the legal services required by other departments or other state agencies.[16] In addition, the Attorney General may:

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[11] ARIZ. CONST. art. V, § 1.

[12] ARIZ. CONST. art. V, § 2.

[13] ARIZ. REV. STAT. § 41-191 (2006).

[14] ARIZ. REV. STAT. § 41-191(B) (2006). This prohibition does not apply to special assistants, except that special assistants may not engage in any private litigation in which the State or an office of the State in his/her official capacity is a party. Assistant attorneys general may, but are not required to, represent private clients in pro bono or private civil matters under the following circumstances:

(1) The representation will be conducted exclusively during off hours or while on leave and the attorney will not receive any compensation for such services;
(2) The client is not seeking an award of attorney fees for the services;
(3) The services are for an individual in need of personal legal services who does not have the financial resources to pay for the professional services or for a nonprofit, tax exempt charitable organizations formed fro the purpose of providing social services to individuals and families;
(4) The representation will not interfere with the performance of any official duties;
(5) The subject matter of pro bono representation is outside of the area of practice to which the attorney is assigned in the attorney general's office and the activity will not appear to create a conflict of interest;
(6) The activity will not reflect adversely on this state of any of its agencies;
(7) The assistant attorney general's position will not influence or appear to influence the outcome of any matter;
(8) The activity will not involve assertions that are contrary to the interest or position of the State of Arizona of any of its agencies;
(9) The activity does not involve a criminal matter or proceeding or any matter in which the State of Arizona is a party of has a direct or substantial interest;
(10) The activity will not utilize resources that will result in a cost to the State of any of its agencies; and
(11) The attorney's supervisor may require the attorney to submit a prior written request to engage in pro bono work which includes a provision holding the agency harmless from any of the work undertaken by the attorney.

Id.

The Attorney General also may employ attorneys for particular cases on a fixed fee basis who are exempt from the restrictions imposed on regular or special assistants. ARIZ. REV. STAT. § 41-192(C) (2006).

[15] ARIZ. REV. STAT. § 41-192(A) (2006).

[16] *Id.*

(1) Organize the Office of the Attorney General into bureaus, subdivisions, or units as s/he deems most efficient and economical and consolidate or abolish them;
(2) Adopt rules for the orderly conduct of the business of the Office of the Attorney General;
(3) Employ and assign assistant attorneys general and other employees necessary to perform the functions of the Office; and
(4) Compromise or settle any action or claim by or against the State of Arizona.[17]

The Office of the Attorney General is comprised of the Attorney General and the subdivisions of the department.[18] The office must, among other things:

(1) Prosecute and defend in the Supreme Court all proceedings in which the State or an officer of the State in his/her official capacity is a party;
(2) At the direction of the Governor or when deemed necessary by the Attorney General, prosecute and defend any proceeding in a state court other than the Supreme Court in which the State or an officer of the State is a party or has an interest;
(3) Represent the State in any action in a federal court;
(4) Exercise supervisory powers over county attorneys in matters pertaining to that office and require reports relating to the public business of those matters;
(5) At the direction of the Governor, or when deemed necessary, assist the county attorney of any county in the discharge of the county attorney's duties;
(6) Maintain a docket of all proceedings in which the Attorney General is required to appear, showing the condition thereof, the proceedings therein, the proceedings subsequent to judgment, and the reasons for any delay; and
(7) Upon demand by the legislature, or either house or any member of the legislature, any public officer of the State or a county attorney, render a written opinion upon any question of law relating to their offices.[19]

The Capital Litigation Section of the Office of the Attorney General's Criminal Division handles all appellate and post-conviction proceedings involving death-row inmates in Arizona, including direct appeals to the Arizona Supreme Court and the United States Supreme Court; state post-conviction relief proceedings in the trial court and the Arizona Supreme Court; and federal habeas proceedings in federal district court, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.[20] The Capital Litigation Section also assists county attorneys with advice and research in pending trial matters, and presents an annual death penalty seminar for prosecutors.[21]

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[17] ARIZ. REV. STAT. § 41-192(B) (2006).
[18] ARIZ. REV. STAT. § 41-193(A) (2006).
[19] *Id.*
[20] Arizona Attorney General, About the Office, *at* http://www.azag.gov/AboutOffice (last visited July 7, 2006).
[21] *Id.*

B. The Arizona Prosecution Attorneys' Advisory Council

The State of Arizona established the Arizona Prosecution Attorneys' Advisory Council[22] to "assist in the coordination of the duties of the prosecuting attorneys of this [S]tate and their staffs"[23] by:

(1) Establishing rules and regulations for the government and conduct of the council, including meeting times, places, and matters to be placed on the agenda of each meeting;
(2) Preparing manuals of procedure;
(3) Giving assistance in the preparation of trial briefs, forms, and instructions;
(4) Conducting research and studies that would be of interest and value to all prosecuting attorneys and their staffs;
(5) Providing training programs for prosecuting attorneys and other criminal justice personnel;
(6) Maintaining liaison contact with study commissions and agencies of all branches of local, state, and federal government that will be of benefit to law enforcement and the fair administration of justice in the State;
(7) Establishing training standards for prosecuting attorneys and assisting in meeting those standards by promulgating rules and procedures relating to such standards; and
(8) Filing an annual report of financial receipts for prosecuting attorneys and expenditures with the Governor, Speaker of the House, and President of the Senate.[24]

The Arizona Prosecution Attorneys' Advisory Council is comprised of all county attorneys, the Attorney General or his/her designee, the Dean of the Arizona State University School of Law or the University of Arizona Law School, the chief municipal or city prosecutor of each city with a population of over 250,000, one full-time municipal prosecutor from a municipality with a population of less than 250,000 appointed by the Governor, and the Chief Justice of the Arizona Supreme Court or his/her designee.[25] Meetings must be held at least quarterly or upon the call of the Chair or by the written request of five members of the council or by the governor. The Council may employ an Executive Director and other staff, including clerical assistants, who are necessary to fulfill the purposes of the Council.[26] Each member of the council has a three-year term, unless s/he leaves the public office that qualified him/her for the appointment.[27] The Council is instructed by the Arizona Revised Statutes to "endeavor to minimize costs of administration, including utilization of training facilities already in existence and available, so that the greatest possible proportion of the funds available to it shall be expended for the purposes of providing training for prosecuting attorneys."[28]

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22 ARIZ. REV. STAT. § 41-1830 (2006).
23 ARIZ. REV. STAT. § 41-1830.01 (2006).
24 *Id.*
25 ARIZ. REV. STAT. § 41-1830(A) (2006).
26 *Id.*
27 ARIZ. REV. STAT. § 41-1830(B) (2006).
28 ARIZ. REV. STAT. § 41-1830.02 (2006).

C. The Arizona Rules of Professional Conduct

The Arizona Supreme Court promulgated the Arizona Rules of Professional Conduct to address the professional and ethical responsibilities of prosecutors.[29]

The Arizona Rules of Professional Conduct state that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[30] To ensure that these obligations are met, Rule 3.8 of the Arizona Rules of Professional Conduct requires that a prosecutor in a criminal case comply with a number of rules, including:

> (1) Refraining from prosecuting a charge that the prosecutor knows is not supported by probable cause;
> (2) Making reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
> (3) Not seeking to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
> (4) Making timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclosing to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
> (5) Not subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes that (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information; and
> (6) Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refraining from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercising reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making.[31]

The Arizona Rules of Professional Conduct also require all attorneys, including prosecutors, to report professional misconduct. Rule 8.3 of the Arizona Rules of Professional Conduct specifically states, "[a] lawyer who knows that another lawyer has

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[29] ARIZ. R. SUP. CT. 42.
[30] ARIZ. R. OF PROF'L CONDUCT 3.8 cmt.
[31] ARIZ. R. OF PROF'L CONDUCT 3.8.

committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these Rules or by law."[32]

The power to investigate grievances and discipline members of the State Bar, including prosecutors, is vested in the Disciplinary Commission (Commission) of the Arizona Supreme Court.[33] Grounds for discipline include the violation of a rule of professional conduct in effect in any jurisdiction; violation of a canon of judicial conduct; willful violation of any rule or any order of the court of a state, territory, or district of the United States; evading service or refusing to cooperate with officials and staff of the State Bar, a hearing officer, the commission or conservator appointed; violation of a condition of probation or diversion; failure to furnish information; violation of a condition of admission; conviction of a crime; and discipline imposed in another jurisdiction.[34]

A disciplinary proceeding may be initiated upon the State Bar receiving a charge against a respondent.[35] When a disciplinary proceeding is initiated, Bar Counsel[36] first will

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[32] ARIZ. R. OF PROF'L CONDUCT 8.3.

[33] ARIZ. SUP. CT. R. 49(a).

[34] ARIZ. SUP. CT. R. 53(a)–(i).

[35] ARIZ. SUP. CT. R. 54(a).

[36] Bar Counsel is responsible for, among other things:

(1) Investigating all information coming to the attention of the state bar that, if true, would be grounds for discipline or transfer to disability inactive status;
(2) Recommending dispositions prior to formal proceedings, and if deemed to be advisable, recommending any discipline in formal proceedings;
(3) Promptly notifying the complainant and respondent of the disposition of each matter;
(4) Representing the state bar in and prosecuting discipline and reinstatement proceedings and proceedings for transfer to or from disability inactive status before hearing officers, the commission and the Arizona Supreme Court, and prosecuting contempt proceedings in the appropriate forum;
(5) In appropriate cases dismissing proceedings if, after conducting a screening investigation, there is no probable cause to believe that misconduct or incapacity exists;
(6) Monitoring and supervising respondents during a probationary or diversionary term, reporting material violations of the terms of probation or diversion to the imposing entity, and preparing and forwarding a report to the imposing entity regarding respondent's completion or non-completion of the imposed terms; and
(7) Monitoring and supervising conditional admittees during the conditional admission period.

ARIZ. SUP. CT. R. 51(b). Acting under the authority of the State Bar of Arizona Board of Governors, the Chief Bar Counsel will employ and supervise staff that is needed for the performance of all discipline functions, including supervision of volunteer bar counsel, including the screening of all information coming to the attention of the State Bar relating to conduct by a member or non-member, and in general oversee and direct the prosecution of discipline cases and the administration of disability, reinstatement matters and contempt proceedings, including compiling statistics to aid in the administration of the system. ARIZ. SUP. CT. R. 51(a)(1). The Chief Bar Counsel also must transmit notice of discipline, transfers to or from disability inactive status, reinstatements, and judgments of conviction to the disciplinary enforcement agency of any other jurisdiction in which the respondent is known to be admitted; transmit notice of all public discipline imposed against a respondent, transfers to or from disability inactive status, reinstatements, and certified copies of any criminal conviction to the National Discipline Data Bank maintained by the American Bar Association Standing Committee on Professional Discipline; cause notices of orders or judgments of censure, suspension, disbarment, transfers to and from disability status, and reinstatement to be published in the Arizona Attorney or another usual periodic publication of the State

evaluate all of the information about the alleged lack of professionalism, misconduct, or incapacity.[37] If the lawyer is subject to the jurisdiction of the Arizona Supreme Court and the information alleges facts which, if true, would constitute misconduct or incapacity, the bar counsel must conduct a screening investigation.[38] After the screening investigation, bar counsel may recommend dismissal, diversion, a stay, informal reprimand, probation, restitution, assessment of costs and expenses, the filing of a complaint, a petition for transfer to disability inactive status, or with the consent of the respondent, any other sanction.[39]

If, after conducting a screening investigation, there is no probable cause to believe that misconduct or incapacity exists, bar counsel may dismiss a discipline proceeding by filing a notice of dismissal with the State Bar.[40] If a formal complaint is filed, the recommendations of a hearing officer will proceed before the Commission for review if

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Bar, and shall make such notices available to a newspaper of general circulation in each county in which the lawyer maintained an office for the practice of law; and promptly advise all courts in Arizona or orders or judgments of suspension, disbarment, reinstatement, and transfers to or from disability inactive status. ARIZ. SUP. CT. R. 51(a)(2). In addition, Chief Bar Counsel must petition the appropriate court to take such action as may be indicated in order to protect the interests of the public, respondent, and respondent's clients. ARIZ. SUP. CT. R. 51(a)(2)(D).

[37] ARIZ. SUP. CT. R. 54(b). If the lawyer is not subject to the jurisdiction of the Arizona Supreme Court, Bar Counsel must refer the information to the appropriate entity in the jurisdiction in which the lawyer is admitted to practice law. ARIZ. SUP. CT. R. 54(b)(1)(A). If the allegations would not constitute misconduct or incapacity, even if true, Bar Counsel will close the matter and may refer it to the Peer Review or Fee Arbitration Committee. ARIZ. SUP. CT. R. 54(b)(1)(B). If the facts asserted in the charge indicate a violation that does not involve deceit, dishonesty, or actual harm to a client, even if true, Bar Counsel may refer the matter to mediation or diversion or take other appropriate action without conducting a full screening investigation. ARIZ. SUP. CT. R. 54(b)(1)(C). In this situation, the respondent has the right to reject referral of the matter to mediation or diversion and may demand a full screening investigation and a probable cause determination. *Id.*

[38] ARIZ. SUP. CT. R. 54(b)(1)(D).

[39] ARIZ. SUP. CT. R. 54(b)(2). All investigations are conducted by staff bar counsel or staff examiners. *Id.*

[40] ARIZ. SUP. CT. R. 54(b)(3). If Bar Counsel recommends a disposition other than dismissal, the recommendation will be reviewed by the panelist or the panelist's designee. ARIZ. SUP. CT. R. 54(b)(4). The panelist or designee may approve, disapprove, or modify the recommendation and must file the decision with the State Bar. *Id.* Bar Counsel may appeal a decision to disapprove or modify Bar Counsel's recommendation to an appeal panel composed of three members from the State Bar Board of Governors. The appeal panel must either approve Bar Counsel's recommendation, approve the action of the first reviewing member, or require any other action that might have been recommended by Bar Counsel. *Id.* A decision of the panelist or, if the decision is appealed by Bar Counsel, a decision of the appeal panel, will be final with respect to dismissal, diversion, stay, informal reprimand, assessment of costs and expenses, probation, restitution, and the filing of formal discipline or disability proceedings. ARIZ. SUP. CT. R. 54(b)(5). Within ten days of service of an order or diversion, stay, informal reprimand, probation, restitution, or assessment of costs and expenses, the respondent has the right to demand that a formal proceeding be instituted. *Id.* If a formal proceeding is instituted, the order will be vacated and the matter disposed of in the same manner as any other matter instituted before a hearing officer. A recommendation of any sanction that is consented to by the respondent, before or while the matter is pending before the panel, other than those made final by decision of the panelist or panel, will be submitted directly to a hearing officer for review. *Id.* Bar Counsel may refer a matter to the Peer Review Committee, the Fee Arbitration Committee, or to mediation after the probable cause panelist has dismissed the discipline proceeding. ARIZ. SUP. CT. R.54(b)(6). The probable cause panelist will enter an order dismissing discipline proceedings following an agreement reached in mediation by the respondent and complainant. ARIZ. SUP. CT. R. 54(b)(7).

the recommended sanction includes disbarment, suspension or censure, or in the case of an appeal, upon filing a notice of appeal.[41]

The Commission is responsible for reviewing findings, conclusions, and recommendations of all hearing officers[42] subject to review with respect to any discipline matters, petitions for transfer to and from disability inactive status, and applications for reinstatement, and in appropriate cases preparing and forwarding to the court its own findings, conclusions, and recommendations together with the record of the proceedings; imposing discipline, holding as many meetings per year at such times and places as it may determine, or as otherwise directed by the court; exercising any other duties delegated to it by the court; and conducting proceedings and issuing orders of contempt relating to violations of orders that are final with the Commission.[43]

Upon appeal of the respondent, the Supreme Court may review cases in which the Commission report recommends censure, suspension, disbarment, reinstatement or denial of reinstatement.[44]

D. Relevant Prosecutorial Responsibilities

1. Notice of Intent to Seek the Death Penalty

The State of Arizona grants county attorneys the discretion to seek the death penalty. If a prosecutor decides to seek a death sentence, s/he must file a notice of intent to seek the death penalty within sixty days of the defendant's arraignment [45] and must provide notice of the aggravating circumstances s/he believes to be present.[46] Notices of intent may be withdrawn, however.[47]

The Pima County Attorney's Office, the Maricopa County Attorney's Office, and the Office of the Attorney General have "Capital Case Panels" that decide, subject to the county attorney or Attorney General's approval, whether to file a notice of intent to seek

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[41] ARIZ. SUP. CT. R. 58(a).

[42] The Arizona Supreme Court, upon recommendation of the Commission, may appoint a lawyer who has been an active member for at least seven years to serve as a hearing officer. ARIZ. SUP. CT. R. 50(a). Hearing officers have statewide jurisdiction over proceedings on complaints of misconduct, applications for reinstatement, petitions for transfer to and from disability inactive status, and any other matters designated by the court. ARIZ. SUP. CT. R. 50(c)(1). Hearing officers must prepare findings of fact and conclusions of law, issue orders, impose discipline, and in appropriate cases, prepare and forward the findings, conclusions, and recommendations, along with the record, to the Commission. ARIZ. SUP. CT. R. 50(c)(2), (3). Hearing officers are appointed for three year terms, may serve consecutive terms, and may be terminated at any time by the court. ARIZ. SUP. CT. R. 50(a), (b).

[43] ARIZ. SUP. CT. R. 49(c).

[44] ARIZ. SUP. CT. R. 59(a).

[45] ARIZ. R. CRIM. P. 15.1(i)

[46] ARIZ. REV. STAT. § 13-703.01(B) (2005); ARIZ. R. CRIM. P. 15.1(i)

[47] *See, e.g.,* State v. Cabanas-Salgado, 92 P.3d 421, 422 (Ariz. App. Div. 2003) ("Cabanas-Salgado waived his right to a jury trial and, in exchange for dismissal of the State's notice of intent to seek the death penalty, stipulated to the admissibility of the transcripts from Flores-Zevada's trial arising from the same incident.").

the death penalty.[48] The Panel is comprised of the County Attorney, the Chief Criminal Deputy, the Chief Trial Counsel, and five senior lawyers from the Criminal Section of the Office, all of whom have prosecuted capital cases. The Capital Case Panel operates by consensus, subject to the overriding authority of the county attorney.[49] According to Rick Unlkesbay, Chief Trial Deputy of the Pima County Attorney's Office, the Panel considers the existence of any aggravating and mitigating circumstances, their relative strengths, the quality of proof for the underlying offense, and the facts of the case. The Panel also considers the opinion of the victim's family.[50]

2. Plea Bargaining

There is no right to plea bargain under the Arizona Constitution and the prosecutor may proceed to trial if s/he chooses.[51]

The Pima County Attorney's Office "Capital Case Panel" makes all decisions regarding plea bargains in capital cases, subject to the county attorney's approval. If a death notice is filed, there is a presumption that the case will go to trial and the death penalty will be sought.[52]

3. Discovery

a. Discovery Requirements

State and federal law provides that defendants are entitled to all exculpatory information or evidence.[53] The prosecutor "is not required to deliver his[/her] entire file to defense counsel, but is required to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[54] In capital cases, this means the prosecution must turn over evidence that would be mitigating at the penalty phase of the trial, in addition to evidence that goes toward guilt,[55] including the disclosure of impeachment evidence which could be used to show bias or interest on the part of a key State witness. Accordingly, the State is under a duty to reveal any [deal or] agreement, even an informal one, with a witness concerning criminal charges pending against that witness.[56] A prosecutor must not only disclose the evidence of which s/he is aware, but also "favorable evidence known to the others acting on the government's behalf," even if the prosecutor is not personally aware of its existence.[57]

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[48] Telephone Interview with Rick Unlkesbay, Chief Trial Deputy, Pima County Attorney's Office; E-mail Interview with Kent Cattani, Chief Counsel of the Capital Litigation Section, Arizona Attorney General's Office (July 11, 2006).

[49] *Id.*

[50] *Id.*

[51] State v. Donald, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000).

[52] Telephone Interview with Rick Unlkesbay, Chief Trial Deputy, Pima County Attorney's Office.

[53] This is known as *Brady* material. Brady v. Maryland, 373 U.S. 83 (1963); *see also* Ariz. R. OF PROF'L CONDUCT 3.8(d).

[54] U.S. v. Bagley, 473 U.S. 667, 675 (1985).

[55] Green v. Alabama, 442 U.S. 95 (1979); State v. Bracy, 703 P. 2d 464, 471 (Ariz. 1985) ("The United States Constitution requires the prosecution to disclose to a defendant information that would tend to absolve the defendant of guilt or mitigate his punishment.").

[56] Giglio v. United States, 405 U.S. 150, 154-55 (1972).

[57] Kyles v. Whitley, 514 U.S. 419, 439-39 (1995).

Arizona courts have held that there is no constitutional right to discovery in criminal cases.[58] As a rule, at the arraignment or preliminary hearing, defendants are entitled to discovery of all reports that were in the possession of the prosecutor at the time of filing that contain all existing original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged, along with the names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons that have been completed.[59]

Further, the prosecutor must make the following material and information within the prosecutor's possession or control available to the defendant:

(1) The names and addresses of all people who the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements;
(2) All statements of the defendant and of any person who will be tried with the defendant;
(3) All then existing original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged;
(4) The names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments, or comparisons that have been completed;
(5) A list of all papers, documents, photographs or tangible objects that the prosecutor intends to use at trial or which were obtained from or purportedly belong to the defendant;
(6) A list of all prior felony convictions of the defendant which the prosecutor intends to use at trial;
(7) A list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial;
(8) All then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment;
(9) Whether there has been any electronic surveillance of any conversations to which the defendant was a party, or of the defendant's business or residence;
(10) Whether a search warrant has been executed in connection with the case; and
(11) Whether the case has involved an informant, and, if so, the informant' identity, if the defendant is entitled to know either or both of these facts.[60]

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[58] State v. O'Neil, 836 P.2d 393, 395 (Ariz. Ct. App. 1991); *see also* State ex rel. Thomas v. Foreman 118 P.3d 1117, 1121 (Ariz. Ct. App. 2005).
[59] ARIZ. R. CRIM. P. 15.1(a).
[60] ARIZ. R. CRIM. P. 15.1(b).

The State also must make available to the defendant at least thirty days before trial, or thirty days after a defense request, a list of the prior felony convictions of witnesses who the prosecutor intends to call at trial, along with a list of the prior felony convictions that the prosecutor intends to use to impeach any disclosed defense witness at trial.[61]

Upon request from the defense, and within thirty days of such request, the prosecutor must make the following available to the defendant for examination, testing, and reproduction:

(1) Any specified items contained in the list of papers, documents, photographs, or tangible objects that the prosecutor intends to use at trial or which were obtained from or purportedly belong to the defendant;
(2) Any 911 calls existing at the time of the request that can reasonably be ascertained by the custodian of the record to be related to the case; and
(3) Any completed written reports, statements, and examination notes made by experts in connection with the particular case.[62]

The prosecutor's obligation to disclose is not simply applied to material and information in his/her possession. Instead, this obligation extends to material and information in the possession or control of members of the prosecutor's staff, any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or any other person who has participated in the investigation or evaluation of the case and who is under the prosecutor's direction or control.[63]

If the defendant shows that s/he has substantial need in the preparation of his/her case for material or information not otherwise covered by the discovery rules, and the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court may order that information made available.[64]

The prosecutor also must disclose the names and addresses of the people who the prosecutor intends to call as rebuttal witnesses together with their relevant written or recorded statements.[65]

The prosecutor must provide the defendant the additional following pieces of information within thirty days of filing a notice of intent to seek the death penalty:

(1) The names and addresses of all people who the prosecutor intends to call as witnesses to support each identified aggravating circumstance at the aggravation hearing, together with any written or recorded statements of the witness;
(2) The names and addresses of experts who the prosecutor intends to call to support each identified aggravating circumstance at the aggravation hearing, together with any written or recorded statements of the witness;

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[61] ARIZ. R. CRIM. P. 15.1(d).
[62] ARIZ. R. CRIM. P. 15.1(e).
[63] ARIZ. R. CRIM. P. 15.1(f).
[64] ARIZ. R. CRIM. P. 15.1(g).
[65] ARIZ. R. CRIM. P. 15.1(h).

(3) A list of any and all papers, documents, photographs, or tangible objects that the prosecutor intends to use to support each identified aggravating circumstance at the aggravation hearing;
(4) All material or information that might mitigate or negate the finding of an aggravating circumstance or mitigate the defendant's culpability;
(5) The names and addresses of all people who the prosecutor intends to call as rebuttal witnesses on each identified aggravating circumstance, together with any written or recorded statements of the witness;
(6) The names and addresses of all people who the state intends to call as witnesses at the penalty hearing, together with any written or recorded statements of the witness;
(7) The names and addresses of experts who may be called at the penalty hearing together with any reports prepared by the expert; and
(8) A list of any and all papers, documents, photographs, or tangible objects that the prosecutor intends to use during the aggravation and penalty hearings.[66]

The State has a continuing duty to make additional disclosures whenever new or different information subject to disclosure is discovered.[67]

b. Challenges to Discovery Violations

Rule 15.7 of the Arizona Rules of Criminal Procedure provides for relief when either the prosecution or the defense fails to make a required disclosure. "[T]he propriety of a given sanction for a discovery violation is largely within the discretion of the trial judge."[68] The judge must order disclosure and impose any sanction s/he finds appropriate, unless the judge finds that the failure to comply was harmless or that the information could not have been disclosed earlier even with due diligence and the information was disclosed immediately upon its discovery.[69] All orders for sanctions must take into account the significance of the information that was not disclosed, the impact of the sanction on the party and the victim, and the stage of the proceedings at which the disclosure was ultimately made.[70] Possible sanctions include, but are not limited to:

(1) Precluding or limiting the calling of a witness, use of evidence or argument in support of or in opposition to a charge or defense;
(2) Dismissing the case with or without prejudice;
(3) Granting a continuance or declaring a mistrial when necessary in the interests of justice;
(4) Holding a witness, party, person acting under the direction or control of a party, or counsel in contempt;
(5) Imposing costs of continuing the proceedings; and

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66 ARIZ. R. CRIM. P. 15.1(i).
67 ARIZ. R. CRIM. P. 15.6(a).
68 State v. Krone, 897 P. 2d 621, 624 (Ariz. 1995).
69 ARIZ. R. CRIM. P. 15.7(a).
70 *Id.*

(6) Any other appropriate sanction.[71]

Following the trial, a defendant may obtain relief for the prosecution's failure to disclose *Brady*[72] material at trial by proving three elements: (1) the evidence at issue is favorable to the accused because it is either exculpatory or impeachment material;[73] (2) the evidence must have been suppressed by the State, either willfully or inadvertently;[74] and (3) prejudice resulted from the failure to disclose the evidence.[75]

The trial court's failure to take corrective action based on a discovery violation committed by the State is reviewed under an abuse of discretion standard and will not be disturbed absent a showing of prejudice.[76]

4. Limitations on Arguments

a. Substantive Limitations

The Arizona Supreme Court has stated that "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal"[77] and therefore "attorneys must be given wide latitude in their arguments to the jury."[78] Despite this latitude, attorneys have exceeded their discretion when comments are made that "inflame the minds of jurors with passion or prejudice or influence the verdict in any degree."[79]

For example, prosecutors may not "impugn the integrity or honesty of opposing counsel,"[80] appeal to the jurors' fears that a not guilty by reason of insanity verdict will result in the defendant's release,[81] convey his/her personal belief about the credibility of a witness,[82] "direct the jurors' attention to the defendant's exercise of his[/her] fifth amendment privilege" against self-incrimination,[83] or invoke biblical passages that are

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[71] *Id.*

[72] *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963).

[73] U.S. v. Bagley, 473 U.S. 667, 676 (1985).

[74] U.S. v. Agurs, 427 U.S. 97, 110 (1976).

[75] *Bagley,* 473 U.S. at 678.

[76] State v. Nordstrom, 25 P.3d 717, 739 (Ariz. 2001).

[77] State v. Gonzalez, 466 P.2d 388, 391 (Ariz. 1970).

[78] State v. Thomas, 275 P.2d 408, 419 (Ariz. 1954), *aff'd*, 356 U.S. 390; State v. Neil, 428 P.2d 676, 677 (Ariz. 1977); State v. Comer, 799 P.2d 333, 346 (Ariz. 1990) (en banc).

[79] State v. Herrera, 850 P.2d 100, 109 (Ariz. 1993) (citing State v. Merryman, 283 P.2d 239, 241 (Ariz. 1955)).

[80] State v. Newell, 132 P.3d 833, 847 (Ariz. 2006).

[81] State v. Moody, 94 P.3d 1119, 1154 (Ariz. 2004).

[82] State v. Lamar, 72 P.3d 831, 841 (Ariz. 2003).

[83] State v. McCutcheon, 764 P.2d 1103, 1104 (Ariz. 1988) (citing State v. Gillies, 662 P.2d 1007, 1017 (Ariz. 1983)); *see also* State v. Blackmun, 38 P.3d 1192, 1209 (Ariz. Ct. App. 2002); *see also* Griffin v. California, 380 U.S. 609 (1965); ARIZ. CONST. art. 2, § 10. The comments are not impermissible, however, unless they are "calculated to direct the jurors' attention to the defendant's exercise of his fifth amendment privilege." *McCutcheon*, 764 P.2d at 1104. "[T]he statements must be examined in context to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." State v. Schrock, 719 P.2d 1049, 1054 (Ariz. 1986).

commonly understood as sanctioning the death penalty.[84] Similarly, prosecutors may not participate in "vouching," which can take two forms: (1) where the prosecutor places the prestige of the government behind its evidence; and (2) where the prosecutor suggests that information not presented to the jury supports the evidence.[85]

Courts have found a large number of other themes to be improper, when used in prosecutorial argument, including the personal opinions of the prosecutor[86] and the jury's lack of responsibility in making the ultimate decision.[87]

b. Challenges to Prosecutorial Arguments

In general, to demonstrate that a prosecutor's comments constituted misconduct that warrants a mistrial, the trial court should consider two factors: (1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks.[88] Even if these questions are answered in the affirmative, the defendant must show that the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[89] The trial court's decision will not be overturned in the absence of a clear abuse of discretion. To warrant reversal, the prosecutorial misconduct must be "'so pronounced and persistent that it permeates the entire atmosphere of the trial'"[90] and improper prosecutorial comments must show that there is a "reasonable likelihood" that the "misconduct could have affected the jury's verdict"[91] as well as the defendant's right to a fair trial.[92]

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84 Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000).
85 *Comer*, 799 P.2d at 346; U.S. v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993).
86 U.S. v. Young, 470 U.S. 1, 8-9 (1989).
87 Caldwell v. Mississippi, 472 U.S. 320 (1985).
88 State v. Newell, 132 P.3d 833, 846 (Ariz. 2006).
89 *Id.* (quoting State v. Hughes, 969 P.2d 1184, 1191 (Ariz. 1998)).
90 *Id.* (quoting State v. Lee, 944 P.2d 1222, 1230 (Ariz. 1997)).
91 *Newell*, 132 P.3d at 847 (quoting State v. Atwood, 832 P.2d 593, 623 (Ariz. 1992)).
92 *Id.* (quoting State v. Dumaine, 783 P.2d 1184, 1195 (Ariz. 1989)).

II. ANALYSIS

A. Recommendation #1

Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

The State of Arizona does not require county attorney offices to have written policies governing the exercise of prosecutorial discretion. The Arizona Supreme Court, however, has established the Arizona Rules of Professional Conduct (the Rules) to, among other things, address prosecutorial discretion in the context of the role and responsibilities of prosecutors.[93] The Rules describe the prosecutor's role as that of a "minister of justice and not simply that of an advocate" and advise the prosecutor to "see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[94] The Rules also require prosecutors to:

(1) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(2) Make reasonable efforts to assure that the defendant has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights;
(4) Make timely disclosure to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
(5) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure, the evidence sought is essential to the successful completion of any ongoing investigation or prosecution, and there is no other feasible alternative to obtain the information; and
(6) Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor otherwise would be prohibited from making.[95]

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[93] ARIZ. R. OF PROF'L CONDUCT 3.8 cmt.
[94] *Id.*
[95] ARIZ. R. OF PROF'L CONDUCT 3.8.

Currently, the State of Arizona gives county attorneys the discretion to seek the death penalty in any case in which the defendant is charged with first-degree murder under section 13-1105 of the Arizona Revised Statutes (A.R.S.).[96] As part of its Final Report, the Arizona Capital Case Commission recommended that "all prosecuting agencies involved in capital case prosecution adopt a written policy for identifying cases in which to seek the death penalty. Such policies should include soliciting or accepting defense input before deciding to seek the death penalty."[97] The Final Report indicated that this recommendation would be submitted to the Arizona Prosecuting Attorneys' Advisory Council,[98] but we were unable to determine whether the Council ever took action. We are aware of at least one county attorney's office that maintains a "Capital Case Panel" to guide prosecutors in exercising their discretion to seek the death penalty. The Pima County Attorney's Office's "Capital Case Panel" decides, subject to the county attorney's approval, whether to file a notice of intent to seek the death penalty.[99] We note that we did not ascertain whether the other fourteen county attorney offices have policies governing the exercise of prosecutorial discretion, however.

While the State of Arizona does not require county attorney's offices to have written policies governing the exercise of prosecutorial discretion, we were unable to determine whether each county attorney office has written materials governing the exercise of prosecutorial discretion. Consequently, we are unable to ascertain whether Arizona meets Recommendation #1.

Additionally, based on the above information, the Arizona Death Penalty Assessment Team makes the following recommendation: to encourage transparency and the even application of the death penalty, the State of Arizona should require that all prosecuting agencies involved in capital case prosecutions have written policies for identifying cases in which to seek the death penalty. As recommended by the Arizona Capital Case Commission, these policies should require the solicitation or acceptance of defense input before deciding to seek the death penalty.

B. Recommendation #2

> **Each prosecutor's office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.**

The State of Arizona has, by court opinion and by rule, established certain trial procedures relevant to the reliability and/or admissibility of eyewitness identifications and expert testimony on eyewitness identifications. Rule 702 of the Arizona Rules of Evidence states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

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[96] Section 13-703(F)(6) of the A.R.S. allows prosecutors to seek death when "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." ARIZ. REV. STAT. § 13-703(F)(6)(2006).

[97] OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT (Dec. 2002).

[98] *Id.*

[99] Telephone Interview with Rick Unlkesbay, Chief Trial Deputy, Pima County Attorney's Office.

qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[100]

The Arizona Supreme Court has expanded upon Rule 702 and held that the key to determining the admissibility of expert testimony about the reliability and/or admissibility of eyewitness identifications is "whether the testimony might assist the jury to resolve the issues raised by the facts. In making this determination, the trial court must first consider those contentions of ultimate fact raised by the party offering the evidence and supported by evidentiary facts in the record. It must then determine whether the expert testimony will assist in resolving the issues."[101] This has been interpreted to mean that there are four criteria that should be applied in determining the admissibility of the expert testimony: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect.[102] Beyond these criteria, the trial court has discretion to exclude testimony that exceeds or does not conform to these standards[103] and "[e]xpert opinion on eyewitness identification will not frequently meet the standard for proper subject . . . and a trial court's discretionary ruling generally will be upheld."[104] Additionally, expert testimony must be "limited to an exposition of the factors affecting reliability" and the expert may not give his/her opinion as to the accuracy or credibility of a particular witness.[105] "Key factors in determining the admissibility of expert testimony on eyewitness identification include the importance of the eyewitness testimony and the presence or absence of other evidence linking the defendant to the crime."[106]

On appeal, "the test is not whether [the appellate court believes] that under these facts the evidence was admissible, but whether the trial court abused its discretion in reaching the contrary conclusion."[107]

Furthermore, the Revised Arizona Jury Instructions (Criminal) include instructions on the factors to be considered in gauging eyewitness identifications. The instruction states that:

> The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as:
>
> (1) The witness' opportunity to view at the time of the crime;
> (2) The witness' degree of attention at the time of the crime;
> (3) The accuracy of any descriptions the witness made prior to the pretrial identification;
> (4) The witness' level of certainty at the time of the pretrial identification;

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[100] ARIZ. R. EVID. R. 702.
[101] State v. Chapell, 660 P.2d 1208, 1222 (Ariz. 1983).
[102] State v. Roscoe, 910 P.2d 635, 646 (Ariz. 1996).
[103] State v. Via, 704 P.2d 238, 253 (Ariz. 1985).
[104] *Roscoe*, 910 P.2d at 646.
[105] State v. Nordstrom, 25 P.3d 717, 730-31 (Ariz. 2001) (quoting *Chapell*, 660 P.2d at 1222).
[106] *Roscoe*, 910 P.2d at 646.
[107] *Chapell*, 660 P.2d at 1222.

(5) The time between the crime and the pretrial identification;
(6) Any other factor that affects the reliability of the identification. If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.[108]

The Arizona Supreme Court has held that this instruction must be given, upon request, when the court has concluded that pretrial identification procedures were unduly suggestive, but that the proposed in-court identification has been shown by clear and convincing evidence to be reliable and derived from an independent source.[109]

Because the State of Arizona does not require county attorney's offices to establish procedures and polices for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit, however, the State of Arizona is not in compliance with Recommendation #2. We note that we were unable to ascertain whether each county attorney's office has established procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

C. Recommendation #3

Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.

Despite the obligations provided by the discovery provisions, state and federal law, and the Arizona Rules of Professional Conduct, it appears that some prosecutors still occasionally fail to comply with the discovery requirements. For example, a Center for Public Integrity study of all Arizona appellate opinions addressing alleged prosecutorial error or misconduct from 1970 until June 2003 revealed thirty-nine cases in which judges reversed or remanded a defendant's conviction, sentence or indictment due to a prosecutor's conduct.[110] In an additional eight, a dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant.[111] Of the cases in which judges ruled the prosecutor's conduct prejudiced the defendant, twenty-five involved improper trial behavior such as arguments and witness examination, six involved the prosecution failing to timely disclose evidence to the defense, three involved discrimination in jury selection, three involved pre-trial conduct, one involved the destruction of evidence favorable to the defendant, and one involved improper conduct in a grand jury proceeding.

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[108] REVISED ARIZONA JURY INSTRUCTIONS (Criminal) 39, Identification, *available at* http://www.myazbar.org/SecComm/Committees/CRJI/CRJI-PDF/StandardCriminal.pdf (last visited Jun. 19, 2006).
[109] State v. Dessureault, 453 P.2d 951, 955 (Ariz. 1969).
[110] *Id.*
[111] *Id.*

Below are three examples in which convictions and/or sentences were overturned because, at least in part, prosecutors were found to have engaged in prosecutorial misconduct .[112] For example:

- Paris Carriger was convicted of robbery and murder in 1978 and sentenced to death. His conviction was overturned by the United States Court of Appeals for the Ninth Circuit in 1997 because the prosecutor failed to disclose information that could have undermined the key witness' credibility. Carriger was released from prison in 1999.
- Christopher McCrimmon was convicted of capital murder and sentenced to death in 1993, along with two co-defendants. After McCrimmon's original trial was overturned because of the trial judge's undue pressure on the jury,[113] it was subsequently discovered that the lead prosecutor against all three co-defendants had presented false evidence in the original case. After this was discovered, McCrimmon was acquitted at re-trial in 1997. In commenting on the prosecutor's deceit, the Arizona Supreme Court wrote: "The record is replete with evidence of Peasley's full awareness that [evidence he presented] was utterly false. Peasley's misdeeds were not isolated events but became a consistent pattern of prosecutorial misconduct that began in 1993 and continued through re-trial in 1997."[114]
- Ray Krone was convicted of first-degree murder and kidnapping and sentenced to death in 1992. His conviction was overturned in 1995 by the Arizona Supreme Court because the prosecutor did not turn over a videotape until just before the start of the trial that an expert witness was preparing to use during his testimony, but he was retried and convicted in 1996.[115] Krone was retried and convicted in 1996, but was exonerated and released from prison in 2002.

State and federal law provide that defendants are entitled to all exculpatory information and evidence.[116] The prosecutor "is not required to deliver his[/her] entire file to defense counsel, but is required to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[117] In capital cases, this has been interpreted to mean that the prosecution must turn over evidence that would be mitigating at the penalty phase of the trial,[118] in addition to evidence that goes toward guilt,[119] including the "disclosure of impeachment evidence which could be used to show bias or interest on the part of a key State witness. Accordingly, the State is under a duty to reveal any [deal

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[112] *See* State v. Carriger, 692 P.2d 991 (Ariz. 1984); State v. Minnitt, 55 P.3d 774 (Ariz. 2002); Krone v. State, 897 P.2d 621 (Ariz. 1995).

[113] State v. McCrimmon/Minnitt, 927 P.2d 1298 (Ariz. 1996).

[114] *See* J. Toobin, *Killer Instincts*, THE NEW YORKER, Jan. 17, 2005. In 2004, the Court unanimously voted to disbar the prosecutor, stating that his behavior "could not have been more harmful to the justice system." He had twice been selected as the state prosecutor of the year. *Id.*

[115] *See* The Center for Public Integrity, Harmful Error, Actual Innocence, available at http://publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=38 (last visited July 10, 2006); Death Penalty Information Center, Innocence and the Crisis in the American Death Penalty, *available at* http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#Sec05a (last visited July 10, 2006).

[116] Brady v. Maryland, 373 U.S. 83 (1963); State v. Jones, 587 P.2d 742, 746 (Ariz. 1978); *see also* ARIZ. R. CRIM. P. 15.1 cmt.

[117] U.S. v. Bagley, 473 U.S. 667, 675 (1985); State v. Tucker, 759 P.2d 579, 584 (Ariz. 1988).

[118] *See, e.g.*, U.S. v. Perez, 222 F. Supp. 2d 164, 168 (D. Conn. 2002).

[119] Green v. Georgia, 442 U.S. 95 (1979).

or] agreement, even an informal one, with a witness concerning criminal charges pending against that witness."[120] A prosecutor must not only disclose the evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf," even if the prosecutor is not personally aware of its existence.[121] The United States Court of Appeals for the Ninth Circuit has stated that this exculpatory evidence must be disclosed, even in the absence of a request from the defense.[122]

Although many prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, this is not always the case. We, therefore, conclude that the State of Arizona is only in partial compliance with Recommendation #3.

D. Recommendation #4

> **Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.**

The State of Arizona has entrusted the State Bar of Arizona and the Disciplinary Commission (Commission) of the Arizona Supreme Court with the task of disciplining lawyers.[123] All attorneys, including prosecutors, are required to report professional misconduct.[124]

According to the American Bar Association Center for Professional Responsibility, the State Bar of Arizona received 4,714 complaints about alleged attorney misconduct in 2004 and had another 715 complaints pending from previous years.[125] Of these cases, 1,697 were investigated, 1,253 were summarily dismissed for lack of jurisdiction, 760 were dismissed after investigation, 252 complaints warranted the filing of formal charges, and 73 were formally charged.[126] Furthermore, 126 lawyers were publicly sanctioned in 2004.[127] Of the 126 lawyers who were publicly sanctioned, nine of them were disbarred, one was disbarred on consent, twenty were suspended, one was suspended on an interim basis (for risk of harm or criminal conviction), fifty-two were publicly reprimanded and/or censured, forty-six were placed on probation, and four were transferred to disability/inactive status.[128] We were unable to determine how many, if any, of these attorneys were or are prosecutors. The organization HALT, which evaluates lawyer discipline systems across the country, assigned a grade of "B-" to Arizona's system,

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[120] Giglio v. U.S. 405 U.S. 150, 154-55 (1972).
[121] Kyles v. Whitley, 514 U.S. 419, 437-39 (1995).
[122] Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997).
[123] ARIZ. SUP. CT. R. 49 (a).
[124] ARIZ. R. OF PROF'L CONDUCT 8.3.
[125] ABA Center for Professional Responsibility, Survey on Lawyer Discipline Systems, 2004, *available at* http://www.abanet.org/cpr/discipline/sold/sold-home.html (last visited Jun. 18, 2006).
[126] *Id.*
[127] *Id.*
[128] *Id.*

based on an assessment of the adequacy of discipline imposed, its publicity and responsiveness efforts, the openness of the process, the fairness of disciplinary procedures, the amount of public participation, and promptness of follow-up on complaints.[129] The organization ranks Arizona as having the third best attorney disciplinary process in the country.[130]

In addition, as previously discussed in Recommendation #3, the Center for Public Integrity's study of Arizona criminal appeals, including both death and non-death cases from 1970 to June 2003, revealed thirty-nine cases in which the judges reversed or remanded a defendant's conviction, sentence or indictment due to a prosecutor's conduct.[131] In an additional eight cases, a dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant.[132] Of the cases in which judges ruled the prosecutor's conduct prejudiced the defendant, twenty-five involved improper trial behavior such as arguments and witness examination, six involved the prosecution failing to timely disclose evidence to the defense, three involved discrimination in jury selection, three involved pre-trial conduct, one involved the destruction of evidence favorable to the defendant, and one involved improper conduct in a grand jury proceeding. In the majority of cases in which the defendant alleged prosecutorial misconduct (254 out of the 302), however, the prosecutor's conduct or error was found to be harmless.[133] We were unable to determine how many of the prosecutors in these cases were referred to the State Bar for discipline.

Although the State of Arizona has established a procedure by which grievances are investigated and members of the State Bar are disciplined, we are unable to determine the number of grievances made or initiated against prosecutor's conduct. Based on this information, the State of Arizona is in partial compliance with Recommendation #4.

E. Recommendation #5

Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.

Rule 15.1(f) of the Arizona Rules of Criminal Procedure Rule requires that the prosecutor's obligation to disclose material information extend "to material and information in the possession or control of any of the following:

(1) The prosecutor, or members of the prosecutor's staff, or,

(2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or,

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[129] HALT, *Lawyer Discipline 2006 Report Card, Arizona, available at* http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/pdf/AZ_LDRC_06.pdf (last visited Jun. 16, 2006).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Center for Public Integrity, *Nationwide Numbers, available at* http://www.publicintegrity.org/pm/search.aspx?act=nat&hID=y (last visited on Jun. 16, 2006).

(3) Any other person who has participated in the investigation or evaluation of the case and who is under the prosecutor's direction or control."[134]

Given that a prosecutor is responsible for disclosing favorable evidence that s/he is not personally aware of but is known to others acting on the State's behalf (i.e., law enforcement officers), it is in the best interest of all prosecutors to ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigation evidence. Most prosecutors appear to take their obligations to disclose exculpatory evidence seriously, but we are aware of one instance in which a crime laboratory failed to disclose material evidence to the prosecutor.[135] However, this information is insufficient to draw any conclusions as to whether all prosecutors are meeting or failing to meet Recommendation #5.

F. Recommendation #6

The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.

The Arizona Prosecuting Attorneys' Advisory Council presents an annual death penalty seminar for prosecutors and assists with other seminars offered by the Arizona Prosecuting Attorneys' Advisory Council.[136] These training programs do not appear to be mandatory, but prosecutors may earn their required Continuing Legal Education credits at these trainings. In addition, the Arizona Prosecuting Attorneys' Advisory Council also provides funding so that Arizona prosecutors may attend training provided by the Association of Government Attorneys in Capital Litigation.

Based on this information, the State of Arizona is in compliance with Recommendation #6.

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[134] ARIZ. R. CRIM. P. 15.1(f). The Arizona Supreme Court has reiterated this obligation. State v. Smith, 599 P.2d 187, 194 (Ariz. 1979).

[135] *See, e.g.*, State v. Meza, 50 P.3d 407, 413-14 (Ariz. Ct. App. 2002).

[136] Arizona Attorney General, *supra* note 20.

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor in determining whether a capital offender/defendant will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. It also requires that counsel invest substantial time and effort into building client trust. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.[1] The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.[2] In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that led ultimately to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, pro bono representation in capital cases, most pro bono representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

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[1] Strickland v. Washington, 466 U.S. 668 (1984).

[2] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ (last visited on May 23, 2006).

I. FACTUAL DISCUSSION

A. Arizona's Indigent Legal Representation System

With the exception of a recently created state capital post-conviction public defender office,[3] Arizona does not have a statewide indigent defense system for criminal cases. Instead, each of Arizona's fifteen counties is responsible for establishing its own system to provide counsel to indigent defendants at trial and on direct appeal. Arizona law provides that the board of supervisors in each county may establish an office of the public defender.[4] County boards of supervisors are not required to establish public defender offices, however, and instead may assign the representation of indigent defendants to private attorneys.[5]

In counties that have them, public defender offices generally serve as the first option for the appointment of counsel to indigent defendants. Legal defender offices, in those counties that have them, are considered secondary public defender offices and generally represent indigent defendants when the public defender office cannot due to a legal or ethical conflict or an overflow of cases. In counties without public defender offices, contract attorneys will be appointed to represent indigent defendants. Contract attorneys also represent indigent defendants in counties with public and/or legal defender offices when those offices cannot take a case for conflict or workload reasons.

Six counties– Cochise, Coconino, Mohave, Navajo, Pima, and Yuma– have primary and secondary public defender offices[6] and utilize contract attorneys to represent defendants in cases where the two offices have conflicts-of-interest or where the public defender offices' workloads exceed what is allowable.[7] Maricopa County has primary, secondary, and tertiary public defender programs, with contract counsel handling any overflow or conflict-of-interest cases.[8] La Paz, Pinal, and Yavapai counties each have a single public defender office[9] and utilize contract attorneys in cases where the public defender offices have conflicts-of-interest or where the public defender offices' workloads exceed the allowable level.[10] The remaining five counties– Apache, Gila, Graham, Greenlee, and Santa Cruz– rely exclusively on contract counsel to provide indigent defense services.[11]

Upon court order, public defender offices are required to defend, advise, and counsel any person who is not financially able to employ counsel in the following sorts of proceedings and circumstances:

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[3] ARIZ. REV. STAT. § 41-4251 (2006).

[4] ARIZ. REV. STAT. § 11-581 (2006). Public Defender Offices are referred to by several different names, including public defender, legal defender, and legal advocate.

[5] Ariz. Op. Att'y Gen. No. 66-15.

[6] The Spangenberg Group, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002 (Sept. 2003).

[7] ARIZONA CRIMINAL JUSTICE COMMISSION, THE RISING COST OF INDIGENT DEFENSE IN ARIZONA, (2003).

[8] The Spangenberg Group, *supra* note 6.

[9] *Id.*

[10] ARIZONA CRIMINAL JUSTICE COMMISSION, *supra* note 7.

[11] The Spangenberg Group, *supra* note 6.

(1) Offenses triable in the superior court or justice courts at all stages of the proceedings, including the preliminary examination, but only for those offenses which by law require that counsel be provided;
(2) Extradition hearings;
(3) Sanity hearings when appointed by the court;
(4) Involuntary commitment hearings held under title 36, chapter 18, if appointed by the court;
(5) Involuntary commitment hearings held pursuant to title 36, chapter 37, when appointed by the court, if the court appoints the public defender and the board of supervisors has advised the presiding judge of the county that the public defender is authorized to accept the appointment;
(6) Juvenile delinquency and incorrigibility proceedings when appointed by the court;
(7) Appeals to a higher court or courts;
(8) All juvenile proceedings other than delinquency and incorrigibility proceedings, if the court appoints the public defender and the board of supervisors has advised the presiding judge of the county that the public defender is authorized to accept the appointment;
(9) All mental health hearings regarding release recommendations held before the psychiatric security review board, when appointed by the court, if the court appoints the public defender and the board of supervisors has advised the presiding judge of the county that the public defender is authorized to accept the appointment;
(10) As attorneys of adults who are allegedly unable to effectively manage their affairs or preserve their estates, if the court appoints the public defender and the board of supervisors has advised the presiding judge of the county that the public defender is authorized to accept the appointment.[12]

In the 2006 legislative session, the State of Arizona created the state capital post-conviction public defender office.[13] The initial state capital post-conviction public defender will be appointed for a term beginning on February 1, 2007 and ending on January 31, 2011.[14] The state capital post-conviction public defender will:

(1) Represent any person who is not financially able to employ counsel in capital state post-conviction proceedings;
(2) Supervise the operation, activities, policies and procedures of the state capital post-conviction public defender office;
(3) Submit an annual budget for the operation of the office to the legislature, beginning in fiscal year 2007-08;
(4) Not engage in the private practice of law or provide outside counsel to any other attorney outside of the state capital post-conviction public defender office;
(5) Not sponsor or fund training for any other attorney outside of the state capital post-conviction public defender office;

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[12] ARIZ. REV. STAT. § 11-584 (2006).
[13] ARIZ. REV. STAT. § 41-4251(A) (2006).
[14] 2006 Ariz. Sess. Laws 369 § 8.

(6) Not provide trial or direct appeal assistance to attorneys outside of the state post-conviction public defender office;

(7) Not lobby, during working hours, the state legislature or the congress of the United States, except as it relates to the submission of an annual budget; and

(8) Allocate personnel and resources to post-conviction relief proceedings so long as there are no conflicts of interest in representation and all state capital post-conviction public defender attorneys are appointed to post-conviction relief cases that are eligible for appointment of counsel.[15]

Between 98% and 99% of all funding for Arizona's indigent defense system is provided by the counties.[16] For example, in 2002, over $80 million was spent on indigent defense in Arizona and State Aid for Indigent Defense Funding contributed a little over $1.2 million.[17]

Two statewide funding sources together comprise the one to two percent of state funding. There is a $25 assessment fee that judges may, but do not have to, assess on indigent defendants seeking representation. Money collected from this assessment is placed in a Special Fund for Public Defenders that is designed to help defray the cost of providing indigent defense services. In addition, the Arizona Supreme Court provides $2 of the $12 fee assessed on people who pay a court ordered penalty, fine, or sanction to county public defender officers for costs associated with training.[18]

The total cost of indigent defense has been rising and is projected to continue to rise. In 1998, total state and county expenditure for indigent defense was $55,353,470 and in 2002, total expenditure was $80,343,726– a 45.1% increase in five years.[19] Individual counties have experienced cost increases too. For example, expenses in Greenlee County rose 68%, expenses in Graham County rose 52.2%, expenses in Maricopa County rose 51.4%, and expenses in Pima County rose 41.4%.[20]

More recent numbers in Pima County indicate that costs continue to rise. According to the *Arizona Daily Star*, payments to contract attorneys have increased 81% over the past five years while budgets for public and legal defenders offices have increased by 30%.[21]

Maricopa and Pima counties account for the vast majority of Arizona's indigent defense spending.[22] In 2002, Maricopa County was responsible for 54.7% of the State's total

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15 ARIZ. REV. STAT. § 41-4251(F) (2006).

16 ARIZONA CRIMINAL JUSTICE COMMISSION, *supra* note 7; *see also* The Spangenberg Group, *supra* note 6; National Association of Criminal Defense Attorneys, A Discussion on Indigent Defense in Arizona (Feb. 2001), *at* http://www.nacdl.org/public.nsf/b540e98ee147ea5485256975005cc335/cc9f6d48f8da502985256a500050d7db/$FILE/LVreport.pdf (last visited Mar. 1, 2006).

17 ARIZONA CRIMINAL JUSTICE COMMISSION, *supra* note 7.

18 The Spangenberg Group, *supra* note 6.

19 ARIZONA CRIMINAL JUSTICE COMMISSION, *supra* note 7.

20 *Id.*

21 Kim Smith, *Cost of lawyers for the indigent soars in Pima*, ARIZ. DAILY STAR, Feb. 19, 2006.

22 *Id.*

spending on indigent defense and Pima County was responsible for 22.6%. Together, these two counties account for over 75% of the total state indigent defense costs.[23]

The State pays for half of the costs of counsel in state post-conviction proceedings under section 13-4041 of the Arizona Revised Statutes.[24]

B. *Appointment, Qualifications, Workload Limitations, Training, Compensation, and Resources Available to Attorneys Handling Death Penalty Cases Covered by Arizona's Indigent Legal Representation Systems*

1. Appointment of Counsel

Arizona law provides that an accused charged with a felony for which the death penalty is being sought is eligible for appointed counsel at trial, on direct appeal, and in state post-conviction proceedings if s/he can establish that s/he is indigent.[25] The presiding judge of each county must establish a procedure for the Superior Court or limited jurisdiction courts to ensure the appointment of counsel for each indigent person entitled to counsel.[26]

In counties that have a public defender, the public defender will represent defendants found to be indigent whenever s/he is authorized by law and able in fact to do so.[27] If the public defender is not appointed to a case, the presiding judge must appoint two private attorneys.[28] All criminal appointments must be made in a manner that is fair and equitable to the members of the State Bar and that takes into consideration the skills likely needed in the particular case.[29]

If counsel is appointed, the lead counsel may select his/her co-counsel at the time of the appointment, so long as the desired co-counsel is willing to accept the appointment and meets the qualification requirements.[30] If the lead counsel does not name his/her co-counsel upon accepting the appointment, the court will make its own selection.[31]

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[23] *Id.*

[24] ARIZ. REV. STAT. § 13-4041(H) (2006); ARIZ. REV. STAT. § 41-4251H) (2006).

[25] ARIZ. R. CRIM. P. 6.2, 6.6, 32.4(c)(1). The Arizona Rules of Criminal Procedure define an indigent as "a person who is not financially able to employ counsel." *See* ARIZ. R. CRIM. P. 6.4(a). A defendant who would like to proceed as an indigent must complete under oath a questionnaire concerning his/her financial resources, on a form approved by the Supreme Court. The defendant then will be examined under oath regarding his/her financial resources by the judge, magistrate, or court commissioner responsible for determining indigency. Prior to questioning, the defendant will be advised of the penalties for perjury. After a determination of indigency or non-indigency has been made, the defendant, the appointed attorney, or the prosecutor may move for reconsideration of that determination if there has been a material change in circumstances. ARIZ. R. CRIM. P. 6.4(b), (c).

[26] ARIZ. R. CRIM. P. 6.2.

[27] ARIZ. R. CRIM. P. 6.5.

[28] ARIZ. R. CRIM. P. 6.5(b), (c); 6.2.

[29] ARIZ. R. CRIM. P. 6.5(c).

[30] *Id.*

[31] *Id.*

The defendant must be appointed two attorneys[32] "as soon as feasible after [s/he] is taken into custody."[33] The appointed counsel must represent the defendant through all trial court proceedings, including the filing of a notice of appeal, unless the court allows the attorney to withdraw.[34] If the court allows the attorney to withdraw, the trial or appellate court must provide the defendant with a new attorney or ensure that counsel has been otherwise provided.[35]

Following review by the Arizona Supreme Court on direct appeal, death-sentenced inmates continue to have a right to appointed counsel in every judicial proceeding, including state post-conviction.[36] Death-sentenced inmates do not have a right to counsel in clemency proceedings, however.[37]

2. Attorney Qualifications

a. Public Defenders and Conflict Attorneys for Trial

To be appointed in a capital case, Arizona law requires that each defense attorney must:

(1) Be a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment;
(2) Have practiced in the area of state criminal litigation for three years immediately preceding the appointment; and
(3) Have demonstrated the necessary proficiency and commitment which exemplify the quality or representation appropriate to capital cases.[38]

In addition, the lead counsel must:

(1) Have practiced in the area of state criminal litigation for five years immediately preceding the appointment;
(2) Have been lead counsel in at least nine felony jury trials that were tried to completion and have been lead counsel or co-counsel in at least one capital murder jury trial;
(3) Be familiar with the American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*;[39] and

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[32] ARIZ. R. CRIM. P. 6.2.
[33] ARIZ. R. CRIM. P. 6.1(a).
[34] ARIZ. R. CRIM. P. 6.3.
[35] ARIZ. R. CRIM. P. 6.2(b) cmt., 6.6.
[36] ARIZ. REV. STAT. § 13-4041(B); *see also* ARIZ. R. CRIM. P. 32.4(c).
[37] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency, on June 7, 2005. *But see infra* note 39. As part of the possible amendment to Arizona Rule of Criminal Procedure 6.8, Guideline 10.15.2 sets forth performance guidelines with which clemency counsel would be required to comply.
[38] ARIZ. R. CRIM. P. 6.8(a).
[39] In May 2006, the State Bar of Arizona passed and submitted to the Arizona Supreme Court a recommendation that Arizona Rule of Criminal Procedure 6.8 be amended to require that lead trial counsel in capital cases not only "be familiar with" the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Guidelines)*, but that they "be familiar with" the *Guidelines* and "comply" with Guidelines 1.1, 10.2, 10.3, 10.4(B)-(D), 10.5, 10.6, 10.7, 10.8, 10.9.1, 10.9.2, 10.10.1,

(4) Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.[40]

Similarly, co-counsel, in addition to being a member in good standing of the State Bar of Arizona, must have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.[41]

In exceptional circumstances, and with the consent of the Arizona Supreme Court, an attorney who does not meet these requirements may be appointed, so long as the attorney's experience, stature, and record allow the court to conclude that the attorney's ability significantly exceeds the standards listed above and that the attorney associates with a lawyer who does meet the standards.[42]

b. Public Defenders and Contract Attorneys on Direct Appeal and in State Post-conviction Proceedings

On direct appeal and in state post-conviction proceedings, to be eligible for appointment, an attorney must:

(1) Be a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment;
(2) Have practiced in the area of state criminal litigation for three years immediately preceding the appointment;
(3) Have demonstrated the necessary proficiency and commitment which exemplify the quality or representation appropriate to capital cases; and
(4) Have attended, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.[43]

In addition, an attorney eligible for appellate or post-conviction appointment must:

10.10.2, 10.11, 10.12, 10.13, and 10.14. The Arizona Supreme Court is expected to accept or reject this amendment later this year.

[40] ARIZ. R. CRIM. P. 6.8(b)(1).

[41] ARIZ. R. CRIM. P. 6.8(b)(2). In conjunction with the May 2006 State Bar of Arizona recommendation that Arizona Rule of Criminal Procedure 6.8 be amended to require that lead trial counsel "be familiar with" the *Guidelines* and "comply" with Guidelines 1.1, 10.2, 10.3, 10.4(B)-(D), 10.5, 10.6, 10.7, 10.8, 10.9.1, 10.9.2, 10.10.1, 10.10.2, 10.11, 10.12, 10.13, and 10.14, the amendment also would require that trial level co-counsel abide by this same requirement. The Arizona Supreme Court is expected to accept or reject this amendment later this year.

[42] ARIZ. R. CRIM. P. 6.8(d).

[43] ARIZ. R. CRIM. P. 6.8(c) (2006).

(1) Within three years immediately preceding the appointment, have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing; or

(2) Have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-convictions proceedings that resulted in evidentiary hearings.[44]

In exceptional circumstances, and with the consent of the Arizona Supreme Court, an attorney may be appointed who does not meet these requirements, so long as the attorney's experience, stature, and record allow the court to conclude that the attorney's ability significantly exceeds the standards listed above and that the attorney associates with a lawyer who does meet the standards.[45]

Arizona law also requires that appointed post-conviction counsel not have represented the defendant in the case at trial or direct appeal, "unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation."[46]

c. State Capital Post-Conviction Public Defender

In the 2006 legislative session, the General Assembly created the state capital post-conviction public defender office.[47] The new law, which comes into effect on February 1, 2007, requires the state capital post-conviction public defender to 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; and

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[44] ARIZ. R. CRIM. P. 6.8(c) (2006); s*ee also* ARIZ. REV. STAT. § 13-4041(C) (2006). The amendment to Arizona Rule of Criminal Procedure 6.8 described in *supra* note 39, if accepted by the Arizona Supreme Court, also would require appellate and post-conviction counsel to be familiar with the Guidelines and to comply with Guideline 1.1, 10.15.1, and 10.15.2.

[45] ARIZ. R. CRIM. P. 6.8(d). The amendment to Arizona Rule of Criminal Procedure 6.8 described in *supra* note 39, if accepted by the Arizona Supreme Court, also would require that attorneys appointed under the "Exceptional Circumstances" provision be familiar with the Guidelines and, if serving as trial-level counsel, comply with Guidelines 1.1, 10.2, 10.3, 10.4 (B)-(D), 10.5, 10.6, 10.7, 10.8, 10.9.1, 10.9.2, 10.10.1, 10.10.2, 10.11, 10.12, 10.13, and 10.14 and, if serving as appellate or post-conviction counsel, comply with Guidelines 1.1, 10.15.1, and 10.15.2.

[46] ARIZ. REV. STAT. § 13-4041(C)(3) (2006).

[47] ARIZ. REV. STAT. § 41-4251(A) (2006).

(4) Meet or exceed the standards for appointment of counsel in capital cases under Arizona Rule of Criminal Procedure 6.8.[48]

Attorneys in the state capital post-conviction public defender also will be required to comply with the requirements set forth in Arizona Rule of Criminal Procedure 6.8.

3. Attorney Workload Limitations

In the 1984 case of *State v. Joe U. Smith*, the Arizona Supreme Court established a maximum caseload for all attorneys who provide indigent defense, regardless of whether they are public defenders or contract attorneys.[49] Under the standards, the maximum allowable caseload for each full-time attorney may not exceed:

(1) Fifty felonies per attorney per year;
(2) Three hundred misdemeanors per attorney per year;
(3) Two hundred juvenile cases per attorney per year;
(4) Two hundred mental commitment cases per attorney per year; or
(5) Twenty-five appeals to appellate court hearing a case on the record and briefs per attorney per year.[50]

Attorneys who work less than full-time or handle a mix of cases are limited to proportional workloads.[51]

Despite this mandate, several counties reportedly exceed these caseload standards. For example, in Maricopa County, workload standards are estimated to be consistently exceeded by 40%.[52] A June 2003 article in the Phoenix New Times reported that the head of the Maricopa County Office of Court Appointed Counsel stated that he would continue appointing qualified attorneys to death penalty cases "as long as they tell me they can do the job."[53] At least one defense attorney, and reportedly more than one, had six capital cases at the time of the newspaper article.[54]

In addition, in a Yuma County survey, it was reported that Apache, Gila, Greenlee, and Santa Cruz could not estimate the average caseload for their criminal contract attorneys or public defenders. Cochise, Coconino, La Paz, Mohave, Navajo, and Yuma Counties estimated that their indigent defense attorneys each were handling more than 200 criminal and misdemeanor cases per year, and Maricopa, Pima, and Pinal counties estimated that their indigent defense attorneys handled nearly 200 cases per year.[55] Only

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[48] ARIZ. REV. STAT. § 41-4251(D) (2006).
[49] State v. Smith, 681 P.2d 1374 (Ariz. 1984) (en banc).
[50] *Id.* at 1380.
[51] *Id.*
[52] National Association of Criminal Defense Attorneys, A Discussion on Indigent Defense in Arizona (Feb. 2001), *at* http://www.nacdl.org/public.nsf/b540e98ee147ea5485256975005cc335/cc9f6d48f8da502985256a500050d7db/$FILE/LVreport.pdf (last visited Mar. 1, 2006).
[53] Paul Rubin, *Off with their heads*, PHOENIX NEW TIMES, June 26, 2003.
[54] *Id.*
[55] John A. Stookey & Larry A. Hammond, *Rethinking Arizona's System of Indigent Representation*, ARIZ. ATTY. (Oct. 1996).

Graham and Yavapai counties reported estimated caseloads much less than 200 cases per year.[56]

In May 2006, the State Bar of Arizona passed and submitted to the Arizona Supreme Court a recommendation that Rule 6.8 of the Arizona Rules of Criminal Procedure be amended to require that all trial-level defense attorneys in capital cases comply with Guideline 10.3,[57] which requires that "[c]ounsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation."[58] The Arizona Supreme Court is expected to accept or reject this amendment later this year.

4. Training Requirements for Public Defenders and Conflict Attorneys and Training Sponsors

a. Training Requirements

Rule 6.8 of the Arizona Rules of Criminal Procedure requires all trial, appellate and post-conviction counsel to have "attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours or relevant training or educational programs in the area of criminal defense."[59]

b. Training Sponsors

The Arizona Public Defenders Association offers training programs each year on a variety of topics, in addition to an annual statewide conference each June.[60]

The State Bar of Arizona offers at least one training program, titled "More Sex, Murder, and the Media," that deals with death penalty issues.[61] In addition, the Maricopa County Office of the Public Defender, in conjunction with other indigent defense offices, provides a variety of training relevant to capital defense. In the Maricopa County Office of the Public Defender 2003 *Annual Report*, it reported that in 2002 it hosted or co-hosted a Death Cases Overview seminar with sixty-five participants, two death penalty trainings with 209 and 190 participants, a juvenile death penalty program with 119 participants, and a capital defense standards program with thirty-two participants.[62] In its 2001 and

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[56] *Id.*

[57] In the Matter of Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, No. R-05-0031 (filed May 22, 2006) (comment by the State Bar of Arizona).

[58] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), at Guideline 10.3.

[59] ARIZ. R. CRIM. P. 6.8(b), (c).

[60] *See* Arizona Public Defender Association, *available at* http://www.apdanet.org/ (last visited Feb. 26, 2006).

[61] *See* MyAZb@r, Catalog, More Sex Murder & the Media, *available at* http://www.legalspan.com/AZBar/catalog.asp?UGUID=&CategoryID=22000061872398314311 6&ItemID=20050106-792243-170848 (last visited Feb. 26, 2006).

[62] *See* OFFICE OF THE MARICOPA COUNTY PUBLIC DEFENDER, 2003 ANNUAL REPORT, *at* http://www.pubdef.maricopa.gov/ (last visited Feb. 26, 2006).

2002 Annual Reports, it reported holding one death penalty training each year, with 171 and 259 participants respectively.[63]

5. Compensation Limits and Rates of Appointed Attorneys

Arizona law requires that "[i]f counsel is appointed by the court and represents the defendant in . . . a criminal proceeding," "counsel shall be paid by the county in which the court presides, except that in those matters in which a public defender is appointed, no compensation shall be paid by the county. Compensation for services rendered to the defendant shall be in an amount that the court in its discretion deems reasonable, considering the services performed."[64] Furthermore, "[t]he manner of determining reasonable compensation shall be as provided by local rule and ARIZ. REV. STAT. § 13-4013. An attorney shall receive a sum representing reasonable compensation for the services performed, considering the hours worked, the experience of counsel, the quality of the work performed, and any amount actually paid by the defendant … However, the aggregate amount paid by the defendant and the county shall not exceed the full amount paid by the county alone to the appointed attorneys in comparable cases."[65]

In state post-conviction proceedings, Arizona law requires that court appointed counsel be compensated at a rate "not to exceed" $100 per hour.[66] If the number of hours worked by counsel exceeds 200, counsel may still be entitled to compensation, so long as s/he shows "good cause."[67]

The hourly rate and the per-case maximum paid to contract and other court-appointed attorneys varies from county to county.[68] Pima County public defender attorney salaries range from approximately $37,500 to $90,000.[69] Its contract attorneys receive $75 per hour, not to exceed $15,000 without prior approval of the court, to be the lead attorney in trial-level capital representation, as well as for appellate representation. Trial-level co-counsel is eligible to receive $60 per hour, not to exceed $7,500 without prior approval of the court.[70]

In Maricopa County, the starting salary for a public defender in 2001 was $42,453.[71] Attorneys receive a flat fee of $10,000 per capital case with an additional $10,000 if the case goes to trial.[72] On appeal, attorneys receive $20,000 per case.[73]

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[63] *See* OFFICE OF THE MARICOPA COUNTY PUBLIC DEFENDER, 2001 ANNUAL REPORT, *at* http://www.pubdef.maricopa.gov/ (last visited Feb. 26, 2006); OFFICE OF THE MARICOPA COUNTY PUBLIC DEFENDER 2002 ANNUAL REPORT, *at* http://www.pubdef.maricopa.gov/ (last visited Feb. 26, 2006).

[64] ARIZ. REV. STAT. § 13- 4013(A) (2005).

[65] ARIZ. R. CRIM. P. 6.7(b).

[66] ARIZ. REV. STAT. § 13-4041(F) (2005).

[67] ARIZ. REV. STAT. § 13-4041(G) (2005).

[68] The Spangenberg Group, *supra* note 6.

[69] National Association of Criminal Defense Attorneys, *supra* note 52.

[70] Professional Services Contract: First Degree Murder/SVP, *at* http://www.pima.gov/ocac/contracts/firstdegreemurdersvpcontract.pdf (last visited Feb. 28, 2006). *See also* The Spangenberg Group, *supra* note 6.

[71] National Association of Criminal Defense Attorneys, *supra* note 52.

[72] Maricopa County Contract for Attorney Services, Serial 04011-ROQ, *available at* http://www.maricopa.gov/ContractCounsel/Assets/Documents/FY04-05/04011-Homicide-Major%20Felony.pdf (last visited March 2, 2006); *see also* The Spangenberg Group, *supra* note 6.

In rural counties, the salaries in public defender offices tend to range between $35,000 and $90,000.[74] In Yavapai County, some defense counsel enter into contracts that pay a flat fee, often $70,000, for representation in a set number of cases; Graham County also uses contract attorneys who are paid $80,000 to provide representation in a hundred cases.[75] Pinal and Mohave counties pay contract attorneys $100 per hour.[76]

6. Resources Available to Public Defenders and Conflict Attorneys

"If a person is charged with a felony offense the court may on its own initiative and shall on application of the defendant and a showing that the defendant is financially unable to pay for such services appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding."[77] In a capital case, Arizona law authorizes that an indigent defendant may apply for the appointment of an investigator, an expert witness, and a mitigation specialist.[78] Arizona law also explicitly allows the trial court to "authorize additional monies to pay for investigative and expert services that are reasonably necessary" in state post-conviction proceedings.[79]

At trial and on direct appeal, the costs of experts will be paid by the prosecuting county so long as the defendant can show that the expert assistance is "reasonably necessary to present a defense adequately at trial or sentencing."[80] Appointed experts will be compensated at the rate the county contracts for those services.[81] "If a necessary expert witness represents a discipline or has a skill that is not then the subject of a county contract, the county may either promptly procure those services . . . or ask the court to establish a reasonable fee for that witness. If no investigator or expert witness who is under contract with the county to provide services is available and the defendant is unable to obtain such services at the county rate, the court shall establish a reasonable fee for the expert witness or investigator providing the service."[82]

In cases where the defendant is represented by the state capital post-conviction public defender office, from the county in which the person was convicted must pay for half of the fees incurred during its representation of that person, up to $30,000 per case.[83] In state post-conviction proceedings where the defendant is not represented by the state

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[73] Maricopa County Contract for Attorney Services, Serial 04021-ROQ, *at* http://www.maricopa.gov/ContractCounsel/Assets/Documents/FY04-05/04021-Appeals-PCR.pdf (last visited Mar. 2, 2006).

[74] National Association of Criminal Defense Attorneys, *supra* note 52.

[75] *Id.*

[76] Telephone Interview with Judge Johnson, Superior Court Judge, Pinal County Superior Court, on Feb. 28, 2006; Telephone Interview with Judge Robert R. Moon, Superior Court Judge, Mohave County Superior Court, on Feb. 28, 2006.

[77] ARIZ. REV. STAT. § 13-4013(B) (2006).

[78] ARIZ. R. CRIM. P. 15.9(a).

[79] ARIZ. REV. STAT. § 13-4013(J) (2006).

[80] ARIZ. R. CRIM. P. 15.9(a).

[81] ARIZ. REV. STAT. § 13-4013(C) (2006).

[82] *Id.*

[83] ARIZ. REV. STAT. § 41-4251(H) (2006).

capital post-conviction public defender office, the county will be reimbursed for half of the expert and investigative services approved by the trial court.[84]

In state post-conviction proceedings, the county will be reimbursed for half of the expert and investigative services approved by the trial court.[85]

As mentioned previously, the State Bar of Arizona recently passed and submitted to the Arizona Supreme Court a recommendation that Rule 6.8 of the Arizona Rules of Criminal Procedure be amended to require that all trial-level defense attorneys in capital cases comply with Guideline 10.4,[86] which requires that defense counsel assemble a defense team as soon as possible after designation or appointment that includes at least one mitigation specialist, one fact investigator, one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments, and any other members who are needed to provide high quality legal representation.[87] Furthermore, if such resources are denied, counsel should make an adequate record to preserve the issue for appellate review.[88] The Arizona Supreme Court is expected to accept or reject this amendment later this year.

C. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Cases Not Covered by Arizona's Indigent Legal Representation System: Clemency

The State of Arizona does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency.[89]

Apart from the Arizona Rules of Professional Conduct requiring competence,[90] there are no additional qualification standards for attorneys who handle state clemency proceedings. Neither the Arizona Revised Statutes nor the Rules of Criminal Procedure require attorneys to possess any qualifications. Similarly, there are no training requirements for attorneys who take on clemency cases.

D. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Federal Habeas Corpus Petitions

Pursuant to section 3599 of Title 18 of the United States Code, a death-sentenced inmate petitioning for federal habeas corpus in Arizona's federal judicial district is entitled to appointed counsel and other resources if s/he "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary

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[84] ARIZ. REV. STAT. § 13-4013(I) (2006).

[85] *Id.*

[86] In the Matter of Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, No. R-05-0031 (filed May 22, 2006) (comment by the State Bar of Arizona).

[87] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), at Guideline 10.4.

[88] *Id.*

[89] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency, on June 7, 2005.

[90] ARIZ. R. PROF'L. CONDUCT 1.1. (recognizing that "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

services."[91] In Arizona, staff attorneys from the Federal Public Defender are appointed to handle these cases unless there is a conflict of interest.[92]

According to section 3599 of Title 18 of the United States Code, inmates entitled to an appointed attorney must be appointed "one or more" qualified attorneys[93] prior to the filing of a formal, legally sufficient federal habeas petition.[94] To be qualified for appointment, at least one of the appointed attorneys must "have been admitted to practice in the [United States Court of Appeals for the Ninth Circuit] for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."[95] For "good cause," the court may appoint another attorney "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation."[96] These attorneys may be compensated at a maximum rate of $163 per hour.[97]

In addition to counsel, the court may also authorize the attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.[98] The fees and expenses paid for these services may not exceed $7,500 in any case.[99]

1. The Federal Public Defender

In the State of Arizona, the Capital Habeas Unit (CHU) of the Federal Public Defender handles all federal habeas cases except in cases of a conflict of interest.[100] As of March 2006, there were ten lawyers employed in the CHU, six in Phoenix and four in Tucson, representing clients in thirty-five death penalty *habeas* cases and an additional seven non-death penalty *habeas* cases.[101]

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[91] 18 U.S.C. § 3599(a)(2) (2006); *see also* McFarland v. Scott, 512 U.S. 849, 856-57 (1994) (citing to 21 U.S.C. § 848(q)(4)(B), which has since been repealed).

[92] *See* A Plan for Budgeting and Management in Capital Habeas Cases in the District of Arizona, *at* http://www.azd.uscourts.gov/azd/courtinfo.nsf/CJA?OpenView&Start=1&Count=250&Expand=4#4 (last visited on Feb. 28, 2006) [hereinafter Plan].

[93] Guide to Judiciary Policy and Procedures (vol. VII), Appointment of Counsel in Criminal Cases, Chapter VI Representation in Federal Capital Cases and in Death Penalty Federal Habeas Corpus Proceedings, § 6.01, *available at* http://www.azd.uscourts.gov/azd/courtinfo.nsf/guide/$file/chapter6.pdf (last visited on Feb. 28, 2006).

[94] 18 U.S.C. § 3599(a)(2) (2006); *see also McFarland*, 512 U.S. at 856-57.

[95] 18 U.S.C. § 3599(c) (2006).

[96] 18 U.S.C. § 3599(d) (2006).

[97] Memorandum from Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, to United States Courts of Appeals Judges, United States District Court Judges, United States Magistrate Judges, Circuit Executives, Federal Public/Community Defenders, District Court Executives, U.S. Courts of Appeals Clerks, U.S. District Courts Clerks, Senior Staff Attorneys, and Chief Preargument/Conference Attorneys (Dec. 29, 2005), *available at* http://www.fpdaz.org/assets/panel/Panel%20rate%202006.pdf (last visited Feb. 28, 2006). Attorneys appointed pursuant to section 3599 are entitled to compensation at a rate of not more than $125 per hour for in-court and out-of-court work, subject to cost-of-living increases. 18 U.S.C. § 3599(g)(1) (2006).

[98] 21 U.S.C. § 3599(f) (2006).

[99] 21 U.S.C. § 3599(g)(2) (2006).

[100] *See* Plan, *supra* note 92.

[101] Telephone Interview by Sigmund Popko with Dale A. Baich, Capital Habeas Unit, Federal Public Defender, on Feb. 28, 2006.

All CHU attorneys are required to comply with the qualification requirements contained in section 848(q)(6) of Title 28 of the United States Code and are required to attend at least two training conferences per year.

II. ANALYSIS

A. Recommendation #1

> **In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings– pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):**

Based on prevailing state and federal law, indigent individuals charged with or convicted of a capital offense in the State of Arizona have a right to appointed counsel during pre-trial proceedings, at trial, on direct appeal, in state post-conviction proceedings, and in federal *habeas corpus* proceedings.[102] Death-sentenced inmates petitioning for clemency are not entitled to appointed counsel.

Indigent individuals entitled to appointed counsel at pre-trial proceedings, during trial, and on direct appeal will be appointed counsel by the prosecuting county's appointing authority "as soon as feasible after a defendant is taken into custody."[103] Indigent death-sentenced individuals in state post-conviction proceedings will be appointed counsel by the Arizona Supreme Court, or if authorized by the Court, the presiding judge of the county from which the case originated will appoint counsel.[104] Similarly, death-sentenced inmates entitled to appointed counsel for federal *habeas corpus* must be appointed counsel prior to the filing of a formal, legally sufficient *habeas* petition.[105]

Despite the fact that Arizona law guarantees counsel to indigent inmates through state post-conviction proceedings, the Arizona Capital Case Commission recognized that "[t]he needs are particularly acute for defense counsel in all post-conviction proceedings, and for prosecutors and defense counsel at the trial level in the rural counties."[106] In fact, in 2001, eight capital cases were delayed at the state post-conviction stage because there were no qualified lawyers available to represent the defendants; some of these defendants have had to wait for over 18 months before a lawyer was appointed to represent them at the state post-conviction stage.[107] Because of the concerns over the availability and quality of state post-conviction defense counsel, the Capital Case Commission recommended the creation of a statewide public defender office for capital cases.[108] Arizona recently created a state capital post-conviction public defender office to handle

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[102] *See* ARIZ. R. CRIM. P. 6.1(a), 32.4(c); ARIZ. REV. STAT. § 13-4041(B) (2006); 18 U.S.C. § 3599(a)(2) (2006); McFarland v. Scott, 512 U.S. 849, 856-57 (1994).
[103] ARIZ. R. CRIM. P. 6.1(a).
[104] ARIZ. REV. STAT. § 13-4041(B) (2006).
[105] *See* 21 U.S.C. § 848(q)(4)(B) (2004); *McFarland*, 512 U.S. at 856-57.
[106] OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, at 14 (Dec. 2002).
[107] *Id.*
[108] *Id.*

state post-conviction cases on a statewide basis, but this office was only provided $220,000 for fiscal year 2006-07.[109]

a. At least two attorneys at every stage of the proceedings qualified in accordance with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.

Given that death-sentenced inmates are not entitled to appointed counsel for clemency proceedings, Arizona law only mandates the number of attorneys that must be appointed at trial, on direct appeal and in state post-conviction proceedings. Arizona law specifically requires that all indigent individuals charged with a capital offense be appointed two attorneys at trial.[110] Arizona law also provides these attorneys with access to investigators and experts at trial.[111] While the Rule 6.8 Committee Comment "recommends that co-counsel be appointed at all stages of capital litigation,"[112] two attorneys are not required on direct appeal and in state post-conviction proceedings. The appointment of investigators and expert witnesses in these appellate proceedings is permitted when the experts are deemed to be "reasonably necessary."[113]

Under federal law, an indigent death-sentenced inmate seeking federal habeas corpus relief must be appointed "one or more attorneys"[114] and these attorneys must have access to investigators, experts, or other services as are reasonably necessary for representation.[115]

The qualification requirements for attorneys appointed for trial, direct appeal, state post-conviction, and federal habeas corpus proceedings will be discussed below under Recommendation #2.

b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.

Arizona law currently does not require at least one member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. However, Arizona law requires that the lead

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[109] 2006 Ariz. Sess. Laws 369 § 10 (A).
[110] ARIZ. R. CRIM. P. 6.2, 6.6.
[111] ARIZ. R. CRIM. P. 15.9(a) (2006).
[112] ARIZ. R. CRIM. P. 6.8 cmt.
[113] *See* State v. Apelt, 861 P.2d 634, 650-51 (Ariz. 1993) (en banc) (concluding that a defendant must show that the appointment of investigators and experts are "reasonably necessary"); ARIZ. REV. STAT. § 13-4013(B) (2005) (calling for the appointment of investigators and experts in cases where they are "reasonably necessary to adequately present a defense at trial and at any subsequent proceeding"); ARIZ. REV. STAT. § 13-4041(I) (2006) ("The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary.").
[114] *See supra* note 93 and accompanying text.
[115] See *supra* note 98 and accompanying text.

defense attorney in a capital trial be familiar with the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*[116] and Guideline 5.1(B)(2)(f) requires that "the [state] qualification standards should insure that the pool [of defense attorneys available to represent indigent capital defendants] includes sufficient numbers of attorneys who have demonstrated skill in the investigation, preparation, and presentation of evidence bearing upon mental status."[117] Furthermore, in May 2006, the State Bar of Arizona passed and submitted to the Arizona Supreme Court a recommendation that Rule 6.8 of the Arizona Rules of Criminal Procedure be amended to require that trial counsel in capital cases not only "be familiar with" the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, but that they "comply" with various Guidelines, including Guideline 10.4,[118] which instructs that in assembling a defense team, lead counsel should include "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorder or impairments."[119] The Arizona Supreme Court is expected to accept or reject this amendment later this year.

In addition, Arizona law requires that trial, appellate, and post-conviction counsel have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours or relevant training or educational programs in the area of criminal defense.[120] This training could, but is not required to, include programming on screening individuals for the presence of mental or psychological disorders or impairments.

Additionally, although the State of Arizona does not require attorneys to participate in training on mental or psychological disorders or impairments, training on these issues may be available through programs offered by the Arizona Public Defenders Association and/or the Maricopa County Office of the Public Defender.

To the best of our knowledge, there are no equivalent programs available to other members of the defense team, such as investigators and mitigation specialists. The process for selecting investigators and experts will be discussed below under Subpart c.

c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure

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[116] ARIZ. R. CRIM. P. 6.8(b)(1). On May 19, 2006, the Arizona State Bar approved amendments to Rule 6.8, which, if approved by the Arizona Supreme Court, would require attorneys to not only be familiar with the Guidelines, but to also comply with them. These amendments next will be considered by the Arizona Supreme Court.

[117] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), at Guideline 5.1.

[118] In the Matter of Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, No. R-05-0031 (filed May 22, 2006) (comment by the State Bar of Arizona).

[119] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), at Guideline 10.4.

[120] ARIZ. R. CRIM. P. 6.8.

provision of such services to private attorneys whose clients are financially unable to afford them.

i. Counsel should have the right to seek such services through ex parte proceedings, thereby protecting confidential client information.
ii. Counsel should have the right to have such services provided by persons independent of the government.
iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

Given that death-sentenced inmates are not entitled to appointed counsel or resources for investigators or experts during clemency proceedings, the State of Arizona only provides resources for investigators and experts to attorneys handling death penalty cases at trial, on direct appeal, and in state post-conviction proceedings.

In every stage of a capital case except clemency, "the court may on its own initiative and shall on application of the defendant and a showing that the defendant is financially unable to pay for such services appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding."[121] In a capital case, Arizona law authorizes that an indigent defendant may apply for the appointment of an investigator, an expert witness, and a mitigation specialist.[122] The costs for experts at trial and on direct appeal will be paid by the prosecuting county so long as the defendant can show that the expert assistance is "reasonably necessary to present a defense adequately at trial or sentencing."[123] In state post-conviction proceedings, the county will be reimbursed for half of the expert and investigative services approved by the trial court.[124]

As the Arizona Supreme Court explained in *State v. Bocharski*:

> So long as the law permits capital sentencing, Arizona's justice system must provide adequate resources to enable indigents to defend themselves in a reasonable way. The process must be orderly and fair. We do not expect mitigation funds to be unlimited, nor is there a set amount that will suffice. The unique facts of each case will determine what is "reasonably necessary" for an indigent to adequately present a defense.[125]

Requests for experts are not allowed to be made *ex parte* unless "a proper showing is made concerning the need for confidentiality."[126]

Some public defender offices, including, for example, the Maricopa County Public Defender's Office, have experts, including investigators and mitigation specialists, on

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[121] ARIZ. REV. STAT. § 13-4013(B) (2006).
[122] ARIZ. R. CRIM. P. 15.9(a).
[123] *Id*.
[124] ARIZ. REV. STAT. § 13-4013(I) (2006).
[125] State v. Bocharski, 22 P.3d 43, 55 (Ariz. 2003) (en banc) (citations omitted).
[126] ARIZ. R. CRIM. P. 15.9(b).

staff and consequently do not have to ask the court for funds to obtain expert assistance.[127] According to the National Association of Criminal Defense Lawyers, however, "[p]ublic defender offices, especially in rural counties, have to beg for more money for experts and investigators."[128]

Contract attorneys, at least in some counties, may request funds for experts from their appointing authority. For example, in Maricopa and Pima counties, attorneys are required to obtain pre-approval for the expenses associated with hiring an expert or investigator.[129]

Under federal law, indigent death-sentenced inmates petitioning for federal *habeas corpus* relief may request and the court may authorize inmates' attorneys to obtain investigative, expert, or other necessary services on behalf of the inmate.[130]

In conclusion, the State of Arizona does not require that indigent individuals charged with or convicted of a capital felony be appointed two attorneys at any stage of the proceedings other than at trial. Instead, the State of Arizona requires the appointment of two attorneys at trial and recommends, but does not require, two attorneys during direct appeal and state post-conviction proceedings. And while Arizona makes experts and investigators available through the state post-conviction process, it does not provide resources for experts and investigators at the clemency stage. Additionally, because it is unclear exactly what is meant by the requirement that the lead defense counsel at trial be familiar with the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* and it is unclear whether the Arizona Supreme Court will adopt changes to Rule 6.8 of the Arizona Rules of Criminal Procedure that explicitly state that a member of the defense team should be trained to screen for mental or psychological disorders or defects, it correspondingly is unclear whether the State of Arizona requires or will require any member of the defense team to be qualified by experience or training to screen for mental or psychological disorders or defects.[131] Based on this information, the State of Arizona is only in partial compliance with Recommendation #1.

In addition, based on the above findings, the Arizona Death Penalty Assessment Team makes the following recommendations:

(1) The State of Arizona should create an adequately funded statewide public defender office for capital cases. As with the Arizona Capital Case

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[127] *See, e.g.*, MARICOPA COUNTY LAW OFFICE OF THE PUBLIC DEFENDER ANNUAL REPORT 2002-2003, *at* http://www.pubdef.maricopa.gov/.

[128] National Association of Criminal Defense Attorneys, *supra* note 52.

[129] Maricopa County Contract for Attorney Services, *supra* note 72; Professional Services Contract, *supra* note 70.

[130] *See supra* note 98 and accompanying text.

[131] Should the Arizona Supreme Court ratify the amendments to Rule 6.8 that were passed by the Arizona State Bar on May 19, 2006, Arizona would not only require attorneys to be familiar with the ABA Guidelines, but to comply with them. Should these amendments be enacted, the State of Arizona would require that a member of the defense team be qualified by experience or training to screen for mental or psychological disorders or defects.

Commission, the Arizona Death Penalty Assessment Team is most concerned with the availability and quality of trial counsel; and

(2) The State of Arizona should conduct an audit of the Maricopa County's Public Defender's Office, Legal Defender's Office, Legal Advocate's Office, and Office of Contract Counsel to determine if any discrepancies in average expenditures on capital cases are problematic and signal differences in the quality of representation.

B. Recommendation # 2

Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

a. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

b. In formulating qualification standards, the jurisdiction should insure:

i. That every attorney representing a capital defendant has:
(a) obtained a license or permission to practice in the jurisdiction;
(b) demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
(c) satisfied the training requirements set forth in Guideline 8.1.

ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
(a) substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
(b) skill in the management and conduct of complex negotiations and litigation;
(c) skill in legal research, analysis, and the drafting of litigation documents;
(d) skill in oral advocacy;
(e) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
(f) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
(g) skill in the investigation, preparation, and presentation of mitigating evidence; and
(h) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

The State of Arizona currently has not adopted the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* but many of the requirements set forth in Guideline 5.1 (reproduced above as Recommendation #2) are required under Rule 6.8 of the Arizona Rules of Criminal Procedure, which provides minimum qualification requirements for all attorneys handling death penalty cases at trial, on direct appeal, and in state post-conviction proceedings.[132]

As required by ABA Guideline 5.1, Rule 6.8 of the Arizona Rules of Criminal Procedure relies not only on quantitative measures of experience to determine whether an attorney is qualified to serve as a capital defense attorney, but also requires all appointed attorneys in capital cases to have "demonstrated the necessary proficiency and commitment which exemplify the quality of representation necessary in capital cases."[133] Additionally, Rule 6.8 requires that all attorneys who are appointed in a capital case at trial, on direct appeal, or in state post-conviction proceedings be members in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment and have practiced in the area of state criminal litigation for three years immediately preceding the appointment.[134]

Arizona's qualification requirements for lead trial attorneys are more expansive than the requirements for trial-level co-counsel and appellate counsel, but still only require compliance with some of the requirements contained in Guideline 5.1. In addition to (1) being a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment; (2) having practiced in the area of state criminal litigation for three years immediately preceding the appointment; and (3) having demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases,[135] lead trial counsel must:

(1) Have practiced in the area of state criminal litigation for five years immediately preceding the appointment;
(2) Have been lead counsel in at least nine felony jury trials that were tried to completion and have been lead counsel or co-counsel in at least one capital murder jury trial;
(3) Be familiar with the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*;[136] and
(4) Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours or relevant training or educational programs in the area of criminal defense.[137]

Arizona law does not require lead trial attorneys to have demonstrated skills in all of the areas contained in Guideline 5.1, however, such as legal research, analysis and writing.

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[132] ARIZ. R. CRIM. P. 6.8.
[133] ARIZ. R. CRIM. P. 6.8(a)(3).
[134] ARIZ. R. CRIM. P. 6.8(a).
[135] ARIZ. R. CRIM. P. 6.8(a).
[136] *See supra* note 39.
[137] ARIZ. R. CRIM. P. 6.8(b)(1).

In addition, the training required under Arizona law falls short of the requirements listed above (which will be discussed in detail under Recommendation #5).

Similarly, trial-level co-counsel, in addition to (1) being a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment; (2) having practiced in the area of state criminal litigation for three years immediately preceding the appointment; and (3) having demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases,[138] must have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.[139] Again, Arizona law does not require trial-level co-counsel to have demonstrated skills in all of the areas contained in Guideline 5.1, such as legal research, analysis and writing, and the training required under Arizona law falls short of the requirements of Guideline 5.1.[140]

On direct appeal and in state post-conviction proceedings, Arizona law requires that to be eligible for appointment, an attorney must, in addition to (1) being a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment; (2) having practiced in the area of state criminal litigation for three years immediately preceding the appointment; and (3) having demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases:[141]

(1) Within three years immediately preceding the appointment, have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing or have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-convictions proceedings that resulted in evidentiary hearings; and

(2) Have attended, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.[142]

Arizona law also requires that appointed post-conviction counsel not have represented the defendant at trial or on direct appeal, "unless the defendant and counsel expressly request

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[138] ARIZ. R. CRIM. P. 6.8 (a).
[139] ARIZ. R. CRIM. P. 6.8(b)(2); *see also supra* note 41.
[140] *See supra* note 41.
[141] ARIZ. R. CRIM. P. 6.8(a).
[142] ARIZ. R. CRIM. P. 6.8(c); ARIZ. REV. STAT. § 13-4041(C) (2006).

continued representation and waive all potential issues that are foreclosed by continued representation."[143]

Furthermore, the newly created position of state capital post-conviction public defender is required to, in addition to meeting or exceeding the requirements set forth in Arizona Rule of Criminal Procedure 6.8, 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, have been a member of the state bar of Arizona or admitted to practice in any other state for the five year immediately preceding the appointment, and have had substantial experience in the representation of accused or convicted person in criminal of juvenile proceedings.[144]

However, at trial, Arizona law does not require attorneys on appeal or in state post-conviction proceedings to have demonstrated skills in all of the areas contained in Guideline 5.1, such as legal research, analysis and writing, and the training required under Arizona law falls short of the requirements of Guideline 5.1.

Furthermore, in exceptional circumstances, and with the consent of the Arizona Supreme Court, an attorney may be appointed at trial, on appeal, or in state post-conviction proceedings who does not meet the appointment requirements, so long as the attorney's experience, stature, and record allow the court to conclude that the attorney's ability significantly exceeds the standards and the attorney associates with a lawyer who does meet the standards.[145]

Some county-based appointing authorities and/or public defender offices require attorneys to meet additional qualifications beyond those required by Arizona law. For example, the Pima County Office of Court Appointed Counsel requires that private attorneys, in applying to accept capital trial or appellate appointments, agree to comply with the performance standards contained in the ABA *Guidelines on the Appointment and Performance of Defense Attorneys in Death Penalty Cases*.[146] Other county-based appointing authorities and/or public defender offices do not have requirements beyond those articulated in Arizona law, however, including but not limited to the Pinal and Mohave County Superior Courts.[147] Furthermore, as discussed throughout this report, the State Bar of Arizona passed and submitted to the Arizona Supreme Court in May 2006 a recommendation that Rule 6.8 of the Arizona Rules of Criminal Procedure be amended to require that trial counsel in capital cases "be familiar with" the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* and "comply" with Guidelines 1.1, 10.2, 10.3, 10.4(B)-(D), 10.5, 10.6, 10.7, 10.8, 10.9.1, 10.9.2, 10.10.1, 10.10.2, 10.11, 10.12, 10.13, and 10.14. The amendment also would require appellate and post-conviction counsel to be familiar with the Guidelines and to comply with Guideline 1.1, 10.15.1, and 10.15.2. The Arizona Supreme Court is expected to accept or reject this amendment later this year.

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[143] ARIZ. REV. STAT. § 13-4041(C)(3) (2006).
[144] ARIZ. REV. STAT. § 41-4251(D) (2006).
[145] ARIZ. R. CRIM. P. 6.8(d); *see also supra* note 45.
[146] Professional Services Contract, *supra* note 70.
[147] Telephone interview with Judge Johnson, Pinal County Superior Court (on file with author); telephone interview with Judge Moon, Mohave County Superior Court (on file with author).

Despite the qualification standards required by Arizona law, the problem of ineffective assistance of counsel is real. The Arizona Capital Case Commission found that between 1974 and 2000, nineteen defendants had their cases reversed, remanded, or modified as a result of ineffective assistance of counsel. Of these nineteen cases, thirteen were granted resentencings and six defendants were granted new trials.[148] As a result, Commission members "urge[d] Superior Court judges to verify early in a capital case that counsel are competent under the standards in Rule 6.8. Commission members also urge[d] judges to hold hearings, if necessary, to advise defendants regarding competency of counsel, as is done when issues arise regarding possible conflicts of interest on the part of defense counsel."[149] To the best of our knowledge, neither recommendation has been implemented in any systematic, statewide manner.

In addition, the Capital Case Commission recommended that Rule 1.1 of the Arizona Rules of Professional Conduct be amended to state:

> 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.*[150]

As of June 2006, this change to the Arizona Rules of Professional Conduct had not been made.

In conclusion, we commend the State of Arizona for developing and publishing qualification standards for defense counsel at every level of the judicial proceedings in capital cases, and for requiring lead trial counsel to be familiar with the ABA *Guidelines on the Appointment and Performance of Defense Attorneys in Death Penalty Cases*. We also commend the State Bar of Arizona for requesting that the Arizona Rules of Criminal Procedure be amended to include a requirement that defense counsel comply with the performance requirements set forth in the *Guidelines*. We are unable to conclude, however, that the State of Arizona has effective and enforceable qualification standards that comply with the entirety of Guideline 5.1, as the State of Arizona only requires attorneys handling death penalty cases to possess some, but not all, of those qualification requirements. The State of Arizona, therefore, is only in partial compliance with Recommendation #2.

C. Recommendation # 3

The selection and evaluation process should include:

a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing

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148 OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, at 17 (Dec. 2002).
149 *Id.*
150 *Id.* (emphasis added to indicate suggested new language).

authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:

i. A defender organization that is either:
- **(a) a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
- **(b) a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**

ii. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

The State of Arizona does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony pre-trial, at trial, or on appeal, despite the fact that the Arizona Capital Case Commission unanimously recognized that "establishing a statewide public defender office for capital cases would be the best and most effective way to improve death penalty trials in Arizona."[151] Rather, this responsibility is divided among Arizona's fifteen counties; the presiding judge of each county is responsible for establishing a procedure for the Superior Court or limited jurisdiction courts to ensure the appointment of counsel for each indigent person entitled to counsel.[152]

The Arizona Supreme Court is required to "establish and maintain a list of qualified candidates" for appointment in state post-conviction proceedings, however.[153] We note that because the Arizona Supreme Court is responsible for developing and maintaining this list, it does not satisfy the ABA requirement that the appointing authority be independent and separate from the judiciary.

The State of Arizona recently created the state capital post-conviction public defender office.[154] The state capital post-conviction public defender will be appointed by the Governor "on the basis of merit alone without regard to political affiliation" from a list of names that are submitted by the nomination, retention and standards commission on indigent defense.[155] This state capital post-conviction public defender office qualifies as a statewide independent appointing authority.

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[151] *Id*. at 14.
[152] ARIZ. R. CRIM. P. 6.2.
[153] ARIZ. REV. STAT. § 13-4041(C) (2006).
[154] ARIZ. REV. STAT. § 41-4251(A) (2006).
[155] ARIZ. REV. STAT. § 41-4251(C) (2006).

The training, selection, and monitoring of counsel will be discussed in Subparts b and c. We note, however, that these responsibilities relate only to the training, selection, and monitoring of counsel at trial, on direct appeal, and in state post-conviction proceedings, and that the State of Arizona does not provide appointed counsel to indigent death-sentenced inmates petitioning for clemency.

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

To the best of our knowledge, no entity within the State of Arizona has developed and/or maintains a roster of eligible lawyers for trial or direct appeal. Instead, each county is responsible for developing its own procedures for appointing counsel to indigent defendants. Under a recently passed Arizona law, however, the State of Arizona recently created the state capital post-conviction public defender office[156] that is designed to "provide representation to 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"[157] and does qualify as a statewide independent appointing authority.

In county public defender offices, there generally is one person responsible for assigning cases to attorneys within the office. In counties without public defender offices, or in situations when the public defender office(s) is not able to accept the appointment, it is possible that the court or the office of court appointed counsel may keep a roster of eligible lawyers for each phase of representation. While we were only able to obtain a small amount of information about whether and how various counties keep and maintain lists of attorneys available for appointment, the Pinal County Superior Court reports that the clerk of the court maintains a list of qualified counsel.[158] In addition, Pima County requires attorneys interested in representing defendants and/or appellants in capital cases to sign a "Professional Services Contract;" it is therefore possible that Pima County maintains a list of attorneys that have signed this contract.[159] But in neither of these examples is the list developed and maintained by an appointing authority independent of the judiciary.

c. The statewide independent appointing authority should perform the following duties:

As indicated above, the State of Arizona does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of capital felonies pre-trial, at trial, or on direct appeal. Consequently, no statewide agency performs the functions listed above for application in those stages of the process.

Also noted above, the State of Arizona recently created the state capital post-conviction public defender office[160] that does qualify as a statewide independent appointing

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[156] ARIZ. REV. STAT. § 41-4251(A) (2006).
[157] 2006 Ariz. Sess. Laws 369 § 14.
[158] Telephone interview with Judge Johnson, Pinal County Superior Court (on file with author).
[159] Professional Services Contract, *supra* note 70.
[160] ARIZ. REV. STAT. § 41-4251(A) (2006).

authority. The Arizona Supreme Court is responsible for maintaining a list of people "who are qualified to represent capital defendant in those cases in which the court does not appoint counsel from the state capital post-conviction public defender office."[161]

Because there is no statewide appointing authority for any part of the capital process other than state post-conviction, the following answers will address only the appointing mechanism in post-conviction cases.

i. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

The Arizona Supreme Court, after affirming a defendant's conviction and sentence in a capital case, is responsible for appointing counsel from the state capital post-conviction public defender office to represent the defendant in his/her post-conviction proceedings, unless a conflict exists or the court makes a finding that the office cannot represent the defendant.[162]

The Arizona Supreme Court is responsible for maintaining a list of people "who are qualified to represent capital defendant in those cases in which the court does not appoint counsel from the state capital post-conviction public defender office."[163] To be placed on the list, an attorney must submit an "Application for Appointment as Counsel in Capital Post-Conviction Proceedings."[164] The application requests information that would enable the court to ensure that an attorney meets the statutory requirements for appointment.[165]

The court initially advertised the availability of the forms through, at a minimum, publication in the *Arizona Business Gazette*, *Arizona Attorney*, *Maricopa Lawyer*, and *The Writ for Pima County*; and mailings to the Arizona Association of Defense Counsel, Arizona Attorneys for Criminal Justice, all attorneys certified as criminal specialists, the Arizona Bar Association Section for Criminal Justice, each president of the county bar associations, the Arizona Bar Association Appellate Practice Section, presiding judges, the Speaker of the House of Representatives, and the President of the State Senate.[166]

As of March 2006, seventeen attorneys qualified for appointment in capital post-conviction cases.[167]

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[161] ARIZ. REV. STAT. § 41-4041(C) (2006).
[162] ARIZ. REV. STAT. § 13-4041(B) (2006).
[163] ARIZ. REV. STAT. § 41-4041(C) (2006).
[164] Admin. Order No. 96-53 (Nov. 19, 1996) *at* http://www.supreme.state.az.us/orders/admorder/orders99/pdf96/9653.pdf.
[165] *Id.*
[166] *Id.*
[167] Telephone interview with Donna Hallam, Arizona Supreme Court, on Mar. 9, 2006). These numbers are from before the state post-conviction capital public defender office was created and the Supreme Court list was the primary method of appointing counsel in state post-conviction cases.

ii. Draft and periodically publish rosters of certified attorneys;

The Arizona Supreme Court maintains and periodically updates a list of attorneys who are certified to accept capital post-conviction appointments. This list is not published, but is available upon request.[168]

iii. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

The certification standards are contained and published in section 13-4041 of the Arizona Revised Statutes and Rule 6.8 of the Arizona Rules of Criminal Procedure.[169] In cases not handled by the state capital post-conviction public defender office, we were unable to determine whether the court has developed procedures by which attorneys are certified and assigned to particular cases.

iv. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

The Arizona Supreme Court is responsible for appointing counsel from the state capital post-conviction public defender office to represent the defendant in his/her post-conviction proceedings, unless a conflict exists or the court makes a finding that the office cannot represent the defendant.[170] In cases where the court does not appoint the state capital post-conviction public defender office to represent the defendant, the Arizona Supreme Court is responsible for appointing counsel in state post-conviction proceedings from a list of qualified attorneys.[171]

v. Monitor the performance of all attorneys providing representation in capital proceedings;

It does not appear that there is any mechanism to monitor the performance of attorneys providing representation in capital proceedings, although the Arizona Supreme Court may remove an attorney from the list of attorneys qualified to receive appointments in state post-conviction proceedings "if the supreme court determines that the attorney is incapable or unable to adequately represent a defendant."[172]

vi. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

People are added to the list of attorneys as their applications are processed.[173] Attorneys may be removed from the list upon request,[174] and in addition, the Arizona Supreme

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[168] *Id.*
[169] ARIZ. REV. STAT. § 13-4041 (2006); ARIZ. R. CRIM. P. 6.8.
[170] ARIZ. REV. STAT. § 13-4041(B) (2006).
[171] ARIZ. REV. STAT. § 13-4041(C) (2006).
[172] *Id.*
[173] Telephone interview with Donna Hallam, Arizona Supreme Court, on Mar. 9, 2006.
[174] *Id.*

Court may remove an attorney from the list of attorneys qualified to receive appointments in state post-conviction proceedings "if the [Court] determines that the attorney is incapable or unable to adequately represent a defendant."[175] As of March 2006, the Arizona Supreme Court had not sought the removal of any attorneys from the list.[176]

vii. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

It does not appear that the Arizona Supreme Court conducts, sponsors, or approves of any specialized training programs for attorneys representing defendants in capital post-conviction proceedings. The state capital post-conviction public defender office may fund or sponsor training for attorneys within the office, but it is not allowed to fund or sponsor training for attorneys outside of the office.[177]

viii. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

It does not appear that the Arizona Supreme Court investigates or maintains records concerning complaints about the performance of attorneys providing capital post-conviction representation.

In conclusion, the State of Arizona has failed to remove the judiciary from the attorney training, selection, and monitoring process. While Arizona recently created the state capital post-conviction public defender office, the Arizona Supreme Court is responsible for appointing post-conviction counsel in conflict cases and some or all of the county trial and appellate county appointment systems rely on the local judiciary as the appointing authority. Additionally, the State of Arizona has not vested with one or more independent agencies all of the responsibilities contained in Recommendation #3. For example, no independent entity within the State of Arizona is responsible for drafting or publishing a roster of certified trial and appellate attorneys or for monitoring, investigating, and maintaining records concerning the performance of all attorneys handling death penalty cases. Based on this information, the State of Arizona is not in compliance with Recommendation #3.

D. Recommendation # 4

Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by the ABA Guideline 9.1, by the defense team and outside experts selected by counsel.[178]

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[175] ARIZ. REV. STAT. § 13-4041(C) (2006).

[176] Telephone interview with Donna Hallam, Arizona Supreme Court, on Mar. 9, 2006.

[177] ARIZ. REV. STAT. § 13-4251(F)(5) (2006).

[178] In order for a state to ensure funding for the "full cost of high quality legal representation," it must be responsible for "paying not just the direct compensation of members of the defense team, but also the costs

The State of Arizona requires that indigent defendants at trial, on direct appeal, and in state post-conviction proceedings receive appointed counsel, but the State provides only a small amount of funding for the cost of legal representation. The counties are responsible for the funding costs associated with trial and appellate work, although the State provides half of the cost of counsel in state post-conviction proceedings.[179] Overall, between 98% and 99% of all funding for Arizona's indigent defense system is provided by counties.[180]

With the exception of clemency proceedings, Arizona law authorizes that "[i]f a person is charged with a felony offense the court may on its own initiative and shall on application of the defendant and a showing that the defendant is financially unable to pay for such services appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding."[181] In a capital case, Arizona law authorizes that an indigent defendant may apply for the appointment of an investigator, an expert witness, and a mitigation specialist.[182] Arizona law also allows "for investigative and expert services that are reasonably necessary" in state post-conviction proceedings.[183]

Despite the fact that Arizona law guarantees counsel to indigent inmates through state post-conviction proceedings, the Arizona Capital Case Commission, noted that it is "difficult recruiting public defenders in the rural counties and [that] the lack of resources needed to bring competent lawyers from urban areas into the rural areas for capital defense work" caused problems. As a result, the Commission recommended the creation of a statewide public defender office for capital cases.[184] The Commission submitted legislation to the 2001 and 2002 State Legislative Sessions that would have created a statewide defender organization to include trial defenders for rural Arizona and post-conviction attorneys for all of Arizona, but the legislation failed.[185] Legislation passed in 2006 that creates a state capital post-conviction public defender office, but it does not address the issue of trial-level counsel.

b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

i. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

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involved with the requirements of the[] Guidelines for high quality representation (e.g. Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5])." *See* American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

[179] ARIZ. REV. STAT. § 13-4041(H) (2006).

[180] ARIZONA CRIMINAL JUSTICE COMMISSION, *supra* note 7; *see also* The Spangenberg Group, *supra* note 6; National Association of Criminal Defense Attorneys, *supra* note 52.

[181] ARIZ. REV. STAT. § 13-4013(B) (2006).

[182] ARIZ. R. CRIM. P. 15.9(a).

[183] ARIZ. REV. STAT. § 13-4013(J) (2006).

[184] OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, at 14 (Dec. 2002).

[185] *Id.*

ii. **Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**
iii. **Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The compensation paid to attorneys who represent indigent individuals charged with a capital felony differs by county, subject to the statutory requirement that the compensation be in an amount that the court deems reasonable.[186] The amount of reasonable compensation is determined as provided by local rule and section 13-4013 of the A.R.S. and should take into consideration "the hours worked, the experience of counsel, the quality of the work performed, and any amount actually paid by the defendant."[187] "The aggregate amount paid by the defendant and the county may not exceed the full amount paid by the county alone to the appointed attorneys in comparable cases."[188]

In state post-conviction proceedings, Arizona law requires that court appointed counsel be compensated at a rate "not to exceed" $100 per hour.[189] If the number of hours worked by counsel exceeds 200, counsel still is entitled to compensation, so long as s/he shows "good cause."[190]

The hourly rate and the per-case maximum paid to contract and court-appointed attorneys for trial and direct appeal varies by county.[191] For example, Pima County public defender attorney salaries range from approximately $37,500 to $90,000.[192] In addition, its contract attorneys receive $75 per hour, not to exceed $15,000 without prior approval of the court, to be the lead attorney in trial-level and appellate capital representation. Trial-level co-counsel is eligible to receive $60 per hour, not to exceed $7,500 without prior approval of the court.[193]

In Maricopa County, the starting salary for a public defender in 2001 was $42,453.[194] Contract attorneys receive a flat fee of $10,000 per capital case with an additional

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186 ARIZ. REV. STAT. § 13-4013(A) (2006).
187 ARIZ. R. CRIM. P. 6.7(b).
188 *Id.*
189 ARIZ. REV. STAT. § 13-4041(F) (2006).
190 ARIZ. REV. STAT. § 13-4041(G) (2006).
191 The Spangenberg Group, *supra* note 6.
192 National Association of Criminal Defense Attorneys, *supra* note 52.
193 Professional Services Contract, *supra* note 70; *see also* The Spangenberg Group, *supra* note 6.
194 National Association of Criminal Defense Attorneys, *supra* note 52.

$10,000 if the case goes to trial.[195] On appeal, contract attorneys receive $20,000 per case.[196]

In rural counties, the salaries in public defender offices tend to range between $35,000 and $90,000.[197] In Yavapai County, some defense counsel enter into contracts that pay a flat fee, often $70,000, for representation in a set number of cases and Graham County also uses contract attorneys who are paid $80,000 to provide representation in a hundred cases.[198] Pinal and Mohave counties pay contract attorneys $100 per hour.[199]

c. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

i. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

ii. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.

iii. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

Given that death-sentenced inmates are not entitled to appointed counsel or resources for investigators or experts during clemency proceedings, the State of Arizona only provides resources for investigators and experts to attorneys handling death penalty cases at trial, on direct appeal, and in state post-conviction proceedings. Arizona law authorizes that "[i]f a person is charged with a felony offense the court may on its own initiative and shall on application of the defendant and a showing that the defendant is financially unable to pay for such services appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding."[200] In a capital case, Arizona law authorizes that an indigent defendant may apply for the appointment of an investigator, an expert witness, and a mitigation specialist.[201] Arizona law also allows the trial court to "authorize additional monies to

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[195] Maricopa County Contract for Attorney Services, *supra* note 72; *see also* The Spangenberg Group, *supra* note 6.

[196] Maricopa County Contract for Attorney Services, Serial 04021-ROQ, *at* http://www.maricopa.gov/ContractCounsel/Assets/Documents/FY04-05/04021-Appeals-PCR.pdf (last visited March 2, 2006).

[197] National Association of Criminal Defense Attorneys, *supra* note 52.

[198] *Id.*

[199] Telephone Interview with Judge Johnson, Superior Court Judge, Pinal County Superior Court, on Feb. 28, 2006; Telephone Interview with Judge Robert R. Moon, Superior Court Judge, Mohave County Superior Court, on Feb. 28, 2006.

[200] ARIZ. REV. STAT. § 13-4013(B) (2006).

[201] ARIZ. R. CRIM. P. 15.9(a).

pay for investigative and expert services that are reasonably necessary" in state post-conviction proceedings.[202]

At trial and on appeal, the costs for experts will be paid by the prosecuting county so long as the defendant can show that the expert assistance is "reasonably necessary to present a defense adequately at trial or sentencing."[203] Appointed experts will be compensated at the rate the county contracts for those services.[204] "If a necessary expert witness represents a discipline or has a skill that is not then the subject of a county contract, the county may either promptly procure those services . . . or ask the court to establish a reasonable fee for that witness. If no investigator or expert witness who is under contract with the county to provide services is available and the defendant is unable to obtain such services at the county rate, the court shall establish a reasonable fee for the expert witness or investigator providing the service."[205] In state post-conviction proceedings, the county will be reimbursed for half of the expert and investigative services approved by the trial court.[206]

Some public defender offices, including Maricopa County, have experts on staff, including investigators and mitigation specialists, and consequently do not have to ask the court for funds for expert assistance.[207] According to the National Association of Criminal Defense Lawyers, however, other "[p]ublic defender offices, especially in rural counties, have to beg for more money for experts and investigators."[208]

Contract attorneys, at least in some counties, must request funds for experts from the court. For example, in Maricopa and Pima counties, attorneys are required to obtain pre-approval for the expenses associated with hiring an expert or investigator.[209]

The payment range for experts employed by public defender offices is unknown and, consequently, we cannot assess whether the salaries for these employees are commensurate with the salary scale of the prosecutor's office.

d. Additional compensation should be provided in unusually protracted or extraordinary cases.

The issue of additional compensation in unusually protracted or extraordinary cases is technically not a concern in cases where a public defender is providing representation as these attorneys are salaried employees.

In cases in which a contract attorney is providing representation, it appears that a decision as to whether or not attorneys will be compensated for their time in protracted or

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[202] ARIZ. REV. STAT. § 13-4013(J) (2006).
[203] ARIZ. R. CRIM. P. 15.9(a).
[204] ARIZ. REV. STAT. § 13-4013(C) (2006).
[205] *Id.*
[206] ARIZ. REV. STAT. § 13-4013(I) (2006).
[207] *See, e.g.*, MARICOPA COUNTY LAW OFFICE OF THE PUBLIC DEFENDER ANNUAL REPORT 2002-2003 *at* http://www.pubdef.maricopa.gov/.
[208] National Association of Criminal Defense Attorneys, *supra* note 52.
[209] Maricopa County Contract for Attorney Services, *supra* note 72; Professional Services Contract, *supra* note 70.

extraordinary cases depends on what stage in the capital process they are providing representation and the county in which the case is being heard.

At trial and on direct appeal, Arizona law requires that appointed counsel in criminal cases "shall be paid by the county in which the court presides"[210] and the availability of additional compensation varies from county to county. In the few counties where we were able to collect the relevant information, it does appear that additional compensation is allowed in unusually protracted or extraordinary cases.

For example, in Pima County, lead counsel receives $75 per hour for representation at trial and on direct appeal, but the amount should not exceed $15,000 without prior approval of the court. Trial-level co-counsel is eligible to receive $60 per hour, not to exceed $7,500 without prior approval of the court.[211] The provision allowing for additional payments upon approval of the court would allow, at least in theory, additional payments in unusually protracted or extraordinary cases.[212]

Alternatively, in Maricopa County, contract attorneys receive a flat fee of $10,000 per capital case with an additional $10,000 if the case goes to trial.[213] On appeal, attorneys receive $20,000 per case.[214] These flat-fee payments seem to allow the attorney to petition the Contract Administrator for additional compensation in extraordinary cases.[215]

In Pinal County, contract attorneys receive $100 per hour with an assumed 120 hour cap. An attorney may submit a written request to exceed this limit, however.[216]

In Yavapai County, however, some defense counsel enter into contracts that pay a flat fee, often $70,000, for representation in a set number of cases and Graham County also uses contract attorneys who are paid $80,000 to provide representation in 100 cases.[217] It is unclear whether these contracts allow for additional payments in unusually protracted or extraordinary cases, although it appears, at least in Yavapai and Graham counties, that flat fee contracts would not allow for additional payments to be provided.

Alternatively, in state post-conviction proceedings, Arizona law requires that court appointed counsel be compensated at a rate "not to exceed" $100 per hour.[218] "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

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[210] ARIZ. REV. STAT. § 13-4013(A) (2006).

[211] Professional Services Contract, *supra* note 70; *see also* The Spangenberg Group, *supra* note 6.

[212] *See* Request for Extraordinary Fees and/or Expenses, Office of Court Appointed Counsel, at http://www.pima.gov/ocac/forms/requestforextraordinaryfees.pdf (last visited Mar. 8, 2006).

[213] Maricopa County Contract for Attorney Services, *supra* note 72; *see also* The Spangenberg Group, *supra* note 6.

[214] Maricopa County Contract for Attorney Services, Serial 04021-ROQ, *at* http://www.maricopa.gov/ContractCounsel/Assets/Documents/FY04-05/04021-Appeals-PCR.pdf (last visited March 2, 2006).

[215] *Id.*

[216] Telephone interview with Judge Johnson, Pinal County Superior Court (on file with author).

[217] National Association of Criminal Defense Attorneys, *supra* note 52.

[218] ARIZ. REV. STAT. § 13-4041(F) (2006).

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." [219] If counsel is appointed in successive post-conviction relief proceedings, compensation will be paid in an amount that the court deems reasonable, considering the services performed.[220]

e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

The issue of compensation for reasonable incidental expenses is not technically a concern in cases where a public defender is providing representation as these attorneys are salaried employees and may seek reimbursement for incidental expenses from their office.

In cases where a contract attorney is providing representation, counties have the discretion to determine what "reasonable" expenses will be reimbursed. In Mohave County, court appointed attorneys may be eligible to receive reimbursement for long distance telephone charges, extraordinary postage, online research, and travel expenses. In the past, the court also has paid for the trial clothes of indigent defendants.[221] In Pinal County, the court will reimburse for postage, long distance telephone charges, copying costs, and travel expenses. The practice in Pinal County is to seek approval in advance for expenses greater than $100.[222] In Pima County, the court will reimburse for the costs associated with long distance telephone charges, postage (other than routine mail), travel mileage, copying, interpreters, and court reporters.[223]

In conclusion, because Arizona allows individual counties to set payment rates for attorneys in capital cases at trial and on appeal, we did not obtain sufficient information to appropriately assess whether the State of Arizona has ensured funding for the full cost of high quality representation. Therefore, we are unable to assess whether the State of Arizona is in compliance with Recommendation #4.

E. Recommendation #5

Training (Guideline 8.1 of the ABA *Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Case*s)

a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

Training, professional development, and continuing education is required for some, but not all, members of the defense team. Rule 6.8 of the Arizona Rules of Criminal

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[219] ARIZ. REV. STAT. § 13-4041(G) (2006).
[220] ARIZ. REV. STAT. §§ 13-4013(A), 13-4041(G) (2006).
[221] Telephone interview with Judge Robert R. Moon, Mohave County Superior Court (on file with author).
[222] Telephone interview with Judge Johnson, Pinal County Superior Court (on file with author).
[223] Telephone interview with Phil Mahoney, Administrative Attorney, Pima County Office of Court Appointed Counsel (on file with author).

Procedure requires that all appointed trial, appellate, and post-conviction counsel must have "attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense."[224] There is no state law provision mandating training for other members of the defense team. Despite this, the Arizona Public Defenders Association hosts an annual statewide conference each June that is open to attorneys and staff members in public defender offices and offers programs on a variety of topics.[225]

Because Arizona's indigent defense system is funded almost entirely at the county level, it does not appear that the State provides funding for this required attorney training. County boards of supervisors provide indigent defense offices with general budgets. Those offices may then choose to spend money on training, but are not required to do so. In addition, the Arizona Supreme Court provides $2 of the $12 fee assessed on people who pay a court ordered penalty, fine, or sanction to county public defender officers for costs associated with training.[226]

It does not appear that any money for training is provided to private attorneys who are appointed to represent capital defendants/appellants.

b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

i. Relevant state, federal, and international law;
ii. Pleading and motion practice;
iii. Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
iv. Jury selection;
v. Trial preparation and presentation, including the use of experts;
vi. Ethical considerations particular to capital defense representation;
vii. Preservation of the record and of issues for post-conviction review;
viii. Counsel's relationship with the client and his family;
ix. Post-conviction litigation in state and federal courts;
x. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
xi. The unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

As discussed above, Rule 6.8 of the Arizona Rules of Criminal Procedure requires that all appointed trial, appellate and post-conviction counsel must have "attended and successfully completed, within one year prior to the initial appointment, at least six hours

[224] ARIZ. R. CRIM. P. 6.8(b), (c).
[225] *See* Arizona Public Defender Association, *at* http://www.apdanet.org/ (last visited Feb. 26, 2006).
[226] ARIZ. REV. STAT. § 12-116(B) (2006).

of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours or relevant training or educational programs in the area of criminal defense."[227] The Arizona Rules of Criminal Procedure do not require the specialized training to include presentations and training on all of the issues listed above. Training on "capital defense" certainly could include presentations and training on all of the issues listed above, but attorneys are not required to take training that covers all of these issues.

c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.

Rule 6.8 of the Arizona Rules of Criminal Procedure requires attorneys handling death penalty trials, direct appeals, and state post-conviction proceedings to have attended and successfully completed at least six hours of relevant training or educational programs in the area of capital defense within one year prior to being appointed and at least twelve hours of relevant training or educational programs in the area of criminal defense within one year prior to any subsequent appointment.[228]

d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

Arizona does not require non-attorneys who wish to be eligible to participate on defense teams to receive continuing professional education appropriate to their areas of expertise.

In conclusion, the State of Arizona provides only limited funding for the training, professional development, and continuing legal education of public defenders. It does not provide any funding for the training, professional development, and continuing legal education of contract attorneys or other members of the defense team. Therefore, the State of Arizona is not in compliance with Recommendation #5.

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[227] ARIZ. R. CRIM. P. 6.8(b), (c).
[228] *Id.*

CHAPTER SEVEN

DIRECT APPEAL PROCESS

INTRODUCTION TO THE ISSUE

Every death-row inmate must be afforded at least one level of judicial review.[1] This process of judicial review is called the direct appeal. As the United States Supreme Court stated in *Barefoot v. Estelle*, "[d]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."[2] The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeal process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. Meaningful comparative proportionality review helps to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, jurors determine the sentence, yet they are neither equipped nor have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

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1 Gregg v. Georgia, 428 U.S. 153 (1976).

2 Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

I. FACTUAL DISCUSSION

In Arizona, an individual convicted of capital murder and sentenced to death receives an automatic appeal to the Arizona Supreme Court,[3] even if s/he pleaded guilty to capital murder.[4] An individual sentenced to death may have his/her conviction reviewed on direct appeal in the Arizona Supreme Court and, in some circumstances, the United States Supreme Court. While the Arizona Supreme Court is required to review any case where the defendant is convicted of capital murder and sentenced to death,[5] the United States Supreme Court may exercise discretion in deciding to hear an appeal.[6]

A. Standard and Scope of Review

1. Offenses Committed Before August 1, 2002

The Arizona Supreme Court will "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence" for offenses committed before August 1, 2002.[7]

If the Arizona Supreme Court determines that an error was made regarding a finding of aggravation or mitigation, it independently will determine, in light of the existing aggravation, whether the existing mitigation is substantial enough to warrant a sentence less than death.[8] According to the Arizona Supreme Court:

> Unlike appellate review of non-capital crimes, in reviewing the imposition of the death penalty, we must make an independent determination of the imposition of that penalty: 'The gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed. . .we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances. . .We must determine for ourselves if the latter outweigh the former when we find both to be present.'[9]

The Arizona Supreme Court will affirm the death sentence if: (1) it upholds the trial court's findings of aggravating and mitigating factors and thereby finds no sufficient mitigating factors;[10] or (2) determines that the trial court made an error regarding

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[3] ARIZ. REV. STAT. §§ 13-703.04(A), 13-703.05(A) (2005); *see also* ARIZ. R. CRIM. P. 26.15; 32.2(b).

[4] *See* ARIZ. REV. STAT. § 13-4031 (2005); State v. Brewer, 826 P.2d 783, 787 (Ariz. 1992) (en banc).

[5] *See* ARIZ. REV. STAT. §§ 13-703.04(A), 12-120.21(A)(1), 13-4031 (2005); ARIZ. R. CRIM. P. 26.15.

[6] ARIZ. SUP. CT. R. 16(2), (3).

[7] ARIZ. REV. STAT. § 13-703.04(A) (2005); *see also* 2002 Ariz. Legis. Serv. Ch.1 (West).

[8] ARIZ. REV. STAT. § 13-703.04(B) (2005).

[9] State v. Watson, 628 P.2d 943, 945-46 (Ariz. 1981) (en banc) (quoting *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1977) (en banc)).

[10] *See, e.g.*, State v. Serna, 787 P.2d 1056, 1065 (Ariz. 1990) (en banc); State v. Fulminante, 778 P.2d 602, 619-22 (Ariz. 1990) (en banc); State v. McCall, 770 P.2d 1165, 1177 (Ariz. 1989) (en banc); State v. Walton, 769 P.2d 1017, 1032-35 (Ariz. 1989) (en banc); State v. Beaty, 762 P.2d 519, 529-31 (Ariz. 1988) (en banc); State v. Nash, 694 P.2d 222, 234-36 (Ariz. 1985) (en banc); State v. Martinez-Villareal, 702 P.2d 670, 679-80 (Ariz. 1985) (en banc); State v. Hensley, 691 P.2d 689, 694-95 (1984) (en banc); State v. Clabourne, 690 P.2d 54, 66-68 (Ariz. 1984) (en banc); State v. Harding, 687 P.2d 1247, 1255-56 (Ariz.

aggravation or mitigation, but that the mitigation found by the Arizona Supreme Court is not sufficiently substantial to warrant leniency.[11] If the Arizona Supreme Court finds that an error was made regarding aggravation or mitigation and that the mitigation is "sufficiently substantial to warrant leniency," it will reduce the appellant's sentence to life imprisonment.[12]

The Arizona Supreme Court also may remand the case for further action "if the trial court erroneously excluded evidence or if the appellate record does not adequately reflect the evidence presented."[13]

2. Direct Appeals Pending on August 1, 2002

In response to the 2002 U.S. Supreme Court decision in *Ring v. Arizona*,[14] Arizona's legislature rewrote its capital sentencing procedures, including those provisions regarding the Arizona Supreme Court's review of capital cases.[15] The new law required that the Arizona Supreme Court conduct a harmless error review[16] of those cases in which the defendants were sentenced under the overturned capital sentencing statutes, but had not yet exhausted their direct appeals.[17] Appellants whose cases were final[18] at the time *Ring v. Arizona* was decided were not entitled to new sentencing hearings.[19]

If the Arizona Supreme Court found that the death sentence imposed under Arizona's old capital sentencing procedures contained error that had "prejudiced or tended to prejudice" the defendant,[20] the Arizona Supreme Court vacated the death sentence and remanded the case for sentencing under the new jury sentencing statutes.[21] If the Arizona Supreme Court found that the death sentence imposed under Arizona's old capital sentencing

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1984) (en banc); State v. Fisher, 686 P.2d 750, 755-56 (Ariz. 1984) (en banc); State v. Gretzler, 659 P.2d 1, 16-17 (Ariz. 1983) (en banc); State v. Smith, 638 P.2d 696, 702 (Ariz. 1981) (en banc).

[11] *See* ARIZ. REV. STAT. § 13-703.04(B) (2005); *see also, e.g.*, State v. Wallace, 773 P.2d 983 (Ariz. 1989) (en banc); State v. Vickers, 768 P.2d 1177, 1190-91 (Ariz. 1989) (en banc); State v. Castenada, 724 P.2d 1, 12-14 (Ariz. 1986) (en banc); State v. Villafuerte, 690 P.2d 42, 51 (Ariz. 1984) (en banc).

[12] ARIZ. REV. STAT. § 13-703.04(B) (2005).

[13] ARIZ. REV. STAT. § 13-703.04(C) (2005).

[14] 536 U.S. 584 (2002) (holding that Arizona's capital sentencing scheme violates the right to a jury trial as guaranteed by the Sixth Amendment of the United States Constitution).

[15] *See* Death Penalty Information Center, *U.S. Supreme Court: Ring v. Arizona*, *at* http://www.deathpenaltyinfo.org/article.php?scid=38&did=247#AZ (last visited Nov. 9, 2005).

[16] In defining harmless error, the Arizona legislature has written: "[n]either a departure from the form or mode prescribed in respect to any pleadings or proceedings, nor an error or mistake therein, shall render the pleading or proceeding invalid, unless it actually has prejudiced, or tended to prejudice, the defendant in respect to a substantial right." ARIZ. REV. STAT. § 13-3987 (2005).

[17] State v. Ring, 65 P.3d 915, 925, 933 (Ariz. 2003) (en banc).

[18] "A defendant's case becomes final when 'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.'" State v. Towery, 64 P.3d 828, 831-32 (quoting Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987)).

[19] *See Towery*, 64 P.3d at 835-36.

[20] ARIZ. REV. STAT. § 13-3987 (2005).

[21] *See* State v. Hoskins, 65 P.3d 953, 955 (Ariz. 2003) (remanding for resentencing upon conclusion that the error was not harmless); State v. Phillips, 67 P.3d 1228, 1232 (Ariz. 2003) (remanding for resentencing upon finding that the error cannot be said to be harmless).

procedures had no error or that any error was harmless, the Court affirmed the death sentence.[22]

3. Offenses Committed on or After August 1, 2002

For offenses committed on or after August 1, 2002, independent review of the trial court's findings of aggravation and mitigation and the propriety of the death sentence are no longer required. Instead, under the new statutory scheme, the Arizona Supreme Court must "review all death sentences to determine whether the trier of fact abused its discretion in finding aggravating circumstances and imposing a sentence of death."[23]

In a different context, the Arizona Supreme Court has held that an abuse of discretion occurs "when the decision is characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts necessary for an intelligent exercise thereof."[24] The Arizona Supreme Court limited this holding, however, by explaining that the imposition of a penalty upon conviction is "entirely within the discretion of the [trier of fact] and will not be reduced unless it appears clearly that the sentence imposed is excessive."[25] The Court has yet to rule on whether this standard is applicable to juries that impose death sentences.

If the Arizona Supreme Court determines that "an error occurred in the sentencing proceedings," it then must determine whether the error was "harmless beyond a reasonable doubt."[26] If the Court "cannot determine whether the error was harmless beyond a reasonable doubt," it will remand the case for a new sentencing proceeding.[27] If the Arizona Supreme Court determines that the error was harmless, it will affirm the capital sentence.[28]

B. Types of Reversible Error

Regardless of offense date, the Arizona Supreme Court may consider the following types of error on direct appeal:

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[22] *See, e.g.*, State v. Sansing, 77 P.3d 30 (Ariz. 2003); State v. Greene, 967 P.2d 106, 119 (Ariz. 1998) (en banc).

[23] ARIZ. REV. STAT. § 13-703.05(A) (2005).

[24] State v. Douglas, 349 P.2d 622, 625 (Ariz. 1960).

[25] State v. Neese, 616 P.2d 959, 968 (Ariz. Ct. App. 1980) (citing State v. Castano, 360 P.2d 479 (1961)). *See also* State v. McGuire, 638 P.2d 1339 (Ariz. 1982) (citation omitted) (holding where a life sentence was imposed that the Arizona Supreme Court "will not reduce a sentence imposed by the trial court unless it clearly appears excessive under the circumstances, resulting in an abuse of discretion"); State v. Jones, 385 P.2d 1019, 1022 (Ariz. 1963) (noting that the Supreme Court's power to reduce a sentence imposed by a trial court, even in the context of a death penalty case, "should be used with great caution and exercised only when it clearly appears a sentence is too severe").

[26] ARIZ. REV. STAT. § 13-703.05(B) (2005).

[27] *Id*.

[28] *See Sansing*, 77 P.3d at 39 (holding the improper procedure by which the judge sentenced Sansing to death to constitute harmless error).

1. Structural Error

Structural error "deprive[s] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair."[29] In the limited circumstances where a court finds structural error, the court automatically will reverse the guilty verdict. The issues identified by the United States Supreme Court as structural error include "a biased trial judge, complete denial of criminal defense counsel, denial of access to criminal defense counsel during an overnight trial recess, denial of self-representation in criminal cases, defective reasonable doubt jury instructions, exclusion of jurors of the defendant's race from grand jury selection, excusing a juror because of his views on capital punishment, and denial of a public criminal trial."[30]

2. Fundamental Trial Error

Fundamental error is defined as error that (1) goes to the foundation of the case, (2) takes away a right essential to the appellant's defense, and (3) is of such magnitude that the defendant could not possibly have received a fair trial.[31] Fundamental error also has been defined as "clear, egregious, and curable only via a new trial."[32] In cases where the Arizona Supreme Court finds that fundamental error has prejudiced the appellant, it may overturn the trial court's decision on guilt or sentence,[33] even if the appellant failed to raise the issue beforehand.[34]

C. Procedural Default and Limitations on Review

The Arizona Supreme Court will not review the following types of claims on direct appeal:

1. Issues Not Raised in the Trial Court

The Arizona justice system "precludes [the] injection of new issues on [direct] appeal."[35] In most instances, an issue must have been raised in the trial court to be heard on appeal. This serves: (1) "to create a record to serve as a foundation for review;" and (2) "to allow

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[29] State v. Ring, 65 P.3d 915, 933 (Ariz. 2003) (en banc) (quoting Neder v. United States, 527 U.S. 1, 8-9 (1999)). Structural error stands in contrast to trial error, which is defined as error that occurs "during the presentation of the case to the jury" and may be "quantitatively assessed in the context of other evidence presented." Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).

[30] *Ring*, 65 P.3d at 933-34 (footnotes omitted).

[31] State v. Henderson, 115 P.3d 601, 608 (Ariz. 2005) (en banc).

[32] State v. White, 982 P.2d 819, 829 (Ariz. 1999) (en banc).

[33] *Henderson*, 115 P.2d at 607; *see also* State v. Taylor, 931 P.2d 1077, 1081-1082 (Ariz. Ct. App. 1996) (supp. op.) (noting that the repeal of section 13-4035 of the A.R.S. does not require appellate courts to "ignore obvious fundamental error in a criminal proceeding" while also noting that the appellate courts are no longer obligated to search for fundamental error in a criminal appeal); State v. Mann, 934 P.2d 784, 796 n.1 (1997) (en banc) (Martone, J., concurring) (stating "if in the process of examining issues presented by way of appeal we stumble across fundamental error, then we have the discretion to address it").

[34] *White*, 982 P.2d at 829.

[35] *Id*.

the lower court an opportunity to weigh and decide the issue."[36] If an appellant first has not raised an issue in the trial court, s/he generally waives the right to raise the issue on direct appeal. [37]

General objections may not be enough to preserve an issue for appeal, as the failure to lodge a *specific* objection during trial also may constitute waiver of the issue. For example, in *State v. Moody*, the Arizona Supreme Court found that defense counsel's general objection during *voir dire* questioning did not preserve the issue of improper juror dismissals unless counsel specifically objected to the removal of individual jurors.[38]

On direct appeal, the Arizona Supreme Court may consider issues that were not raised in the trial court only if the trial court's decision on the issue constitutes fundamental error.[39] This waiver principle applies to both constitutional and non-constitutional issues.[40]

2. Issues Improperly Raised or Argued in Appellate Briefs

Generally, "[f]ailure to [raise or] argue a claim on appeal constitutes waiver of that claim."[41] "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."[42] Summarily listing claims without providing explanatory arguments is not enough to avoid waiver.[43] Therefore, the Arizona Supreme Court will not review claims for which the defendant failed to present arguments sufficient for appellate review.[44] In addition, claims and arguments raised in appendices attached to the brief, but not in the body of the brief, will not be considered.[45]

Issues improperly raised or argued may still be reviewed for fundamental error, despite the defendant's failure to properly raise or argue the claims.[46]

D. Relief Available

The Arizona Supreme Court, in reviewing the conviction of a death-sentenced individual, may reverse, affirm, or modify the judgment, and may grant a new trial, render a judgment, or make an order "consistent with the justice and the rights of the [S]tate and the defendant."[47]

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36 *Id.*
37 *Id.*
38 State v. Moody, 94 P.3d 1119, 1144-45 (Ariz. 2004) (en banc).
39 State v. Bolton, 896 P.2d 830, 837 (Ariz. 1995) (en banc) (citations omitted).
40 *Id.*
41 *Bolton*, 896 P.2d at 837-38.
42 State v. Carver, 771 P.2d 1382, 1390 (Ariz. 1989) (en banc) (citations omitted).
43 *Carver*, 771 P.2d at 1390.
44 *Bolton*, 896 P.2d at 838.
45 *Id.*
46 *Id; see also supra* note 33 and accompanying text.
47 ARIZ. REV. STAT. §13-4036 (2005).

II. ANALYSIS

A. Recommendation #1

> **In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought.**

The Arizona Supreme Court is not required to conduct proportionality review in capital cases. As late as 1991, the Court would determine whether a death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[48] In 1992, however, the Arizona Supreme Court held that proportionality reviews were mandated neither by statute nor by the United States or Arizona Constitutions.[49] Since then, the Court has rejected any arguments that the absence of proportionality review denies capital defendants equal protection and due process of law, or that it is tantamount to cruel and unusual punishment.[50]

Today, Arizona has no codified procedures, nor any other binding authority, to ensure proportionate death sentencing. As such, the State of Arizona fails to comply with Recommendation #1.

Additionally, based on the above findings, the Arizona Death Penalty Assessment Team makes the following recommendations:

(1) Because proportionality is better achieved at the front end rather than the back end, a capital case review committee housed in the Arizona Prosecuting Attorneys' Advisory Council should exercise final discretion as to whether the death penalty may be sought. The County Attorney may choose not to seek death, but if s/he desires that capital charges be filed, a capital case review committee must make the final decision as to the appropriateness of capital charges; and

(2) Pursuant to the Arizona Capital Case Commission recommendation about the importance of continued data collection, the State of Arizona should establish and fund a clearinghouse to collect data on first-degree murder cases. At a minimum, this clearinghouse should collect data on each county's provisions of defense services in capital cases. Relevant information on all death-eligible cases should be made available to the Arizona Supreme Court for use in any proportionality review.

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[48] State v. Richmond, 560 P.2d 41, 51 (Ariz. 1977) (en banc).
[49] State v. Salazar, 844 P.2d 566, 583-84 (Ariz. 1992) (en banc).
[50] State v. Glassel, 116 P.3d 1193, 1218 (Ariz. 2005) (en banc).

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims; claims made possible by the discovery of crucial new evidence; claims based upon prosecutorial misconduct; unconstitutional racial discrimination in jury selection; and other meritorious constitutional claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death-row inmate to return to federal court a second time. Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal habeas that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death-row inmates from having valid claims heard or reviewed at all.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to get state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings does not mean that *any* court, state or federal, ever rules on the merits of the inmate's claims– even when compelling new evidence of innocence comes to light shortly before an execution. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate's constitutional claims.

I. FACTUAL DISCUSSION

A. Overview of State Post-Conviction Proceedings

1. The Filing of a Post-Conviction Relief Application

In death penalty cases, the Arizona Supreme Court will automatically file a notice of post-conviction relief with the trial court once the Court has affirmed a petitioner's conviction and death sentence on direct appeal.[1] If the petitioner is indigent, the Arizona Supreme Court[2] then must appoint the petitioner counsel.[3] A petitioner in a capital case, however, may choose to file a notice of post-conviction relief before the conclusion of his/her direct appeal.[4]

A petitioner must file a post-conviction petition within 120 days of the court filing the notice of post-conviction relief.[5] The petitioner may be granted a filing extension of sixty days and extensions of thirty days thereafter if "good cause" is shown.[6] If a petitioner fails to file a petition within 180 days from the date counsel was appointed, the date the notice was filed, or the date a request for counsel was denied, the petitioner will be obligated to file a notice every sixty days, advising the Arizona Supreme Court of the status of the proceedings until his/her "first post-conviction proceedings have concluded."[7]

Once a petitioner files a petition for post-conviction relief, s/he may amend the petition only on a showing of good cause.[8]

2. The Contents of Petitions for Post-Conviction Relief and Pre-Hearing Matters

A post-conviction petition must encompass every ground known for overturning the conviction and/or death sentence.[9] For the court to grant post-conviction relief, the petition must include at least one of the following claims:

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[1] ARIZ. REV. STAT. § 13-4234(D) (2005); *see also* ARIZ. R. CRIM. P. 32.4(a). If an appeal of the defendant's conviction and/or sentence is pending before the Arizona Supreme Court or the U.S. Supreme Court, the clerk must send a copy of the notice to the court in which the appeal is pending within five days of the filing of the notice for post-conviction relief. ARIZ. REV. STAT. § 13-4234(D) (2005); ARIZ. R. CRIM. P. 32.4(b).

[2] Either the Arizona Supreme Court or the trial court judge authorized by the Arizona Supreme Court may appoint counsel. ARIZ. REV. STAT. § 13-4041(B) (2006); ARIZ. R. CRIM. P. 32.4(c)(1).

[3] ARIZ. REV. STAT. § 13-4041(B) (2006); ARIZ. R. CRIM. P. 32.4(c)(1); ARIZ. REV. STAT. § 13-4234(D) (2006).

[4] *See* Krone v. Hotham, 890 P.2d 1149, 1152 (Ariz. 1995) (en banc) (noting (1) that rarely will it be advantageous to file a post-conviction petition before the direct appeal concludes, (2) that "it would be unwise to preclude early claims of newly discovered exculpatory evidence, which may become more difficult to try as time passes and which cannot be legally raised on direct appeal," and (3) that generally a direct appeal will not be stayed upon the filing of a petition for post-conviction relief).

[5] ARIZ. R. CRIM. P. 32.4(c)(1). *See also* State ex. rel. Napolitano v. Brown, 982 P.2d 815 (Ariz. 1999) (en banc) (holding that under the separation of powers doctrine the Arizona code provision providing sixty days to file a petition for post-conviction relief was unconstitutional because it conflicted with the court rule providing 120 days).

[6] ARIZ. R. CRIM. P. 32.4(c)(1).

[7] *Id.*

[8] ARIZ. R. CRIM. P. 32.6(d).

(1) The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;
(2) The court was without jurisdiction to render judgment or impose sentence;
(3) The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
(4) The person is being held in custody after the sentence imposed has expired;
(5) Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence;[10]
(6) The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part;
(7) There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; and/or
(8) The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found the defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.[11]

The petition must include any affidavits, records, or other evidence in support of the allegations.[12] Any alleged facts within the defendant's personal knowledge must be noted separately and under oath.[13] In addition, the petition must cite to the record and legal authority and contain memoranda of points and authorities.[14] In capital cases, the petition cannot exceed forty pages.[15] If a petition fails to comply with any of these procedural requirements, the Court will return it to the petitioner for correction.[16] The petitioner must then re-file the revised petition within thirty days of its receipt.[17] If the petitioner does not return the petition in a timely manner or with the requisite corrections, the court will dismiss the post-conviction petition with prejudice.[18]

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[9] ARIZ. R. CRIM. P. 32.5. The defendant must certify to this fact. *Id*. *See also* ARIZ. REV. STAT. § 13-4235 (2005).

[10] "Newly discovered material facts exist if: (1) the facts were discovered after the trial; (2) the defendant exercised due diligence in securing the newly discovered material facts; and (3) the newly discovered material facts are not merely cumulative or used for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence." ARIZ. R. CRIM. P. 32.1(e); *see also* ARIZ. REV. STAT. § 13-4231(5) (2005).

[11] ARIZ. R. CRIM. P. 32.1; *see also* ARIZ. REV. STAT. § 13-4231 (2005).

[12] ARIZ. R. CRIM. P. 32.5; ARIZ. REV. STAT. § 13-4235 (2005).

[13] ARIZ. R. CRIM. P. 32.5; ARIZ. REV. STAT. § 13-4235 (2005).

[14] ARIZ. R. CRIM. P. 32.5. The response cannot be more than twenty-five pages, and any reply cannot be more than ten pages. *Id*.

[15] *Id.* The response cannot be more than forty pages, and any reply cannot be more than twenty pages. *Id*.

[16] ARIZ. R. CRIM. P. 32.5; ARIZ. REV. STAT. § 13-4235 (2005).

[17] *Id*.; ARIZ. REV. STAT. § 13-4235 (2005).

[18] *Id*.

The State, in turn, must file a response within forty-five days from the filing of the petition.[19] The State may be granted a thirty-day extension on a showing of "good cause" and additional time on a showing of "extraordinary circumstances."[20] The petitioner has fifteen days from the receipt of the State's response to file a reply or the trial court may authorize further time if "extraordinary circumstances" exist.[21]

3. Summary Disposition of a Petition and the Post-Conviction Evidentiary Hearing

The court must review the petition, response, reply, files, and records and identify all procedurally defaulted claims within twenty days after the State's filing deadline has passed.[22] The court will summarily dispose of the petition if, after noting all precluded claims, the court determines that no remaining claims present material issues of law or fact entitling the petitioner to relief.[23] If the court finds that material issues of law or fact exist, the court will hold an evidentiary hearing within thirty days of this initial review.[24]

If an evidentiary hearing is held to resolve disputed issues of material fact,[25] the petitioner is entitled to be present at the hearing and to subpoena witnesses,[26] and while the Rules of Evidence govern the proceedings, the petitioner may be compelled to testify.[27] The court also has the discretion to conduct the evidentiary hearing at the place of the petitioner's confinement, if space is available and proper notice is provided to the facility.[28]

During the evidentiary hearing, the petitioner has the burden of proving by a preponderance of the evidence the allegations of fact contained in his/her petition.[29] When the petitioner proves that a constitutional defect exists, the burden then shifts to the State to demonstrate that the defect was harmless beyond a reasonable doubt.[30]

4. Decisions on Petitions for Post-Conviction Relief

The court must issue a ruling within ten days of the evidentiary hearing, unless "extraordinary circumstances where the volume of the evidence or the complexity of the issues" mandate an extension of time.[31] If the court finds in the petitioner's favor, it must

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[19] ARIZ. R. CRIM. P. 32.6(a); ARIZ. REV. STAT. § 13-4236(A) (2005).
[20] ARIZ. R. CRIM. P. 32.6(a); ARIZ. REV. STAT. § 13-4236(A) (2005).
[21] ARIZ. R. CRIM. P. 32.6(b); ARIZ. REV. STAT. § 13-4236(B) (2005).
[22] ARIZ. R. CRIM. P. 32.6(c); ARIZ. REV. STAT. § 13-4236(C) (2005).
[23] ARIZ. R. CRIM. P. 32.6(c); ARIZ. REV. STAT. § 13-4236(C) (2005).
[24] ARIZ. R. CRIM. P. 32.6(c); ARIZ. REV. STAT. § 13-4238(B) (2005). When a hearing is ordered, the State, if requested, must notify the victims of the hearing. ARIZ. R. CRIM. P. 32.6(c); ARIZ. REV. STAT. § 13-4238(B) (2005).
[25] ARIZ. R. CRIM. P. 32.8(a); ARIZ. REV. STAT. § 13-4238(A) (2005).
[26] ARIZ. R. CRIM. P. 32.8(a); ARIZ. REV. STAT. § 13-4238(A) (2005).
[27] ARIZ. R. CRIM. P. 32.8(b).
[28] ARIZ. R. CRIM. P. 32.8(a); ARIZ. REV. STAT. § 13-4238(A) (2005). Notice must be provided at least fifteen days prior to the evidentiary hearing to the officer in charge of the confinement facility. ARIZ. R. CRIM. P. 32.8(a); ARIZ. REV. STAT. § 13-4238(A) (2005).
[29] ARIZ. R. CRIM. P. 32.8(c); ARIZ. REV. STAT. § 13-4238(C).
[30] ARIZ. R. CRIM. P. 32.8(c); ARIZ. REV. STAT. § 13-4238(C).
[31] ARIZ. R. CRIM. P. 32.8(d).

enter an order "with respect to the conviction, sentence or detention, any further proceedings, including a new trial and conditions of release, and other matters that may be necessary and proper."[32] In issuing the order, the court must make specific findings of fact and expressly state its conclusions of law.[33]

5. Motions for Rehearing

If the petitioner or the State believes that the court erred in making its decision, either party may move for a rehearing within fifteen days of the court's ruling.[34] The motion for rehearing must detail the grounds on which the petitioning party believes the court erred.[35] The opposing party will not file a response to the motion for rehearing unless the court requests that one be filed,[36] but the court will not grant a motion for rehearing if such a response has not been requested and filed.[37] If a response is filed, the petitioner has ten days from the date the response is served to file a reply.[38] If the court grants the motion for rehearing, the court may amend its previous ruling without a hearing, or hold a new hearing and amend or reaffirm its previous ruling.[39] When the court amends its ruling, it must provide its rationale.[40] The filing of a motion for rehearing does not restrict the issues that may be presented in a petition or cross-petition for review.[41]

6. Appealing Decisions on Post-Conviction Petitions

Either party may appeal the trial court's decision to grant or deny post-conviction relief to the Arizona Supreme Court within thirty days.[42] The other party, after having been served with the petition for review, may opt to file a cross-petition for review within fifteen days.[43] The petitioner and, if a cross-petition is filed, the cross-petitioner must also file a notice of the filing with the trial court within three days of filing.[44] Any motion for an extension of time to file the petition or cross-petition for review must be made and decided by the trial court.[45]

The petition and the cross-petition, if one is filed, must include a discussion of the trial court's ruling, the issues that the petitioner wishes to present for review, the facts that are

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32 ARIZ. R. CRIM. P. 32.8(d); ARIZ. REV. STAT. § 13-4238(D) (2005).
33 ARIZ. R. CRIM. P. 32.8(d); ARIZ. REV. STAT. § 13-4238(D) (2005).
34 ARIZ. R. CRIM. P. 32.9(a); ARIZ. REV. STAT. § 13-4239(A) (2005).
35 ARIZ. R. CRIM. P. 32.9(a); ARIZ. REV. STAT. § 13-4239(A) (2005).
36 ARIZ. R. CRIM. P. 32.9(a).
37 *Id.*
38 ARIZ. R. CRIM. P. 32.9(a); ARIZ. REV. STAT. § 13-4239(A) (2005).
39 ARIZ. R. CRIM. P. 32.9(b); ARIZ. REV. STAT. § 13-4239(B) (2005).
40 ARIZ. R. CRIM. P. 32.9(b); ARIZ. REV. STAT. § 13-4239(B) (2005).
41 ARIZ. R. CRIM. P. 32.9(c)(1); ARIZ. REV. STAT. § 13-4239(C) (2005).
42 ARIZ. R. CRIM. P. 32.9(c). Either party may also appeal within thirty days of the court's final decision on a motion for rehearing. *Id.* *See also* ARIZ. REV. STAT. §§ 12-120.21(A)(1), 13-4031 (2005) (providing only the Arizona Supreme Court with jurisdiction to hear appeals in cases where a death sentence has been imposed).
43 ARIZ. R. CRIM. P. 32.9(c); ARIZ. REV. STAT. § 13-4239(C) (2005).
44 ARIZ. R. CRIM. P. 32.9(c).
45 *Id.* All other motions, including the petition for review, cross-petition, and responsive pleadings, must be filed in the court in which the petition is to be filed. *Id.*

material to those issues, and the reasons why the petition should be granted.[46] Failure to raise any issue that could have been raised in the petition or cross-petition constitutes waiver of that issue on appellate review.[47] Responses to the petition and cross-petition may be filed within thirty days from the date the petition or cross-petition is served.[48]

The Arizona Supreme Court is under no obligation to hear the appeal.[49] If the Court grants review, it may order oral arguments and grant any relief it "deems necessary and proper."[50] If the Arizona Supreme Court declines to hear the appeal or affirms the lower court's decision, however, the petitioner may file a request for *certiorari* with the U.S. Supreme Court. If the U.S. Supreme Court declines to hear the appeal or affirms the lower court's decision, the collateral appeal is complete.

A warrant of execution will not be issued until the conclusion of a petitioner's first post-conviction proceeding.[51]

B. Procedural Restrictions on Petitions for Post-Conviction Relief

1. Rule 32.2 Procedural Bars and Rule 32.1 Exceptions

In order to prevent "piecemeal litigation" and encourage "judicial efficiency," Rule 32.2 of the Arizona Rules of Criminal Procedure "essentially requires a defendant to raise all known claims for [post-conviction] relief in a single petition to the trial court."[52] Under Rule 32.2(a), a petitioner is precluded from relief in state post-conviction proceedings on claims that were:

(1) Raisable on direct appeal or on post-trial motion;
(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;[53]
(3) [W]aived at trial, on appeal, or in any previous collateral proceeding.[54]

Prior to 1992, an issue was precluded only when the petitioner failed to "knowingly, voluntarily and intelligently" raise an issue.[55] While the "knowingly, voluntarily and intelligently" standard still attaches to claims of "sufficient constitutional magnitude," courts have held that other errors are waived if they were not raised at trial, on appeal, or in a prior collateral proceeding, even if those waivers were not made "knowingly, voluntarily, and intelligently."[56] "The question [as to] whether an asserted ground is of

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46 ARIZ. R. CRIM. P. 32.9(c)(1)(i)-(iv).
47 ARIZ. R. CRIM. P. 32.9(c)(1); ARIZ. REV. STAT. § 13-4239(C) (2005).
48 ARIZ. R. CRIM. P. 32.9(c)(2).
49 *Id.*
50 *Id.*
51 ARIZ. REV. STAT. § 13-706(A); Krone v. Hatham, 890 P.2d 1149, 1150 (Ariz. 1995) (en banc).
52 State v. Rosales, 66 P.3d 1263, 1267-68 (Ariz. Ct. App. 2003).
53 *See* State v. Wallace, 773 P.2d 983, 985 (Ariz. 1989) (en banc) (rejecting claims that the petitioner's death sentences must be vacated because a "defendant cannot utilize post-conviction relief proceedings in order to attack matters finally adjudicated on their merits on direct appeal").
54 ARIZ. R. CRIM. P. 32.2(a); ARIZ. REV. STAT. § 13-4232(A) (2005).
55 ARIZ. R. CRIM. P. 32.2 cmt.
56 ARIZ. R. CRIM. P. 32.2 cmt.; Stewart v. Smith, 46 P.3d 1067, 1070-71 (Ariz. 2002) (en banc).

'sufficient constitutional magnitude' to require a knowing, voluntary and intelligent waiver. . . does not depend upon the merits of the particular ground," but "merely upon the particular right alleged to have been violated."[57] The Arizona Supreme Court has recognized a defendant's right to counsel and a defendant's right to a jury trial to be of "sufficient constitutional magnitude" to mandate a knowing, voluntary, and intelligent waiver.[58]

Although the State generally must plead and prove by a preponderance of the evidence any grounds for preclusion, the trial court, on its own motion, may hold a claim to be precluded.[59] The court may not preclude a claim in any event, however, when the petition rests on at least one of the following grounds delineated in Rule 32.1:

(1) The person is being held in custody after the sentence imposed has expired;
(2) Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence;[60]
(3) The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part;
(4) There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence;
(5) The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found the defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.[61]

2. Successive and Untimely Petitions

Generally, a petitioner must raise all possible claims for post-conviction relief in his/her first petition and will not be granted relief unless the petition is timely filed. Successive or untimely petitions may be permitted, however, if the petition raises any of the five Rule 32.1(d) through (h) exceptions delineated immediately above.[62] Whenever claims implicating Rules 32.1(d) through 32.1(h) are raised in a successive or untimely post-conviction petition, the notice of post-conviction relief must "set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner."[63] If the exception and reasons specified by the petitioner fail to substantiate the claims, the court must dismiss the petition.[64] A death-row inmate who

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[57] ARIZ. R. CRIM. P. 32.2 cmt.; *Stewart*, 46 P.3d at 1070-71.
[58] *See Stewart*, 46 P.3d at 1070.
[59] ARIZ. R. CRIM. P. 32.2(c); ARIZ. REV. STAT. § 13-4232(C) (2005).
[60] *See supra* note 10.
[61] ARIZ. R. CRIM. P. 32.1; *see also* ARIZ. REV. STAT. §§ 13-4232(B), 13-4231(4)-(7) (2005).
[62] ARIZ. R. CRIM. P. 32.2(b). After filing a notice for post-conviction relief, the petitioner has thirty days to file a successive petition. ARIZ. R. CRIM. P. 32.4(c).
[63] ARIZ. R. CRIM. P. 32.2(b).
[64] *Id*.

files a successive post-conviction petition also may seek a stay of his/her execution in the Arizona Supreme Court, if needed.[65]

Furthermore, when a death-row inmate files a petition under Rule 32.1(f) alleging only that his/her failure to appeal the court's decision within the prescribed time was without fault on his/her part, s/he does not waive any potential substantive claims for post-conviction relief in a subsequent petition.[66]

C. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel must be raised in a Rule 32 post-conviction proceeding.[67] If a petitioner raised or could have raised claims of ineffective assistance of counsel in an earlier post-conviction petition, any ensuing claims of ineffective assistance of counsel will be considered waived and thereby precluded.[68] Because a petitioner has no constitutional right to counsel during post-conviction proceedings, a petitioner in a capital case may not allege a claim based on counsel's performance during the post-conviction proceedings.[69]

In order to overturn a conviction and/or sentence on the basis of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient, and (2) that the deficient performance caused prejudice to the petitioner.[70] While counsel's performance may fall below "the range of competence demanded of attorneys in criminal cases," reversal is warranted if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[71]

D. Retroactivity of New Constitutional Rules

In determining whether a new constitutional rule may be applied retroactively, most Arizona courts have adopted the three-pronged analysis articulated by the U.S. Supreme Court in *Teague v. Lane*.[72] Under *Teague*, the court first must determine whether a petitioner's case has become "final."[73] A case is final when "a judgment of conviction

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[65] ARIZ. R. CRIM. P. 32.4(f).

[66] ARIZ. R. CRIM. P. 32.1(f); State v. Rosales, 66 P.3d 1263, 1266 (Ariz. Ct. App. 2003).

[67] State v. Torres, 93 P.3d 1056, 1060-61 (Ariz. 2004) (en banc) (noting that claims of ineffective assistance of counsel must be raised in a Rule 32 proceeding); State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) (en banc) ("Ineffective assistance of counsel claims are to be brought in Rule 32 proceedings."). If, however, a petitioner has raised or raises the claim on direct appeal, the court simply will not address the issue, and the petitioner will not be precluded from re-raising the claim in his/her petition for post-conviction relief. *Spreitz*, 39 P.3d at 526.

[68] *Spreitz*, 39 P.3d at 526. The claim will not be precluded if it falls within any of the exceptions noted in Rules 32.1(d) through 32.1(h). *See supra* note 61 and accompanying text.

[69] State v. Mata, 916 P.2d 1035, 1049 (Ariz. 1996) (en banc); State v. Krum, 903 P.2d 596, 599-600 (Ariz. 1995). The Arizona Supreme Court has noted that, as a practical matter, such a right "would be the likelihood of an infinite continuum of litigation." *Mata*, 916 P.2d at 1049.

[70] State v. Vickers, 885 P.2d 1086, 1090-92 (Ariz. 1994) (en banc); Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[71] *Vickers*, 885 P.2d at 1090-92. "Reasonable probability" is defined as less than "more likely than not," but more than "a mere possibility." *Id.*

[72] State v. Towery, 64 P.3d 828, 831 (Ariz. 2003) (en banc); Teague v. Lane, 489 U.S. 288 (1987).

[73] *Towery*, 64 P.3d at 831.

has been rendered, the availability of appeal exhausted, and the time for a petition for *certiorari* elapsed or a petition for *certiorari* finally denied." [74] In nearly all instances, except where a petitioner files for post-conviction relief before the conclusion of his/her direct appeal, a petitioner's case has become final if s/he is pursuing post-conviction relief.[75]

Second, the court must determine whether the new constitutional rule is substantive or procedural in nature.[76] Once a petitioner's case is final, s/he may only avail him/herself of new substantive rules.[77] For a new procedural rule to apply retroactively in a final case, the rule must either (1) "place[ ] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) be "a watershed rule of criminal procedure that is 'implicit in the concept of ordered liberty.'"[78]

Alternatively, a limited number of Arizona courts have adopted the analysis outlined in *Allen v. Hardy*[79] to determine whether a new rule applies retroactively.[80] Under *Allen*, the courts must consider three factors: (1) the purposes of the new rule,[81] (2) the degree to which law enforcement authorities relied on the old rule,[82] and (3) the effect of its retroactive application on the administration of justice.[83]

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[74] *Id*. at 831-32 (quoting Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987)).
[75] *Id*. at 831.
[76] *Id.*
[77] *Id*.
[78] *Id.* at 833; Teague v. Lane, 489 U.S. 288, 307, 311 (1987). A watershed rule must "seriously diminish the likelihood of obtaining an accurate conviction" and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Towery*, 64 P.3d at 833; Tyler v. Cain, 533 U.S. 656, 665 (2001); *Teague*, 489 U.S. at 307, 313.
[79] Allen v. Hardy, 478 U.S. 256 (1986).
[80] Towery, 64 P.3d at 835; Allen v. Hardy, 478 U.S. 255 (1986).
[81] *See Allen*, 478 U.S. at 259 ("Retroactive application is 'appropriate where a new constitutional principle is designed to enhance the accuracy of a criminal trials.").
[82] *See Towery*, 64 P.3d at 836 (finding that the justice system's good faith reliance on *Walton v. Arizona*, which approved of Arizona's capital sentencing scheme in which a judge, and not a jury, determined the presence of aggravating factors weighed against the retroactive application of the new rule).
[83] *Id*. at 835; *Allen*, 478 U.S. at 258.

II. ANALYSIS

A. Recommendation #1

> **All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.**

While the Arizona Rules of Criminal Procedure contain certain rules that seem to permit the adequate development and judicial consideration of claims, there are several aspects of Arizona law that may preclude this. Specifically, Arizona law (1) assigns the original sentencing judge to preside over post-conviction proceedings, (2) allows for summary dismissal of post-conviction claims without an evidentiary hearing, (3) imposes strict timelines for filing a post-conviction petition, and (4) does not require an automatic stay of execution upon the filing of a successive petition.

1. Assignment of Sentencing Judge to Post-Conviction Proceedings

Post-conviction cases in Arizona usually are assigned to the sentencing judge.[84] Although the sentencing judge may have knowledge of relevant facts and issues, a potential for bias or the appearance of bias exists under this scenario, as post-conviction proceedings stem from a decision in which the judge presided. A judge's ability to exercise independent judgment, therefore, may be compromised and a petitioner may not be afforded adequate judicial consideration.

2. Filing Deadlines and Summary Disposition of Claims

The time restrictions promulgated in the Rules of Criminal Procedure potentially could limit the adequate development of post-conviction claims. Prior to 1992, Arizona law allowed any individual convicted of a criminal offense to file a petition for post-conviction relief "at any time after entry of judgment and sentence," and, upon the petition being filed, allowed the trial court to stay the execution.[85] Because "unwarranted delay" sometimes resulted from inmates waiting until the eve of their execution date to file a petition, the Arizona Supreme Court amended the rule to provide for the automatic filing of a notice of post-conviction relief.[86]

Today, Arizona law mandates an automatic filing of a notice of post-conviction relief once the Arizona Supreme Court affirms a petitioner's conviction and death sentence on direct appeal.[87] A death-row inmate then has 120 days to file a petition for post-

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[84] *See* ARIZ. R. CRIM. P. 32.4(e). The judge must transfer the case if it appears that his/her testimony may be relevant. *Id. See also* ARIZ. REV. STAT. § 13-4234(I) (2005).

[85] *See* Krone v. Hatham, 890 P.2d 1149, 1150 (Ariz. 1995) (en banc).

[86] *See id*.

[87] ARIZ. R. CRIM. P. 32.4(c)(2).

conviction relief.[88] Although the court may grant filing extensions, the time which Arizona courts have allotted to file this petition may or may not be sufficient to ensure the adequate development of all claims. It is thus unclear whether the time periods allotted for filing post-conviction petitions provide adequate time for petitioners to fully develop viable claims and file legally sufficient petitions.

Furthermore, the State's procedures for summary disposal and its failure to require evidentiary hearings inhibit full judicial consideration of all post-conviction claims. Arizona trial courts have the authority to summarily dispose of a petition without affording the petitioner an evidentiary hearing if, after noting all precluded claims, the court determines that no remaining claim presents a material issue of law or fact entitling the petitioner to relief.[89] The court is required to hold an evidentiary hearing only if there is a claim presenting material issues of law or fact.[90] Indeed, Arizona case law indicates that courts may summarily dispose of a post-conviction proceeding after a petitioner files a notice of post-conviction relief, but before filing an actual petition, if a prior petition had already been filed.[91] Given that the court may dispose of a petition without an evidentiary hearing, it is imperative that petitioners be afforded sufficient time to fully develop their claims in order to avoid their dismissal.

3. Stays of Execution

The Arizona Supreme Court may not issue an execution warrant until "a conviction and sentence of death are affirmed and the first post-conviction proceedings have concluded."[92] However, if a petitioner files a successive post-conviction petition, s/he must seek a stay of his/her execution in the Arizona Supreme Court, delineating any claims for post-conviction relief in the stay application.[93] The Court has discretion to either grant or deny the petitioner's request, which, in the case of a denial, deprives the petitioner of an "adequate opportunity to fully brief, argue and decide" his/her claims.[94] Given that an automatic stay is not mandated when a petitioner files a successive petition, state post-conviction proceedings are likely to be unfairly expedited in these instances.

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[88] ARIZ. R. CRIM. P. 32.4(c)(1). *See also* State ex. rel. Napolitano v. Brown, 982 P.2d 815 (Ariz. 1999) (en banc) (holding that under the separation of powers doctrine the Arizona code provision providing sixty days to file a petition for post-conviction relief was unconstitutional because it conflicted with the court rule providing 120 days).

[89] ARIZ. R. CRIM. P. 32.6(c). Before summarily disposing of the petition, the trial court must review the petition, response, reply, files and records and identify all procedurally defaulted claims. ARIZ. R. CRIM. P. 32.6(c).

[90] ARIZ. R. CRIM. P. 32.8(a), 32.6(c). If a hearing is held, the State, if requested, must notify the victims. *Id.*

[91] *See* State v. Rosales, 66 P.3d 1263, 1264, 1267 (Ariz. Ct. App. 2003) (noting that a post-conviction petition based on Rule 32.1(f) was filed after the petitioner's initial notice in this non-death penalty case and stating "if, as here, a trial court is presented with a successive notice of post-conviction relief in which no claims under Rule 32.1(d) through (h) are articulated, supported by facts, and excused for being tardily raised, the court could dismiss the entire proceeding on the notice, implicitly finding that all potential claims are precluded by being waived in the previous proceedings.").

[92] ARIZ. REV. STAT. § 13-706(A) (2005); Krone v. Hatham, 890 P.2d 1149, 1150 (Ariz. 1995) (en banc).

[93] ARIZ. R. CRIM. P. 32.4(f); ARIZ. REV. STAT. § 13-4234(J). This, of course, assumes the petitioner wishes to seek a stay of his/her execution.

[94] *See* State v. Mata, 916 P.2d 1035, 36-37 (Ariz. 1996) (en banc) (concluding that the petitioner is not entitled to a stay of his execution upon the filing of his fourth petition for post-conviction relief because his claim of ineffective assistance counsel was precluded).

Although the State of Arizona provides a post-conviction framework that inhibits the full development and adequate judicial consideration of claims, we were unable to determine to what extent, if any, the time-limits for filing post-conviction petitions hindered a petitioner from fully developing any viable claims and filing a legally sufficient petition. We also were unable to ascertain with certainty to what extent, if any, bias or the appearance of bias permeated judges' decisions, and if Arizona courts exercised their discretion in a manner that permitted the full and deliberate consideration of all post-conviction claims.

We are thus unable to conclude whether the State of Arizona complies with the requirements of Recommendation #1.

B. Recommendation #2

The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.

Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

Rule 32 of the Arizona Rules of Criminal Procedure does not delineate a method by which a petitioner may obtain discovery in post-conviction proceedings. Instead, under Arizona law, the trial court has the inherent authority to grant a petitioner's request for discovery on a showing of "good cause."[95] To show good cause, a petitioner must first file a post-conviction petition,[96] which protects the State from "random discovery requests" and facilitates consideration of a petitioner's claims for post-conviction relief and a petitioner's request for discovery.[97] For the court to compel discovery, the allegations set forth in the petition must state a colorable claim.[98] If the court compels discovery and a petitioner thereby uncovers new or exculpatory evidence, s/he may amend his/her petition to include any additional claims for post-conviction relief.[99]

Given that the trial court has considerable discretion in determining the scope of discovery, we were unable to ascertain whether Arizona courts exercise this discretion to both provide full and meaningful discovery. Thus, we are unable to conclude whether the State of Arizona complies with the requirements of Recommendations #2 and #3.

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95 Canion v. Cole, 115 P.3d 1261, 1263 (Ariz. 2005) (en banc).
96 *Id.*
97 *Id.*
98 *Id.*
99 *See* ARIZ. R. CRIM. P. 32.6(d); *Canion*, 115 P.3d at 1264.

C. Recommendation #4

When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for disposition of claims.

Although a petitioner may appeal the denial of his/her post-conviction petition, the Arizona appellate courts are not obligated to hear the appeal.[100] When the court grants review, the court may order that oral arguments be held and may grant any relief deemed "necessary and proper."[101] While the trial court must make specific findings of fact and expressly state its conclusions of law in issuing its opinion,[102] the Arizona Supreme Court has no similar obligation.[103] Indeed, in capital cases, the record of the post-conviction proceedings—which consists of the notice of post-conviction relief, the petition for post-conviction relief, response and reply (if any), all motions and responsive pleadings, all minute entry orders issued, the transcript, and exhibits admitted—is only transferred to the Arizona Supreme Court on request of the court.[104]

Because the State of Arizona is neither required to address explicitly the issues of fact and law raised by the claims nor required to issue opinions that fully explain the bases for disposition of claims, the State fails to meet the requirements of Recommendation #4.

D. Recommendation #5

On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not properly preserved at trial or on appeal.

Recommendation #6

When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding, and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.

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[100] ARIZ. R. CRIM. P. 32.9(c)(2).

[101] *Id.*

[102] ARIZ. R. CRIM. P. 32.8(d).

[103] *See* State v. Tankersley, 121 P.3d 829, 830-31 (Ariz. 2005) (remanding a portion of the case to the Superior Court to make specific findings of fact); *see also* ARIZ. SUP. CT. R. 111(b) (detailing that an opinion is mandated when a majority of the judges determine that the opinion: (1) "[e]stablishes, alters, modifies or clarifies a rule of law, or; (2) "[c]alls attention to a rule of law which appears to have been generally overlooked;" (3) [c]riticizes existing law;" (4) "[i]nvolves a legal or factual issue of unique interest or substantial public importance;" or a judge, who has a concurring or dissenting expression, wishes for the decision to be published). To the best of our knowledge, whether all post-conviction decisions in capital cases raise "a legal or factual issue of unique interest or substantial public importance" has not been addressed by the Arizona courts.

[104] ARIZ. R. CRIM. P. 32.9(e).

Before 1992, a petitioner in Arizona must have failed to "knowingly, voluntarily and intelligently" raise any issue before having the issue precluded.[105] Today, while the "knowingly, voluntarily and intelligently" standard still attaches to claims of "sufficient constitutional magnitude," courts have held that other errors are waived if not properly preserved at trial or on appeal.[106] Whether an asserted ground is of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver hinges upon the particular right alleged to have been violated.[107] The Arizona Supreme Court has recognized a defendant's right to counsel and a defendant's right to a jury trial to be of "sufficient constitutional magnitude."[108]

Furthermore, the State of Arizona does not apply a "plain error" review in post-conviction proceedings.

Because the State of Arizona fails to apply the "plain error" standard in its review of post-conviction proceedings, and applies the "knowingly, voluntarily, and intelligently" standard only to certain constitutional errors not properly preserved at trial or raised on appeal, the State fails to meet the requirements of Recommendations #5 and #6.

E. Recommendation #7

> **The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.**

Recommendation #8

> **For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with American Bar Association *Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.**

In 2000, then-Attorney General Janet Napolitano created the Attorney General's Capital Case Commission (the Commission) to study the death penalty process in Arizona and issue recommendations ensuring its fair and timely implementation.[109] The Commission unanimously believed that the establishment of a statewide public defender office for capital cases would be the "best and most effective" manner by which to improve capital trials in Arizona.[110] In 2001 and 2002, the Commission endorsed legislation seeking the creation of a statewide public defender office to represent indigent capital defendants in

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[105] ARIZ. R. CRIM. P. 32.2 cmt.
[106] ARIZ. R. CRIM. P. 32.2 cmt.; Stewart v. Smith, 46 P.3d 1067, 1070-71 (Ariz. 2002) (en banc).
[107] ARIZ. R. CRIM. P. 32.2 cmt.; *Stewart*, 46 P.3d at 1070-71.
[108] *See Stewart*, 46 P.3d at 1070; *see also* State v. Espinosa, 29 P.3d 278, 280 (Ariz. Ct. App. 2001) (holding in non-death penalty cases that the violation of a defendant's due process rights where the prosecutor improperly withdrew a plea offer was not of "sufficient constitutional magnitude" to require a knowing, voluntary, and intelligent waiver).
[109] OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, at 1 (Dec. 2002).
[110] *Id*. at 14.

post-conviction proceedings.[111] Both years, the bill failed in the legislature.[112] In June 2006, Arizona created the state capital post-conviction public defender office to "[r]epresent any person who is not financially able to employ counsel in postconviction relief proceedings in state court after a judgment of death has been rendered."[113]

The Arizona Supreme Court has held that death-row inmates in post-conviction proceedings have no constitutional right to appointed counsel and that the appointment of investigators and expert witnesses is permitted only when "reasonably necessary."[114] Nonetheless, the Arizona Supreme Court[115] recognizes a "state-created right" to counsel and appoints post-conviction counsel for indigent inmates on death row.[116]

The Arizona legislature has mandated that post-conviction counsel meet the following requirements:

(1) Be a member of the State Bar of Arizona for at least five years immediately prior to appointment;
(2) Have three years of criminal litigation experience on the state level immediately prior to the appointment;
(3) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases;
(4) Within the three years prior to his/her appointment, have served as lead counsel in an appeal or post-conviction proceeding of a capital case and experience as lead counsel in the appeal of three felony convictions and a post-conviction proceeding resulting in an evidentiary hearing. Or, have served as lead counsel in the appeal of at least six felony convictions (two must be appeals from a first or second-degree murder conviction), and lead counsel in two post-conviction proceedings cases resulting in evidentiary hearings.
(5) Within a year before the appointment, have completed at least six hours of relevant training or educational programs in the area of capital defense, and within a year prior to any subsequent appointment, at least twelve hours of relevant training or educations programs in the area of criminal defense.[117]

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[111] *Id.*
[112] *Id.*
[113] ARIZ. REV. STAT. § 41-4251 (F)(1) (2006).
[114] *See* State v. Mata, 916 P.2d 1035, 1052 (Ariz. 1996) (en banc) (recognizing a "state-created right" to counsel during post-conviction proceedings); *see also* State v. Apelt, 861 P.2d 634, 650-51 (Ariz. 1993) (en banc) (concluding that a defendant must show that the appointment of investigators and experts are "reasonably necessary"); ARIZ. REV. STAT. § 13-4013(B) (2005) (calling for the appointment of investigators and experts in cases where they are "reasonably necessary to adequately present a defense at trial and at any subsequent proceeding").
[115] Either the Arizona Supreme Court or the trial court judge, who must be authorized by the Arizona Supreme Court, may appoint counsel. ARIZ. R. CRIM. P. 32.4(c)(1).
[116] ARIZ. R. CRIM. P. 32.4(b); *Mata*, 916 P.2d at 1052.
[117] ARIZ. R. CRIM. P. 6.8(a), (c). Under exceptional circumstances, an attorney who does not meet these requisites may be appointed. *See* ARIZ. R. CRIM. P. 6.8(d).

The Arizona Rules of Professional Conduct provide that the qualifications set forth above apply to all attorneys, whether appointed or retained, who represent capital defendants.[118]

In addition, Arizona law requires that appointed post-convcition counsel meet the following qualifications:

(1) Be a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment;
(2) Have practiced in the area of state criminal appeals or post-conviction proceedings for at least three years immediately preceding the appointment; and
(3) Not previously have represented 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.[119]

Currently, under Arizona law, court appointed counsel is compensated at a rate "not to exceed" $100 per hour.[120] If the number of hours worked by counsel exceeds 200, counsel still is entitled to compensation, so long as s/he shows "good cause."[121]

While Arizona has promulgated qualifications for counsel, the State, among other things, does not require the appointment of two attorneys in each post-conviction capital case and has failed to provide counsel in a timely manner. The Commission, noting the acute need for defense counsel in post-conviction proceedings, cited to at least six capital cases in which inmates were awaiting the appointment of post-conviction counsel.[122] Indeed, at the time of the Report's publication, several death-row inmates had been awaiting the appointment of counsel for nearly two years.[123]

While the State of Arizona recently established a statewide public defender office to represent capital defendants in state post-conviction, there is no similar arrangement in federal habeas corpus and clemency proceedings and the State has yet to meet the requirements outlined by the American Bar Association. Consequently, the State of Arizona is only in partial compliance with Recommendations #7 and #8.

F. Recommendation #9

State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.

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[118] ARIZ. R. OF PROF'L CONDUCT 1.1 cmt.
[119] ARIZ. REV. STAT. § 13-4041(C) (2005).
[120] ARIZ. REV. STAT. § 13-4041(F) (2005).
[121] ARIZ. REV. STAT. § 13-4041(G) (2005).
[122] *See supra* note 109, at 21.
[123] *Id.*

Arizona post-conviction courts give full retroactive effect to changes in the law announced by the United States Supreme Court in limited circumstances. Although Arizona courts recognize a petitioner's right to avail himself of new substantive rules, the court will usually accord retroactive effect to new procedural rules in post-conviction proceedings when (1) the new rule places certain conduct beyond the scope of the law, or (2) the new rule is a "watershed" rule of criminal procedure "implicit in the concept of ordered liberty."[124] Alternatively, a limited number of Arizona courts may allow the retroactive application of a new rule after weighing three factors: (1) the purposes of the new rule, (2) the degree to which law enforcement authorities relied on the old rule, and (3) the effect of its retroactive application on the administration of justice.[125] All other new rules of procedural law, including those announced by the United States Supreme Court, apply retroactively only to cases still within the direct appeal pipeline.[126]

Because the State of Arizona accords retroactive effect to changes in the law announced by the United States Supreme Court under limited circumstances, the State of Arizona is in partial compliance with Recommendation #9.

G. Recommendation #10

> **State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.**

Arizona law allows for successive post-conviction petitions when (1) a meritorious claim is not raised or litigated as a result of counsel's deficient performance or (2) an intervening court decision that changed the law precluded a likely meritorious claim from being raised in the petitioner's earlier petition.[127] It appears, however, that in cases where an intervening court decision extinguishes the bar against filing a successive petition, the question of the law's retroactivity, as discussed in Recommendation #9, must be addressed before the court will consider the revived claim. Thus, even if a change in the law allows a petitioner to overcome the statutory bar against successive post-conviction petitions, the new law must be a rule of substantive criminal law or a new rule of law necessary to ensure the fundamental fairness and accuracy of a criminal trial in order to be applied to the petitioner's case.[128]

Although Arizona law allows for successive post-conviction petitions where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, claims raised in a successive petition pursuant to an intervening court decision may still be barred due to the application of stringent retroactivity rules.

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[124] State v. Towery, 64 P.3d 828, 833 (Ariz. 2003) (en banc); Teague v. Lane, 489 U.S. 288, 307, 311 (1987).

[125] *Towery*, 64 P.3d at 835; Allen v. Hardy, 478 U.S. 255, 258 (1986).

[126] *See* State v. Febles, 115 P.3d 629, 632 (Ariz. Ct. App. 2005).

[127] *See* State v. Spreitz, 39 P.3d 525, 526 (Ariz. 2002) (en banc). Although claims not raised in the first petition are generally considered precluded, the claims will not be precluded if they fall within any of the exceptions noted in Rules 32.1(d) through 32.1(h). *See supra* note 61 and accompanying text.

[128] *See supra* notes 72 through 83 and accompanying text.

The State of Arizona, therefore, only partially meets the requirements of Recommendation #10.

H. Recommendation #11

> **In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.**

In *Chapman v. California*, the U.S. Supreme Court stated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[129] The burden to show that the error was harmless falls on the "beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."[130] Arizona courts follow this pronouncement by requiring the same burden of proof for errors involving a petitioner's constitutional rights—the petitioner is entitled to post-conviction relief unless the State proves that the error is harmless beyond a reasonable doubt.[131]

The State of Arizona, therefore, meets Recommendation #11.

I. Recommendation #12

> **During the course of a moratorium, a "blue ribbon commission" should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future**.

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to the State of Arizona at this time.

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[129] Chapman v. California, 386 U.S. 18, 24 (1967).
[130] *Id.*
[131] ARIZ. R. CRIM. P. 32.8(c). *See* State v. Smith, 4 P.3d 388, 395 (Ariz. Ct. App. 1999); State v. Clark, 887 P.2d 572, 573 (Ariz. Ct. App. 1994).

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE

Under a state's constitution or clemency statute, the Governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual; and (2) whether a person should be put to death. This process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death-row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[1]

Since 1972, when the United States Supreme Court temporarily barred the death penalty as unconstitutional, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through April 2006, clemency has been granted on humanitarian grounds 229 times in 19 of the 38 death penalty states and the federal government.[2] One hundred sixty-seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the State's only opportunity to prevent miscarriages of justice, even in cases involving actual innocence. A clemency decision maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of a death sentence without regard to constraints that may limit a

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[1] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

[2] *See* Death Penalty Information Center, Clemency, *at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited on May 11, 2006).

court's or jury's decision making. Yet as the capital punishment process currently functions, meaningful review frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION

A. Clemency Decision Makers

1. Authority of the Board of Executive Clemency and the Governor

While the Arizona Board of Executive Clemency (Board) holds the sole power to recommend a grant of executive clemency, the power to make such a grant rests exclusively with the Governor.[3] Without first receiving a recommendation by the Board, the Governor is powerless to issue a reprieve, commutation or pardon of any kind.[4] This statutory mandate that the Board first issue a recommendation is designed to "prevent the [G]overnor from abusing the clemency power" vested in her/him by the Arizona Constitution.[5]

2. Appointment to and Structure of the Board

The Board consists of five members, including a Chair selected biennially by the Governor.[6] Members of the Board are nominated by a selection committee appointed by the Governor.[7] The selection committee, which is comprised of the Director of the Department of Public Safety, the Director of the State Department of Corrections and three others of the Governor's choosing, compiles a list of three qualified nominees for each vacancy on the Board.[8] Subject to the Senate's consent, the Governor, in turn, appoints a Board member from the list of candidates provided by the selection committee.[9]

Each Board member is appointed on the basis of his/her professional or educational background and is to have a manifested interest in the State's correctional program.[10] In order to ensure a "philosophically balanced"[11] Board, only two members from the same profession are allowed to serve concurrently.[12] Members serve on a full-time basis[13] for a term of five years,[14] which may be interrupted by the Governor "for cause."[15]

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[3] ARIZ. REV. STAT. § 31-402(A), (C) (2005); ARIZ. CONST. art. V, § 5. *See also* McDonald v. Thomas, 40 P.3d 819, 824 (Ariz. 2002) (en banc) (stating that "the [G]overnor retains ultimate authority to grant or deny a recommended commutation"). There are two noted exceptions to the Governor's power– the Governor does not have the power to grant clemency to individuals convicted of treason and in cases of impeachment. ARIZ. CONST. art. V, § 5. However, the Governor may suspend execution of a sentence for treason until the case can be reported to the legislature at its next session. ARIZ. REV. STAT. § 31-444 (2005).

[4] ARIZ. REV. STAT. § 31-402(A), (C) (2005).

[5] *McDonald*, 40 P.3d at 825.

[6] ARIZ. REV. STAT. § 31-401(A), (F) (2005). The Chairman, however, may be removed "at the pleasure of the [G]overnor." ARIZ. REV. STAT. § 31-401(F) (2005).

[7] ARIZ. REV. STAT. § 31-401(A) (2005).

[8] ARIZ. REV. STAT. §§ 31-401(A), 38-211(A) (2005).

[9] ARIZ. REV. STAT. § 31-401(A) (2005).

[10] ARIZ. REV. STAT. § 31-401(B) (2005).

[11] *See* Questionnaire to the Governor's Office (on file with author).

[12] ARIZ. REV. STAT. § 31-401(B) (2005).

[13] *Id.*

The Board also is required to employ an Executive Director,[16] who is charged with "perform[ing] all administrative, operational and financial functions for the [B]oard."[17] Within this sphere, the Executive Director is empowered to hire any needed case analysts to assist the Board in gathering information on commutation applications,[18] as well as any hearing officers to aid in the investigation of cases.[19]

3. Duties of the Board and the Governor

The Governor must immediately transmit all clemency applications relating to felony offenses committed prior to 1994 to the Chair of the Board upon receipt.[20] Upon review, the Board must return the applications with its recommendations to the Governor along with documentation that the victim or his/her family was notified of the pending application.[21] With respect to felony offenses committed on or after January 1, 1994, the Board must receive and review petitions for pardons and commutations of death sentences from any individuals, organizations, or the Arizona Department of Corrections.[22]

Additionally, Board members, once appointed, are obliged to partake in a four-week course that is "relat[ed] to the duties and activities of the [B]oard" and is conducted by the Board and the Attorney General's Office.[23] The Board also must convene at least once a month at the state prison.[24] While three members of the Board generally must be present to establish a quorum and take action, the Chair may stipulate a quorum to consist of the presence of two Board members.[25] When a quorum is present, the Board is free to adopt and amend any rules deemed "proper for the conduct of its business," so long as those rules do not conflict with existing law.[26]

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[14] ARIZ. REV. STAT. § 31-401(D) (2005).
[15] ARIZ. REV. STAT. § 31-401(E) (2005).
[16] ARIZ. REV. STAT. § 31-401(K) (2005).
[17] ARIZ. REV. STAT. § 31-402(E) (2005).
[18] ARIZ. REV. STAT. § 31-402(F) (2005).
[19] ARIZ. REV. STAT. § 31-402(G) (2005).
[20] ARIZ. REV. STAT. § 31-402(B) (2005).
[21] *Id*.
[22] ARIZ. REV. STAT. § 31-402(C)(4) (2005). *See also* ARIZ. REV. STAT. § 31-402(C)(3) (2005) (noting that the Board, for those felony offenses committed on or after January 1, 1994, is also to "receive petitions from individuals for whom the court has entered a special order allowing the person to petition the [B]oard pursuant to § 13-603, subsection L").
[23] ARIZ. REV. STAT. § 31-401(C) (2005).
[24] ARIZ. REV. STAT. § 31-401(H) (2005).
[25] ARIZ. REV. STAT. § 31-401(I) (2005). When two members constitute a quorum and fail to agree on the action under consideration, the Chairman will cast the deciding vote. However, if the Chairman is one of the two members, no action can be taken until a quorum consisting of at least three members is established. ARIZ. REV. STAT. § 31-401(J) (2005).
[26] ARIZ. REV. STAT. § 31-401(G) (2005).

B. Clemency Petitions

Under Arizona law, a clemency hearing is not a matter of right, but "a matter of executive grace."[27] Consequently, the due process afforded by the Constitution in such instances is "quite limited;"[28] petitioners, for instance, are not entitled to counsel.[29] They may, however, obtain counsel on their own accord to represent them through the process.[30]

1. Pardons

Except where proscribed by law, any individual convicted of a felony offense in Arizona may apply for a pardon, so long as the conviction still stands.[31] Individuals applying for a pardon are required to complete and submit a pardon application to the Board.[32] In doing so, Arizona law mandates that an applicant serve a written and signed notice of his/her intention to apply for a pardon on the county attorney where the applicant was convicted ten days before the Board "acts upon" a pardon application and that the applicant provide proof of service to the Board.[33] "Unless dispensed with by the [G]overnor," a copy of the notice also is to be published for thirty consecutive days in a newspaper situated in the county in which the applicant was convicted.[34] These procedural requirements, however, are waived when the convicted individual is in "imminent danger."[35]

Once the Department of Corrections reviews the application and finds the inmate "eligible" for a pardon,[36] the Board may require the applicant to submit further information.[37]

2. Commutations of Death Sentences

To apply for a commutation of a death sentence, the applicant generally completes a Commutation of Sentence Application as adopted by the Board.[38] In the application, inmates are to detail (1) their institutional record, (2) any positive accomplishments within prison, (3) their reasoning for the commutation, (4) their involvement in the

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[27] Woratzeck v. Ariz. Bd. of Exec. Clemency, 117 F.3d 400, 404 (9th Cir. 1997).
[28] *Id.*
[29] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[30] *Id.*
[31] ARIZ. ADMIN. CODE § R5-4-201(A) (2005).
[32] ARIZ. ADMIN. CODE § R5-4-201(B), (C) (2005).
[33] ARIZ. REV. STAT. § 31-442(A) (2005).
[34] *Id.*
[35] ARIZ. REV. STAT. § 31-442(B) (2005). "Imminent danger of death" is defined by the Board as meaning "upon verification by the Arizona Department of Corrections Health Services, an applicant has been examined by a medical doctor and that doctor has diagnosed the applicant as suffering from a medical condition which, in the doctor's professional medical opinion, will to a reasonable medical certainty result in the applicant's death within six (6) months." Policy No. 100.01.A (Ariz. Bd. of Exec. Clemency 2003).
[36] ARIZ. ADMIN. CODE § R5-4-201(B), (C) (2005).
[37] *Id.*
[38] Policy No.400.13(A) (Ariz. Bd. of Exec. Clemency 2004).

crime, (5) their plans upon returning to society, and (6) any other additional information they deem fit.[39]

The Board normally only considers applicants who have served two years of their sentence and are not within a year of their mandated release or their possible release via parole.[40] Where the Board receives a warrant of execution issued by the Arizona Supreme Court, as well as in several other limited cases,[41] the Board retains the power to waive such procedural requirements, including the submission of the Board's adopted application.[42] In fact, when a warrant of execution is issued for a death-row inmate, the Chair automatically will schedule a reprieve and commutation hearing.[43]

3. Reprieves

Death-row inmates need not submit an application for a reprieve.[44] Under Arizona policy, after the Arizona Supreme Court issues a warrant of execution, the Board automatically arranges a reprieve and commutation hearing for the inmate.[45] While the Board asks that individuals who "wish to . . . personally request a reprieve hearing" complete the Commutation of Sentence Application, the individual need not do so, as the Board suspends all "formalities" upon the issuance of an execution warrant.[46]

Moreover, when an inmate fails to submit any documents or evidence in support of the reprieve or commutation, the assigned hearing officer will draft a report for the Board, detailing the case and including all court documents and transcripts.[47] Board members may review the report before the hearing.[48]

C. The Clemency Decision Making Process

1. Scope of Review and Consideration of Petitions for Pardons and Commutations

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[39] *See* Commutation of Sentence Application, as adopted by the Bd. of Exec. Clemency (on file with the author).

[40] Policy No. 400.13(C) (Ariz. Bd. of Exec. Clemency 2004).

[41] For example, in instances where an applicant is "not in imminent danger of death" and has only completed a year of his/her sentence, the Board may commute the sentence if (1) the sentence is three years or less and (2) the applicant's earliest eligibility release date is greater than six months away. Policy No. 400.13(C) (Ariz. Bd. of Exec. Clemency 2004). *See also* ARIZ. REV. STAT. §13-603(L) (2005). If, at sentencing, the court finds that the legally mandated sentence is "clearly excessive," the individual can petition the Board within ninety days of his/her commitment to the Department of Corrections for a commutation of that sentence.

[42] Policy No. 400.13(E) (Ariz. Bd. of Exec. Clemency 2004).

[43] Policy No. 400.08(A), (D) (Ariz. Bd. of Exec. Clemency 1998); *see also* Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

[44] Policy No. 400.08(A) (Ariz. Bd. of Exec. Clemency 1998); *see also* Ariz. Op. Att'y Gen. No. I80-224 (1980).

[45] Policy No. 400.08(A), (D) (Ariz. Bd. of Exec. Clemency 1998); *see also* Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

[46] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

[47] *Id.*

[48] *Id.*

When considering a petition for clemency, neither the Board nor the Governor is required to conduct any specific type of review.[49] No restrictions exist, by statute, regarding what the Board may consider in making its recommendation to the Governor.[50] The Board therefore is free to consider anything, including their own personal beliefs.[51] Indeed, according to the current Chair of the Board, Duane Belcher, the Board will consider everything the applicant submits.[52] In deciding whether to grant or deny clemency, the Governor, by law, need only be provided with the clemency application and the Board's recommendation.[53]

2. Clemency Hearings on Petitions for Pardons, Commutations, and Reprieves

a. Pardons[54]

In cases of pardon applications, once all procedural requirements are satisfied, the Board will set a hearing date and notify the applicant in writing of its date and time.[55] If it so chooses, the Board may require the judge before whom the applicant was convicted or the prosecuting attorney to provide a statement of proven facts from the trial "without delay" and any other facts relating to the "propriety of granting or refusing the pardon."[56]

At the hearing,[57] the Board will vote either (1) to deny the pardon request, or (2) to recommend to the Governor that a pardon be granted.[58] While recognizing that pardons are to be made in "extraordinary cases," Arizona law provides no other statutory guidance to the Board in making or denying a pardon recommendation.[59] When the Board votes to recommend a pardon, those members voting in favor must provide the Governor with a recommendation letter outlining their rationale.[60] Similarly, opposing members, if they wish, are free to send to the Governor a "letter of dissent."[61] Regardless of the Board's decision, the applicant must be notified in writing of the outcome within ten working days.[62]

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[49] *Id.*; Questionnaire, *see supra* note 11.

[50] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] A pardon is defined as "an action by the [G]overnor that absolves an applicant of the legal consequences of the crime for which the applicant was convicted." ARIZ. ADMIN. CODE § R5-4-101(5) (2005).

[55] ARIZ. ADMIN. CODE § R5-4-201(D) (2005).

[56] ARIZ. REV. STAT. § 31-441 (2005).

[57] All hearings are open to the public. ARIZ. DEP'T OF CORR. ORDER MANUAL, Order No. 202.02(1.1) (effective April 16, 2001).

[58] ARIZ. ADMIN. CODE § R5-4-201(E) (2005).

[59] ARIZ. REV. STAT. § 31-402(C)(4) (2005) (stating that for persons who committed felony offenses on or after January 1, 1994, the Board "shall receive petitions from individuals, organizations or the department for review and commutation of sentences and pardoning of offenders in *extraordinary cases* and may make recommendations to the [G]overnor") (emphasis added).

[60] ARIZ. ADMIN. CODE § R5-4-201(F) (2005).

[61] *Id.*

[62] ARIZ. ADMIN. CODE § R5-4-201(E) (2005).

b. Commutations of Sentences[63]

After review by the Department of Corrections, only applicants considered "eligible"[64] will be afforded a public hearing by the Board on their request for a commutation.[65] For individuals who committed felony offenses on or after January 1, 1994, the Board must provide notice of the hearing to the victim, county attorney, and presiding judge and afford each the opportunity to speak.[66]

Generally, commutation hearings are conducted in two parts: Phase I and Phase II.[67] During the Phase I hearing, the Board reviews the application, any letters, the applicant's files, and "all relevant information."[68] Although the Phase I hearing is *in absentia*,[69] anyone, including friends, family, victims and legal counsel, can submit relevant written materials or testify orally before the Board.[70] At the end of the Phase I hearing, the Board can find by a majority vote (1) that the application needs no further consideration, or (2) that a Phase II hearing is warranted to further investigate the matter.[71] If, however, an inmate is "the subject of a warrant of execution issued by the Arizona Supreme Court," a Phase I hearing is not obligatory.[72]

The Phase II hearing consists of an interview of the applicant, a review of "all relevant information," together with a report prepared by Board staff, and testimony from witnesses— be they family, friends, victims, legal counsel, or others.[73] Upon its conclusion, the Board renders a "final decision" as to whether to recommend a commutation to the Governor.[74]

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[63] The United States Supreme Court has defined a commutation as a "substitution of a lesser type of punishment for the punishment actually imposed at trial." Schick v. Reed, 419 U.S. 256, 273 (1974).

[64] *See* Policy No. 400.13(B)-(F) (Ariz. Bd. of Exec. Clemency 2004). Applicants considered "eligible" are those who (1) served two years of their sentence and are not within a year of their parole eligibility or mandatory release; (2) served one year of their sentence which is not to exceed three years, is not in imminent danger of death, and is not within six months of their earliest possible release date, (3) obtained a court order pursuant to sect. 13-603(L) of the A.R.S. (which means that at the time of the sentencing the court found the legally mandated sentence to be clearly excessive) allowing the individual to petition the Board within ninety days after commitment to the Dep't of Corrections for a commutation. Such "eligibility criteria" may be waived by the Board however if (1) the applicant is in imminent danger of death, and the medical status has been verified by the Department of Corrections; (2) the Arizona Supreme Court has issued a warrant of execution; or (3) the court has entered a special order pursuant to sect. 13-603(L) of the A.R.S.

[65] Policy No. 400.13(B) (Ariz. Bd. of Exec. Clemency 2004); Ariz. Dep't of Corr. Order Manual, Order No. 202.02(1.1) (effective April 16, 2001).

[66] ARIZ. REV. STAT. § 31-402(C)(2) (2005). It is unclear from the law in which phase of the hearing should such an opportunity be afforded.

[67] Policy No. 400.13(F) (Ariz. Bd. of Exec. Clemency 2004).

[68] Policy No. 400.13(F)(1) (Ariz. Bd. of Exec. Clemency 2004).

[69] *See* Policy No. 100.01(A)(20) (Ariz. Bd. of Exec. Clemency 2003) (defining "*in-absentia*" as "a hearing conducted by the Board where the inmate is not present").

[70] Policy No. 400.13(F)(1) (Ariz. Bd. of Exec. Clemency 2004).

[71] *Id.*

[72] Policy No. 400.13(F)(3) (Ariz. Bd. of Exec. Clemency 2004).

[73] Policy No. 400.13(F)(2) (Ariz. Bd. of Exec. Clemency 2004).

[74] *Id.*

The only statutory guidance in making a recommendation of commutation is provided in section 31-402 of the Arizona Revised Statutes.[75] Here, the Board may recommend a commutation to the Governor for individuals who committed felony offenses on or after January 1, 1994, if "clear and convincing evidence" shows that "the sentence imposed is clearly excessive given the nature of the offense and the record of the offender" and that "a substantial probability" exists "that when released the offender will conform [his/her] conduct to the requirements of the law."[76] However, such a standard is neither applicable nor used in death penalty cases.[77] In practice, when dealing with death penalty cases, Chair Duane Belcher has stated that, for the Board, the only question is: "Should this person be executed?"[78]

As in pardon cases, if a majority of the Board votes in favor of a recommending a commutation, a letter outlining the Board's rationale must be sent to the Governor.[79] Opposing Board members may also contribute letters of dissent.[80] All letters and any materials considered by the Board during the Phase II hearing will be passed on to the Governor by the Chair.[81]

c. Reprieves[82]

Upon the Chair's receipt of a warrant of execution, a death-row inmate will receive a reprieve hearing.[83] The Board provides written notification to the inmate of the hearing's time and location at least fifteen days before its date.[84] The Board also notifies victims, officials, and, if necessary, consular officials of the hearing.[85] If a death-row inmate opts not to attend, the reprieve hearing is conducted in his/her absence.[86] Generally, the Chair meets with the inmate beforehand to ensure that s/he comprehends the process and, where applicable, that s/he is sure of his/her decision not to attend.[87]

All reprieve hearings are held at the Rynning Unit in the Eyman Complex of the Florence Prison and are open to the public.[88] Typically, the State first addresses the

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[75] Note that this section applies only to persons who committed felony offenses on or after January 1, 1994. ARIZ. REV. STAT. § 31-402(C)(2) (2005).
[76] *Id.*
[77] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[78] *Id.*
[79] Policy No. 400.13(G) (Ariz. Bd. of Exec. Clemency 2004).
[80] *Id.*
[81] Policy No. 400.13(H) (Ariz. Bd. of Exec. Clemency 2004).
[82] See Rodriguez v. Sims, 156 P. 94, 96 (Ariz. 1916) (noting that a reprieve "postpones the execution of a judgment for a time, and does not and cannot defeat the ultimate execution of the judgment of the court").
[83] Policy No. 400.08(A) (Ariz. Bd. of Exec. Clemency 1998).
[84] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

Board, followed by the inmate and/or counsel, who may attempt to refute the State's case.[89] Any individuals present at the hearing also may address the Board.[90]

Afterwards, Board members have an opportunity to speak before voting whether to recommend a reprieve or commutation to the Governor.[91] At the end of the reprieve hearing, the Board must act either (1) to recommend to the Governor a reprieve or a commutation of the inmate's death sentence, or (2) to not recommend a reprieve or commutation of the sentence.[92] The Chair must "immediately" call the Governor's Office with the decision and send a letter via fax or hand delivery with the Board's recommendation to the Governor's Office.[93]

D. Clemency Decisions

After the Board makes its recommendation, the power to grant or deny clemency lies with the Governor.[94] In making this decision, the Governor has great discretion. In fact, the Governor may grant commutations, pardons, and reprieves for any offense other than impeachment and treason, upon any of the "conditions, restrictions and limitations [s/]he *deems proper*."[95] If the Governor fails to act within ninety days of the Board's recommendation, however, any unanimous recommendation for commutation by the present and voting Board members becomes effective automatically.[96]

When the Governor grants a pardon, commutation, or reprieve or suspends execution of a death sentence, s/he must publish the reason(s) for the grant within ten days.[97] A copy of the Governor's rationale must also be filed with the Secretary of State.[98] Furthermore, at the start of each regular session, the Governor must provide the legislature with the details of each case in which clemency was granted, including the prisoner's name, the crime, the sentence and its date, the date of the grant, and the Governor's rationale for doing so.[99]

If, however, the Governor denies the Board's recommendation of a pardon, the applicant will receive written notice from the Board at the time the decision is known.[100] To re-apply for a pardon, the applicant must wait three years from the date

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Policy No. 400.08(D) (Ariz. Bd. of Exec. Clemency 1998).
[93] *Id.*
[94] ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. § 31-402(A), (C) (2005).
[95] ARIZ. REV. STAT. § 31-443 (2005) (emphasis added).
[96] ARIZ. REV. STAT. § 31-402(D) (2005).
[97] The publication must be in a newspaper of general circulation in the county of the grantee's conviction. ARIZ. REV. STAT. § 31-445 (2005).
[98] *Id.*
[99] ARIZ. REV. STAT. § 31-446 (2005).
[100] ARIZ. ADMIN. CODE § R5-4-201(G) (2005).

the pardon is denied.[101] In cases of commutations, the applicant must wait until two years have lapsed from the date the Board took final action on the application.[102]

Finally, where the Governor denies the Board's recommendation for a reprieve or one is not recommended, the Board, nevertheless, must be "continuously available to receive any last minute information" twenty-four hours before the scheduled execution and must be ready to reconvene at least three hours before the schedule execution.[103] In such instance, only the inmate or the attorney of record may ask for the reprieve hearing to be reopened.[104]

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[101] *Id.*

[102] Policy No. 400.13(I) (Ariz. Bd. of Exec. Clemency 2004). Note that a commutation may be denied by the Board in either Phase I or Phase II.

[103] Policy No. 400.08(E), (F) (Ariz. Bd. of Exec. Clemency 1998).

[104] Policy No. 400.08(G) (Ariz. Bd. of Exec. Clemency 1998).

II. ANALYSIS

A. Recommendation #1

The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts.

Under Arizona law, neither the Board nor the Governor is required to conduct any specific type of review when considering a petition for clemency.[105] Indeed, the Governor's discretion in granting or denying clemency is largely "unfettered."[106] Similarly, Board members, in deciding whether to recommend a grant of clemency to the Governor, have great leeway and may consider anything, even their own personal beliefs.[107]

Since it is unclear what the clemency decision making review in Arizona specifically entails, we are unable to assess whether the State of Arizona is in compliance with this recommendation.

B. Recommendation #2

The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.

This recommendation requires the Governor and the Board to consider "all factors" which may lead them to conclude that a death sentence is not warranted. "All factors" include, but are not limited to the following:

(1) Constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not "unreasonable," state court rulings;
(2) Constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
(3) Lingering doubts of guilt (as discussed in recommendation #4);
(4) Facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
(5) Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);

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[105] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005); Questionnaire, *see supra* note 11.
[106] Wigglesworth v. Mauldin, 990 P.2d 26, 33 (Ariz. Ct. App. 1999).
[107] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

(6) Inmates' mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and

(7) Inmates' age at the time of the offense (as discussed in Recommendation #4).[108]

According to the Chair of the Board, Duane Belcher, Board members consider any information that is submitted to them and accord it proper weight in deliberation.[109] As mentioned previously, the Governor's discretion in granting or denying clemency is "unfettered."[110] Indeed, the governor may grant clemency upon any of the "conditions, restrictions and limitations [s/]he *deems proper*."[111] Although the current Governor, Janet Napolitano, has not received any clemency petitions for a death sentence, her counsel has stated that "all material information would be appropriately reviewed" in such a case.[112] We were unable to assess what exactly lies within the scope of "all material information," however.

A review of Arizona's past clemency decisions does not further illuminate the factors considered by the Governor in determining whether death is an appropriate punishment. Since the death penalty's reinstatement in 1973, twenty-two inmates have been executed.[113] All were afforded reprieve hearings, but only one, Walter LaGrand, a German national, received a reprieve recommendation from the Board.[114] Edward Levya, then Chair of the Board, said the Board was persuaded by the fact that LaGrand's case was to be presented to the International Court of Justice.[115] Governor Hull, however, denied the Board's recommendation to stay Hull's execution sixty days, commenting simply: "In the interest of justice and with the victims in mind, I have decided to allow this execution to go forward as scheduled."[116] Since no death-row inmate has ever been granted clemency and since neither the Governor nor the Board is required to explain any clemency denials, the factors considered by these decision-makers cannot be readily ascertained.

In summary, it appears that, while not required to do so, the Board does in practice consider the factors presented here, at least in some cases. We were unable to ascertain if these factors are considered by the Governor as well however; and therefore, are unable to ascertain whether the State of Arizona is in compliance with Recommendation #2. To ensure that "all factors" suggested by the ABA are considered when reviewing petitions for clemency, we recommend that a rule be adopted

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[108] AMERICAN BAR ASSOCIATION, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (2002).

[109] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

[110] *Wigglesworth*, 990 P.2d at 33.

[111] ARIZ. REV. STAT. § 31-443 (2005) (emphasis added).

[112] Questionnaire, *supra* note 11.

[113] Ariz. Dep't of Corr., Death Penalty History, *at* http://www.adcprisoninfo.az.gov/DeathRow/DeathPenaltyHistory.htm (last visited Oct. 13, 2005).

[114] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

[115] CNN.com, Arizona governor refuses deal on German death row inmate (Mar. 2, 1999), *at* http://www.cnn.com/US/9903/02/arizona.execution.01/.

[116] *Id.*

delineating the factors that the Board and the Governor must consider when reviewing clemency petitions.

C. Recommendation #3

Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographical disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.

Recommendation #4

Clemency decision-makers should consider as factors in their deliberations the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence relating to a lingering doubt about the inmate's guilt.

Recommendation #5

Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

As previously discussed, the Board will take into consideration any and all submitted materials in deciding whether to recommend a grant of clemency to the Governor.[117] According to Chair Duane Belcher, such factors include patterns of racial or geographic disparity, the inmate's mental state and competency, the inmate's age at the time of the offense, and any evidence relating to a lingering doubt about the inmate's guilt.[118] The Board also considers an inmate's possible rehabilitation or his/her performance of significant positive acts. For example, in the Board's Commutation of Sentence Application, inmates are asked to detail their "positive accomplishments" while imprisoned, including any participation in educational, vocational, and therapeutic programs, as well as to explain why they are entitled to a commutation of their sentence.[119]

Under Arizona law, the Governor must only be presented with the Board's recommendation and the clemency application before s/he decides to grant or deny clemency to a death-row inmate.[120] In deciding, the Governor may consider anything s/he "deems proper."[121] Again, although Governor Napolitano has not been presented with a clemency petition for a death-row inmate, her counsel has stated that in such a scenario "all material information would be appropriately reviewed."[122] It is unclear, however, whether the factors highlighted in Recommendations #3 through #5 would be

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[117] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[118] *Id.*
[119] Commutation of Sentence Application, *supra* note 39.
[120] Questionnaire, *supra* note 11.
[121] ARIZ. REV. STAT. § 31-443 (2005).
[122] Questionnaire, *supra* note 11.

deemed "material" by the Governor. Accordingly, we cannot assess whether the State of Arizona is in compliance with this recommendation.

Furthermore, because clemency has never been granted to an Arizona death-row inmate and a clemency denial does not require an explanation from the Board or the Governor, we cannot deduce the extent, if any, to which these factors have been considered in the past.[123]

To ensure that the factors in Recommendations #3 through #5 are considered in the clemency decision making process, we recommend that guidelines be created and utilized delineating the factors that the Board and the Governor must consider when reviewing a petition for clemency.

D. Recommendation #6

> **In clemency proceedings, death row inmates should be represented by counsel and such counsel should have qualifications consistent with the recommendations in the Defense Services Section.**

The State of Arizona does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency. Accordingly, the State of Arizona fails to comply with the requirements of Recommendation #6.

E. Recommendation #7

> **Prior to clemency hearings, death-row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.**

The State of Arizona does not have any laws, rules, procedures, standards, or guidelines entitling a death-row inmate's counsel to compensation or access to investigative and expert resources in preparation for clemency hearings, much less any laws entitling a defendant to counsel.[124]

A death-row inmate's counsel does appear, however, to have sufficient time to develop the basis for any factors, previously undeveloped, upon which clemency may be granted, as Arizona law has no filing deadlines for clemency petitions or for the submission of evidence.[125] In fact, the petitioner or his/her counsel even may submit evidence beyond the date of the reprieve hearing.[126] For example, when a reprieve is denied by the Governor or not recommended by the Board, the Board must be "continuously available to receive any last minute information" for at least twenty-four

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[123] *Id.*

[124] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).

[125] *Id.*

[126] *Id.*

hours prior to the execution.[127] Requests to reopen the hearing also are allowed by the inmate or his/her counsel.[128]

It remains unclear, however, whether counsel has sufficient time to rebut opposing evidence from the State. The State is not required to file any documents in opposition to a clemency petition, but if the State does respond during a reprieve hearing, an inmate's counsel is afforded an opportunity to refute the State's case at the hearing.[129] An inmate's counsel also may request to reopen the reprieve hearing, where a further opportunity to refute the State's case may be presented.[130]

Additionally, although the first phase of a commutation hearing is conducted *in absentia*, an inmate's counsel still is afforded an opportunity to speak.[131] We were unable to ascertain, however, if sufficient time is provided to counsel to rebut the State in commutation and pardon hearings where a warrant of execution has not been issued. We therefore cannot assess fully whether such opportunities are sufficient to rebut any opposition from the State.

Accordingly, the State of Arizona is only in partial compliance with Recommendation #7.

F. Recommendation #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

All pardon, commutation, and reprieve hearings presided over by the Board and held in the Arizona Department of Corrections facilities are "considered open meetings."[132] During this stage of the clemency proceedings, members of the media are permitted to attend and bring audiotape recorders as well as video cameras.[133] In reprieve hearings, anyone who desires to address the Board will be afforded the opportunity to do so.[134] Board members also may speak before voting upon a recommendation of reprieve, and the Board's decision to either recommend or not recommend clemency is made publicly.[135]

Once the Board makes its recommendation, the Governor grants or denies clemency in a process that appears to be shielded from public scrutiny. The Governor is only

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[127] Policy No. 400.08(F) (Ariz. Bd. of Exec. Clemency 1998).
[128] Policy No. 400.08(G) (Ariz. Bd. of Exec. Clemency 1998).
[129] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[130] Policy No. 400.08(G) (Ariz. Bd. of Exec. Clemency 1998).
[131] Policy No. 400.13(F)(1) (Ariz. Bd. of Exec. Clemency 2004).
[132] ARIZ. DEP'T OF CORR. ORDER MANUAL, Order No. 202.02(1.1) (effective April 16, 2001); *see* Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[133] ARIZ. DEP'T OF CORR. ORDER MANUAl, Order No. 202.02(1.4.5), (1.4.6) (effective April 16, 2001).
[134] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[135] *Id.*

required to explain his/her reasoning when s/he grants clemency and is under no similar requirement when s/he denies a clemency petition.[136] Because the Governor's decision-making process remains opaque, particularly when rejecting clemency applications, the State of Arizona is only in partial compliance with the requirements of Recommendation #8.

G. Recommendation #9

> **If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.**

The State of Arizona does not have any laws, rules, procedures, standards or guidelines requiring that the entire Board or the Governor meet with the petitioning inmate. As the ultimate decision-maker, the Governor generally is insulated from the inmate, rendering it possible or even likely that s/he will make a clemency decision without ever meeting the inmate.

Although not practice, such a scenario also may occur with the Board. In cases where a warrant of execution has been issued, the Board will hold a reprieve hearing.[137] An inmate has the option to attend and address the Board, but is not required to do so.[138] As a matter of course, however, Chair Belcher generally meets with the inmate before the hearing to ensure s/he understands the process and, where applicable, to ensure s/he understands his/her right to speak before the Board.[139]

Where a warrant of execution has not yet been issued by the Arizona Supreme Court, the Board is not mandated to meet with the inmate. Indeed, in a commutation hearing, the Phase I hearing is conducted in the inmate's absence, and only upon a Phase II hearing (if the Board finds one warranted) does the inmate have a right to testify personally before the Board.[140]

Although the Governor's Office is not mandated to meet in-person with a death row inmate, the Board affords all death row inmates an opportunity to plead their case in person at a reprieve hearing. As such, the State of Arizona is in partial compliance with this recommendation.

H. Recommendation #10

> **Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.**

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[136] ARIZ. REV. STAT. §§ 31-445, 31-446 (2005).
[137] Policy No. 400.08(A) (Ariz. Bd. of Exec. Clemency 1998).
[138] Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005).
[139] *Id.*
[140] Policy No. 400.13(F)(1) (Ariz. Bd. of Exec. Clemency 2004).

Board members must be appointed "on the basis of broad professional or educational qualifications and experience" and have a manifested interest in the State's correctional program.[141] Of the current Board members, all but one have a master's degree.[142] In addition, Arizona law mandates that Board members complete four weeks of training pertaining "to the duties and activities of the Board."[143] Although the exact scope and content of the training is unknown, it must include, at minimum, a decision-making workshop and a study of all the statutes affecting the Board.[144] While the course is "designed and administered" by the Chair, it is "conducted" by the Board and the Attorney General's Office.[145]

Significantly, the State of Arizona has no laws, rules, procedures, standards, or guidelines requiring the Board or the Governor to encourage the education of the public about the nature of clemency powers or on the limitations of the judicial system's ability to grant relief under circumstances that may warrant clemency.

Based on this information, the State of Arizona is only in partial compliance with Recommendation #10.

I. Recommendation #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

The ultimate decision to grant or deny clemency rests with the Governor.[146] To shield the Governor from political pressures, the legislature has provided that a unanimous Board recommendation to commute a sentence will take effect automatically should the Governor not act within ninety days.[147]

Nevertheless, in a sign that some elected officials are concerned about what is perceived to be a politically-charged commutation process,[148] Arizona Senator Linda Gray introduced a bill in January 2005 that would have transferred the exclusive power to grant commutations from the Governor to the Board, upon voter approval of a

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[141] ARIZ. REV. STAT. § 31-401(B) (2005).

[142] Arizona Board of Executive Clemency, Board Members, *at* http://azboec.gov (last visited Oct. 13, 2005).

[143] ARIZ. REV. STAT. § 31-401(C) (2005).

[144] *Id*.

[145] *Id.*

[146] ARIZ. REV. STAT. ANN. § 31-402(A), (C) (2005); ARIZ. CONST. art. v, § 5. *See also* McDonald v. Thomas, 40 P.3d 819, 824 (Ariz. 2002) (en banc) (stating that "the [G]overnor retains ultimate authority to grant or deny a recommended commutation").

[147] ARIZ. REV. STAT. § 31-402(D) (2005); *see also* Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005); Questionnaire to the Governor's Office (on file with author).

[148] *See* Amanda J. Crawford & Ryan Konig, *Clemency Voice Goes Unheeded*, THE ARIZ. REPUBLIC, May 22, 2005, at A1.

Constitutional amendment restricting the Governor's clemency powers.[149] The bill currently is pending in the Rules Committee.[150]

Although appointed by the Governor via a selection committee, Board members must be approved by the Senate,[151] which may also leave them vulnerable to political considerations. Arizona law, however, allows removal of Board members by the Governor only for cause, partially insulating the Board from political considerations.[152] Moreover, while Board hearings are open to the public,[153] Board members are not required to explain any decisions in which they deny clemency. They only must provide a rationale for their actions upon recommending a commutation or pardon and, even then, the rationale need only be provided to the Governor.[154] This quasi-confidentiality which surrounds the Board's decision-making process insulates members from political considerations and, at the same time, allows the process to maintain some transparency.

The State of Arizona has taken steps to ensure that clemency determinations are insulated from political considerations or impacts and thus is in partial compliance, at least, with Recommendation #11. We were unable to ascertain whether Arizona has done so to the maximum extent possible, however.

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[149] S.B. 1242, 47th Leg., 1st Sess. (Ariz. 2005). Senator Gray introduced the bill after becoming concerned that the Governor was failing to act on Board commutation recommendations, thereby keeping some inmates in prisons longer than needed and, consequently, wasting taxpayer money. Crawford, *supra* note 148.

[150] S.B. 1242, *supra* note 149 (pending within the Rules Committee).

[151] ARIZ. REV. STAT. § 31-401(A) (2005).

[152] ARIZ. REV. STAT. § 31-401(E) (2005); *see also* Telephone Interview by Tanya Imming with Duane Belcher, Chairman of the Ariz. Bd. of Exec. Clemency (June 7, 2005); Questionnaire, *supra* note 11.

[153] ARIZ. DEP'T OF CORR. ORDER MANUAl, Order No. 202.02(1.1) (effective April 16, 2001).

[154] *See* ARIZ. ADMIN. CODE § R5-4-201(F) (2005); Policy No. 400.13(G) (Ariz. Bd. of Exec. Clemency 2004).

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the "awesome responsibility" of deciding whether another person will live or die.[1] Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors' decision making. Often, however, jury instructions are poorly written and conveyed. As a result, instructions often serve only to confuse jurors, not to communicate.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial courts, whether intentionally or not, give instructions that may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors conclude that their decisions are not vitally important in determining whether a defendant will live or die.

It also is important that courts ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of "life without parole" does not ensure that the offender will remain in prison for the rest of his/her life. Such jurors may vote to impose a death sentence because they erroneously believe that otherwise, the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment. Unfortunately, jurors often believe that mitigation is the same as aggravation, or that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.

[1] Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

I. FACTUAL DISCUSSION

A. *Voir Dire*

All individuals charged with a capital felony possess the right to a trial by jury,[2] although a defendant may waive that right with the consent of the prosecutor and court.[3] In selecting a capital jury, the court may examine either a select group of potential jurors,[4] or, along with counsel, the entire prospective jury pool.[5] This process, which is known as *voir dire*, allows the court to assess each prospective juror's qualifications and fitness to serve.[6] At its end, the State and defense will have selected twelve jurors to resolve a capital defendant's fate—life or death.[7]

1. Structure and Scope of *Voir Dire*

Voir dire is intended to "unveil a juror's prejudices so that the parties can exercise intelligently their peremptory challenges and challenges for cause."[8] The court has the primary responsibility in conducting *voir dire*[9] and is responsible for identifying the parties and their counsel, briefly outlining the nature of the case, explaining the purpose of the examination, and asking questions that touch on the prospective jurors' qualifications.[10]

At the court's discretion, the parties may present brief opening statements to the entire jury panel.[11] The court then must conduct a "thorough oral examination" of the prospective jurors.[12] Although its scope is limited to inquiries related to either party's exercise of a challenge for cause or peremptory challenge,[13] this questioning is intended to "elicit more detailed and candid responses."[14]

If a prospective juror is reluctant to admit his/her opinion in open court or a juror's comments "concerning the case might color the entire jury's perspective," the court may

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[2] ARIZ. CONST. art. II, § 23; ARIZ. REV. STAT. § 13-703.01(S)(1) (2005) (defining the trier-of-fact to be a jury or, if the defendant waives his/her right to a jury trial, the court).

[3] ARIZ. REV. STAT. § 13-3983 (2005); ARIZ. R. CRIM. P. 18.1(b).

[4] The group consists of thirty-two potential jurors (because twelve individuals comprise a jury and the parties are allowed a total of twenty peremptory strikes, thirty-two potential jurors are selected), along with however many alternates (if any) have been chosen. *See* ARIZ. R. CRIM. P. 18.5(b).

[5] *Id.*

[6] ARIZ. R. CRIM. P. 18.5(d).

[7] ARIZ. CONST. art. II, § 23; ARIZ. REV. STAT. § 21-102(A) (2005). *See also* ARIZ. R. CRIM. P. 18.2, 18.5(h). The jury may also be comprised of an unknown number of alternatives (if any).

[8] State v. Verive, 627 P.2d 721, 727 (Ariz. Ct. App. 1981).

[9] ARIZ. R. CRIM. P. 18.5(a)-(e) cmt.

[10] ARIZ. R. CRIM. P. 18.5(c).

[11] *Id.*

[12] ARIZ. R. CRIM. P. 18.5(d).

[13] ARIZ. R. CRIM. P. 18.5(e).

[14] State v. Blakley, 65 P.3d 77, 83 (Ariz. 2003).

privately examine the jurors.[15] In addition to the oral examination, the court may approve the completion of written questionnaires by prospective jurors.[16]

The prosecution and defense also may be allowed to examine individual jurors, but only if good cause appears during the court's examination.[17]

a. Required and Proper Questioning During *Voir Dire*

Beyond the general requirement that the court "conduct a thorough oral examination of prospective jurors,"[18] there are no specific questions that must be asked during *voir dire* and "[t]he extent of *voir dire* examination is left to the sound discretion of the trial court."[19]

While specific questions are not mandated, the court must examine potential jurors on a subject if there is a "nexus between [a] prejudice feared and an issue in the case."[20] When a juror's response hints at a possible prejudice, the court is obligated to pose further questions to allow the parties to determine if a challenge for cause should be made.[21]

As part of its examination, the court also should address prospective jurors' opposition to (*Witherspoon* questions)[22] and support of (reverse-*Witherspoon* questions)[23] the death penalty.[24] The "trial judge must excuse any potential jurors who cannot provide assurance that their views on the death penalty will not affect their ability to decide issues of guilt."[25]

There is no right to use jury questionnaires during *voir dire*, although their use is permitted at the court's discretion.[26]

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[15] ARIZ. R. CRIM. P. 18.5(a)-(e) cmt. The court may examine jurors privately only in "appropriate" cases. Examples of "appropriate" cases include those that involve "unusually sensitive subjects or which are surrounded by a great deal of publicity."

[16] ARIZ. R. CRIM. P. 18.5(d).

[17] ARIZ. R. CRIM. P. 18.5(a)-(e) cmt. For example, the trial judge must "allow the parties some leeway in exploring each panelist's exposure to pretrial publicity." State v. Blakely, 65 P.3d 77, 83 (Ariz. 2003).

[18] ARIZ. R. CRIM. P. 18.5(d).

[19] State v. Detrich, 932 P.2d 1328, 1336 (Ariz. 1997) (emphasis added).

[20] State v. Chaney, 686 P.2d 1265, 1274 (Ariz. 1984).

[21] *Id.*

[22] *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

[23] *See* Morgan v. Illinois, 504 U.S. 719, 731-34 (1992) (recognizing a right to dismiss jurors who would always impose the death penalty on a defendant).

[24] *See* State v. Moody, 94 P.3d 1119, 1144-45 (Ariz. 2004).

[25] State v. Canez, 42 P.3d 564, 578 (Ariz. 2002) (quoting State v. Kayer, 984 P.2d 31, 40 (Ariz. 1999)); s*ee also* State v. Anderson, 4 P.3d 369, 374 (Ariz. 2000) ("Disqualification when a juror states his inability to be impartial is not only permissible but imperative.") (quoting State v. Wiley, 698 P.2d 1244, 1253 (Ariz. 1985), *overruled on other grounds*).

[26] *Moody*, 94 P.3d at 1146.

b. Improper Questioning During *Voir Dire*

Voir dire is used to seek relevant information from and about jurors, but is not intended to impart information or arguments to the jurors.[27] In other words, attorneys are not allowed to "condition" jurors "by means of questions and argument which amount to preliminary instructions on the law and facts of the case."[28]

2. Juror Selection

After the judge, State, and defense have examined the prospective jurors on *voir dire*, the court will select the jury.[29]

a. Challenges for Cause

A challenge for cause is "a request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons."[30] A party may raise a challenge for cause at any time during the proceedings,[31] and may object to a juror serving if s/he:

(1) Has been convicted of a felony;
(2) Lacks any of the qualifications prescribed by law to render a person a competent juror;
(3) Is of such unsound mind or body as to render him[/her] incapable of performing the duties of a juror;
(4) Is related by consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;
(5) Stands in the relationship of guardian and ward, attorney and client, master and servant, or landlord and tenant, or is an employee of or member of the family of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;
(6) Has been a party adverse to the defendant in a civil action, or has complained against or been accused by him[/her] in a criminal prosecution;
(7) Has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;
(8) Has served on the trial jury which has tried another person for the offense charged in the indictment or information;

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[27] ARIZ. R. CRIM. P. 18.5(c), 18.5(a)-(e) cmt.
[28] ARIZ. R. CRIM. P. 18.5(a)-(e) cmt.
[29] ARIZ. R. CRIM. P. 18.5(g), (h).
[30] BLACKS LAW DICTIONARY 157 (6th ed. 1991).
[31] ARIZ. R. CRIM. P. 18.4(b). The court, however, may deny the challenge if the requesting party failed to exercise due diligence. *Id.*

(9) Has been a member of the jury formerly sworn to try the same charge and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

(10) Has served as a juror in a civil action brought against the defendant for the act charged as an offense;

(11) Is on the bond of the defendant or engaged in business with the defendant or with the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(12) Is a witness on the part of the prosecution or defendant or has been served with a subpoena or bound by an undertaking as such;

(13) Has a state of mind in reference to the action or to the defendant or to the person alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted, which will prevent him[/her] from acting with entire impartiality and without prejudice to the substantial rights of either party;

(14) If the offense charged is punishable by death, entertains conscientious opinions which would preclude his[/her] finding the defendant guilty, in which case [s/]he shall neither be permitted nor compelled to serve as a juror; or

(15) Does not understand the English language sufficiently well to comprehend the testimony offered at the trial.[32]

This list of objections, formerly enumerated in Rule 219 of the Arizona Rules of Criminal Procedure (1956), does not encompass all the bases upon which a challenge for cause may be formed.[33] In fact, the Rule was revised precisely to "direct the attention of attorneys and judges to the essential question [underlying a challenge for a cause]—whether a juror can try a case fairly."[34] Today, consequently, the Rule reads:

> When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative, or on motion of any party, shall excuse the juror from service in the case.[35]

A "reasonable ground" necessitating a juror's dismissal may be predicated on a juror's views on the death penalty. If a prospective juror expresses general objections or a conscientious opposition to capital punishment, however, s/he cannot automatically be dismissed.[36] Rather, the court, State, and/or defense must ask the juror additional questions to attempt to clarify and rehabilitate the juror's views on capital punishment.[37] If rehabilitation of the juror fails and the juror's views may "prevent or substantially

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[32] ARIZ. R. CRIM. P. 18.4(b) cmt.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* State v. Roseberry, 111 P.3d 402, 408 (Ariz. 2005) (reviewing potential jurors' personal objections to the imposition of the death penalty); Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding it unconstitutional to excuse a juror for cause simply because s/he is conscientiously opposed to or expressed general objections to capital punishment).

[37] *See* State v. Moody, 94 P.3d 1119, 1145 (Ariz. 2004); Wainwright v. Witt, 469 U.S. 412, 424-26 (1985); *see also* ARIZ. R. CRIM. P. 18.5(d) (calling for a "thorough examination" of the potential jurors by the court).

impair the performance of [the juror's] duties," the court may excuse the juror.[38] If a prospective juror states unambiguously that s/he would automatically vote against the death penalty, regardless of the facts, s/he must be excluded from the jury.[39] Conversely, if a potential juror states s/he would automatically vote for the death penalty, it is error for the trial judge to refuse to excuse the juror for cause.[40]

b. Peremptory Challenges

A peremptory challenge is "a request from a party that a judge not allow a certain prospective juror to be a member of the jury."[41] In all death penalty cases, the defendant and the State each are allowed ten peremptory challenges.[42] When defendants are tried jointly for a capital offense, each defendant is allowed five peremptory challenges, while the State is allowed a total of ten peremptory challenges.[43] Fewer peremptory challenges may be exercised on the agreement of the parties.[44]

The use of a peremptory challenge does not require any sort of justification or cause,[45] unless a party engages in purposeful discrimination on the grounds of race or gender.[46] If the State or defense believes that jurors are being struck from the jury based on race and/or gender, the party opposing the strike may challenge the use of the peremptory challenge.[47] In order to block the strike, the opposing party must establish a *prima facie* case of racial and/or gender discrimination.[48] If the opposing party establishes a *prima facie* case, the other party must provide a neutral explanation for the exercise of the challenge.[49] The explanation need not "be persuasive or even plausible, only legitimate."[50] The judge then must assess whether the opposing party has established a discriminatory intent.[51]

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[38] State v. Glassel, 116 P.3d 1193, 1208 (Ariz. 2005) (quoting *Wainwrigh*t, 469 U.S. at 424).

[39] *See* Roseberry, 111 P.3d at 408; State v. Anderson, 4 P.3d 369, 373 (Ariz. 2000).

[40] *See, e.g.*, State v. Canez, 42 P.3d 564, 578 (Ariz. 2002) (quoting State v. Kayer, 984 P.2d 31, 40 (Ariz. 1999)) ("The 'trial judge must excuse any potential jurors who cannot provide assurance that their death penalty views will not affect their ability to decide issues of guilt.'"); *Roseberry*, 111 P.3d at 408 ("Prospective jurors should be excused for cause if either their objection to, or support of, the death penalty prevents them from properly judging the facts of a particular case.").

[41] BLACKS LAW DICTIONARY, *supra* note 30, at 787.

[42] ARIZ. R. CRIM. P. 18.4(c)(1), (i).

[43] ARIZ. R. CRIM. P. 18.4(c)(2).

[44] ARIZ. R. CRIM. P. 18.4(c)(3).

[45] Bd. Trustees Eloy Elem. School Dist. v. McEwen, 430 P.2d 727, 734 (Ariz. Ct. App. 1967) (reiterating "that the right to challenge a given number of jurors without showing cause is one of the most important rights to a [defendant]").

[46] Batson v. Kentucky, 476 U.S. 79, 89 (1985) (holding that the Equal Protection Clause prohibits the State from challenging potential jurors solely on the basis of their race); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that a defendant may not engage in "purposeful discrimination on the ground of race in the exercise of peremptory challenges"); J.E.B. v. Alabama, 511 U.S. 127 (1994) (holding that the Equal Protection clause prohibits discrimination on the grounds of gender in selecting a jury).

[47] *Batson*, 476 U.S. at 89; *McCollum*, 505 U.S. at 59; State v. Martinez, 999 P.2d 795, 799-800 (Ariz. 2000).

[48] *Batson*, 476 U.S. at 89; *McCollum*, 505 U.S. at 59; *Martinez*, 999 P.2d at 800.

[49] *Batson*, 476 U.S. at 89; *McCollum*, 505 U.S. at 59; *Martinez*, 999 P.2d at 799-800 (holding that a black defendant's opposition to the death penalty was a neutral explanation).

[50] *Martinez*, 999 P.2d at 800 (quoting Purkett v. Elem, 514 U.S. 765, 767 (1995)).

[51] *Purkett*, 514 U.S at 767.

3. Appellate Review of *Voir Dire*

The judge's control of the scope of *voir dire* and decisions regarding a juror's qualifications are reviewed under an abuse of discretion standard.[52] In reviewing a judge's determination of a prospective juror's qualification, the appellate court must accord deference to the trial judge's decision.[53] If a defendant fails to object specifically to a juror, s/he may waive any challenges to the dismissal on appeal.[54]

B. Proposed Pattern Jury Instructions and Case Law Interpretation of Jury Instructions

At or before the conclusion of evidence, each party must present written requests for jury instructions and verdict forms to the court.[55] A copy of the requested instructions and verdict forms also must be provided to all other parties.[56] Prior to closing arguments, the court will hold a conference to discuss the proposed jury instructions and verdict forms.[57]

A capital defendant has the right to a jury instruction on "any theory reasonably supported by the evidence,"[58] and the trial judge has a duty to instruct the jury on the law "which relates to the facts of the case and matters necessary for proper consideration of the evidence."[59] The trial judge cannot disclose to the jury which instructions, if any, have been provided at the request of a specific party.[60] On review, to ascertain the sufficiency of instructions, the court will examine the instructions "in their entirety."[61]

Generally, if a party does not object to the court's instruction or to the court's failure to provide an instruction before the jury begins deliberating, s/he waives the right to raise any alleged errors on appeal, unless the error is "fundamental."[62] Failure to instruct the jury on a matter "vital" to the defendant's rights constitutes fundamental error.[63] A

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[52] *See* State v. Glassel, 116 P.3d 1193, 1205, 1207-08 (Ariz. 2005); State v. Da Volt, 84 P.3d 456, 472 (Ariz. 2004) (using a "clear abuse" standard and finding that the trial court did not abuse its discretion in denying the defendant's request to use a jury questionnaire).

[53] *Glassel*, 116 P.3d at 1208.

[54] *See* State v. Jones, 49 P.3d 273, 283 (holding that a capital murder defendant waived on appeal any challenges to dismiss potential jurors because he only made general objections to their qualifications); State v. Kayer, 984 P.2d 31, 40 (Ariz. 1999) (noting that absent a specific objection to a juror's dismissal, a juror's dismissal would only be reviewed for fundamental error).

[55] ARIZ. R. CRIM. P. 21.2.

[56] *Id.*

[57] ARIZ. R. CRIM. P. 21.3(a).

[58] *Martinez*, 999 P.2d at 804.

[59] State v. Gamble, 523 P.2d 53, 54 (Ariz. 1974).

[60] ARIZ. R. CRIM. P. 21.3(b).

[61] State v. Hoskins, 14 P.3d 997, 1015 (Ariz. 2000).

[62] ARIZ. R. CRIM. P. 21.3(c); *see* State v. Dickens, 926 P.2d 468, 489 (Ariz. 1996); State v. Gendron, 812 P.2d 626, 627 (Ariz. 1991) (noting that error "is fundamental when it reaches 'the foundation of the case or takes from the defendant a right essential to his defense,' or is an 'error of such dimension that it cannot be said it is possible for a defendant to have had a fair trial'").

[63] *Gamble*, 523 P.2d at 54.

defendant also may waive the right to raise any errors that stem from instructions that s/he has requested.[64]

The following sections will provide an overview of the proposed pattern jury instructions that have been adopted by the Board of Governors of the State Bar of Arizona. This overview will be followed by an in-depth description of certain portions of the proposed pattern jury instructions, along with a discussion of the courts' interpretation of the statutory aggravating and mitigating circumstances, and, to the extent possible, the courts' interpretation and application of various jury instructions.[65] Specifically, we have highlighted the relevant portions of jury instructions from the aggravation and penalty phases of two capital jury trials, *State v. Gay*[66] and *State v. Smith*.[67] While these two sets of jury instructions do not allow us to draw statewide conclusions, they do demonstrate the type of jury instructions that are being provided by the courts.

1. The Application of the Proposed Pattern Jury Instructions

Arizona currently has no pattern jury instructions specifically tailored to the two phases of a capital defendant's sentencing hearing, the aggravation/eligibility phase and the penalty phase. Prior to 2002, Arizona's capital sentencing scheme vested the trial judge with the authority to determine if a capital defendant received a sentence of life or death.[68] Consequently, a judge, not a jury, was responsible for making factual determinations pertaining to the presence of any aggravating and mitigating circumstances.[69] Because the capital sentencing determination was entrusted to a judge, the State of Arizona had no need for jury instructions.

In 2002, the U.S. Supreme Court struck down Arizona's capital sentencing scheme in *Ring v. Arizona*.[70] The Court held that the State's capital sentencing scheme violated a defendant's Sixth Amendment right to a jury trial because it relied on a judge to find the statutory aggravating circumstance(s) necessary to impose the death penalty.[71] In so doing, the U.S. Supreme Court relied on its decision in *Apprendi v. New Jersey*,[72] which held that juries, instead of judges, must determine any facts leading to an increased sentence. The Court reasoned:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding

[64] State v. Anderson, 111 P.3d 369, 386 (Ariz. 2005) (concluding because the defendant requested the instruction, he "invited" any error and waived any arguments claiming the instruction was error).
[65] As the need for jury instructions only arose in the wake of *Ring* and the State's revisions to the capital sentencing statute, Arizona case law concerning capital jury instructions is also limited.
[66] State v. Gay, CR 2001-1542 (May 2004).
[67] State v. Smith, CR 95116 (May 2004).
[68] Ring v. Arizona, 536 U.S. 584, 588, 591-92 (2002).
[69] *Id.*
[70] *Id*. at 589.
[71] *Id*. at 588-89.
[72] 530 U.S. 466 (2000).

> necessary to put him[/her] to death. We hold that the Sixth Amendment applies to both.[73]

In response to *Ring*, the Arizona Legislature amended the statute to grant jurors the power to determine whether the death penalty is appropriate.[74] Today, unless a defendant waives his/her right to a jury trial, only a jury may determine the presence of any aggravating and mitigating circumstances.[75]

Due to this recent shift, the Criminal Jury Instruction Committee of the State Bar of Arizona is in the process of drafting criminal pattern jury instructions for capital cases.[76] The instructions are set to be completed in October 2006.[77] While we have included in our discussion the relevant portions of the proposed pattern jury instructions that have been approved by the Board of Governors of the State Bar of Arizona, these instructions are still in draft form and are subject to change.

a. The Aggravation/Eligibility Phase[78]

The aggravation/eligibility phase of a capital defendant's sentencing hearing is designed to determine whether the State has proven beyond a reasonable doubt the existence of any statutory aggravating circumstances.[79] If the State does not prove the existence of at least one statutory aggravating circumstance, the defendant cannot be sentenced to death.[80] If the State does prove the existence of a statutory aggravating circumstance, however, the defendant will proceed to the penalty phase of the trial to determine the defendant's sentence.[81]

In providing instructions for the aggravation phase, the proposed pattern capital jury instructions, approved in part by the Board of Governors of the State Bar of Arizona, begin with a list of the possible penalties that may be imposed on the defendant—"death, or imprisonment for life without the possibility of release from prison, or imprisonment

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[73] *Ring*, 536 U.S. at 609.

[74] COMMITTEE ON PUBLIC INSTITUTIONS AND RETIREMENT, Minutes of Meeting (Feb. 7, 2005), Ariz. H.R., 47th Leg. (1st Reg. Sess.), *available at* http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/legtext/47leg/1R/comm_min/House/020705PIR.DOC.htm.

[75] A capital defendant, however, has no right to have the same jury which decided his/her guilt, also decide his/her sentence. State v. Anderson, 111 P.3d 369, 389 (Ariz. 2005) (rejecting defendant's claim that "because the jury at the penalty phase may consider any mitigation presented during the guilt phase. . ., a different jury cannot sit in the penalty phase").

[76] Unlike most other states, the Supreme Court of Arizona does not formally accept pattern jury instructions. *See* The State Bar of Arizona, Criminal Jury Instructions, *at* http://www.myazbar.org/SecComm/Committees/CRJI/crji.cfm (last visited March 3, 2006). Instead, Arizona courts may approve or disapprove of individual pattern jury instructions when they review them on appeal.

[77] Telephone Interview with Nedra Brown, Director of Sections and Committee, State Bar of Arizona (Feb. 21, 2006).

[78] Although the Arizona code refers to this portion of the sentencing hearing as the aggravation phase, the draft version of the Capital Case Sentencing Instructions refers to the aggravation phase as the eligibility phase.

[79] ARIZ. REV. STAT. §§ 13-703(B); 13-703.01(C) (2005).

[80] ARIZ. REV. STAT. § 13-703.01(E) (2005).

[81] ARIZ. REV. STAT. § 13-703.01(D) (2005).

for life with the possibility of release after twenty-five or thirty-five years."[82] The instructions then proceed to explain the bifurcated nature of the sentencing hearing: (1) a phase, in which the "jury decides whether any aggravating circumstances exist," and (2) if necessary, a second phase, in which the jury decides whether to sentence the defendant to life imprisonment or death.[83]

When assessing the existence of any statutory aggravating circumstances, the proposed instructions direct the jury to consider the testimony and exhibits that the court has admitted into evidence at either the trial and/or the aggravation/eligibility phase, with the caveat that any "[e]vidence that was admitted for a limited purpose shall not be considered for any other purpose."[84] The proposed instructions for the aggravation/eligibility phase also direct jurors to "not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," nor to be influenced by "[r]ace, color, religion, national ancestry, gender or sexual orientation" in performing their duties.[85]

b. The Penalty Phase

During the penalty phase of a capital defendant's sentencing hearing, the jury will determine whether the defendant should be sentenced to life imprisonment or death.[86] The proposed pattern capital jury instructions for the penalty phase, approved in part by the Board of Governors of the State Bar of Arizona, begin by reiterating to jurors that they "must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling" nor be "swayed by mere sympathy not related to the evidence presented during the penalty phase."[87] The proposed instructions also provide that jurors "must not be influenced by [their] personal feelings of bias or prejudice for or against the [d]efendant or any person involved in th[e] case on the basis of anyone's race, color, religion, national ancestry, gender or sexual orientation."[88]

In assessing whether the death penalty should be imposed, the proposed pattern capital jury instructions direct the jurors to consider evidence admitted during the trial, the aggravation/eligibility phase, and the penalty phase.[89] The instructions specifically inform the jury that:

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[82] Draft Capital Case Sentencing Instructions, Eligibility Phase, 1.1 Nature of the Hearing (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[83] *Id.*

[84] Draft Capital Case Sentencing Instructions, Eligibility Phase, 1.3 Evidence (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[85] Draft Capital Case Sentencing Instructions, Eligibility Phase, 1.2 Nature of the Hearing (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[86] ARIZ. REV. STAT. § 13-703.01(D), (E) (2005).

[87] Draft Capital Case Sentencing Instructions, Penalty Phase, 2.1 Nature of Hearing and Duties of Jury (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[88] *Id.*

[89] Draft Capital Case Sentencing Instructions, Penalty Phase, 2.2 Evidence (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author). The proposed pattern instructions also state that "evidence that was admitted for a limited purpose shall not be considered for any other purpose." *Id.*

> During this part of the sentencing hearing, the Defendant and the State may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. The State may also present any evidence that demonstrates that the Defendant should not be shown leniency.
>
> Mitigating circumstances may be found from any evidence presented during the trial, during the first part of the sentencing hearing or during the second part of the sentencing hearing.[90]

Under the proposed pattern capital jury instructions, each juror "should consider all of the evidence presented" without consideration as to which party presented it.[91] Jurors also are instructed that they are "the sole judges of the credibility of the witnesses" and of the weight that is to be accorded to the testimony of each witness. In assessing a witness' testimony, the proposed pattern instructions allow jurors to consider the "opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in a light of all the evidence, and any other factors that bear on credibility and weight."[92]

In reaching a verdict, the proposed pattern capital jury instructions impose upon jurors a duty to "discuss the case" and "consider the evidence" with their fellow jurors.[93]

2. Statutory Aggravating Circumstances

Arizona's capital sentencing scheme is comprised of an exclusive set of aggravating circumstances, detailed in section 13-703(F) of the Arizona Revised Statutes (A.R.S.).[94] These statutory aggravating circumstances serve to "genuinely narrow the class of persons eligible for the death penalty and [to] reasonably justify the imposition of a more severe sentence" on one defendant convicted of a capital offense as opposed to another.[95]

In providing jury instructions defining statutory aggravating circumstances, the Arizona Supreme Court has approved instructions stating that "[a]ggravating factors are those which increase the guilt or enormity of the offense."[96] The *Smith* court also used this language in defining the term "statutory aggravating circumstances" to jurors.[97]

The proposed pattern jury instructions state that "[i]n deciding whether an aggravating circumstance exists, you are not to be swayed by mere sentiment, conjecture, sympathy,

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] Draft Capital Case Sentencing Instructions, Penalty Phase, 2.4 Duty to Consult With One Another (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author). In so doing, the instructions also state to the jurors that: "Each of you must decide the case for yourself."
[94] ARIZ. REV. STAT. § 13-703(F) (2005).
[95] Zant v. Stephens, 462 U.S. 862, 877 (1983); State v. Martinez, 115 P.3d 618, 622 n.5 (Ariz. 2005).
[96] State v. Anderson, 111 P.3d 369, 391 (Ariz. 2005) (holding that the instruction did not constitute fundamental error). *See also* State v. Carreon, 107 P.3d 900, 917-18 (Ariz. 2005).
[97] Final Instructions, Aggravation Phase, State v. Smith, Jr. CR 95116, 64 (May 18, 2004).

passion, prejudice, public opinion, or public feeling. Race, color, religion, national ancestry, gender or sexual orientation should not influence you."[98]

a. Interpretation of the Statutory Aggravating Circumstances

i. The (F)(1) Aggravating Circumstance: The Defendant has been convicted of another offense in the United States, and under Arizona law a sentence of life imprisonment could be or was imposed.

The term "conviction" signifies "a determination of guilty," not a formal entry of judgment.[99] A determination of guilt arises when a defendant pleads guilty in open court, or the jury or trial judge returns a guilty verdict.[100]

This statutory aggravator may be predicated on an offense occurring after the capital murder offense for which the State is seeking the death penalty, so long as the conviction for the other offense is entered before the defendant's sentencing hearing.[101] A prior conviction, if invalidated, may not be used to support this aggravating circumstance.[102]

In determining whether a defendant could have received life imprisonment, the court will consider the potential sentences allowed for the crime on the date of the actual offense.[103]

In *State v. Smith*, the court provided the following (F)(1) instruction to the jury:

> To determine whether the [S]tate has proven this allegation, you must make two decisions: First, you must decide whether the defendant has been convicted in at least one of these cases: CR 77216 (rape), CR 77394 (rape), and CR 92168 (rape). Second, if you find that he has been convicted of one or more of these offenses, then you must decide whether under the law in effect at the time of the conviction that rape was an offense for which a sentence of life or death was imposable.[104]

ii. The (F)(2) Aggravating Circumstance: The Defendant was previously convicted of a serious offense, either preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.

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98 Draft Capital Case Sentencing Instructions, *supra* note 85.

99 State v. Walden, 905 P.2d 974, 994 (Ariz. 1995) *rejected on other grounds*.

100 *Id*. at 994-95.

101 *See* State v. Moody, 94 P.3d 1119, 1165 (Ariz. 2004) (holding that each of defendant's two murder convictions supported applying the (F)(1) aggravating circumstance to the other murder offense, even though the defendant committed the murders on different occasions).

102 State v. Jordan, 614 P.2d 825, 829-30 (Ariz. 1980).

103 State v. Atwood, 832 P.2d 593, 647-48 (Ariz. 1992), *overruled on other grounds*, (although stating that the court should consider the potential sentence allowed for the crime on the date of the actual offense, the Court did not appear to foreclose using the date of sentencing).

104 Final Instructions, Aggravation Phase, State v. Smith, Jr., CR 95116 65 (May 18, 2004).

In order for a jury to find that this aggravating circumstance exists, the State must prove beyond a reasonable doubt that the defendant was convicted of a "serious offense."[105] Section 13-703(I) of the A.R.S. defines a "serious offense" to include thirteen offenses: (1) first degree murder, (2) second degree murder, (3) manslaughter, (4) aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument, (5) sexual assault, (6) any dangerous crime against children, (7) arson of an occupied structure, (8) robbery, (9) burglary in the first degree, (10) kidnapping, (11) sexual conduct with a minor under fifteen years of age, (12) burglary in the second degree, and (13) terrorism.[106] A serious offense is not limited to the crimes detailed in the statute, however. For instance, in *State v. Martinez*, the Arizona Supreme Court affirmed the lower court's finding that the "dangerous or deadly assault by a prisoner," although not specifically delineated in section 13-703(I), constituted a serious offense for the purpose of determining the presence of this aggravating circumstance.[107]

The State may also seek the death penalty on the basis of this aggravating circumstance in expectation that the defendant will be convicted of a serious felony.[108] As long as the conviction for the serious offense is entered before the capital defendant's sentencing proceeding, the conviction may constitute an aggravating circumstance, regardless of the order of the crimes' occurrences or convictions.[109]

In *State v. Smith*, the court provided the jury with the following instruction in determining whether the (F)(2) aggravating circumstance existed:

> Concerning this alleged aggravating circumstance, the [S]tate claims that the defendant has been previously convicted of a felony involving the use or threat of violence on another person. To determine whether the [S]tate has proven this alleged aggravated circumstance, you must make two decisions. First, you must determine whether the defendant has been convicted of the first-degree murder of Sandy Spencer. Second, you must determine whether that first-degree murder conviction was a felony that necessarily involved the use or threat of violence on another person.
>
> In deciding whether the murder of Sandy Spencer necessarily involved the use or threat of violence, you are to consider (1) the statutory definition of "first degree murder" contained in Exhibit 6; (2) the indictment charging

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[105] *See* State v. Martinez, 999 P.2d 795, 805 (Ariz. 2000).

[106] ARIZ. REV. STAT. § 13-703(I) (2005).

[107] *Martinez*, 999 P.2d at 805-06 (noting that if the offenses listed in section 13-703(I) of the A.R.S. were identified by statute numbers, then the conviction for "dangerous or deadly assault by a prisoner" would not qualify as a previous conviction for a serious offense under section 13-703(F)(2)). Note that *Martinez* refers to the aggravating circumstance enumerated in section 13-703(H) of the A.R.S. which has been renumbered as 13-703(I).

[108] *See* State v. Lee, 944 P.2d 1204, 1218-19 (Ariz. 1997) (noting that a (F)(2) finding "applies to prior convictions as well as simultaneous convictions").

[109] *See* ARIZ. REV. STAT. § 13-703(F)(2) (2005); *Lee*, 944 P.2d at 1218-19. *But see* State v. Rutledge, 76 P.3d 443, 446-47 n.6 (Ariz. 2003) (holding that a serious offense conviction arising out of the same event as a murder charge could not be used to support the (F)(2) aggravator, if the offense occurred before May 26, 2003, the effective date of an amendment to A.R.S. § 13-703(F)(2) allowing for a "serious crime" occurring at the same time as the murder to support a (F)(2) finding).

the defendant with the first-degree murder of Sandy Spencer, Exhibit 5; and (3) the definition of violence detailed below. You cannot consider the specific facts of the offense; you are to solely consider the documents just described in deciding this aggravating factor.[110]

iii. The (F)(3) Aggravating Circumstance: 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.

A grave risk of death to another is presented only if the defendant's commission of the murder[111] places others in a "zone of danger."[112] Generally, the "mere presence of bystanders or pointing a gun at another to facilitate escape" does not support a finding of this aggravating circumstance.[113] Instead, the court must determine whether "during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injuries."[114]

Arizona courts have failed to uphold this aggravator where the defendant intended to kill the victim.[115]

iv. The (F)(4) Aggravating Circumstance: The Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

This aggravating circumstance generally applies in cases where the defendant hires an individual to commit murder.[116] The State may prove the existence of this aggravator by showing that the defendant "got the actual killers to commit the murder by promising to

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[110] Final Instructions, Aggravation Phase, State v. Smith, Jr. CR 95116, 65 (May 18, 2004).

[111] Only the actions surrounding the "murderous act itself" uphold this statutory aggravating circumstance. *See* State v. McCall, 677 P.2d 920, 933 (Ariz. 1983); s*ee also* State v. Tucker, 68 P.3d 110, 121 (Ariz. 2003) (concluding that a reasonable jury could disagree as to whether a risk of death was present during the defendant's "murderous attack" on three others which left an infant alone in a house).

[112] *See* State v. Carreon, 107 P.3d 900, 913 (Ariz. 2005) (concluding that although the victim's sons were present during her murder, "they were not within the zone of danger created by [the defendant's] murderous attack" because the gun shots were in the direction opposite their room); *Tucker*, 68 P.3d at 121.

[113] State v. Wood, 881 P.2d 1158, 1174 (Ariz. 1994). *See* State v. Jeffers, 661 P.2d 1105, 1129-30 (Ariz. 1983) (holding that the (F)(3) aggravating circumstance was not proven where defendant pointed a gun at an individual to ensure her cooperation while he killed another); *see also* State v. Smith, 707 P.2d 289, 300 (Ariz. 1985) (reversing the trial judge's finding of the (F)(3) aggravating circumstance where the defendant shot a convenience store owner in the presence of others and where he pointed the gun at two individuals in the parking lot while directing them to leave); State v. Nash, 694 P.2d 222, 235 (Ariz. 1985) (finding the individual was within the zone of danger because of her close proximity to the victim during the murder and the fact that the defendant pointed the gun at her while shooting the victim, and distinguishing the case from *Jeffers* on the grounds that the defendant there only pointed the gun at the third party "to quiet her" and intended no harm to the third party).

[114] *Carreon*, 107 P.3d at 913 (quoting State v. Gonzalez, 892 P.2d 838, 850 (Ariz. 1995)).

[115] *See McCall*, 677 P.2d at 933-34 (holding that because the shootings were neither "random [n]or indiscriminate," but "purposeful and intentional," the aggravating circumstance failed to exist); State v. Fierro, 804 P.2d 72, 83 (Ariz. 1990) (upholding the (F)(3) aggravating circumstance because the defendant had no intent to kill the third party).

[116] *See* State v. Carlson, 48 P.3d 1180, 1190 (Ariz. 2002).

pay them."[117] In *State v. Carlson*, for instance, the defendant was found to have procured the commission of the murder by promising to pay the killer $20,000.[118] In another instance, in *State v. Robinson*, the Court concluded that the defendant secured the commission of the murders by promising that either drugs or money would be found at the victims' home.[119]

v. The (F)(5) Aggravating Circumstance: The Defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

This aggravating circumstance refers to the "motive" or "cause of" the murder, which must be based on the "receipt or expectation of anything of pecuniary value."[120] Here, the central issue is whether the murder is "prompted by the desire for pecuniary gain;"[121] the "expectation of pecuniary gain" must be "a motive, cause, or impetus for the murder and not merely a result of the murder."[122] Financial gain, therefore, does not have to be the sole reason for the murder, but simply one of the reasons.[123]

The (F)(5) aggravating circumstance does not exist in all cases where a defendant benefits financially from a murder.[124] Simply "because money and items [are] taken" does not mean the purpose of a murder is pecuniary gain.[125] Conversely, the fact that no property is taken from the murder victim does not mean the aggravator fails to exist.[126]

In *State v. Gay*, the court used the following (F)(5) instruction:

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[117] *Id.*

[118] *Id.* at 1185.

[119] State v. Robinson, 796 P.2d 853, 861-62 (Ariz. 1990). The court found the (F)(4) aggravating circumstance on these facts alone-- the defendant provided the murder weapon to the actual killer, directed the actual killer to the victims' home, with whom the killer shared no relationship, and the actual killer demanded drugs and money before fatally shooting the victims.

[120] *See* State v. Lamar, 115 P.3d 611, 615 (Ariz. 2005) (quoting State v. Hyde, 921 P.2d 655, 683 (Ariz. 1996)).

[121] *See* State v. Anderson, 111 P.3d 369, 393 (Ariz. 2005) (rejecting the defendant's argument that because no property was taken from some of the victims this aggravating circumstance could not be found).

[122] *Id.*

[123] *See* State v. Armstrong, 93 P.3d 1076, 1079 n.2 (Ariz. 2004) (concluding that the (F)(5) aggravating circumstance should be found "if the receipt of money is established as *a cause of* the murders" and noting that the "but for" test is not mandated by Arizona case law or A.R.S. § 13-703(F)(5)). In State v. Prasertphong, 76 P.3d 438, 440 (Ariz. 2003) (quoting State v. Ring, 65 P.3d 915, 942 (Ariz. 2003)), the Arizona Supreme Court specified that the murder must not have transpired "but for" the defendant's pecuniary motive. In so doing, the Court also interpreted the "but for" language to mean that "the expectation of pecuniary gain is a motive, cause, or impetus for the murder and not merely a result of the murder." *See Prasertphong*, 76 P.3d at 440 (quoting State v. Hyde, 921 P.2d 655, 683 (Ariz. 1996)).

[124] State v. Rutledge, 76 P.3d 443, 446 (Ariz. 2003) ("Proving a taking in a robbery or the existence of some economic motive at some point during the events surrounding a murder does not necessarily prove the motivation for a murder.").

[125] State v. Gillies, 662 P.2d 1007, 1019 (1983) (finding that "the purpose of the murder was to eliminate the victim as a witness to her own rape").

[126] *Anderson*, 111 P.3d at 393 (noting that "the pecuniary gain aggravator does not require that property be taken from each victim").

> To establish the aggravating circumstance that the murder was committed for pecuniary value, the State must prove beyond a reasonable doubt that the receipt of something of pecuniary value was a motive, cause or impetus for the murder and not merely the result of the murder.
>
> The pecuniary value motive need not have been the defendant's only motive for the murder. There may be other motives for murder. This aggravating circumstance does not merely exist because a person was murdered and after the murder the defendant obtained something of pecuniary value. To find this aggravating circumstance, you must find a connection between the murder and the defendant's pecuniary motive.
>
> "Pecuniary value" as used in this instruction means anything of monetary value, including property.
>
> The verdict of guilty for burglary is not sufficient by itself to prove the murder was motivated by receipt of something of pecuniary value.[127]

vi. The (F)(6) Aggravating Circumstance: The Defendant committed the offense in an especially heinous, cruel or depraved manner.

This aggravating circumstance pertains only to those murders "wherein additional circumstances of the nature enumerated above set the crime apart from the usual or the norm."[128] While all three factors—especially heinous, cruel, or depraved– may be found, only one factor must be established for the aggravator to exist.[129]

Although the U.S. Supreme Court held the (F)(6) aggravating circumstance to be facially vague in *Walton v. Arizona*,[130] the Court concluded that enough substance had been provided to the statute's "operative terms" to render it constitutional.[131] The Arizona Supreme Court has since held the following (F)(6) instruction to be constitutionally sufficient:

> The terms "heinous" and "depraved" focus on the defendant's mental state and attitude at the time of the offense as reflected by his[/her] words and actions. A murder is especially heinous if it is hatefully or shockingly evil. A murder is depraved if marked by debasement, corruption, perversion or deterioration.
>
> In order to find heinousness or depravity, you must find beyond a reasonable doubt that the defendant exhibited such a mental state at the

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[127] Final Jury Instructions, Phase II, State v. Gay, CR 2001-1542 74 (May 4, 2004).

[128] State v. Gretzler, 659 P.2d 1, 10 (Ariz. 1983) (quoting State v. Knapp, 562 P.2d 704, 716 (Ariz. 1977)).

[129] *Gretzler*, 659 P.2d at 51. The finding of all three factors supports only one aggravating circumstance. State v. Miller, 921 P.2d 1151, 1164 (Ariz. 1996).

[130] 497 U.S. 639 (1990).

[131] *Id*. at 654. Since *Ring*, which mandated the jury to find aggravating circumstances, the Arizona Supreme Court has continued to reject vagueness challenges. *See Anderson*, 111 P.3d at 394-95.

> time of the offense by doing at least one of the following acts: One, relishing the murder. In order to relish a murder the defendant must show by his words or actions that [s/]he savored the murder. These words or actions must show debasement or perversion, and not merely that the defendant has a vile state of mind or callous attitude.
>
> Statements suggesting indifference, as well as those reflecting the calculated plan to kill, satisfaction over the apparent success of the plan, extreme callousness, lack of remorse, or bragging after the murder are not enough unless there is evidence that the defendant actually relished the act of murder at or near the time of the killing.
>
> Two, inflicted gratuitous violence on the victim clearly beyond that necessary to kill.
>
> Three, needlessly mutilated the victim's body. In order to find this factor, it must be proven beyond a reasonable doubt that the defendant had a separate purpose beyond murder to mutilate the corpse.
>
> The term "cruel" focuses on the victim's state of mind. Cruelty refers to the pain and suffering the victim experiences before death. A murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner. The defendant must know or should have known that the victim would suffer.[132]
>
> A finding of cruelty requires conclusive evidence that the victim was conscious during the infliction of the violence and experienced significant uncertainty as to his or her ultimate fate. The passage of time is not determinative.

a. Especially Cruel

The "especially cruel" factor embodies a murder victim's mental anguish and physical pain.[133] For cruelty to exist, the court must find that (1) the victim, while conscious, experienced mental or physical pain; and (2) the defendant knew or should have known that the victim would suffer.[134]

Mental anguish encompasses instances in which a victim is uncertain of his/her fate[135] as well as instances in which a victim is forced to witness the murder of a loved one.[136] In

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[132] *Anderson*, 111 P.3d at 394-95 n.19.

[133] State v. Trostle, 951 P.2d 869, 883 (Ariz. 1997); *see* State v. Moody, 94 P.3d 1119, 1167 (Ariz. 2004) (refusing to uphold this aggravating circumstance despite concluding that the victim did experience physical and mental pain before dying).

[134] *Trostle*, 951 P.2d at 883; *Moody*, 94 P.3d at 1167 (refusing to uphold this aggravating circumstance although the evidence showed the victim suffered because the court was unsure as to whether the defendant was conscious of the suffering).

[135] State v. Jackson, 918 P.2d 1038, 1047 (Ariz. 1996) (noting the victim repeatedly begged for her life after being driven to a remote desert area). More recently, the Arizona Supreme Court has noted that "[f]ew especially cruel findings . . . are predicated solely on an inference that the victim contemplated his

regards to physical suffering, evidence of a "prolonged, bloody struggle and the victim's defensive wounds" may establish cruelty.[137] A victim's physical pain need not withstand the duration of the murder, but only a short period.[138] Rape constitutes both mental and physical suffering.[139]

A defendant cannot be "vicariously liable" for cruelty in a capital case, "absent a plan intended or reasonably certain to cause suffering."[140] However, where a defendant is present and actively participates in the murder, a finding of cruelty is not precluded by the fact that s/he did not "inflict the fatal blows."[141]

b. Especially Heinous or Depraved Manner

The terms "heinous or depraved" refers to a defendant's state of mind.[142] To determine if the defendant's state of mind was "especially heinous or depraved," Arizona courts have outlined six factors to be considered: (1) "whether the defendant relished the murder,"[143] (2) "whether the defendant inflicted gratuitous violence on the victim,"[144] (3) "whether the defendant needlessly mutilated the victim,"[145] (4) "the senselessness of the crime,"[146]

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or her fate…The length of time during which a victim contemplates [his/]her fate affects whether the victim's mental anguish is sufficient to bring a murder within that group of murders that is especially cruel." State v. Prince, 75 P.3d 114, 117 (Ariz. 2003).

[136] State v. Dickens, 926 P.2d 468, 491 (Ariz. 1996) (upholding that the murder was cruel where the victim was forced to witness the murder of his wife); State v. Ramirez, 871 P.2d 237, 250 (Ariz. 1994) (finding the murder was especially cruel in part because the victims, a mother and daughter, were aware of each other's suffering).

[137] *Ramirez*, 871 P.2d at 250; *see* State v. Sansing, 77 P.3d 30, 34 (Ariz. 2003) (finding the victim was murdered in an especially cruel manner where she struggled for fifteen minutes after being initially attacked, was clubbed in the head, sexually assaulted and stabbed).

[138] *See* State v. Schackart, 947 P.2d 315, 325 (Ariz. 1997) (recognizing that the Arizona Supreme Court has held suffering anywhere between eighteen seconds to two to three minutes may be sufficient for the (F)(6) aggravator to exist).

[139] *Sansing*, 77 P.3d at 34.

[140] State v. Carlson, 48 P.3d 1180, 1193 (Ariz. 2002) (finding the aggravator not applicable when defendant hired a killer who "bungled" the killing). "The plan must be such that suffering before death must be inherently and reasonably certain to occur, not just an untoward event." *Id.*

[141] *See Anderson*, 111 P.3d at 395 (holding the (F)(6) aggravating circumstance to apply where the defendant cut the throat of one victim and held the victim down while another put a knife through the victim's ear, and where the defendant struck another victim with a lantern and provided an accomplice with the murder weapon).

[142] State v. Murdaugh, 97 P.3d 844, 856 (Ariz. 2004).

[143] Generally, in order to show a defendant relished the murder, the defendant must "say or do something, other than the commission of the crime itself, to show [s/]he savored the murder." State v. Roscoe, 910 P.2d 635, 651 (Ariz. 1996). *See* State v. Detrich, 932 P.2d 1328, 1339 (Ariz. 1997) (finding a defendant's remark that "It's dead, but it's warm. Do you want a shot at it?" showed the defendant relished the murder); State v. Maturana, 882 P.2d 933, 939 (Ariz. 1994) (finding the defendant relished the murder where the defendant bragged "how great it was," and showed no remorse).

[144] Gratuitous violence is violence "beyond that necessary to kill" and "alone may demonstrate a heinous or depraved state of mind." *See* State v. Rienhardt, 951 P.2d 454, 465 (Ariz. 1997) (finding gratuitous violence where the victim was severely beaten and had two boulders dropped on his head after being fatally shot); *see also Sansing*, 77 P.3d at 35-36 (finding that the "rape, facial wounds, neck ligatures, gagging, blind-folding, and grinding of the knife" into the victim constituted gratuitous violence).

[145] Needless mutilation may occur when the defendant mutilates the victim's body after death, indicating "a mental state that is 'marked by debasement.'" *See* State v. Pande, 65 P.3d 950, 953 (Ariz. 2003) (finding that the fact the defendant severed the victim's nipples after her death supported a finding of the

(5) "the helplessness of the victim,"[147] and (6) "whether the defendant intended to eliminate a witness."[148] The senselessness and helplessness factors, on their own, rarely support a finding of heinous or depravity.[149]

While the six factors articulated by the Arizona Supreme Court are not all-encompassing, the Court, in order to preserve the statute's constitutionality, is reluctant to expand the construction of the terms "especially heinous or depraved."[150] Nonetheless, the murder of one's own child or a child with whom a defendant shares a caretaker relationship also may constitute a murder that is committed in an especially heinous or depraved manner.[151]

vii. The (F)(7) Aggravating Circumstance: The Defendant committed the offense while (a) 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; or (b) on probation for a felony offense.[152]

(F)(6) aggravator)*;* State v. Stokley, 898 P.2d 454, 467 (Ariz. 1995) (upholding the trial court's finding of both gratuitous violence and needless mutilation where the defendant stabbed the victims' eyes and stomped on the victims).

[146] "A murder is senseless if it is unnecessary for the defendant to complete his[/her] objective." State v. Lee, 944 P.2d 1222, 1233 (Ariz. 1997) (holding the murder to be senseless because the defendant did not need to kill the victim in order to complete a robbery). Generally, senseless alone is not enough to constitute an "especially heinous or depraved manner." *Id*. The murder of a "helpless child" has been "inherently" deemed senseless. *See* State v. Jones, 72 P.3d 1264, 1269 (Ariz. 2003) (finding that the murder of a 12 years-old girl who was "smaller and weaker" than the defendant and whose arms were bound, was senselessness and that the victim was helpless).

[147] A victim is helpless when s/he is "unable to resist the murder." *Jones*, 72 P.3d at 1269. *See Sansing*, 77 P.3d at 36 (concluding the victim was rendered helpless after having her wrists and ankles bound); State v. Hyde, 921 P.2d 655, 683 (Ariz. 1996) (finding the victims to be helpless because of their ages (seventy-two years old and fifty years old), their small statures, and their positions on the floor while being attacked); State v. Jackson, 918 P.2d 1038, 1048 (Ariz. 1996) (finding a victim who is unarmed, outnumbered three to one, and wearing no shoes or jacket to be helpless); *see also* State v. Gulbrandson, 906 P.2d 579, 602 (Ariz. 1995) (noting that "evidence of a protracted struggle does not negate the finding of helplessness").

[148] *See* State v. Gretzler, 659 P.2d 1, 10-12 (Ariz. 1983) (discussing the factors of (1) relishing of the murder, (2) gratuitous violence, (3) needless mutilation, (4) senselessness, and (5) helplessness); State v. Ross, 886 P.2d 1354, 1362 (Ariz. 1994) (discussing how murders motivated by a defendant's desire to eliminate a witness may support a finding of heinousness or depravity).

[149] State v. Trostle, 951 P.2d 869, 883 (Ariz. 1997).

[150] *See* State v. Barreras, 892 P.2d 852, 859-60 (Ariz. 1995) (refusing to uphold a finding that the murder was heinous and depraved on the factors of helplessness and senseless alone).

[151] *See* State v. Milke, 865 P.2d 779, 787 (Ariz. 1993) (holding that the use of the parental relationship "in partial support of a finding of heinousness and depravity under section 13-703(F)(6)" constitutional and that the "parent /child relationship is a circumstance that separates the crime from the 'norm of first degree murders'"). *But see* State v. Styers, 865 P.2d 765, 777 (Ariz. 1993) (finding that the fact that the victim and the defendant shared a "special relationship in that defendant was the child's full-time caregiver for several months" before killing the child demonstrated the defendant's depravity and made "the crime even more senseless and the victim especially helpless as to [the] defendant").

[152] The (F)(7) statutory aggravating circumstance was amended in 2003 to include a defendant on probation for a felony offense. *See* 2003 ARIZ. SESS. LAWS, 1ST REG. SESS., CH. 255, § 1. The amendment applies to capital offenses that occurred on or after May 26, 2003, the effective date of the amendment.

To find the existence of this aggravating circumstance, the State must present evidence that the defendant was in custody or released by the appropriate entity during the murder.[153] The testimony of a parole officer, by itself, can warrant the finding of this aggravator.[154] This aggravating circumstance also applies to any defendant released from the custody of the Federal Bureau of Prisons.[155]

viii. The (F)(8) Aggravating Circumstance: The Defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense.

To prove the existence of this aggravator, the State must prove that the homicides were "temporally, spatially, and motivationally related, taking place during 'one continuous course of criminal conduct.'"[156]

The homicides are spatially related if the victims were all in "close proximity."[157] To be temporally related, the homicides must have occurred "within moments" of each other or during a "short, uninterrupted span of time."[158] A motivational relationship is established when a defendant's motive to kill is the same for all victims,[159] or, if differences exist as to the defendant's "precise motive for killing," when the motives are sufficiently "related."[160] The Arizona Supreme Court has found murders to be sufficiently "related" where, for example, a defendant intends to kill only one individual, but kills others because of their presence at the crime scene.[161]

Once proven, this aggravating circumstance can attach to each first-degree murder conviction.[162]

ix. The (F)(9) Aggravating Circumstance: 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.

The defendant need not have knowledge of the victim's age at the time of the offense for this aggravating circumstance to apply.[163] Nor must documentation be admitted to prove

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[153] *See, e.g.*, State v. Carreon, 107 P.3d 900, 912 (Ariz. 2005).

[154] State v. Jones, 4 P.3d 345,365 (Ariz. 2000).

[155] State v. Lamar, 115 P.3d 611, 615 (2005) (noting that the Federal Bureau falls within the Department of Justice, which is a "law enforcement agency").

[156] State v. Prasertphong, 76 P.3d 438, 441 (Ariz. 2003) (supp. op.).

[157] *See* State v. Anderson, 111 P.3d 369, 393-94 (Ariz. 2005) (finding the murders were spatially related as all three victims were killed in "close physical proximity" on the same residential property); State v. Dann, 79 P.3d 58, 60 (Ariz. 2003) (finding the murders were spatially related where the victims were all sitting near one another in the same room).

[158] *Dann*, 79 P.3d at 60 (finding the murders to be temporally related as they occurred within moments of each other, i.e. "a short, uninterrupted span of time"); State v. Armstrong, 93 P.3d 1076, 1080 (Ariz. 2004) (finding a temporal relationship where the killings were "within moments of each other," in this case, within seconds of each other).

[159] *See* State v. Glassel, 116 P.3d 1193, 1201, 1216 (Ariz. 2005).

[160] *Armstrong*, 93 P.3d at 1081.

[161] *See Dann*, 79 P.3d at 61; *see also Armstrong*, 93 P.3d at 1080-81.

[162] State v. Djerf, 959 P.2d 1274, 1288 (Ariz. 1998).

the age of the victim; courts have found the testimony of two witnesses and a defendant's reference to the victim's age in a sentencing memorandum sufficient to support a finding of the aggravating circumstance.[164]

x. The (F)(10) Aggravating Circumstance: Murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties, and the Defendant knew, or should have known, that the murdered person was a peace officer.

Section 13-105(25) of the A.R.S. defines a "peace officer" as "any person vested by law with a duty to maintain public order and make arrests."[165] A defendant "knew or should have known" that the victim was a peace officer when, for instance, an officer is in a marked car and in uniform.[166]

xi. The (F)(11) Aggravating Circumstance: The Defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate.

A thorough and exhaustive review of the relevant published Arizona case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

xii. The (F)(12) Aggravating Circumstance: The Defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.

A thorough and exhaustive review of the relevant published Arizona case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

xiii. The (F)(13) Aggravating Circumstance: The offense was committed in a cold, calculated manner without pretense of moral or legal justification.

A thorough and exhaustive review of the relevant published Arizona case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

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[163] State *v.* Medina, 975 P.2d 94, 101-02 (Ariz. 1999).
[164] *Medina*, 975 P.2d at 101.
[165] ARIZ. REV. STAT. § 13-105(25) (2005).
[166] *See* State v. Martinez, 999 P.2d 795, 806 (Ariz. 2000) (noting that the defendant conceded the existence of this aggravating circumstance at his sentencing).

xiv. The (F)(14) Aggravating Circumstance: The Defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.

The Arizona legislature amended the capital sentencing statute in 2005 to include Aggravating Circumstances (F)(11) through (F)(14). As of date, the courts have yet to comment on these aggravating circumstances.

b. The Burden of Proof and Unanimity of Finding as to Statutory Aggravating Circumstances

In order to impose a sentence of death, the jury must unanimously find that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt.[167] The burden of establishing the presence of an aggravating circumstance lies with the State.[168] The proposed pattern capital jury instructions, approved in part by the Board of Governors of the State Bar of Arizona, set forth the following in regards to the State's burden of proof:

> Before evidence is presented, you must start with the presumption that the alleged aggravating circumstance is not proven. The State must present evidence to prove any alleged aggravating circumstance beyond a reasonable doubt. The defendant is not required to testify or produce evidence of any kind. The decision on whether to testify or produce evidence is left to the defendant, acting with the advice of an attorney. The defendant's decision not to testify or produce evidence is not evidence of the existence of any aggravating circumstance.[169]

Although the Arizona Supreme Court has held that the trial judge must define "reasonable doubt" within the context of a defendant's guilt,[170] a review of relevant case

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[167] ARIZ. REV. STAT. § 13-703(E) (2005).

[168] ARIZ. REV. STAT. § 13-703(B) (2005).

[169] Draft Capital Case Sentencing Instructions, Eligibility Phase, 1.4 Burden of Proof (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[170] *See* State v. Portillo, 898 P.2d 970, 974 (Ariz. 1995) (requiring all courts to provide jurors in all criminal cases with the "reasonable doubt" instruction articulated by the court, effective January 1, 1996). Except for the addition of one sentence ("This means the State must prove each element of each charge beyond a reasonable doubt."), the instructions defining reasonable doubt set forth below by the State Bar of Arizona mirror the language of the *Portillo* Court:

> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove each element of each charge beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charge, you must find [him][her] guilty. If, on the other

law indicates that the Court has imposed no similar obligation on trial judges within the context of proving a statutory aggravating circumstance in a capital case.[171] However, in *State v. Gay*, the court used the following instruction in defining "reasonable doubt" within the context of proving a statutory aggravating circumstance:

> The State has the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not true, or that its truth is highly probable. In criminal cases such as this, the [S]tate's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced that an aggravating circumstance exists. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convicted that the State has proven an aggravating circumstance beyond a reasonable doubt, you must find the circumstance proven. If, on the other hand, you think there is a real possibility that an aggravating circumstance does not exist, you must give the defendant the benefit of the doubt and find the circumstance not proved.[172]

The instructions used by the *Gay* court to define "proof beyond a reasonable doubt" nearly mirror the ones found in the proposed pattern capital jury instructions.[173] The proposed pattern instructions, however, also direct the jury that "proof beyond a reasonable doubt" means that the "State must prove each element of each alleged aggravating circumstance beyond a reasonable doubt."[174]

> hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

REVISED ARIZONA JURY INSTRUCTIONS (Criminal) (3d ed.), Standard Criminal 5b(1), *at* http://www.myazbar.org/SecComm/Committees/CRJI/crji.cfm.

[171] *See Portillo*, 898 P.2d at 974.

[172] Final Jury Instructions, Phase II, State v. Gay, CR-2001-1542, 64 (May 4, 2004).

[173] Draft Capital Case Sentencing Instructions, Eligibility Phase, 1.5 Definition of Proof Beyond a Reasonable Doubt (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[174] *Id*. The exact definition proposed by the Committee is:

> The State has the burden of proving any alleged aggravating circumstance beyond a reasonable doubt. This means that the State must prove each element of each alleged aggravating circumstance beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the alleged aggravating circumstance is proven. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that any alleged aggravating circumstance is proven, then you must make that finding. If, on the other hand, you think there is a real possibility that the alleged aggravating circumstance is not proven, you must give the Defendant the benefit of the doubt and find the alleged aggravating circumstance is not proven.

c. The Need for Statutory Aggravating Circumstance(s) to Be Set Forth in Writing

At the conclusion of the aggravation phase, the jury must set forth in writing the statutory aggravating circumstances, if any, proved by the State.[175] If the jury unanimously finds the (F)(6) aggravating circumstance to exist, the jury must specify in writing whether it "unanimously found the murders 'cruel,' 'heinous,' or 'depraved.'"[176] Failure to delineate the basis upon which the jury reached its decision will result in the aggravator's dismissal on review.[177]

3. Mitigating Circumstances

Every death sentence imposed is based on two elements: (1) proof beyond a reasonable doubt of the existence of at least one aggravating circumstance, and (2) a finding "that there are no mitigating circumstances sufficiently substantial to call for leniency."[178] Section 13-703(G) of the A.R.S. defines mitigating circumstances as:

> [A]ny factors proffered by the defendant or the [S]tate that 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.[179]

While the legislature has codified five mitigating circumstances, these enumerated mitigating circumstances are not exclusive.[180] Indeed, Arizona Courts have recognized a myriad of non-statutory mitigators, including but not limited to, a defendant's cooperation with the prosecution, lack of criminal history, difficult childhood or family history, employment history or service in the military, lack of intent to commit murder (e.g., in the instance of a felony murder conviction), good character, educational attainment, medical problems, and behavior while imprisoned.[181]

Any instructions that restrict the mitigating evidence jurors can consider may violate the Eighth Amendment of the U.S. Constitution.[182] The Arizona Supreme Court has approved the "use of the precise statutory language as set forth in 13-703(G) as the mitigation factor instruction."[183]

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[175] *See* State v. Anderson, 111 P.3d 369, 397 (Ariz. 2005); Final Instructions Phase II, State v. Andriano, No. CR 2000-096032, 9 (filed Dec. 1, 2004 in Maricopa County).
[176] *Anderson*, 111 P.3d at 397.
[177] *Id*. at 398.
[178] ARIZ. REV. STAT. § 13-703(E) (2005).
[179] ARIZ. REV. STAT. § 13-703(G) (2005).
[180] ARIZ. REV. STAT. § 13-703(G)(1)-(5) (2005).
[181] Arizona Death Penalty Judicial Assistance Program, CAPITAL SENTENCING GUIDE (Winter 2005-2006) (table of contents, *available at* http://www.supreme.state.az.us/courtserv/CrtProj/capsentguid/TOC.htm.
[182] *See Anderson*, 111 P.3d at 391 (expressing approval of instructions that direct jurors not to be "swayed, by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" and holding that such an instruction is not inviolate of the Eight Amendment).
[183] *Carreon*, 107 P.3d at 915-16.

In *State v. Smith*, the court defined mitigating circumstances to the jury as being:

> [C]ircumstances which do not justify or excuse the offense, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment. Mitigating circumstances may be any factors presented by the defendant or the [S]tate that are relevant in determining whether to impose a sentences of less than death, including any aspect of the defendant's character, propensities or record and any circumstances of the offense.[184]

However, in *State v. Gay*, the court used the following definition:

> Mitigating circumstances are any aspect of the defendant's character, propensities or record, or any of the circumstances of the offense relevant to determining whether the defendant should be shown leniency. Mitigating circumstances are not an excuse or justification for the offense of first degree murder of which the defendant was found guilty, but are circumstances which if found to be sufficiently substantial would lead you to find that death is not an appropriate sentence.[185]

Meanwhile, the proposed pattern capital jury instructions contain the following definition:

> Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, including any sympathetic or other aspect of the Defendant's character, propensity, history or record, or circumstances of the offense.
>
> Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the Defendant's moral culpability.[186]

The instruction goes on to state that "[t]he fact that the Defendant has been convicted of first degree murder is unrelated to the existence of mitigating circumstances. You must give independent consideration to all of the evidence concerning mitigating circumstances, despite the conviction[s]." [187]

The proposed jury instructions also state, in a separate jury instruction on the application of the law to the evidence, that "[m]itigating circumstances may be found from any

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[184] Final Jury Instructions, Penalty Phase, State v. Smith, Jr., CR 95116, 92-3 (May 27, 2004).
[185] Final Jury Instructions, Phase III, State v. Gay, CR 2001-1542, 104 (May 18, 2004).
[186] Draft Capital Case Sentencing Instructions, Penalty Phase, 2.3 Mitigation (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).
[187] *Id.*

evidence presented during the trial, during the first part of the sentencing hearing or during the second part of the sentencing hearing."[188]

a. Interpretation of the Statutory Mitigating Circumstances

i. The (G)(1) Mitigating Circumstance: The defendant's capacity to appreciate the wrongfulness of his[/her] conduct or to conform his[/her] conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

This mitigating circumstance requires that the defendant's capacity either to (1) appreciate the wrongfulness of his/her conduct, or (2) to conform his/her conduct to the requirements of the law be significantly impaired.[189] Evidence of impairment usually is derived from expert witness testimony.[190]

A defendant's impairment may be caused by drug or alcohol use at the time of the offense or by chronic substance abuse.[191] "Evidence of drug ingestion or intoxication" by a defendant, without more, does not normally constitute a mitigating circumstance, however;[192] there must be evidence indicating that a defendant was impaired during the commission of the murder.[193] Nor does this mitigating circumstance exist when a defendant attempts to avoid prosecution after the murder, or the intoxication does not appear to "overwhelm the defendant's ability to control his[/her] physical behavior."[194]

Although mental illness may support a finding of the (G)(1) mitigator, mental illness by itself does not.[195] A character or personality disorder generally is not "sufficient to satisfy this statutory mitigator."[196] Significantly, the Arizona Supreme Court has noted that "mental impairments have a far greater mitigating effect [than personality disorders] because they may evidence an inability of the defendant to control his conduct."[197]

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[188] Draft Capital Case Sentencing Instructions, Penalty Phase, 2.2 Evidence (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[189] *See* State v. Stuard, 863 P.2d 881, 897 (Ariz. 1993) (finding that that the aggravating circumstances outweighed the mitigating evidence).

[190] *See* State v. Murdaugh, 97 P.3d 844, 860 (Ariz. 2004).

[191] State v. Sansing, 77 P.3d 30, 37 (Ariz. 2003); *see* State v. Jones, 937 P.2d 310, 322 (Ariz. 1997) (concluding insufficient evidence had been presented to show that defendant's drug use constituted a mitigating circumstance).

[192] *Sansing*, 77 P.3d at 37.

[193] State v. Carreon, 107 P.3d 900, 916 (Ariz. 2005) (noting that some sort of impairment must be shown during the offense for a defendant's impairment to constitute a mitigating circumstance under A.R.S. § 13-703(G)(1)).

[194] *Sansing*, 77 P.3d at 37 (quoting State v. Reinhardt, 951 P.2d 454, 466-67 (Ariz. 1997)).

[195] State v. Clabourne, 983 P.2d 748, 754 (Ariz. 1999) ("To say that all persons with a mental illness are always significantly impaired in at least one of these two specific ways is supported by neither medical evidence nor common sense.").

[196] State v. Kayer, 984 P.2d 31, 45 (Ariz. 1999); State v. Brewer, 826 P.2d 783, 802 (Ariz. 1992).

[197] *Brewer*, 826 P.2d at 802 (quoting State v. Walton, 769 P.2d 1017, 1034 (Ariz. 1989)). In *Brewer*, the court stated that a defendant with a personality or character disorder "differ[s] in degree from a slow, dull, brain-damaged defendant whose judgment and rationality are marginal," i.e. an individual suffering from a mental impairment. *Id.*

While case law requires that a causal nexus be proven between the impairment and the capital offense,[198] the Arizona Supreme Court recently suggested that such an instruction would be improper, especially in light of the U.S. Supreme Court's decision in *Tennard v. Dretke*.[199] In *Tennard*, the U.S. Supreme Court held that a defendant is not required to establish a nexus between his/her mental capacity and the crime s/he committed in order for his/her mental capacity to be considered "relevant mitigating evidence."[200]

ii. The (G)(2) Mitigating Circumstance: The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

The Arizona Supreme Court has defined duress as "any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him[/her] to do an act contrary to his[/her] free will."[201] In order to prove duress, a defendant must show that s/he was "coerce[d] or induce[d]" to commit the offense against his/her will."[202] A defendant's level of duress at the time of the offense must also be "unusual and substantial."[203]

Duress also may be established where the evidence indicates that a defendant acted on the orders of another.[204]

iii. The (G)(3) Mitigating Circumstance: The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his[/her] participation was relatively minor, although not so minor as to constitute a defense to prosecution.

This mitigating circumstance relates to cases in which a defendant's conviction for murder may be attenuated by the degree of his/her participation in the crime.[205] Here,

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[198] *See* State v. Murdaugh, 97 P.3d 854, 859-60 (Ariz. 2004); *Sansing*, 77 P.3d at 37 ("Mere evidence of drug ingestion or intoxication, however, is insufficient to establish statutory mitigation. [ ] The defendant must also prove a causal nexus between his drug use and the offense.").

[199] Tenndard v. Dretke, 542 U.S. 274 (2004) (holding "evidence of impaired intellectual functioning is inherently mitigating at a penalty phase of a capital case," regardless of whether a defendant has established a nexus between his/her mental capacity and the offense).

[200] *Tenndard*, 542 U.S. at 287.

[201] *Brewer*, 826 P.2d at 803 (quoting State v. Wallace, 728 P.2d 232, 239 (Ariz. 1986)).

[202] *Id*. at 803.

[203] State v. Herrera, 850 P.2d 110, 113 (Ariz. 1993) (finding duress to be unusual and substantial where the defendant acted on the immediate order of his father to shoot a deputy); *see also* State v. Clabourne, 983 P.2d 748, 755 (Ariz. 1999) (holding that the defendant's claim that he was under "unusual or substantial duress" failed where evidence showed that a "frightening sociopath" was the "mastermind and influenced, and even scared" the defendant); State v. Williams, 904 P.2d 437, 454 (Ariz. 1995) (finding that any possibility that the defendant acted under "unusual and substantial duress" ended when the victim, acting as the initial aggressor, was disarmed).

[204] *See Herrera*, 850 P.2d at 113 (finding duress where a son acted immediately on his father's orders and evidence revealed a history of physical abuse by the father).

[205] Arizona Death Penalty Judicial Assistance Program, CAPITAL SENTENCING GUIDE, Minor Participation (Winter 2005-2006), *available at* http://www.supreme.state.az.us/courtserv/CrtProj/capsentguid/G3MinorPart.htm.

"participation in a crime may be considered as mitigation where a defendant demonstrates that while [s/]he was legally accountable for the conduct of another, his/[her] participation in the crime was relatively minor."[206]

A review of Arizona case law reveals only cases in which the courts rejected a finding of this mitigator. For example, in *State v. Anderson*, the Arizona Supreme Court rejected the defendant's claim that his participation in a multiple homicide was minor, in light of the facts that the defendant cut the throat of one victim, struck another victim with a lantern, and provided the murder weapon to his accomplice.[207] In *State v. Carlson*, the Court also rejected the defendant's claim that her participation in the murder of her mother-in law was minor.[208] The defendant, although not present at the actual killing, "planned the murder, hired the killers, gave them money to buy gloves, provided them with a key to [the victim's] apartment, drove them to a place near [the victim's] apartment, and awaited their return."[209]

iv. The (G)(4) Mitigating Circumstance: The defendant could not reasonably have foreseen that his[/her] 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.

To determine if this mitigating circumstance exists, the courts employ a "reasonable person" standard.[210] In other words, the courts will determine whether a reasonable person "would foresee that [his/her] conduct would create a grave risk of death."[211] Nevertheless, if a defendant intended to kill the victim or believed the victim might be killed, Arizona courts normally will not find this mitigating circumstance to be present.[212]

v. The (G)(5) Mitigating Circumstance: The defendant's age.

Section 13-703(G)(5) of the A.R.S. stipulates neither the age which constitutes a mitigating circumstance nor the weight that this mitigating circumstance should be given.[213] Arizona courts have found, however, that a defendant's age at the time of the

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[206] State v. Hoskins, 14 P.3d 997, 1020 (Ariz. 2000) (rejecting the defendant's contention that his participation was minor).

[207] State v. Anderson, 111 P.3d 369, 399 (Ariz. 2005).

[208] State v. Carlson, 48 P.3d 1180, 1195-96 (Ariz. 2002).

[209] *Id.*

[210] *See* State v. Bolton, 896 P.2d 830, 854 (Ariz. 1995).

[211] *Id.*

[212] *E.g.*, State v. Trostle, 951 P.2d 869, 886 (Ariz. 1997) (finding that the defendant knew the victim "would likely be killed"); State v. Schackart, 947 P.2d 315, 329 (Ariz. 1997) (rejecting the existence of the (G)(4) mitigator where the jury found the defendant had the "intent to kill"); *Hoskins***,** 14 P.3d at 1020 ("[T]he defendant's planning, deliberation, the verbal statements of intent well in advance of the crime, and the actual murder weapon found on his person, pointed strongly to the foreseeability of the victim's death.").

[213] *See* State v. Clark**,** 616 P.2d 888, 897 (Ariz. 1980) (noting that the age of twenty at the time of the murder was a mitigating circumstance, but not sufficient enough for leniency); State v. Watson, 628 P.2d 943, 947 (Ariz. 1981) (finding that the defendant's age of twenty-one, coupled with other mitigating circumstances, was sufficient for leniency); State v. Poland, 698 P.2d 183, 202 (Ariz. 1985) (finding that

offense may be a "substantial and relevant" mitigating circumstance.[214] Generally, as the age of a defendant increases, the weight afforded this mitigating circumstance decreases.[215] Nonetheless, courts also have found old age to constitute a mitigating circumstance.[216]

In determining the existence of this mitigating circumstance, the courts not only consider a defendant's age, but also the defendant's intelligence level, maturity, involvement in the crime, and past experience.[217]

b. The Identification and Consideration of Specific Mitigating Circumstances

Neither the U.S. nor Arizona Constitutions mandate jury instructions specifying particular mitigating factors, or details "on how to consider mitigating evidence in light of aggravating evidence."[218] In fact, a jury instruction simply directing the jury to make a sentencing decision on "all the evidence" is constitutionally permissible.[219]

The Arizona Supreme Court has provided that "jury instructions should focus on the statutory requirement that a juror may not vote to impose the death penalty unless s/he finds, in the juror's individual opinion, that 'there are no mitigating circumstances sufficiently substantial to call for leniency.'"[220] In considering mitigating circumstances, the *Ga*y court provided the jury with the following instruction:

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the defendant's age of twenty-seven at the time of the offense, along with his behavior as a model prisoner, were not mitigating circumstances "sufficiently substantial" to call for leniency).

[214] State v. Valencia, 645 P.2d 239, 241 (Ariz. 1982) (holding that the defendant's age of sixteen was a mitigating circumstance "sufficiently substantial" to impose a sentence of life imprisonment); State v. Jackson, 918 P.2d 1038, 1048 (Ariz. 1996); s*ee also* Roper v. Simmons, 543 U.S. 551 (2005) (holding the execution of a defendant under eighteen years of age at the time of the offense is unconstitutional under the 8th and 14th Amendments of the U.S. Constitution).

[215] *Jackson*, 918 P.2d at 1048.

[216] *See, e.g.*, State v. Nash, 694 P.2d 222, 236 (Ariz. 1985) (rejecting a defendant's contention that his age, sixty-seven, at the time of the offense constituted a mitigating circumstance while recognizing that old age could be considered a mitigating circumstance); *see* State v. Glassel, 116 P.3d 1193 (Ariz. 2005) (finding defendant's age to be a mitigating factor, but it, along with other mitigation, was insufficient to call for leniency); George K. Staropoli, *Ventana Lakes Homeowner Association Murders, The Story of Richard Glassel*, Jan. 12, 2003, *available at* http://www.ahrc.com/new/index.php/src/news/sub/article/action/ShowMedia/id/329 (noting that Glassel was over the age of sixty at the time of the murders).

[217] *See* State v. Poyson, 7 P.3d 79, 89 (Ariz. 2000) ("Chronological age, however, is not the end of the inquiry. To determine how much weight to assign the defendant's age, we must also consider his[/her] level of intelligence, maturity, past experience, and level of participation in the killings."); State v. Phillips, 46 P.3d 1048, 1060-61 (Ariz. 2002) (rejecting the age of twenty as a mitigating circumstance after considering the defendant's "level of intelligence, maturity, participation in the murder, and criminal history").

[218] Arizona Death Penalty Judicial Assistance Program, CAPITAL SENTENCING GUIDE, Mitigating Circumstances (Winter 2005-2006), *available at* http://www.supreme.state.az.us/courtserv/CrtProj/capsentguid/MitIntro.htm.

[219] Buchanan v. Angelone, 522 U.S. 269, 275-77 (1998).

[220] State *ex rel* Thomas v. Granville, 123 P.3d 662, 666-67 (Ariz. 2005) (quoting ARIZ. REV. STAT. § 13-703(E)(2005)). This statutory standard serves to "guide[] and channel[] the jurors' discretion as they evaluate and consider the mitigating circumstances, whether proved by the defendant or present in the record, in determining whether death is the appropriate sentence for that particular defendant." *Id.* at 667.

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. Each juror is free to assign whatever value that juror deems appropriate to each and all of the circumstances the juror has found. In weighing the various circumstances, each juror determines, under the relevant evidence, whether the death penalty is appropriate by considering the aggravating circumstances with the totality of the mitigating circumstances. In reaching a reasoned judgment about whether the death penalty is appropriate, each juror must decide how compelling or persuasive the totality of the mitigating circumstances are when compared against the aggravating circumstance.
>
> Once each juror has weighed the aggravating circumstance against any mitigating circumstance or circumstances, then each juror must determine whether the mitigating circumstances each juror individually found are sufficiently substantial to call for leniency in light of the aggravating circumstance. The law does not define what is "sufficiently substantial to call for leniency." Each juror must determine for him or herself what is "sufficiently substantial to call for leniency."[221]

The *Smith* court, however, used the following instruction:

> Although a final decision on a penalty of death or life in prison must be unanimous, the determination of what circumstances are mitigating and the weight to be given to the mitigating circumstances is for each of you to resolve, individually, based upon all the evidence presented in both the aggravation and penalty phases. To do this, you must individually determine the nature and extent of mitigating circumstances. Then, in light of all of the aggravating circumstances that have been proved to exist, you must individually determine if the totality of the mitigating circumstances is sufficiently substantial to call for leniency and a life sentence. You must not weigh each mitigating circumstance against each aggravating circumstance.[222]

c. The Unanimity of Findings as to Mitigating Circumstances and Burden of Proof

A jury is not required to reach a unanimous decision regarding mitigating circumstances.[223] Instead, each juror may consider any mitigating circumstance(s) s/he believes to exist in determining the defendant's fate.[224]

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[221] Final Jury Instructions, Phase III, State v. Gay, CR 2001-1542, 110 (May 18, 2004).

[222] Final Instructions, Penalty Phase, State v. Smith, Jr. CR 95116, 64 (May 27, 2004).

[223] ARIZ. REV. STAT. § 13-703(C) (2005); *see also Granville*, 123 P.3d at 666 ("A mitigating factor that motivates one juror to vote for a sentence of life in prison may be evaluated by another juror as not having been proved or, if proved, as not significant to the assessment of the appropriate penalty.").

[224] ARIZ. REV. STAT. § 13-703(C) (2005); *see also* State v. Anderson, 111 P.3d 369, 392 (Ariz. 2005) (holding that instructions stating that "while the jury must be unanimous as to the appropriate sentence, 'each juror may consider any mitigating circumstance found by that juror in determining the appropriate

The Arizona Supreme Court has suggested that jury instructions should center on each juror's "individual assessment" as to whether the "mitigation is of such quality or value that it warrants leniency."[225] In light of this, the Court has found that an instruction stating, "Each of you, individually, must decide whether the mitigation that each of you, individually, believes has been proven, is sufficiently substantial to call for a life sentence," is appropriate.[226]

A defendant carries the burden of proving the existence of a mitigating circumstance by a preponderance of the evidence.[227] In defining the "preponderance of the evidence" standard, the *Revised Arizona Jury Instructions* recommend the following instruction:

> A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.[228]

In practice, the *Smith* court instructed the jury that a "matter is proved by a preponderance of the evidence if it is shown to be more likely true than not."[229] Similarly, the *Gay* court stated that "[p]roof by a preponderance of the evidence means the evidence presented is more likely true than not that that the mitigating circumstance exists."[230]

The Court has explicitly rejected jury instructions stating that a defendant bears the burden of proving by a preponderance of the evidence that the mitigation was sufficiently substantial to call for leniency.[231]

d. The Right to Allocution

A statement of allocution serves to "allow the defendant to make a mitigating statement for the judge [or jury] to consider in determining the sentence."[232] Although a capital defendant has a right to provide the jury a statement of allocution in the penalty phase of a capital trial,[233] his/her right to do so "is not absolute."[234] If a defendant is denied an opportunity to address the court before sentencing, s/he only will be afforded a re-

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penalty'" did not amount to an instruction that "they must unanimously agree on the existence of any particular mitigating circumstance in order to recommend a life sentence."

[225] *Granville*, 123 P.3d at 667.

[226] *Id*. at 667.

[227] ARIZ. REV. STAT. § 13-703(C) (2005).

[228] REVISED ARIZONA JURY INSTRUCTIONS (Criminal) (3d ed.), Standard Criminal 5b(2), *at* http://www.myazbar.org/SecComm/Committees/CRJI/crji.cfm.

[229] Final Jury Instructions, Penalty Phase, State v. Smith, Jr. CR 95116, 92 (May 27, 2004).

[230] Final Jury Instructions, Phase III, State v. Gay, CR 2001-1542, 102 (May 18, 2004).

[231] *Granville*, 123 P.3d at 666.

[232] State v. McCall, 770 P.2d 1165, 1170 (Ariz. 1989).

[233] ARIZ. R. CRIM. P. 19.1(d)(7).

[234] *Anderson*, 111 P.3d at 392 (noting that the defendant testified during the penalty phase).

sentencing hearing on a showing that s/he "would have added something to the mitigating evidence already presented."[235]

e. Mercy Instructions

An instruction defining mitigation to include mercy may be permitted.[236] The Arizona Supreme Court has found no error or "inherent conflict" to exist where the court provides a mercy instruction along with an instruction stating that the jury "must not be influenced by sympathy or prejudice."[237]

4. Availability and Definitions of the Sentencing Options

A defendant convicted of a capital offense in Arizona may be sentenced to death, imprisonment for life, or imprisonment for natural life.[238] In the penalty phase of a capital trial, the jury, however, decides only whether the death penalty will be imposed on the defendant.[239] If the jury decides not to impose the death penalty, it is within the discretion of the trial court judge to determine whether the defendant will receive a sentence of imprisonment for life or imprisonment for natural life.[240] In *State v. Gay*, the court instructed the jurors accordingly:

> In the event you decide that that the defendant should not be sentenced to death, this court will impose one of the other two possible punishments for first degree murder. In that event, it will solely be the responsibility of this court to determine whether the defendant will be sentenced to life or natural life. The jury would not decide that question.[241]

Under section 13-703(A) of the A.R.S., a sentence of natural life means that the defendant "is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis,"[242] while a sentence of life means that the defendant must serve at least twenty-five years, if the victim was fifteen or older, or thirty-five years, if the victim was an unborn child or under the age of fifteen.[243] Arizona law does not require a court to instruct the jury on the definitions of "imprisonment for life" or "imprisonment for natural life." However, the proposed pattern capital jury instructions, approved in part by the Board of Governors of the State Bar of Arizona, define "life without [the] possibility of release from prison" to mean that the defendant "will never be eligible to be released from prison for any reason for the rest of the [d]efendant's life." The instructions also inform the jury that the defendant may be sentenced to "life imprisonment without the possibility of release after 25[35] years."

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235 *Id.*
236 *See* State v. Carreon, 107 P.3d 900, 915 (Ariz. 2005).
237 *Id.* at 916-17.
238 ARIZ. REV. STAT. §§ 13-703(A); 13-703.01(A) (2005).
239 *See* ARIZ. REV. STAT. §§ 13-703(A), 13-703.01(A) (2005).
240 ARIZ. REV. STAT. § 13-703.01(A) (2005).
241 Final Jury Instructions, Phase III, State v. Gay, CR 2001-1542, 103 (May 18, 2004).
242 ARIZ. REV. STAT. § 13-703(A) (2005).
243 *Id.*

If no aggravating circumstances are found to exist during the aggravation phase, the death penalty must be removed as a sentencing option.[244] If the jury finds one or more aggravating circumstances to be present, a defendant still may receive a sentence of imprisonment for life or natural life.[245] Although jury instructions to this effect are not required under Arizona law, the proposed pattern capital jury instructions have incorporated such instructions within the aggravation/eligibility phase of the defendant's sentencing hearing.[246] For instance, under the proposed instructions, a sentence of death or life imprisonment may be imposed only if the jury finds beyond a reasonable doubt the existence of one or more aggravating circumstances.[247] The instructions also explain that if the State "does not prove beyond a reasonable doubt that an aggravating circumstance exists, the judge will sentence the [d]efendant to either life imprisonment without the possibility of release, or life imprisonment with the possibility of release after 25[35] years."[248]

It is error, however, for the court to instruct jurors to impose a life sentence if they "entertain[ ] 'a doubt'" as to whether death is the appropriate sentence.[249]

5. Victim Impact Evidence

a. The Purpose and Use of Victim Impact Evidence

The United States and Arizona Supreme Courts have recognized that a victim's characteristics and the impact of the murder are relevant in determining a defendant's sentence, in that they may not only indicate the "blameworthiness and culpability" of the defendant, but also the harm caused by the defendant's conduct.[250]

The Arizona Victims' Bill of Rights allows a victim, defined as including a family member or lawful representative,[251] to "present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at any aggravation, mitigation, pre-sentencing or sentencing proceeding."[252] The law also entitles family members to be present at the court proceedings and to address the court.[253]

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[244] ARIZ. REV. STAT. § 13-703.01(E) (2005).
[245] ARIZ. REV. STAT. § 13-703.01(H) (2005).
[246] Draft Capital Case Sentencing Instructions, Eligibility Phase, 1.1 Nature of the Hearing (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author). Specifically, the proposed instructions state: "If the jury unanimously decides beyond a reasonable doubt that an aggravating circumstance does exist, each juror will decide if mitigating circumstances exist and then, as a jury, you will decide whether to sentence the Defendant to life imprisonment or death." *Id*.
[247] *Id*.
[248] *Id*.
[249] State *ex rel* Thomas v. Granville, 123 P.3d 662, 667-68 (Ariz. 2005) (concluding that such an instruction would amount to placing an impermissible burden of proof on the defendant—proof that death is appropriate beyond any doubt).
[250] Lynne v. Reinstein, 68 P.3d 412, 416 (Ariz. 2003); Payne v. Tennessee, 505 U.S. 808, 825-27 (1991).
[251] ARIZ. REV. STAT. § 13-4401(19) (2005). Because in capital cases, the victim is dead and unable to testify, we will use the term family member to encompass the meaning of a victim as defined under the statute.
[252] ARIZ. REV. STAT. § 13-4426(A) (2005).
[253] ARIZ. REV. STAT. § 13-4426(B) (2005).

In capital cases, section 13-703.01(R) of the A.R.S. specifies that a family member has the right to be present during court proceedings and to provide "any information that is relevant to the proceeding" at both the aggravation and penalty phases of the trial.[254] Only during the penalty phase, however, may an individual family member provide information to the jury about the murder victim and the impact of his/her death on the family.[255]

b. Admissibility of Victim Impact Evidence

Victim impact evidence is admissible in so far that it "is relevant in determining whether the death penalty should be imposed."[256] The "relevance" of victim impact evidence "is a constitutional concept that considers whether information that may bear upon the capital sentencing decision creates a constitutionally unacceptable risk that jurors may impose a death sentence based upon impermissible arbitrary and emotional factors."[257] It is therefore a violation of a capital defendant's constitutional right against cruel and unusual punishment for a family member to give his/her opinion of the capital defendant or the crime.[258] Similarly, a family member's opinions concerning which sentence to impose on the defendant are constitutionally irrelevant and must be precluded.[259] Family members also are prohibited from presenting any "inflammatory or unduly prejudicial evidence."[260]

c. Instructions Regarding Victim Impact Evidence

In *State v. Gay*, the court provided the jury with the following instruction in regards to victim impact evidence:

> The victim's brother has made a statement relating to the personal characteristics of [the victim] and the impact of her murder on her family. This information is not a new aggravating circumstance and you cannot consider it as such. Just as the law allows you to see the defendant as a unique person and to see the loss that will result from his execution, the law also allows you to see the murder victim as a unique person and to see the loss resulting from her murder. You are to consider this information only for this limited purpose.[261]

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[254] ARIZ. REV. STAT. § 13-703.01(R) (2005).
[255] *Id*. The victim impact statement may be oral or written.
[256] *Lynne*, 68 P.3d at 416.
[257] *Id.* at 417 n.5.
[258] *Id*. at 416-17.
[259] *Lynne*, 68 P.3d at 414; *Glassel*, 116 P.3d at 1214.
[260] State v. *ex rel*. Thomas v. Foreman, 118 P.3d 1117, 1121 (Ariz. Ct. App. 2005). In cases where the victim impact evidence is "so unduly prejudicial that it renders the trial fundamentally unfair," the defendant may seek relief under the Due Process Clause of the Fourteenth Amendment. *Glassel*, 116 P.3d at 1214
[261] Final Jury Instructions, Penalty Phase, State v. Smith, CR 95116, 95 (May 27, 2004).

6. The Awesome Power to Decide Between Life and Death

Although the Arizona Supreme Court has recognized that the imposition of a death sentence is an awesome power, it has not mandated that jurors specifically be instructed about it.[262]

7. Instructions After Jury Deliberations Have Commenced

a. The Arizona Rules of Criminal Procedure

Under Rule 22.3, the court may provide additional instructions to the jury, once the jury has retired to begin deliberations.[263] In order to do so, a request from either the jury or a party must have been received, and notice of the court's intention to give additional instructions must be afforded to the parties.[264]

If the jury finds itself at an impasse, the court may, "in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process."[265] To ensure the court's inquiry is not "coercive, suggestive or unduly intrusive," the Rules of Criminal Procedure suggest the following inquiry by the court:

> This instruction is offered to help your deliberations, not to force you to reach a verdict as a result of this procedure.
>
> You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.
>
> If you still have disagreement, you may wish to identify for the court and counsel which issues or questions of law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.
>
> I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try.[266]

b. The Allen Charge

The U.S. Supreme Court, in *Allen v. United States*,[267] authorized judges to provide additional instructions to jurors after judges have rendered the main charge to the jury

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[262] *See* State v. Nash, 694 P.2d 222, 232 (Ariz. 1985).
[263] ARIZ. R. CRIM. P. 22.3.
[264] *Id.*
[265] ARIZ. R. CRIM. P. 22.4.
[266] ARIZ. R. CRIM. P. 22.4 cmt.
[267] Allen v. United States, 164 U.S. 492, 501 (1896).

and jury deliberations have begun.[268] The Court upheld for that purpose the following instruction, which is known as the *Allen* charge:

> [I]n substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.[269]

c. Use of the *Allen* Charge and Permissible Instructions After the Jury Has Been Deliberating for an Extended Period of Time

A review of Arizona case law reveals only one instance in which the propriety of the Allen charge was examined. In *State v. Dunlap*, the Arizona Court of Appeals, while recognizing that each defendant is entitled to receive "a fair trial at the hands of an independent jury, the members of which were free from intimidation or undue pressure," concluded that the Allen charge did not coerce the guilty verdicts.[270] In determining if the jury charge was coercive, the court questioned whether "under totality of the circumstances, the trial court's actions or remarks displaced the independent judgment of the jurors."[271]

In *Dunlap*, the court also rejected the defendant's claims that a supplemental instruction provided to the deadlocked jury mandated reversal of the defendant's conviction.[272] To aid in the jury's deliberation, the trial court stated:

> It is desirable if you can reasonably agree upon a verdict. For the parties involved in the case it is an important one, and there is no reason to believe that the case could ever be submitted to a jury more competent to decide it."[273]

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[268] *See id.*
[269] *See Id.*
[270] State v. Dunlap, 930 P.2d 518, 541 (Ariz. Ct. App. 1996) (quoting State v. Lautzenheiser, 881 P.2d 339, 341 (Ariz. 1994)).
[271] *Id.*
[272] *Id.* at 541-42.
[273] *Id.*

Although the court acknowledged that such an instruction should not have been given and had been disapproved of by prior courts, it concluded that the instruction "did not impermissibly pressure jurors to reach a verdict or deny [the] defendant a fair trial by an independent jury."[274]

The Arizona Supreme Court has held that the "test for coerciveness is whether the trial court's actions or remarks, viewed in the totality of the circumstances, displaced the independent judgment of the jurors."[275]

8. Form of Instructions

Under Arizona's Rules of Criminal Procedure, each juror must receive a written copy of the court's preliminary and final instructions on the law before the court reads the instructions.[276] When the jury retires to deliberate, each juror must also take with him/her (1) a verdict form, (2) written or recorded[277] copies of the jury instructions, (3) any notes, and (4) any "such tangible evidence as the court in its discretion shall direct."[278]

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[274] *Id*. at 542.
[275] *See* State v. Jackson, 918 P.2d 1038, 1046 (Ariz. 1996) (finding no jury coercion).
[276] ARIZ. R. CRIM P. 21.3(d).
[277] *Id.* Courts of limited jurisdiction also may provide audio-taped instructions to the jury for use during deliberations.
[278] ARIZ. R. CRIM. P. 22.2(a)-(d).

II. ANALYSIS

A. Recommendation #1

> **Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.**

Pattern capital jury instructions currently do not exist in Arizona. Although the Criminal Jury Instruction Committee of the Arizona State Bar is working to draft and promulgate capital pattern jury instructions by October 2006, the Committee is composed entirely of attorneys and judges, and to the best of our knowledge, is not working with linguists, social scientists, psychologists, or jurors to (1) evaluate the extent to which jurors understand capital jury instructions; (2) ensure that jurors understand applicable law; and (3) monitor the extent to which jurors understand the instructions to permit further revision as necessary.

In 1993, however, the Arizona Supreme Court, wishing to address "the lack of [representation] in an increasingly diverse society, enforced juror passivity during trials and unacceptably low levels of juror comprehension of the evidence and the court's instructions" established the Committee on More Effective Use of Juries, which included attorneys, judges, former jurors, as well as academics in the fields of psychology and anthropology.[279] To ensure jurors better understood the applicable law in each case, the Committee on More Effective Use of Juries, in its report entitled *Jurors: The Power of 12*, recommended that preliminary jury instructions should be expanded to include elements of the charge and any defenses, be case-specific, and be in plain English.[280] Although the Committee reconvened in 1996 to consider additional issues, none specifically touched on the issues highlighted in Recommendation #1.[281] To the best of our knowledge, the Committee has not reconvened since 1996 to address the changes spurred by *Ring v. Arizona*.[282]

The State of Arizona, therefore, fails to comply with Recommendation #1.

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[279] Ariz. Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of Twelve*, at Introduction (1944), *available at* http://www.supreme.state.az.us/jury/Jury/jury.htm.

[280] *Id.* at 30.

[281] Ariz. Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of Twelve, Part 2* (1998), *available at* http://www.supreme.state.az.us/jury/Jury2/jury2.htm.

[282] It also is important to note that in 2001, the Arizona Supreme Court Ad Hoc Committee to Study Jury Practices and Procedures was created by the administrative order of the Chief Justice. The scope of the Ad Hoc's Committee mandate though was limited predominantly to the court administrative process and not tailored to address the issues raised within this Recommendation. *See* ARIZ. SUP. CT. AD HOC COMMITTEE TO STUDY JURY PRACTICES AND PROCEDURES, FINAL REPORT AND RECOMMENDATIONS, 1,2 (Aug. 2002).

B. Recommendation #2

Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.

This recommendation is supported by a myriad of studies finding that jurors provided with written court instructions pose fewer questions during deliberations, express less confusion about the instructions, use less time trying to decipher the meaning of the instructions, and spend less time inappropriately applying the law.[283] Written instructions, therefore, result in more efficient and worthwhile deliberations.[284]

Under the Arizona Rules of Criminal Procedure, each juror must receive a copy of the court's preliminary and final instructions on the law before such instructions are read by the court.[285] Jurors must also have a copy of the instructions while in deliberations.[286]

Because Arizona courts are required to provide capital jurors with written copies of the court's instructions while charging the jury and during juror deliberations, the State of Arizona meets Recommendation #2.

C. Recommendation #3

Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.

Capital jurors commonly have difficulty understanding jury instructions.[287] This can be attributed to a number of factors, including, but not limited to, the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.[288] Given that jurors have difficulty

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[283] The Hon. B. Michael Dann, *'Lessons Learned' and 'Speaking Rights': Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1259 (1993); Judge Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. Rev. 135. 177, 178 (2000) (noting that 69.0% of the judges polled thought that juror comprehension would be aided by giving written instructions after the judge charged the jury and most believed that it would aid juror comprehension to have the instructions with them during deliberations).

[284] *Dann*, *supra* note 283, at 1259; *Young*, *supra* note 283, at 162-63.

[285] ARIZ. R. CRIM. PROC. 21.3(d).

[286] *See* ARIZ. R. CRIM. P. 21.1; ARIZ. R. CIV. P. 51(b)(3).

[287] Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries understanding or misunderstanding of jury instructions).

[288] James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1169-1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (1995) (discussing jurors understanding of the concept of

understanding jury instructions, judges should respond meaningfully to jurors' requests for clarification of the instructions to ensure juror comprehension of the applicable law. Under Arizona law, trial courts have the discretion to provide jurors with additional instructions upon a juror's request.[289]

The Arizona Supreme Court's Committee on More Effective Use of Jurors highlighted this problem in Arizona more than a decade ago in its first report, *Jurors: The Power of 12*.[290] In proposing a solution, the Committee recommended that final jury instructions state that any written questions about the final instructions are welcome before and during deliberations.[291] The Committee, recognizing the "failure of too many judges to fully and fairly respond to questions" from the jury, also urged trial judges to deal fully and fairly with a jury's questions and recommended that judges receive instructions on how to do so. [292] To the best of our knowledge, however, none of these recommendations have been adopted by the State of Arizona.

More recently, in 2002, the Arizona Capital Case Commission expressed concerns regarding the ambiguity of the (F)(6) statutory aggravating circumstance (a murder committed in an "especially cruel, heinous or depraved manner").[293] Although in *Walton v. Arizona*,[294] the U.S. Supreme Court held the (F)(6) aggravating circumstance to be facially vague, the Court concluded that enough substance had been provided to the statute's "operative terms" to render it constitutional.[295] The Capital Case Commission, noting that the (F)(6) aggravator was the mostly commonly found aggravator prior to the U.S. Supreme Court's decision in *Ring v. Arizona*,[296] highlighted the need to define and narrow this aggravating circumstance since its determination now rests with a jury and not a judge.[297] Given the inherent vagueness of this aggravating circumstance, it is of utmost importance that the State of Arizona adopt a uniform and specific definition of this aggravating circumstance when instructing jurors during the penalty phase of a capital trial. Currently, the courts, in determining the constitutionality of jury instructions used to explain this aggravating circumstance, require the instructions to contain "essential narrowing factors" and provide "specificity and direction" to the jury,[298] but do not mandate that a uniform and specific definition be used.

Despite a need to clarify confusion among capital jurors, we have been unable to determine whether courts are exercising their discretion to respond meaningfully to juror questions in practice. We are, therefore, unable to ascertain whether the State of Arizona meets Recommendation #3.

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mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

[289] ARIZ. R. CRIM. P. 22.3; *see* State v. Stevens 909 P.2d 478 (Ariz. Ct. App. 1995).

[290] *See supra* note 279.

[291] *Id.*

[292] *Id.*

[293] OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, at 30 (Dec. 2002).

[294] 497 U.S. 639 (1990).

[295] *Id*. at 654. Since *Ring*, which mandated the jury to find aggravating circumstances, the Court has continued to reject vagueness challenges. *See* State v. Anderson, 111 P.3d 369, 394-95 (Ariz. 2005).

[296] Ring v. Arizona, 536 U.S. 584 (2002).

[297] *See supra* note 293.

[298] State v. Cromwell, 119 P.3d 448, 456 (Ariz. 2005).

D. Recommendation #4

> **Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.**

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to provide instructions and allow the introduction of evidence on parole practices, including witness testimony, upon the defendant's request.

1. Alternative Punishments

Under section 13-703(A) of the A.R.S., a defendant convicted of a capital offense may be sentenced to death, imprisonment for life, or imprisonment for natural life.[299] Arizona law does not require a court to instruct the jury on the definitions of "imprisonment for life" or "imprisonment for natural life," however. The proposed pattern capital jury instructions, approved in part by the Board of Governors of the State Bar of Arizona, do define "life without [the] possibility of release from prison" to mean that the defendant "will never be eligible to be released from prison for any reason for the rest of the [d]efendant's life." The instructions also inform the jury that the defendant may be sentenced to "life imprisonment without the possibility of release after 25[35] years."

In addition, beyond not requiring that alternative sentences be defined for the jury, in at least one case, the court went beyond not defining the sentencing options and did not instruct on the *existence* of one of the three potential sentencing options. In *State v. Smith*, a copy of the preliminary instructions given to the jury during the aggravation phase specified only two sentencing options—death or a sentence of life without the possibility of release until at least 25 years have been served"—and failed to mention the possibility of sentencing the defendant to imprisonment for natural life, with no possibility of parole.[300] The final instructions provided in the aggravation phase of *Smith* failed to mention the defendant's sentencing options at all.[301]

2. Parole Practices

While studies consistently have shown that capital jurors underestimate the total number of years defendants convicted of capital murder, but not sentenced to death spend in

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[299] ARIZ. REV. STAT. §§ 13-703(A); 13-703.01(A) (2005).

[300] *See* Preliminary Instructions, Aggravation Phase, State v. Smith, Jr., CR 95116, (May 17, 2004). The Preliminary Instructions for the Aggravation Phase read: "In referring to the nature of the sentencing hearing, the court states: 'Because the defendant has been convicted of the crime of first-degree murder, under Arizona law applicable to this case the defendant is subject to being punished by either death or imprisonment for life without the possibility of release until at least 25 calendar years have been served.'"

[301] *See* Final Instructions, Aggravation Phase, State v. Smith, Jr., CR 95116 (May 18, 2004).

prison,[302] Arizona law does not, to the best of our knowledge, allow parole officials or other knowledgeable witnesses to testify about parole practices to clarify jurors' understanding of alternative sentences.

In order to enable capital jurors to make informed sentencing decisions, the State of Arizona should ensure that the pattern jury instructions include and define "imprisonment for life" as well as "imprisonment for natural life," and permit parole testimony when necessary to clarify a jury's understanding of these alternative sentences.

Based on the foregoing, the State of Arizona fails to comply with Recommendation #4.

E. Recommendation #5

> **Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.**

Arizona law does not require an instruction stating that the jury may impose a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty. A review of Arizona case law also did not reveal any instances in which this instruction was used by the courts. Instead, the Arizona Supreme Court has instructed that "jury instructions should focus on the statutory requirement that a juror may not vote to impose the death penalty unless s/he finds, in the juror's individual opinion, that 'there are no mitigating circumstances sufficiently substantial to call for leniency.'"[303] A juror could consequently fail to understand that s/he could choose to vote against a sentence of death, even in the absence of mitigation evidence.

The State of Arizona, therefore, fails to comply with Recommendation #5.

F. Recommendation #6

> **Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Further, jurisdictions should implement provision of Model Penal Code Section 210.6(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.**

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[302] William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 645 (1999); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51,80 (2003); William J. Bowers, *The Capital Jury: Is it Titled Toward Death*, 79 JUDICATURE 220, 221-22 (1996).

[303] State *ex rel* Thomas v. Granville, 123 P.3d 662, 666-67 (Ariz. 2005) (quoting ARIZ. REV. STAT. § 13-703(E)). This statutory standard serves to "guide[] and channel[] the jurors' discretion as they evaluate and consider the mitigating circumstances, whether proved by the defendant or present in the record, in determining whether death is the appropriate sentence for that particular defendant."

The State of Arizona does not require judges to instruct jurors that residual doubt concerning the defendant's guilt is a mitigating circumstance nor does it have a state law requiring the imposition of a sentence less than death in cases in which residual doubt concerning the defendant's guilt is present.

As previously discussed, Arizona has no pattern capital jury instructions. Section 13-703(G) of the A.R.S., however, allows jurors to consider any facts "relevant in determining whether to impose a sentence less than death." In at least one case, Arizona courts have included residual doubt in the list of mitigating circumstances it presented to the jury in its jury instructions.[304] The Court has cast doubt on the validity of residual doubt as a mitigating factor, however, by stating that "[d]uring the aggravation and penalty phases, a juror may not revisit its initial guilty verdict."[305]

Significantly, in December 2002, the Capital Case Commission recommended that residual doubt not be added to the list of statutory mitigating circumstances outlined in section 13-703(G) of the A.R.S.[306] The Commission's recommendation was made "largely because the strength of the government's proof of guilt may already be considered during the sentencing phase of a capital case."[307]

The State of Arizona, therefore, is not in compliance with Recommendation #6.

G. Recommendation #7

> **In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.**

Under section 13-703(E) of the A.R.S., a sentence of death must be imposed if the jury finds the existence of one or more statutory aggravating circumstance(s), and then concludes that "there are no mitigating circumstances sufficiently substantial to call for leniency."[308] This section, as interpreted by the Arizona. Supreme Court, "read most naturally, [ ] requires the [jury] to weigh aggravating and mitigating circumstances—to determine the relative 'substan[ce]' of the two kinds of factors."[309]

While there are not yet criminal pattern jury instructions for capital cases, in at least one case, *State v. Granville*, the court did provide instructions clarifying the method by which jurors should consider aggravating and mitigating factors.[310] There, the jury instructions addressing the "sufficiently substantial to call for leniency" standard of section 13-703(G) read:

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[304] *See* State v. Carreon, 107 P.3d 900, 915 (Ariz. 2005) (instructing mitigation to include residual doubt).
[305] State v. Anderson, 111 P.3d 369, 390 (Ariz. 2005) (holding that a defendant is not constitutionally entitled to have aggravation and penalty issues decided by the same jury that decided guilt).
[306] *See supra* note 293, at 1, 21.
[307] *Id*. at 20.
[308] ARIZ. REV. STAT. § 13-703(E) (2005).
[309] *See* State v. Barreras, 892 P.2d 852, 857 (Ariz. 1995) (quoting Richmond v. Lewis 506 U.S. 40, 47 (1992)).
[310] *See* State v. Granville, 123 P.3d 662, 667 (Ariz. 2005).

> In deciding whether the defendant should be sentenced to death or life in prison, you must weigh the mitigating circumstances that have been proven to you against the aggravating factor that you have already found, and determine whether there is mitigation that is sufficiently substantial to call for life in prison. . .
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale.[311]

Out of a concern that "weighing" language could "confuse or mislead jurors," [312] the Arizona Supreme Court has discouraged the use of jury instructions which employ an instruction that "mitigating circumstances must 'outweigh' aggravating factors for life to be the appropriate sentence" and concluded instead that:

> [J]ury instructions should focus on the statutory requirement that a juror may not vote to impose the death penalty unless he or she finds, in the juror's individual opinion, that "there are no mitigating circumstances sufficiently substantial to call for leniency." In other words, each juror must determine whether, in that juror's individual assessment, the mitigation is of such quality or value that it warrants leniency.[313]

To ensure that all defendants are accorded fair sentencing hearings, the State of Arizona should adopt capital pattern jury instructions clarifying that the death penalty should not be imposed merely because the number of aggravating circumstances found exceeds the number of mitigating circumstances.

Although the State of Arizona does not have a pattern jury instruction on this issue and the Arizona Supreme Court does not *require* clarifying language, the Arizona Supreme Court has acknowledged the issue of potential juror confusion and has suggested that judges move away from an instruction that mitigating circumstances must "outweigh" aggravating factors for life to be the appropriate sentence. Consequently, the State of Arizona is in partial compliance with Recommendation #7.

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311 *Id*. at 668 (appendix).
312 *Id.* at 667.
313 *Id.*

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE

INTRODUCTION TO THE ISSUE

Our criminal justice system relies on the independence of the Judicial Branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. However, judicial independence is increasingly being undermined by judicial elections, appointments and confirmation proceedings that are affected by nominees or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even where these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the Constitutional doctrine in the case but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, and makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

I. FACTUAL DISCUSSION

A. Selection of Judges

The judicial selection process in Arizona reflects a blend of two systems: merit-based appointments and non-partisan elections. All Arizona Supreme Court justices, Court of Appeals judges, and Superior Court judges from counties with a population of 250,000 or more are selected on the basis of merit by the Governor, who, in turn, bases his/her appointments upon the recommendations of a nominating commission.[1] Superior Court judges from counties with a population of fewer than 250,000 people, however, are selected in non-partisan elections.[2] To serve additional terms, all Arizona state court judges are subject to unopposed retention elections or general re-elections.[3]

1. The Arizona Supreme Court and the Court of Appeals

All Arizona Supreme Court justices and Court of Appeals judges are appointed by the Governor from a list of candidates compiled by the Commission on Appellate Court Appointments (CACA).[4] CACA is composed of sixteen Governor-appointed members: the Chief Justice of the Arizona Supreme Court (who serves as Chair), five attorneys,[5] and ten non-attorneys.[6] For each judicial vacancy, CACA must nominate at least three individuals.[7] Only two of the three nominees may share the same political affiliation, unless CACA submits four or more nominees to the Governor, in which case no more than sixty percent of the nominees may share the same political affiliation.[8]

Before submitting its list of judicial nominees, CACA is obligated to "conduct investigations, hold public hearings and take public testimony."[9] CACA's decision about nominees must be made in a public forum and, while CACA must consider the diversity of the State's population, its principal consideration must be merit.[10] Similarly, while the Governor must base his/her selection primarily on a candidate's merit, s/he still must take into consideration the diversity reflected in Arizona's population.[11]

If CACA fails to submit its nominees to the Governor within sixty days of a judicial vacancy, the Governor retains authority to appoint any qualified person until CACA provides the Governor with its nominees.[12] Alternatively, if the Governor fails to appoint a nominee within sixty days of CACA's submission, responsibility for filling the judicial

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1 ARIZ. CONST. art. 6, § 37(A), (B).
2 ARIZ. CONST. art. 6, § 12(A).
3 ARIZ. CONST. art. 6, § 38.
4 ARIZ. CONST. art. 6, § 37(A).
5 The Board of Governors of the State Bar of Arizona nominates the five attorneys who are then appointed by the Governor "with the advice and consent of the senate in the manner prescribed by law." ARIZ. CONST. art. 6, § 36(A), para. 1.
6 The Governor also appoints the non-attorney members "with the advice and consent of the senate in the manner prescribed by law." *Id.*
7 ARIZ. CONST. art. 6, § 37(A).
8 *Id.*
9 ARIZ. CONST. art. 6, § 36(D).
10 *Id.*
11 ARIZ. CONST. art. 6, § 37(C).
12 *Id.*

vacancy shifts to the Chief Justice of the Arizona Supreme Court.[13] When making the appointment, the Chief Justice's sole consideration must be the candidate's merit.[14]

Once appointed, justices of the Arizona Supreme Court and judges of the Arizona Court of Appeals initially serve a term "ending sixty days following the next regular general election after the expiration of a term of two years in office."[15] If a justice or judge wishes to retain his/her seat beyond the initial term, s/he must file a declaration of this desire with the Office of the Secretary of State between sixty and ninety days before the general election prior to the end of his/her term.[16] At the general election, the judge's name will appear on the ballot without any partisan designation.[17] If a majority votes to retain the judge or justice, s/he will serve a term of six years.[18] If a majority votes against retaining the justice or judge or s/he simply fails to file a declaration, however, his/her office will become vacant.[19]

2. The Superior Courts

The method used to select Arizona Superior Court judges depends on the population of each county. Counties with 250,000 or more people as of the most recent U.S. Census are constitutionally mandated to follow nearly the same judicial selection process as the Arizona Supreme Court and the Court of Appeals– merit-based elections, followed by retention elections.[20] Presently, the only Arizona counties that meet this population threshold are Maricopa and Pima counties.[21] In contrast, counties with fewer than 250,000 people are constitutionally mandated to hold non-partisan elections to select Superior Court judges.[22]

a. Counties with Populations of 250,000 or More: The Maricopa County and Pima County Superior Courts

All Superior Court judges for Maricopa and Pima counties are appointed by the Governor from a list of candidates compiled by either the Maricopa County Commission on Trial Court Appointments or the Pima County Commission on Trial Court Appointments (the commission(s)).[23] Like CACA, each commission consists of sixteen governor-appointed members: the Arizona Supreme Court Chief Justice,[24] five attorneys,[25] and ten non-

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13 *Id.*
14 *Id.*
15 *Id.*
16 ARIZ. CONST. art. 6, § 38(A).
17 ARIZ. CONST. art. 6, § 38(B).
18 ARIZ. CONST. art. 6, § 38(C); ARIZ. CONST. art. 6, § 4; ARIZ. REV. STAT. 12-120.01(B) (2005).
19 ARIZ. CONST. art. 6, § 38(C), (E).
20 *See* ARIZ. CONST. art. 6, § 37(B); ARIZ. CONST. art. 6, § 41(A)-(L).
21 *See* ARIZ. CONST. art. 6, § 37(B); ARIZ. CONST. art. 6, § 41(A)-(L).
22 ARIZ. CONST. art. 6, § 12(A).
23 *See* ARIZ. CONST. art. 6, § 41(B).
24 The Arizona Supreme Court Chief Justice serves as Chair. ARIZ. CONST. art. 6, § 41(B), para. 1.
25 The State Board of Governors of the State Bar of Arizona nominates the five attorneys appointed by the Governor "subject to confirmation by the senate in the manner prescribed by law." ARIZ. CONST. art. 6, § 41(B), para. 2. No more than three attorneys may be of the same political party. *Id.*

attorneys[26] and must provide at least three judicial nominees to the Governor after "conduct[ing] investigations, hold[ing] public hearings and tak[ing] public testimony."[27] In selecting nominees, the commissions must focus primarily on merit, but also must consider the diversity of each county's population and the "geographical distributions of the residences of the judges throughout the county."[28] The Governor too must base his/her selection of a Superior Court judge on the candidate's merit, while considering the diversity of the county.[29]

If the Governor does not receive the commission nominations within sixty days of the judicial vacancy, the Governor has the authority to appoint a qualified individual until their receipt.[30] Alternatively, if the Governor fails to appoint a nominee within sixty days of a commission's submission, the Chief Justice of the Arizona Supreme Court must immediately appoint a judge.[31] In making the appointment, the Chief Justice's sole consideration must be the candidate's merit.[32] Once appointed, Superior Court judges in Maricopa and Pima counties initially serve for a term "ending sixty days following the next regular general election after the expiration of a term of two years in office."[33]

If a Maricopa or Pima county Superior Court judge wishes to serve another term, s/he must file a declaration of his/her "desire to be retained in office" in the Office of the Clerk of the Board of Supervisors of the respective county between sixty and ninety days before the general election prior to the end of his/her term.[34] At the next regular general election, the judge's name will appear on the ballot without a political designation.[35] If a majority votes in favor of retaining the judge, s/he will serve a term of four years.[36] If a majority votes against retaining the judge or the judge fails to file a declaration, his/her seat will become vacant.[37]

b. Counties with Populations of Fewer than 250,000

Superior Court judges in counties with fewer than 250,000 people must be elected in non-partisan county general elections.[38] Elected Superior Court judges serve a term of four years.[39] If a judicial vacancy arises prior to the expiration of a term of office, the

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[26] ARIZ. CONST. art. 6, § 41(B), para 3. No more than two non-attorney members can "reside in the same supervisorial district." *Id.*

[27] ARIZ. CONST. art. 6, § 41(I), (J). Again, only two of the three nominees may share the same political affiliation unless the commission submits at least four nominees, in which case no more than 60% of the nominees may share the same political affiliation. *See* ARIZ. CONST. art. 6, § 37(B), § 41(I).

[28] ARIZ. CONST. art. 6, § 41(J).

[29] ARIZ. CONST. art. 6, § 37(C).

[30] *Id.*

[31] *Id.*.

[32] *Id.*.

[33] *Id.*

[34] ARIZ. CONST. art. 6, § 38(A).

[35] ARIZ. CONST. art. 6, § 38(B).

[36] ARIZ. CONST. art. 6, § 12(B); ARIZ. CONST. art. 6, § 38(C).

[37] ARIZ. CONST. art. 6, § 38 (C), (E).

[38] ARIZ. CONST. art. 6, § 12(A).

[39] *Id.*

Governor has the authority to appoint a new judge "until the election and qualification of a successor."[40]

Counties with fewer than 250,000 people also are constitutionally permitted to select Superior Court judges in the same manner as counties with populations of 250,000 or more,[41] but a county first must vote in favor of this judicial selection process.[42] As of yet, no Arizona county has chosen to do so.

3. Constitutionally Mandated Performance Evaluations

In 1992, the Arizona Constitution was amended to mandate a process for evaluating merit-selected justices and judges who are subject to retention elections.[43] The following year, the Arizona Supreme Court established the Commission on Judicial Performance Review (CJPR) to administer the evaluation process.[44] The CJPR, presently a twenty-nine-member commission,[45] is responsible for creating performance standards and conducting performance reviews.[46] To do this, the CJPR surveys jurors, attorneys, litigants, witnesses, personnel, and others with personal knowledge of the justice or judge's performance, and the CJPR solicits public comments.[47] Various media outlets and the Secretary of State disseminate the results of the evaluation state-wide.[48]

In addition, the CJPR administers a self-improvement program for judges and justices.[49] As part of this program, justices and judges provide information relating to their own performance.[50] A three-member team comprised of a judge, attorney, and public member volunteer will review the information and isolate areas of improvement or areas in which the judge or justice may be able to assist his/her colleagues on the bench.[51]

B. Conduct of Judicial Candidates and Judges

The Arizona Commission on Judicial Conduct (ACJC), created by constitutional amendment in 1970, is the independent state agency charged with investigating complaints against justices and/or judges on the Arizona Supreme Court, Court of Appeals, and Superior Courts.[52]

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[40] ARIZ. CONST. art. 6, § 12 (B).
[41] ARIZ. CONST. art. 6, § 40.
[42] *Id.*
[43] Ariz. Comm'n on Jud. Performance Review, Evaluating Judges' Job Performance: Judicial Performance Review (on file with author).
[44] ARIZ. R. JUD. PERFORMANCE REV. 1, 2.
[45] Arizona Supreme Court, Judicial Performance Review, Membership Roster, *available at* http://www.supreme.state.az.us/jpr/COMMISSION%20ROSTER.pdf (last visited May 30, 2006).
[46] Arizona Supreme Court, Judicial Performance Review, Who Judges the Judges? You do! We can help., *available at* http://www.supreme.state.az.us/jpr/ (last visited May 30, 2006).
[47] *Id.*
[48] *Id.* Results of the evaluations are "distributed throughout the state via media reports and the Secretary of State voter information pamphlet mailed to households prior to general elections." *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] ARIZ. COMM'N ON JUD. CONDUCT, HANDBOOK, at 1 (Feb. 2006). The ACJC also investigates complaints against any justice and municipal court judges. *Id.*

The ACJC consists of eleven members: six judges appointed by the Arizona Supreme Court;[53] two attorneys appointed by the Board of Governors of the State Bar of Arizona; and three individuals, neither attorneys nor judges, appointed by the Governor and confirmed by the State Senate.[54] Members serve staggered six-year terms and must elect a Chairperson, a Vice-Chairperson, and a Secretary, each of whom serves for two years.[55] The Commission may also employ an Executive Director to serve as the chief administrative officer, disciplinary counsel to conduct preliminary investigations and serve as a prosecutor in the proceedings, and any other necessary staff.[56]

The ACJC is authorized to examine complaints and discipline any justices, judges, or judicial candidates who (1) engage in "willful misconduct in office," (2) "willfully and persistently fail to perform judicial duties," (3) express "habitual intemperance," (4) engage in "conduct prejudicial to the administration of justice that brings the judiciary into disrepute," and/or (5) violate the Code of Judicial Conduct, the standards for ethical conduct promulgated by the Arizona Supreme Court.[57] While the ACJC recognizes a duty "to protect the public and to maintain high standards for the judiciary and the administration of justice," the ACJC is also cognizant of the fact that its duty does not encompass taking action against a justice/judge for his/her decisions of fact and/or law, even if they are erroneous.[58] The ACJC's authority also extends to alleged misconduct occurring prior to a justice/judge's term of service.[59]

1. Requisite Conduct of Judicial Candidates During Campaigns

The Arizona Code of Judicial Conduct (the Code) establishes a set of standards for the ethical conduct of judicial candidates.[60] Canon 5 of the Code requires all judicial candidates, including incumbent judges, to maintain a certain standard of conduct during their campaigns.[61] Canon 5(A)(1) addresses "Political Conduct in General" and specifically prohibits any judicial candidate from:

(1) Acting as a leader or holding any office in a political organization;
(2) Making speeches for a political organization or candidate or publicly endorsing a candidate for public office;
(3) Soliciting funds for or paying an assessment to a political organization or candidate, or making contributions to a political party or organization or to a non-judicial candidate in excess of a combined total of $250 per year; or

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[53] *Id*. The six judges consist of two judges from the court of appeals, two from the superior court, one from a justice court, and one from a municipal court.). *Id.*
[54] *Id.*; ARIZ. COMM'N ON JUD. CONDUCT R. 3(a).
[55] ARIZ. COMM'N ON JUD. CONDUCT R. 3(a), (b).
[56] ARIZ. COMM'N ON JUD. CONDUCT R. 4(a)-(c).
[57] ARIZ. COMM'N ON JUD. CONDUCT R. 6.
[58] ARIZ. COMM'N ON JUD. CONDUCT R. 5, 7. This holds true so long as the judge did not act fraudulently, with a corrupt motive or bad faith. ARIZ. COMM'N ON JUD. CONDUCT R. 7.
[59] ARIZ. COMM'N ON JUD. CONDUCT R. 2.
[60] ARIZ. CODE OF JUD. CONDUCT (Preamble).
[61] ARIZ. CODE OF JUD. CONDUCT Canon 5.

(4) Actively taking part in any political campaign other than his/her own election, reelection or retention in office.[62]

In addition, Canon 5(B), which specifically addresses "Judicial Campaign Conduct," mandates that any judicial candidate, including incumbent judges:

(1) Maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and . . . encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;
(2) Prohibit employees and officials who serve at the pleasure of the candidate, and . . . discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the sections of this Canon;
(3) Not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the sections of this Canon;
(4) Not (i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or (ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.[63]

The Code allows judicial candidates to address political gatherings on their own behalf and to reply, in accordance with Canon 5(B), to any personal attacks on their records.[64] The Code also permits judicial candidates to campaign for retention or reelection and to obtain public state support as well as campaign funds.[65] Judicial candidates, however, are prohibited from personally soliciting funds and must abide by Arizona campaign-finance laws.[66] Under Arizona law, a judicial candidate may accept individual and PAC contributions of up to $760 for state-wide races and $300 for local races; s/he may not accept any contributions from corporations or labor unions.[67]

2. Requisite Conduct of Judges

a. Conduct of Judges

The Arizona Code of Judicial Conduct includes a number of standards of conduct to which active judges are required to adhere. This discussion, however, will focus on the

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[62] ARIZ. CODE OF JUD. CONDUCT Canon 5(A)(1)(a)-(d). These standards of conduct also extend to judges.
[63] ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(1)(a)-(d).
[64] ARIZ. CODE OF JUD. CONDUCT Canon 5(A)(2), 5(B)(1)(e).
[65] ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(2), (3).
[66] ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(2). Instead, candidates "should refer prospective contributors to the candidate's campaign committee." *Id.*
[67] *See* American Judicature Society, Judicial Selection in the States, Arizona: Judicial Campaigns and Elections, *available at* http://www.ajs.org/js/AZ_elections.htm (last visited Mar. 22, 2006).

standards of conduct pertaining to three issues: (1) judicial impartiality; (2) public comment on cases; and (3) the conduct of prosecutors and defense attorneys.

i. Judicial Impartiality

Judges "should participate in establishing, maintaining and enforcing high standards of conduct," and are required to "personally observe those standards so that the integrity and independence of the judiciary will be preserved."[68] Specifically, judges are required to be "faithful to the law" and "not be swayed by partisan interests, public clamor or fear of criticism."[69] Judges also are required to perform their judicial duties "without bias or prejudice."[70] Any judge who "manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."[71]

ii. Public Comment on Cases

Judges must refrain from making any public comment that "might reasonably be expected to affect [a court proceeding's] outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing" while a proceeding is pending or impending,[72] including during any appellate process and until final disposition.[73]

iii. Conduct of Prosecutors and Defense Attorneys

The Code provides that a judge must require "lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others."[74] The judge also must require that lawyers act in a "patient, dignified and courteous" manner to litigants.[75]

A judge should act appropriately when s/he "receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct."[76] Appropriate action includes "direct communication with the . . . lawyer who has committed the violation . . . , other direct action if available, and reporting the violation to the appropriate authority or other agency or body."[77] A judge is obligated to report the violation to the appropriate authority if an attorney's violation of the Rules of Professional Conduct raises a "substantial question" as to the attorney's "honesty, trustworthiness or fitness" as a practitioner and is known to the judge.[78]

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68 ARIZ. CODE OF JUD. CONDUCT Canon 1(A).
69 ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(2).
70 ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(5).
71 ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(5) cmt.
72 ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(9).
73 ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(9) cmt.
74 ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(6).
75 ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(4).
76 ARIZ. CODE OF JUD. CONDUCT Canon 3(D)(2).
77 ARIZ. CODE OF JUD. CONDUCT Canon 3(D)(2) cmt.
78 ARIZ. CODE OF JUD. CONDUCT Canon 3(D)(2).

3. Complaints Against Judicial Candidates and Judges

An individual wishing to file a complaint against a judge or judicial candidate may do so by writing to the ACJC.[79] Each complaint consists of a description of the alleged misconduct and a list of any witnesses.[80] Upon receipt of a complaint, the Executive Director of the ACJC must conduct an initial screening.[81] The Executive Director will dismiss any complaints found to be "frivolous, unfounded, solely appellate in nature, or outside the jurisdiction of the commission."[82] If, however, the complaint properly alleges judicial misconduct, disciplinary counsel for the ACJC must conduct a preliminary investigation.[83]

A preliminary investigation may include interviews of the judge, complainant, and/or other witnesses as well as an examination of records and documents.[84] At the conclusion of the preliminary investigation, disciplinary counsel may recommend dismissal of the complaint, or an informal sanction, generally constituted by a reprimand.[85] Disciplinary counsel's recommendations and findings must be presented to the ACJC for review and/or approval.[86]

However, if disciplinary counsel needs more information to resolve the complaint, or, alternatively, the evidence supports charges against the judge, the ACJC will start formal proceedings against the judge by establishing an investigative panel of three judges to review the findings of the preliminary investigation.[87] If the investigative panel believes that further evidence "supporting the allegations may be obtained," the panel may approve a full investigation.[88] Before instituting any formal proceedings, the ACJC must notify the judge of the contents of the complaint and provide him/her with an opportunity to respond.[89]

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[79] ARIZ. COMM'N ON JUD. CONDUCT R. 20. The ACJC may commence a proceeding on its own motion. *Id.* An incapacity proceeding also may be initiated by the filing of a complaint as well as "by a claim of inability to defend in a disciplinary proceeding, or by an order of involuntary commitment or adjudication of incompetency." Incapacity proceedings, while conducted according to the procedures outlined for disciplinary proceedings, are performed to determine whether the judge suffers from a permanent incapacity (or one that is likely to become permanent) that seriously interferes with his/her judicial abilities. If the ACJC finds that the judge suffers from an incapacity, it will recommend retirement. *See* ARIZ. COMM'N ON JUD. CONDUCT R. 33(a)-(c).

[80] How to File a Complaint Against a Judge, Complaint Form (on file with author).

[81] ARIZ. COMM'N ON JUD. CONDUCT R. 21. All dismissals are subject to review by the ACJC. *Id.*

[82] *Id.*

[83] ARIZ. COMM'N ON JUD. CONDUCT R. 22(a).

[84] ARIZ. COMM'N ON JUD. CONDUCT, *supra* note 52, at 3.

[85] *Id.*; ARIZ. COMM'N ON JUD. CONDUCT R. 17(a), 22(a). Dismissal of the complaint may actually occur at any time during the course of the investigation. ARIZ. COMM'N ON JUD. CONDUCT, *supra* note 52, at 3. The ACJC issues a reprimand "for conduct that is unacceptable…but that is not so serious as to warrant formal proceedings or further discipline by the supreme court." ARIZ. COMM'N ON JUD. CONDUCT R. 17(a).

[86] ARIZ. COMM'N ON JUD. CONDUCT R. 22(a), 23(a).

[87] ARIZ. COMM'N ON JUD. CONDUCT, *supra* note 52, at 4; ARIZ. COMM'N ON JUD. CONDUCT R. 22(c).

[88] ARIZ. COMM'N ON JUD. CONDUCT R. 22(d).

[89] ARIZ. COMM'N ON JUD. CONDUCT R. 22(b).

After the full investigation (if one is necessary), the panel may recommend that the complaint be dismissed or that informal sanctions be imposed.[90] In such cases, the ACJC will review the complaint, any reports compiled by the disciplinary counsel or Executive Director, or any of the investigative panel's recommendations.[91] The ACJC may then choose to dismiss the complaint or impose an informal sanction.[92] Either the judge or the complainant may file a motion for reconsideration within fifteen days of the mailing of an order, or the judge may request a formal hearing.[93]

However, if the investigative panel finds that "reasonable cause to believe that one or more grounds for discipline of a judge exists that cannot be resolved through dismissal or informal sanctions," formal charges must be brought against the judge.[94] The formal charges must be served on the judge "along with a notice of formal proceedings prepared by the [E]xecutive [D]irector," informing the judge of the charges, his/her right to counsel, and his/her right to respond.[95] If the judge fails to reply within fifteen days or fails to show good cause justifying an extension of time, the allegations of misconduct will "be deemed admitted."[96] Once the judge files an answer or fails to file an answer within the allotted time, the proceedings "become public and the [ACJC] may no longer resolve the case informally." Generally, the ACJC then will hold a formal hearing.[97]

A hearing will be held before a panel of those commission members not party to the investigative panel or, if the ACJC is indisposed, before a hearing officer or panel of three hearing officers.[98] The presiding member of the hearing panel is charged with overseeing all pre-hearing proceedings and presiding over the formal hearing.[99] In this capacity, the presiding member may order a settlement conference, rule on pre-hearing motions, and conduct pre-hearing conferences.[100] At any time before the hearing, the presiding member may mandate a settlement conference between the parties.[101] The judge must be afforded at least fifteen days advanced notice of the hearing.[102]

Prior to the formal hearing, both parties are offered an opportunity to conduct discovery.[103] Within twenty days after the judge files a response to the formal charges,

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90 ARIZ. COMM'N ON JUD. CONDUCT R. 23(a).
91 *Id.*
92 *Id.*
93 ARIZ. COMM'N ON JUD. CONDUCT R. 23(b), (c).
94 ARIZ. COMM'N ON JUD. CONDUCT R. 22(f); 24(a). Note that there appears to be a discrepancy as to when formal charges must be filed. Under Rule 22(f), if the investigative panel finds "reasonable cause to believe that one or more grounds for discipline of a judge exists that cannot be resolved through dismissal or informal sanctions, the investigative panel "*may* instruct disciplinary counsel to prepare formal charges." ARIZ. COMM'N ON JUD. CONDUCT R. 22(f) (emphasis added). Under Rule 24(a), "after the investigative panel finds reasonable cause to proceed, disciplinary counsel *shall* prepare a statement of formal charges." ARIZ. COMM'N ON JUD. CONDUCT R. 24(a) (emphasis added).
95 ARIZ. COMM'N ON JUD. CONDUCT R. 24(b).
96 ARIZ. COMM'N ON JUD. CONDUCT R. 25(d).
97 ARIZ. COMM'N ON JUD. CONDUCT, *supra* note 52, at 4.
98 ARIZ. COMM'N ON JUD. CONDUCT R. 27(a), (c).
99 ARIZ. COMM'N ON JUD. CONDUCT R. 27(b), (c).
100 *Id.*
101 ARIZ. COMM'N ON JUD. CONDUCT R. 27(e).
102 ARIZ. COMM'N ON JUD. CONDUCT R. 27(d).
103 *See* ARIZ. COMM'N ON JUD. CONDUCT R. 26.

disciplinary counsel and the judge must inform each other of all individuals having knowledge of the alleged misconduct.[104] If a party shows good cause and the presiding member of the hearing panel or the hearing officer grants permission, the party may refuse to provide the requisite names.[105] Both parties have a continuing obligation to disclose evidence related to the charges, which includes any exculpatory evidence within the ACJC's possession.[106] The parties must complete discovery, to the extent it is "practicable," forty-five days after the judge files a response to the formal charges or fifteen days before the hearing.[107]

During the hearing, counsel for both parties may present evidence and examine witnesses, including the judge.[108] Each party also may recommend an appropriate disciplinary measure to the ACJC.[109] All testimony must be made under oath and findings of fact must be predicated on "clear and convincing evidence."[110] Procedural error will not serve as a basis to invalidate the proceedings, unless they affect the judge's substantive rights.[111]

If the judge or his/her counsel does not appear at the hearing, s/he will have, in effect, conceded to the allegations of misconduct as well as to the merits of any motions or recommendations before the panel or hearing officer.[112] Only if the judge shows good cause will a proceeding be delayed or continued in his/her absence.[113]

In determining the appropriate disciplinary action, ACJC members may consider the following factors:

(1) The nature, extent, and frequency of the misconduct;
(2) The judge's experience and length of service on the bench;
(3) Whether the conduct occurred in the judge's official capacity or private life;
(4) The nature and extent to which the acts of misconduct injured other persons or respect for the judiciary;
(5) Whether and to what extent the judge exploited his/her position for improper purposes;
(6) Whether the judge has recognized and acknowledged the wrongful nature of the conduct and manifested an effort to change or reform the conduct;

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[104] ARIZ. COMM'N ON JUD. CONDUCT R. 26(a).
[105] *Id.*
[106] ARIZ. COMM'N ON JUD. CONDUCT R. 26(c), (d). "Exculpatory evidence, for the purposes of disciplinary proceedings, is not evidence of otherwise expected judicial conduct." ARIZ. COMM'N ON JUD. CONDUCT R. 26(c). Confidential information is only subject to discover upon a showing of good cause. ARIZ. COMM'N ON JUD. CONDUCT R. 26(b).
[107] ARIZ. COMM'N ON JUD. CONDUCT R. 26(e).
[108] ARIZ. COMM'N ON JUD. CONDUCT R. 27(f)(5), (6). The Arizona Rules of Evidence apply to the extent "practicable." ARIZ. COMM'N ON JUD. CONDUCT R. 27(f)(2).
[109] ARIZ. COMM'N ON JUD. CONDUCT R. 27(f)(7).
[110] ARIZ. COMM'N ON JUD. CONDUCT R. 27(f)(1), (4).
[111] ARIZ. COMM'N ON JUD. CONDUCT R. 27(f)(3).
[112] ARIZ. COMM'N ON JUD. CONDUCT R. 27(h).
[113] *Id.*

(7) Whether there has been prior disciplinary action concerning the judge, and if so, its remoteness and relevance to the present proceeding;
(8) Whether the judge complied with prior discipline or requested and complied with a formal ethics advisory opinion;
(9) Whether the judge cooperated fully and honestly with the commission in the proceeding; and
(10) Whether the judge was suffering from personal or emotional problems or from physical or mental disability or impairment at the time of the misconduct.[114]

The ACJC may impose formal sanctions of censure, suspension, or removal of the judge,[115] and also may order a judge to undergo professional counseling, "participate in… judicial education, mentoring, or other similar activities," or recommend other formal sanctions, including the assessment of attorney fees and costs.[116]

If a hearing officer conducted the proceedings, the ACJC must review the findings of fact and conclusions of law and may "adopt, reject, or modify the proposed recommendations."[117] Otherwise, the ACJC's recommendations must be served on both parties, and if either party disagrees with the ACJC's decision, s/he may file a motion for reconsideration within ten business days.[118] If a party files a motion for reconsideration, the opposing party may file a response within ten business days.[119]

Recommendations for formal sanctions are subject to review by the Arizona Supreme Court either by petition or the court's own motion.[120] A recommendation entailing censure, however, will be final unless the judge or disciplinary counsel files a petition contesting the recommendation.[121] To initiate review, the judge may file a petition to modify or reject the final recommendation along with a request for oral argument within fifteen days after the final recommendation is filed in the Arizona Supreme Court.[122] A copy of the petition must be served on disciplinary counsel, who, in turn, may file his/her own response within fifteen days of the petition's receipt.[123] If the judge fails to challenge the recommendation within thirty days of the filing deadline when the ACJC's

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[114] ARIZ. COMM'N ON JUD. CONDUCT R. 19(a)-(j).
[115] ARIZ. COMM'N ON JUD. CONDUCT R. 18(a). The ACJC also may recommend to the Arizona Supreme Court the involuntary retirement of a judge, if agreed to by the parties. ARIZ. COMM'N ON JUD. CONDUCT R. 18(b).
[116] ARIZ. COMM'N ON JUD. CONDUCT R. 16(b), 18(e). If the ACJC or Arizona Supreme Court mandate discipline that "includes terms and conditions prescribing behavior or requiring a corrective course of action by the judge," the ACJC must report on the judge's compliance. If further disciplinary action is needed, the ACJC may commence additional proceedings. ARIZ. COMM'N ON JUD. CONDUCT R. 34(a). The judge also may request a certificate of compliance. *See* ARIZ. COMM'N ON JUD. CONDUCT R. 34(b).
[117] ARIZ. COMM'N ON JUD. CONDUCT R. 28(b).
[118] ARIZ. COMM'N ON JUD. CONDUCT R. 28(a), (b). The motion only addresses whether the evidence in the record supports the findings of fact. *Id.*
[119] *Id.*
[120] ARIZ. COMM'N ON JUD. CONDUCT R. 28(c). Informal sanctions are not subject to review by the Arizona Supreme Court. *Id.*
[121] ARIZ. COMM'N ON JUD. CONDUCT R. 29(a).
[122] ARIZ. COMM'N ON JUD. CONDUCT R. 29(c).
[123] *Id.*

recommendation suggests suspension, removal, or retirement of the judge from office,[124] the Arizona Supreme Court may decline review or grant review on its own motion.[125] If the judge fails to challenge the recommendation within thirty days, regardless of the recommendation's substance, the Executive Director of the ACJC must file in the Arizona Supreme Court a form of judgment.[126]

Alternatively, at any time before the final disposition, the judge and disciplinary counsel may reach a settlement agreement, wherein the judge may concede to any of the allegations or charges "in exchange for an agreed upon sanction."[127] The agreement must be signed by the judge and disciplinary counsel, include all material facts, and be approved by the hearing panel or hearing officer.[128] The hearing panel or officer may recommend modifications to the agreement, in which case the parties are afforded fifteen days or "such reasonable time" to accept or reject the modified agreement.[129] If the hearing panel or officer rejects the agreement, or if either party opts to reject the modified agreement, the agreement "cannot be used by or against the judge in any proceeding."[130]

D. Judicial Training

In 1983, the Arizona Supreme Court created an educational system for all state judges and court employees to ensure that "judicial independence and competence might be preserved and reinforced."[131] The Arizona Supreme Court also created the Committee on Judicial Education and Training (COJET) to assist in the development of educational policies and standards for the judiciary and to monitor the quality of judicial training.[132]

All new Superior Court judges must participate in an orientation conducted by an experienced Superior Court judge and meet the orientation requirements established by COJET within a year of their appointment.[133] New appellate court judges also must receive orientation on the procedures, functions, and laws of the appellate court from an experienced judge within a year of their appointment.[134] In addition, new judges must complete a requisite number of hours of training, the numbers of which are contingent upon the month the judge commenced employment.[135] For example, new judges who

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[124] If the ACJC's final recommendation entails suspension, removal, or retirement, the judge will be disqualified upon the ACJC's filing of the recommendation with the Arizona Supreme Court. ARIZ. COMM'N ON JUD. CONDUCT R. 18(c).

[125] ARIZ. COMM'N ON JUD. CONDUCT R. 29(d).

[126] ARIZ. COMM'N ON JUD. CONDUCT R. 29(g).

[127] ARIZ. COMM'N ON JUD. CONDUCT R. 30(a).

[128] ARIZ. COMM'N ON JUD. CONDUCT R. 30(a), (b).

[129] ARIZ. COMM'N ON JUD. CONDUCT R. 30(c).

[130] ARIZ. COMM'N ON JUD. CONDUCT R. 30(b), (c).

[131] Educational Services Division, Arizona Administrative Office of the Courts, Educational Policies and Standards, at introduction, *available at* http://www.supreme.state.az.us/ed/ao9908.htm (last visited Apr. 11, 2006).

[132] *Id.*

[133] *Id.* § D(1), (4). If the superior court judge assumes a new assignment in a specialized division, the presiding judge of the court must determine if the judge needs additional training. *Id*.

[134] *Id.* § C(1), (4).

[135] *Id.* § K(1)(b). Note that these timelines may be revised in the near future. *See* ARIZ. CODE OF JUD. ADMIN. § 1-302(F) (draft version, not for re-distribution) (last revised on March 2, 2006) (on file with author).

begin their employment between January 1st and March 31st must complete twelve hours of mandatory training and education, while new judges who begin their employment between October 1st and December 31st must only complete their orientation.[136]

Subsequently, judges are obliged to complete sixteen hours of continuing education a year, including an ethics course and an annual judicial conference.[137] If a judge fails to complete the requisite hours of training and education, s/he is subject to disciplinary action under the Code of Judicial Conduct.[138]

Significantly, in December 2002, the Capital Case Commission, which was formed by then Attorney General Janet Napolitano to ensure Arizona's death penalty process is just, timely and fair to defendants and victims, recommended that the Rules of the Arizona Supreme Court be amended to require that judges receive at least six hours of judicial education in capital litigation within three years of their first capital case.[139] To date, no amendment requiring judicial training in capital cases has been adopted by the Arizona Supreme Court.

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[136] Educational Services Division, Arizona Administrative Office of the Courts, Educational Policies and Standards § K(1)(b), *available at* http://www.supreme.state.az.us/ed/ao9908.htm (last visited Apr. 11, 2006).

[137] *Id.* §§ C(1); D(1), I.

[138] *Id*. § K(1)(b). Exemptions may be obtained under certain circumstances, including medical necessity and approved leaves of absences. *Id*. § K(2).

[139] *See* OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, *at* 1, 25 (Dec. 2002). According to the Final Report, the Attorney General was charged with preparing the petition to amend Arizona Supreme Court Rule 45. *Id.* at 25.

II. ANALYSIS

A. Recommendation #1

> **States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.**

Currently, the Arizona judicial selection process reflects a blend of two systems. On one hand, the Arizona Constitution requires all state appellate court judges and Superior Court judges for counties with a population of 250,000 or more (presently only Maricopa and Pima Counties) to be appointed by the Governor on the basis of merit from a list of nominees compiled by a nominating commission.[140] On the other hand, the State Constitution requires Superior Court judges from counties with a population of fewer than 250,000 to be elected in nonpartisan elections.[141] By relying on a merit-based system, the State of Arizona has, for the most part, insulated its judicial process from political pressures and campaign demands, and in turn, protected the judiciary's independence.

The State of Arizona has tried to stimy the effects of politics on its judicial selection process by regulating the political composition of both the nominating commissions and the judicial nominees referred to the Governor for appointment.[142] Nonetheless, the great majority of judges and justices appointed throughout the years have shared the same political affiliation as their appointing governor.[143] Indeed, former Arizona Governors Raul Castro, Evan Mecham, Rose Mofford, and Fife Symington did not appoint a single appellate judge with a differing political party.[144] Similarly, as of April 2005, Governor Janet Napolitano had yet to appoint a judge or justice of differing political persuasion to the Arizona Supreme Court or the Court of Appeals.[145]

Significantly, to serve an additional term, all state court judges must either participate in unopposed retention elections or general re-elections,[146] and to serve at all, Superior Court judges from counties with a population of fewer than 250,000 must participate in general elections.[147] Elections, regardless of whether they are partisan or non-partisan, raise significant questions about both the fairness of judicial selection and the independence of judges selected to serve.[148] Judicial elections operate in tension with a

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[140] ARIZ. CONST. art. 6, § 37(A), (B).

[141] ARIZ. CONST. art. 6, § 12(A); *see supra* notes 41-42 and accompanying text (noting that counties with a population fewer than 250,000 may opt to select judges on the basis of merit).

[142] *See* ARIZ. CONST. art. 6, § 37(A); *see also supra* notes 25, 27 and accompanying text.

[143] Mark Brnovich, Goldwater Institute, Policy Report No. 203, Judging the Justices: A Review of the Arizona Supreme Court, 2003-2004, at 6 (April 8, 2005).

[144] *See id*.

[145] *See id*.

[146] *See* ARIZ. CONST. art. 6, § 38(A); ARIZ. CONST. art. 6, § 12(A).

[147] *See* ARIZ. CONST. art. 6, § 38(A); ARIZ. CONST. art. 6, § 12(A).

[148] Mark E. Behrens and Cary Silverman 11, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, CORNELL J. OF L. AND PUBLIC POLICY 273, 277 (2002).

core principle of the judiciary— namely that "[a]n independent and honorable judiciary is indispensable to justice in our society."[149]

One reason judicial elections are considered to be a threat to the judiciary's independence is that judicial elections often allow monetary influences to seep into the judicial selection process.[150] However, in Arizona, judicial retention elections—at least on the Supreme Court level— have not appeared to create unfair problematic financial pressure on the candidates. Between 1993 and 2002, none of the eight Arizona Supreme Court justices subject to retention elections raised any campaign funds.[151] Significantly, Arizona campaign financing laws restrict the influence of contributions by prohibiting judicial candidates from personally soliciting funds and from accepting any contributions from corporations or labor unions.[152] In fact, judicial candidates may only accept individual and PAC contributions of up to $760 for statewide races and $300 for local races.[153]

Secondly, elections undoubtedly correspond with campaigning. An American Bar Association survey revealed that three quarters of Americans consider judicial campaigning to compromise a judge's impartiality,[154] and Canon 2 of the Arizona Code of Judicial Conduct specifically mandates that judges not only "avoid impropriety," but also any "*appearance of impropriety*."[155]

Another potential threat to the judiciary's independence is Arizona's constitutionally mandated judicial evaluation program for merit-based appointed justices and judges subject to retention elections.[156] In the early 1990's, the Arizona Supreme Court concluded a three-year study of its merit-based system and launched a pilot project on judicial performance review, in part to refute criticism of the system—namely its insulation of judges.[157] It was the Arizona legislature, however, that, at the conclusion of its own investigation, spearheaded the passage of a constitutional amendment in 1992 requiring judicial evaluation reviews for all judges subject to retention elections.[158]

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[149] ARIZ. CODE OF JUD. CONDUCT Canon 1(A). "An independent judiciary is one free of inappropriate outside influences." ARIZ. CODE OF JUD. CONDUCT Canon 1(A) cmt.

[150] *Compare* JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004 13 (2005), *with* JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002 19 (2005), and JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000 11 (2005); Ted A. Schmidt, Arizona Attorney, *Fair Courts Under Fire, A Special Section on Judges and Judicial Independence, Part 1: Merit Selection of Judges Under Attack Without Merit*, at 13 (Feb. 2006).

[151] *See* JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002 19, 20 (2005).

[152] *See* ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(2); American Judicature Society, Judicial Selection in the States, Arizona: Judicial Campaigns and Elections, *available at* http://www.ajs.org/js/AZ_elections.htm (last visited Mar. 22, 2006). Instead, candidates "should refer prospective contributors to the candidate's campaign committee." ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(2).

[153] *See* ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(2); American Judicature Society, *supra* note 152. Instead, candidates "should refer prospective contributors to the candidate's campaign committee." ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(2).

[154] *See* Schmidt, *supra* note 150.

[155] ARIZ. CODE OF JUD. CONDUCT Canon 2 (emphasis added).

[156] ARIZ. CONST. art. 6, §42; ARIZ. COMM'N ON JUD. PERFORMANCE REV., *supra* note 43.

[157] Daniel Becker and Malia Reddick, The American Judicature Society, Judicial Selection Reform: Examples from Six States, at 36 (2003).

[158] *Id*.

Currently, the Commission on Judicial Performance Review (CJPR), which is charged with administering the evaluation process, [159] creates performance standards and conducts judicial performance reviews.[160] The reviews entail surveying jurors, attorneys, litigants, witnesses, court personnel, and others who have personal knowledge of the justice or judge's performance, and soliciting public comments. [161] Various media outlets and the Secretary of State then disseminate the results of the evaluation statewide.[162]

Arizona's judicial evaluation program harbors an "inevitable tension" between its competing goals of protecting judicial independence and fostering public accountability.[163] Judicial independence embodies the notion that a judge should "make decisions based on an objective, impartial review of the facts and applicable law in accordance with constitutional and legal principles, *free of outside influence or pressure*."[164] In this case, public accountability allows for voters to decide whether to retain judges based on their judicial performance.[165] Although judicial independence is compromised when a judge considers the impact of a decision on his/her retention election, Arizona's performance review limits its standards to determining whether judges:

(1) Administer justice fairly, ethically, uniformly, promptly and efficiently;
(2) Are free from personal bias when making decisions and decide cases based on the proper allocation of law;
(3) Issue prompt rulings that can be understood and make decisions that demonstrate competent legal analysis;
(4) Act with dignity, courtesy and patience; and
(5) Effectively manage their courtrooms and the administrative responsibilities of their office.[166]

Importantly, the performance standards do not directly review actual decisions made by a judge, although the evaluation of a judge's competency in legal analysis could arguably extend into this area. The CJPR also restricts its published findings to whether or not a judge meets the performance standards and to the percentages of evaluators who gave the judge a "satisfactory," "very good," or "superior" in each category of review.[167] In fact, in its 2004 *Voter Information Guide*, the CJPR listed the following judicial performance standards in its evaluations: legal ability, integrity, communication skills, judicial temperament, and administrative performance.[168] To further protect judicial

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[159] ARIZ. COMM'N ON JUD. PERFORMANCE REV., *supra* note 43.
[160] Arizona Supreme Court, *supra* note 46.
[161] *Id.*
[162] *Id.* Results of the evaluations are "distributed throughout the state via media reports and the Secretary of State voter information pamphlet mailed to households prior to general elections." *Id.*
[163] John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L. J. 643, 700 (1998); RULES OF PROCEDURE FOR JUD. PERFORMANCE REV. IN THE STATE OF ARIZ. R.1.
[164] Pelander, *supra* note 163 (emphasis added).
[165] ARIZ. COMM'N ON JUD. PERFORMANCE REVIEW, Judicial Merit Selection and Retention in Arizona (on file with author).
[166] ARIZ. COMM'N ON JUD. PERFORMANCE REV., *supra* note 43.
[167] ARIZ. COMM'N ON JUD. PERFORMANCE REVIEW, 2004 VOTER INFORMATION GUIDE, REPORT OF THE ARIZ. COMM'N ON JUD. PERFORMANCE REV., at 6, 7.
[168] *Id.* at 7.

independence, judges also have the right to appear before or submit written comments to the CJPR prior to the publication of the Voter Information Guide,[169] and all narrative comments in the surveys are confidential.[170] The evaluation process itself also is conducted confidentially.[171]

Despite Arizona's attempts to safeguard the judiciary's independence, politics are steadily being infused into Arizona's retention elections. In 2004, NOBADJUDGES.COM, a political committee registered with the Arizona Secretary of State, launched a campaign against Maricopa County Superior Court Judge Ken Fields and Maricopa County Superior Court Judge William Sargeant for their "outrageously activist and offensive decisions," namely with respect to abortion.[172] Although judges on average garnered seventy-three to seventy-five percent voter approval during the 2004 general elections, Judge Fields received only a sixty-eight percent voter approval, while Judge Sargeant received sixty-nine percent voter approval.[173] Len Munsil, Chairman of NOBADJUDGES.COM, claimed that his committee "moved 25,000 votes in a three-week campaign without very much money and with no help from the media."[174]

In Arizona, the notion of a fair and autonomous judiciary appears to be shifting in favor of greater public accountability.[175] In 2000, an *Arizona Republic* editorial opined that "the people should have the right to shape, gradually over[]time, the judicial philosophy under which they are governed."[176] Since its adoption in 1974, the Arizona legislature has attacked the merit-based system at least thirteen times.[177] Those opposing the system have advocated for partisan elections, for non-binding recommendations of judicial nominees, for increasing the requisite vote to win a retention election from a majority to a two-thirds vote, for subjecting the governor's judicial appointments to senate confirmation, and for general contested elections in the selection of all judges.[178] In his February 2005 State of the Judiciary Address, former Chief Justice Charles E. Jones responded to legislative attacks on judicial independence when he stated in his concluding remarks to the Arizona State Senate and House of Representatives that:

> An independent judiciary is absolutely essential if the rule of law is to be maintained. I am aware that some of you have expressed unhappiness over a number of court decisions. I suggest, however, that by reason of our constitutional structure, tension between the branches has been with us in varying degree since the beginning of the Republic. It will probably

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[169] R. OF PROC. FOR JUD. PERFORMANCE REV. IN THE STATE OF ARIZ. 6(e)(2).
[170] R. OF PROC. FOR JUD. PERFORMANCE REV. IN THE STATE OF ARIZ. 6(c).
[171] R. OF PROC. FOR JUD. PERFORMANCE REV. IN THE STATE OF ARIZ. 6(a).
[172] NOBADJUDGES.COM, Frequently Asked Questions, *available at* http://www.nobadjudges.com/faq.htm (last visited Apr. 7, 2006).
[173] Michael Kiefer, THE ARIZ. REPUBLIC., *Judges/Groups Says Its Efforts Hurt Pair's Poll Ratings*, Nov. 4, 2004, at 9B.
[174] *Id.*
[175] *See* ARIZ. SUP. CT., A STRATEGIC AGENDA FOR ARIZONA'S COURTS 2005-2010, at 13 (delineating the judiciary's goal of "Being Accountable").
[176] Robert Robb, THE ARIZ. REPUBLIC, *One Proposal for Reforming State Judiciary*, Jan. 19, 2000, at 9B.
[177] Ted A. Schmidt, Arizona Attorney, *Fair Courts Under Fire, A Special Section on Judges and Judicial Independence, Part 1: Merit Selection of Judges Under Attack Without Merit*, at 13 (Feb. 2006).
[178] *Id*. at 17.

> continue as long as we remain a free and independent people. I simply express the hope that tension not become a destructive force.[179]

As reflected in former Chief Justice Jones' comments, Arizona's judicial system is not immune to political pressure, and recent trends indicate a gradual erosion of the judiciary's independence. Still, Arizona's system has been toted as a model by the United States in "helping other countries reform the[ir] judicial system[s]," and, at its core, continues to reflect an independent judiciary.[180] Efforts should be taken to ensure it remains so.

The Arizona Supreme Court in *A Strategic Agenda for Arizona's Courts 2005-2010* (*Strategic Agenda*) highlighted its goal of "foster[ing] public understanding" of the judiciary's role through community outreach and educational programs.[181] One initiative specifically calls for the judiciary, in conjunction with the State Bar of Arizona, to enlarge school educational programs in order to cultivate a greater understanding of the courts' role under a constitutionally-based government.[182] The *Strategic Agenda* also calls for a number of public educational efforts that, although not directly related to judicial independence, touch upon the judicial selection process and the activities of the judiciary.[183]

Although the State of Arizona has examined the fairness of the judicial appointment/election process in the past and has committed itself to undertaking a public education effort to inform the public about the role of the judiciary, we have been unable to ascertain the full scope and contents of these examinations and efforts. Accordingly, we can only find that Arizona is in partial compliance with Recommendation # 1.

B. Recommendation #2

> **A judge who has made any promise—public or private—regarding his or her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.**

The Arizona Code of Judicial Conduct (Code) prohibits judicial candidates and judges from making statements that may impact current and/or future decisions. Canon 5 of the Code states that judicial candidates may not "with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office,"[184] but that judicial candidates must "act in a manner consistent with the impartiality, integrity and independence of the judiciary."[185] The accompanying

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[179] 2005 State of the Judiciary Address by the Honorable Chief Justice of Arizona, at 9 (Feb. 21, 2005).
[180] *See* Schmidt, *supra* note 150, at 16.
[181] ARIZ. SUP. CT., *supra* note 175, at 14.
[182] *Id.* at 15.
[183] *See* i*d*. at 14, 15. For example, the *Strategic Agenda* states that the judiciary "must make every effort to ensure voters, who decide on judicial election and retention, have sufficient information provided to them to make an informed choice at the voting booth." *Id.* at 14.
[184] ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(1)(d)(i).
[185] ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(1)(a).

commentary to Canon 5 also indicates that "disqualification or other remedial action may be required of any judge in cases that involve an issue about which the judge previously announced his or her views even if such action is otherwise appropriate under the [C]ode."[186] Similarly, Canon 3 states that judges must refrain from making any public comment that "might reasonably be expected to affect [a court proceeding's] outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing" at any time while a proceeding is pending or impending in any court, including during any appellate process and until final disposition.[187]

Because complaints filed against judges were confidential until January 1, 2006, we were unable to determine whether or how often judges were disciplined as a result of comments made during a judicial campaign or their term in office that relate to the death penalty, since the creation of the Arizona Commission on Judicial Conduct in 1970.

Based on this information, it is unclear whether the State of Arizona is taking sufficient steps to preclude judges, who make promises regarding their prospective decisions in capital cases that amount to prejudgment, from presiding over capital cases or from reviewing any death penalty decision in the jurisdiction. Accordingly, we are unable to conclude whether Arizona is in compliance with Recommendation # 2.

C. Recommendation #3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.

a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not "technicalities" and that judges and lawyers are bound to protect those rights for all defendants.

b. Bar associations and community leaders publicly should oppose any questioning of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they have upheld the death penalty.

c. Purported views on the death penalty or on *habeas corpus* should not be litmus tests or important factors in the selection of judges.

We did not obtain sufficient information to appropriately assess the role of bar associations and community leaders in fulfilling the requirements of Recommendation #3.

We note, however, that the Arizona State Bar has recognized the significance of maintaining an independent judiciary for numerous years. Indeed, the Arizona State Bar

[186] ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(1)(d)(i) cmt.
[187] ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(9).

passed a resolution stating its belief that "in a democratic society, fair, open and vigorous debate and criticism of judges and judicial decisions is necessary and appropriate. But… efforts . . . to intimidate judges and thereby diminish the independence of the judiciary must not be permitted."[188] Additionally, in 1997, the Arizona State Bar created the Committee on Separation of Powers and Judicial Independence (Committee), and recognized a duty to "denounce . . . attacks on judicial autonomy and individual judges in particular cases."[189]

Although the Committee is no longer in existence, the Arizona State Bar continues to advocate for the judiciary's independence. More recently, in September 2005, President Helen Perry Grimwood urged Arizona attorneys to "stand up for judicial independence and our judicial system."[190] In February 2006, President Grimwood reiterated the need to "stand[] up for fair, impartial courts" and urged Bar members to monitor attacks on the judiciary, openly communicate with legislators and neighbors about the importance of impartial courts, and to use a tool-kit available on the State Bar's website to educate themselves and others.[191]

D. Recommendation # 4

A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.

Recommendation # 5

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

The Arizona Code of Judicial Conduct advises judges to "take appropriate action" when they receive information indicating a "substantial likelihood" that an attorney has committed a violation of the Rules of Professional Conduct.[192] Appropriate action includes "direct communication with the . . . lawyer who has committed the violation. . . and reporting the violation to the appropriate authority or other agency or body."[193] The Code mandates that a judge report the violation to the appropriate authority if the attorney's violation of the Rules of Professional Conduct raises a "substantial question" as to the attorney's "honesty, trustworthiness or fitness" as a practitioner and is known to the judge.[194]

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[188] *See* Michael L. Piccarreta, Arizona Attorney, President's Message, at 12 (Jan. 1997).
[189] *Id.* at 11.
[190] Helen Perry Grimwood, ARIZ. ATTORNEY, President's Message, *Taking Actions to be Leaders*, at 6 (Sept. 2005).
[191] Helen Perry Grimwood, ARIZ. ATTORNEY, President's Message, *Standing Up for Fair, Impartial Courts*, at 6 (Feb. 2006).
[192] ARIZ. CODE OF JUD. CONDUCT Canon 3(D)(2).
[193] ARIZ. CODE OF JUD. CONDUCT Canon 3(D)(2) cmt.
[194] ARIZ. CODE OF JUD. CONDUCT Canon 3(D)(2).

We were unable to ascertain the measures taken by individual judges to remedy the harm caused by "ineffective lawyering" of defense counsel or "prosecutorial misconduct." Consequently, we are unable to assess Arizona's compliance with these recommendations.

E. Recommendation # 6

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.

A capital defendant has no constitutional right to pretrial discovery,[195] nor does the Arizona Revised Statutes or the Code of Judicial Conduct explicitly require judges to ensure that capital defendants are provided with full discovery. However, Canon 3 of the Arizona Code of Judicial Conduct does require judges to be "faithful to the law" and perform their judicial duties impartially,[196] which includes enforcing existing discovery laws.

Additionally, under Rule 15 of the Arizona Rules of Criminal Procedure (Rule 15), judges must enforce disclosure of certain information and materials within the possession or control of the prosecutor or defendant.[197] If either party has a "substantial need" for additional information or material that is not otherwise provided by Rules 15.1 or 15.2 of the Arizona Rules of Criminal Procedure and whose obtainment places "undue hardship" on the party, the judge may exercise his/her discretion to order its availability.[198] Where the prosecutor has requested additional discovery, the judge must ensure that the defendant's constitutional rights will not be violated.[199] Judges also may exercise their discretion to order depositions, provided the deposed individual is not the defendant.[200]

If a party fails to disclose any material s/he wishes to use at trial within the prescribed time-limit,[201] the party may move to extend the prescribed time and include the use of the

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[195] Calderon-Polomino v. Nichols, 36 P.3d 767, 771 (Ariz. Ct. of App. 2001).

[196] ARIZ. CODE OF JUD. CONDUCT Canon 3, 3(B)(2).

[197] *See* ARIZ. R. CRIM. P. 15.1 (delineating the disclosure requirements of the State); ARIZ. R. CRIM. P. 15.2 (delineating the disclosure requirements of the defendant). However, a "victim" has the right to have the prosecutor withhold his/her address and telephone number as well as the place of his/her employment during discovery. ARIZ. R. CRIM. P. 39(b)(10). If the defendant shows good cause, the judge may order the information to be disclosed, along with any other restrictions the judge finds appropriate. *Id.* A victim also has the right to decline discovery requests by the defendant, including requests for an interview and a deposition. ARIZ. R. CRIM. P. 39(b)(11). A victim as defined under this rule includes an individual against whom a criminal offense as detailed in section 13-4401(6) of the A.R.S. has allegedly occurred or the spouse, parent, lawful representative or child of an individual killed or incapacitated, provided the spouse, parent, lawful representative, or child is not the alleged perpetrator. ARIZ. R. CRIM. P. 39(a)(1).

[198] ARIZ. R. CRIM. P. 15.1(g), 15.2(g). If the court's order would be "unreasonable or oppressive," the affected individual may request that the court vacate or modify the order. ARIZ. R. CRIM. P. 15.1(g), 15.2(g).

[199] ARIZ. R. CRIM. P. 15.2(g).

[200] ARIZ. R. CRIM. P. 15.3(a). A party or witness must first file a motion and must meet the requirements outlined in Rule 15(a) before the judge may order a deposition be taken. *See id.; see also supra* note 197 (granting "victims" the right to refuse depositions requested by the defendant or on his/her behalf).

[201] Disclosure must be completed generally at least seven days before the trial, unless otherwise provided. ARIZ. R. CRIM. P. 15.6(c)

material at trial.[202] If the judge determines that the material "could not have been discovered or disclosed earlier even with due diligence," and was immediately disclosed upon its discovery, the judge must allow the introduction of the materials at trial.[203] Otherwise, the judge has discretion to grant or deny the motion.[204]

If a party fails to comply with Rule 15, the aggrieved party may move to compel disclosure and sanctions.[205] The judge must order disclosure and must impose any sanctions it finds appropriate, unless the judge finds that the non-compliance was harmless, or that earlier disclosure was not possible with "due diligence" and occurred immediately after its discovery.[206] Significantly, Arizona judges have discretion to restrict discovery under Rule 15 whenever they find that the "disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party," and that "the risk cannot be eliminated by a less substantial restriction of discovery rights."[207]

Unfortunately, in at least one capital case, the Arizona Supreme Court refused to exercise its judicial authority to "order more liberal discovery than usual."[208] However, we were unable to obtain sufficient information to assess whether Arizona judges, as a whole, are ensuring that defendants are provided with full discovery in capital cases.

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[202] ARIZ. R. CRIM. P. 15.6(d).

[203] *Id.* Absent a finding of "dilatory conduct, neglect, or other improper reason" by the moving party or under the prosecution or defendant's control as detailed in Rules 15.1(f) and 15.2(f), the judge must grant an extension of time for scientific evidence. ARIZ. R. CRIM. P. 15.6(e).

[204] ARIZ. R. CRIM. P. 15.6(d). In such case, if the judge grants the motion, s/he may still impose sanctions as listed under Rule 17.5, so long as it is neither preclusion nor dismissal. *Id.*

[205] ARIZ. R. CRIM. P. 15.7(a). Before such a motion can be made, counsel must have made good faith efforts to resolve the matter. *See* ARIZ. R. CRIM. P. 15.7(b). In cases wherein a plea deadline is in place and the prosecution fails to disclose materials under Rule 15.1(b) thirty days before trial, the court, on the defendant's motion, must consider such impact on the defendant's decision to accept or reject the plea. *See* ARIZ. R. CRIM. P. 15.8.

[206] ARIZ. R. CRIM. P. 15.7(a). Before such a motion can be made, counsel must have made good faith efforts to resolve the matter. *See* ARIZ. R. CRIM. P. 15.7(b).

[207] ARIZ. R. CRIM. P. 15.5(a), (1), (2). The court must be shown good cause by a party's motion. *Id.*

[208] State v. West, 862 P.2d 192, 207 (Ariz. 1993*), overruled on other grounds*. In this case, the discovery request was made after the trial. *Id.*

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some States, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*[1] that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systematic racial disparity in the implementation of the death penalty.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part, because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty; ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that we identify the various ways in which race infects the administration of the death penalty and that we devise strategies to root out discriminatory practices.

[1] 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate by the United States Supreme Court's decision in *McCleskey v. Kemp.*[2] Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth (the Baldus study), McClesky challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.[3] The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in his particular case.[4] While rooted in Georgia law, the holding—that to be found unconstitutional, discrimination must be proven in an individual case—applied nationwide.

Nearly five years later, the United States Court of Appeals for the Ninth Circuit applied the *McClesky* holding to Arizona.[5] In *Carriger v. Lewis,* Carringer relied on statistical evidence showing the death penalty was applied more frequently when the victim was white to argue that Arizona's capital sentencing statute was unconstitutional.[6] Because, as in *McCleskey*, Carriger failed to offer more than systemic statistical evidence, the court refused to find that Carriger had proven discrimination in his case.[7]

Despite the *Carringer* decision, the existence of racial and/or ethnic discrimination in Arizona's criminal justice system continued to be discussed and studied state-wide. In addition to state-sponsored empirical studies, the Arizona Supreme Court recognized the problem of racial and/or ethnic bias when it formed the Commission on Minorities in the Judiciary and again in its 2005-2010 Strategic Agenda. The Attorney General's Capital Case Commission also considered the issue as part of its study of Arizona's death penalty system. Our discussion below outlines the efforts undertaken by the State of Arizona and others to identify and/or address any racial and/or ethnic bias within the State's criminal justice system.

A. Continuing Empirical Analysis

1. *Explaining Death Row's Population and Racial Composition*[8]

The systemic racial and ethnic disparities within Arizona's death penalty system were highlighted in the 2004 study *Explaining Death Row's Population and Racial Composition* (the Study).[9] By comparing thirty-one states' death row populations with

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2 *Id.*
3 *Id.* at 291-92.
4 *Id.* at 297.
5 Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir. 1992).
6 *Id.*
7 *Id.*
8 John Blume, Theodore Eisenberg, and Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUDIES 165 (2004).
9 *See id.* at 167.

the number of murders in each state, the Study revealed that blacks were under-represented as a whole on America's death row.[10] However, the Study also found that race played a "substantial role in the administration of the death penalty" in two respects.[11] First, blacks who murder whites were most likely to be sentenced to death, in turn, bolstering the portion of blacks on death-row.[12] Second, blacks who murder blacks were least likely to receive death sentences, in turn, depressing the number of blacks on death row.[13]

With respect to Arizona, the Study revealed that the State was ten times more likely to impose the death penalty when the defendant and victim were both white as compared to when the defendant and victim were both minorities.[14] The Study also found that Arizona imposed death sentences more frequently when a minority murdered a white than when a white murdered a minority.[15]

2. The Capital Case Commission

The State of Arizona specifically addressed the issue of racial and/or ethnic discrimination in its capital system as part of the review undertaken by the Capital Case Commission in 2000. The Capital Case Commission, created by then-Attorney General Janet Napolitano to ensure the just and timely implementation of the death penalty, was mandated to identify any racial and/or ethnic biases in the administration of the death penalty as part of its mandate.[16]

To examine the issue of racial and/or ethnic discrimination, the Capital Case Commission's Data/Research Subcommittee compiled a significant amount of relevant data.[17] In addition to collecting data in cases in which a death sentence had been imposed from January 1, 1974 through July 1, 2000,[18] the Capital Case Commission also examined information from three various decision points in the administration of the death penalty— (1) the grand jury's return of the indictment, (2) the prosecutor's decision to seek the death penalty, and (3) the decision to impose the death penalty—for Maricopa

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[10] *Id.* at 166, 169 (concluding that "African Americans are sentenced to death at lower rates than whites" and that although "African Americans commit more than 50% of the country's murders . . . they comprise 40% of death row.").

[11] *Id*. at 190.

[12] *Id.*

[13] *Id.* at 167, 192.

[14] *Id*. at 199. The death-sentence rate for minority defendant-minority victim homicides was 5.4 per 1,000 murders while the white defendant-white victim homicide rate was 58.9 per 1,000 murders. *Id*. Because Hispanics and blacks comprise a significant portion of Arizona's population, the Study combined both groups into one "minority" category. *Id*. at 196.

[15] *Id.* at 197.

[16] OFFICE OF THE ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT, at 1, 26 (Dec. 2002).

[17] *Id*. at 2, 26; Summary of Death Sentence Process: Data Set I Research Report to Arizona Capital Case Commission, March 2001, at v (examining the characteristics of 230 Arizona death sentence cases from 1974 through July 1, 2000) [hereinafter Data Set I]; Arizona First-degree Murder Cases Summary of 1995-1999 Indictments: Data Set II Research Report to Arizona Capital Case Commission, June 2002, at v (focusing on the first-degree murder indictments in Arizona from 1995 to 1999 and comparative analyses of those cases) [hereinafter Data Set II].

[18] Data Set I, *supra* note 17.

County, Pima County, the outlying counties, and the State as a whole from January 1, 1995 to December 31, 1999.[19]

The Capital Case Commission's data for 1995 through 1999 revealed the following discrepancies in Arizona's death sentencing rates:

(1) The percentage of indictments resulting in death sentences for cases in which both the defendant and the victim were white was nearly eight times higher than those cases in which both the defendant and the victim were minorities.[20]

(2) The percentage of indictments resulting in death sentences for cases consisting of a minority defendant and a white victim was five times higher than those cases consisting of a white defendant and a minority victim.[21]

(3) In Maricopa County and the outlying counties, there was not a single indictment resulting in a death sentence for a case in which the defendant was white, but the victim was a minority.[22]

(4) Only one out of 316 first-degree murder indictments in which the victim was Hispanic led to a death sentence.[23]

(5) Throughout the State, prosecutors chose to seek the death penalty less frequently when the homicide victim was a minority, with judges following a similar pattern, opting to impose the death penalty less frequently when the victim was a minority and more frequently when the victim was white.[24]

In its December 2002 Final Report, the Capital Case Commission unanimously agreed that the criminal justice community was responsible for promoting practices that guaranteed "race-neutral" decisions in respect to capital defendants and their victims.[25] However, various members of the Capital Case Commission disagreed as to the relevance of the data and the existence of racial and/or ethnic discrimination in the State's administration of the death penalty.[26] While some Commission members found that

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[19] Data Set II, *supra* note 17, at v, 15.

[20] *Id.* at 15. In Arizona, where a white defendant was indicted for killing a white individual, the percentage of indictments resulting in death sentences was 9.1%. Whereas, where a minority was indicted for killing another minority, the percentage of indictments resulting in death sentences was 1.2%. *Id*. Note that although the Data Set II Research Report uses the term "defendant of color," we instead have used the term "minority" when referring to the statistics synthesized within the Commission's reports. For purposes of the Data Set II Research Report, the term minority encompasses Hispanics, African Americans, American Indians and Asians. *See id*. at 16.

[21] *Id*. at 15 (noting that the percentage of indictments resulting in death sentences for minority defendant-white victim cases was 10.3%, while the percentage for white defendant-minority victim cases was 2.0%).

[22] *Id*.

[23] CAPITAL CASE COMMISSION, *supra* note 16, at 29.

[24] Data Set II, *supra* note 17, at 15 (denoting the percentage of cases in which the prosecutor decided to seek the death penalty and the judge decided to impose the death penalty on the basis of the defendant and victim's race/ethnicity).

[25] CAPITAL CASE COMMISSION, *supra* note 16, at 27. The Commission also unanimously agreed that "participants in the system should use the empirical data from Data Sets I and II in internal reviews and discussions regarding the death penalty process." *Id.*

[26] *Id*. at 26, 27.

racial bias did not appear in its administration, other members concluded that racial bias may exist in relation to the victim's race and/or ethnicity, or, alternatively, that it was impossible to determine its existence from the statistical evidence presented.[27]

B. Judicial Responses to Real and/or Perceived Bias in the Judicial System

1. The Commission on Minorities in the Judiciary

In 1990, the Arizona Supreme Court created the Commission on Minorities in the Judiciary to help eradicate barriers to racial equality and increase the number of minorities in the judiciary.[28]

Presently, the Commission on Minorities in the Judiciary, whose members along with its Chair and Vice Chair are appointed by the Chief Justice of the Arizona Supreme Court, meets every two months and consists of four working groups—Diversity, Cultural Competency, Overrepresentation, and Collaboration.[29] Although the Commission's activities have centered on the over-representation of minority youth in the juvenile justice system, the Commission's work also encompasses areas focusing on racial and/or ethnic equality and understanding. Over the past decade, some of those efforts include:

(1) Offering Judicial Appointment Workshops for minority attorneys;
(2) Offering Judicial Clerkship Workshops at state universities and law schools for minority students;
(3) Incorporating a cultural competency component in the New Judges Orientation;
(4) Monitoring judicial appointments; and
(5) Helping to establish the Committee to Study Interpreter Issues in the Arizona Courts and the Arizona Court Interpreter Funding Committee.[30]

2. The 2005-2010 Strategic Agenda

In June 2005, the Arizona Supreme Court carved out Goal #1 in its Strategic Agenda for the years 2005 through 2010—"Providing Access to Swift and Fair Justice"—in part to address bias in the judicial system.[31] Recognizing that "all citizens coming before the courts are entitled to equal justice, regardless of race [or] ethnicity,"[32] the Arizona

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[27] *Id*. at 26.

[28] ARIZ. CODE OF JUD. ADMIN. § 1-107(B) (2005); State of Arizona Supreme Court, Commission on Minorities in the Judiciary, *at* http://www.supreme.state.az.us/courtserv/ComMinorities/minorities.htm (last visited March 16, 2006); ARIZONA SUPREME COURT COMMISSION ON MINORITIES, PROGRESS REPORT, June 1994-May 1996, at i.

[29] *See* ARIZ. CODE OF JUD. ADMIN. § 1-107(B) (2005); Commission on Minorities in the Judiciary, Strategic Planning Session, Accomplishments as enumerated on January 10, 2006, *available at* http://www.supreme.state.az.us/courtserv/ComMinorities/agenda-minutes.htm (last visited March 16, 2006); Commission on Minorities in the Judiciary, Approval of a 2006 Meeting Schedule, Feb. 23, 2006, *available at* http://www.supreme.state.az.us/courtserv/ComMinorities/agenda-minutes.htm (last visited Mar. 16, 2006).

[30] *See* Strategic Planning Session, *supra* note 29; Commission on Minorities, Arizona Supreme Court, Update, Aug. 2000.

[31] ARIZ. SUP. CT., A STRATEGIC AGENDA FOR ARIZONA'S COURTS 2005-2010, at 2, 4.

[32] *Id*. at 4.

Supreme Court called for the judicial system to "[c]ontinue to strive for a justice system in Arizona that is free from actual or perceived racial, ethnic, gender, or economic bias," by:

(1) Enhancing communication between the courts and minority communities;
(2) Providing continuing education to the judiciary and judicial staff on issues of cultural and racial diversity;
(3) Increasing the diversity of the judiciary at all levels to reflect the communities it serves while maintaining the highest level of judicial qualifications;
(4) Addressing the over-representation of minority youth in the justice system through the "Building Blocks" initiative.[33]

[33] *Id*. at 5.

II. ANALYSIS

A. Recommendation #1

Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.

Arizona has undertaken at least three initiatives that seek to investigate and evaluate the impact of racial discrimination in its criminal justice system and/or strive to eliminate it: the Attorney General's Capital Case Commission, the Arizona Supreme Court's Commission on Minorities in the Judiciary, and the Court's Strategic Agenda for 2005 through 2010.

1. The Capital Case Commission

In 2000, the Office of the Attorney General formed the Capital Case Commission to ensure the just and timely implementation of the death penalty in Arizona.[34] In assessing racial and/or ethnic bias in the State's criminal justice system, the Capital Case Commission's investigation focused, in part, on indictments resulting in death sentences, on prosecutorial discretion to seek the death penalty, and on judicial decisions to impose the death penalty.[35]

The Capital Case Commission's investigation and evaluation of racial discrimination in the State's criminal justice system relied on statistical evidence detailing the race/ethnicity of each defendant and victim in cases in which the death penalty was imposed between January 1, 1974 and July 1, 2000, as well as a comparative analysis of all first-degree murder cases resulting in an indictment between January 1, 1995 and December 31, 1999.[36] To the best of our knowledge, the investigation and evaluation did not include any public hearings, interviews, surveys, or reviews of studies.

Despite the fact that several Commission members found that "it is impossible to draw conclusions" as to the existence of any racial bias in the Arizona criminal justice system,[37] the Commission's Final Report concluded that "any suggestion that Arizona's death penalty process reflects a racial bias appears to be unwarranted."[38] In support of this statement, the Capital Case Commission cited to the fact that "[s]eventeen out of the 22 people executed in Arizona since the State's death penalty statute was amended in 1973 were Caucasian, and approximately 70% of the current death-row population in Arizona is Caucasian."[39]

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[34] CAPITAL CASE COMMISSION, *supra* note 16, at 1, 26.
[35] *Id.* at 26-27; Data Set II, *supra* note 17, at v, 15.
[36] Data Set I, *supra* note 17, at v; Data Set II, *supra* note 17, at v.
[37] CAPITAL CASE COMMISSION, *supra* note 16, at 26.
[38] *Id*. at 27.
[39] *Id.*

In arriving at this conclusion, the Capital Case Commission validated the importance of statistics regarding the race of defendants, but downplayed the importance of statistics regarding the race of victims in assessing the role of racial and/or ethnic bias in Arizona's capital system. Although the Commission's data showed that the death penalty was imposed more frequently when the murder victim was white as opposed to when the murder victim was a minority and eight Commission members noted in dissenting comments that the imposition of the death penalty was significantly related to the victim's race,[40] the Commission's Final Report stated that:

> Statistics relating to the race of the victim are not necessarily informative regarding racism. An analysis of whether race plays a role in the process is more appropriately focused on the race of the *defendant* . . . Statistics relating to the race of the victim may be misleading because they may relate to the type of murder committed rather than to the way the defendant is treated in the death penalty process. Some types of murders are less likely to be pursued as a capital case, not because of the race of the victim, but because of the nature of the murder. If, for example, a murder occurs during a gang incident, there is less likelihood of the death penalty being sought or imposed for a number of reasons. There may be some degree of fault on the part of the murder victim, there may be a problem with the credibility of witnesses to the crime, or an unwillingness on the part of witnesses to assist with the prosecution. If, as appears to be the case, the percentage of non-Caucasians involved in gang members is higher than that for Caucasians . . . statistics relating to the race of the victim as an indicator of whether the death penalty will be sought or imposed may be skewed.[41]

Because the majority of the Capital Case Commission chose to focus exclusively on evidence relating to the impact of a defendant's race on the capital system, the Commission diminished the importance of data showing that a wide discrepancy exists on the basis of a victim's race and/or ethnicity in Arizona's implementation of the death penalty. For instance, from 1995 through 1999, the percentage of indictments resulting in death sentences for cases in which both the defendant and the victim were white was *nearly eight times higher* than those cases in which both the defendant and the victim were minorities.[42] During this same period, the percentage of indictments resulting in death sentences for cases consisting of a minority defendant and a white victim was *five times higher* than those cases consisting of a white defendant and a minority victim.[43] In fact, in Maricopa County and the outlying counties, there was not one indictment resulting in a death sentence for a case in which the defendant was white, but the victim was a minority.[44] In contrast, the percentage of indictments resulting in death sentences

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[40] *See id*. at 26-27, 29.

[41] *Id*. at 27.

[42] Data Set II, *supra* note 17, at 15. In Arizona, where a white defendant was indicted for killing a white individual, the percentage of indictments resulting in death sentences was 9.1%. Whereas, where a minority was indicted for killing another minority, the percentage of indictments resulting in death sentences was 1.2%. *Id*.

[43] *Id*. at 15 (noting that the percentage of indictments resulting in death sentences for minority defendant-white victim cases was 10.3%, while the percentage for white defendant-minority victim cases was 2.0%).

[44] *Id*.

for cases in which the defendant was a minority, but the victim was white in these two jurisdictions was 7.5% and 30.0%, respectively.[45] According to the Commission's own data, prosecutors state-wide also opted to seek the death penalty less frequently when the homicide victim was a minority, more frequently when the victim was white.[46] Judges also opted to impose the death penalty less frequently when the homicide victim was a minority than when the homicide victim was white.[47] Significantly, only one of the 316 first-degree murder indictments in which the victim was Hispanic led to a death sentence.[48] The State's own evidence therefore leaves us to question the Capital Case Commission's conclusion that any suggestion of racial bias in Arizona's death penalty system appears "unwarranted."

The problem with the Commission's focus on the defendant's race to the exclusion of any consideration of the victim's race is that: (1) the victim's race itself may, in fact, indicate that Arizona's capital system is not race-neutral, and (2) it ignores the combined impact that the race of the defendant and the race of the victim may have on the system. The fact that minorities may be under-represented in Arizona's death row population does not necessarily mean the State of Arizona applies the death penalty in a "race-neutral" manner.[49] To fully understand racial discrimination within the criminal justice system, it is crucial to consider the race and/or ethnicity of the defendant and the victim, and the interplay between the two.

Research over the past decade demonstrates that discrimination may stem not only from the defendant's race and/or ethnicity, but also from the victim's.[50] Lower death sentence rates for cases in which the victim was a minority and especially low rates for cases in which both the defendant and victim were minorities may be explained by "a traditionally racially discriminatory view in which [a minority] life is valued less highly than white life, or in which the white-dominated social structure is less threatened by [minority]-victim homicide."[51]

While disparities surrounding the race of victims are one piece of the puzzle, the combined effect of the defendant's race and the victim's race seems to matter greatly in Arizona. The Commission's data from 1995 through 1999 shows:

(1) Minority defendants who murder white victims are most likely to be sentenced to death;
(2) White defendants who murder white victims are the next most frequent group to be sentenced to death; and

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[45] *Id*.
[46] *Id*.
[47] *Id*. (denoting the percentage of cases in which the judge decided to impose the death penalty on the basis of the defendant and victim's race/ethnicity).
[48] CAPITAL CASE COMMISSION, *supra* note 16, at 29.
[49] *See* Blume, *supra* note 8, at 167; CAPITAL CASE COMMISSION, *supra* note 16, at 27 ("[A] Caucasian defendant who commits a murder similar to that committed by a non-Caucasian defendant is slightly more likely to receive the death penalty than a non-Caucasian defendant.").
[50] Blume, *supra* note 8; *see also* Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 CRIM. JUST. REV. 65 (1997).
[51] Blume, *supra* note 8, at 202.

(3) Minority defendants who murder minority victims are the least likely to be sentenced to death.[52]

Given that murders are generally intra-racial (i.e., involve a defendant and victim of the same race/ethnicity), prosecutors' reluctance to seek the death penalty as well as judges' to impose the death penalty in cases involving a minority defendant and minority victim operate to reduce minority death-row populations.[53]

Nonetheless, even after unanimously agreeing that each participant in Arizona's criminal justice system has a responsibility to promote practices that guarantee race-neutral decisions for both capital defendants *and victims*,[54] the Commission refused to recognize that the race and/or ethnicity of the victim is an integral component in the assessment of racial bias in its capital system.[55]

In our analysis of this recommendation, we do not foreclose the possibility that racial disparities may arise from other factors, such as the composition of the jury or the circumstances of the crime; accordingly, the State of Arizona should thoroughly study and consider those other factors as well.

2. The Commission on Minorities in the Judiciary

In addition to the Capital Case Commission's recommendations, the State of Arizona has devised and continues to devise strategies that strive to eliminate racial discrimination within its judicial system. Recognizing a need to eliminate barriers to racial equality and to increase the number of minorities within the judiciary, the Arizona Supreme Court created the Commission on Minorities in the Judiciary.[56] Specifically, the Commission is mandated to develop programs that:

(1) Achieve a meaningful increase in the number of vendors under contract to the Administrative Office of the Courts (AOC) who employ minority staff and professionals to provide specialized psychological, and therapeutic treatment services for minority youth offenders;
(2) Where appropriate, encourage a meaningful increase in the number of minorities employed throughout the judicial department as clerical, administrative and professional staff, with priority given to efforts to recruit qualified minority juvenile and adult probation officers and staff;

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[52] *See* Data Set II, *supra* note 17, at 15 (noting that from 1995 through 1999, the percent of indictments resulting in death sentences was 10.3% for minority defendant-white victim cases, 9.1% for white defendant-white victim cases, and 1.2% for minority defendant-minority victim cases). *But see* Blume, *supra* note 8, at 197 (indicating that in Arizona from 1977-2000, the death sentence rates were highest for white defendant-white victim cases, followed by minority defendant-white victim cases, with minority defendant-minority victim cases having the lowest death sentence rates).

[53] Blume, *supra* note 8, at 167.

[54] CAPITAL CASE COMMISSION, *supra* note 16, at 27 (emphasis added). The Capital Case Commission also urged participants in the system to use empirical data from Data Sets I and II in internal reviews and discussions regarding the death penalty process. *Id.*

[55] *Id.* at 26-27.

[56] State of Arizona Supreme Court, Commission on Minorities in the Judiciary, *at* http://www.supreme.state.az.us/courtserv/ComMinorities/minorities.htm (last visited Mar. 16, 2006).

(3) Coordinate with other public and private sector programs that seek to address the problems created by the over-representation of minority youth in the juvenile justice system;
(4) Institute a judicial candidates' career conference to provide information and training for minority applicants who are seeking judicial positions;
(5) Encourage minority group members to obtain internships, clerkships, and participate in other career development and training programs for judicial, legal and law-related positions; and
(6) Make recommendations to the Arizona Judicial Council that help the judicial department become more accessible to all people.[57]

In 1994, the Commission on Minorities in the Judiciary undertook a two-year review of the impact of racial and/or ethnic bias in the Arizona court system, considering both testimonial and documentary evidence.[58] At its conclusion, then-Chair Gerald Richard II wrote to Arizona Supreme Court Chief Justice Stanley J. Feldman that:

> Although the magnitude of the problems appear to be insurmountable at times, we are greatly heartened by the enthusiasm, perseverance and goodwill of all who have made a commitment to eradicate this moral blight from the Judicial Department.[59]

Since then, although the Commission has concentrated on minority youth in the juvenile justice system, the Commission also has focused on areas pertaining to racial and/or ethnic equality and understanding. Those efforts include, but are not limited to: judicial appointment workshops for minorities, the posting of all judicial announcements on the Arizona Judicial Branch website, judicial clerkship workshops at state universities and law schools for minority students, incorporating a cultural competency component in the New Judges Orientation, monitoring judicial appointments, and assisting in the creation of the Committee to Study Interpreter Issues in the Arizona Courts and the Arizona Court Interpreter Funding Committee.[60]

3. The Strategic Agenda 2005-2010

Recently, Arizona Supreme Court Chief Justice Ruth V. McGregor set a goal of "Providing Access to Swift and Fair Justice" in the judiciary's 2005-2010 *Strategic Agenda*, in part to address bias in the judicial system.[61] Specifically, the initiative outlined under this goal calls for the judicial system to "[c]ontinue to strive for a justice system in Arizona that is free from actual or perceived racial, ethnic, gender, or economic bias," by:

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[57] ARIZ. CODE OF JUD. ADMIN. § 1-107(A) (2005); State of Arizona Supreme Court, Commission on Minorities in the Judiciary, *at* http://www.supreme.state.az.us/courtserv/ComMinorities/minorities.htm (last visited Mar. 16, 2006).
[58] Ariz. Sup. Ct. Comm'n on Minorities, Progress Report, *supra* note 28 (letter to Chief Justice Stanley G. Feldman from Gerald Richard II, Commission Chair, dated May 15, 1996).
[59] *Id.*
[60] *See* Strategic Planning Session, *supra* note 29; Arizona Supreme Court, Update, Aug. 2000.
[61] Strategic Agenda, *supra* note 31, at 2, 4.

(1) Enhancing communication between the courts and minority communities;
(2) Providing continuing education to the judiciary and judicial staff on issues of cultural and racial diversity;
(3) Increasing the diversity of the judiciary at all levels to reflect the communities it serves while maintaining the highest level of judicial qualifications; and
(4) Addressing the over-representation of minority youth in the justice system through the "Building Blocks" initiative.[62]

While laudable, none of the initiatives proposed to date include any investigations or evaluations of the impact of racial discrimination in the criminal justice system; nor do any of the initiatives appear to be predicated upon any past investigations or evaluations.[63] Such investigations should be done.

4. Conclusion

While the State of Arizona has taken significant steps to comply with this recommendation, including the investigation and evaluation of racial bias by the Capital Case Commission, the creation of the Commission on Minorities in the Judiciary, and the outlining of initiatives to address racial bias in the judiciary by the Arizona Supreme Court, more can and should be done. On one hand, the judiciary remains cognizant of an on-going need to eliminate racial bias (which is likely to seep into the administration of the death penalty), while on the other, the Capital Case Commission and the Office of the Attorney General have refused to recognize any significant racial bias within the death penalty process. Given the racial discrepancies evidenced in the implementation of the death penalty on the basis of a victim's race and the relationship between the defendant and victim's race, the State of Arizona should reevaluate its response to the evidence showing the impact of race on its capital system, and develop new strategies to eliminate these racial disparities. The Commission also may wish to include in its reevaluation all first-degree murder indictments occurring in the wake of *Ring v. Arizona*,[64] which spurred significant changes to Arizona's capital sentencing statute, and shifted the authority to impose the death penalty from judge to jury.

Given that the State of Arizona has previously examined the impact of racial discrimination in its criminal justice system, but needs to develop new strategies that strive to eliminate the impact of racial discrimination, the State of Arizona is only in partial compliance with Recommendation #1.

In addition, based on the above information, the Arizona Death Penalty Assessment Team makes the following recommendation: the State of Arizona should provide funding for the completion and public release of a study of the administration of its death penalty system to determine the existence or non-existence of unacceptable disparities, socio-economic, racial, geographic, or otherwise.

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[62] *Id*. at 5.
[63] *See id*. at 4.
[64] 536 U.S. 584 (2002).

B. Recommendation #2

Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.

In conjunction with the mandate of the Capital Case Commission to ensure the just and timely implementation of the death penalty, the Commission, with the assistance of the Center for Urban Inquiry at Arizona State University, collected and maintained data on the race of the defendant and victim, and on aggravating and mitigating circumstances, but not on the nature and strength of the evidence for all potential capital cases at all stages of the proceedings.[65] In its December 2002 Final Report, Capital Case Commission members recommended that data continue to be compiled by the Attorney General's Office and the Center for Urban Inquiry.[66] According to Peg Bortner, the Director of the Center for Urban Inquiry, the Capital Case Commission, in conjunction with the Center for Urban Inquiry, is working on a sophisticated statistical analysis for a dataset comprised of all individuals indicted for first-degree murder in Arizona for the five-year period spanning from January 1, 1995 to December 31, 1999. The Center is conducting in-depth analyses for each of these cases at every stage of the process, including the: (1) prosecutorial decision to death notice individuals indicted for first-degree murder; (2) prosecutorial decision to take death-noticed individuals to trial or offer plea agreement; (3) jury decision to convict (for first-degree murder) death-noticed individuals; and (4) judicial decision to sentence to death.[67]

Additionally, the Arizona Department of Corrections compiles a list of prisoners currently serving death sentences detailing each prisoner's name, corrections number, ethnicity, date of birth, date of imprisonment, and county of conviction.[68] The Department of Corrections also has collected data and created profiles for inmates executed prior to 1992.[69] These profiles consist of the following data: name; corrections number; birth-date; nationality; religion; date, time, and method of execution; county of conviction; crime details; and occupation, but do not include information on the race of the victim, all aggravating or mitigating circumstances, or the nature and strength of evidence presented at trial.[70]

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[65] *See* CAPITAL CASE COMMISSION, *supra* note 16, at 24.

[66] *Id.*; Data Set I, *supra* note 17, at v (examining the characteristics of 230 Arizona death sentence cases from 1974 through July 1, 2000); Data Set II, *supra* note 17, at v (focusing on the first-degree murder indictments in Arizona from 1995 to 1999 and comparative analyses of those cases).

[67] Email from Peg Bortner, Director of the Arizona State University Center for Urban Inquiry (Nov. 30, 2004).

[68] Arizona Department of Corrections, Death Row Information, *at* http://www.azcorrections.gov/DeathRow/DeathRowMain.asp (last visited on Mar. 16, 2006).

[69] Arizona Department of Corrections, Executed Inmates, *at* http://www.azcorrections.gov/DeathRow/Executed.htm (last visited on Mar. 16, 2006).

[70] *Id.*

As the State of Arizona only collects and maintains data relating to the race of defendants and victims, and on aggravating and mitigating circumstances, the State of Arizona is in partial compliance with Recommendation #2.

C. Recommendation #3

> **Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.**

To the best of our knowledge, the State of Arizona is not currently collecting and reviewing all valid studies already undertaken to determine the impact of racial discrimination on the death penalty. As discussed in Recommendation #2, however, the Capital Case Commission, through the Center for Urban Inquiry, is working on a sophisticated statistical analysis to help determine the impact of race in capital sentencing for a dataset comprised of all individuals indicted for first-degree murder in Arizona for the five-year period from January 1, 1995 to December 31, 1999. The Center is conducting in-depth analyses for each of these cases at every stage of the process, including the: (1) prosecutorial decision to death notice individuals indicted for first-degree murder; (2) prosecutorial decision to take death-noticed individuals to trial or offer plea agreement; (3) jury decision to convict (for first-degree murder) death-noticed individuals; and (4) judicial decision to sentence to death.[71]

In 2002, while investigating the impact of racial bias in Arizona's criminal justice system, the Capital Case Commission relied solely on statistical evidence compiled and analyzed by its Research Subcommittee, and did not review all valid studies already undertaken to assess the impact of racial bias on the administration of the death penalty.[72] However, the Commission did collect and synthesize data by the defendant and victim's race/ethnicity for various decision-making points in the death penalty process, including, but not limited to, the return of the grand jury indictment, the prosecutorial decision to seek the death penalty, and the judicial decision to impose the death penalty.[73]

Based on this information, the State of Arizona is only in partial compliance with Recommendation #3.

D. Recommendation #4

> **Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.**

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[71] Email from Peg Bortner, Director of Arizona State University Center for Urban Inquiry (Nov. 30, 2004).

[72] *See* CAPITAL CASE COMMISSION, *supra* note 16, at 26-27.

[73] Data Set II, *supra* note 17, at v, 15.

The data collected and reviewed by the Capital Case Commission appears to disclose a pattern of racial discrimination in Arizona's implementation of the death penalty. From 1995 through 1999, the percentage of indictments actually resulting in death sentences for cases in which both the defendant and the victim were white was *nearly eight times higher* than those cases in which both the defendant and the victim were minorities.[74] During this same period, the percentage of indictments resulting in death sentences for cases consisting of a minority defendant and a white victim was *five times higher* than those cases consisting of a white defendant and a minority victim.[75] Indeed, in Maricopa County and the outlying counties, there was not a single indictment resulting in a death sentence where the defendant was white, but the victim was a minority.[76] Across the State, prosecutors chose to seek the death penalty less frequently when the homicide victim was a minority; while judges chose to impose the death penalty less frequently when the homicide victim was a minority.[77]

Because the Capital Case Commission asserted that "[s]tatistics relating to the race of the victim are not necessarily informative regarding racism" and that "[a]n analysis of whether race plays a role in the process is more appropriately focused on the race of the *defendant*," the Commission discounted the importance of research noting the relationship between racial bias and a victim's race/ethnicity.[78] Consequently, in its Final Report, the Capital Case Commission only recommended that participants in the criminal justice system promote practices that ensure race-neutral decisions are made in deciding to seek or impose the death penalty in regards to both defendants and victims, and that participants use the empirical data gathered by the Commission for internal reviews and discussions.[79] The Capital Case Commission failed to recommend any remedial or preventive strategies to address any racial disparities.

Because Arizona is not currently developing remedial and preventative strategies to address the apparent racial disparities in its administration of the death penalty, the State does not meet the requirements of Recommendation #4.

E. Recommendation #5

> **Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is**

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[74] Data Set II, *supra* note 17, at 15. In Arizona, where a white defendant was indicted for killing a white individual, the percentage of indictments resulting in death sentences was 9.1%. Whereas, where a minority was indicted for killing another minority, the percentage of indictments resulting in death sentences was 1.2%. *Id*.

[75] *Id*. (noting that the percentage of indictments resulting in death sentences for minority defendant-white victim cases was 10.3%, while the percentage for white defendant-minority victim cases was 2.0%).

[76] *Id*.

[77] *Id*. (denoting the percentage of cases in which the prosecutor decided to seek and judges decided to impose the death penalty on the basis of the defendant and victim's race/ethnicity).

[78] CAPITAL CASE COMMISSION, *supra* note 16, at 27.

[79] *Id.*

established, the State should have the burden of rebutting it by substantial evidence.

The State of Arizona has not adopted legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. Therefore, the State of Arizona is not in compliance with Recommendation #5.

F. Recommendation #6

Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.

In December 2000, then-Attorney General Janet Napolitano, along with the Tucson Police Officers Association, the Arizona Conference of Police and Sheriffs, the Arizona Association of Chiefs of Police, the Latino Peace Officers Association, the National Organization of Black Law Enforcement Executives (Arizona Chapter), the Tucson Police Department, the Phoenix Law Enforcement Association, the Arizona Sheriffs Association, the Associated Highway Patrolmen of Arizona, the Fraternal Order of Police, and the Arizona County Attorneys and Sheriffs Association, issued a declaration condemning racial profiling and resolving that law enforcement agencies must provide training on prohibited profiling practices.[80] A month later, the Attorney General's Office issued its Report on Racial Profiling, reiterating the need for law enforcement training on racial profiling, including training pertinent to cultural differences and, when necessary, foreign language instruction.[81] The extent to which these educational opportunities were incorporated into existing or developing law enforcement policies and then implemented is unknown.[82]

However, eighteen Arizona law enforcement agencies have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), which requires law enforcement agencies to adopt policies on racial sensitivity.[83] Specifically, CALEA requires certified law enforcement agencies to establish a written directive that prohibits bias-based profiling and requires training on how to avoid biased-based profiling.[84]

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[80] OFFICE OF THE ATTORNEY GENERAL, REPORT ON RACIAL PROFILING (Jan. 2001), at 12 (Declaration of Arizona Law Enforcement Condemning Racial Profiling).

[81] *Id.* at 7.

[82] Most recently, in 2005, the Civil Rights Division of the Arizona Attorney General's Office provided a "Racial Profiling Policy Guidance" to law enforcement agencies across Arizona in order to assist law enforcement agencies in creating or revising internal procedures on racial profiling. ARIZONA ATTORNEY GENERAL TERRY GODDARD 2005 ANNUAL REPORT, at 39.

[83] CALEA Online, Agency Search, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited Nov. 3, 2005).

[84] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at 1-4 (Standard 1.2.9) (4th ed. 2001).

Additionally, the Commission on Minorities in the Judiciary has incorporated a cultural competency component for new judges' orientation.[85] However, the content and scope of this training is unknown.

Although it appears that the State of Arizona has developed and implemented several programs to stress that race should not be a factor in Arizona's criminal justice system, the programs do not appear to specifically address the role of race in the administration of the death penalty nor do the programs apply to all parts of the criminal justice system. Consequently, the State of Arizona is only in partial compliance with Recommendation #6.

G. Recommendation #7

> **Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel is trained to identify biased jurors during *voir dire*.**

The State of Arizona does not require defense attorneys to participate in training to identify and develop racial discrimination claims in capital cases and identify biased jurors during *voir dire*. However, Rule 6.8 of the Arizona Rules of Criminal Procedure does mandate that appointed counsel complete six hours of training in the area of capital defense, within one year prior to the initial appointment, and twelve hours of capital defense training within one year prior to any subsequent appointment.[86]

The State Bar of Arizona offers at least one training program, entitled "More Sex, Murder, and the Media," that deals with various aspects of the death penalty, including the decision to seek the death penalty.[87] While the Maricopa County Office of the Public Defender, in conjunction with other indigent defense offices, provides a variety of training relevant to capital defense, we were unable to determine whether they or the State Bar's program touched on the subject of identifying and developing racial discrimination claims or identifying biased jurors during *voir dire*.[88]

Although training on the issue of race in capital litigation may be available, the State of Arizona does not require defense counsel to participate in training to specifically identify and develop racial discrimination claims in capital cases and to identify biased jurors during *voir dire*. The State of Arizona, therefore, fails to comply with Recommendation #7.

H. Recommendation #8

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[85] *See* Strategic Planning Session, *supra* note 29.

[86] ARIZ. R. CRIM. P. 6.8(B)(1)(iv), (2).

[87] *See* State Bar of Arizona, My AzB@r, *at* http://www.legalspan.com/AZBar/catalog.asp?UGUID=&CategoryID=22000061872398314311 6&ItemID=20050106-792243-170848 (last visited Feb. 26, 2006). The program occasionally is available live and also is available as an audio/video training program. *Id.*

[88] *See* OFFICE OF THE MARICOPA COUNTY PUBLIC DEFENDER 2001 ANNUAL REPORT, *at* http://www.pubdef.maricopa.gov/ (last visited Feb. 26, 2006); OFFICE OF THE MARICOPA COUNTY PUBLIC DEFENDER 2002 ANNUAL REPORT, *at* http://www.pubdef.maricopa.gov/ (last visited Feb. 26, 2006).

Jurisdictions should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.

Neither the *Revised Arizona Jury Instructions* (Criminal 3rd) nor Arizona case law requires jury instructions to inform jurors that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.

Moreover, because Arizona's capital sentencing scheme previously vested the trial judge with the authority to determine if a capital defendant received a sentence of life or death, Arizona currently has no pattern jury instructions specifically tailored to a capital trial.[89] However, due to the United States Supreme Court's decision in *Ring v. Arizona*, which shifted the responsibility to impose the death penalty from judge to jury, the Criminal Jury Instruction Committee of the State Bar of Arizona is in the process of drafting pattern jury instructions for capital cases.[90] A portion of these proposed instructions, which has been approved by the Board of Governors of the State Bar of Arizona, provides the following guidance to jurors in deciding whether an aggravating circumstance exists during the first phase of a capital defendant's sentencing hearing:

> [Y]ou are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Race, color, religion, national ancestry, gender or sexual orientation should not influence you.[91]

During the Penalty Phase, in which the jury decides whether to impose a sentence of life or death, the proposed pattern jury instructions, approved in part by the Board of Governors of the State Bar of Arizona, reiterate to jurors that:

> You must not be influenced by your personal feelings of bias or prejudice for or against the Defendant or any person involved in this case on the basis of anyone's race, color, religion, national ancestry, gender or sexual orientation.[92]

Although the State Bar of Arizona is promulgating pattern jury instructions that direct jurors as to the impropriety of considering any racial factors in their decision-making, the draft pattern jury instructions, as of yet, do not require jury instructions to denote that jurors should report any evidence of racial discrimination in deliberations. The State of Arizona, therefore, at best, only partially meets the requirements of Recommendation #8.

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[89] *See* Ring v. Arizona, 536 U.S. 584, 588-89, 592-93 (2002).

[90] Unlike other states, the Supreme Court of Arizona does not issue any approvals of its own in regards to pattern jury instructions. *See* The State Bar of Arizona, Criminal Jury Instructions, *at* http://www.myazbar.org/SecComm/Committees/CRJI/crji.cfm (last visited March 3, 2006).

[91] Draft Capital Case Sentencing Instructions, Eligibility Phase, 1.2 Duties of the Jury (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

[92] Draft Capital Case Sentencing Instructions, Penalty Phase, 2.1 Nature of Hearing and Duties of Jury (Feb. 20, 2006) (approved by the Board of Governors on May 20, 2005) (on file with author).

I. Recommendation #9

Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.

Canon 3 of the Arizona Code of Judicial Conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer."[93] The number of judges who have actually disqualified themselves due to racial bias or prejudice is unknown. Consequently, it is impossible to assess whether Canon 3 sufficiently ensures that judges rightfully disqualify themselves, as required by Recommendation #9.

Significantly, the Arizona Commission on Judicial Conduct is the independent state agency charged with resolving complaints filed against judges on the Arizona Supreme Court, the Court of Appeals, the Superior Court, justices of the peace, and municipal courts.[94] Under the Commission's new rules, effective January 2006, complaints against judges will be posted on the Commission's website upon their resolution.[95] No complaints resolved and posted as of March 2006 included allegations of racial and/or ethnic bias.

J. Recommendation #10

States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.

The State of Arizona does not make any exceptions to the normal procedural rules for claims of racial discrimination in the imposition of a death sentence. Specifically, a defendant's failure to raise a claim of racial discrimination that could have been raised at trial or on appeal will not be reviewed in a post-conviction proceeding unless the defendant can show that:

(1) S/he is being held in custody after the sentence imposed has expired;

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[93] ARIZ. CODE OF JUD. CONDUCT Canon 3(E)(1)(a); *see also* ARIZ. CODE OF JUD. CONDUCT Canon 3(B)(5) (requiring judges to perform their judicial duties without "bias or prejudice" or "by words or conduct" that do not "manifest bias or prejudice, including but not limited to bias or prejudice based upon race [or] national origin").

[94] Supreme Court of Arizona, Overview of the Arizona Commission on Judicial Conduct, *available at* http://www.supreme.state.az.us/ethics/Commission_on_Judicial_Conduct_Overview.htm (last visited March 18, 2006).

[95] *See* Arizona Supreme Court, Commission on Judicial Conduct, Judicial Complaints, *available at* http://www.supreme.state.az.us/ethics/Complaints/Judicial_Complaints.htm (last visited March 17, 2006); ARIZ. COMM'N ON JUD. CONDUCT R. 9(a) (internet edition).

(2) Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence;

(3) The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part;

(4) There has been a significant change in the law that if determined to apply to the defendant's case would probably overturn the defendant's conviction or sentence;

(5) The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found the defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.[96]

Based on this information, the State of Arizona fails to comply with Recommendation #10.

[96] ARIZ. R. CRIM P. 32.1(d)-(h), 32.2(b); *see also* ARIZ. REV. STAT. §§ 13-4232(B), 13-4231(4)–(7) (2005).

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE

Mental Retardation

The ABA unconditionally opposes the imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Mental Retardation defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if the individual is significantly limited in his/her conceptual, social, and practical adaptive skills; and if these limitations were present before the person reached the age of 18. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range (approximately 70-75 or below) that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often preclude defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant but also requires proof greater than a preponderance of the evidence.

Accordingly, a great deal of additional work is required to make the holding of *Atkins*, i.e., that people with mental retardation should not be executed, a reality.

Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his[/her] conduct or to conform his[/her] conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication"; and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct."

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three statutory factors listed above as

aggravating, rather than *mitigating*, factors in cases involving mental illness. One study found specifically that jurors' consideration of the factor, "extreme mental or emotional disturbance," in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining "future dangerousness," often a criterion for imposing the death penalty. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead them to receive capital punishment.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

I. FACTUAL DISCUSSION

A. Mental Retardation

In concert with the United States Supreme Court's 1989 decision in *Penry v. Lynaugh*,[1] Arizona once considered mental retardation as mitigating evidence during the penalty phase of a capital trial, but not "as an absolute constitutional bar to the imposition of the death penalty."[2] In 2001, a year before the U.S. Supreme Court banned the execution of all mentally retarded offenders in *Atkins v. Virginia*,[3] the Arizona legislature adopted section 13-703.02 of the Arizona Revised Statutes (A.R.S.), prohibiting the imposition of the death penalty on any individual with mental retardation and outlining the procedures by which the State should determine whether a capital defendant has mental retardation.[4] As initially adopted, the statute dealt with only those cases in which the State had filed a notice of intent to seek the death penalty after the statute's effective date of April 26, 2001.[5] However, in 2002, in response to *Atkins*, the legislature amended the statute to encompass all capital sentencing proceedings, including re-sentencing proceedings.[6]

1. Definition of Mental Retardation

Section 13-703.02 of the A.R.S. defines mental retardation as "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."[7] Under this statute, significantly subaverage general intellectual functioning is defined as "a full scale intelligence quotient of seventy or lower,"[8] while adaptive behavior is defined as "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."[9]

The Arizona Supreme Court has further specified that mental retardation "is not curable or controllable by medication."[10]

2. Pre-Trial Determinations of Mental Retardation

Whenever the State files a notice of intent to seek the death penalty, the court has an obligation to appoint a prescreening psychological expert[11] (the prescreening expert) to

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1 492 U.S. 302 (1989).
2 *See* State v. Grell, 66 P.3d 1234, 1240 (Ariz. 2003).
3 536 U.S. 304 (2002).
4 *See id.*; ARIZ. REV. STAT. § 13-703.02 (2006).
5 *See* State v. Dann, 79 P.3d 58, 62 n. 3 (Ariz. 2003); ARIZ. REV. STAT. § 13-703.02 (2006); 2001 Ariz. Legis. Serv. 260 (S.B. 1551) (West).
6 *See Dann*, 79 P.3d at 62 n. 3. Note that there is no requirement that a defendant be afforded a hearing on mental retardation on re-sentencing. *See id.*
7 ARIZ. REV. STAT. § 13-703.02(K)(3) (2006).
8 ARIZ. REV. STAT. § 13-703.02(K)(5) (2006). In determining the defendant's IQ, the court must "take into account the margin of error for the test administered." *Id.*
9 ARIZ. REV. STAT. § 13-703.02(K)(1) (2006).
10 *Dann*, 79 P.3d at 63.

determine the defendant's intelligence quotient (IQ).[12] Within ten days of testing the defendant, the prescreening expert must provide the court with a written report detailing the defendant's IQ; the IQ assessment must be based upon "current community, nationally and culturally accepted intelligence testing procedures."[13]

If the prescreening expert concludes that the defendant's IQ is above seventy-five, the notice of intent to seek the death penalty cannot be dismissed on the basis that the defendant has mental retardation.[14] In such a case, the expert's report also must be sealed, with access only being afforded to the defendant.[15] A capital defendant whose prescreening indicates an IQ above seventy-five may still introduce evidence of his/her mental retardation or diminished mental capacity in the penalty phase of the trial.[16]

Alternatively, if the prescreening expert concludes that the defendant has an IQ of seventy-five or below, the trial court must order the State and the defendant to (1) individually nominate three experts in mental retardation,[17] or (2) jointly nominate one expert in mental retardation.[18] The trial court must then either appoint two experts, one nominated by the State and the other by the defendant, or appoint one expert nominated in concert by both parties.[19] The court also may opt to appoint an additional expert in mental retardation who was not nominated by the State or the defendant.[20]

After both parties have supplied the expert(s) and the court with any records germane to the defendant's mental retardation status,[21] each mental retardation expert will examine the defendant to determine if s/he has mental retardation.[22] The examination must be conducted in accordance with "current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures."[23] Within

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[11] A prescreening psychological expert is defined as a "psychologist licensed pursuant to title 32, chapter 19.1 with at least five years' experience in the testing, evaluation and diagnosis of mental retardation." ARIZ. REV. STAT. § 13-703.02(K)(4) (2006).

[12] ARIZ. REV. STAT. § 13-703.02(B) (2006).

[13] *Id.*

[14] ARIZ. REV. STAT. § 13-703.02(C) (2006).

[15] *Id.* However, if the defendant introduces the report during the capital proceedings or if the defendant is convicted of an offense in the capital proceedings and the sentence is final, the court must release the report on the motion of any party. *Id.*

[16] *Id.*

[17] An expert in mental retardation is defined as a "psychologist or physician licensed pursuant to tile 32, chapter 13, 17 or 19.1 with at least five years' experience in the testing or testing assessment, evaluation and diagnosis of mental retardation. ARIZ. REV. STAT. § 13-703.02(K)(2) (2006).

[18] ARIZ. REV. STAT. § 13-703.02(D) (2006). The court must issue its order within ten days of the report's receipt. *Id*.

[19] *Id.* The expert(s) nominated must be different from the prescreening expert. *Id.*

[20] *Id.* The additional expert appointed by the court must be different from the prescreening expert. *Id*.

[21] ARIZ. REV. STAT. § 13-703.02(D), (E) (2006). The records must be provided within forty-five days of the court's order to appoint the expert(s), or on the actual appointment of such expert(s), whichever is later, unless the defendant or State shows good cause for an extension of time. *Id.*

[22] ARIZ. REV. STAT. § 13-703.02(E) (2006). The examination must occur by the later of the following two: (1) at least twenty days after the expert(s)' receipt of the records, or (2) at least twenty days after the deadline for providing the expert(s) with the records has passed. *Id.*

[23] ARIZ. REV. STAT. § 13-703.02(E) (2006).

fifteen days of the examination, each expert must provide the trial court a written report that includes his/her opinion "as to whether the defendant has mental retardation."[24]

If every IQ test discloses that the defendant has an IQ higher than seventy, the notice of intent to seek the death penalty cannot be dismissed on the basis that the defendant has mental retardation.[25] A defendant found to have an IQ higher than seventy on every IQ test still may present proof of his/her mental retardation or diminished mental capacity at the penalty phase of the trial, however.[26]

If any IQ test indicates that the defendant has an IQ of seventy or below, a hearing must be conducted to decide if the defendant has mental retardation.[27] During the hearing, the defendant carries the burden of proving mental retardation by clear and convincing evidence, unless the trial court determines that the defendant has an IQ of sixty-five or below, in which case the defendant establishes a rebuttable presumption of mental retardation.[28] If the court determines that the defendant has mental retardation, the State may no longer seek the death penalty.[29] Conversely, if the court finds that the defendant is not mentally retarded, the State may still pursue the death penalty,[30] but the defendant may present evidence of his/her mental retardation or diminished mental capacity during the penalty phase.[31]

In order to appeal the trial court's decision regarding whether the defendant has mental retardation, either party may file a petition for special action with the Arizona Court of Appeals within ten days of the trial court's determination.[32]

3. Consideration of Mental Retardation Evidence at Trial

If a capital defendant objects to a prescreening evaluation, s/he waives the right to a pre-trial determination of mental retardation,[33] but the defendant will be permitted to introduce evidence of his/her mental retardation during the penalty phase of the trial.[34] Similarly, if the prescreening reveals that the defendant has an IQ above seventy-five, or if the defendant fails to establish mental retardation by clear and convincing evidence at the pre-trial hearing, s/he may still offer evidence of his/her mental retardation or diminished mental capacity at the penalty phase of the trial.[35]

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24 *Id.*
25 ARIZ. REV. STAT. § 13-703.02(F) (2006).
26 *Id.*
27 ARIZ. REV. STAT. § 13-703.02(G) (2006). The hearing must occur "[n]o less than thirty days after the experts in mental retardation submit reports to the court and before trial." *Id.*
28 *Id.*
29 ARIZ. REV. STAT. § 13-703.02(H) (2006).
30 *See id.*
31 *Id.*
32 ARIZ. REV. STAT. § 13-703.02(I) (2006).
33 ARIZ. REV. STAT. § 13-703.02(B) (2006).
34 *Id.*
35 ARIZ. REV. STAT. § 13-703.02(C), (H) (2006).

4. Post-Trial Determinations of Mental Retardation

A capital defendant or death-row inmate may assert a claim of mental retardation on direct appeal or during post-conviction proceedings, if s/he did not have an opportunity to present evidence of mental retardation as a bar to execution during pre-trial proceedings.[36]

Prior to *Atkins*, Arizona courts viewed evidence of mental retardation as a mitigating circumstance and not as "an absolute bar to execution."[37] In light of this fact, the Arizona Supreme Court has held that due process requires that a hearing be conducted to determine if the defendant has mental retardation, regardless of whether the court has already considered evidence of mental retardation.[38] However, a capital defendant is not entitled to an automatic hearing; s/he must first show evidence of mental retardation, or at minimum, some evidence "that raises any doubt as to whether [s/]he may be mentally retarded."[39] In *State v. Dann*, the Arizona Supreme Court indicated that an IQ below the range of seventy to seventy-five "triggers the mental retardation inquiry."[40] Significantly, in order to be entitled to a post-trial hearing on mental retardation, it does not appear that the defendant must have raised the issue of mental retardation during any court proceedings prior to *Atkins*, assuming s/he was not entitled to a pre-trial hearing on mental retardation as set forth in section 13-703.02 of the A.R.S.[41]

The Arizona Supreme Court has contoured the parameters of a post-trial hearing on mental retardation by stipulating that the trial courts "should use *Atkins* as a guide," and,

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[36] *See* State v. Grell, 66 P.3d 1234, 1240 (Ariz. 2003) (en banc) (remanding the case to the trial court to determine whether the capital defendant was mentally retarded on direct appeal to the Arizona Supreme Court); State v. Dann, 79 P.3d 58, 63 (Ariz. 2003) (denying capital defendant's assertion on direct appeal to the Arizona Supreme Court that he is entitled to a hearing on mental retardation). Additionally, the defendant may petition the court to grant post-conviction relief on the grounds that the (1) the sentence was in violation of the U.S. or Arizona Constitutions; and/or (2) there has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence. It is important to note that claims of mental retardation raised on direct appeal or in a post-conviction proceeding must meet the requirements for review as discussed in The Direct Appeal Process and State Post-Conviction Proceedings Chapters. *See infra*, at Chapters Seven and Eight.

[37] *Grell*, 66 P.3d at 1240.

[38] *Id.*

[39] *Dann*, 79 P.3d at 63 (concluding "as a matter of law that Dann has not met the minimum threshold necessary to trigger an Atkins or § 13-703.02 inquiry" and thereby denying his request for a hearing on mental retardation). The Arizona Supreme Court in this case also explained its decision to grant a hearing on mental retardation in Grell, noting, in part, "because Grell had made a showing of subaverage intellectual functioning, deficits in adaptive functioning, and onset before age 18—we held that due process required that Grell's case be remanded for an Atkins hearing to determine whether Grell had mental retardation." *Id*. at 62.

[40] *Id* at 63. It is unclear what "triggers" the mental retardation inquiry. *Dann* also suggests that evidence of all three prongs of mental retardation (i.e., subaverage intellectual functioning, deficits in adaptive functioning, and onset before age the age of eighteen) must be presented. *Id*. at 62. There is no case law that speaks to whether this post-trial hearing is mandated when a defendant has waived the pre-trial determination.

[41] *See id*. In *State v. Dann*, the Arizona Supreme Court denied Dann's request for a hearing on mental retardation. *Id.* In so doing, the Court noted that Dann "never alleged mental retardation and did not offer any evidence demonstrating even the possibility of mental retardation." *Id.* Nonetheless, it appears that if Dann had introduced evidence at any point in the proceedings indicating he may have mental retardation, the Court would have held otherwise. *See id*.

to the extent practical, adhere to the procedures outlined in section 13-703.02 of the A.R.S.[42] With respect to *Atkins*, the Court specifically has highlighted *Atkins*' assertion that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18" and that an IQ level below the range of seventy to seventy-five denotes subaverage intellectual functioning.[43] Arizona courts are not mandated to conduct a jury trial to resolve a defendant's post-trial claim of mental retardation.[44]

B. Mental Disorders Other Than Mental Retardation

1. Insanity

a. The Definition of Insanity

Prior to 1993, Arizona's definition of insanity embodied the principles outlined in the *M'Naghten*[45] test for criminal insanity.[46] As codified in 1977 in former section 13-502 of the A.R.S., a defendant was insane if, at the time of the offense, s/he suffered from "(1) [s]uch a defect of reason as not to know the nature and quality of the act, or (2) [i]f [s/]he did know [the nature and quality of the act], that [s/]he did not know [s/]he was doing what was wrong."[47] In 1993, the Arizona legislature adopted a new version of section 13-502(A), which essentially eliminated the first half of the *M'Naghten* test, and enacted a new insanity defense, "guilty except insane."[48] Today, a defendant may be found "guilty except insane" only if "at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."[49]

b. Automatic Prescreening Evaluation

In all cases in which the State seeks the death penalty, the court must order a prescreening evaluation of the defendant to assess whether "reasonable grounds" exist for further examination in order to determine (1) if the defendant is competent to stand trial and (2) if s/he was sane at the time of the alleged offense.[50]

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[42] *Grell*, 66 P.3d at 1241.

[43] *Id.* at 1238.

[44] *See* Schriro v. Smith, 126 S. Ct. 7, 8-9 (2005) (holding the Ninth Circuit exceeded its authority by requiring Arizona courts to conduct a jury trial on the issue of a defendant's mental retardation).

[45] *M'Naghten's Case*, 10 Clark & Fin. 200, 8 Eng. Reprint 718 (1843).

[46] State v. Tamplin, 986 P.2d 914, 916 (Ariz. Ct. App. 1999).

[47] *Id*. (citations omitted).

[48] *See id*.; *see also* Renée Melançon, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 290, 313 (1998) (noting the changes were spurred partly in response to public outcry over the acquittal of a defendant for the murder of his estranged wife on the grounds of insanity and the defendant's subsequent release after only six months of confinement in the Arizona State Hospital).

[49] ARIZ. REV. STAT. § 13-502(A) (2006).

[50] ARIZ. REV. STAT. § 13-703.03(A) (2006).

c. The Defense of Guilty Except Insane

Under Arizona law, legal insanity constitutes an affirmative defense.[51] If a defendant intends to raise the defense of insanity and wishes to introduce evidence at trial in support of the defense, s/he must provide written notice of this intent to the prosecutor.[52] The notice must include the names of all witnesses the defendant intends to call in support of the defense, including the defendant himself.[53] The notice must be filed no later than forty days after arraignment or ten days after the prosecutor's disclosure, whichever is first, unless directed otherwise by the court.[54] If the defendant fails to comply with the requisite notice, the trial court may exercise its discretion to determine whether evidence of the defendant's insanity will be permitted at trial.[55]

If the court determines that there is a reasonable basis to support the defendant's plea of guilty except insane, the court may either commit the defendant to a secure mental health facility under the Department of Health Services, a secure county mental health evaluation and treatment facility, or another secure licensed mental health facility for up to thirty days for mental health evaluation and treatment.[56] If the court orders the defendant committed to a mental health facility, s/he must be examined by an expert,[57] who, in turn, must submit the results of the examination to the court and both parties.[58] If the court does not commit the defendant to a secure mental facility, it will order an evaluation by an independent expert;[59] the expert then must provide the court, defense, and prosecution with a written report of his/her findings.[60] In addition to any statutorily mandated evaluations, both the defendant and the State are entitled to obtain additional psychiatric examinations by other mental health experts.[61]

The defendant must prove his/her insanity by clear and convincing evidence.[62] In determining whether a defendant was insane at the time of the offense, the criminal act must be considered "wrong" in relation to a community standard of morality, and not the personal beliefs of the defendant.[63] Arizona law specifically prohibits the finding of a mental disease or defect from "disorders that result from acute voluntary intoxication or

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51 ARIZ. REV. STAT. § 13-502(A) (2006).

52 ARIZ. R. CRIM. P. 15.2(b). The notice also must be filed with the court. *Id.*

53 *Id.*

54 ARIZ. R. CRIM. P. 15.2(d)(1).

55 State v. Alford, 403 P.2d 806 (Ariz. 1965).

56 ARIZ. REV. STAT. § 13-502(B) (2006). These procedures are not limited to capital cases, but include any case "involving the death or serious physical injury of or the threat of death or serous physical injury to another person." *Id.*

57 The expert conducting the evaluation must be licensed, have familiarity with the state's insanity statutes, be a specialist in mental diseases and defects, and knowledgeable in the field of insanity. *Id.*

58 *Id.*

59 As before, the independent expert conducting the evaluations must be licensed, have familiarity with the state's insanity statutes, be specialists in mental diseases and defects, and knowledgeable in the field of insanity. *Id.*

60 *Id.*

61 *Id.* Again, the experts elected by the State or defendant must be licensed, have familiarity with the state's insanity statutes, be specialists in mental diseases and defects, and knowledgeable in the field of insanity. *Id.*

62 ARIZ. REV. STAT. § 13-502(C) (2006).

63 State v. Tamplin, 986 P.2d 914, 916-17 (Ariz. Ct. App. 1999).

withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders."[64] The defense of insanity also fails to apply in "momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct."[65]

d. Post-Verdict Actions Regarding a Defendant Found Guilty Except Insane

Upon a finding of guilty except insane, the court must commit the individual to a state mental health facility for treatment.[66] In capital cases, the individual will be placed under the jurisdiction of the Psychiatric Security Review Board (the Board) for a term of life or natural life.[67]

However, after 120 days have passed from the individual's date of commitment, the individual may request a hearing before the Board to determine if s/he is eligible for release.[68] Before the hearing, the individual seeking release, his/her attorney and a representative of the State may select a licensed psychologist or psychiatrist to examine the individual.[69] The results of the examination must be filed with the Board and must include the expert's opinion as to the individual's mental condition and his/her dangerousness.[70] Provided there is good cause, the Board or its Chairman also may elect to order an independent mental health evaluation by a licensed psychologist or psychiatrist.[71] At least fifteen days prior to the hearing, the state mental health facility or supervising agency that is charged with the individual's care must provide the Board with a report on his/her mental status.[72]

In any hearing, "public safety and protection are primary" and the defendant carries the burden of proof by clear and convincing evidence.[73] During the hearing, the Board may take one of three actions.[74] First, if the Board concludes that the individual still has a mental disease or defect and is dangerous, the Board must deny release.[75] Second, if the Board finds that the individual has proven by clear and convincing evidence that s/he has no mental disease or defect and is not dangerous, the Board must grant the individual's

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64 ARIZ. REV. STAT. § 13-502(A) (2006).
65 *Id.*
66 ARIZ. REV. STAT. §§ 13-502(D); 13-3994(A), (D) (2006); *see also* ARIZ. R. CRIM. P. 25; ARIZ. REV. STAT. § 13-703(A) (2006).
67 ARIZ. REV. STAT. § 13-3994(D) (2006).
68 ARIZ. REV. STAT. § 13-3994(F) (2006). Significantly, an individual cannot be confined for more than two years without a hearing to determine whether s/he should be released. ARIZ. REV. STAT. § 13-3994(G) (2006).
69 ARIZ. REV. STAT. § 13-3994(N) (2006).
70 ARIZ. REV. STAT. § 13-3994(N)(1), (2) (2006).
71 ARIZ. REV. STAT. § 13-3994(O) (2006).
72 ARIZ. REV. STAT. § 13-3994(I) (2006).
73 ARIZ. REV. STAT. § 13-3994(H)(1), (2) (2006).
74 ARIZ. REV. STAT. § 13-3994(F) (2006).
75 ARIZ. REV. STAT. § 13-3994(F)(1) (2006).

release.[76] Third, if the Board finds that the individual is not dangerous, but still has a mental disease or defect or that the mental disease or defect is in stable remission, the Board must order the individual's conditional release.[77] Regardless if the Board orders a release or conditional release, the individual still remains under the Board's jurisdiction.[78]

Once the Board has made its determination, an individual must wait at least twenty months before seeking a new release hearing, unless the hearing is sought by the Medical Director of the state mental health facility treating the individual.[79]

C. Competency to Be Executed[80]

An inmate who is sentenced to death but found to be "mentally incompetent to be executed" cannot be executed.[81] An inmate is mentally incompetent to be executed if "due to a mental disease or defect [the inmate] is presently unaware that [s/]he is to be punished for the crime of murder or . . . [s/]he is unaware that the impending punishment for that crime is death."[82]

1. Determination of Competency to Be Executed

If the Director of the Arizona Department of Corrections or an attorney for the inmate or the State believes with good reason that an inmate may be mentally incompetent to be executed, s/he may file a motion requesting that the inmate's mental competency be examined.[83] The motion must include facts in support of the assertion that the inmate is mentally incompetent and facts related to the prisoner's conviction and sentence.[84]

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[76] ARIZ. REV. STAT. § 13-3994(F)(2) (2006). Before granting release, however, the Board must take into consideration the individual's criminal history. If the Board concludes that the individual "has a propensity to reoffend," it cannot order his/her release. *Id.*

[77] ARIZ. REV. STAT. § 13-3994(F)(3) (2006). If an individual is conditionally released, the Board must continue to monitor the individual. A supervised treatment plan also must be in place prior to the individual's release. *Id.*

[78] ARIZ. REV. STAT. § 13-3994(F)(2),(3) (2006). Because the individual still remains under the Board's jurisdiction, s/he may be compelled to return to a treatment facility. *See* ARIZ. REV. STAT. § 13-3994(L), (M) (2006) (noting also that a hearing will be held upon the individual's return to the mental health facility).

[79] ARIZ. REV. STAT. § 13-3994(G) (2006).

[80] In 1986, the United States Supreme Court, in *Ford v. Wainwright*, found that procedures for assessing an inmate's mental competency are in violation of the Eighth Amendment of the United States Constitution if the procedures do the following: (1) fail to include the inmate in the "truth-seeking process;" (2) deny the inmate the opportunity to challenge or impeach the state-appointed psychiatrists' opinions; and (3) place the decision on the inmate's mental capacity wholly within the executive branch. *See* Ford v. Wainwright, 477 U.S. 399, 413-16 (1986).

[81] ARIZ. REV. STAT. § 13-4021(A) (2006).

[82] ARIZ. REV. STAT. § 13-4021(B) (2006).

[83] ARIZ. REV. STAT. § 13-4022(A) (2006). The motion must be filed with the Superior Court of the county in which the inmate is detained. *Id*. If a stay of execution is desired, an application for a stay must be submitted to the Arizona Supreme Court. ARIZ. REV. STAT. § 13-4022(B) (2006).

[84] ARIZ. REV. STAT. § 13-4022(A) (2006).

If the court finds that the motion is timely[85] and sets forth reasonable grounds for an examination, the court must appoint experts to conduct an evaluation of the inmate.[86] The court may subject the inmate to any examinations that are "reasonably necessary," including any physical, neurological, and psychological assessments.[87] If an inmate objects to being examined by state experts, the court, in turn, will not consider any evidence presented by the inmate's own experts.[88] Both parties are obligated to disclose any prior examinations by any mental health experts.[89]

Following the inmate's examination, each expert must prepare a report, answering whether the inmate has a mental disorder, illness, defect or disability "such that the prisoner is incompetent to be executed and would benefit from competency restoration treatment."[90] The reports must be made available to both parties.[91]

The court may then hold a hearing to assess the inmate's competency to be executed.[92] At the hearing, both parties may introduce witnesses and evidence on the issue of the inmate's mental competency.[93] Alternatively, the parties may opt to allow the court decide the issue on the basis of the experts' reports or other evidence.[94] In all cases, a death-row inmate is presumed to be competent to be executed,[95] and carries the burden of proving his/her incompetency by clear and convincing evidence.[96]

If the court finds that the inmate has proven his/her mental incompetency to be executed, it must stay the inmate's execution[97] and order competency restoration treatment until such time as the inmate regains competency.[98] If the court determines that the inmate is competent, another competency hearing only will be held if the successive motion contains an affidavit from a physician or a psychologist.[99] The affidavit must show that the expert examined the inmate and that "a substantial change of circumstances" raises a

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[85] A motion is considered untimely if filed less than twenty days before a scheduled execution. ARIZ. REV. STAT. § 13-4024(A) (2006). However, the court will consider a motion that is filed less than twenty days before an execution if the motion includes an affidavit by a licensed physician or psychologist stating that the prisoner is not competent to be executed and good cause for the failure to file a timely motion. ARIZ. REV. STAT. § 13-4024(A)(1), (2) (2006).

[86] ARIZ. REV. STAT. § 13-4022(C) (2006). In order to obtain review of the court's ruling on a motion for examination, either party may file a petition for special action with the Arizona Supreme Court within five days of the decision. ARIZ. REV. STAT. § 13-4022(I) (2006).

[87] ARIZ. REV. STAT. § 13-4022(D) (2006).

[88] *Id.*

[89] ARIZ. REV. STAT. § 13-4022(C) (2006).

[90] *Id.*

[91] *Id.*

[92] ARIZ. REV. STAT. § 13-4022(E) (2006).

[93] *Id.*

[94] *Id.*

[95] ARIZ. REV. STAT. § 13-4022(F) (2006).

[96] *Id.*

[97] ARIZ. REV. STAT. § 13-4022(G) (2006). The order must immediately be sent to the Arizona Supreme Court. *Id*.

[98] *Id.*

[99] ARIZ. REV. STAT. § 13-4024(C) (2006). This also applies to decisions in which the court denied a petition for a hearing on the issue of an inmate's competency. *Id*.

significant question as to the inmate's competency to be executed since the court's prior determination.[100]

In order to obtain review of the court's finding of mental competency, either party may file a petition for special action with the Arizona Supreme Court within five days of the court's decision.[101]

2. Restoration of Competency

An inmate found incompetent to be executed must participate in competency restoration treatment. Although an inmate adjudged incompetent remains within the custody of the Arizona Department of Corrections, the Department of Health Services is the governmental entity charged with providing competency restoration treatment.[102] Consequently, within sixty days of an inmate's commitment to a treatment facility, the Chief Medical Officer of the state hospital must file a status report with the Superior Court.[103] Until the inmate is found competent to be executed, the Chief Medical Officer must update the report every sixty days.[104] Copies of the report also must be provided to the parties and the Arizona Supreme Court.[105]

When the individual overseeing the inmate's treatment concludes the inmate is competent, s/he must provide a report to the Superior Court, Attorney General, and prisoner's attorney, outlining his/her finding.[106] Additionally, the Chief Medical Officer must certify to the Arizona Supreme Court that the prisoner is competent.[107] The Court will then order execution of the warrant, or if the original warrant has expired, a new warrant of execution.[108]

Within ten days after the warrant is issued, the Superior Court must appoint psychological experts to assess the competency of the inmate.[109] Following review of the expert opinions, if the court believes a significant question exists as to the prisoner's competency to be executed, the court must conduct a hearing to decide the matter.[110] However, if the inmate and State both consent, the court may elect not to hold a hearing, and instead base its decision of competency on the expert reports.[111]

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[100] ARIZ. REV. STAT. § 13-4024(C) (2006).
[101] ARIZ. REV. STAT. § 13-4022(I) (2006).
[102] ARIZ. REV. STAT. § 13-4022(H) (2006).
[103] ARIZ. REV. STAT. § 13-4023(A) (2006).
[104] *Id.*
[105] *Id.*
[106] ARIZ. REV. STAT. § 13-4022(H) (2006).
[107] ARIZ. REV. STAT. § 13-4023(B) (2006).
[108] *Id*. Upon a party's request, the court may appoint psychological experts prior to the issuance of the warrant of execution, but after the certification of the inmate's competency by the Chief Medical Officer. ARIZ. REV. STAT. § 13-4023(D) (2006).
[109] ARIZ. REV. STAT. § 13-4023(C) (2006). Significantly, an inmate may choose to waive the appointment of any experts. ARIZ. REV. STAT. § 13-4023(E) (2006).
[110] ARIZ. REV. STAT. § 13-4023(C) (2006).
[111] *Id.*

In order to seek review of the court's decision, either party may file a petition for special action with the Arizona Supreme Court within five days of the decision.[112]

[112] ARIZ. REV. STAT. § 13-4023(F) (2006).

II. ANALYSIS

A. Recommendation #1

> **Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime**.

The American Association on Mental Retardation (AAMR) defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18."[113]

In 2001, the State of Arizona banned the execution of all mentally retarded individuals against whom the State sought the death penalty after April 26, 2001.[114] In 2002, following the U.S. Supreme Court's decision in *Atkins v. Virginia*,[115] the Arizona legislature amended the statute, allowing it to encompass all capital sentencing proceedings.[116] The statute, section 13-703.02 of the A.R.S., defines mental retardation as "a condition based on a mental deficit that involves:" (1) "significantly subaverage general intellectual functioning," (2) "existing concurrently with significant impairment in adaptive behavior," and (3) "where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen."[117]

Although Arizona's definition of mental retardation is similar to the AAMR definition, it appears to be more restrictive in one crucial aspect: its definition of subaverage general intellectual functioning. Under the AAMR definition, limited intellectual functioning requires that an individual have an impairment in general intellectual functioning that places him/her in the lowest category of the general population. IQ scores alone are not

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[113] American Association on Mental Retardation, Mental Retardation, Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on May 16, 2006). The AAMR lists five assumptions as being essential to the application of this definition:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.
5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

Id.

[114] *See* State v. Grell, 66 P.3d 1234, 1240 (Ariz. 2003) (en banc)*;* ARIZ. REV. STAT. § 13-703.02 (2006); 2001 Ariz. Legis. Serv. 260 (S.B. 1551) (West).

[115] 536 U.S. 304 (2002)

[116] *See* State v. Dann, 79 P.3d 58, 62 n. 3 (Ariz. 2003); 2002 Ariz. Legis. Serv. 5th Sp. Sess. 1 (S.B. 1001) (West).

[117] *See* ARIZ. REV. STAT. § 13-703.02(K)(3) (2006); 2001 Ariz. Legis. Serv. 260 (S.B. 1551) (West).

precise enough to identify the upper boundary of mental retardation. In fact, the AAMR has asserted that it is impossible to identify "a fixed cutoff point for making the diagnosis of mental retardation."[118] Still, experts generally agree that the definition of mental retardation not only includes individuals with IQ scores of seventy or below, but also some individuals with IQ scores in the low to mid-seventies.[119] No state therefore should impose an IQ maximum lower than seventy-five.[120]

The definition set forth in section 13-703.02 of the A.R.S., however, states that "significantly subaverage generally intellectual functioning" signifies "a full scale intelligence quotient of seventy or lower."[121] Importantly, Arizona courts must "take into account the margin of error for the test administered" in determining a defendant's IQ.[122] While the margin of error may allow diagnoses of mental retardation in individuals with an IQ between seventy and seventy-five,[123] neither the statute nor Arizona case law specify a commonly accepted standard error of measurement that allows us to identify an upper IQ threshold for mental retardation.

Interestingly, a discrepancy also appears to exist within Arizona law as to the range of IQ scores that are required to establish mental retardation. In reliance on *Atkins*, the Arizona Supreme Court has stated that an "IQ below 70-75 indicates subaverage intellectual functioning."[124] However, if each IQ test is administered as dictated by Arizona statute,

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[118] AAMR, Mental Retardation 58 (10th ed. 2002).

[119] *See* James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 7 (2002) (unpublished manuscript), *available at* www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited on June 19, 2006). Ellis notes that "relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation." *Id.* at 7 n.18; *see also* American Association of Mental Retardation, AAMR Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on May 17, 2006) (noting that "[a]n obtained IQ score must always be considered in light of its standard error of measurement," thus potentially making the IQ ceiling for mental retardation rise to seventy-five. However, "an IQ score is only one aspect in determining if a person has mental retardation."); AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (Ruth Luckasson ed., 9th ed. 1992) ("Mental retardation is characterized by significantly subaverage intellectual capabilities or 'low intelligence.' If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) ("Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

[120] This fact is reflected in *Atkins v. Virginia*, where the Court noted that "an IQ between 70 and 75" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. 304, 309 n.5 (2002).

[121] ARIZ. REV. STAT. § 13-703.02(K)(5) (2006).

[122] *Id.*

[123] *See* American Association of Mental Retardation, Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on May 17, 2006) (stating that "[a]n obtained IQ score must always be considered in light of its standard error of measurement," which generally is nearly five, thus increasing the IQ ceiling for mental retardation to seventy-five).

[124] State v. Canez, 74 P.3d 932, 936-37 (Ariz. 2003) (stating the defendant presented evidence of an IQ of 70, "placing him on the borderline of mental retardation"); *see also* State v. Grell, 66 P.3d 1234, 1238-39 (Ariz. 2003) (en banc) (determining the defendant was entitled to a mental retardation hearing wherein the defendant's IQ scores were 72, 67, 69, 70, 57, and 65, and the defendant's expert discounted the IQ score

the defendant will not be immune from execution on the grounds that s/he has mental retardation if the defendant has an IQ score higher than seventy on each test.[125] Furthermore, because it is unclear whether the State of Arizona considers IQ scores between the range of seventy to seventy-five to indicate significant subaverage intellectual functioning, and because we could not pinpoint a commonly accepted standard error of measurement, we are unable to conclude whether the State of Arizona is in compliance with that portion of Recommendation #1 requiring that no maximum IQ score under seventy-five be imposed. Significantly, this section of 13-703.02 also allows for a determination of mental retardation to be made solely on the basis of an IQ score, in opposition to Recommendation #1.

In addition to a "significantly subaverage" IQ score, the State of Arizona requires that a capital defendant have one or more significant impairments in adaptive behavior. The AAMR definition of mental retardation also includes adaptive behavior limitations, which produce real-world disabling effects on a person's life, designed to ensure that an individual is truly disabled and not simply a poor test-taker.[126] Under this definition, adaptive behavior is "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives."[127]

Similar to the AAMR definition, Arizona defines the term "adaptive behavior" as "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."[128] The Arizona Supreme Court has not refined or expounded upon this definition; it has simply reiterated *Atkins*' assertion that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction . . ."[129]

The AAMR also requires that mental retardation be manifested before the age of eighteen. This does not mean that a person must have scored in the mentally retarded

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of 57); State v. Dann, 79 P.3d 58, 63 (Ariz. 2003) ("In fact, the IQ evidence that Dann offered showed that at the time of sentencing his full scale IQ was 100, substantially above the 'seventy to seventy-five range' that triggers the mental retardation inquiry."

[125] ARIZ. REV. STAT. § 13-703.02(F) (2006). It is important to note that this cannot occur until after examination by a prescreening psychological expert and additional examination by one or more experts in mental retardation. *See supra* notes 11 – 26 and accompanying text.

[126] James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 8 (2002) (unpublished manuscript), *available at* www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited on May 16, 2006).

[127] American Association on Mental Retardation, Mental Retardation, Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on May 16, 2006). The U.S. Supreme Court in *Atkins v. Virginia* indicated that a limitation in adaptive behavior was comprised of deficits in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. 536 U.S. 304, 309 n.3 (2002). Since *Atkins*, the AAMR has dispensed with the requirement that deficiencies in at least two or more of the ten skill areas be found. While the AAMR still considers many of the ten adaptive skills relevant in assessing mental retardation, clinicians now focus on them in terms of conceptual, social, and practical skills. *See* American Association of Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Support 81-82 (Ruth Lackasson et al. eds., 10th ed. 2002).

[128] ARIZ. REV. STAT. § 13-703.02(K)(1) (2006).

[129] State v. Grell, 66 P.3d 1234, 1238 (Ariz. 2003) (en banc); State v. Canez, 74 P.3d 932, 937 (Ariz. 2003).

range on an IQ test during the developmental period, but that there must have been manifestations of mental disability.[130] At an early age, this generally takes the form of problems in the area of adaptive functioning.[131] The age of onset requirement is thus used to distinguish mental retardation from those forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.[132] In concert with the AAMR's definition, the State of Arizona similarly requires the "onset" of subaverage intellectual functioning and concurrent deficits in adaptive behavior before the age of eighteen.[133]

In assessing whether a capital defendant has mental retardation, clinical judgments by experienced diagnosticians are necessary to ensure accurate diagnoses. Under the A.R.S., each defendant against whom the State files a notice of intent to seek the death penalty is automatically entitled to an evaluation by a prescreening psychological expert who must have at least five years of experience "in the testing, evaluation and diagnosis of mental retardation."[134] If the defendant's evaluation reveals an IQ of seventy-five or below, s/he then is subject to further examination by either one or more experts in mental retardation who also must have at least five years of experience "in the testing or testing assessment, evaluation and diagnosis of mental retardation."[135] In accordance with this Recommendation, testing used in arriving at this judgment therefore need not have been performed prior to the crime.[136]

Given that the State of Arizona may determine whether the definition of mental retardation is satisfied solely upon a legislatively prescribed IQ measure and that the State may impose an IQ maximum lower than seventy-five, the State of Arizona is only in partial compliance with Recommendation #1.

B. Recommendation #2

> **All actors in the criminal justice system, including police, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.**

All Arizona law enforcement officers are statutorily required to complete a basic training course at a training academy authorized by the Arizona Peace Officers Standards and Training Board (POST Board), the regulatory body charged with overseeing the training of law enforcement candidates and officers.[137] Prior to obtaining certification as a peace officer, all candidates must complete 585 hours of training, two hours of which touch upon mental illness and developmental disabilities, including mental retardation.[138]

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130 Ellis, *supra* note 119.
131 *Id.*
132 *Id.*
133 ARIZ. REV. STAT. § 13-703.02(K)(3) (2006).
134 ARIZ. REV. STAT. § 13-703.02(B), (K)(4) (2006).
135 ARIZ. REV. STAT. § 13-703.02(D), (E), (K)(2) (2006).
136 ARIZ. REV. STAT. § 13-703.02 (2006).
137 *See* ARIZ. REV. STAT. § 41-1822(A) (2006); ARIZ. ADMIN. CODE R13-4-110(A)(1); R13-4-116 (2006).
138 ARIZ. ADMIN. CODE R13-4-116(E); R-13-4-110(A) (2006); *see* Email from Rick Watling, AZ Peace Officers Standards and Training Board, to Banafsheh Amirzadeh, Project Attorney, American Bar

Peace officers then are mandated to complete eight hours of continuing education each year.[139] As part of its continuing education curriculum, the POST Board offered in January 2005 the telecourse *Recognizing Mental Illness & Developmental Disabilities: A Pro-Active Approach*, which not only discussed approaches and special considerations police officers should take when interacting with mentally retarded offenders, but also provided training on distinguishing between mental retardation and mental illness.[140]

Furthermore, in capital cases, the Arizona Rules of Criminal Procedure mandate that lead counsel appointed at the trial level be familiar with the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (*Guidelines*).[141] The *Guidelines* require that attorneys seeking to qualify to receive appointments should receive training in "the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science"[142] and that the pool of available defense attorneys should have sufficient numbers of attorneys who have demonstrated "skill in the investigation, preparation, and presentation of evidence bearing upon mental status."[143] In addition, the Arizona Rules of Criminal Procedure require all counsel handling death penalty cases to have completed at least six hours of relevant training or educational programs in the area of capital defense within a year of their initial appointment, and at least twelve hours of relevant training or educational programs in the area of criminal defense within a year prior to any subsequent appointment.[144] Similarly, all new judges are obliged to complete a requisite number of hours of training, depending on the month they commenced employment,[145] and sixteen hours of continuing education a year subsequently.[146] We were unable to ascertain whether the required training and continuing legal education for capital defense attorneys and judges include specialized training on mental retardation, however.

Association (May 15, 2006) (on file with author) (denoting two hours of training in the area of mental illness and developmental disabilities).

[139] ARIZ. ADMIN. CODE R13-4-111(A)(1) (2006).

[140] AZ POST Board, *Recognizing Mental and Developmental Disabilities: A Proactive Approach, A Telecourse Production of the Arizona Peace Officer Standards & Training Board*, at 4, 11 (January 20, 2005). In 2006, the AZ POST Board also offered an eight hour course for peace officer instructors entitled *Mental Illness/Developmental Disability Train-the-Trainer*. AZ POST Board, Training Calendar January – June 2006, at 11, available *at* http://www.azpost.state.az.us/.

[141] ARIZ. R. CRIM. P. 6.8(b)(1)(iii). On May 19, 2006, the Arizona State Bar approved amendments to Rule 6.8, which, if approved by the Arizona Supreme Court, would require lead counsel to not only be familiar with the Guidelines, but to also comply with them. In the Matter of Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, No. R-05-0031 (Ariz. filed May 22, 2006) (comment by State Bar of Arizona).

[142] American Bar Association, *Guidelines for the Appointments and Performance of Defense Counsel in Death Penalty Cases*, at 8.1(B)(11) (revised Feb. 2003).

[143] *Id.* at 5.1(B)(2)(f) (revised Feb. 2003).

[144] ARIZ. R. CRIM. P. 6.8(B)(1),(2), (C) (including post-conviction counsel). In exceptional circumstances, and with the consent of the Arizona Supreme Court, an attorney may be appointed who does not meet these requirements. ARIZ. R. CRIM. P. 6.8(D).

[145] Educational Services Division, Arizona Administrative Office of the Courts, Educational Policies and Standards § K(1)(b), *available at* http://www.supreme.state.az.us/ed/ao9908.htm (last visited April 11, 2006).

[146] *Id.* §§ C(1); D(1); I.

To the best of our knowledge, the State of Arizona does not explicitly require any other actors in the criminal justice system, including court officers, prosecutors, judges, and prison authorities to participate in training to recognize mental retardation in capital defendants and death-row inmates.

Based on this information, it appears that while certain members of the criminal justice community may receive training on mental retardation, not all actors within the criminal justice system do. The State of Arizona, therefore, is only in partial compliance with Recommendation #2.

C. Recommendation #3

> **The jurisdiction should have in place policies to ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.**

The State of Arizona requires that capital defense attorneys appointed at the trial level be familiar with the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*,[147] which, in turn, requires that capital defense attorneys participate in training related to "developments in the mental health fields."[148] Significantly, the *Guidelines* note that:

> Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend *Miranda* warnings, and competency to waive constitutional rights.[149]

The *Guidelines* also stipulate that the defense team should, at minimum, include two attorneys, one investigator, and one mitigation specialist; one member of which must be "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."[150]

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[147] ARIZ. R. CRIM. P. 6.8(b)(1)(iii). On May 19, 2006, the Arizona State Bar approved amendments to Rule 6.8, which, if approved by the Arizona Supreme Court, would require attorneys to not only be familiar with the Guidelines, but to also comply with them. In the Matter of Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, No. R-05-0031 (Ariz. filed May 22, 2006) (comment by State Bar of Arizona).

[148] American Bar Association, *Guidelines for the Appointments and Performance of Defense Counsel in Death Penalty Cases*, at 5.1(B)(1)(c), 8.1(B)(10) (revised Feb. 2003).

[149] *Id.* at 4.1 cmt.

[150] *Id.* at 4.1(A)(1),(2); 10.4(C)(2)(b).

Under section 13-703.02 of the A.R.S., whenever the State seeks the death penalty, the defendant automatically is appointed a prescreening psychological expert to assess his/her IQ.[151] At this prescreening, the court, not the defendant, chooses the prescreening psychological expert who then reports the outcome of the evaluation to the court.[152] Because the prescreening psychological expert is not provided directly to counsel, s/he is not the type of resource contemplated by this Recommendation.

If the prescreening expert determines that the defendant has an IQ of seventy-five or below, the trial court must order the State and the defendant to (1) individually nominate three experts in mental retardation,[153] or (2) jointly nominate one expert in mental retardation.[154] The trial court must then either appoint two experts, one nominated by the State and the other by the defendant, or appoint one expert nominated in concert by both parties.[155] The court also may opt to appoint an additional expert in mental retardation who was nominated neither by the State nor the defendant.[156] Although the expert(s) must still provide the trial court their opinion "as to whether the defendant has mental retardation,"[157] this system of appointing experts balances the interests of each party while allowing for a neutral determination of mental retardation. The system thereby provides attorneys with some resources to assist them in assessing the mental capacities and adaptive skills deficiencies of a defendant who may have mental retardation.

Additionally, if a defendant shows that s/he does not have the financial means to pay for investigators and experts, the court must appoint investigators and experts "as are *reasonably necessary* to adequately present a defense at trial and at any subsequent proceeding."[158] The court also may choose to appoint investigators and experts on its own accord.[159] What is "reasonably necessary" for an adequate defense hinges upon the particular facts of each case.[160] While the Arizona Supreme Court has held that "[s]o long as the law permits capital sentencing, Arizona's justice system must provide adequate resources to enable indigents to defend themselves in a reasonable way," the Court also has noted that "an indigent defendant does not have an unlimited right to all items that [s/]he believes are necessary for his[/her] defense."[161]

Based on this information, it is unclear whether Arizona is in compliance with Recommendation #3.

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[151] ARIZ. REV. STAT. § 13-703.02(B). An expert will not be appointed, however, if the defendant objects. *Id.*

[152] See *id*.

[153] An expert in mental retardation is defined as a "psychologist or physician licensed pursuant to tile 32, chapter 13, 17 or 19.1 with at least five years' experience in the testing or testing assessment, evaluation and diagnosis of mental retardation." ARIZ. REV. STAT. § 13-703.02(K)(2) (2006).

[154] ARIZ. REV. STAT. § 13-703.02(D) (2006). The court must issue its order within ten days of the report's receipt. *Id*.

[155] *Id.* The expert(s) nominated must be different from the prescreening expert. *Id.*

[156] *Id*. The additional expert appointed by the court must be different from the prescreening expert. *Id*.

[157] ARIZ. REV. STAT. § 13-703.02(E) (2006).

[158] ARIZ. REV. STAT. § 13-4013(B) (2006) (emphasis added).

[159] *Id.*

[160] State v. Bocharski, 22 P.3d 43, 55 (Ariz. 2001) (en banc).

[161] *Id.* at 55 n.5.

D. Recommendation #4

> **For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*[162] or the State's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.**

Section 13-703.02 of the A.R.S. allows each defendant against whom the State seeks the death penalty to determine whether s/he has mental retardation prior to trial.[163] Because Arizona law allows for a pre-trial determination of mental retardation, the State of Arizona is in compliance with Recommendation #4.

E. Recommendation #5

> **The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.**

The State of Arizona does not require the prosecution to disprove mental retardation after the defendant has presented a substantial showing that s/he may have mental retardation. Rather, Arizona places the burden of proving mental retardation on the defendant by "clear and convincing evidence."[164] Only if the trial court determines that the defendant has an IQ of sixty-five or below is the defendant entitled to a rebuttable presumption of mental retardation.[165]

The State of Arizona, therefore, fails to comply with Recommendation #5.

F. Recommendation #6

> **During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.**

Arizona has no state law ensuring that the *Miranda* rights of mentally retarded individuals are sufficiently protected or that false, coerced or garbled confessions are not obtained or used.

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[162] 536 U.S. 304 (2002).

[163] ARIZ. REV. STAT. § 13-703.02 (2006).

[164] ARIZ. REV. STAT. § 13-703.02(G) (2006). Of the twenty-six states that have adopted statutes or rules prohibiting the execution of the mentally retarded, sixteen states require the defendant to prove mental retardation by a preponderance of the evidence and Arizona is one of six states using a clear and convincing evidence standard. *See* John H. Blume, Summaries of Relevant Cases and Legislation Resulting From *Atkins v. Virginia*, 536 U.S. 304 (2002) (Dec. 2, 2005) (unpublished manuscript) (on file with author).

[165] ARIZ. REV. STAT. § 13-703.02(G) (2006).

However, police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Arizona certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)[166] are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.[167] CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel.[168] Although these directives may include procedures designed to ensure that the *Miranda* rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we were unable to assess the extent to which law enforcement officials have adopted any such procedures.

We do note that the General Operating Procedures for the Tucson Police Department state that officers must be "careful in explaining the *Miranda* rights to suspects who may have trouble understanding them, such as . . . persons with low IQ."[169] Additionally, the Phoenix Police Department has established a separate and distinct Operations Order for interviewing and/or interrogating individuals with disabilities.[170] However, we were unable to determine the exact scope of the Order and whether individuals with disabilities encompass individuals with mental retardation.

The Arizona Supreme Court has recognized that mentally retarded offenders are entitled to special consideration from police.[171] In reviewing the investigative procedures employed by police to assess the voluntariness of a confession, Arizona courts must consider the defendant's mental condition.[172] Indeed, the Court in *State v. Carrillo* stated that "[c]ertainly the police are not permitted to take advantage of the . . . mentally deficient . . . by employing artifices or techniques that destroy the will of the weakest but leave the strong, the tough, and the experienced untouched."[173] In the very same case,

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[166] Eighteen police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Arizona have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). *See* CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on May 16, 2006) (use second search function, designating "U.S." and "Arizona" as search criteria); *see also* CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited on Sept. 23, 2005) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)).

[167] COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1).

[168] *Id*. at 1-3 (Standard 1.2.3).

[169] TUCSON POLICE DEPARTMENT GENERAL OPERATING PROCEDURES § 2264, Vol. 2 (Revised Feb. 2004).

[170] *See* PHOENIX POLICE DEPT. OPERATIONS ORDER 4.19, § 3(E) (stating that employees must follow the guideline set in Operations Order 4.15 with respect to interviewing/interrogating individuals with disabilities).

[171] Sate v. Carrillo, 750 P.2d 883, 893, 895 (Ariz. 1988) (en banc) (affirming mentally retarded defendant's conviction of second-degree murder and theft).

[172] *Id.* at 895 (assessing the voluntariness of a mentally retarded defendant's confession).

[173] *Id.* at 894-95 (The "police cannot treat an uneducated, retarded suspect in the same manner as they might treat a sophisticated businessmen or professional suspected of white collar crime.").

however, the Court held the police's interrogation of the mentally retarded defendant to be non-custodial, thus dispensing with the requirement that *Miranda* warnings be provided.[174] In so holding, the Court found that "[g]iven his diminished mental capacity, it may be that [the defendant's] subjective perception was to the contrary, but we deal with objective criteria only in determining whether the interrogation was custodial."[175]

Because we were unable to ascertain the steps taken by the State of Arizona to ensure that the *Miranda* rights of mentally retarded offenders are sufficiently protected or that false, coerced, or garbled confessions are not obtained or used, we are unable to determine whether the State of Arizona meets the requirements of Recommendation #6.

G. Recommendation # 7

> **The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.**

Courts can protect against "waivers" of rights, such as the right to counsel, by holding a hearing (either *sua sponte* or on the request of one of the parties) to determine whether the defendant's mental disability affects his/her ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant's mental disability. The State of Arizona, however, does not appear to require its courts to conduct hearings in order to determine whether a defendant's mental retardation affects his/her ability to make a knowing and voluntary waiver.

Under Arizona law, the waiver of a defendant's rights "must be balanced against the state's interest in conducting a fair trial and upholding the integrity of the judicial process."[176] The waiver of a constitutional right also must be made voluntarily, knowingly, and intelligently.[177] For example, the State of Arizona will only allow a defendant to waive his/her right to counsel if the waiver is in writing and the court has determined that s/he knowingly, intelligently, and voluntarily relinquished it.[178]

Accordingly, it does not appear that the State of Arizona is in compliance with Recommendation #7.

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[174] *Id*. at 892.
[175] *Id*.
[176] State v. Bocharski, 22 P.3d 43, 54 (Ariz. 2001) (en banc).
[177] *Id.*
[178] ARIZ. R. CRIM. P. 6.1(c).