

A. Pre-Trial Issues Subcommittee

1. Purpose

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

2. Issues for Consideration

The Subcommittee identified these issues for exploration:

1. How does Arizona’s statutory scheme for determining death eligibility in first-degree murder cases compare with that of other states?
2. How do prosecutors in Arizona identify cases in which to seek the death penalty? Is the process in Arizona different than other states?
3. Do Arizona prosecutors ask for defense input before a case is identified as one where the death penalty will be sought? What do other states do?
4. How does Arizona compare nationally regarding the eligibility of minors for the death penalty?
5. How do other states handle the eligibility of the mentally retarded to be executed?
6. Do other states have a mitigator of “residual doubt”?
7. Have Arizona’s capital procedures produced a race neutral implementation of the death penalty? If not, what additional procedures should be adopted? See the Trial Issues Subcommittee discussion of this issue in Section 3(g) of Appendix B and Exhibits 35 and 36 of the Data Set I Research Report.
8. Are the existing rules of filing the notification of intent to seek the death penalty sufficient? Should the timetables be altered?

The Subcommittee decided to add several issues for consideration:

1. How are defense counsel selected for indigent defendants?
2. Should the prosecutor be required to provide notice of potential aggravating factors before trial, rather than after the verdict as is now required by Ariz. R. Crim. P. 15.2(g)?
3. As a sub-issue to issue number 2: What is the process by which prosecutors, county by county, determine to seek the death penalty? Are there differences?
4. As a sub-issue to issue number 5: How do other states handle the eligibility of the mentally incompetent to be executed?

3. Discussion and Subcommittee Recommendations

a) Mental Retardation

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

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

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

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

b) Minimum Age for Capital Punishment

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

The Subcommittee debated minimum age on March 20, 2001, at the end of its meeting and received comments from Dr. Mark Welleck, a psychiatrist in Phoenix and a member of the

American Society for Adolescent Psychiatry. The Subcommittee voted 7 to 1 to recommend to the Commission that the issue of minimum age should be studied further before any recommendation is made to change Arizona's current law.

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

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

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

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

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

d) Selection of Capital Cases by Prosecutors and Defense Input

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

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

e) Residual Doubt in Sentencing

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

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

f) Competency to be Executed

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

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

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

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

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

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

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

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

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