

D. Reforms Recommended by the Commission

1. Capital Litigation Resources, Senate Bill 1486.

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

Strike Everything Amendment to SB1486

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

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

11-589.01. State capital trial public defender; office; appointment qualifications; duties

- A. BEGINNING ON JULY 1, 2001, THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER IS ESTABLISHED. THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER IS A SEPARATE AGENCY WITHIN THE EXECUTIVE BRANCH OF STATE GOVERNMENT.
- B. THE STATE IS RESPONSIBLE FOR FUNDING THE STATE CAPITAL TRIAL PUBLIC DEFENDER OFFICE INCLUDING ONETIME START-UP COSTS.
- C. THE GOVERNOR SHALL APPOINT THE STATE CAPITAL TRIAL PUBLIC DEFENDER AND FILL ANY VACANCY IN THE OFFICE ON THE BASIS OF MERIT ALONE WITHOUT REGARD TO POLITICAL AFFILIATION FROM THE LIST OF NAMES SUBMITTED PURSUANT TO SECTION 11-589.03 AND PURSUANT TO SECTION 38-211. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SERVES A FOUR YEAR TERM AND SERVES UNTIL THE APPOINTMENT AND QUALIFICATION OF A SUCCESSOR IN OFFICE. AFTER APPOINTMENT, THE STATE CAPITAL TRIAL PUBLIC DEFENDER IS SUBJECT TO REMOVAL FROM OFFICE ONLY FOR GOOD CAUSE AS DETERMINED BY A MAJORITY VOTE OF THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE. A VACANCY SHALL BE FILLED FOR THE BALANCE OF THE UNEXPIRED TERM.
- D. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SHALL MEET ALL OF THE FOLLOWING CRITERIA:
 - 1. BE A MEMBER IN GOOD STANDING OF THE STATE BAR OF ARIZONA OR BECOME A MEMBER OF THE STATE BAR OF ARIZONA WITHIN ONE YEAR AFTER APPOINTMENT,
 - 2. HAVE BEEN A MEMBER OF THE STATE BAR OF ARIZONA, OR ADMITTED TO PRACTICE IN ANY OTHER STATE, FOR THE FIVE YEARS IMMEDIATELY PRECEDING THE APPOINTMENT,

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3. HAVE HAD SUBSTANTIAL EXPERIENCE IN THE REPRESENTATION OF ACCUSED OR CONVICTED PERSONS IN CRIMINAL OR JUVENILE PROCEEDINGS,
 4. MEET OR EXCEED THE STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES UNDER RULE 6.8, ARIZONA RULES OF CRIMINAL PROCEDURE, AS DETERMINED BY THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE.
- E. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SALARY SHALL EQUAL THE ANNUAL SALARY OF THE CHIEF COUNSEL OF THE CAPITAL LITIGATION SECTION IN THE OFFICE OF THE ATTORNEY GENERAL.
- F. THE STATE CAPITAL TRIAL PUBLIC DEFENDER SHALL:
1. SUPERVISE THE OPERATION, ACTIVITIES, POLICIES AND PROCEDURES OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER OFFICE.
 2. BEGINNING IN FISCAL YEAR 2002-2003, SUBMIT AN ANNUAL BUDGET FOR THE OPERATION OF THE OFFICE TO THE LEGISLATURE.
 3. NOT ENGAGE IN THE PRIVATE PRACTICE OF LAW.
 4. APPOINT AND COMPENSATE AN ATTORNEY TO REPRESENT EVERY PERSON WHO IS NOT FINANCIALLY ABLE TO EMPLOY COUNSEL IN PROCEEDINGS IN STATE COURT IN WHICH THE STATE HAS SERVED NOTICE OF ITS INTENT TO SEEK THE DEATH PENALTY IN COUNTIES WITH A POPULATION LESS THAN FIVE HUNDRED THOUSAND PERSONS ACCORDING TO THE MOST RECENT UNITED STATES DECENNIAL CENSUS. ALLOCATE PERSONNEL AND RESOURCES, IN CONSULTATION WITH THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER, TO BOTH POST-CONVICTION RELIEF PROCEEDINGS AND TRIAL PROCEEDINGS SO LONG AS THERE ARE NO CONFLICTS OF INTEREST IN REPRESENTATION. MAKE EVERY EFFORT TO REDUCE THE BACKLOG OF CASES PENDING APPOINTMENT OF POST-CONVICTION RELIEF COUNSEL UNDER SECTION 13-4041.
 5. ACT AS A COORDINATOR FOR CAPITAL TRIAL REPRESENTATION THROUGHOUT ARIZONA.
 6. PROVIDE OTHER INDIGENT CAPITAL DEFENSE SERVICES IN COUNTIES WITH A POPULATION LESS THAN FIVE HUNDRED THOUSAND PERSONS ACCORDING TO THE MOST RECENT DECENNIAL CENSUS, INCLUDING BUT NOT LIMITED TO, INVESTIGATION, MITIGATION SPECIALISTS, AND EXPERT WITNESSES.

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- G. THE DUTIES OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER ARE LIMITED TO REPRESENTING ANY PERSON WHO IS NOT FINANCIALLY ABLE TO EMPLOY COUNSEL IN PROCEEDINGS IN STATE COURT IN WHICH THE STATE HAS SERVED NOTICE OF ITS INTENT TO SEEK THE DEATH PENALTY IN COUNTIES WITH A POPULATION LESS THAN FIVE HUNDRED THOUSAND PERSONS ACCORDING TO THE MOST RECENT UNITED STATES DECENNIAL CENSUS, AND THE DUTIES ENUMERATED IN SUBSECTION F OF THIS SECTION. ANY COUNTY IN WHICH THE STATE CAPITAL TRIAL PUBLIC DEFENDER REPRESENTS A DEFENDANT IN A CAPITAL CASE SHALL APPOINT A SECOND ATTORNEY TO REPRESENT THAT DEFENDANT AND THE COUNTY SHALL COMPENSATE THAT SECOND ATTORNEY.
- H. THE STATE CAPITAL TRIAL PUBLIC DEFENDER MAY:
1. ACCEPT AND EXPEND PUBLIC AND PRIVATE GIFTS AND GRANTS FOR USE IN IMPROVING AND ENHANCING CAPITAL INDIGENT DEFENSE REPRESENTATION.
 2. EMPLOY DEPUTIES AND OTHER EMPLOYEES AND MAY ESTABLISH AND OPERATE ANY OFFICES AS NEEDED FOR THE PROPER PERFORMANCE OF THE DUTIES OF THE OFFICE.

11-589.02. State capital post-conviction public defender; office; appointment qualifications; duties

- A. BEGINNING ON JULY 1, 2001, THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER IS ESTABLISHED. THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER IS A SEPARATE AGENCY WITHIN THE EXECUTIVE BRANCH OF STATE GOVERNMENT.
- B. THE STATE IS RESPONSIBLE FOR FUNDING THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER OFFICE INCLUDING ONETIME START-UP COSTS FOR THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER OFFICE.
- C. THE GOVERNOR SHALL APPOINT THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER AND FILL ANY VACANCY IN THE OFFICE ON THE BASIS OF MERIT ALONE WITHOUT REGARD TO POLITICAL AFFILIATION FROM THE LIST OF NAMES SUBMITTED PURSUANT TO SECTION 11-589.03 AND PURSUANT TO SECTION 38-211. THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER SERVES A FOUR YEAR TERM AND SERVES UNTIL THE APPOINTMENT AND QUALIFICATION OF A SUCCESSOR IN OFFICE. AFTER APPOINTMENT, THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER IS SUBJECT TO REMOVAL FROM OFFICE ONLY FOR GOOD CAUSE AS DETERMINED

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

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

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

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

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

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

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

S.B. 1486 (continued)

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

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

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

- A. THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE IS ESTABLISHED CONSISTING OF THE FOLLOWING MEMBERS:
1. TWO COUNTY PUBLIC DEFENDERS WHO ARE APPOINTED BY THE GOVERNOR, ONE OF WHOM IS FROM A COUNTY WITH A POPULATION OF FIVE HUNDRED THOUSAND PERSONS OR MORE AND ONE OF WHOM IS FROM A COUNTY WITH A POPULATION OF LESS THAN FIVE HUNDRED THOUSAND PERSONS.
 2. ONE CRIMINAL DEFENSE ATTORNEY APPOINTED BY THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE.
 3. ONE CRIMINAL DEFENSE ATTORNEY WHO IS APPOINTED BY THE STATE BAR OF ARIZONA.
 4. TWO PRIVATE CITIZENS WHO ARE APPOINTED BY THE GOVERNOR, NEITHER OF WHOM IS A JUDGE, LAW ENFORCEMENT OFFICER, PROSECUTOR OR COURT APPOINTED EMPLOYEE.
 5. ONE PRIVATE DEFENSE ATTORNEY WHO IS APPOINTED BY THE GOVERNOR.
- B. AT ALL TIMES DURING THEIR TERMS COMMISSION MEMBERS SHALL MAINTAIN THE OCCUPATIONAL STATUS UNDER WHICH THEY WERE APPOINTED OR SHALL BE REPLACED BY A PERSON QUALIFYING FOR SUCH AN OCCUPATIONAL STATUS.

S.B. 1486 (continued)

- C. COMMISSION MEMBERS SERVE THREE YEAR TERMS AND UNTIL A SUCCESSOR IS APPOINTED. AN APPOINTMENT TO FILL A VACANCY THAT RESULTS OTHER THAN FROM THE EXPIRATION OF A TERM IS FOR THE UNEXPIRED PORTION OF THE TERM ONLY.
- D. THE GOVERNOR SHALL APPOINT A MEMBER IF THE PERSON WHO IS DESIGNATED TO APPOINT A MEMBER FAILS TO APPOINT THE MEMBER.
- E. ON THE ORIGINAL NOMINATION OF, OR WITHIN THIRTY DAYS BEFORE THE STATE CAPITAL TRIAL PUBLIC DEFENDER OR THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER VACATES THE OFFICE, OR WITHIN THIRTY DAYS AFTER ANY UNEXPECTED VACANCY IN EITHER OFFICE, THE COMMISSION SHALL SUBMIT TO THE GOVERNOR THE NAMES OF AT LEAST THREE PERSONS WHO ARE NOMINATED TO FILL THE VACANCY, AND THESE PERSONS SHALL MEET OR EXCEED THE CRITERIA PRESCRIBED IN SECTIONS 11-589.01 OR 11-589.02. NO MORE THAN TWO-THIRDS OF THE NOMINEES MAY BE MEMBERS OF THE SAME POLITICAL PARTY.
- F. THE COMMISSION SHALL STUDY AND MAKE RECOMMENDATIONS ON THE FOLLOWING ISSUES:
 - 1. THE DELIVERY OF INDIGENT SERVICES.
 - 2. A DETERMINATION OF INDIGENCE AND ELIGIBILITY FOR LEGAL REPRESENTATION.

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

41-191.09. State aid for capital prosecution

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

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

S.B. 1486 (continued)

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

- A. THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER TERMINATES ON JULY 1, 2011.
- B. SECTIONS 11-589.01 THROUGH 11-589.03 ARE REPEALED ON JANUARY 1, 2012.

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

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

- A. THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER TERMINATES ON JULY 1, 2011.
- B. SECTIONS 11-589.01 THROUGH 11-589.03 ARE REPEALED ON JANUARY 1, 2012.

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

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

- A. Except pursuant to subsection G of this section, if counsel is appointed by the court to represent the defendant in either a criminal proceeding or insanity hearing on appeal, the county in which the court from which the appeal is taken presides shall pay counsel, except that in those appeals where the defendant is represented by a public defender or other publicly funded office, compensation shall not be set or paid. Compensation for services rendered on appeal shall be in an amount as the supreme court in its discretion deems reasonable, considering the services performed.
- B. After the supreme court has affirmed a defendant's conviction and sentence in a capital case, the supreme court, or if authorized by the supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state post-conviction relief proceeding AND MAY APPOINT COUNSEL FROM THE OFFICE OF THE STATE CAPITAL POST-CONVICTION PUBLIC DEFENDER OR THE OFFICE OF THE STATE CAPITAL TRIAL PUBLIC DEFENDER. Counsel shall meet the following qualifications:

S.B. 1486 (continued)

1. Membership in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.
 2. Practice in the area of state criminal appeals or post-conviction proceedings for at least three years immediately preceding the appointment.
 3. No previous representation of the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.
- C. The supreme court shall establish and maintain a list of qualified candidates. In addition to the qualifications prescribed in subsection B of this section, the supreme court may establish by rule more stringent standards of competency for the appointment of post-conviction counsel in capital cases. The supreme court may refuse to certify an attorney on the list who meets the qualifications established under subsection B of this section or may remove an attorney from the list who meets the qualifications established under subsection B of this section if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant. The court shall appoint counsel pursuant to subsection B of this section from the list.
- ~~D. Notwithstanding subsection C of this section, the court may appoint counsel pursuant to subsection B of this section from outside the list of qualified candidates if either:~~
- ~~1. No counsel meets the qualifications under subsections B and C of this section.~~
 - ~~2. No qualified counsel is available to serve.~~
- E. Before filing a petition, the capital defendant may personally appear before the trial court and waive counsel. If the trial court finds that the waiver is knowing and voluntary, appointed counsel may withdraw. The time limits in which to file a petition shall not be extended due solely to the change from appointed counsel to self-representation.
- F. If at any time the trial court determines that the capital defendant is not indigent, appointed counsel shall no longer be compensated by public monies and may withdraw.

S.B. 1486 (continued)

- G. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state post-conviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour for up to two hundred hours of work, whether or not a petition is filed. Monies shall not be paid to court appointed counsel unless either:
1. A petition is timely filed.
 2. If a petition is not filed, a notice is timely filed stating that counsel has reviewed the record and found no meritorious claim.
- H. On a showing of good cause, the trial court shall compensate appointed counsel from county funds in addition to the amount of compensation prescribed by subsection G of this section by paying an hourly rate in an amount that does not exceed one hundred dollars per hour. The attorney may establish good cause for additional fees by demonstrating that the attorney spent over two hundred hours representing the defendant in the proceedings. The court shall review and approve additional reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent over the two hundred hour threshold are unreasonable, the attorney may file a special action with the Arizona supreme court. If counsel is appointed in successive post-conviction relief proceedings, compensation shall be paid pursuant to § 13-4013, subsection A.
- I. The county shall request reimbursement for fees it incurs pursuant to subsections G, H and J of this section arising out of the appointment of counsel to represent an indigent capital defendant in a state post-conviction relief proceeding. The state shall pay fifty per cent of the fees incurred by the county out of monies appropriated to the supreme court for these purposes. The supreme court shall approve county requests for reimbursement after certification that the amount requested is owed.
- J. The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.

RE: LETTER TO CONFORM

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

S.B. 1486 (continued)

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

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

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

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

- A. Notwithstanding section 11-589.03, Arizona Revised Statutes, as added by this act, the initial terms of members are:
 - 1. Three terms ending on January 31, 2004 for appointments under section 11-589.03, subsection A, paragraphs 1 and 2, Arizona Revised Statutes.
 - 2. Four terms ending on January 31, 2005 for appointments under section 11-589.03, subsection A, paragraphs 3, 4 and 5, Arizona Revised Statutes.
- B. The appropriate appointing official shall make all subsequent appointments as prescribed by statute.

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

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

Sec. 10. Purpose

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

S.B. 1486 (continued)

Sec. 11. Appropriations; purpose

- A. The sum of \$981,250 is appropriated from the state general fund in each of the fiscal years 2001-2002 and 2002-2003 to the office of the state capital trial public defender to carry out the duties prescribed in section 11-589.01, Arizona Revised Statutes, as added by this act, including hiring nine full-time employees.
- B. The sum of \$700,000 is appropriated from the state general fund in each of the fiscal years 2001-2002 and 2002-2003 to the office of the state capital post-conviction public defender to carry out the duties prescribed in section 11-589.02, Arizona Revised Statutes, as added by this act, including hiring six full-time employees.
- C. The sum of \$686,500 is appropriated from the state general fund in each of the fiscal years 2001-2002 and 2002-2003 to the department of law for the purposes prescribed in section 41-191.09, Arizona Revised Statutes, as added by this act, including hiring three full-time employees.

Sec. 12. Retroactivity

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

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

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

g. Additional Disclosure in a Capital Case.

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

3. Jury Deliberation in Capital Cases

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

The Arizona Attorney General and the Attorney General’s Capital Case Commission oppose the proposed amendment to Rule 19.4 of the Arizona Rules of Criminal Procedure, which would permit jurors in criminal cases to discuss the evidence “amongst themselves in the jury room during recesses from trial, when all are present, as long as they reserve judgment concerning the guilt or innocence of the defendant,” before deliberations commence.

As the State’s chief legal officer, the Attorney General is directly interested in the development and application of Arizona’s rules of criminal procedure. Capital Case Commission members, which include several judges, retired judges, prosecutors, defense attorneys, and members of the community, are similarly interested in the development and application of the rules of criminal procedure, particularly with regard to their application in capital cases. The Attorney General and Commission members object to the proposed amendment because: (1) the proposed Rule may ultimately be found unconstitutional, and the risks involved in enacting a constitutionally questionable procedure outweigh the perceived benefits of pre-deliberation jury discussions; (2) pre-deliberation discussions in criminal cases are likely to reflect a bias against the defendant because of the order in which evidence is presented; and (3) recently enacted Rules permitting jurors to submit questions to the court already provide a viable mechanism for averting juror confusion during trial. Accordingly, and based on the following Discussion, the Attorney General and the Capital Case Commission object to the proposed amendment to Rule 19.4.

DISCUSSION

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

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

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

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

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

In *Winebrenner*, the Eighth Circuit Court of Appeals reversed a criminal

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

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

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

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

was permissible as long as the jurors did not “start making up [their] minds about what [the] verdict should be.” *State v. Pierce*, 346 S.E.2d 707, 709–10 (S.C. 1986), *overruled in part on other grounds*, *State v. Torrence*, 406 S.E.2d 315, n.5 (S.C. 1991). The Pennsylvania Supreme Court similarly reversed a conviction where the trial judge gave an “experimental” instruction permitting jurors to discuss the evidence prior to deliberating, and further found that defense counsel was ineffective for consenting to the instruction. *Commonwealth v. Kerpan*, 498 A.2d 829 (Pa. 1985); *see also*

United States v. Wiesner, 789 F.2d 1264, 1269 n.3 (7th Cir. 1986) (“Admonishing the jury [regarding premature deliberations] is a critical and important duty and cannot be over-emphasized.”).

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

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

Because of the structure of a criminal trial, pre-deliberation discussions by jurors raise concerns different than those present in a civil case. In *United States v. Resko*, 3 F.3d 684, 689–90 (3rd Cir. 1993), the Third Circuit Court of Appeals reversed the defendant’s convictions because of premature jury discussions, reasoning as follows:

1. Because the prosecution presents its evidence first, any premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason.
2. Once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion. Consequently, the mere act of openly expressing his or her views may tend to cause the juror to

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

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

3. The jury system is meant to involve decision making as a collective, deliberative process and premature discussions among individual jurors may thwart that goal.
4. Juries that engage in premature deliberations do so without the benefit of the court's instructions. Although the trial court gives preliminary instructions dealing with the reasonable doubt standard and burden of proof, the parties and trial court do not even settle instructions until the evidence is presented.

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

4. Mental Retardation

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

House Engrossed Senate Bill

State of Arizona
Senate
Forty-fifth Legislature
First Regular Session
2001

SENATE BILL 1551

AN ACT

S.B. 1551 (continued)

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

(TEXT OF BILL BEGINS ON NEXT PAGE)

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

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

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

A. A person guilty of first degree murder as defined in section 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as

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

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

B. C. When a defendant is found guilty of or pleads guilty to first degree murder as defined in section 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F G and G H of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all

S.B. 1551 (continued)

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

C. D. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. A victim may submit a written victim impact statement, an audio or video tape statement or make an oral impact statement to the probation officer preparing the presentence report for the probation officer's use in preparing the presentence report. The probation officer shall consider and include in the presentence report the victim impact information regarding the murdered person and the economical, physical and psychological impact of the murder on the victim and other family members. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F G or G H of this section. Any information relevant to any mitigating circumstances included in subsection G H of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but

the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F G of this section shall be governed by the rules of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The victim has the right to be present and to testify at the hearing. The victim may present information about the murdered person and the impact of the murder on the victim and other family members. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F G and G H of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F G of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G H of this section is on the defendant.

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

S.B. 1551 (continued)

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

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

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a serious offense, whether preparatory or completed.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
4. The defendant procured the commission of the offense by payment, or promise of

payment, of anything of pecuniary value.

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

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

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

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

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

S.B. 1551 (continued)

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

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

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

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

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

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or

would create a grave risk of causing, death to another person.

5. The defendant's age.

H. I. As used in this section:

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

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

(a) First degree murder.

(b) Second degree murder.

S.B. 1551 (continued)

(c) Manslaughter.

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

(e) Sexual assault.

(f) Any dangerous crime against children.

(g) Arson of an occupied structure.

(h) Robbery.

(i) Burglary in the first degree.

(j) Kidnapping.

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

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

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

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

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

S.B. 1551 (continued)

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

C. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS SEVENTY-FIVE OR LESS, THE TRIAL COURT SHALL APPOINT ONE OR MORE ADDITIONAL PSYCHOLOGICAL EXPERTS TO INDEPENDENTLY DETERMINE WHETHER THE DEFENDANT HAS MENTAL RETARDATION. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS SEVENTY-FIVE OR LESS, THE TRIAL COURT SHALL, WITHIN TEN DAYS OF RECEIVING THE WRITTEN REPORT, ORDER THE STATE AND THE DEFENDANT TO EACH

NOMINATE THREE PSYCHOLOGICAL EXPERTS, OR JOINTLY NOMINATE A SINGLE PSYCHOLOGICAL EXPERT. THE TRIAL COURT SHALL APPOINT ONE PSYCHOLOGICAL EXPERT NOMINATED BY THE STATE AND ONE PSYCHOLOGICAL EXPERT NOMINATED BY THE DEFENDANT, OR A SINGLE PSYCHOLOGICAL EXPERT JOINTLY NOMINATED BY THE STATE AND THE DEFENDANT, NONE OF WHOM MADE THE PRE-SCREENING DETERMINATION OF THE DEFENDANT'S INTELLIGENCE QUOTIENT. THE TRIAL COURT MAY, IN ITS DISCRETION, APPOINT AN ADDITIONAL PSYCHOLOGICAL EXPERT WHO WAS NEITHER NOMINATED BY THE STATE NOR THE DEFENDANT, AND WHO DID NOT MAKE THE PRESCREENING DETERMINATION OF THE DEFENDANT'S INTELLIGENCE QUOTIENT. WITHIN FORTY-FIVE DAYS AFTER THE TRIAL COURT ORDERS THE STATE AND THE DEFENDANT TO NOMINATE PSYCHOLOGICAL EXPERTS, OR UPON THE APPOINTMENT

S.B. 1551 (continued)

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

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

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

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

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

G. IF THE TRIAL COURT FINDS THAT THE DEFENDANT HAS MENTAL RETARDATION, THE TRIAL COURT SHALL DISMISS THE INTENT TO SEEK THE DEATH PENALTY, SHALL NOT IMPOSE A SENTENCE OF DEATH ON THE DEFENDANT IF THE DEFENDANT IS CONVICTED OF FIRST DEGREE MURDER AND SHALL DISMISS ONE OF THE ATTORNEYS APPOINTED UNDER RULE 6.2, ARIZONA RULES OF CRIMINAL PROCEDURE UNLESS THE COURT FINDS THAT THERE IS GOOD CAUSE TO RETAIN BOTH ATTORNEYS. IF THE TRIAL COURT FINDS THAT THE DEFENDANT DOES NOT HAVE MENTAL RETARDATION, THE COURT'S FINDING DOES NOT PREVENT THE DEFENDANT FROM INTRODUCING EVIDENCE OF THE DEFENDANT'S MENTAL RETARDATION OR DIMINISHED MENTAL CAPACITY AS A MITIGATING FACTOR AT ANY SENTENCING PROCEEDING PURSUANT TO SECTION 13-703.

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

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

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

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

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

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

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

Sec. 3. Legislative intent

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

The version of the bill approved by the legislature

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

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

ARS 13-703 (F) (10).

The court shall consider the following aggravating circumstances:

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

STATUS AS A PEACE OFFICER WHEN THE DEFENDANT
COMMITTED THE OFFENSE.

6. Selection of Capital Cases by Prosecutors and Defense Input

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

7. Competence to be Executed

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

8. Competence of Defense Counsel

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

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

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

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

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

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

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

- a. Capital Case.
- (1) Upon a determination of guilt in a capital case, the trial court shall set a date for the aggravation/mitigation hearing if the state, pursuant to Rule 15.1(g)(4), is not precluded from and is seeking the death penalty. The penalty hearing shall be held not less than 60 days nor more than 90 days after the determination of guilt unless good cause is shown. Upon a showing of good cause, the trial court may grant additional time for the hearing subject to the limitation of subparagraph (2) below.
 - (2) A pre-aggravation/mitigation conference shall be held after the return of a guilty verdict of first degree murder in a capital case no more than 10 days before the aggravation/mitigation hearing.
 - (3) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE VICTIM, AS DEFINED IN A.R.S. §13-703(H)(2), TO BE HEARD REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS. THE TRIAL COURT SHALL CONSIDER THE INFORMATION PRESENTED BY THE VICTIM IN ACCORDANCE WITH THE PROVISIONS OF A.R.S. §13-703(D).
 - (4) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE DEFENDANT THE RIGHT OF ALLOCUTION.
 - (5) UPON COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL SET A DATE FOR THE RETURN OF THE SPECIAL VERDICT AND SENTENCING. THE RETURN OF THE SPECIAL VERDICT AND SENTENCING SHALL OCCUR NO EARLIER THAN 7 DAYS AFTER THE COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, TO ENSURE THAT THE TRIAL COURT HAS ADEQUATE TIME PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT TO CONSIDER THE EVIDENCE, INFORMATION, AND ARGUMENTS PRESENTED AT THE AGGRAVATION/MITIGATION HEARING.

Proposed Comment to 2001 Amendment to Rule 26.3(c)

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

Rule 26.3 (continued)

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

CONSISTENT WITH *BOOTH V. MARYLAND*, 482 US 496 (1987) AND *PAYNE V.*

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

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

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

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

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: ADMINISTRATIVE
REQUIREMENTS FOR VICTIMS' RIGHTS
IMPLEMENTATION PROCEDURES FOR USE Admin. Order 94-16
BY THE SUPERIOR COURT, JUSTICE
COURTS AND MUNICIPAL COURTS

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

1. Prompt Restitutions

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

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

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

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

Admin. Order 94.16 (continued)

3. 2. Notice to Prosecutor

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

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

4. 3. Change of Plea/Victim Statements

The changing of a plea minute entry shall state whether the victim was given the

opportunity to address the court and whether any statements submitted by the victim have been reviewed by the court prior to accepting the plea.

5. 4. Sentencing/Victim Statements

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

I. CAPITAL CASE/VICTIM STATEMENTS

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

Admin. Order 94.16 (continued)

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

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

6. Victim's Statements

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

7. Receipt of Victim's Statements

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

8. Inspection of Presentence Report

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

9. Criminal History Information - Presentence Reports

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

Admin. Order 94.16 (continued)

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

II VICTIM INFORMATION - PRE-SENTENCE REPORTS IN CAPITAL CASES

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

HOWEVER, IF NON-CAPITAL COUNTS ARE INCLUDED IN THE CAPITAL CASE THAT IS THE BASIS FOR THE PRE-SENTENCE REPORT, THE PROBATION OFFICER MAY FURTHER EXPLAIN TO THE VICTIM THAT THE VICTIM'S RIGHT TO PROVIDE ADDITIONAL INPUT REGARDING *THE DEFENDANT, THE SENTENCE AND THE NEED FOR RESTITUTION*, CAN BE HEARD AND CONSIDERED BY

THE COURT AFTER THE SPECIAL VERDICT IS RENDERED, BUT THAT BECAUSE THE PRE-SENTENCE REPORT IS FILED WITH THE COURT PRIOR TO THE SPECIAL VERDICT, THE VICTIM'S VIEWS REGARDING NON-CAPITAL COUNTS (EXCEPT AS RELATED TO THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS) WILL NOT BE INCLUDED IN THE REPORT.

10.11. Victim Notices Regarding Probation Modifications, Revocation Dispositions and Terminations, and Discharges

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

Admin. Order 94.16 (continued)

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

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

11.12. Minimize Contact Between Victim and Defendant

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

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

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

12.13. Victim's right to privacy

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

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

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

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

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

Rule 15.9 APPOINTMENT OF INVESTIGATORS AND EXPERT WITNESS FOR INDIGENT DEFENDANTS

- A. AN INDIGENT DEFENDANT MAY APPLY FOR THE ASSISTANCE OF AN INVESTIGATOR, EXPERT WITNESS, OR MITIGATION SPECIALIST TO BE PAID AT COUNTY EXPENSE IF THE DEFENDANT CAN SHOW THAT SUCH ASSISTANCE IS REASONABLY NECESSARY TO ADEQUATELY PRESENT A DEFENSE AT TRIAL OR SENTENCING.
- B. AN APPLICATION FOR THE APPOINTMENT OF INVESTIGATOR OR EXPERT WITNESSES PURSUANT TO THIS RULE SHALL NOT BE MADE EX PARTE.
- C. AS USED IN THE RULE, A "MITIGATION SPECIALIST" IS A PERSON QUALIFIED BY KNOWLEDGE, SKILL, EXPERIENCE, OR OTHER TRAINING AS A MENTAL HEALTH OR SOCIOLOGY PROFESSIONAL TO INVESTIGATE, EVALUATE, AND PRESENT PSYCHO-SOCIAL AND OTHER MITIGATING EVIDENCE.

11. Prolonged Time Intervals in Direct Appeal Proceedings

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

Rule 31.9. Transmission of the record

- a. Time for Transmission. Within 45 days after the filing of the notice of appeal,

the clerk of the superior court shall transmit to the appellate court a copy of the pleadings, documents, and minute entries, and the original paper and photographic exhibits of a manageable size filed with the clerk of the

Rule 31.9 (continued)

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

- b. Duty to Certify and Transmit the Record. After certifying that it is true, correct, and complete as ordered, the clerk of the trial court and the court reporter or reporters shall transmit to the clerk of the Appellate Court the portions of the record on appeal for which they are responsible. Each shall number the items comprising his or her portion of the record and shall transmit with that portion a list of the items so numbered.
- c. Extension and Reduction of Time for Transmission of the Record. The Appellate Court, on a showing of good cause, may grant one extension of the time for transmitting the record which shall not exceed 20 days or it may require the record to be transmitted at any time within the prescribed period. A copy of any order issued under this section shall be sent to the parties, the clerk of the trial court, and to the appropriate court reporter or reporters.
- d. Transmission of Other Exhibits. The court, or any party upon motion made to the appellate court, may request the transmission of exhibits not automatically transmitted under Rule 31.9(a) when such are necessary to the determination of the appeal.

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

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

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

13. Audio or Video Recording of Interrogations

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

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

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

In any capital case, in ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final resolution of the case.

Comment: To implement the victim's right to a prompt and final conclusion of the case, see Ariz. Const. Art. 2, § 2.1(A)(10), the victim shall be permitted to file a statement with the court, at the inception of the proceeding, which expresses their views with respect to any extensions. Or, the victim can request, pursuant to A.R.S. § 13-4411, that the prosecutor's office communicate the victim's views to the court concerning any extensions.

15. Minimum Age for Capital Punishment

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