

II. Capital Punishment in Arizona

History

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

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

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

In 1976, the United States Supreme Court decided three landmark cases relating to the constitutionality of post-*Furman* death penalty statutes. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld Georgia’s new statute which included statutory aggravating circumstances and required specific findings as to the circumstances of the crime and the character of the defendant. The Court also found that the new Georgia statute provided the sentencer with “adequate information and guidance.” In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court rejected North Carolina’s mandatory imposition of the death penalty for any first-degree murder convictions. The Court found that the imposition of a mandatory death sentence without consideration of the circumstances of the crime and the character and record of the defendant violated the Eighth Amendment’s proscription against cruel and unusual punishment. However, the United States Supreme Court rejected the argument that the death penalty

was *per se* cruel and unusual punishment in *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Proffitt*, the Court held that the aggravating factor “especially heinous, atrocious or cruel” was valid as applied, upheld Florida’s statutory procedures that required the consideration of specific aggravating and mitigating factors by the court, and the imposition of the death penalty only when aggravating factors outweigh mitigating factors. The Arizona death penalty statute, which provided for a procedure similar to that in Florida (separate guilt and penalty phases of the capital trial) was upheld as constitutional by the Arizona Supreme Court in 1976 in *State v. Richmond*, 114 Ariz. 186, 560 P.2d. 41 (1976).

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

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

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

In *Ring v. Arizona*, 122 S. Ct. 2428 (2002), the United States Supreme Court overruled *Walton* to the extent that it authorized a judge, rather than a jury, to determine aggravating circumstances that subject the defendant to the death penalty. In response to *Ring*, the Arizona legislature enacted a new death penalty sentencing statute (Attachment “E”) that provides for jury sentencing in capital cases.

The Capital Case

In Arizona, the death penalty may only be imposed for first-degree premeditated or felony murder. The prosecuting agency handling the case must, within sixty days of the arraignment of the defendant, file a

notice of intent to seek the death penalty under Rule 15.1(g)(1) of the Arizona Rules of Criminal Procedure.

In determining whether to seek the death penalty the prosecutor may weigh many factors in addition to statutory mitigating factors enumerated in A.R.S. § 13-703(G). The prosecutor may also consider non-statutory mitigation information offered by the defendant, his family or his counsel, and information offered by the victim's family.

Trial Process

Although capital murder trials are similar to any other felony trial, there are some distinct differences. The trial of a capital case is divided into two separate proceedings. The first is the guilt phase of the trial, at which the prosecutor presents factual evidence as to the defendant's guilt for the murder. The second phase is the sentencing proceeding, at which statutory aggravating circumstances is required to be proved beyond a reasonable doubt. If that requirement is met, the aggravating circumstances are weighed against any mitigation evidence proffered on the defendant's behalf.

Guilt Phase

Once the prosecuting agency has filed the notice of intent to seek the death penalty, the defendant is assigned a second defense counsel under Rule 6.2 of the Arizona Rules of Criminal Procedure. Only attorneys meeting the heightened experience and skill standard set forth in Rule 6.8 of the Arizona Rules of Criminal Procedure can be appointed to represent a defendant in a capital case. However, the defendant is free to retain counsel of his own choosing.

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

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

Sentencing Phase

Prior to August, 2002, sentencing was handled entirely by the trial judge without jury input. The prosecutor presented evidence regarding statutory aggravating circumstances and the defense presented evidence of mitigating circumstances. (The prosecutor could also present evidence of mitigation.) The trial court was also permitted to consider "victim impact" evidence. At the conclusion of the evidence, the trial judge issued a Special Verdict, detailing findings regarding aggravating and mitigating circumstances, and setting forth the sentence to be imposed.

With the enactment of Arizona's new death penalty statute, the sentencing process now has two phases. In the first phase, the prosecutor presents evidence relating to aggravating circumstances. If the jury determines that the State has not established at least one statutory aggravating circumstance, the defendant is no longer subject to the death penalty. The jury is dismissed and the trial judge decides the appropriate sentence. If the jury finds that there is at least one aggravating circumstance, the jury remains empaneled and considers any mitigating evidence presented by the defense or by the State, as well as victim impact evidence. The jurors then decide whether to impose a death sentence, assessing whether the proffered mitigation is sufficiently substantial to warrant leniency.

Appeals Process

Direct Appeal

Death penalty cases are automatically appealed to the Arizona Supreme Court. Prior to the enactment of Arizona's new death penalty sentencing statute, the Court independently reviewed the propriety of the death sentence. Under the new statute, the Arizona Supreme Court reviews the conviction and sentence for error, but does not independently determine whether to impose a death sentence.

Prior to *State v. White*, 168 Ariz. 500, 815 P.2d. 869 (1991), the Arizona Supreme Court engaged in a proportionality review of each case to determine whether the death penalty was excessive or disproportionate. This review is not constitutionally required and the Court no longer conducts such a review.

To the extent that the ruling of the Arizona Supreme Court addresses a federal constitutional issue, either of the parties can appeal a decision of that court directly to the United States Supreme Court by petitioning for a writ of certiorari.

Post-Conviction Relief

Immediately following the final conclusion of the direct appeal to the Arizona Supreme Court, post-conviction relief (PCR) proceedings are initiated in the trial court. Post-conviction relief proceedings allow the defendant to raise claims relating primarily to whether: (1) trial counsel provided effective representation during the trial and sentencing hearing; (2) there is "newly-discovered" evidence that would have changed the verdict or sentence had it been presented at the time of trial; and (3) a change in the law that applies retroactively would probably change the conviction or sentence.

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

Federal Habeas Corpus

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

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

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

Execution

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

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

Competency to be Executed

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

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

The Department of Health Services is responsible for the restoration of competency treatment of the prisoner. During treatment, the chief medical officer of the State Hospital is required to file status reports with the superior court at sixty-day intervals until competency is restored. When the Department of Health Services believed the prisoner has been restored to competency, the prisoner is entitled to a hearing in the trial court to address the competency issue. Once there is a finding that the prisoner has been restored to competency, the Arizona Supreme Court orders the issuance of a death warrant.

Clemency

The Arizona Board of Executive Clemency is a five member panel appointed by the governor and confirmed by the State Senate. The Board reviews all death sentences and determines whether to recommend to the governor reprieve, commutation or pardon, or to make no recommendation at all. The Board conducts a hearing in which the defendant and his attorney, the State's attorneys, and the victim's family and friends, as well as the public, are allowed to participate and provide statements regarding the prisoner and the crime.

If the Board recommends reprieve, commutation or pardon, the governor then has constitutional authority to grant the recommended relief to the prisoner. The governor may only take such action upon a recommendation by the Board.