

# V. Comments by Commission Members

Commission members were invited to submit Comments to be included in Commission Reports. Some Comments were previously submitted and are included in the Interim Report attached to this Report. The Comments presented in the Interim Report and in this Final Report do not represent consensus views of the Commission and were not circulated for response from other Commission members.

**Comments by John A. Stookey. Joined by: Peg Bortner, Jose Cardenas, Harold Higgins, Michael Kimerer, Charles Krull, Christopher Johns, and Lois Yankowski**

As the Introduction to the Final Report indicates, the issues of whether the death penalty should be eliminated or a moratorium placed on its imposition were never directly presented to the Commission. However, it is my strong belief that the confluence of three factors that were or should have been before the Commission logically leads to the conclusion that, at a minimum, a moratorium should be imposed until such time as fundamental flaws in the capital system are corrected. Those factors include:

Data collected by the Commission indicating that:

- (a) innocent persons have been wrongfully sentenced to death in Arizona;
- (b) the reversal rate in Arizona capital cases is disturbingly high; and
- (c) outcomes in capital cases are related in concerning ways to the race of the victim.

The Commission finding that capital indigent representation is significantly underfunded and understaffed, combined with Commission data showing that the most common reason for reversals in capital cases is ineffective assistance of counsel.

The fact that the Commission never looked at the implications of the *Ring* decision or of the new statute, which, if anything, would seem to increase the chances of wrong and inconsistent decision-making.

**I. Data collected by the Commission warrant the elimination of the death penalty in Arizona or at least a moratorium to address whether and how these problems may be addressed.**

**A. The Arizona capital system has wrongfully sentenced individuals to death.** The recent total vindication of Ray Krone by DNA evidence and the acceptance of that vindication by the Maricopa County Attorney's Office is the most clear and visible example of the fact that Arizona has wrongfully sentenced people to death. After the Krone outcome, the question is not whether, but how many. The Capital Case Commission data demonstrate that 7 other individuals who were originally sentenced to death later had their convictions overturned, and were then found not guilty of the underlying offense on retrial. Additionally, 6 other individuals who were originally

sentenced to death because of evidentiary issues, later had their sentences reduced to time served and were released from prison.

**B. The reversal rate in Arizona capital cases is very high.** Capital Case Commission Data demonstrate that Arizona's capital cases are reversed at a rate of approximately equal to 50%. This means there is a 50% chance that a person sentenced to death will have his or her conviction or sentence overturned on appeal at least once.

**C. The imposition of the death penalty is significantly related to the race of the victim.** For the period 1995 to 2000 for all first degree murder indictments for which data were available to the Capital Case Commission on race of both the victim and offender, there are significant differences in the way offenders who killed Caucasian victims are sentenced in comparison to those who killed Hispanic victims. For example, of the 316 first degree murder indictments for the murder of a Hispanic, only one case resulted in the death penalty. Put another way, only .3% of the 316 Hispanic first degree murder victims had their offenders sentenced to death. On the other hand, of the 277 Caucasian victims during the same period, 24 offenders were given the death penalty (8.7%).

The final Commission Report and Recommendations do not in any systematic way address the significance of these statistics gathered by the Commission itself. I do not believe that we can continue uninterrupted with a system that has demonstrably sentenced the innocent to death; has pervasive inconsistency and error, and makes decisions related in disturbing ways to the race of the victims. These data alone lead me to conclude either that the death penalty is a failed experiment in Arizona or that we must at least impose a moratorium to determine whether these flaws can be remedied.

## **II. Indigent representation is woefully underfunded and understaffed in Arizona.**

The Commission itself recognized this problem and to its credit proposed legislation in two different sessions to establish a state-wide capital defenders office for Post-Conviction Relief representation and capital trial representation in the rural counties. Unfortunately the legislature chose not to pass the legislation. Although the Commission did not fully study this issue, it would seem irrefutable that with recent budget cuts and fiscal difficulties, the problems of funding adequate capital representation have indeed become worse.

These realities must be laid against the data collected by the Commission that the number one reason for reversals in capital cases is ineffective assistance of counsel. Even a cursory look behind those numbers shows that this is not merely a story about incompetent lawyers, but a story about underfunded and understaffed public defender offices. The Commission data further demonstrate the significance of these findings because nearly all capital cases in Arizona involve indigent defendants represented by public counsel.

The Commission's Final Report indicates that the Commission "regrets" that the legislature did not do anything to resolve this situation, but does not make any statements about what we as a state should do in the face of the failure of the legislature to act. I believe that the only reasonable response to a system that seeks to impose the death

penalty, but is so underfunded as to be unable to make the decision of who should live and who should die in a fair and equitable way, is to either eliminate that system or at least stop it until such time as adequate funding is provided.

### **III. The Commission did not address in any way the implications of the *Ring* decision and the new capital statute in Arizona.**

The Final Report nearly totally ignores that during the last year the largest change in recent history in the Arizona death penalty system has occurred. In the wake of the *Ring* decision, Arizona's death penalty statute was declared unconstitutional and replaced by a new and fundamentally different system. Arizona has now moved from a system where all capital fact-finding and sentencing was done by a judge to one where all relevant decisions are made by a jury.

All of the data collected by the Commission were collected with regard to the old system and there has been no attempt by the Commission to address whether the new system will increase, decrease, or be irrelevant with regard to the flaws already identified by the Commission in the capital system. For example, under the new statute, there is a substantially reduced safety net to prevent wrongful convictions and sentences. Such a safety net might include: (1) the possibility for the trial judge to override capital sentences; (2) a life sentence when the jury is hung with regard to appropriate sentence; and (3) continued de novo independent review by the Arizona Supreme Court. The new statute provides no opportunity for trial judge override; permits multiple juries when the original jury is hung on the sentence; and eliminates the longstanding provisions for independent review by the State Supreme Court.

Similarly, the new statute makes no attempt to reshape aspects of the old system that were particularly designed for judge sentencing that may no longer be appropriate for jury sentencing. For example, Commission data show that the especially heinous, cruel, or depraved aggravator is the most commonly found aggravator to make a defendant death eligible in Arizona under the old system. Case law on this aggravator has consistently made it clear that the inherent ambiguity of these terms was not problematic in Arizona because it was the judge, rather than the jury, that found capital facts. However, now that the statute calls for the jury to make that decision, it would seem that some attempt must be made to further define and narrow that aggravator. The Commission did not consider this issue. Similarly, proportionality review has been eliminated in Arizona, but it would seem plausible to consider seriously its reinstatement in the wake of potential inconsistencies of jury sentencing. Again the Commission has not addressed this issue.

We also now know that the new system will be even more costly to operate than the old system. Indeed in Maricopa County both the prosecutor and all indigent defense agencies have asked for substantial supplemental appropriations, which must be considered in the light of existing budget cuts. The new system will in all likelihood accentuate the existing problems of indigent capital representation. Again the Commission did not consider this issue.

Until such an evaluation of the new statute is conducted, I do not believe that we can, in good faith, say that the capital system should continue in Arizona.

#### **IV. Conclusion.**

The members of the Capital Commission have taken a significant step toward understanding and evaluating the death penalty in Arizona. Most significantly that step has been to collect data and information about the operation of the system. However, I believe that the Commission has not completed the work necessary to finish its review. Most importantly, we have not fully addressed what I believe is the inevitable conclusion that ours is a fundamentally flawed system; flawed by incorrect decisions; high levels of inconsistency, inadequate funding for representation; and decisions related to what should be irrelevant factors, such as the race of the victim. On top of that, we have not looked at all at the implications of the new system that has been instituted in the wake of *Ring*.

For these reasons, I respectfully suggest that the only appropriate recommendation for the Capital Case Commission based upon what we have learned over the last two years and what we now realize we still don't know is that, at a minimum, a moratorium should be imposed within the capital system until we can determine whether the observed flaws can be eliminated or whether our inability as a society to remedy these flaws should lead to the abolition of the death penalty in Arizona.