

## 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 by 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 impossible; (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 required to prove at least one of these aggravating circumstance beyond a reasonable doubt for the defendant to be eligible for 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 which 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 ruled that the aggravating factor of "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 1978 the Arizona Supreme Court in *State v. Bishop*, 118 Ariz. 263, 576 P.2d 122 (1978), construed the list of mitigating circumstances enumerated in A.R.S. § 13-703(G) to be exclusive. Shortly after the Arizona Supreme Court decision in *Bishop*, the Ohio statutory scheme limiting the presentation of mitigation was found to be improper by the United State Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978). The Court held that the Eighth and Fourteenth Amendments required 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 to be unconstitutional due to its limitation on the presentation of mitigation. However, the Court found that the unconstitutional portion of the statute (limiting mitigation) was severable from the constitutional portion, and 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.

In 1979, following the Arizona Supreme Court's decision in *Watson*, the Arizona legislature amended A.R.S. § 13-703(G) to allow for the admission into evidence by either the defendant or the State of 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, in addition to life imprisonment with the opportunity for parole after 25 years in prison.

In 1988, in *Adamson v. Ricketts*, 865 F.2d 1011 (9<sup>th</sup> 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 the defendant being denied his right to jury sentencing, the aggravating circumstance of "especially heinous, cruel or depraved" being too arbitrary, the sentencing court's consideration of mitigating circumstances was improperly limited, and the statute imposed a presumption of death. The United States Supreme Court denied *certiorari* review on *Adamson*, but granted review in *Walton v. Arizona*, 497 U.S. 639 (1990), to address similar issues. In the *Walton* opinion 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.

## **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 thirty days of the arraignment of the defendant, file a notice of intent to seek the death penalty under Ariz. R. Crim. P. 15.1(g)(1).

In determining whether to seek the death penalty the prosecutor may weigh many factors. These include the apparent existence of any of the statutory mitigating factors enumerated in A.R.S. § 13-703(G); any information offered by the victim's family; information offered by the defendant, his family or his counsel; and any other information the prosecutor believes relevant in a given case.

## **Trial Process**

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, called the aggravation and mitigation hearing. During the aggravation and mitigation hearing, the prosecutor presents evidence as to the existence of aggravating circumstances, and the defense (or the prosecution) presents evidence as to the existence of mitigating circumstances. Both parts of the trial are presided over by the same judge, however, the finder of fact at the guilt phase is a jury, and the finder of fact at the sentencing phase is the trial court judge.

Capital murder trials are similar to any other felony trial, however there are some distinct differences.

### **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 Ariz. R. Crim. P. 6.2. Only attorneys meeting a heightened experience and skill standard set forth in Ariz. R. Crim. P. 6.8 may be appointed to represent a defendant in a capital case. However, the defendant is free to retain counsel of his own choosing, and such counsel need not meet the qualifications of Ariz. R. Crim. P. 6.8.

One difference in a capital trial is that jurors may be "death qualified". This refers to the process of questioning 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 nevertheless 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 the same way they do in all other criminal trials.

## **Sentencing Phase**

If the defendant is convicted of first degree murder, the court will set a date for the aggravation and mitigation hearing. The same judge that presided over the trial, or before whom a guilty plea was entered, generally conducts the aggravation and mitigation hearing. Another judge may conduct the hearing in the event of the death, resignation, incapacity or disqualification of the judge who presided at trial.

The presentation of evidence at the aggravation and mitigation hearing follows much the same format as during the guilt phase of the trial. Witnesses testify under oath and are cross-examined, evidence is admitted for the court's consideration, and counsel for the State and the defense give oral argument.

The decision to present evidence to the court in aggravation is the sole responsibility of the prosecutor. The admissibility of evidence in support of the aggravating circumstances is governed by the rules of evidence. Evidence in mitigation may be offered by the defense or the State regardless of its admissibility under the rules of evidence. Once the prosecution has presented evidence supporting aggravating circumstances and either side has presented mitigating circumstances, the court decides whether to impose the death penalty, regardless of the views of the prosecutors.

At the aggravation and mitigation hearing, the statutory victims under A.R.S. § 13-4401(19) have the right under the Victim's Bill of Rights (Ariz. Const. Art. 2, § 2.1(A)(4)) to address the court. Outlined in A.R.S. § 13-703(D), the victim(s) may testify as to the emotional, financial and psychological impact the murder has had on the survivors of the victim. The sentencing judge cannot, however, consider a sentencing recommendation by the victim(s) in determining whether to impose the death penalty.

## **Trial Court's Decision to Impose the Death Penalty**

After the sentencing hearing, the trial court sets a date for the rendering of sentence and the reading of the special verdict. In the special verdict, as provided for in A.R.S. § 13-703(D), the court sets forth its findings as to the existence or non-existence of each of the aggravating circumstances set forth in A.R.S. § 13-703(F) and any mitigating circumstances included in A.R.S. § 13-703(G).

As a preliminary matter at sentencing in felony murder cases, the trial court must first determine if the facts of the offense met the *Enmund/Tison* standard. Under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), the death penalty should not be imposed unless the defendant killed, intended to kill, or attempted to kill. If that criterion is not met, the defendant is not eligible to be sentenced to death unless he or she was a major participant in the underlying felony and acted with reckless disregard for human life. If the trial court determines that the facts of the crime meet the *Enmund/Tison* standard, it then decides the existence or non-existence of aggravating and mitigating circumstances.

In deciding whether to impose the death penalty the trial court must determine if the State has established beyond a reasonable doubt at least one of the ten statutory aggravating circumstances set forth in A.R.S. § 13-703(F):

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 §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; and
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.

If the court determines that the State has proven at least one of the ten aggravating circumstances beyond a reasonable doubt it next turns to deciding the existence of mitigating circumstances. In deciding the mitigating circumstances the trial court must determine if the defendant has proven, by a preponderance of the evidence, any factors that are relevant in determining whether to impose the death penalty. This determination includes any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to, the following factors listed in A.R.S. § 13-703(G):

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement 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 § 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; and
5. The defendant's age.

In balancing the proven aggravating and mitigating circumstances the trial court “shall take into account the aggravating and mitigating circumstances... and shall impose a sentence of death if the court finds one or more of the aggravating circumstances ... and that there are no mitigating circumstances sufficiently substantial to call for leniency.” A.R.S. § 13-703(E)

The court must, in each particular case, weigh the facts of the crime and the background of the defendant, recognizing that the death penalty is limited to only particularly aggravated first-degree murders.

If the trial court decides that the State has proven beyond a reasonable doubt at least one of the statutory aggravating circumstances, and that there are no mitigating circumstances sufficiently substantial to call for leniency, the court shall impose the sentence of death. Immediately following the rendering of the special verdict and sentence of death, the court shall file the defendant’s notice of appeal and the case is automatically appealed to the Arizona Supreme Court.

## **Appeals Process**

### **Direct Appeal**

In the automatic appeal, the Arizona Supreme Court independently reviews the death sentence. Although the Court does not defer to the trial court’s decision to impose the death penalty, it does give deference to the factual findings underlying the trial court’s decision. When the Arizona Supreme Court has doubt about the imposition of the death penalty, the Court will resolve the doubt in favor of a life sentence.

Before *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. The Court instead focuses on the facts and circumstances of the crime at issue and the character and record of the defendant.

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 the Arizona Supreme Court directly to the United States Supreme Court by petitioning for a writ of certiorari. Immediately following the final conclusion of the direct appeal to the Arizona Supreme Court, post-conviction relief proceedings are initiated.

### **Post-Conviction Relief**

As soon as the mandate is issued affirming the defendant’s conviction and sentence, the Arizona Supreme Court automatically initiates a post-conviction relief proceeding. Post-conviction relief proceedings allow the defendant to raise claims relating primarily to whether: (1) trial counsel provided effective representation during the trial or 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 certiorari requesting the United States Supreme Court to review the decision of the State Supreme Court.

### **Federal Habeas Corpus**

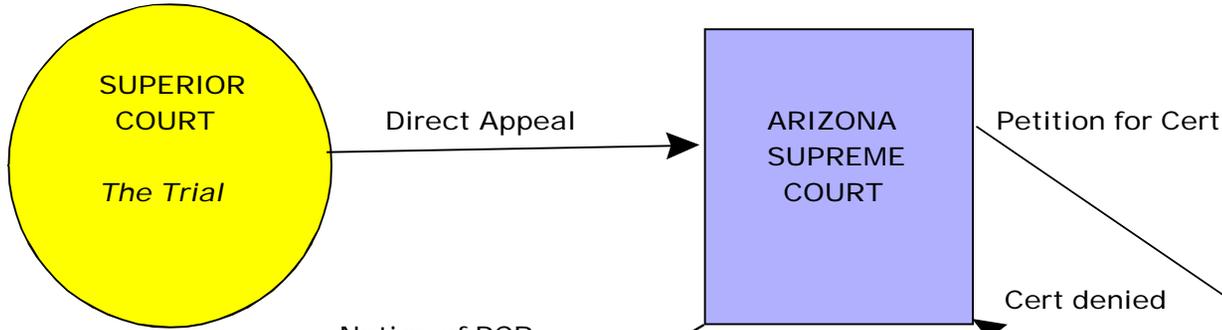
Under 28 U.S.C. 2254, a state prisoner may seek relief in federal district court for claims that his federal constitutional rights were violated at trial or at sentencing. A federal constitutional claim can only be raised in federal court if it has first been raised in a procedurally appropriate manner 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" (actual innocence or ineligibility for the death penalty).

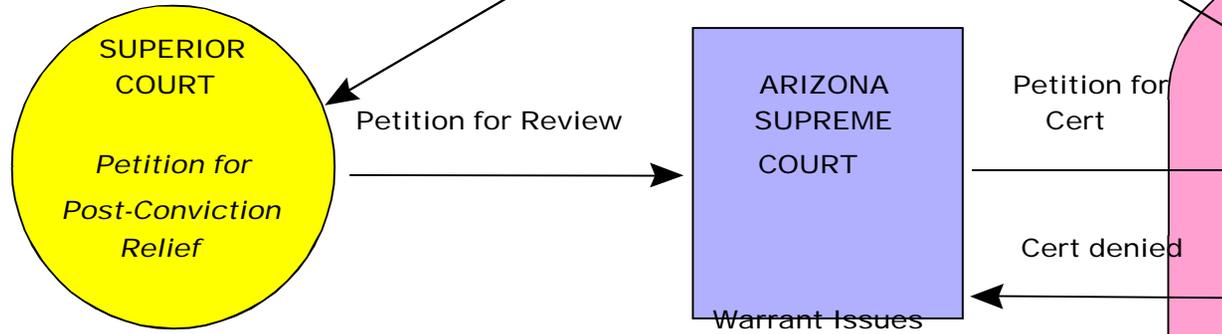
The decision of the United States District Court on the habeas corpus petition may be appealed by either party. The appeal from the United States District Court is taken to the United States Court of Appeals for the Ninth Circuit, and the parties may seek review of the decision of that court by filing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

# DEATH PENALTY PROCEDURES

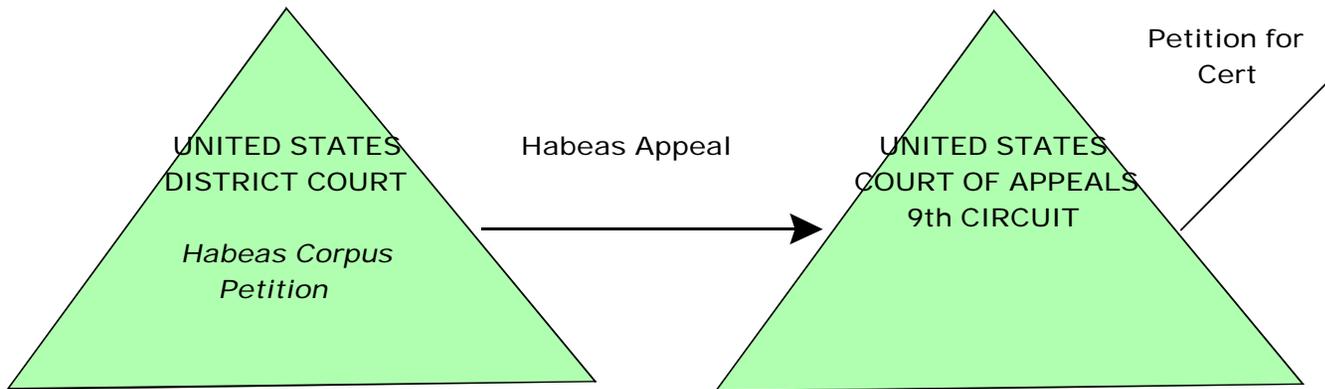
## Direct Appeal:



## Post Conviction Proceeding:



## Federal Appeal:



## **Execution**

The initial warrant for 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 subsequent warrants 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 subsequent post-conviction relief.

In 1992, a constitutional amendment was passed by the 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, the prisoner is not subject to execution if found to be mentally incompetent or pregnant. A prisoner is not competent to be executed unless he understands (1) that he is being punished for murder, and (2) the punishment is death.

If the court finds that the prisoner is incompetent, he 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 prisoner's competency is restored, the individual who supervised the treatment must submit a report to the Superior Court, the Attorney General, and the prisoner's attorney, stating that they have determined the prisoner's competency restored. In addition to the report written by the treating individual, the chief medical officer certifies to the Arizona Supreme Court that the prisoner is competent to be executed. The Arizona Supreme Court will then order the issuance of the death warrant.

### **Clemency**

The Arizona Board of Executive Clemency has authority to review all death sentences and determine whether there are grounds for reprieve, commutation or pardon. The 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 reprieve, commutation or pardon, or to make no recommendation at all.

The Board of Executive Clemency conducts a hearing to determine whether to make a recommendation to the Governor. At the hearing the defendant and his attorney, the State's attorneys, and the victim are allowed to participate and provide statements regarding the prisoner and the crime.

If the Board decides to recommend reprieve, commutation or pardon, the Governor then has constitutional authority to grant the recommended relief to the prisoner. The Governor can only take such action upon a recommendation by the Board.