

## **Summary of Attorney General Janet Napolitano's Capital Case Commission Recommendations**

1. *Statewide Capital Public Defender Office:* Create a statewide capital public defender office to represent capital defendants at the trial level in the rural counties and in statewide post-conviction relief proceedings. Legislation that would establish such an office was defeated in the 2001 and 2002 State Legislative Sessions. The Capital Case Commission deeply regrets that the Legislature did not address this need and urges the Legislature to pass legislation appropriating monies for capital litigation resources.
2. *Audio/videotaping Interrogations and Confessions:* Urge law enforcement to audiotape or videotape all advice of rights, waiver of rights and questioning of suspects in all first-degree murder cases when feasible. A protocol was drafted and presented to the Attorney General's Law Enforcement Advisory Board. Although resource concerns were expressed, the Advisory Board concurred in sending the protocol to the Arizona Criminal Justice Commission for consideration.
3. *Minimum Age:* Enact legislation that would make defendants under the age of 18 at the time of a crime ineligible for the death penalty. Legislation introduced in the 2002 State Legislative Session failed. It is anticipated that similar legislation will be reintroduced in the 2003 Regular Legislative Session. (This recommendation was supported by a majority of the Commission, but was not a consensus recommendation.)
4. *Mental Retardation:* Enact legislation that would (1) make mentally retarded defendants ineligible for the death penalty; and (2) require pre-trial mental retardation screening of all defendants facing the death penalty. Legislation implementing this proposal was introduced in the 2001 Legislative Session and signed into law on April 26, 2001.
5. *Death Penalty Notice:* Amend Rule 15.1(g)(1) of the Arizona Rules of Criminal Procedure to extend the time for filing the notice of intent to seek the death penalty to 60 days after arraignment to allow more reasoned deliberations regarding whether to seek the death penalty. Additional extensions of time would be available by stipulation of the parties and approval by the trial court. The Capital Case Commission's proposed change to Rule 15.1(g)(1) was adopted by the Arizona Supreme Court effective June 1, 2002.
6. *Selection of Capital Cases:* Urge prosecutors to develop written policies regarding the identification of cases in which to seek the death penalty, including a provision to solicit or accept defense input before seeking the death penalty. This recommendation will be submitted to the Arizona Prosecuting Attorneys' Advisory Council ("APAAC") for consideration.
7. *Competence of Defense Counsel:* Amend Ethical Rule 1.1 to require all lawyers who represent capital defendants to comply with the standards set forth in Rule 6.8 of the Arizona Rules of Criminal Procedure (court-appointed counsel is already required to meet the experience and qualification standards set forth in Rule 6.8; the proposed rule would impose the same standards for privately-retained counsel). Amend Ethical Rules 5.1, 5.2 and 5.3 to hold supervisors in public law offices responsible for supervising counsel appointed in capital cases and to ensure

that subordinate attorneys' caseloads are such that they are able to render competent representation. The Ethical Rule Review Group (ERRG) of the Arizona Bar Association recommended these changes. As of the publication of this Report, public comment was pending.

8. *Legal and Judicial Education*: Amend Rule 45(a) of the Rules of Arizona Supreme Court to (1) require attorneys to complete a minimum of six hours of continuing legal education in capital litigation, including ethical duties, within the preceding three years of being assigned a capital case; and (2) require judges to complete a minimum of six hours of continuing judicial education in capital litigation within the preceding three years of being assigned a capital case. The Attorney General's Office will prepare a Petition to amend Rule 45(a) for submission to the Arizona Supreme Court on behalf of the Capital Case Commission.
9. *Mitigation Specialists*: Amend Rule 15 of the Arizona Rules of Criminal Procedure to provide for the appointment of investigators and expert witnesses for indigent defendants. The Capital Case Commission's proposed changes to Rule 15 were adopted with minor modifications by the Arizona Supreme Court effective June 1, 2002.
10. *Considerations Regarding Requests for Extension of Time*: Amend Rules 31 and 32 of the Arizona Rules of Criminal Procedure to require courts to consider the rights of the victim and defendant to a prompt and final conclusion of the case when ruling on any request for extension of time. The Capital Case Commission's proposed changes to Rules 31 and 32 were adopted by the Arizona Supreme Court effective June 1, 2002.
11. *Jury Deliberations*: Oppose a Petition to Amend Rule 19.4 of the Arizona Rules of Criminal Procedure that would allow juries in criminal cases to deliberate the case before jury instructions are given by the court. The Attorney General's Office submitted comments opposing the Petition on behalf of the Capital Case Commission. The Arizona Supreme Court denied the Petition to Amend Rule 19.4.
12. *When a Peace Officer is Murdered*: Amend A.R.S. § 13-703(F)(10) to include the murder of an off-duty peace officer as an aggravating factor if the murder was motivated by the peace officer's status. This recommendation was presented to the Attorney General's Law Enforcement Advisory Board, but the Board declined to pursue the recommendation at this time.
13. *Victim Impact at Aggravation/Mitigation Hearings*: Amend Rule 26.3 of the Arizona Rules of Criminal Procedure, the Comment, and Supreme Court Administrative Order 94-16 to provide that a sentence is not imposed in a capital case until seven days after a sentencing hearing at which the court considers aggravating and mitigating factors, the victim's family is given an opportunity to present information, and the defendant is allowed to present allocution. The Capital Case Commission's proposed changes to Rule 26.3 were adopted by the Arizona Supreme Court effective June 1, 2002. That change, however, became inapplicable with the enactment of Arizona's new jury-sentencing statute in August 2002.
14. *Residual Doubt in Sentencing*: Oppose adding residual doubt to Arizona's list of statutory mitigators found in A.R.S. § 13-703(G), acknowledging that trial judges have the authority to consider the strength of the government's case in determining the appropriate sentence. (Non-consensus recommendation.)

15. *Clerks of Court and Court Reporters' Procedures:* (1) Amend Rule 31.9 of the Arizona Rules of Criminal Procedure to require clerks of court to notify all court reporters in capital cases within ten days of the filing of the notice of appeal to submit all transcripts to the Clerk of the Supreme Court; (2) require trial judges to order transcription of all trial proceedings and the gathering of the record on appeal in every first-degree murder case at the time the guilty verdict is returned; and (3) require superior court clerks to enter a docketing code on all criminal calendars identifying cases in which the death penalty is sought. The Commission's recommended changes were adopted by the Arizona Supreme Court effective June 1, 2002.
16. *File Repository:* Create a repository in each county for all trial and appellate defense files in all capital cases so that post-conviction relief counsel can readily access files from a single location. Additional discussion is needed with court administrators, prosecutors and defense counsel to implement this recommendation.
17. *Competency to be Executed:* Commute death sentences to the maximum lawful sentence possible upon finding that the defendant has become incompetent to be executed after the issuance of a death warrant. Legislation was introduced during the 2002 State Legislative Session, but failed. It is anticipated that similar legislation will be reintroduced in the 2003 Regular Legislative Session. (Non-consensus recommendation.)
18. *Maintain Capital Case Data:* (1) Amend data collection procedures at superior courts, prosecuting attorneys' offices and at the Attorney General's Office to better capture descriptive data about defendants, victims and the death penalty process; and (2) establish a mechanism that will allow the Attorney General's Office to maintain Data Set I, and the Center for Urban Inquiry, College of Public Programs at Arizona State University to maintain Data Set II. A subgroup of the Data/Research Subcommittee will continue to deliberate and develop processes and protocols to implement these recommendations.
19. *Preservation of DNA Evidence:* Encourage that legislation be enacted that would require the preservation of all biological materials found at the scene of all unsolved homicides and in all capital cases until such time as a defendant can be provided an opportunity to request DNA testing of that evidence. The Attorney General's Law Enforcement Advisory Board expressed concerns regarding a lack of resources to implement this proposal, but did not oppose the recommendation. (Non-consensus recommendation.)
20. *Use of the F6 Aggravator:* Encourage further study of the use of the A.R.S. § 13-703(F)(6) aggravating factor that a murder was committed in an especially cruel, heinous or depraved manner. Concerns raised during Commission discussions were that the aggravator is overused and is vague. Opposition to changing the F6 aggravator was based on a belief that this is an important aggravator in determining which cases stand out as being above the norm of first-degree murders, and the current terms are relatively well defined by case law. (Non-consensus recommendation.)
21. *Race-Neutral Decisions:* Encourage all participants in the criminal justice system to promote practices that ensure race-neutral decisions, and encourage the use of the empirical data from Data Sets I and II in internal reviews and discussions regarding the death penalty process.