

CAPITAL CASE OVERSIGHT COMMITTEE

MEETING AGENDA

Tuesday, December 3, 2019

12:00 to 1:30 PM

State Courts Building * 1501 W. Washington * Conference Room 119 * Phoenix, AZ

Item no. 1	Call to Order Opening remarks	<i>Hon. Ronald Reinstein, Chair</i>
Item no. 2	Approval of the April 18, 2019 meeting minutes	<i>Judge Reinstein</i>
Item no. 3	Status reports: Superior Court Appeals and PCRs	<i>Judge Starr Ms. Adel Ms. Phillis Mr. Rodriquez Mr. Unklesbay Ms. Gard Ms. Hallam</i>
Item no. 4	Draft comment to Criminal Rule 6.8(e)	<i>All</i>
Item no. 5	Capital case jury workgroups	<i>Judge Reinstein</i>
Item no. 6	Roadmap	<i>Judge Reinstein</i>
Item no. 7	Call to the Public Adjourn	<i>Judge Reinstein</i>

Items on this Agenda, including the Call to the Public, may be taken out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Angela Pennington at (602) 452-3547. Requests should be made as early as possible to allow time to arrange accommodations.

**Capital Case Oversight Committee
State Courts Building, Phoenix
Meeting Minutes: April 18, 2019**

Members attending: Hon. Ronald Reinstein (Chair), Jon Canby, Hon. Kent Cattani, Lacey Gard, Donna Hallam, Hon. Kellie Johnson, Dan Levey, Marty Lieberman, Rosemarie Peña Lynch, William Montgomery by his proxy Jon Eliason, Hon. Sam Myers, Christina Phillis, David Rodriguez (late arrival), Natman Schaye, Rick Unklesbay

Guests: Jimmy Jenkins, Ellie Hoecker, Jennifer Garcia, Rebecca Huerta, Jeff Kirchler, Chris Bleuenstein, Patty Stevens, Tim Geiger, John Todd, Jeff Sparks, Jana Sutton, Michele Lawson, Aaron Nash

Staff: Mark Meltzer, Angela Pennington

1. Call to order, introductory remarks, and approval of meeting minutes. The Chair called the meeting to order at 12:02 p.m. The Chair welcomed three new members, and members and guests introduced themselves. The Chair then referred members to the October 31, 2018 draft meeting minutes.

Motion: A member moved to approve those minutes, the motion received a second, and it passed unanimously.

The Chair summarized his presentation of the Oversight Committee's 2018 Report to the Arizona Judicial Council ("AJC") on December 13, 2018, and the AJC's action on the Committee's recommendations.

- The AJC approved a Committee recommendation concerning judicial training for capital case jury selection and establishing a workgroup to review capital case jury instructions. (See further section 7 of these minutes.)
- The AJC also approved a recommendation to increase the statutory rate of compensation for capital post-conviction counsel. Unlike the current statute, the recommendation would place a floor, or minimum amount, on that rate, but not a cap, allowing a county to pay more than the prescribed minimum. However, implementation of this recommendation requires someone to sponsor the legislative change and there currently is no sponsor, so there will be no action on the recommendation until at least the next legislative session.
- The AJC authorized the Oversight Committee to file a rule petition concerning the post-judgment appointment of counsel in a capital case, and the Committee filed this petition in January, number R-19-0006. (See further section 4 of these minutes.)
- The AJC did not approve a recommendation regarding an amendment to Criminal Rule 6.8(e) that would add the word "meaningfully" before the words "associate with a lawyer," but the Chair suggested that the Oversight Committee

Capital Case Oversight Committee: draft minutes
April 18, 2019

consider filing a petition in the next rules cycle that would propose a comment to the rule to clarify the role and responsibilities of associated counsel.

Finally, the Chair reviewed with members Administrative Order No. 2019-29, which extended the term of the Oversight Committee until December 31, 2021. The Order directs the Committee to “continue to identify issues affecting the administration of capital cases and propose recommendations to improve the judicial administration of these cases.” The Order requires the Committee to submit two progress reports to the AJC, with the first report due by October 2020.

2. Status reports. The Chair provided a status report concerning pending capital cases in four counties. Gila and Santa Cruz counties recently filed their first death notices in decades. The Gila case is a triple homicide, and the Santa Cruz case involves the death of a law enforcement officer. The Chair reported that there are two capital cases pending in Yavapai County, and 8 pending capital cases in Pinal County. Several of the Pinal cases are homicides involving prison inmates. A Yavapai jury recently returned a death verdict, the first such verdict in that county in more than 10 years.

Judge Myers reported 48 capital cases pending trial in Maricopa County, and trials in progress in 3 cases. In addition, a judge ordered resentencing in a capital petition for postconviction relief; that order is the subject of a petition for review. There are 28 pending petitions for post-conviction relief in capital cases; 2 are pending evidentiary hearings, 9 have been fully briefed, and 17 are in the briefing stage. Judge Myers added that Judge Patricia Starr will become the presiding criminal judge in Maricopa County at the midyear judicial rotation. Mr. Eliason noted that his figures are generally compatible with the data presented by Judge Myers. Ms. Phillis reported that her office has fully staffed capital teams in 10 cases where the State might file a death notice, as well as 4 cases in which the notice was withdrawn. Mr. Unklesbay advised that Pima County now has 3 pending capital cases; his office filed a death notice earlier this year on a prison homicide, and another in a case involving a double homicide of minors.

Ms. Gard advised that there are 9 pending capital appeals in the Arizona Supreme Court, and Ms. Hallam concurred with this figure. There are 36 cases pending in federal district court; 24 are on initial habeas review, and 12 are remands from the Ninth Circuit based on *Martinez*, *McKinney*, or both. There are 16 pending cases in the Ninth Circuit, and 12 cases where inmates have exhausted their post-judgment remedies. Ms. Hallam added that there are 16 petitions for review of capital cases pending in the Arizona Supreme Court, although some of these are successive petitions.

Members proceeded to a discussion of pending rule petitions affecting capital cases.

3. Discussion of petition R-18-0038. Mr. Lieberman filed this petition to amend Rule 17.4. The petition’s objective was to promote plea discussions in capital cases because of a concern among Maricopa County prosecutors that if they make non-death plea offers, the defendant will introduce those offers as mitigation evidence. The Arizona

*Capital Case Oversight Committee: draft minutes
April 18, 2019*

Prosecuting Attorneys Advisory Council filed a comment supporting the proposed amendment. However, Mr. Lieberman withdrew the petition yesterday, and in that filing said, "Upon vetting with the capital defense bar, it is clear that the rule has too many potential unintended consequences which could affect the constitutional rights of capital defendants." He noted that while stakeholders did not oppose the goals of the petition, they could not fashion a rule to achieve them.

The defense bar concluded that defendants have a constitutional right to introduce mitigation evidence, which could include plea offers, and court rules cannot limit this right. Although a Maricopa prosecutor supported R-18-0038, a Pima prosecutor advised that the issue the petition sought to address is not problematic in Pima county, and that Pima County prosecutors and defense counsel routinely engage in plea discussions without the need for the proposed rule amendment's evidentiary limitation. Before Mr. Lieberman withdrew the petition, he made inquiries to various jurisdictions within the Ninth Circuit and concluded that this is a Maricopa-centric issue. The Chair thought that using a settlement judge as an intermediary could diffuse the issue for Maricopa County prosecutors, but members did not otherwise address the matter.

4. Discussion of petition R-19-0006. The Oversight Committee filed this petition. The proposed amendment to Rule 31.5 would permit the Supreme Court to appoint counsel on a direct capital appeal. Existing authority already authorizes the Court to delegate the appointment of counsel on a capital petition for post-conviction relief to a superior court presiding judge.

No comments have been filed yet on the Court Rules Forum. However, if the Court adopts the petition, a member asked about the source of the Supreme Court's pool of appellate counsel. The Chair anticipated that the Court would utilize Maricopa County's existing list of vetted attorneys and consult further with the County's Office of Public Defense Services. Ms. Hallam noted that she would discuss the process for Supreme Court appointment of appellate counsel with the Chief Justice, and that she might need to prepare an application form for appellate applicants (she already has a form for capital PCR applicants). Ms. Hallam also explained that defender agencies are sometimes selected as appellate counsel, and she would need to establish a process for confirming when those appointments are made to avoid the Court redundantly appointing counsel upon receipt of a capital notice of appeal. Finally, although the Maricopa Review Committee is apparently willing to continue vetting attorney applicants for capital appeals, its process is geared for Maricopa County, and there will be capital appeals from other counties, so a vetting process for attorneys outside Maricopa County will require further consideration.

5. Discussion of petition R-19-0008. The Maricopa County Attorney filed this rule petition, and Ms. Stevens joined Mr. Eliason in making the presentation. Anecdotally, that office, as well as the superior court, occasionally receive concerns from former jurors who have been contacted by investigators, yet these jurors do not want to answer investigators' questions but simply want to forget a traumatic experience and leave the

Capital Case Oversight Committee: draft minutes
April 18, 2019

case in the past. The petition seeks to enhance juror privacy by three rule amendments. It would amend Rule 18.5 by prohibiting a party or the party's representative from contacting a prospective or seated juror who has not been discharged. An amendment to Rule 22.5 would require the court to inquire of empaneled jurors upon their discharge whether they wished to refuse—or opt-out—of speaking with anyone about the case in the future. And an amendment to Rule 32.1 would provide a process for a party to obtain a court order requiring jurors who opted-out to discuss their previous jury service. A parallel bill, SB 1313, was introduced in the current legislative session but was recently the subject of a “strike-everything” amendment and is no longer moving forward.

Although no one objected to the principle expressed in the proposed amendment to Rule 18.5, some members thought this principle was universally understood and that a rule amendment was unnecessary. One member, citing previous and similar rule petitions and bills, characterized the entire petition as recycled. The member contended that recommendations made in the Power of Twelve report more than 20 years ago did an adequate job of protecting juror privacy, and that new issues had not surfaced since then that needed to be addressed by rule amendments. The member suggested that a juror who does not want to speak with an investigator can simply refuse to do so. Moreover, this member believes that the court should encourage former jurors to speak with investigators. On occasion, a defendant will need a declaration from a former juror to support a colorable claim of juror misconduct. And a defendant cannot determine if there was jury misconduct without speaking to jurors. The member also suggested that affording an opt-out option when discharging the jury was poorly timed because the underlying claim of misconduct might not be raised until years into the future. The member intends to file a comment opposing the rule petition.

A judge member observed that jurors who have been contacted by investigators after they've been discharged have well-grounded concerns that the defendant knows where they live. It is disingenuous to identify jurors by number rather than by name to preserve their anonymity during the trial, when that anonymity might cease to exist after the trial. Moreover, a few investigators have reportedly misled former jurors about their identity, e.g., saying “I'm from the government” or “I'm from the county” rather than “I'm from the public defender's office” or “I am here for the defendant.” Another member emphasized that professionalism is essential when anyone contacts former jurors. Members concurred that these were statewide concerns.

One member suggested that giving jurors the alternative to opt-out was like a victim's right to decline an interview, but another member thought that giving former jurors that option could result in every juror declining an interview. The judge member proposed that the court send a letter to the former juror advising that the defendant had requested an interview and requesting the juror's cooperation, but another member thought a juror might construe this as official permission to decline an interview. Rather, the member would prefer the court to encourage former jurors to speak about the case. Another member thought that the draft rule was so broad that it might impair the ability

of federal investigators to speak with jurors during habeas proceedings and could lead to additional litigation in the district court concerning post-judgment interviews.

The Chair observed that years ago, jurors appeared comfortable speaking as a group with counsel in the courtroom after a trial, even after the trial of a death penalty case. However, these conversations might be insufficient for defendants who later seek information for post-conviction relief. The Chair suggested that if the petition goes forward, the proposed amendment to Rule 32.1 would be more appropriately located in Rule 18 or Rule 22, because the proposal would also impact motions for new trial under Rule 24, and because Rules 18 and 22 are specifically about jurors. Ms. Stevens agreed with that suggestion. But after considering the members' varying viewpoints on this petition, the Chair declined to file a comment on the Committee's behalf.

6. Discussion of petition R-19-0012. The Rule 32 Task Force filed this petition, and because several members of that Task Force are also members of the Oversight Committee, those members had previously presented draft Rule 32 provisions to this Committee. Today's agenda only asked the Oversight Committee to review proposed Rule 32.1(h). Ms. Hoecker, who had prepared an analysis of Rule 32.1(h) in support of the majority view, cited a concurring opinion in *State v. Miles* that noted the standard for relief in the current rule might require clarification. Ms. Hoecker explained that the Task Force had carefully considered Rule 32.1(h) and agreed to amend it by clarifying that the standard is an objective one. She added that a minority proposal would do more than simply clarify the standard; it would make a substantive change to the rule and would eliminate the narrow avenue of relief the rule currently affords. Ms. Gard spoke for the minority view. She said that *Miles* presented what appeared to be an ineffective assistance of counsel claim characterized as an (h) claim. She contended that actual innocence for the death penalty can be objectively established only by showing actual innocence of any aggravating factors.

The Chair concluded that Oversight Committee members would probably be as divided on this issue as the Task Force members, who were almost evenly split. Because that division and the respective positions were fully discussed in R-19-0012, the Chair saw no need for a vote by the Oversight Committee on which view it preferred, and members agreed.

7. Judicial training; jury instructions. The superior court in Maricopa County, in conjunction with the Education Services Division of the Administrative Office of the Courts, will conduct a seminar on capital cases for judges statewide on May 30 and 31. Judge Myers reviewed the seminar agenda, which was in the meeting materials and that included sessions on jury selection. Although the training is designed for judges, several attorneys, including members of the Oversight Committee, will serve as panelists for selected items on the two-day agenda. Some of the attorneys had requested permission to attend other sessions that are related to their panel topics. The initial reaction was that having attorneys attend those other sessions might inhibit discussions among judges attending the program, but after further consideration, members concurred that attorney

Capital Case Oversight Committee: draft minutes
April 18, 2019

participants should have the opportunity to listen to presentations by related panelists. This might also help these attorneys to avoid repeating matters that judge panelists had already presented. Judge Myers will attempt to modify the agenda to facilitate the attorneys' broader participation.

At its December meeting, the AJC considered the subject of judicial training on jury selection in conjunction with the topic of jury instructions in capital cases. The Chair proposed establishing a workgroup that would suggest improvements to penalty phase instructions. The workgroup would make recommendations to the State Bar, because jury instructions in Arizona are promulgated by the State Bar. Judge Myers, who currently serves as chair of the State Bar's criminal jury instructions committee, observed that although no new capital case jury instructions are pending, attorneys who do not practice capital litigation have previously offered constructive suggestions concerning those instructions. The Chair acknowledged this observation and added that members of this new workgroup need not be Oversight Committee members. Anyone who is interested in serving on this workgroup should contact Oversight Committee staff.

7. Call to the public; adjourn. There was no response to a call to the public. The meeting adjourned at 1:23 p.m.

Capital Cases Pending Trial in Arizona by County: 2008 to 2019

These annual surveys were conducted in late August and early September, except 2008, which was conducted in July.

Counties shown with gray shading had no pending capital cases during the 2019 survey.

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Apache	1	1	0	0	0	0	0	0	0	0	0	0
Cochise	0	0	1	3	3	2	1	0	0	0	0	0
Coconino	0	0	0	0	0	0	0	0	0	0	0	0
Gila	0	0	0	0	0	0	0	0	0	0	0	1
Graham	0	0	0	0	0	0	0	0	0	0	0	0
Greenlee	0	0	0	0	0	0	0	0	0	0	0	0
LaPaz	0	0	0	0	0	0	0	0	0	0	0	0
Maricopa	127	109	79	68	63	68	68	67	64	57	48	43*
Mohave	2	3	2	1	1	0	0	2	2	2	0	0
Navajo	0	0	0	0	0	0	0	0	0	0	0	0
Pima	14	13	10	7	5	6	6	5	2	0	1	3
Pinal	3	4	5	5	5	10	17	14	12	8	9	7
Santa Cruz	0	0	0	0	0	0	0	0	0	0	0	1
Yavapai	3	2	2	2	5	7	7	3	2	2	4	1
Yuma	5	4	3	3	1	1	1	1	1	0	0	0
TOTAL	155	136	102	89	83	94	100	92	83	69	62	56

*Maricopa had 43 pending cases at the end of August 2019 and 44 at the end of September 2019.

The April 18, 2019 Oversight Committee meeting minutes, as pages 1-2, say,

The AJC did not approve a recommendation regarding an amendment to Criminal Rule 6.8(e) that would add the word “meaningfully” before the words “associate with a lawyer,” but the Chair suggested that the Oversight Committee consider filing a petition in the next rules cycle that would propose a comment to the rule to clarify the role and responsibilities of associated counsel.

Here for discussion purposes is a draft Comment to Rule 6.8(e):

An appointed attorney under Rule 6.8(e) must associate with a lawyer who meets the qualifications of Rule 6.8. The amount of time expended in the association, and the nature of the relationship between the appointed attorney and the associated lawyer, will vary based on the facts and issues of each case, but the time must not be perfunctory, and the relationship must not be superficial. The association between the appointed attorney and the associated lawyer must be meaningful, purposeful, significant, and ongoing. [Optional: The court may require the associated lawyer to appear and participate in any pre-trial, trial, or post-trial proceeding.]

Also, see

We hold that due process and, by implication, [Rules 7.2\(a\)](#) and [7.3\(b\)](#), require the trial court to make an individualized determination in setting discretionary pretrial release conditions that restrict parents’ access to their minor non-victim children. Consistent with due process standards, a defendant has a right to be heard “at a meaningful time and in a meaningful manner,” [Mathews](#), 424 U.S. at 333, 96 S.Ct. 893, but a trial court is not generally required to conduct an evidentiary hearing.

[Samiuddin v Nothwehr](#) 243 Ariz. 204, 404 P.3d 232 (Nov. 2017), opinion by J. Lopez (emphasis added)

Oversight Committee
December 3, 2019

Regarding the capital jury workgroups, here is information regarding two subject matter experts:

Robert Leonard:

<https://www.hofstra.edu/academics/colleges/hclas/cll/linguistics/institute-leadership.html>

http://www.robertleonardassociates.com/PDF/leonard_cv.pdf

Scott Sundby:

<https://www.law.miami.edu/faculty/scott-e-sundby>

<http://law2.wlu.edu/faculty/profiles/sundby.asp>

REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL)

Fifth Edition, 2019

(Cite as RAJI (CRIMINAL) 5th)



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Third Edition – 2008

2010 Supplement □ April 2010

2011 Cumulative Supplement – June 2011

2012 Cumulative Supplement – June 2012

Third Edition –December 2013

Fourth Edition – December 2016

2017 Update – March 2017

2018 Update – July 2018

Fifth Edition – September 2019

State Bar of Arizona

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RAJI (CRIMINAL) 5TH has been prepared by the Criminal Jury Instructions Committee of the State Bar of Arizona. The State Bar Board of Governors has approved these instructions and authorized their publication and sale.

These instructions are recommended for use in all criminal trials in Arizona courts. But court and counsel should satisfy themselves in each case—from original and fully current authority—that the instructions being given in a case are both appropriate and correct for the case.

With regard to the use of these instructions, please refer to the Important Notice immediately following.

PREFACE

This Fifth Edition, and prior editions, of REVISED CRIMINAL JURY INSTRUCTIONS (RAJI CRIMINAL) is the product of thousands of hours of work by the State Bar of Arizona Criminal Jury Instruction Committee. This project would not have been accomplished without the dedicated work of the members of the Criminal Jury Instruction Committee. RAJI CRIMINAL, 5TH EDITION represents a collaborative effort by defense attorneys, prosecutors and judicial officers.

The First Edition of RAJI CRIMINAL was published in 1989 as RECOMMENDED ARIZONA JURY INSTRUCTIONS. Those jury instructions were approved in advance of publication by the Arizona Supreme Court. Subsequently, the Arizona Supreme Court stopped approving jury instructions except in the context of appellate cases. Accordingly, the user is advised that these instructions have not been approved by the Arizona Supreme Court.

The Second Edition of RAJI CRIMINAL was published in 1996 under the renamed title REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL), 2nd Edition. After publication of the 1996 RAJIs, the Criminal Jury Instruction Committee was assigned the task of revising the instructions. A supplement was published in 2000. From 1997 to 2005, the Committee completed the Standard Instructions, eight chapters in Title 13, Title 28 instructions and non-capital case aggravation phase instructions. Work on the capital case instructions started in 2002 following the United State Supreme Court's decision in *Ring v. Arizona*. Since 2005, the Committee completed over twenty-five chapters in Title 13 and four non-Title 13 chapters, revamped Title 28 (predominantly DUI instructions) and drafted the capital case instructions, amounting to over 400 individual instructions and verdict forms. A large bulk of these instructions, including all the capital case instructions, did not even exist in the 1996 RAJI CRIMINAL, 2nd Edition.

The Third Edition, published in 2008, represented a comprehensive revision to RAJI CRIMINAL, 2nd Edition and its supplements. Subsequent editions include revisions based on yearly legislative amendments to the Arizona Criminal Code.

Many of the jury instructions are accompanied by Use Notes and Comments. The Criminal Jury Instruction Committee not only wants RAJI CRIMINAL, 5th Edition to be a comprehensive set of accurate jury instructions, but also a resource for the user wishing to do additional research about issues related to criminal jury instructions.

We thank the past and present members of the Committee for their hard work in bringing the third edition to fruition. We also thank Ilona Kukan from the State Bar staff for her assistance and encouragement. The instructions remain a work in progress, so any suggestions for revisions or for new instructions are always appreciated. The State Bar is committed to keeping RAJI Criminal up-to-date with periodic supplements reflecting legislative changes and the always evolving case law.

Hon. Sam J. Myers, Chair
June 2019

CAPITAL CASE INSTRUCTIONS

PENALTY PHASE

Capital Case 2.1 □ Nature of Hearing and Duties of Jury

Members of the jury, at this phase of the sentencing hearing, you will determine whether the defendant will be sentenced to life imprisonment or death.

The law that applies is stated in these instructions and it is your duty to follow all of them whether you agree with them or not. You must not single out certain instructions and disregard others.

You must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling. You are not to be swayed by mere sympathy not related to the evidence presented during the penalty phase.

You must not be influenced by your personal feelings of bias or prejudice for or against the defendant or any person involved in this case on the basis of anyone's race, color, religion, national ancestry, gender or sexual orientation.

Both the State and the defendant have a right to expect that you will consider all the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict.

I do not mean to indicate any opinion on the evidence or what your verdict should be by any ruling or remark I have made or may make during this penalty phase. I am not allowed to express my feelings in this case, and if I have shown any you must disregard them. You and you alone are the triers of fact.

SOURCE: Preliminary Criminal Instruction 1 and Standard Criminal Instruction 1 (non-capital) (2005); CALJIC 8.84.1 (modified); *California v. Brown*, 479 U.S. 538, 542-43 (1987) ("We think a reasonable juror would . . . understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.")

Capital Case 2.2 □ Evidence

You are to apply the law to the evidence and in this way decide whether the defendant will be sentenced to life imprisonment or death.

The evidence you shall consider consists of the testimony [and exhibits] the court admitted in evidence during the trial of this case, during the first part of the sentencing hearing, and during the second part of the sentencing hearing.

It is the duty of the court to rule on the admissibility of evidence. You shall not concern yourselves with the reasons for these rulings. You shall disregard questions [and exhibits] that were withdrawn or to which objections were sustained.

Evidence that was admitted for a limited purpose shall not be considered for any other purpose.

You shall disregard testimony [and exhibits] that the court has not admitted, or the court has stricken.

[The lawyers may stipulate certain facts exist. This means both sides agree that evidence exists and is to be considered by you during your deliberations at the conclusion of the trial. You are to treat a stipulation as any other evidence. You are free to accept it or reject it, in whole or in part, just as any other evidence.]

During the first part of the sentencing hearing, you found that the State had proved that [a statutory aggravating circumstance exists] [statutory aggravating circumstances exist] making the defendant eligible for the death sentence. During this part of the sentencing hearing, the defendant and the State may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for a sentence less than death. The State may also present any evidence that demonstrates that the defendant should not be shown leniency, which means a sentence less than death.

Mitigating circumstances may be found from any evidence presented during the trial, during the first part of the sentencing hearing or during the second part of the sentencing hearing.

You should consider all of the evidence without regard to which party presented it. Each party is entitled to consideration of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and what weight is to be given the testimony of each witness. In considering the testimony of each witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in a light of all the evidence, and any other factors that bear on credibility and weight.

The attorneys' remarks, statements and arguments are not evidence, but are intended to help you understand the evidence and apply the law.

The attorneys are entitled to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

SOURCE: A.R.S. §§ 13-751(C), -752(G); Preliminary Criminal Instructions 3, 5, 6 and 7 and Standard Criminal Instructions 3 and 4 (non-capital) (2005).

USE NOTE: Use bracketed material as applicable.

Capital Case 2.3 □ Mitigation

Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, ~~so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history or record, or circumstances of the offense.~~

Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the defendant's moral culpability.

Mitigating circumstances may be offered by the defendant or State or be apparent from the evidence presented at any phase of these proceedings. You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to

CAPITAL CASE INSTRUCTIONS

~~consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principle.~~

[The circumstances proposed as mitigation by the defendant for your consideration in this case are:

[List the factors]. You are not limited to these proposed mitigating circumstances in considering the appropriate sentence. You also may consider anything related to the defendant's character, propensity, history or record, or circumstances of the offense.]

The fact that the defendant has been convicted of first-degree murder is unrelated to the existence of mitigating circumstances. You must give independent consideration to all of the evidence concerning mitigating circumstances, despite the conviction.

SOURCE: A.R.S. § 13-751(G); *State v. Pandelli*, 215 Ariz. 114, 126, ¶ 33, 161 P.3d 557, 569 (2007) (the defendant need not prove that the mitigating circumstances were the direct cause of the offense); *Smith v. Texas*, 125 S. Ct. 400, 404 (2004); *Tennard v. Dretke*, 124 S. Ct. 2562, 2570 (2004); *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that capital sentencers must be allowed to consider, "as a mitigating factor, any aspect of the defendant's character or record and circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977) (Mitigating circumstances are "circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability."); *State v. Tucker*, 215 Ariz. 298, 322, ¶ 106, 160 P.3d 177, 201 (2007).

USE NOTE: Use bracketed material as applicable. The defendant shall provide the court with a list of mitigating circumstances, but the defense is not required to list the circumstances.

Capital Case 2.4 Duty to Consult with One Another

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief concerning the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

SOURCE: Washington Pattern Jury Instructions, 2nd ed. 31.04 (modified).

USE NOTE: In *State v. Andriano*, 215 Ariz. 497, ¶¶ 59-60, 161 P.3d 540 (2007), an instruction based on Rule 22.4, Arizona Rules of Criminal Procedure, that included a "duty to deliberate" was given as an impasse instruction. The Arizona Supreme Court approved use of the instruction in that context.