



Arizona State Senate Issue Brief

November 23, 2022

Note to Reader:

The Senate Research Staff provides nonpartisan, objective legislative research, policy analysis and related assistance to the members of the Arizona State Senate. The *Issue Briefs* series is intended to introduce a reader to various legislatively related issues and provide useful resources to assist the reader in learning more on a given topic. Because of frequent legislative and executive activity, topics may undergo frequent changes. Nothing in the Brief should be used to draw conclusions on the legality of an issue.

CAPITAL PUNISHMENT

HISTORY AND OVERVIEW

The use of the death penalty is permissible in 27 states, including Arizona. Under the Arizona Constitution, executions are performed by lethal injection. Inmates sentenced prior to November 23, 1992, may choose lethal injection or lethal gas.¹

A defendant convicted of first-degree murder is eligible for the death penalty if the existence of at least one statutorily enumerated aggravating circumstance exists and there are no mitigating circumstances sufficiently substantial to call for leniency.² [Laws 2002, Fifth Special Session, Chapter 1](#) required juries, rather than judges, to determine whether aggravating and mitigating circumstances exist in death penalty cases and whether the death penalty will be imposed. The legislation was in response to the U.S. Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

If aggravating circumstances exist, the jury enters the penalty phase of the trial, considers any mitigating circumstances and determines whether the death penalty should be imposed. A jury must come to a unanimous verdict when determining whether an aggravating circumstance has been proven and whether the death penalty is the appropriate sentence.³

In 2001, Arizona prohibited the execution of inmates who are determined to have an intellectual disability according to statutory psychological evaluations. The U.S. Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) soon followed, stating that a person with intellectual disability cannot be sentenced to death. The U.S. Supreme Court later held that a capital defendant with an IQ falling within the standard error of measurement must be able to present additional evidence of intellectual disability at trial.⁴

If a death sentence is imposed and the trial court finds that an inmate is mentally incompetent to be executed, the death warrant is suspended and the inmate remains in the custody of the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR)

¹ [Ariz. Const. art. 22, § 22](#)

² [A.R.S. § 13-751](#)

³ [A.R.S. § 13-752](#)

⁴ [Laws 2001, Chapter 260; A.R.S. § 13-753; Hall v. Florida, 134 S. Ct. 1986 \(2014\)](#)

until the Arizona Supreme Court reviews the trial court's finding or until the time for review has expired. If the Arizona Supreme Court upholds the trial court's finding, the inmate is transferred to a licensed behavioral health or mental health facility. The Department of Health Services (DHS) is responsible for providing competency restoration treatment to the inmate. If DHS believes the inmate has been restored to competency, the inmate may have a hearing on the issue and, once there is a finding that the prisoner has been restored to competency, the Arizona Supreme Court will order the issuance of a death warrant.⁵

Arizona generally does not specify a minimum age for capital punishment; however, in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the U.S. Supreme Court held that the Eighth and Fourteenth Amendments of the U.S. Constitution forbid imposition of the death penalty on offenders who were under 18 years old when their crimes were committed.

In 2014, executions in Arizona were temporarily halted after a drug combination of midazolam and hydromorphone failed to cause the execution of Joseph Wood in a timely manner. The stay on executions was lifted in 2017 after ADCRR agreed to use different barbiturate drugs in its execution protocol: sodium thiopental or pentobarbital. The Arizona Attorney General's Office (AG) sent two separate letters to the Governor in August and October of 2020 indicating that the AG had found a lawful supplier of pentobarbital and a compounding pharmacist for the purpose of preparing the pentobarbital for use in executions.⁶

The Arizona Supreme Court has subsequently granted three motions for warrants of execution which were carried out in May, June and November of 2022. According to the AG, there are currently 110 inmates on Arizona's death row, 21 of whom have exhausted the appeals process.⁷

APPEALS AND POSTCONVICTION RELIEF

Appeal of a conviction in a death penalty case where the defendant is sentenced to death is automatic and called the *direct appeal*.⁸ Direct appeals are heard exclusively before the Arizona Supreme Court.

Postconviction relief (PCR) is a voluntary proceeding by which a defendant, through counsel other than the defendant's trial counsel, may challenge a conviction and appeal on specific legal grounds, such as newly discovered evidence that would have changed the verdict or sentence if it had been presented at trial or a change in the law that applies retroactively that could change the conviction. PCR proceedings must be initiated by the defendant within 90 days of the affirmation of the defendant's conviction and sentence after a direct appeal. Statute outlines minimum qualifications necessary to represent capital defendants in PCR proceedings and the Arizona Supreme Court maintains a list of persons qualified to represent indigent capital defendants in PCR proceedings. Counsel appointed to represent an indigent capital defendant in a PCR proceeding are paid an hourly rate of up to \$100 per hour.⁹

The trial court's decision on PCR may be appealed to the Arizona Supreme Court by either party and the parties may file a petition for writ of certiorari requesting the U.S. Supreme Court to review the decision of the Arizona Supreme Court. The Arizona Supreme Court issues the initial warrant of execution after affirming the death sentence on direct appeal if the first PCR proceeding is concluded or the period of time to file the PCR petition has expired.¹⁰

[Laws 2006, Chapter 369](#) established the State Capital Postconviction Public Defender Office (Office) and, subject to exceptions, prohibited county public defenders from representing a capital defendant in a PCR proceeding. The

⁵ [A.R.S. § 13-4022](#)

⁶ [AG Letter August, 2020](#) and [AG Letter October, 2020](#)

⁷ [AG Press Release, November 16, 2022](#)

⁸ [Ariz. R. Crim. P. 31.2](#)

⁹ [A.R.S. §§ 13-4041](#) and [13-4234](#)

¹⁰ [A.R.S. § 13-759](#)

legislation required the Arizona Supreme Court to appoint representation for capital defendants in PCR proceedings from the Office in accordance with guidelines established by the American Bar Association and set forth in the Arizona Rules of Criminal Procedure.¹¹ However, [Laws 2012, Chapter 302](#) eliminated the Office and returned these responsibilities to the counties.

HABEAS CORPUS REVIEW

Following all state and federal direct appeals and PCR proceedings, the defendant has one final opportunity to challenge the conviction in a habeas corpus review. The habeas corpus review is an opportunity for the defendant to litigate the lawfulness of the state conviction in federal court. If the U.S. Supreme Court does not grant relief in a habeas corpus review, the judicial appeals process is exhausted and the judgment stands.¹²

ADDITIONAL RESOURCES

- Arizona Department of Corrections
1600 W. Jefferson Ave.
Phoenix, AZ 85007
602-542-3133
[Arizona Death Penalty History](#)
- National Conference of State Legislatures
7700 East First Place
Denver, CO 80230
303-364-7700
[States and Capital Punishment](#)
- Death Penalty Information Center
1101 Vermont Avenue NW, Suite 701
Washington, DC 20005
202-289-7336
<http://www.deathpenaltyinfo.org/>

¹¹ [Ariz. R. Crim. P. 6.8](#)

¹² [22 U.S.C. § 2254](#)