

ATTACHMENT B

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R-02-0033

FILED

AUG 28 2002

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ARIZONA SUPREME COURT

R-02-_____

IN RE: ORDER AMENDING RULES 8.2,
11.2, 13.5, 15.1, 15.2, 15.9, 18.1, 18.5, 18.6,
19.1, 20, 23.2, 24.1, 26.2, 26.3, 26.9 AND
26.10, ARIZONA RULES OF CRIMINAL
PROCEDURE.

MARICOPA COUNTY ATTORNEY'S MOTION TO
AMEND RULES 8.2, 11.2, 13.5, 15.1, 15.2, 15.9,
18.1, 18.5, 18.6, 19.1, 20, 23.2, 24.1, 26.2, 26.3,
26.9 AND 26.10, ARIZONA RULES OF CRIMINAL
PROCEDURE.

Pursuant to Rule 28, Arizona Supreme Court Rules, the Maricopa County Attorney hereby moves to amend Rules 8.2, 11.2, 13.5, 15.1, 15.2, 15.9, 18.1, 18.5, 18.6, 19.1, 20, 23.2, 24.1, 26.2, 26.3, 26.9 and 26.10, Arizona Rules Of Criminal Procedure based on the following Memorandum of Points and Authorities. The County Attorney requests that the amended rules be adopted on an emergency interim basis until final rules can be adopted. The Arizona Attorney General joins in the request to adopt these rules.

Respectfully submitted this 28th day of August, 2002.

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MEMORANDUM OF POINTS AND AUTHORITIES

On June 24, 2002, in *Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 2428 (2002), the United States Supreme Court held that Arizona's capital sentencing procedures were unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). In response to the *Ring* decision, the Arizona Legislature, convened in special session, passed a new death penalty statute. See 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 (S.B. 1001) (August 1, 2002). The new statute has an emergency clause, making it effective immediately. S.B. 1001, § 10. The sentencing provisions are applicable to any capital sentencing after the effective date of the statute. S.B. 1001, § 7. The key change in the new capital sentencing statute is that a jury, not the trial court, actually determines if the death sentence is appropriate. S.B. 1001, § 13-703.01(R)(1).

In light of the new capital sentencing statute, many of the Arizona Rules of Criminal Procedure need to be amended. The Maricopa County Attorney, in consultation with the Arizona Attorney General, submits the following amendments for the Court's consideration. The County Attorney requests that the rules be adopted be done so on an interim emergency basis because the statute is now in effect and the rules should comport with the new sentencing procedures.

1 **I. THE REASON FOR AMENDING THE RESPECTIVE RULES.**

2 [Note: The proposed rules are all referenced to the rules adopted by this Court to take
3 effect on December 1, 2002.]

4 **A. RULE 8.2. Time Limits**

5 The new statute requires that capital sentencings start immediately after the jury
6 returns a guilty verdict. S.B. 1001, § 13-703.01(C) and (F). This means that all discovery
7 regarding sentencing that previously occurred after a guilty verdict, will now have to be
8 done before trial. The change to Rule 8 recognizes that this discovery will take additional
9 time over that of other first-degree murder cases. The proposal extends the time to try a
10 capital case to one year after arraignment.

11 **B. RULE 11.2. Motion To Have Defendant's Mental Condition Examined.**

12 A.R.S. §§ 13-703.02 and 13-703.03 provide for trial court appointment of mental
13 health examinations in capital cases. The change to Rule 11.2 recognizes that the trial
14 court has the authority to make such appointments. The language is in the permissive as
15 defendants may object to such mental health examinations. A.R.S. § 13-703.03(A).

16 **C. RULE 13.5. Amendment of the Charges; Defects in the Charging Document.**

17 **Rule 13.5(a).**

18 The proposed change to Rule 13.5(a) recognizes that the changes mandated by
19 *Apprendi* will apply in non-capital sentencing cases as well. In the non-capital sentencing
20 area, there are sentencing allegations that now must be presented to the jury. See e.g. *State*

1 v. *Gross*, 201 Ariz. 41, 31 P.3d 815 (App. 2001) (*Apprendi* requires that the State must
2 prove to a jury that the defendant was on pretrial release before a sentence can be
3 enhanced under A.R.S. § 13-604(R)). Rather than listing all of the potential areas that
4 may apply, the amendment just recognizes that such factors exist and the prosecutor must
5 add such allegations within the time limits of Rule 16.
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8 **Rule 13.5(c)**

9 The change in Rule 13.5(c) is not a substantive change. The added language appears
10 now in Rule 19.1(c). Rule 19 deals with the order of proceedings. The current version
11 of Rule 19.1(b) dealing with proving prior convictions to a jury is inconsistent with
12 A.R.S. § 13-604(P) that provides that prior convictions should be tried to the trial court.
13 The language in current Rule 19.1(c) should be moved to Rule 13.5 to give fair warning
14 to practitioners that sentencing allegations can be challenged by motion.
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17 **Rule 13.5(d).**

18 Rule 15.1(j) requires the State to file a notice of intent to seek the death penalty
19 and to notify the defense of the potential aggravating circumstances. *See also* A.R.S. §
20 13-703.01(B) (State must file notice of aggravating circumstances before trial). Rule
21 13.5(d) makes clear that once the State properly files its notice, no further filings are
22 required under Rule 13. A properly filed notice under Rule 15 should be sufficient to
23 amend the indictment or information and give notice to the defense of the aggravating
24 circumstances to be tried.
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1 Recently amended Rule 15.1 allows the State to file its notice of intent to seek the
2 death penalty up to 60 days after arraignment. This change should be maintained. If the
3 State is required to decide whether to seek the death penalty at the time of the indictment
4 or filing of the complaint, many more capital allegations will be filed needlessly. For
5 example, according to the data compiled by the Arizona Capital Case Commission, in
6 Arizona a notice of intent to seek the death penalty was filed in only 39.2% of the first-
7 degree murder indictments filed between 1995-99. Exhibit No. 2, Data Set II, Summary
8 of 1995-1999 Arizona First-degree Murder Cases, Arizona Capital Case Commission
9 (Data Set II) (June 2002). Of those cases where the State initially sought the death
10 penalty, the State went to trial in 51.2% of the cases. *Id.* This trial rate is significantly
11 higher than the 39.8% of non-death noticed cases taken to trial. *Id.* In many of the death-
12 noticed cases the State did not take to trial, the State dropped the death penalty notice
13 after having time to further evaluate the case.
14

15 The filing of a death notice is an important event as it triggers the appointment of
16 two attorneys and results in other costs to a county and the State. See e.g. Rule 6, Ariz.
17 R. Crim. Pro.; A.R.S. §§ 13-703.02 and 13-703.03. There are strong public policy reasons
18 to allow prosecutors sufficient time to evaluate whether a particular case should be filed
19 as a capital case. The Capital Case Commission strongly supported the proposal to extend
20 the time to file a notice seeking the death penalty from 30 to 60 days after arraignment.
21 This Court adopted the Capital Case Commission's recommendation.
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1 In many cases, the decision whether a case is capital or not cannot be made at the
2 time of indictment or filing of a complaint. The prosecuting agency may have to file a
3 complaint or get an indictment quickly after a murder takes place to secure the
4 incarceration of a defendant. It is ill advised to force the prosecutor to have to make the
5 decision whether to seek the death penalty at such an early time in the proceedings. If the
6 State is precluded from seeking the death penalty unless it files the death allegation in the
7 charging document, the State will be forced to file death notices in more cases to preserve
8 its right to do so while it investigates the case. Forced haste in the charging decision will
9 result in unnecessary expenditures of resources in cases that the State ultimately decides
10 not to seek the death penalty.
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15 Once the State decides to file its notice of intent to seek the death penalty, proposed
16 Rule 15.1(j)(2), provides that in the notice the State will allege those aggravating
17 circumstances that it will use at the aggravation hearing under § 13-703.01(C). Proposed
18 Rule 13.5(d) provides that the defendant may challenge the legal sufficiency to allege a
19 particular aggravating circumstance prior to trial. This is a significant change. Current
20 Rule 15.1(j)(2) specifically prohibits challenging the propriety of an aggravating
21 circumstance until the sentencing hearing.
22

23
24 The law regarding whether aggravating circumstances have to be in the charging
25 document is unclear. Defendants argue that because the United States Supreme Court
26 stated that Arizona's enumerated aggravating factors operate as "the functional equivalent
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1 of an element of a greater offense,”¹ aggravating circumstances must be included in the
2 charging document. Only if the aggravating circumstances are in the charging document
3 does it satisfy the provisions of the Arizona Constitution and the Rules of Criminal
4 Procedure that mandate a probable cause determination regarding the elements of felony
5 offenses.
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8 There is, however, a counter argument. Although aggravating circumstances may
9 be the “functional equivalent” of elements of capital murder, they have not been held by
10 any court to be elements, *per se*. The United State Supreme Court has stated that
11 “Aggravating circumstances are not separate penalties or offenses, but are ‘standards to
12 guide the making of [the] choice’ between the alternative verdicts of death or life
13 imprisonment.” *Poland v. Arizona*, 476 U.S. 147, 156, 106 S.Ct. 1749 (1986) (quoting
14 *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S.Ct. 1852 (1981)). Neither *Ring* nor
15 *Apprendi* altered that characterization. *Cf. Floyd v. State*, 42 P.3d 249, 256 (Nev. 2002)
16 (holding that a probable cause finding is not necessary for the State to allege aggravating
17 circumstances and seek death penalty). Therefore, the State need not allege in the
18 charging document, the aggravating circumstances to be proved in a capital case.
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23 This Court will ultimately have to decide which argument is correct. The State
24 believes it is better to decide such an important question earlier rather than later. If this
25 Court holds that the aggravating circumstances have to be in the charging document, then
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28 ¹ *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19, 120 S.Ct. 2348 (1999), *quoted in Ring v. Arizona*,

1 many first-degree murder cases will have to be sent back to the grand jury, or remanded
2 for a preliminary hearing, on the issue. The State believes that a compromise will satisfy
3 any concern the Court may have.
4

5 The purpose of requiring a probable cause determination on "elements" before trial
6 is for notice and to ensure that a defendant is not needlessly forced to stand trial for a
7 crime the State cannot prove. While the State does not believe that aggravating
8 circumstances are "elements," the State's proposal will allow the defendant to request a
9 determination of probable cause before trial if the defense deems it appropriate. This
10 would allow the State the opportunity to investigate the crime and the defendant's
11 background with sufficient deliberation before filing the death notice with aggravators.
12 If the defendant believes the State has improperly noticed an aggravator, the court can
13 determine whether there is legal sufficiency. Due process would be satisfied, and the
14 policy of allowing the State to properly evaluate a case before filing the death notice
15 would be preserved. This is the system Arizona has used in the non-capital area for
16 sentence enhancements for many years.
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21 **D. Rule 15.1. Disclosure by the State**

22 **Rule 15.1(j)(2)**

23 The changes to this rule are discussed under Rule 13.5(d).
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28 ___ U.S. ___, 122 S.Ct. 2428, 2443 (2002).

1 **Rule 15.1(j)(3)**

2 The current rule allows the prosecutor to supplement its disclosure of aggravating
3 circumstances up to 10 days after the verdict. This is no longer viable under SB 1001.
4 See A.R.S. § 13-703.01(B)(Aggravating circumstances must be noticed before trial).
5 Under the proposed new rule, if the State wishes to amend its notice of intent to seek the
6 death penalty to include additional aggravating circumstances, it would have to file a
7 motion under Rule 16. Rule 16.1(b) provides that such motions should be filed not later
8 than 20 days prior to trial.
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12 **Rule 15.1(j)(4)**

13 The proposed change to this rule allows the State 30 days after it files its notice of
14 intent to seek the death penalty to disclose what evidence and witnesses it will rely on to
15 prove the noticed aggravating circumstances.
16

17 **Rule 15.1(j)(6)**

18 The proposed change to this rule mandates that 60 days after the State receives the
19 Defendant's notice of mitigation, the State will provide to the defense full disclosure of
20 rebuttal evidence that the State will offer at the penalty phase of the capital sentencing.
21 Corresponding Rule 15.2(g)(1), allows the defense 60 days after receiving the State's
22 notice of aggravation to provide to the State its notice of mitigation and the evidence to
23 be produced at the aggravation or penalty hearings.
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1 **E. RULE 15.2. Disclosure by Defendant.**

2 **Rule 15.2(g)(1)**

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4 The proposed changes to this rule require the defense to notice its mitigation and
5 the evidence it intends to produce at the aggravation and penalty hearings 60 days after
6 the defense receives the State's discovery regarding aggravation. When this 60-day time
7 starts to run for the defense to disclose its mitigation, the defense will have received the
8 State's guilt and aggravation disclosure under Rule 15.1.
9

10 **Rule 15.2(g)(4)**

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12 The proposed changes to this rule require the defense to notice any rebuttal
13 evidence that it intends to present at the penalty hearing 30 days after the State discloses
14 the evidence it will present at the penalty hearing.
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16 **F. RULE 15.9 Appointment of Investigators and Expert Witnesses for Indigent**
17 **Defendants.**

18 **Rule 15.9(c)**

19 To ensure that the case is handled in a timely manner, the change in this Rule
20 requires the defense to move for experts and mitigation specialists no later than 30 days
21 after it receives the State's disclosure of aggravation evidence. Without imposing a time
22 requirement of 30 days after receiving the State's disclosure to ask for experts, there is no
23 reasonable likelihood that the defense will be able to make its disclosure of noticing the
24 experts and reports at 60 days after the State's disclosure.
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1 **Rule 15.9 (d)**

2 In *State v. Apelt*, 176 Ariz. 349, 365, 861 P.2d 634, 650 (1993), this Court held that
3 a trial court should not hold an *ex parte* hearing on a request for expert assistance under
4 A.R.S. § 13-4013. This Court rejected the notion that a defendant needed such hearing
5 to avoid "tipping his hand" to the prosecution. *See also*, Canon 3(A)(4), Code of Judicial
6 Conduct (forbidding *ex parte* proceedings except where authorized by law). This Court
7 likewise found that the Fourteenth Amendment's guarantees of due process and equal
8 protection do not encompass such a right.

9
10 Given broad disclosure required by the Arizona Rules of Criminal Procedure, an *ex*
11 *parte* hearing on the defendant's request for assistance would simply result in delay in
12 alerting the State to potential areas of investigation, thereby further delaying the system.
13 Based on these arguments, the Capital Case Commission recommended that Rule 15.9
14 reflect the status of the law and prohibit *ex parte* communication on requests for experts.
15 This Court initially agreed, then removed the language. The Maricopa County Attorney
16 requests that the Court adopt such limiting language.

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18 **G. RULE 18.1 Trial by Jury.**

19 This rule should be amended to reflect that the defendant may waive his right to
20 a jury sentencing if the State concurs. A.R.S. § 13-703.01(R)(1).
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H. RULE 18.5. Procedure for Selecting a Jury

Rule 18.5(i)

A.R.S. § 13-703.01(M) provides that alternate jurors impaneled for the trial shall not be excused from the case until the penalty is decided. If the alternate juror has not heard the evidence and argument of counsel at the aggravation or penalty hearings, the juror would not be qualified to deliberate if substituted into the jury. The changes to Rule 18.5(i), allow alternate jurors to listen to the evidence and argument of counsel at the aggravation or penalty hearings so that they could deliberate with the jury if called on.

I. Rule 18.6 Preparation of Jurors.

The change to this rule simply allows jurors in a capital case to maintain their notes until the conclusion of the penalty phase.

J. Rule 19.1. Conduct of Trial

Rule 19.1(b).

The changes proposed in this rule are mentioned in the comments to Rule 13.5. The changes allow for non-capital sentencing allegations that must be found by a jury to be presented after the jury has rendered a verdict concerning the defendant's guilt. See *Apprendi v. New Jersey, supra*. The change also recognizes the change in Arizona law that jurors do not determine prior convictions. A.R.S. § 13-604(P).

Rule 19.1(c).

Former Rule 19.1(c) is moved to Rule 13.5 for consistency. New Rule 19.1(c)

1 provides the order of proceedings in the aggravation phase of a capital sentencing.

2 Because the State must prove the aggravators beyond a reasonable doubt, and the rules
3 of criminal procedure apply, the order of proceedings is like that of the trial of guilt. The
4 State goes first. The Defense may then present its case. The State has rebuttal. Argument
5 is the same with the State going first and last.
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8 **Rule 19.1(d)**

9 Proposed Rule 19.1(d) recognizes the fact that in the penalty phase of the
10 proceeding, the defense has the burden of proof. A.R.S. § 13-703(C). The defense goes
11 first. The State may then present its evidence. The defendant then offers any statement
12 in allocution. The defense has first and last closing argument.
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15 **K. RULE 20. Judgment of Acquittal**

16 The proposed changes to Rule 20 reflect that if the state fails to present "substantial
17 evidence" that an aggravating circumstance exists, the trial court may direct a verdict for
18 the Defendant at the aggravation hearing. There is no corresponding provision at the
19 penalty phase as the burden is on the Defendant, and the State cannot have a directed
20 verdict in its favor.
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23 **L. RULE 23.2. Types of Verdict.**

24 The changes to this rule reflect the new verdicts that a jury must render—
25 aggravation and penalty.
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M. RULE 24. Motion for New Trial.

The changes to this rule reflect that a Defendant may move to have a new aggravation or penalty hearing. The listed bases for the new trial are the same as for a guilty verdict.

N. RULE 26.2. Time of Rendering Judgment

The changes to this rule reflect that the trial court shall enter the judgment and sentence upon the return of a capital verdict. When entered, the trial court orders the Clerk of Court to submit the same material to the Department of Corrections that would be sent for a non-capital sentence.

O. RULE 26.3. Date of Sentencing Extension.

Rule 26.3(c) is deleted. This rule is no longer required as the jury determines the sentence and there is no longer a sentencing hearing before the trial court.

P. RULE 26.9. Presence of the Defendant

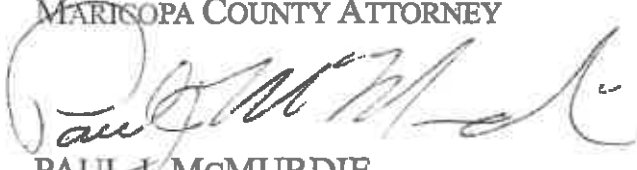
The change to this rule recognizes that the Defendant has the right to be present during the aggravation and penalty phases of the capital sentencing proceeding and the return of the verdicts.

Q. RULE 26.10. Pronouncement of Judgment and Sentence.

The change to this rule simply recognizes that the trial court does not impose a sentence in a capital charge.

1 RESPECTFULLY SUBMITTED this 26th day of August, 2002.

2
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5 
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RULE 8.2. Time limits

a. General. Subject to the provisions of Rule 8. 4, every person against whom an indictment, information or complaint is filed shall be tried by the court having jurisdiction of the offense within the following time periods:

(1) **Defendants in Custody.** 150 days from arraignment if the person is held in custody, except as provided in subsection (a), paragraph (3) of this section.

(2) **Defendants Released From Custody.** 180 days from arraignment if the person is released under Rule 7, except as provided in subsection (a), paragraph (3) of this section.

(3). **Complex Cases.** 270 days from arraignment if the person is charged with any of the following:

(i) 1st Degree Murder, except as provided in paragraph (a)(4) of this rule,

(ii) Offenses that will require the court to consider evidence obtained as the result of an order permitting the interception of wire, electronic or oral communication,

(iii) Any complex cases as determined by a written factual finding by the court.

(4). **Capital Cases.** One year from arraignment. if the state files a notice of intent to seek the death penalty.

b. Waiver of Appearance at Arraignment. If a person has waived an appearance at arraignment pursuant to Rule 14.2, the date of the arraignment held without the defendant's presence shall be considered the arraignment date for purposes of Section (a), Paragraphs (1), (2), ~~and~~ (3) and (4) of this rule.

....

RULE 11.2. Motion to have defendant's mental condition examined

a. Motion for Rule 11 Examination. At any time after an information or complaint is filed or indictment returned, any party may request in writing, or the court on its own motion may order, an examination to determine whether a defendant is competent to stand trial, or to investigate the defendant's mental condition at the time of the offense. The motion shall state the facts upon which the mental examination is sought. On the motion of or with the consent of the defendant, the court may order a screening examination for a guilty except insane plea pursuant to A.R.S. § 13-502 to be conducted by the mental health expert. In a capital case, the court may order the defendant to undergo mental health examinations as required under A.R.S. §§ 13-703.02 and 13-703.03.

• • • •

RULE 13.5. Amendment of the charges; defects in the charging document

a. Prior Convictions and Other Non-Capital Sentencing Allegations. The prosecutor may amend an indictment, information or complaint to add an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b).

b. Altering the Charges; Amendment to Conform to the Evidence. The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

c. Defects in Charging Document. No issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16. A defendant may challenge the legal sufficiency of an alleged prior conviction or non-capital sentencing allegation that must be found by a jury by motion filed pursuant to Rule 16.

d. Capital Sentencing Allegations. The filing of a notice to seek the death penalty with noticed aggravating circumstances shall amend the charging document, and no further pleading needs to be filed. A defendant may challenge the legal sufficiency of an alleged aggravating circumstance by motion filed pursuant to Rule 16.

RULE 15.1. Disclosure by State

....

(j). Additional Disclosure in a Capital Case.

(1) The prosecutor, no later than 60 days after the arraignment in superior court, shall provide to the defendant notice of whether the prosecutor intends to seek the death penalty. This period may be extended for thirty days upon stipulation of counsel. Additional extensions may be granted upon motion of the state and approval of the court.

(2) If the prosecutor files notice of intent to seek the death penalty, the prosecutor shall at the same time provide the defendant with a list of aggravating ~~circumstances~~ factors ~~relied upon by the state will rely on at the aggravation hearing in deciding to seek~~ seeking the death penalty. ~~The court shall not consider any motion challenging the propriety of a listed aggravating factor prior to the presentence hearing.~~

~~(3) The prosecutor shall supplement disclosure of any additional aggravating factors no later than ten days after the verdict.~~

~~(4)~~ (3) The prosecutor, no later than ~~10~~ 30 days after ~~a verdict~~ filing a notice to seek the death penalty, shall provide to the defendant the following:

(a) The names and addresses of all persons whom the prosecutor will call as witnesses to support each identified aggravating circumstance at the ~~pre-sentence~~ aggravation hearing together with any written or recorded statements of the witness.

(b) The names and addresses of experts who may be called to support each identified aggravating circumstance at the ~~pre-sentence~~ aggravation hearing together with any written or recorded statements or notes of the expert.

(c) A list of any and all papers, documents, photographs or tangible objects ~~which~~ that the prosecutor will use to support each identified aggravating circumstance at the ~~pre-sentence~~ aggravation hearing.

(d) All material or information, which might mitigate or negate the finding of an aggravating ~~factor~~ circumstance or mitigate the defendant's culpability.

~~(54)~~ The trial court may enlarge the time or allow the notice required in subsection ~~(43)~~ above to be amended only upon a showing of good cause by the prosecution, or upon stipulation of counsel and approval of the court.

~~(65)~~ A violation of the prosecutor's duty of disclosure pursuant to this rule shall result in any sanction authorized by Rule 15.7.

~~(76)~~ Within ~~15~~ 60 days of receipt of the disclosure required under Rule 15.2(g)(1), the prosecutor shall disclose the names and addresses of all persons whom the prosecutor shall call as rebuttal witnesses on each identified aggravating circumstance together with any written or recorded statements of the witness. The prosecutor shall also disclose the names and addresses of all persons the state will call as witnesses at the penalty hearing together with any written or recorded statements of the witness. The prosecutor shall also provide the names and addresses of experts who may be called at the penalty hearing together with any reports or notes prepared by the expert.

RULE 15.2. Disclosure by Defendant

....

g. Additional Disclosure in a Capital Case.

(1) Within ~~20~~ 60 days after ~~a verdict of first degree murder in a case where the~~ prosecutor receiving the state's disclosure pursuant to rule 15.1(j)(3) is seeking the ~~death penalty~~, the defendant shall provide to the prosecutor:

(a) A list of all mitigating circumstances intended to be proved.

(b) The names and addresses of all persons, other than the defendant, who shall be called as witnesses during the ~~pre-sentence~~ aggravation or penalty hearing hearings, together with all written or recorded statements of the witnesses.

(c) The names and addresses of any experts who the defendant will call during the ~~pre-sentence~~ aggravation or penalty hearing hearings together with any reports or notes prepared excluding the defendant's statements,

(d) A list of any and all papers, documents, photographs or tangible objects, which the defendant will use during the ~~pre-sentence~~ aggravation or penalty hearing hearings.

(2) The trial court may enlarge the time or allow the notice required in subsection (1) above to be amended only upon a showing of good cause by the defendant or upon stipulation of counsel and approval of the court.

(3) A violation of defendant's duty of disclosure pursuant to this rule shall result in any sanction authorized by Rule 15.7.

(4) Within 30 days of receiving the state's supplemental disclosure pursuant Rule 15.1(j)(6), the defense shall disclose any rebuttal witnesses or experts to be called at the penalty hearing, together with any reports or notes and all written or recorded statements of the witnesses.

RULE 15.9. Appointment of investigators and expert witnesses for indigent defendants

a. An indigent defendant may apply for the appointment of an investigator and expert witness, and in a capital case an indigent defendant may also apply for the appointment of a mitigation specialist, to be paid at county expense if the defendant can show that such assistance is reasonably necessary to present a defense adequately at trial or sentencing.

b. As used in this rule, a "mitigation specialist" is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigation evidence.

c. In a capital case, any motion for experts or mitigation specialists shall be made no later than 30 days after the state makes its disclosure pursuant to Rule 15.1(j)(3).

d. Unless the defendant can show a manifest necessity, a motion under this rule shall not be made ex parte.

Rule 18.1. Trial by jury

a. **By Jury.** The number of jurors required to try a case and render a verdict shall be as provided by law.

b. **Waiver.** The defendant may waive ~~his or her~~ the right to trial by jury with consent of the prosecution and the court. In a capital case, the defendant may also waive the right to have a jury determine aggravation or the penalty if the prosecution and the court concur.

(1) **Voluntariness.** Before accepting a waiver the court shall address the defendant personally, advise the defendant of his or her right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent.

(2) **Form of Waiver.** A waiver of jury trial under this rule shall be made in writing or in open court on the record.

(3) **Withdrawal of Waiver.** With the permission of the court, the defendant may withdraw ~~his or her~~ the waiver of jury trial or sentencing but no withdrawal shall be permitted after the court begins taking evidence.

Rule 18.5. Procedure for selecting a jury

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i. Deliberations in a Capital Case. In a capital case, alternate jurors not selected to participate in the guilt phase deliberations shall not be excused if the jury returns a guilty verdict of first-degree murder. During the aggravation phase, the alternate jurors shall listen to the evidence and argument presented to the jury. When the jury retires to deliberate on aggravation, the alternate or alternates shall not participate but shall be instructed to continue to observe the admonitions to jurors until they are informed they are discharged. If the jury returns a verdict finding one or more aggravating factors, the alternate jurors shall listen to the evidence and argument presented at the penalty phase. When the jury retires to deliberate on the penalty, the alternate or alternates shall not participate but shall be instructed to continue to observe the admonitions to jurors until they are informed they are discharged. In the event a deliberating juror is excused during either the aggravation or penalty phases due to inability or disqualification to perform required duties, the court may substitute an alternate juror, choosing from among the alternates in the order previously designated, unless disqualified, to join in the deliberations. In the event that an alternate or alternates are substituted during the aggravation or penalty deliberations, the jurors shall only begin anew for the phase of the sentencing that they are currently deliberating. The jurors shall not deliberate anew about a verdict already reached and entered

Rule 18.6. Preparation of jurors

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d. Note Taking; Access to Juror Notes and Notebooks. The court shall instruct the jurors that they may take notes regarding the evidence presented. The court shall provide materials suitable for this purpose. In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by jurors during trial to aid them in performing their duties. Jurors shall have access to their notes and notebooks during recesses and deliberations. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall destroy them promptly. In a capital case, the jurors shall have access to their notes from the trial and all phases of the sentencing proceedings until the jury renders a penalty verdict or is dismissed.

RULE 19.1. Conduct of trial

a. Order of Proceedings. The trial shall proceed in the following order unless otherwise directed by the court:

- (1) The indictment, information or complaint shall be read and the plea of the defendant stated.
- (2) The prosecutor may make an opening statement.
- (3) The defendant may then make an opening statement or may defer such opening statement until the close of the prosecution's evidence.
- (4) The prosecutor shall offer the evidence in support of the charge.
- (5) The defendant may then make an opening statement if it was deferred, and offer evidence in his or her defense.
- (6) Evidence in rebuttal shall then be offered unless the court upon a showing of good cause allows a case-in-chief to be reopened.
- (7) The parties may present arguments, the prosecutor having the opening and closing.
- (8) The judge shall then charge the jury.

With the permission of court, the parties may agree to any other method of proceeding.

b. Proceedings when Defendant is Charged With Prior Convictions or Non-Capital Sentencing Allegations Required to be Found by a Jury. In all prosecutions in which a prior conviction or a non-capital sentencing allegation required to be found by a jury is alleged, unless such conviction or allegation is an element of the crime charged, the procedure shall be as follows:

- (1) The trial shall proceed initially as though the ~~offense charged were a first offense~~ sentencing allegations were not alleged. When the indictment, information or complaint is read all reference to prior offenses or sentencing allegations shall be omitted. During the trial of the case no instructions shall be given, reference made, nor evidence received concerning the non-capital sentencing allegations required to be found by the jury or the prior offenses, except as permitted by the rules of evidence.
- (2) If the verdict is guilty, the issue of the non-capital sentencing allegation required to be found by the jury ~~prior conviction~~ shall then be tried, unless

the defendant has admitted to the allegation the prior conviction. The trial court shall determine the allegation of prior conviction.

~~**c. Challenge of Prior Conviction.** The defendant may also challenge the legal sufficiency of an alleged prior conviction by motion filed pursuant to Rule 16.~~

c. Aggravation Proceeding in a Capital Case. If a defendant is convicted of first-degree murder and the state has filed a notice of intent to seek the death penalty, the aggravation proceedings shall proceed as follows:

- (1) The alleged aggravators shall be read to the jury.
- (2) The prosecutor may make an opening statement.
- (3) The defendant may then make an opening statement or may defer such opening statement until the close of the prosecution's evidence.
- (4) The prosecutor shall offer the evidence in support of the aggravating circumstances alleged.
- (5) The defendant may then make an opening statement if it was deferred, and offer evidence in defense of the alleged circumstances.
- (6) Evidence in rebuttal shall then be offered unless the court upon a showing of good cause allows a case-in-chief to be reopened.
- (7) The parties may present arguments, the prosecutor having the opening and closing.
- (8) The judge shall then charge the jury.

With the permission of court, the parties may agree to any other method of proceeding.

d. Penalty Hearing in a Capital Case. If a jury finds one or more aggravating circumstances, the penalty proceedings shall proceed as follows:

- (1) The defense may make an opening statement.
- (2) The state may then make an opening statement or may defer such opening statement until the close of the defense's evidence.
- (3) The defense shall offer evidence in support of mitigation.
- (4) The state may then make an opening statement if it was deferred, and offer evidence in support of a death sentence.
- (5) The defendant may present statements of allocution to the jury.

- (6) The parties may present arguments, the defense having the opening and closing.
- (7) The judge shall then charge the jury.

With the permission of court, the parties may agree to any other method of proceeding.

RULE 20. Judgement of Acquittal

a. **Before Verdict.** On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction. In an aggravation hearing in a capital case, after the evidence on either side is closed, on a motion of a defendant or on its own initiative, the court shall enter a judgment that an aggravating circumstance was not proven if there is no substantial evidence to warrant the allegation. The court's decision on a defendant's motion shall not be reserved, but shall be made with all possible speed.

b. **After Verdict.** A motion for judgment of acquittal made before verdict may be renewed by a defendant within 10 days after the verdict was returned.

RULE 23.2. Types of verdict

a. General Verdicts. Except as otherwise specified in this rule, the jury shall in all cases render a verdict finding the defendant either guilty or not guilty.

b. Insanity Verdicts. When the jury determines that a defendant is guilty except insane, the verdict shall so state.

c. Different Offenses. If different counts or offenses are charged in the indictment or information, the verdict shall specify each count or offense of which the defendant has been found guilty or not guilty.

d. Different Degrees. When the verdict of guilty is to an offense which is divided into degrees, the verdict shall specify the degree of which the defendant has been found guilty.

e. Aggravation Verdict. In a capital case, at the conclusion of the aggravation hearing, the jury shall render a verdict determining whether the alleged aggravating circumstances were proven or not.

f. Capital Verdict. In a capital case, at the conclusion of the penalty hearing, the jury shall render a verdict determining whether to impose a sentence of death.

RULE 24.1. Motion for new trial

a. **Power of the Court.** When the defendant has been found guilty by a jury or by the court, or sentenced to death by a jury, the court on motion of the defendant, or on its own initiative with the consent of the defendant, may order a new trial or, in a capital case, an aggravation or penalty hearing.

b. **Timeliness.** A motion for a new trial shall be made no later than 10 days after the verdict has been rendered.

c. **Grounds.** The court may grant a new trial or aggravation or penalty hearing for any of the following reasons:

- (1) The verdict is contrary to law or to the weight of the evidence;
- (2) The prosecutor has been guilty of misconduct;
- (3) A juror or jurors have been guilty of misconduct by:
 - (i) Receiving evidence not properly admitted during the trial or the aggravation or penalty hearing;
 - (ii) Deciding the verdict by lot;
 - (iii) Perjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination;
 - (iv) Receiving a bribe or pledging his or her vote in any other way;
 - (v) Becoming intoxicated during the course of the deliberations; or
 - (vi) Conversing before the verdict with any interested party about the outcome of the case;
- (4) The court has erred in the decision of a matter of law, or in the instruction of the jury on a matter of law to the substantial prejudice of a party;
- (5) For any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial or capital sentencing.

d. **Admissibility of Juror Evidence to Impeach the Verdict.** Whenever the validity of a verdict is challenged under Rule 24.1(c)(3), the court may receive the testimony or affidavit of any witness, including members of the jury, which relates to the conduct of a juror, official of the court, or third person. No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict.

RULE 26.2. Time of Rendering Judgement

a. **Upon Acquittal.** When a defendant is acquitted of any charge, or of any count of any charge, judgment pertaining to that count or to that charge shall be pronounced and entered immediately.

b. **Upon Conviction.** Upon a determination of guilt on any charge, or on any count of any charge, judgment pertaining to that count or to that charge shall be pronounced and entered together with the sentence.

c. **Upon a jury verdict of death.** Upon a jury verdict of death, the court shall immediately enter the judgement and sentence. The court shall direct the Clerk of Court to send to the Department of Corrections, along with the sentencing order, copies of all medical and mental health reports prepared as to or relating to the defendant sentenced to death.

e d. **Factual Determination.** In the event the trial court did not make an affirmative finding of a factual basis for the plea pursuant to Rule 17.3, before the entry of the judgment of guilt the trial court shall make such determination. One or more of the following sources may be considered: statements made by the defendant; police reports; reporter's transcripts of the proceedings before the grand jury; and other satisfactory information.

RULE 26.3. Date of sentencing extension

a. Date of Sentencing.

(1) **Superior Court.** Upon a determination of guilt, the court shall set a date for sentencing. Sentence shall be pronounced not less than 15 nor more than 30 days after the determination of guilt unless the court, after advising the defendant of his or her right to a pre-sentence report, grants his or her request that sentence be pronounced earlier.

(2) **Courts of Limited Jurisdiction.** In limited jurisdiction courts, sentence may be pronounced immediately upon determination of guilt unless the court on its own motion, or upon request of a party or victim, orders that sentence should be pronounced at a later date, not more than 30 days after determination of guilt.

b. Extension of Time. If a pre-sentencing hearing is requested under Rule 26.7, or if good cause is shown, the trial court may reset the date of sentencing within 60 days after the determination of guilt.

c. Capital Case.

~~(1) Upon a determination of guilt in a capital case, the trial court shall set a date for the aggravation/mitigation hearing if the state, pursuant to Rule 15.1(g)(4), is not precluded from and is seeking the death penalty. The penalty hearing shall be held not less than 60 days nor more than 90 days after the determination of guilt unless good cause is shown. Upon a showing of good cause, the trial court may grant additional time for the hearing subject to the limitation of subparagraph (2) below.~~

~~(2) A pre-aggravation/mitigation conference shall be held after the return of a guilty verdict of first degree murder in a capital case no more than 10 days before the aggravation/mitigation hearing.~~

~~(3) At the aggravation/mitigation hearing, the trial court shall allow the victim, as defined in A.R.S. § 13-703(H)(2), to be heard regarding the murdered person and the impact of the murder on the victim and other family members. The trial court shall consider the information presented by the victim in accordance with the provisions of A.R.S. § 13-703(D).~~

~~(4) At the aggravation/mitigation hearing, the trial court shall allow the defendant the right of allocution.~~

~~(5) Upon completion of the aggravation/mitigation hearing, the trial court shall set a date for the return of the special verdict and sentencing. The return of the special verdict and sentencing shall occur no earlier than 7 days after the completion of the aggravation/mitigation hearing, to ensure that the trial court has adequate time prior to the preparation of the special verdict to consider the evidence, information, and arguments presented at the aggravation/mitigation hearing.~~

~~(6) As to capital counts, the presentence report writer shall not solicit or include in any presentence report the victims' recommendations with respect to the capital sentencing decision. The presentence report writer shall explain to the victims this rule, its comments, and the provisions of A.R.S. § 13-703(D).~~

RULE 26.9. Presence of the Defendant.

The defendant is entitled to be present at a pre-sentencing hearing and shall be present at sentencing. In a capital case, the defendant is entitled to be present at both the aggravation and penalty hearings, and the return of any verdict.

RULE 26.10. Pronouncement of Judgement and Sentence in Non-Capital Cases.

a. Pronouncement of Judgment. In pronouncing judgment on non-capital counts, the court shall set forth the defendant's plea, the offense of which the defendant was convicted or found guilty, and a determination of whether the offense falls in the categories of dangerous, nondangerous, and repetitive or non-repetitive.

b. Pronouncement of Sentence. The Court shall:

- (1) Give the defendant an opportunity to speak on his or her own behalf;
- (2) State that it has considered the time the defendant has spent in custody on the present charge;
- (3) Explain to the defendant the terms of the sentence or probation;
- (4) Specify the commencement date for the term of imprisonment and a computation of time to be credited against the sentence as required by law; and
- (5) Direct the Clerk of Court to send to the Department of Corrections, along with the sentencing order, copies of all pre-sentence reports, probation violation reports, medical and mental health reports prepared as to or relating to the defendant sentenced.