The Aggravating Circumstances of Arizona's Death Penalty Statute: A Review

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I felt that my senses were leaving me. The sentence—the dread sentence of death—was the last of distinct accentuation which reached my ears. . . . I saw. . . the lips of black-robed judges. . . fashion the syllables of my name; and I shuddered because no sound succeeded. . . . And then there stole into my fancy, like a rich musical note, the thought of what sweet rest there must be in the grave. The thought came gently and stealthily . . . but just as my spirit came at length . . . to feel and entertain it, . . . the judges vanished . . . darkness supervened. . . . Then silence, and stillness, and night were the universe.

—Edgar Allan Poe,
The Pit and the Pendulum[1]

The death penalty pervades world history in one form or another.[2] Socrates was forced to drink hemlock, Christ was crucified, Joan of Arc was burned at the stake, and Mary, Queen of Scots, was beheaded.[3] The methods of execution have taken many other forms including boiling, stoning, strangling, crushing (by elephant foot), and slicing ("death by the thousand cuts").[4] Capital punishment in the United States has undergone a similar history of change: changes in execution methods[5] and, more im-

1. THE ANNOTATED TALES OF EDGAR ALLAN POE 121 (S. Peithman ed. 1981).

2. *See generally* J. LAURENCE, A HISTORY OF CAPITAL PUNISHMENT (1960); Andersen, *An Eye for an Eye*, TIME, Jan. 24, 1983, at 28-39.

3. *See* J. LAURENCE, *supra* note 2, at 29, 221-22; N.K. TEETERS, ". . . HANG BY THE NECK . . ." 102 (1967); Andersen, *supra* note 2, at 36 (article insert entitled "Revenge Is The Mother of Invention").

4. Andersen, *supra* note 2, at 36 (article insert entitled "Revenge Is The Mother of Invention").

5. *See* Andersen, *supra* note 2, at 28, 30, 38. Hanging was the common American form of execution through the 1800s. Today, it is still permissible in four states. *Id.* at 30, 38. Fifteen electric chairs, nine gas chambers, and several firing squad facilities are also presently a part of the American penal system. *Id.* at 28. The world's first and most prolific electric chair, nicknamed "Old Sparky," still resides in New York and was responsible for 695 executions from 1890 to 1963. *Id.* The newest method of execution is lethal anesthesia injection which has been adopted in five states. *Id.* In December, 1982, in Texas, Charlie Brooks, Jr. became the first recipient of a lethal injection. *Id.*

In Arizona, the only approved method of execution is death by lethal gas. ARIZ. REV. STAT. ANN. § 13-704 (Supp. 1983).

portantly, changes in American capital sentencing procedures. Sentencing has evolved from unlimited judicial discretion[6] to crafted statutory schemes designed to provide the sentencer with some guidance.[7] Recent legal history regarding capital punishment provides the explanation for this change.

In 1972, the United States Supreme Court in *Furman v. Georgia*[8] condemned all death penalty statutes that allowed unguided discretionary sentencing.[9] The effect of this decision was an overnight abolition of the death penalty in America.[10] The legal community analyzed the splintered 5-4 decision and noted an apparent consensus among the majority justices: the constitutionality of capital punishment statutes is initially dependent on the presence of sufficient standards that guide the sentencer and that circumvent the possibility that the death penalty might be indiscriminately imposed.[11] Consequently, state legislatures redesigned their capital statutes in conformity with this interpretation of *Furman*.[12] It was not until 1976, however, that the Supreme Court again addressed the issue of capital

6. Two pronounced examples in American history of discretionary capital sentencing are the Salem witch trials of the seventeenth century and the "hanging judges" of the Old West during the middle and later nineteenth century. *See* N.K. TEETERS, *supra* note 3, at 128-32, 136-50, 398-404. The condemned men and women of Salem, Massachusetts were "pathetic and tragic victims to [sic] superstition and colonial hysteria and bigotry." *Id.* at 136; *see also*, ARTHUR MILLER, THE CRUCIBLE (1953) (a play that vividly captures the consequences of the Salem hysteria).

Two centuries later, America's untamed western frontier and its people inspired a new breed of swift, discretionary justice. Its administrators were dubbed "hanging judges." *See* N.K. TEETERS, *supra* note 3, at 398-404; P. TRACHTMAN, THE OLD WEST: THE GUNFIGHTERS 136-65 (1974). One of the most notorious of these sentencers was Isaac Charles Parker, a federal judge in Fort Smith, Arkansas, who sentenced 172 persons to death during his twenty-one year term. N.K. TEETERS, *supra* note 3, at 398-99. Parker's court (which was "open from 8:30 a.m. to nightfall six days a week" and, if necessary, during the evening) received mixed reviews from his contemporaries. Historians have both defended and questioned his motivations. P. TRACHTMAN, *supra*, at 149-50, 153, 155, 157, 163-64. Despite his sentencing record, Parker, himself, favored abolition of the death penalty "provided that there is a certainty of punishment, whatever that punishment may be, for in the uncertainty of punishment following crime lies the weakness of our halting justice." P. TRACHTMAN, *supra*, at 157.

7. *See* THE DEATH PENALTY IN AMERICA 247-88 (H.A. Bedau 3d ed. 1982), a compilation of articles on different aspects of American capital punishment (e.g. public opinion, the ethnic composition of each state's death row, deterrence theories, arguments for and against capital punishment, etc.).

8. 408 U.S. 238 (1972) (per curiam).

9. The format of the *Furman* decision is peculiar. In a short per curiam opinion, the Court held that imposition of a death sentence in the cases at bar constituted cruel and unusual punishment in violation of the eight amendment, applicable to the states by the fourteenth amendment. 408 U.S. at 239-40. The holding is followed by nine separate opinions which comprise the 5-4 vote. Two justices believed that the death penalty is cruel and unusual punishment in all cases. *Id.* at 305 (Brennan, J., concurring); *id.* at 369-71 (Marshall, J., concurring). Both justices maintain this position to the present day. *See* Pulley v. Harris, 104 S. Ct. 871, 891 (1984) (Brennan & Marshall, JJ., dissenting). Three justices based their decision, at least in part, on the rationale that discretionary sentencing results in arbitrary imposition of the death sentence and, therefore, violates the eighth amendment. *See* 408 U.S. at 256-57 (Douglas, J., concurring); *id.* at 313-14 (White, J., concurring); *id* at 309-10 (Stewart, J., concurring). The remaining four justices (Burger, C.J., Blackmun, Powell, and Rehnquist, JJ.) filed dissenting opinions. 408 U.S. at 375-470.

10. *See* THE DEATH PENALTY IN AMERICA 249-50 (H.A. Bedau 3d ed. 1982); *To Die or Not to Die*, NEWSWEEK, Oct. 17, 1983, at 44.

An interesting description of public reaction to *Furman* can be found in M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 289-91 (1973).

11. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). Justices Douglas and White expressed a similar sentiment in their respective concurrences. *See id.* at 256-57, 313-14.

12. The reaction to *Furman* was "a virtual stampede of State reenactments" by 35 states. R.

punishment. The Court quelled the worries of the uncertain legislators by endorsing several rewritten state statutes.[13] The death penalty in the United States was thus reborn.

Section 13-703 of the Arizona Revised Statutes (A.R.S.) is Arizona's reply to *Furman*.[14] Section 13-703 is an aggravation-mitigation statute that delineates the respective burdens of proof for the prosecution and the defense in a capital proceeding. The prosecution's evidentiary tools of persuasion are seven aggravating circumstances enumerated in section 13-703.[15] Since the enactment of this section, the Arizona Supreme Court has undertaken the task of defining and clarifying the words that constitute the aggravating circumstances.[16] The court's efforts have resulted in a substantially objective standard for invoking the death penalty.

This Note presents a survey of Arizona Supreme Court case law on the aggravating circumstances set forth in section 13-703. The survey begins shortly after the 1976 "rebirth" of capital punishment in the United States[17] and continues up to the present. The general statutory scheme of section 13-703 and the type of appellate review undertaken by the Arizona Supreme Court in capital cases are explored. Each aggravating circumstance is then examined in light of recent Arizona Supreme Court deci-

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BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 125 (1982) (quoting from J.H. ELY, DEMOCRACY AND DISTRUST 65 (1980)).

13. The Court reviewed five death penalty cases on July 7, 1976: Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), Jurek v. Texas, 428 U.S. 262 (1976), Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976).

The Court upheld the aggravation-mitigation sentencing schemes being used in Georgia, *Gregg*, 428 U.S. at 206-07, and in Florida, *Proffitt*, 428 U.S. at 251-53. The Court also approved Texas's new statute which implicitly requires a balancing of aggravating and mitigating circumstances. *Jurek*, 428 U.S. at 270-74, 276. The opinions in *Woodson*, 428 U.S. at 301-05, and *Roberts, 428 U.S. at 331-36*, held mandatory death penalty statutes unconstitutional.

A thorough history of the Supreme Court's tangles with capital punishment can be found in R. BERGER, *supra* note 12.

14. *See* ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1983). Prior to the 1978 Revised Criminal Code, Arizona's death penalty was found at ARIZ. REV. STAT. ANN. § 13-454. *See, e.g.*, State v. Bishop, 127 Ariz. 531, 532, 622 P.2d 478, 479 (1980). For a brief history of Arizona's earlier death penalty statutes, see Note, *Reconstruction of Arizona's Death Penalty Statute under Watson*, 22 ARIZ. L. REV. 1037, 1038 n.10 (1980).

15. ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1983) provides in pertinent part:

F. Aggravating circumstances to be considered shall be the following:
   1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
   2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
   3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.
   4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
   5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
   6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
   7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

16. *See infra* notes 52-148 and accompanying text.

17. The oldest case in this survey is State v. Richmond (*Richmond I*), 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915 (1977).

sions. In particular, the judicial interpretations of the sixth aggravating circumstance—the "especially heinous, cruel or depraved" murder—are emphasized. The case law provides sufficient support for the conclusion that invocation of the death penalty in Arizona is not unconstitutionally arbitrary.

I. THE STATUTORY SCHEME OF SECTION 13-703

In Arizona, persons convicted of first degree murder[18] are sentenced to death or life imprisonment without the possibility of parole for 25 years.[19] The sentencing decision is left to the trial court judge who presides over a statutorily mandated aggravation-mitigation hearing.[20] The

18. First degree murder is statutorily defined as: (1) premeditated murder, or (2) felony-murder: i.e. killing in the perpetration of sexual conduct with a minor, sexual assault, child molestation, certain narcotics offenses, kidnapping, burglary, arson, escape, or an attempt to commit one of these offenses. ARIZ. REV. STAT. ANN. § 13-1105 (Supp. 1983).

Whether the defendant is convicted of premeditated murder or felony-murder is a crucial factor in the capital sentencing scheme because it provides evidence of the defendant's intent to kill. The importance of this factor was announced in Enmund v. Florida, 458 U.S. 782 (1982), in which the United States Supreme Court held that a sentencing scheme that permits the imposition of the death penalty, absent a finding that the defendant killed, attempted to kill or intended to kill his victim, violates the eighth amendment of the United States Constitution (i.e. constitutes cruel and unusual punishment). *Id.* at 788. In *Enmund*, the defendant assisted in the underlying robbery by driving the getaway car. *Id.* at 784. He did not intend or anticipate a killing by his partners, nor was he present at the scene of the murder. *Id.* at 788, 797. The Supreme Court held that Enmund did not possess the intent required to justify a death sentence. *Id.*

The Arizona Supreme Court, applying the *Enmund* holding in recent capital cases, announced that a finding of felony-murder, unlike premeditated murder, does not require that the defendant have the culpability required by *Enmund*. State v. McDaniel, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983). A problem arises when the jury returns a general verdict of first degree murder and does not specify whether its verdict is based on premeditation or an underlying felony. *Id.* Therefore, the supreme court has declared that, absent a finding of premeditated murder, the sentencing judge must determine beyond a reasonable doubt (prior to imposing a death sentence) that the defendant killed, attempted to kill or intended to kill his victim. *Id.*

The *Enmund* culpability standard does not limit the death penalty to those who wield the murder weapon. State v. Gillies, 135 Ariz. 500, 514, 662 P.2d 1007, 1021 (1983) (quoting Johnson v. Zant. 249 Ga. 812, 295 S.E.2d 63 (1982)). Its scope includes anyone who takes an active and deliberate part in the killing. 135 Ariz. at 515, 662 P.2d at 1022 (citing State v. Steelman, 126 Ariz. 19, 21, 612 P.2d 475, 477 (1980).

The Arizona Supreme Court first applied the *Enmund* standard in *State v. Gillies* by noting that the defendant actively participated in the events leading up to the victim's death, was present at the time of the murder, did nothing to interfere with the killing, and provided his accomplice with the murder weapon. 135 Ariz. at 515, 662 P.2d at 1022. In *State v. McDaniel*, the supreme court emphasized the defendant's active and substantial participation in the events leading up to the victim's death. 136 Ariz. at 199, 665 P.2d at 81. In both *Gillies* and *McDaniel*, the court held that for the purposes of *Enmund*, the defendant did in fact kill. *Gillies*, 135 Ariz. at 515, 662 P.2d at 1022. *McDaniel*, 136 Ariz. at 200, 665 P.2d at 82.

It is interesting to note that both before and after *Gillies*, a defendant's minimal participation in the murder is a statutory mitigating circumstance in Arizona. *See* ARIZ. REV. STAT. ANN. § 13-703(G)(3), set out at *infra* note 25; *see also* State v. Schad, 129 Ariz. 557, 573-74, 633 P.2d 366, 382-83 (1981) (the possibility that the defendant was convicted on a felony-murder theory was considered a mitigating circumstance absent evidence of the defendant's specific intent to kill the victim), *cert. denied*, 455 U.S. 983 (1982).

19. ARIZ. REV. STAT. ANN. § 13-703(A).

20. *See* ARIZ. REV. STAT. ANN. § 13-703(B).

There is no constitutional right to jury participation in a capital sentencing decision. State v. McCall, 139 Ariz. 147, 159-60, 677 P.2d 920, 932-33 (1983); State v. Watson, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978), *cert. denied*, 440 U.S. 924 (1979); *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51 (citing Proffitt v. Florida, 428 U.S. 242 (1976)).

The *Watson* court stated that sentencing by an experienced trial judge, instead of a jury,

evidence offered at this hearing allows the judge to decide whether the character and propensities of the defendant merit a death sentence.[21] The prosecution must prove beyond a reasonable doubt[22] the existence of one or more of the seven aggravating circumstances enumerated in section 13-703.[23] Conversely, the defense's burden is to prove the applicability of mitigating circumstances,[24] whether statutorily enumerated or not.[25]

A mitigating circumstance is any factor relevant in determining whether to impose a sentence less than death.[26] The defense's burden of proof is easier than the prosecution's because the defense need only produce uncontroverted credible evidence tending to prove the mitigation it asserts.[27] The defense meets this burden by introducing affirmative evi-

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should lead to greater consistency in the imposition of death penalties. 120 Ariz. at 447, 586 P.2d at 1259 (quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976)).

21. "The punishment should fit the offender and not merely the crime." State v. Valencia (*Valencia I*), 124 Ariz. 139, 141, 602 P.2d 807, 809 (1979) (quoting Williams v. New York, 337 U.S. 241 (1949)). *See also* ARIZ. REV. STAT. ANN. § 13-703(G).

22. State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982); State v. Jordan, 126 Ariz. 283, 286, 614 P.2d 825, 828, *cert. denied*, 449 U.S. 986 (1980).

23. ARIZ. REV. STAT. ANN. § 13-703(C).

It is improper for the court to allow the prosecution to prove any aggravating circumstances not enumerated in the death penalty statute. State v. Clark, 126 Ariz. 428, 435, 616 P.2d 888, 895, *cert. denied*, 449 U.S. 1067 (1980).

The admissibility of evidence that proves an aggravating circumstance is determined by the Arizona (Criminal) Rules of Evidence. State v. Rumsey, 136 Ariz. 166, 171, 665 P.2d 48, 53 (1983); ARIZ. REV. STAT. ANN. § 13-703(C).

24. Section 13-703(G) permits either the defense *or the prosecution* to offer evidence of mitigating circumstances. ARIZ. REV. STAT. ANN. § 13-703(C); *see* State v. Zaragoza, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983). Usually, the defense carries this burden alone because of the adversarial nature of a criminal trial.

Mitigating evidence need not comply with the Arizona (Criminal) Rules of Evidence to be admissible. *Rumsey*, 136 Ariz. at 171 n.6, 665 P.2d at 53 n.6; ARIZ. REV. STAT. ANN. § 13-703(C).

25. In State v. Watson, 120 Ariz. at 445, 586 P.2d at 1257, the court held that a death penalty is unconstitutional if it limits the number of mitigating circumstances to be considered by the sentencer. The court thereby adopted the holding announced in Lockett v. Ohio, 438 U.S. 586 (1978). Shortly thereafter, ARIZ. REV. STAT. ANN. § 13-703(G) was amended to provide for unlimited mitigation.

ARIZ. REV. STAT. ANN. § 13-703(G) provides:

> G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including *but not limited to* the following:
>
> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> 2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
>
> 3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
>
> 5. The defendant's age.

(Emphasis added).

For an analysis of the *Watson* decision, see Note, *supra* note 14.

26. ARIZ. REV. STAT. ANN. § 13-703(G); *Zaragoza*, 135 Ariz. at 70, 659 P.2d at 29.

27. *Zaragoza*, 135 Ariz. at 70, 659 P.2d at 29.

dence; proof does not consist of the absence of contrary evidence.[28] The prosecution is not required to prove the non-existence of mitigating circumstances beyond a reasonable doubt.[29]

The sentencing court considers all admitted evidence, presents its aggravation-mitigation findings in writing,[30] and renders its ultimate decision in the following manner:

1. If the court finds no aggravating circumstances, it sentences the defendant to life imprisonment,[31] or
2. If the court finds at least one aggravating circumstance, and no mitigating circumstances are proven, it imposes the death penalty,[32] or
3. If the court finds that both aggravating and mitigating circumstances are sufficiently proven, it balances them to determine which circumstances are weightier.[33] The gravity, not the number, of proven aggravating circumstances is balanced against the existing mitigating circumstances.[34] If mitigating circumstances outweigh aggravating circumstances, the court exercises leniency in the form of life imprisonment.[35] If, however, the scale tips the other way, the sentence is death.[36]

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28. State v. Greenawalt, 128 Ariz. 150, 173, 624 P.2d 828, 851, *cert. denied*, 454 U.S. 882 (1981).

In *Watson*, the court declared that at the sentencing stage of a criminal proceeding, the defendant has already been found guilty, and therefore, requiring him to demonstrate why he should receive leniency does not violate due process. 120 Ariz. at 447, 586 P.2d at 1259.

29. *Greenawalt*, 128 Ariz. at 173, 624 P.2d at 851 (citing *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978)).

30. ARIZ. REV. STAT. ANN. § 13-703(D). An example of a sentencing court's written findings can be found in State v. Ceja (*Ceja II*), 126 Ariz. 35, 37-39, 612 P.2d 491, 493-95 (1980).

31. State v. Gretzler, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983) (citing ARIZ. REV. STAT. ANN. § 13-703(E)). *See, e.g.*, State v. Madsen, 125 Ariz. 346, 353, 609 P.2d 1046, 1053, *cert. denied*, 449 U.S. 873 (1980); State v. Lujan, 124 Ariz. 365, 373, 604 P.2d 629, 637 (1979).

32. *Gretzler*, 135 Ariz. at 54, 659 P.2d at 13 (citing ARIZ. REV. STAT. ANN. § 13-703(E)). *See also Greenawalt*, 128 Ariz. at 172, 624 P.2d at 850; State v.Mata, 125 Ariz. 233, 242, 609 P.2d 48, 57, *cert. denied*, 449 U.S. 938 (1980).

33. *Gretzler*, 135 Ariz. at 54, 659 P.2d at 13 (citing ARIZ. REV. STAT. ANN. § 13-703(E)).

34. *Gretzler*, 135 Ariz. at 54, 659 P.2d at 13 (citing similar language contained in State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979)).

Some defendants have argued that Arizona's death penalty statute will result in arbitrary impositions (thereby violating due process) because it contains no guidance for balancing aggravating and mitigating circumstances. The United States Supreme Court, however, rejected this line of reasoning in *Proffitt v. Florida* after noting the absence of "numerical weights" in Florida's aggravation-mitigation statute. 428 U.S. at 258. Accordingly, the Arizona Supreme Court has repeatedly held that section 13-703 is not violative of due process in this regard. *See, e.g.*, State v. Woratzeck, 134 Ariz. 452, 456, 657 P.2d 865, 869 (1982); *Mata*, 125 Ariz. at 241-42, 609 P.2d at 56-57.

35. *Gretzler*, 135 Ariz. at 55, 659 P.2d at 14. *See also McDaniel*, 136 Ariz. at 201, 665 P.2d at 83 (defendant's lack of intent to kill outweighed a finding that he had committed an especially heinous, cruel or depraved murder); State v. Doss, 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977) (defendant's impaired capacity to appreciate the wrongfulness of his conduct outweighed proof that his actions at the murder scene endangered other persons in addition to the victim).

36. *Gretzler*, 135 Ariz. at 55, 659 P.2d at 14. *See also* State v. Adamson, 136 Ariz. 250, 267, 665 P.2d 972, 989 (1983) (defendant's cooperation with the government and the length of his legal proceedings did *not* outweigh proof that he committed the murder in an especially cruel manner and in expectation of the receipt of something of value); State v. Gerlaugh (*Gerlaugh II*), 135 Ariz. 89, 659 P.2d 642 (1983) (defendant's young age did *not* outweigh proof of a prior felony conviction, the especially heinous, cruel or depraved manner in which he committed the murder, and his expectation of the receipt of something of value).

If the judge entertains any doubts as to the propriety of a death sentence, he must sentence the defendant to life imprisonment.[37]

Defendants sentenced to death have the right of automatic appeal[38] to the Arizona Supreme Court.[39] The supreme court has decided that meaningful appellate review is achieved once it determines:

1. Whether passion, prejudice, or any other arbitrary factors influenced the sentencing decision,
2. Whether proven statutory aggravating circumstances are supported by sufficient evidence,
3. Whether mitigating circumstances that were held inapplicable were disproved by sufficient evidence,
4. Whether proven mitigating circumstances are sufficiently substantial to call for leniency, and
5. Whether the death sentence was excessive or disproportionate in light of prior cases that involved a similar crime and defendant.[40]

The first four steps of the analysis involve the supreme court's independent review of all of the aggravation-mitigation evidence and independent decision on the appropriateness of the death sentence.[41] The final step is the court's proportionality review, designed to insure consistent application of the death penalty.[42]

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37. State v. Valencia (*Valencia II*), 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982).

38. Rule 31.2(b) of the Arizona Rules of Criminal Procedure provides:

> b. *Automatic Appeal When Defendant is Sentenced to Death.* When a defendant has been sentenced to death, the clerk, pursuant to Rule 26.15, *shall* file a notice of appeal on his behalf at the time of entry of judgment and sentence (emphasis added).

There is no right of automatic appeal if the defendant is sentenced to life imprisonment. State v. Rumsey, 136 Ariz. 166, 173 n.10, 665 P.2d 48, 55 n.10 (1983). The state is allowed to appeal only if the defendant has appealed. *Id.*; ARIZ. REV. STAT. ANN. § 13-4032(4) (Supp. 1983).

39. ARIZ. REV. STAT. ANN. § 13-4031 (Supp. 1983) provides:

> . . . criminal actions involving crimes for which a sentence of death or life imprisonment has actually been imposed may only be appealed to the supreme court.

40. *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51.

During this review of the record, the Arizona Supreme Court cannot address the failure of the sentencing court to find an aggravating circumstance unless the state cross-appeals. State v. Richmond (*Richmond II*), 136 Ariz. 312, 320, 666 P.2d 57, 65 (1983).

41. *See Gretzler*, 135 Ariz. at 54, 659 P.2d at 13 (citing *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51).

42. *See id.*

The United States Supreme Court recently held that it is not unconstitutional for a state appellate court to affirm a death sentence without conducting a proportionality review even if the defendant so requests. Pulley v. Harris, 104 S. Ct. 871, 879-80 (1984). The Court views proportionality review as "an additional safeguard against arbitrarily imposed death sentences," but such review is not constitutionally mandated in every case. *Id.* at 879. The Court did suggest that a capital sentencing scheme might be so lacking in other checks on arbitrariness that it would not be constitutional without comparative proportionality review. The California statute before the Court was not such a scheme. *Id.* at 880.

After *Pulley*, the Arizona Supreme Court has the opportunity to eliminate its proportionality review in future state capital cases. Retention of this review, however, seems to be the better route because of the logical value of retaining additional safeguards against arbitrariness in capital sentencing.

The Arizona Supreme Court conducts its independent and proportionality review in all capital cases whether or not any issue concerning the penalty imposed was raised on appeal. *Gerlaugh II*, 135 Ariz. at 89, 659 P.2d at 642 (citing *Richmond I*, 114 Ariz. 186, 560 P.2d 41 (1976)). The findings of these two reviews are set forth in the supreme court's opinion. 135 Ariz. at 89-90, 659 P.2d at 642-43 (supplemental opinion issued because the court forgot to include its independent

If the supreme court remands a capital case for resentencing and the death penalty is a potential end result, the court recommends that a new aggravation-mitigation hearing be held.[43] At the new hearing, the original sentencing judge may resentence the defendant[44] unless intervening events have occurred that might affect the judge's impartiality.[45] If the defendant was originally sentenced to life imprisonment, it violates double jeopardy to impose the death penalty on resentencing.[46] If, however, the original sentence was death, then the prosecution may have the opportunity to introduce evidence of aggravating circumstances not raised at the first hearing.[47] After resentencing, appellate review is once again undertaken.[48]

II. THE AGGRAVATING CIRCUMSTANCES

Seven aggravating circumstances enumerated in A.R.S. § 13-703(F) comprise the prosecutor's arsenal at an aggravation-mitigation hearing.[49]

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and proportionality reviews in State v. Gerlaugh (*Gerlaugh I*), 134 Ariz. 164, 654 P.2d 800 (1982)). Justice Cameron was dissatisfied with the quality of the *Gerlaugh* supplemental opinion and, therefore, filed a concurring opinion which included "a more thorough enunciation" of the court's reasons for its decision. *See Gerlaugh II*, 135 Ariz. at 90, 659 P.2d at 643 (Cameron, J., concurring).

43. State v. Arnett (*Arnett II*), 125 Ariz. 201, 203, 608 P.2d 778, 780 (1980) ("[T]he evidence and testimony [at a resentencing hearing] should be as fresh as possible.").

44. *See Watson*, 120 Ariz. at 449, 586 P.2d at 1261.

45. *See Valencia I*, 124 Ariz. at 140, 602 P.2d at 808 (sentencing judge talked with the victim's brother before the resentencing hearing and, therefore, should not have presided over the second hearing). Furthermore, it is improper for a judge who sentenced the defendant to death in a prior case to try the same defendant for a second, unrelated murder. State v. Vickers (*Vickers II*), 138 Ariz. 450, 452, 675 P.2d 710, 712 (1983)).

46. *Rumsey*, 136 Ariz. at 174-75, 665 P.2d at 56-57 (citing Bullington v. Missouri, 451 U.S. 430 (1981)); *Gretzler*, 135 Ariz. at 49, 659 P.2d at 8.

The fifth amendment to the Constitution of the United States provides in pertinent part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V. The purpose of the double jeopardy clause is to prevent successive trials for the same offense. *Rumsey*, 136 Ariz. at 169, 665 P.2d at 51. Arizona's sentencing procedure—the aggravation-mitigation hearing—is "effectively a 'trial' to the bench." *Id.* at 172, 665 P.2d at 54. In a capital case, a defendant who receives a life sentence has been "acquitted" of the death penalty, and he cannot at any later date be resentenced to death. *Gretzler*, 135 Ariz. at 49, 659 P.2d at 8 (citing Bullington v. Missouri, 451 U.S. at 445-46); *see Rumsey*, 136 Ariz. at 174-75, 665 P.2d at 56-57.

The United States Supreme Court recently took this analysis one step further. In Arizona v. Rumsey, 104 S. Ct. 2305 (1984), the Court held that if a defendant's life sentence is later set aside on appeal because the sentencing (trial) court committed an error of law (i.e., misconstruing the applicability of an aggravating circumstance), it would violate the double jeopardy clause to resentence the defendant to death. *Id.* at 2310-11 (the Court relied heavily on Bullington v. Missouri, 451 U.S. 430 (1981), as support for its determinations). When a defendant is sentenced to life imprisonment at a "trial-like" sentencing hearing, he is acquitted of the death penalty. 104 S. Ct. at 2310.

47. *Gretzler*, 135 Ariz. at 48-49, 659 P.2d at 7-8 (". . . the state was justified in its attempt to establish two additional aggravating factors on resentencing, as the [case] law on both of these factors had been substantially clarified since the time of the original sentencing.").

48. *See supra* notes 38-42 and accompanying text.

49. *See supra* note 15.

The admissibility of evidence directly proving any of these circumstances is governed by ARIZ. REV. STAT. ANN. § 13-703(C). This subsection does not address the admissibility of the prosecution's or the defense's rebuttal evidence. The Arizona Supreme Court has held that any relevant evidence, whether or not it is admissible at trial, may be offered to rebut the defense's mitigating circumstances. State v. Ortiz, 131 Ariz. 195, 208, 639 P.2d 1020, 1033 (1981), *cert. denied*, 456 U.S. 984 (1982). In *Ortiz*, the court expressly declined to consider the standard of admissibility for evidence rebutting the prosecution's aggravating circumstances. *Id.* n.10.

The prosecutor must give the defendant notice of each aggravating circumstance he intends to prove, as well as its evidentiary basis, to comply with constitutional due process.[50] Notice must be given sufficiently in advance of the aggravation-mitigation hearing so that the defendant has a reasonable opportunity to prepare rebuttal.[51]

A. *Prior Convictions*

The first and second aggravating circumstances focus on the defendant's prior criminal record.[52] The first aggravating circumstance is "sentence-dependent" since the prosecution must show that a sentence of death or life imprisonment could have been imposed for the defendant's prior crime, whether or not it was actually imposed.[53] The second circumstance, on the other hand, requires that the defendant's prior crime be a felony crime of violence.[54] Proof of violent or threatening behavior during the prior felony is insufficient absent a finding that the felony, by its statutory definition, involves violence or the threat of violence on another person.[55]

Often, the same prior crime serves as the basis of proof for both the first and second circumstances.[56] A constitutionally-valid conviction[57]

50. *Id.* at 207, 639 P.2d at 1032. The supreme court declared that notice is required by the due process clause of the fourteenth amendment.

51. *Id.* (quoting State v. Sonnier, 379 So. 2d 1336, 1356 (La. 1979)).

52. *See* ARIZ. REV. STAT. ANN. § 13-703(F)(1) and (2). For text, see *supra* note 15.

53. *Watson*, 120 Ariz. at 448, 586 P.2d at 1260.

Out-of-state convictions may be used to prove section 13-703(F)(1) so long as the offense, if committed in Arizona, would be punishable by death or life imprisonment. *See, e.g., Greenawalt*, 128 Ariz. at 170, 624 P.2d at 848 (Arkansas convictions); State v. Steelman, 126 Ariz. 19, 23, 612 P.2d 475, 479 (California convictions), *cert. denied*, 449 U.S. 913 (1980).

54. *See* State v. Arnett (*Arnett I*), 119 Ariz. 38, 50-51, 579 P.2d 542, 554-55 (1978). The court defined the word "violence" in the second aggravating circumstance (formerly ARIZ. REV. STAT. ANN. § 13-454(E)(2), presently ARIZ. REV. STAT. ANN. § 13-703(F)(2)) as being the "exertion of any physical force so as to injure or abuse." 119 Ariz. at 51, 579 P.2d at 555 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2554 (1976)). Accordingly, the court found the defendant committed a prior crime of "violence" by inserting his finger into a five-year-old girl's vagina, thereby rupturing her hymen and causing vaginal bleeding (i.e. "lewd and lascivious acts upon a child under the age of 14 years"). 119 Ariz. at 51, 579 P.2d at 555.

Since *Arnett I*, the Arizona Supreme Court has established a more objective standard than its definitional one to be used to prove the violence element of a prior felony conviction. *See infra* notes 55, 58, and 60 and accompanying text.

55. *Gillies*, 135 Ariz. at 511, 662 P.2d at 1018. In *Gillies*, the victim of a prior theft committed by the defendant testified that Gillies acted violently and made threats during the theft. The supreme court held that this testimony could not be used to establish the violence element of the second aggravating circumstance. In effect, a second "trial" on the prior conviction would occur without a jury long after the crime was committed, clearly violating due process. The element of violence must be proven by the prior crime's statutory definition. Gillies' prior theft, therefore, did not constitute an ARIZ. REV. STAT. ANN. § 13-703(F)(2) aggravating circumstance. 135 Ariz. at 511, 662 P.2d at 1018. The court also pointed out that testimony which reports the particular circumstances of a defendant's prior crime may be introduced to determine the *weight* to be given a prior conviction. *Id.* (citing *Greenawalt*, 128 Ariz. 150, 624 P.2d 828 (1981)).

One example of the new violence standard announced in *Gillies* would be a prior robbery conviction since fear of force is a statutory element of robbery. *Gillies*, 135 Ariz. at 511, 662 P.2d at 1018 (citing *Watson*, 120 Ariz. at 448, 586 P.2d at 1260).

56. *See, e.g., Gretzler*, 135 Ariz. at 46, 48, 659 P.2d at 5, 7 (nine prior convictions for first degree murder in California); *Valencia II*, 132 Ariz. at 250, 645 P.2d at 241 (prior convictions for rape and armed robbery); State v. Vickers (*Vickers I*), 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981) (prior conviction for assault with a deadly weapon); *Arnett I*, 119 Ariz. at 41, 579 P.2d at 545 (prior conviction in California for lewd and lascivious acts upon a child under the age of 14 years).

57. A prior conviction secured in a constitutionally infirm manner may not be used as an

must be entered before the aggravation-mitigation hearing to qualify as an aggravating circumstance.[58] Such conviction need not precede the first degree murder conviction, nor must the offense have been committed before the murder.[59] However, convictions for offenses arising out of the same set of events as the murder are not within the scope of either of the first two aggravating circumstances.[60]

B. *Grave Risk of Danger*

The third aggravating circumstance exists if the defendant's behavior during the murder endangers anyone besides the intended victim(s).[61] If the defendant's attempts to conceal the body immediately after the murder endanger others, these acts are also considered part of the "commission of the offense."[62] A typical situation invoking the third aggravating circumstance occurs when the victim is located in a crowded area and the defendant begins shooting in a random or indiscriminate manner.[63] The supreme court requires that the prosecution prove that the endangered person(s) were close enough to the victim to be within a "zone of danger" where harm was a realistic possibility.[64]

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aggravating circumstance for the purpose of enhancing punishment. *Watson*, 120 Ariz. at 448, 586 P.2d at 1260 (citing Burgett v. Texas, 389 U.S. 109 (1967)).

58. *See Gretzler*, 135 Ariz. at 57 n.2, 659 P.2d at 16 n.2 (the supreme court disapproved contrary language enunciated in State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981). In *Ortiz*, the supreme court announced that "a prior conviction must be entered prior to the time for which jeopardy attaches on the first degree murder charge that subsequently results in a . . . sentencing hearing" in order to constitute an aggravating circumstance. 131 Ariz. at 211, 639 P.2d at 1036.

59. *Gretzler*, 135 Ariz. at 57 n.2, 659 P.2d at 16 n.2.

60. *Id.* The Arizona Supreme Court used this distinction to explain and justify its apparently "contrary" language and result in *Ortiz*. *See supra* note 58.

61. State v. Tison, 129 Ariz. 526, 542, 633 P.2d 335, 351 (1981); *see* ARIZ. REV. STAT. ANN. § 13-703(F)(3). For text of the statute see *supra* note 15.

A person becomes a victim when the evidence indicates that the killer intended to murder that person. *See McCall*, 139 Ariz. at 161, 677 P.2d at 934 (1983). If a killer merely points a weapon at a person in order to demand silence or compliance, that person is not a victim because there is no intent to kill. State v. Jeffers, 135 Ariz. 404, 428-29, 661 P.2d 1105, 1129-30 (1983). A victim does not lose his or her status as a victim just because the person miraculously survives the murderer's intentional attempt to kill. *McCall*, 139 Ariz. at 161, 677 P.2d at 934.

62. *Ortiz*, 131 Ariz. at 209-10, 639 P.2d at 1034-35. In *Ortiz*, the defendant attempted to dispose of his victim's body by setting her house on fire while her three young children were inside. *Id.* at 209, 639 P.2d at 1034. The children escaped, and the supreme court held that their lives had been endangered and that concealment of a murder is legally part of the murder transaction. *Id.* at 210, 639 P.2d at 1035.

63. *See, e.g.*, State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637 (1983) (defendant opened fire in a crowded bar); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977) (defendant opened fire in a crowded gymnasium); State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977) (defendant opened fire in a crowded bar).

64. State v. Clark, 126 Ariz. 428, 435-36, 616 P.2d 888, 895-96 (1980). Usually this zone is narrow, but ricocheting ammunition can expand its coverage. *See id.* at 436, 616 P.2d at 896. In *Clark*, the victim's wife, in another room of the house at the time of the murder, was not within a realistic zone of danger even if the bullets had richocheted. *Id.* at 436, 616 P.2d at 896. The wife was murdered shortly after her husband. *Id.* at 430, 616 P.2d at 890. It is rather peculiar that the court did not mention this fact during its review of the third aggravating circumstance because the wife's status as a "victim" would prohibit the applicability of ARIZ. REV. STAT. ANN. § 13-703(F)(3). *See supra* note 61 and accompanying text.

C. *Murders Involving Pecuniary Gain*

The fourth aggravating circumstance applies to any person who pays or promises to pay another something of value as consideration for a murder.[65] Anyone who accepts this type of offer or commits a murder in expectation of receiving something of value falls within the purview of the fifth aggravating circumstance.[66] The fourth aggravating circumstance appears limited in its application to solicitants of "hired gun" or "contract" murders.[67] The fifth aggravating circumstance, on the other hand, applies to the hired gun himself,[68] and to murderers who leave the scene of the crime with valuables belonging to their victims.[69] In the latter situation, it is necessary to prove by tangible evidence or by strong circumstantial inference that pecuniary gain was a cause and not just a result of the murder.[70] For example, courts have commonly found the fifth aggravating

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65. *See* ARIZ. REV. STAT. ANN. § 13-703(F)(4). For text, see *supra* note 15.

66. *See* ARIZ. REV. STAT. ANN. § 13-703(F)(5). For text, see *supra* note 15.

67. *See* State v. Holsinger, 115 Ariz. 89, 91, 98, 563 P.2d 888, 890, 897 (1977) (the defendant hired a person to kill his mother-in-law's husband to make it more likely that his wife would receive an inheritance when her mother died). The fourth aggravating circumstance applies whether the solicitant pays the murderer before or after the murder. *Clark*, 126 Ariz. at 437, 616 P.2d at 897 (Gordon, J., specially concurring); ARIZ. REV. STAT. ANN. § 13-703(F)(4).

68. State v. McCall, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983) ("There is no doubt that A.R.S. § 13-703(F)(5) applies to the 'hired gun' situation."); State v. Adamson, 136 Ariz. 250, 266, 665 P.2d 972, 988 (1983).

69. *Clark*, 126 Ariz. at 436, 616 P.2d at 896. In *Clark*, the defendant left the murder scene with his victims' credit cards, money, two diamond rings, and their station wagon. The court refused to limit the fifth aggravating circumstance to "hired gun" situations and held that it was applicable to the *Clark* facts since expectation of financial gain was a cause of the murders. *Id.*

Since *Clark*, the supreme court has continued to define the fifth aggravating circumstance in the foregoing manner. *See, e.g.*, State v. Gretzler, 135 Ariz. 42, 49-50, 659 P.2d 1, 8-9 (1983) (defendants left the murder scene with the victims' credit cards, blank checks, camera, and automobile); State v. Poland, 132 Ariz. 269, 286, 645 P.2d 784, 801 (1982) (defendants murdered two Purolator van guards and took $281,000 from the van); State v. Tison, 129 Ariz. 526, 542, 633 P.2d 335, 351 (1981) (defendants took their victims' automobile and some items of personal property).

In *Clark*, Justice Gordon disagreed with the majority's interpretation of the fifth aggravating circumstance. *See Clark*, 126 Ariz. at 437, 616 P.2d at 897 (Gordon, J., specially concurring). The justice argued that the Arizona legislature's intent was to limit both the fourth and fifth aggravating circumstances to hired gun situations. He cited as support for his argument the parallel substantive construction of both circumstances and the absence of specific statutory language justifying the court's interpretation. 126 Ariz. at 437, 616 P.2d at 897. For three years, Justice Gordon maintained this position. *See, e.g., Gretzler*, 135 Ariz. at 59, 659 P.2d at 18 (Gordon, V.C.J., concurring in part and dissenting in part); State v. Woratzeck, 134 Ariz. 452, 458, 657 P.2d 865, 871 (1982) (Gordon, V.C.J., concurring in part and dissenting in part); *Tison*, 129 Ariz. at 546, 633 P.2d at 355 (Gordon, J., specially concurring). Recently, however, Vice Chief Justice Gordon accepted the *Clark* majority interpretation because the Arizona legislature's failure to amend these disputed aggravating circumstances suggests that the legislators agree with the *Clark* holding. State v. Harding, 137 Ariz. 278, 296, 670 P.2d 383, 401 (1983) (Gordon, V.C.J., specially concurring).

70. State v. Gillies, 135 Ariz. at 512, 662 P.2d at 1019 (A.R.S. § 13-703(F)(5) was inapplicable because the defendant's confessions established that the purpose of the murder was to eliminate the victim as a witness to her own rape and not to secure pecuniary gain); *See also Harding*, 137 Ariz. at 296, 670 P.2d at 401 (Gordon, V.C.J., specially concurring) (". . . the hope of pecuniary gain must provide the impetus for the murder."); *Poland*, 132 Ariz. at 286, 645 P.2d at 801; State v. Madsen, 125 Ariz. 346, 353, 609 P.2d 1046, 1053.

In *Madsen*, the defendant carried out his premeditated plan to shoot his estranged wife while they were target shooting in the desert. 125 Ariz. at 347-48, 609 P.2d at 1047-48. Sometime later, the defendant collected $50,000 of life insurance proceeds. The supreme court held that the mere existence of the policy, the defendant's initial ignorance regarding his right to collect, the subsequent receipt of the proceeds, and his statements *after* the murder that insurance was an easy way

circumstance in situations in which a murder is committed for the purpose of obtaining a getaway car.[71]

D. *Inmate Murders*

The seventh aggravating circumstance applies to defendants who murder while in the custody of the department of corrections, a law enforcement agency, or county or city jail.[72] Its purpose is to protect guards and inmates at holding facilities and to discourage inmate violence.[73] Constructive custody by the department of corrections, such as an unsecured work furlough program, is not within the scope of the seventh aggravating circumstance.[74] Apparently, the circumstance is narrowly limited to inmate murders committed within the incarceration facility.[75]

E. *Especially Heinous, Cruel or Depraved Murders*

The sixth aggravating circumstance, like the third and seventh, describes the defendant's behavior at the scene of the crime.[76] Typically, murders characterized as "especially heinous, cruel or depraved" result in a death sentence affirmed by the Arizona Supreme Court.[77] The case law confirms that the sixth circumstance is the prosecution's weightiest ally

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"to get money" were insufficient to prove that pecuniary gain was a *cause* of the murder. Therefore, the fifth aggravating circumstance was not proven. 125 Ariz. at 353, 609 P.2d at 1053.

71. *See, e.g., Gretzler*, 135 Ariz. at 50, 659 P.2d at 9; *Tison*, 129 Ariz. at 542, 633 P.2d at 351 (defendant stated at a psychological evaluation that "the whole purpose was to obtain an automobile").

72. ARIZ. REV. STAT. ANN. § 13-703(F)(7). For text, see *supra* note 15.

73. *Gillies*, 135 Ariz. at 512, 662 P.2d at 1019.

74. *Id.*

75. Arizona State Prison inmate Robert Wayne Vickers is primarily responsible for what little case law there is regarding the seventh aggravating circumstance. Vickers murdered one fellow inmate in 1978, *Vickers I*, 129 Ariz. 506, 633 P.2d 315 (1981), and another in 1982, *Vickers II*, 138 Ariz. 450, 675 P.2d 710 (1983). The Arizona Supreme Court seems reluctant to expand the scope of ARIZ. REV. STAT. ANN. § 13-703(F)(7) beyond the walls of holding facilities. For example, in State v. Greenawalt, 128 Ariz. 150, 171-72, 624 P.2d 828, 849-50 (1981), the defendant/murderer was an escaped inmate; yet the court did not address the seventh aggravating circumstance in its review of the case.

76. *See* ARIZ. REV. STAT. ANN. § 13-703(F)(6). For text, see *supra* note 15.

77. *See, e.g.*, State v. Richmond (*Richmond II*), 136 Ariz. 312, 666 P.2d 57 (1983); State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983); State v. Gerlaugh (*Gerlaugh II*), 135 Ariz. 89, 659 P.2d 642 (1982); State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984 (1982); State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980); State v. Ceja (*Ceja II*), 126 Ariz. 35, 612 P.2d 491 (1980); State v. Madsen, 125 Ariz. 346, 609 P.2d 1046, *cert. denied*, 449 U.S. 873 (1980); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908 (1978).

There appears to be only one Arizona capital case since late 1976 in which the sixth aggravating circumstance was proven and the defendant was not sentenced to death. In State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983), the defendant and his accomplices poured liquor down the victim's throat and then locked him in the trunk of a car which they later abandoned in an apartment complex parking lot. The victim subsequently died in the trunk; however, the court reasoned that since the car was left in an apartment parking lot with the keys in the ignition, the captors probably thought someone would hear the victim inside the trunk and free him. The liquor simply insured that the rescued victim would be unable to recall the details of his robbery. The supreme court considered this interpretation of the facts as proof of the defendant's lack of intent to kill, which constituted a nonstatutory mitigating circumstance. The court held that this mitigating circumstance outweighed its finding that the murder was committed in a cruel manner and, therefore, sentenced McDaniel to life imprisonment. 136 Ariz. at 199-201, 665 P.2d 81-83.

and, as a result, proof of its existence is a cumbersome and closely scrutinized procedure. The supreme court's scrutiny of A.R.S. § 13-703(F)(6) focuses on an analysis of the controlling words: *especially, heinous, cruel* and *depraved.*

The supreme court believes that all first degree murders are heinous, cruel or depraved to some degree,[78] and therefore, the prosecution must prove that the murderer's acts were *especially* heinous, cruel or depraved.[79] This burden requires evidence that the killing was committed in a manner setting it apart from the norm of first degree murders.[80] The supreme court's definitions of *heinous, cruel* and *depraved* guide it in determining whether a murder is indeed "apart from the norm."

In *State v. Knapp*,[81] the Arizona Supreme Court set forth various dictionary definitions as guidelines for determining the existence of the sixth aggravating circumstance.[82] In the capital cases that followed *Knapp*, the supreme court sought to refine these definitions by providing more concrete standards.[83] Initially, it was commonplace for the court to hold that the murder was "especially heinous, cruel or depraved."[84] Recently, the supreme court has been more conscientious in determining which of the three adjectives best characterizes the murderer's acts.[85] Indeed, since the

78. *See, e.g.*, State v. Zaragoza, 135 Ariz. 63, 69, 659 P.2d 22, 28 (1983); State v. Steelman, 126 Ariz. 19, 26, 612 P.2d 475, 482 (1980) ("First degree murder is by its nature willful, cruel and repugnant."); State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977) (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975): "[A]ll killings are atrocious").

79. *See, e.g., Zaragoza*, 135 Ariz. at 69, 659 P.2d at 28; State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979) ("[I]t is important to emphasize . . . that the killing be *especially* heinous, cruel or depraved."). The sixth aggravating circumstance is not a catch-all provision for first degree murders that lack evidence of any other aggravating circumstances. *Ortiz*, 131 Ariz. at 206, 639 P.2d at 1031.

80. *See, e.g., Gretzler*, 135 Ariz. at 51, 659 P.2d at 10 (quoting *Knapp*, 114 Ariz. at 543, 562 P.2d at 716); State v. Brookover, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979); *Knapp*, 114 Ariz. at 543, 562 P.2d at 716 (citing State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973)).

In *Richmond I*, 114 Ariz. at 196-97, 560 P.2d at 51-52 (citing State v. Dixon, 283 So. 2d 1 (Fla. 1973)), the court noted that the Florida Supreme Court had previously defined similar statutory terms ("especially heinous, atrocious, or cruel") as applicable only to the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Subsequent Arizona capital cases have proven that some adjectives do not parallel the words "heinous, cruel or depraved." *See Madsen*, 125 Ariz. at 352, 609 P.2d at 1052 (a "planned and cold-blooded" murder); *Brookover*, 124 Ariz. at 41, 601 P.2d at 1325 (a "cowardly" murder); *Watson*, 120 Ariz. at 448, 586 P.2d at 1260 (a "shocking" murder). Not one of these killings was held to be especially heinous, cruel or depraved.

81. 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908 (1978).

82. The words "heinous, cruel or depraved" have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:

> *heinous*: hatefully or shockingly evil: grossly bad.
> *cruel*: disposed to inflict pain esp. in a wanton, insenstate or vindictive manner: sadistic.
> *depraved*: marked by debasement, corruption, perversion or deterioration.

Id. at 543, 562 P.2d at 716.

83. *See infra* notes 87-148 and accompanying text.

84. *See, e.g.*, State v. Mata, 125 Ariz. 233, 242, 609 P.2d 48, 57 (1980); *Knapp*, 114 Ariz. at 543, 562 P.2d at 716; *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51 (supreme court did not address the sentencing court's general finding that this was an especially heinous, cruel or depraved murder because proof of another aggravating circumstance justified affirmance of Richmond's death sentence).

85. *See, e.g., Adamson*, 136 Ariz. at 266-67, 665 P.2d at 988-89 (held to be especially cruel); *Ortiz*, 131 Ariz. at 210, 639 P.2d at 1035 (held to be especially heinous and depraved); *Vickers I*,

sixth aggravating circumstance is written in the disjunctive, the prosecution may invoke A.R.S. § 13-703(F)(6) by proving the applicability of any one of these adjectives.[86]

1. *Cruel*

A finding of cruelty follows evidence of pain inflicted upon and suffered by the victim before death.[87] The victim's mental or physical suffering is sufficient to constitute a cruel killing.[88] Instantaneous death precludes a finding of cruelty.[89]

A finding of cruel infliction of mental distress is common in situations where the victim, aware of imminent death, is held captive for a lengthy period.[90] For example, in *State v. Gretzler*,[91] one victim was gagged and bound for over an hour and, before her own murder, heard the shot that killed her husband.[92] The court held that this was an especially cruel murder because imprisonment, during which a captive is uncertain as to his or her ultimate fate, inevitably results in intensified anxiety.[93] Furthermore, a (future) victim typically becomes extremely distressed upon seeing or hearing the murder of another victim.[94]

Usually, the victim's words or demeanor before death proves mental or physical suffering.[95] If, however, there is proof that the victim was unconscious when murdered, a finding of cruelty by physical suffering is eliminated.[96] In *State v. Richmond (Richmond II)*,[97] the defendant

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129 Ariz. at 515, 633 P.2d at 324 (held to be especially depraved); *Ceja II*, 126 Ariz. at 39, 612 P.2d at 495 (held to be especially heinous and depraved).

86. *Clark*, 126 Ariz. at 436, 616 P.2d at 896 (citing *Ceja II*, 126 Ariz. at 39, 612 P.2d at 495).

87. *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10; *Ceja II*, 126 Ariz. at 39, 612 P.2d at 495.

88. *Ceja II*, 126 Ariz. at 39, 612 P.2d at 495; *see also Adamson*, 136 Ariz. at 266, 665 P.2d at 988 (victim suffered physical pain); *Gillies*, 135 Ariz. at 513, 662 P.2d at 1020 (victim suffered physical pain and mental anguish); *Gretzler*, 135 Ariz. at 53, 659 P.2d at 12 (victims suffered mental and physical distress).

89. *See Clark*, 126 Ariz. at 436, 616 P.2d at 896 (fatal wounds inflicted upon vital parts of the victims' bodies caused swift deaths).

90. *See, e.g., McCall*, 139 Ariz. at 161, 677 P.2d at 934; *Tison*, 129 Ariz. at 543, 633 P.2d at 352; *Steelman*, 126 Ariz. at 26, 612 P.2d at 482.

91. 135 Ariz. 42, 659 P.2d 1 (1983).

92. *Id.* at 45, 659 P.2d at 4.

93. *Id.* at 53, 659 P.2d at 12 (quoting *Steelman*, 126 Ariz. at 26, 612 P.2d at 482). Gretzler and Steelman were co-participants in the murders of Michael and Patricia Sandberg, and both were sentenced to death. *See also Tison*, 129 Ariz. at 543, 633 P.2d at 352.

94. *See McCall*, 139 Ariz. at 161, 677 P.2d at 934 (citing *Gretzler*, 135 Ariz. at 53, 659 P.2d at 12); *Tison*, 129 Ariz. at 543, 633 P.2d at 352.

Flannery O'Connor's short story, *A Good Man is Hard to Find*, depicts the mental distress suffered by (future) victims caught in a situation similar to that in *Tison*. *See* F. O'CONNOR, A GOOD MAN IS HARD TO FIND AND OTHER STORIES 9-29 (1955).

95. *See, e.g.*, State v. Lambright, 138 Ariz. 63, 75, 673 P.2d 1, 13 (1983) (victim was described as scared and trembling during her abduction); *Adamson*, 136 Ariz. at 266, 665 P.2d at 988 (after an attempted bombing murder, the victim could be heard screaming for help); *Steelman*, 126 Ariz. at 26, 612 P.2d at 482 (victim became so frightened and nervous during her captivity that the defendants gave her Valium).

96. *See, e.g., Zaragoza*, 135 Ariz. at 69, 659 P.2d at 28 (no finding of cruelty because the evidence was insufficient to prove that the victim was conscious at the time the defendant inflicted the killing blows); *Lujan*, 124 Ariz. at 368, 372, 604 P.2d at 632, 636 (murder was not especially cruel since there was no evidence that the victim suffered pain; the victim was knocked unconscious before being murdered by a stab wound in the stomach).

97. 136 Ariz. 312, 666 P.2d 57 (1983).

knocked the victim to the ground and rendered him unconscious by hitting him with several large rocks.[98] The defendant subsequently murdered the victim by twice running over him with a car.[99] The court held that the murder was not especially cruel because the victim suffered no pain beyond the initial blow which caused him to lose consciousness.[100]

Although testimony describing the victim's words and demeanor before death is common, it is not always conclusive. For example, in *State v. Brookover*,[101] the victim fell to the floor moaning after the defendant shot him in the back.[102] The defendant reassured him that it would soon be over and shot him again in the back.[103] Despite evidence of the victim's moans, the court held that the murder was not especially cruel or depraved.[104] The court considered the defendant's acts cowardly but not unnecessarily torturous to the victim and, therefore, not apart from the norm of first degree murders.[105] The *Brookover* holding is probably best understood as one of the court's attempts to distinguish between cruel and *especially* cruel murders.[106]

In most cases, expert medical testimony and autopsy reports constitute the most persuasive evidence in the cruelty analysis.[107] In *State v. Bishop*,[108] the defendant struck the victim several times with a hammer and later threw rocks on top of the victim as he lay twitching and gasping.[109] Despite this evidence, the supreme court held that the murder was not especially cruel based on expert medical testimony that the victim was not conscious of pain at the time of his thrashings.[110]

Recently, in *State v. Adamson*,[111] the supreme court announced an additional prerequisite to a finding of cruelty. The *Adamson* court held that cruelty under A.R.S. § 13-703(F)(6) requires proof that the defendant intended or could reasonably foresee a substantial likelihood that the vic-

98. *Id.* at 315, 666 P.2d at 60.

99. *Id.*

100. *Id.* at 319, 666 P.2d at 64.

101. 124 Ariz. 38, 601 P.2d 1322 (1979).

102. *Id.* at 39, 601 P.2d at 1323.

103. *Id.* (the wounded victim even asked the defendant what he had done before the final shot was fired).

104. *Id.* at 41, 601 P.2d at 1325.

105. *Id.* (citing State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) and *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978)).

106. *See supra* notes 78-80 and accompanying text for a discussion of the importance of *especially*.

107. *See, e.g., McCall*, 139 Ariz. at 161, 677 P.2d at 934 (expert medical testimony proved victim's physical pain); *Tison*, 129 Ariz. at 543, 633 P.2d at 352 (expert medical testimony indicated one victim did not die instantly from her gunshot wound, but instead bled to death suffering great physical pain); *Poland*, 132 Ariz. at 274, 285, 645 P.2d at 789, 800 (autopsies of apparent drowning victims indicated that neither had been wounded or bound prior to being placed in the water, nor had they put up any struggle; therefore, cruelty was not proven beyond a reasonable doubt).

108. 127 Ariz. 531, 622 P.2d 478 (1980).

109. *Id.* at 534, 622 P.2d at 481.

110. *Id.* (pathologist's examination of the victim's body seventeen days after the murder led him to conclude that the hammer blows to the head immediately rendered the victim incapable of feeling pain).

111. 136 Ariz. 250, 665 P.2d 972 (1983).

tim would suffer as a consequence of the defendant's acts.[112] This new requirement mandates a two-pronged cruelty analysis: the victim's suffering and the defendant's state of mind.

2. *Heinous or Depraved*

The Arizona Supreme Court recognizes that the "heinous" and "depraved" elements of A.R.S. § 13-703(F)(6) go hand in hand since both focus on the defendant's state of mind, evidenced by his acts at or near the time of the murder.[113] In a recent capital case, the supreme court suggested a list of factors that could lead to a finding of heinousness and/or depravity.[114]

The first factor is the apparent relishing of the murder by the defendant.[115] In *State v. Bishop*,[116] the court held that the murder was especially heinous and depraved after emphasizing the defendant's statement as he drove away from the site of a hammer murder: "Good-bye, Norman. I hope we never see you again."[117] The defendant's post-murder boasts are frequently his undoing. In *State v. Clark*,[118] the defendant kept a spent bullet as a souvenir of his crime and later commented to an acquaintance: "You should have seen Charley when I hit him with those cutters."[119] The defendant in *State v. Lambright*[120] took a charm necklace from his victim as "a m[e]mento of the trip" and later celebrated the murder with his co-participants by playing the song "We Are The Champions."[121] These cases illustrate that the relishing factor, by itself, supports a finding of a heinous or depraved murder.

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112. *Id.* at 266, 665 P.2d at 988. In *Adamson*, the method used to kill the victim—murder by bombing—was sufficient to prove that the defendant should have foreseen the victim's suffering in the absence of instantaneous death. *Id.*

The *Adamson* prerequisite has been applied in subsequent cases. *See McCall*, 139 Ariz. at 161, 677 P.2d at 934 (*Adamson* prerequisite applied to victim-by-victim execution of three individuals who were bound, gagged, and held captive for a period of time preceding their murders); *McDaniel*, 136 Ariz. at 200, 665 P.2d at 82. In *McDaniel*, the victim was beaten, bound, gagged, wrapped in a blanket, and locked in the trunk of his car. He was banging in the trunk when the defendant abandoned the car. This evidence, as well as the fact that the car was abandoned on a very hot August day, was proof that the defendant should have foreseen the victim's suffering (before his death by heat exhaustion or suffocation). 136 Ariz. at 200, 665 P.2d at 82.

113. *See Gretzler*, 135 Ariz. at 51, 659 P.2d at 10; *Ceja II*, 126 Ariz. at 39, 612 P.2d at 495 ("Heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions.").

The proper focus of the heinousness-depravity analysis is the defendant's state of mind, not the corpse's appearance. Accordingly, the type of weapon used to commit the murder is "constitutionally irrelevant." *Richmond II*, 136 Ariz. at 323, 666 P.2d at 68 (Cameron, J., specially concurring) (quoting Godfrey v. Georgia, 446 U.S. 420, 433 n.16 (1980)).

The court also examines acts done immediately after the killing to determine the murderer's mental state at the time of the killing. *Lujan*, 124 Ariz. at 372, 604 P.2d at 636; *see also Vickers I*, 129 Ariz. at 515, 633 P.2d at 324 ("Defendant's actions subsequent to the [victim's] death . . . indicate that the offense was committed in an especially depraved manner.").

114. *See Gretzler*, 135 Ariz. at 51-53, 659 P.2d at 10-12.

115. *Id.* at 52, 659 P.2d at 11.

116. 127 Ariz. 531, 622 P.2d 478 (1980).

117. *Id.* at 534, 622 P.2d at 481.

118. 126 Ariz. 428, 616 P.2d 888 (1980).

119. *Id.* at 436-37, 616 P.2d at 896-97 (held to be a depraved murder).

120. 138 Ariz. 63, 673 P.2d 1 (1983).

121. *Id.* at 75, 673 P.2d at 13 (facts were sufficient to prove a heinous and depraved murder).

A second factor that demonstrates a heinous or depraved state of mind is the infliction of gratuitous violence upon the victim.[122] Frequently, this factor is characterized as a barrage of violence beyond the point necessary to kill the victim. For example, in *State v. Ceja (Ceja II)*,[123] the defendant shot one victim seven times (at least four shots struck her head at close range), and then shot her husband four times (the final shot came after he had fallen to the floor, dead).[124] The defendant then repeatedly kicked the dead husband in the face.[125] The supreme court held that the defendant's acts were clearly heinous and depraved.[126] In *State v. Woratzeck*,[127] the defendant strangled the victim, then stabbed her three times, and struck her on the head twice.[128] Based on a pathologist's testimony that any one of these attacks was potentially fatal, the court characterized the excessive violence as heinous and depraved.[129]

A third factor in the supreme court's analysis of heinousness or depravity is the needless mutilation of the victim.[130] An illustrative case is *State v. Vickers (Vickers I)*,[131] in which the defendant, an inmate at the Arizona State Prison, strangled his cellmate to death and then carved his prison nickname, "Bonzai," into the victim's back.[132] The court held that Vickers' actions were indicative of a mental state "marked by debasement" and were clearly depraved.[133] In *State v. Smith*,[134] two women suffocated to death when the defendant forced dirt into their mouths.[135] The defendant also inflicted numerous knife wounds to the victims' breasts and sex organs before and after their deaths.[136] The supreme court easily concluded that the acts of mutilation evidenced a heinous and depraved murder.[137]

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122. *Gretzler*, 135 Ariz. at 52, 659 P.2d at 11.

123. 126 Ariz. 35, 612 P.2d 491 (1980).

124. *Id.* at 40, 612 P.2d at 496 (quoting State v. Ceja (*Ceja I*), 115 Ariz. 413, 417, 565 P.2d 1274, 1278, *cert. denied*, 434 U.S. 975 (1977)).

125. *Id.*

126. *Id.* ("[D]efendant's . . . continuing . . . barrage of violence . . . beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, . . . [sets the murder] apart from the 'usual or the norm.' ").

127. 134 Ariz. 452, 657 P.2d 865 (1982).

128. *Id.* at 457, 657 P.2d at 870.

129. *Id.* ("The violence committed against Linda Leslie was certainly beyond the point necessary to fulfill a plan to steal and even to kill.")

130. *Gretzler*, 135 Ariz. at 52, 659 P.2d at 11.

131. 129 Ariz. 506, 633 P.2d 315 (1981).

132. *Id.* at 509, 633 P.2d at 318.

133. *Id.* at 515, 633 P.2d at 324.

During one of his interrogations, Vickers told officers that the sight of blood made him feel good and that he would kill any cellmate. *Id.* at 509, 633 P.2d at 318. About three and a half years after the "Bonzai" killing, Vickers threw a container of flammable hair tonic on a nearby inmate and then tossed lit toilet paper into his cell causing the victim to burn to death. Earlier in the day, the victim had made an insulting remark about Vickers' niece after seeing a picture of her. When guards arrived at the scene of the murder and asked if the victim was dead, Vickers replied: "He ought to be, he's on fire." *Vickers II*, 138 Ariz. at 451, 675 P.2d at 711.

134. 131 Ariz. 29, 638 P.2d 696 (1981).

135. *Id.* at 30-31, 638 P.2d at 697-98.

136. *Id.*

137. *Id.*

Justice Cameron has suggested that a finding of mutilation should require proof that the defendant intended to disfigure the victim and that the disfigurement was not just a consequence of the killing itself. *Richmond II*, 136 Ariz. at 323, 666 P.2d at 68 (Cameron, J., specially concur-

The remaining two factors that the supreme court considers in its heinousness-depravity analysis are the senselessness of the crime and the helplessness of the victim.[138] These factors are not as weighty as the preceding three because, absent additional aggravation, they will not necessitate a finding of heinousness or depravity.[139] In *State v. Lujan*,[140] the defendant participated in a robbery and later murdered an unconscious victim despite the victim's inability to identify any of the members of the robbery gang.[141] While the court noted the victim's helplessness, the lack of necessity for the killing, and the defendant's clear intent to kill, it nonetheless held that the murder was not especially heinous or depraved.[142] In *State v. Tison*,[143] however, the supreme court emphasized the following factors in finding that the murders were committed in an especially heinous and depraved manner: the senselessness of the murders, the victims' inability to prevent the criminals' escape, and the shooting of an infant in his mother's arms.[144] *Tison* is distinguishable from *Lujan* for a number of reasons. First, the *Tison* language indicates that the court's reasoning was significantly influenced by the obviously senseless murder of an infant.[145] Secondly, the *Tison* defendants murdered four people, one at a time,[146] whereas the *Lujan* defendant murdered one person.[147] Finally, the *Tison* court suggested that the murders were especially cruel because the victims suffered mental anguish during their pre-murder captivity.[148] The *Tison* case exemplifies the additional aggravation that is needed to complement the senselessness and helplessness factors in order to prove a heinous and depraved murder.

The foregoing factors represent the Arizona Supreme Court's attempt to mold an objective analysis out of subjective statutory terms. For a number of years, capital defendants have argued that the terms "especially heinous, cruel or depraved" are too imprecise and vague and will result in arbitrary sentencing decisions.[149] The supreme court has relied on the

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ring). The intent to disfigure, which is separate from the defendant's intent to kill, may be the factor that distinguishes mutilation from gratuitous violence.

138. *Gretzler*, 135 Ariz. at 52, 659 P.2d at 11.

139. *Id.* ("Either or both of these factors, *considered together with other circumstances . . . may* lead to the conclusion that an offense was heinous or depraved.") (Emphasis added).

140. 124 Ariz. 365, 604 P.2d 629 (1979).

141. *Id.* at 368, 604 P.2d at 632.

142. *Id.* at 373, 604 P.2d at 637.

143. 129 Ariz. 526, 633 P.2d 335 (1981).

144. *Id.* at 543, 633 P.2d at 352 (infant was less than two years old).

145. *Id.* ("[A] young child . . . who posed no threat to the captors, was indiscriminately shot while in the arms of his mother . . . [evidencing] that the . . . slayers possessed a shockingly evil state of mind.")

The supreme court quoted the sentencing judge's belief that the murder of the young child, by itself, proved depravity; however, the supreme court refused to base its finding on that fact alone. *Id.*

146. *Id.*

147. 124 Ariz. at 368, 604 P.2d at 632.

148. 129 Ariz. at 543, 633 P.2d at 352. The court concluded that it was reasonable to believe that the victims suffered a great degree of mental pain before the murders, but refused to affirm the finding of the sixth aggravating circumstance on the existence of cruelty alone. *Id.*

In *Lujan*, the court found no evidence proving that the victim suffered pain and, therefore, held that the killing was not done in an especially cruel manner. 124 Ariz. at 372, 604 P.2d at 636.

149. The supreme court disagrees. *See, e.g., Zaragoza*, 135 Ariz. at 68, 659 P.2d at 27; *Gretzler*,

United States Supreme Court's decision in *Proffitt v. Florida*[150] as the constitutional basis of the sixth aggravating circumstance.[151] Furthermore, the court believes that its recent case law constitutes a successful standardization of the "heinous, cruel or depraved" circumstance and gives sufficient guidance to sentencing courts.[152] The court has even cited the dissension among its members in *Richmond II*[153] as an example of the "lengths to which this court has gone in order to insure the proper application of the definitions of terms like 'cruel' and 'depraved' " which reflects the court's "commitment to uniformity in imposition of this most serious sanction."[154]

III. CONCLUSION

In 1976, the United States Supreme Court reinstated capital punishment by validating the newly-designed death penalty statutes of Georgia, Florida, and Texas. The Arizona legislature rewrote its statute to closely resemble Florida's aggravation-mitigation scheme. Consequently, the Arizona judiciary is confident that section 13-703 of the Arizona Revised Statutes is constitutional.

In Arizona, persons convicted of first degree murder are sentenced to

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135 Ariz. at 50, 659 P.2d at 9 ("[T]he statutory phrase 'especially heinous, cruel, or depraved' has been construed in a constitutionally narrow fashion, and has been properly applied in individual cases."); *Ortiz*, 131 Ariz. at 206, 639 P.2d at 1031, which explained Godfrey v. Georgia, 446 U.S. 420 (1980) thusly:

> [W]hen a state has an aggravating circumstance that is the analog of a heinous, cruel, or depraved murder, the state: (1) must objectively define the terms used; and (2) must not use the circumstance as a catch-all for those first degree murders where no other aggravating circumstance applies.

150. 428 U.S. 242 (1976).

151. In *Proffitt*, the Supreme Court held that the "especially heinous, atrocious, or cruel" aggravating circumstance in Florida's death penalty statute was not unconstitutionally vague because the Florida Supreme Court had narrowly construed the circumstance. *Id.* at 255-56. The Arizona Supreme Court cites *Proffitt* as support for the constitutionality of ARIZ. REV. STAT. ANN. § 13-703(F)(6). *See, e.g., Gretzler*, 135 Ariz. at 50, 659 P.2d at 9; *Richmond I*, 114 Ariz. at 196-97, 560 P.2d at 51-52.

152. *See Harding*, 137 Ariz. at 293, 670 P.2d at 398.

153. 136 Ariz. 312, 666 P.2d 57 (1983). In *Richmond II*, the defendant ran his car over the unconscious victim *twice*. Chief Justice Holohan and Justice Hays felt that one pass would have been sufficient to kill, and deemed the murderer's acts to be heinous and depraved because they constituted gratuitous violence and needless mutilation of the victim. *Id.* at 319, 666 P.2d at 64. The remaining three justices did not believe that the acts were heinous and depraved and stated that because the defendant could reasonably have believed that the victim remained alive after being run over once, running over the victim a second time was not gratuitous violence. *Id.* at 323, 324, 666 P.2d at 68, 69 (Cameron, J., and Gordon, V.C.J., specially concurring; Feldman, J., dissenting). To support their position, the justices cited a recent case in which the victim remained alive after being run over by a car several times. *Id.* at 323, 666 P.2d at 68 (citing *Gerlaugh I*, 134 Ariz. 164, 654 P.2d 800 (1982)). The justices felt that mutilation was not proven under the facts in *Richmond II* because disfigurement resulted from the murder, not from distinct acts. Finally, the justices quoted from Godfrey v. Georgia, 446 U.S. 420 (1980), in which the United States Supreme Court reversed a finding of the statutory aggravating circumstance of an "outrageously or wantonly vile, horrible or inhuman" murder:

> An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. *Id.* at 433 n.16 (plurality opinion). *See also id.* at 435 (Marshall, Brennan, J.J., concurring) (". . . the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant.").

136 Ariz. at 323, 666 P.2d at 8 (citation omitted in part).

154. *Harding*, 137 Ariz. at 293, 670 P.2d at 398.

death or life imprisonment without the possibility of parole for 25 years. The trial court judge presides over a statutorily mandated aggravation-mitigation hearing at which the prosecutor must prove beyond a reasonable doubt the existence of one or more of the seven aggravating circumstances. The defense, on the other hand, must produce uncontroverted credible evidence tending to prove any relevant mitigating factor. The sentencing judge balances all proven aggravating and mitigating circumstances and orders a death sentence only if the former are weightier.

A sentence of death invokes an automatic appeal to the Arizona Supreme Court. The supreme court reviews all relevant evidence and independently determines which aggravating and mitigating circumstances exist and which are weightier. The court also compares the case at bar to prior cases involving a similar crime and defendant. This twofold review leads to consistent impositions of the death penalty.

The prosecution's evidentiary tools of persuasion are the seven aggravating circumstances listed in subsection 13-703(F). Each aggravating circumstance is designed to focus the sentencer's attention on the character and propensities of the defendant, and/or the circumstances of the crime. The Arizona Supreme Court has defined and clarified the words comprising these aggravating circumstances.

The epitome of the supreme court's efforts to standardize each aggravating circumstance is found in its handling of the "especially heinous, cruel or depraved" circumstance. A finding of cruelty follows from evidence of the victim's mental or physical suffering before death. The defendant must intend or reasonably foresee that there is a substantial likelihood that the victim will suffer as a consequence of his acts. Heinousness and depravity both focus on the defendant's state of mind at the time of the offense. The Arizona Supreme Court has suggested a list of factors that prove heinousness and/or depravity: (1) the apparent relishing of the murder by the defendant, (2) the infliction of gratuitous violence upon the victim, (3) the needless mutilation of the victim, (4) the senselessness of the crime, and (5) the helplessness of the victim.

The Arizona legislature has limited the appropriateness of the death sentence to one crime—first degree murder. The legislature has also promulgated a limited number of aggravating circumstances that guide the sentencer's determination of whether the murderer falls within the class of individuals whose acts and character are deserving of a death sentence. Finally, the Arizona Supreme Court has established limiting definitions for each aggravating circumstance in order to create a substantially objective sentencing analysis. Thus, in Arizona, arbitrary impositions of the death penalty have been circumvented by these combined efforts to restrict section 13-703's applicability to the most egregious murders.