

Death Penalty 101: The Death Penalty Charging Decision in Arizona. Is There a Better Way?

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Two former prosecutors who are now judges on the Arizona Court of Appeals offer a proposal to reform Arizona's death penalty process so that the decision to charge death is made at the state level, rather than county-by-county.

Arizona's procedure for determining whether to seek the death penalty—a decision by an elected County Attorney—was established when Arizona became a state in 1912.¹ At that time, however, a decision to seek the death penalty began a process that bore little resemblance to what we have today. For example, between 1912 and 1960, in the 63 cases in which a death sentence was imposed, the average time from the date of the murder to the date of execution was less than two years. In fact, in 10 of those cases, less than a year passed between the crime and the execution.² The current process, in contrast, often lasts more than 30 years, consuming significant resources at both the local and state level.³ And although the State—through the Arizona Attorney General's Office—is now primarily responsible for handling death penalty cases (at considerable expense) throughout most of the process, the State does not have any corresponding input into the charging decision.⁴

This article posits that Arizona's framework for deciding whether to seek the death penalty no longer makes sense given the State's role and interest in the process, and that the ultimate decision whether to seek the death penalty should be made at the state level, rather than county-by-county. Such a change would make the death penalty process in Arizona less arbitrary and would facilitate an analysis of whether a particular defendant convicted of

1. ARIZ. CIV. CODE ¶ 2528(1) (1913).

2. Ariz. Att'y Gen.'s Off., Capital Litigation Section Report (2020) (on file with authors).

3. *Id.*

4. Although both the County Attorney and the Attorney General represent “the State” in criminal proceedings, for purposes of this article, references to “the State” are to the State of Arizona and/or the Attorney General.

murder is among those “most deserving of execution.”⁵ Additionally, it would facilitate narrowing the types of cases in which the death penalty is sought to ones in which it is more likely that such a sentence will actually be imposed at trial and upheld on appeal.

I. A CHANGING LANDSCAPE AND THE STATE’S INCREASED ROLE

The death penalty process in Arizona has evolved due to court rulings, legislative enactments, and changes in the rules of criminal procedure. Of particular significance, in *Furman v. Georgia*, the United States Supreme Court held that the death penalty as administered in Georgia violated the United States Constitution’s Eighth Amendment prohibition against cruel and unusual punishment.⁶ The Court found that because the sentencer’s discretion when imposing the death penalty was not adequately guided, the death penalty was being meted out in “arbitrary and capricious” ways.⁷ The decision effectively declared unconstitutional death penalty laws in thirty-two states, including Arizona.⁸

In 1973, Arizona enacted a new statute⁹ addressing the concerns outlined in *Furman*.¹⁰ And since then, other court decisions and court rules have created additional requirements and criteria to try to ensure that defendants facing a possible death sentence are provided adequate representation and a process that provides protections against arbitrariness.¹¹ Given these and other rulings, along with comprehensive defense counsel Guidelines

5. See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting that under the Eighth Amendment, capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution”).

6. 408 U.S. 238, 239–40 (1972) (per curiam).

7. *Id.* at 295 (Brennan, J., concurring).

8. *Id.* at 442 n.37 (Powell, J., dissenting).

9. ARIZ. REV. STAT. § 13-454 (1973) (current version at ARIZ. REV. STAT. § 13-751 (2021)).

10. *Arizona Death Penalty History*, ARIZ. DEP’T OF CORRS., REHAB. & REENTRY, <https://corrections.az.gov/public-resources/death-row/arizona-death-penalty-history> [<https://perma.cc/4CU3-YMCS>].

11. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that Georgia’s post-Furman statute provided the sentencer “adequate information and guidance” by adopting statutory aggravating circumstances and requiring specific findings as to the circumstances of the crime and the character of the defendant); *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider as mitigation any aspect of the defendant’s character or record, and any circumstances of the offense the defendant argues mitigates the sentence to less than death); *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (holding that a jury, rather than a judge, must determine whether the State has proven at least one aggravating circumstance justifying the imposition of a death sentence).

promulgated by the American Bar Association, the death penalty process through trial and sentencing is far more complex and costly to prosecute and defend than it was in 1912.¹²

Appellate and post-conviction proceedings, which are handled by the Arizona Attorney General's Office, likewise have expanded significantly, and now are more extensive than anything imaginable in 1912. In fact, the death penalty process now spans more than two decades at a cost that often exceeds three million dollars. In addition to a direct appeal to the Arizona Supreme Court and from there to the United States Supreme Court, a defendant can pursue state post-conviction proceedings under Rule 32 of the Arizona Rules of Criminal Procedure in the trial court and the Arizona Supreme Court, as well as in the United States Supreme Court.¹³ Rule 32 provides a vehicle for a defendant to challenge whether trial and appellate counsel provided effective assistance, and to raise other types of claims, including whether newly discovered evidence calls into question the defendant's conviction or sentence.¹⁴ The Attorney General's Office represents the State in these proceedings, which often require extensive investigation and attorney time.¹⁵

The Attorney General's involvement continues when a defendant moves to federal court for habeas proceedings under 28 U.S.C. § 2254. In these proceedings, a defendant can assert claims that the state courts misapplied federal constitutional law in imposing or affirming a conviction or sentence.¹⁶ The proceedings may involve additional evidentiary hearings in district court and extensive appellate briefing and argument in the Ninth Circuit and the United States Supreme Court.¹⁷ Federal proceedings under § 2254 have become increasingly complex and generally take more than a decade to

12. See, e.g., AMER. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/overview/aba_guidelines/aba_guidelines.pdf [<https://perma.cc/YP9D-ZX3L>]. In 2003, after the *Ring* decision, Arizona adopted jury sentencing in capital cases. See ARIZ. REV. STAT. § 13-703.01 (2003) (current version at ARIZ. REV. STAT. § 13-752 (2021)).

13. See ARIZ. R. CRIM. P. 32.4.

14. *State v. Spreitz*, 202 Ariz. 1, 3 (2002) (en banc); ARIZ. R. CRIM. P. 32.1(e).

15. As of July 31, 2021, there were 115 Arizona death-row inmates in various stages of appellate and post-conviction review, and more than 60 defendants statewide awaiting trial and facing a potential death sentence. Ariz. Att'y Gen.'s Off., *supra* note 2.

16. 28 U.S.C. § 2254(d)(1).

17. See 28 U.S.C. § 2254(a) ("The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody . . ."); 28 U.S.C. § 2253(a) (granting right of persons in custody to appeal final habeas corpus orders of the district judge to circuit court).

complete.¹⁸ Furthermore, even after those proceedings are completed, additional, lengthy litigation may result from challenges to Arizona's method of execution, which are likewise handled by the Attorney General's Office.¹⁹

Given how significantly the death penalty process has changed since statehood, thought should be given to whether the system is working and whether it can be improved. In our view, the vast changes to the process since 1912 warrant in particular a change in the way the decision to seek the death penalty is made, along with a change in who is responsible for paying for the process.

II. INCLUDING THE ATTORNEY GENERAL'S OFFICE IN THE DECISION WHETHER TO SEEK THE DEATH PENALTY AND CHANGING HOW COSTS ARE ALLOCATED

In light of the State's significant involvement and expenditure of resources in handling appellate and post-conviction proceedings, it is illogical not to provide a role for the State in the death-penalty charging decision. We thus propose that Arizona's criminal code be amended to require approval from the Arizona Attorney General before a County Attorney is permitted to file a notice of intent to seek the death penalty.

We suggest a process in which a County Attorney makes an initial recommendation, with Attorney General approval (presumably based on a committee recommendation) required before a notice of intent to seek the death penalty is filed. We also recommend that, once a decision to file is made, the State pay for the entire process (including the trial). We further recommend that a County Attorney retain authority to proceed over the Attorney General's objection, but with the proviso that the County must pay the entire cost of the death penalty process, including appellate and post-conviction proceedings in state and federal court.

18. See, e.g., ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUST. STATS., FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 23–25 (1995), <https://bjs.ojp.gov/content/pub/pdf/FHCRCSCC.PDF> [<https://perma.cc/ML57-BX9Y>]; NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 41–44 (2007), <https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/F9L3-G7RY>].

19. The last execution in Arizona took place in 2014. Twenty-one defendants have exhausted their state and federal appeals, but their executions are on hold pending a resolution of the defendant's challenge to the State's lethal injection protocol.

III. CHANGING THE PROCESS WOULD IMPROVE CONSISTENCY IN HOW THE DECISION TO SEEK THE DEATH PENALTY IS MADE

Requiring the Attorney General's involvement in the charging decision would not only ensure that those responsible for handling the lengthy appellate and post-conviction proceedings in capital cases have input at the outset of the process, it would also improve consistency in the way the death penalty is approached statewide and would help ensure that the death penalty is reserved for those most deserving of such a penalty.

Arizona's current death penalty statutes contemplate the imposition of the death penalty anywhere in the state, but in practice, Arizona's process for determining whether the sentence is appropriate in any given case does not reflect a consistent statewide application of that law.²⁰ Arizona previously provided for a form of proportionality review by the Arizona Supreme Court on direct appeal.²¹ The court was statutorily authorized to independently review any death sentence and substitute its judgment for that of the trial judge regarding whether the sentence was warranted, even if there was no error in the trial proceedings.²² This process in theory provided a means—albeit limited—to assess how the murder at issue and its perpetrator compared to others, or to consider whether the sentence had been imposed

20. See ARIZ. REV. STAT. §§ 13-751 to -759 (2021).

21. See *State v. Greenway*, 170 Ariz. 155, 171 (1991) (“This court, and not the trial court, reviews every death penalty case in Arizona. . . . Therefore, only this court will conduct a proportionality review”); *State v. Walton*, 159 Ariz. 571, 589 (1989) (holding that the Supreme Court’s independent review of death penalty cases includes a proportionality review).

22. After *Furman*, in *State v. Richmond*, 114 Ariz. 186, 196 (1976), the Arizona Supreme Court described its review process as follows:

In performing this [independent] review we find it necessary to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors; whether the evidence supports the sentencing court's finding the existence of a statutory aggravating circumstance(s); whether the evidence supports the sentencing court's finding the absence of the statutory mitigating circumstance(s); whether mitigating circumstances found to be present are sufficiently substantial to call for leniency; and, whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Accord *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd*, *Gregg v. Georgia*, *supra* note 11.

The court subsequently rejected an assertion that trial courts should engage in a proportionality review when considering whether to impose a capital sentence, *State v. Greenway*, 170 Ariz. 155, 171 (1991), and in *State v. Salazar*, 173 Ariz. 399, 417 (1992), the court determined that appellate courts are similarly ill equipped to conduct a proportionality review. The *Salazar* court stated that “we have not conducted a separate proportionality review in this case, nor will we in future cases.” *Id.*

arbitrarily. But when the legislature enacted jury sentencing in 2003, it eliminated the court's statutory authority to independently review death sentences, and the court now simply reviews the record to determine whether there is evidence that supports the jury's verdict.²³ Thus, an assessment of the relative gravity of a murder or the character of the murderer is no longer made after a determination of guilt and may only be done—if at all—at the outset of the case when a prosecutor decides whether to file a notice of intent to seek the death penalty. And notwithstanding good-faith efforts by County Attorneys, without a statewide charging process, such an assessment is difficult, if not impossible.

The significant differences in how Arizona counties make the determination whether to seek a death sentence highlight the absence of a consistent application of our state death penalty statutes. Currently, only three of fifteen counties are pursuing capital cases, with cost being a prohibitive factor for most of the other counties.²⁴ According to an audit commissioned by the Maricopa County Office of Public Defense Services, defending a capital case at trial typically costs close to \$1 million.²⁵ And in some cases, costs far exceed that amount. For example, in one notable high-profile 2015 case in which the defendant, Jodi Arias, was tried for killing her former boyfriend, the defense costs for her trial exceeded \$3 million.²⁶

Along with the cost to defend, a capital case also consumes significant prosecution and judicial resources. Death penalty trials are much more time-consuming than other trials, with jury voir dire and sentencing proceedings in particular requiring extensive court time and resources, not least because of the need for comprehensive investigative and expert assistance to address sentencing mitigation proffered by the defendant. Thus, cost has become a

23. See *State Developments, Post-Ring*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/state-developments-post-Ring> [https://perma.cc/4RXZ-76ZZ].

24. See Lupita Murillo, *Digging Deeper: Death Penalty Cases in Arizona Cost \$3 to \$4 Million per Inmate, Expert Says*, KVOA (Apr. 9, 2021, 9:07 PM), <https://kvoa.com/news/digging-deeper/2021/04/09/digging-deeper-death-penalty-cases-in-arizona-cost-3-to-4-million-per-inmate-expert-says/> [https://perma.cc/UQ8X-J3PR].

25. See Michael Kiefer, *Maricopa County Runs Out of Death-Penalty Defense Attorneys*, AZCENTRAL.COM (Apr. 22, 2017, 9:33 PM), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/03/26/death-penalty-cases-maricopa-county-attorney-bill-montgomery/99238852/> [https://perma.cc/69XW-9LXJ].

26. David Schwartz, *Jodi Arias Trial to Cost Arizona Taxpayers More Than \$3.2 Million: Officials*, REUTERS (Mar. 6, 2015, 2:10 PM), <https://www.reuters.com/article/us-usa-crime-arias/jodi-arias-trial-to-cost-arizona-taxpayers-more-than-3-2-million-officials-idUSKBN0M22AL20150306->; see also *State v. Arias*, 248 Ariz. 546, 551 (Ct. App. 2020). Arias was convicted of murder, but the jury hung on whether to impose a death sentence; a second jury similarly hung on the sentencing determination, and she was sentenced to life in prison. *Id.*

significant factor for a County Attorney deciding whether to seek a death sentence in a murder case.

Furthermore, among counties that can afford to prosecute capital cases, there are significant differences in how the decision to seek the death penalty is made, and even within the same county, there have been differences over time based on the policies of the County Attorney in office at the time the decision is made. For example, beginning in 2005, a newly elected Maricopa County Attorney began noticing death cases at an exponentially higher rate than his predecessors.²⁷ As a result, in 2007, there were 149 pending capital cases awaiting trial in Maricopa County, and the number of death notices being filed in that county was the highest per capita in the United States.²⁸

The Maricopa County Attorney's position at that time appeared to be that absent exceptional circumstances, the death penalty would be sought whenever the prosecution had a good-faith basis for alleging at least one aggravating circumstance under title 13, section 751(F) of the Arizona Revised Statutes.²⁹ But those statutory aggravating circumstances arguably encompass the overwhelming majority of first-degree murders committed in Arizona, particularly given title 13, section 751(F)(4), which can be asserted whenever "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner."³⁰ Thus, such an approach did little to narrow the class of murders for which the death penalty would be sought.³¹

Although the successors to that County Attorney have filed fewer notices of intent to seek the death penalty,³² the Maricopa County Attorney's Office has continued to seek the death penalty in a relatively high percentage of

27. See Jennifer Steinhauer, *Policy Shift on Death Penalty Overwhelms Arizona Court*, N.Y. TIMES (Mar. 5, 2007), <https://www.nytimes.com/2007/03/05/us/05death.html> [<https://perma.cc/H4GC-D2V8>].

28. ARIZ. SUP. CT. CAP. CASE TASK FORCE, REPORT OF RECOMMENDATIONS TO THE ARIZONA JUDICIAL COUNCIL 3 (2007) <https://www.azcourts.gov/Portals/74/CCTF/FinalRpt092007.pdf?ver=2014-06-26-230809-520> [<https://perma.cc/Y6UR-KXZM>]; see Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 JUDICATURE 216, 216 (2012).

29. See Dupont & Hammond, *supra* note 28, at 216.

30. ARIZ. REV. STAT. § 13-751(F)(4).

31. See *State v. Hidalgo*, 241 Ariz. 543, 549–51 (2017) (recognizing that Arizona's aggravating circumstances encompass most first-degree murders but rejecting a constitutional challenge under *Furman*).

32. See CAP. CASE OVERSIGHT COMM., MEETING MINUTES 1–2 (Nov. 1, 2007), <https://www.azcourts.gov/Portals/74/CCOC/ArchivedMinutes2017CCOC.pdf?ver=2019-11-25-112742-093> [<https://perma.cc/JL56-AG3U>].

cases each year, and as of July 20, 2021, there were forty-two capital cases awaiting trial.³³

In Pima County, the County Attorney's Office vigorously pursued the death penalty for many years.³⁴ In recent years, however, that office has filed fewer death notices, and in 2021, a newly elected County Attorney announced that she would not pursue the death penalty in any future cases.³⁵

Given the disparity in how the charging decision is made—whether because of cost reasons or the individual policies of a particular County Attorney—a decision to seek the death penalty in Arizona appears to be based more on the county in which the murder occurred than on the relative severity of the crime. While some might assert that this disparity is not relevant to whether a death sentence has been properly imposed in any given case, such disparity supports an argument that the overall death penalty process is arbitrary.

Other jurisdictions have addressed—or are trying to address—concerns about arbitrariness in the death penalty process. For example, the Washington Supreme Court ruled in 2018 that the death penalty process in that state violated its state constitution because “the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant.”³⁶ And on June 30, 2021, United States Attorney General Merrick Garland issued a directive pausing federal executions, expressing serious concerns about the death penalty process.³⁷ Attorney General Garland noted in particular “arbitrariness in its application,” “disparate impact on people of color,” and “the troubling number of exonerations in capital and other serious cases.”³⁸

33. See CAP. CASE OVERSIGHT COMM., MEETING MINUTES 1 (2019), <https://www.azcourts.gov/Portals/74/CCOC/DraftMinutes120319CCOC.pdf?ver=2021-10-19-171357-597> [<https://perma.cc/85NE-X44E>].

34. Eighteen of the current 115 death-row inmates in Arizona were convicted in Pima County. *Death Row Sentences - County Breakdown*, ARIZ. DEP'T OF CORR., REHAB. & REENTRY, <https://corrections.az.gov/public-resources/death-row/death-row-sentences-county-breakdown> [<https://perma.cc/J4LY-G2JP>].

35. Caitlin Schmidt, *Big Changes from Pima's Prosecutor: No Death Penalty; Focus on Fraud Cases, Jail Alternatives*, TUCSON.COM (Apr. 16, 2021), https://tucson.com/news/local/big-changes-from-pimas-prosecutor-no-death-penalty-focus-on-fraud-cases-jail-alternatives/article_f3c83942-9c7a-11eb-b27b-d736c264b797.html [<https://perma.cc/DPC4-7H54>].

36. *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018).

37. *Department of Justice Formally Pauses Federal Executions to Review Trump Death-Penalty Regulations*, DEATH PENALTY INFO. CTR. (July 6, 2021), <https://deathpenaltyinfo.org/news/departments-of-justice-formally-pauses-federal-executions-to-review-trump-death-penalty-regulations> [<https://perma.cc/YG4B-TZTC>].

38. *Id.*

While neither the Washington Supreme Court ruling nor the directive from the United States Attorney General are controlling in Arizona, the concerns at issue bear consideration, particularly, as relevant here, with regard to arbitrariness in Arizona's death penalty process.³⁹ And because the most effective way to address arbitrariness is at the start of the process, it makes sense to consider how the choice to seek the death penalty is made, and to pursue a process that would provide a more consistent statewide approach.

IV. OTHER BENEFITS OF A STATEWIDE CHARGING PROCESS

The statewide charging process suggested here would not only address the arbitrariness issue, it would also ensure a broader perspective regarding the types of cases for which a death sentence will be imposed by a jury and upheld by the courts throughout the lengthy state and federal appeals process. Nationwide, the death penalty is actually imposed in only a small percentage of the cases in which a prosecutor files a notice of intent to seek the death penalty.⁴⁰ And once a death sentence has been imposed, the most likely outcome is that the defendant's conviction or sentence will be reversed on appeal.⁴¹ Execution is only the third most likely outcome, after death by natural causes.⁴²

Arizona is not an outlier in this regard. In Maricopa County, for example, over the past ten years, juries have imposed death sentences in only sixteen

39. Capital defendants have long argued that prosecutorial discretion, as well as plea bargaining, jury discretion to convict on a lesser-included offense, and the possibility of sentence commutation or executive clemency are mechanisms of an arbitrary selection process. *See Furman v. Georgia*, 408 U.S. 238 (1972); *State v. Richmond*, 114 Ariz. 186, 195 (Ariz. 1976), *abrogated by State v. Salazar*, 173 Ariz. 399 (Ariz. 1992); *see also Furman*, 408 U.S. at 295 (Brennan, J., concurring). But this point was raised and rejected in *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) ("The existence of these discretionary stages is not determinative of the issues before us. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."). Nevertheless, while such selectivity arbitrariness may not be unconstitutional, it does not mean that systemic safeguards protecting against it should be ignored, particularly as it relates to the initial charging decision.

40. *See Current Statistics Re Use of Federal Death Penalty*, FED. DEATH PENALTY RES. COUNS. (Jan. 19, 2021), <https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017> [<https://perma.cc/FY8Q-6L2K>] (finding that only 86 cases out of 538 in which the government was authorized to seek the death penalty resulted in a death sentence).

41. Frank R. Baumgartner & Anna W. Dietrich, *Most Death Penalty Sentences are Overturned. Here's Why That Matters*, WASH. POST (Mar. 17, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/> [<https://perma.cc/J8FM-SKVL>].

42. *Id.*

percent of the cases in which a death notice was filed.⁴³ Moreover, imposition of a death sentence in that small percentage of cases does not guarantee that the defendant will be executed. Of the 321 defendants sentenced to death following implementation of Arizona's post-*Furman* death penalty statute, 129 have had their death sentence vacated, and another 31 have died while awaiting execution.⁴⁴ In light of these statistics, and to avoid the significant expenditure of time and resources that are incurred in prosecuting and defending a capital case that is unlikely to result in a sustainable death verdict, it makes sense to try to narrow the category of cases in which death is sought.

The approach suggested here would facilitate such a narrowing, and given the Attorney General's Office's familiarity with the overall death penalty process (including reasons for reversals), the Attorney General's input would provide an essential perspective to trial prosecutors (and to crime victims) before a decision is made to start the lengthy capital case process.

V. OTHER CONSIDERATIONS

Our proposal to change who pays for death penalty cases would significantly alter the current process. We acknowledge that the State Legislature might be reluctant to finance the entire cost of pursuing a death sentence. And County Boards of Supervisors might balk at paying the entire cost of a death penalty case if a County Attorney chooses to seek the death penalty without the State's acquiescence. But if so, it would simply highlight the flaws in a system that allows a decision to be made by someone or some entity that is not accountable to those responsible for paying the resulting costs.

We also acknowledge that those who support the death penalty may assert that the cost of pursuing a death case should not be a determining factor in deciding whether to seek the death penalty in any given case. But the criminal justice system operates in a world of finite resources, and the cost of pursuing a death sentence cannot be ignored. Giving the State input into the charging decision while requiring it to pay for the entire death penalty process would recognize this reality and more fairly account for the State's role in the process.

Finally, some may argue that the concerns identified above are reasons to do away with the death penalty in Arizona. But although there has been a

43. See Michael Kiefer, *Maricopa County Runs Out of Death-Penalty Defense Attorneys*, AZCENTRAL (Mar. 26, 2017, 5:46 AM), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/03/26/death-penalty-cases-maricopa-county-attorney-bill-montgomery/99238852/> [<https://perma.cc/AF2B-QJES>].

44. Ariz. Att'y Gen.'s Off., *supra* note 2.

nationwide trend away from the death penalty, it remains in effect in Arizona and twenty-six other states.⁴⁵ And public support for the death penalty may continue to some degree because there are cases, such as terrorist bombings, for which the public may view a life sentence to be inadequate. But such support does not necessarily extend to unbridled discretion to seek the death penalty in other types of cases, particularly where the costs of that decision will be borne by taxpayers to whom the decision-maker does not directly answer. And even death penalty proponents must agree that the penalty should not be administered arbitrarily and that changes should be made to the death penalty process where warranted.

VI. CONCLUSION

As currently administered, the death penalty process in Arizona overburdens the criminal justice system and is inconsistently applied throughout the state. The approach suggested here regarding the death-penalty charging decision would provide a more consistent statewide approach and would also help make the death penalty system less arbitrary. Additionally, it would ensure that the death penalty charging decision is made after appropriate consideration of the cost of pursuing such a penalty and the likelihood a death sentence ultimately will be carried out. In sum, a review of the mechanism for deciding when to seek the death penalty is long overdue.

45. *States and Capital Punishment*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 11, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx> [<https://perma.cc/7E2T-PBFG>]. Three more states continue to statutorily authorize capital punishment, but the Governors in those states have imposed a moratorium on executions. *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/Z8QM-N56D>].