Appendix

No. 13-9097

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT ALLEN POYSON, Petitioner.

vs.

CHARLES L. RYAN, Director of the
Arizona Department of Corrections, et al., Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO DEFER CONSIDERATION

Petitioner Robert Allen Poyson respectfully moves that the Court defer consideration of his petition for writ of certiorari in light of the order, issued by the United States Court of Appeals for the Ninth Circuit on April 2, 2014, holding that the petition for panel rehearing filed by Petitioner in the Ninth Circuit on April 12, 2013, "remains pending." *See* Appendix A to Respondent Charles Ryan's Brief in Opposition ("Rep. App."). Because the Ninth Circuit has *sua sponte* reconsidered its prior order denying Petitioner's petition for panel rehearing, his case is no longer final in the court of appeals, making consideration by this Court of his petition for writ of certiorari premature.

RELEVANT PROCEDURAL HISTORY

The Ninth Circuit issued its original opinion in Petitioner's case on March 22, 2013. (Petitioner's Appendix ("App.") at 055.) Petitioner filed a petition for rehearing and rehearing en banc on April 12, 2013. (*See* App. 004.) The appellate court amended its opinion in conjunction with its denial of Petitioner's petition for rehearing and rehearing en banc on November 7, 2013. (App. 001.)

Petitioner filed his timely petition for a writ of certiorari with this Court on March 7, 2014. Five days later, the Ninth Circuit granted en banc rehearing in *McKinney v. Ryan*, No. 09-99018, a capital habeas corpus appeal involving, among other things, an *Eddings v. Oklahoma* issue similar to the one presented in this case. *See* Appendix A to this motion (March 12, 2014, Order granting en banc review in *McKinney*).

On April 12, 2014, the Ninth Circuit panel that had adjudicated Petitioner's appeal issued a *sua sponte* order overriding its prior denial of Petitioner's petition for panel rehearing:

> Appellant's petition for panel rehearing, filed April 12, 2013, remains pending. The panel will stay proceedings on the petition for panel rehearing pending resolution of en banc proceedings in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013), *rehearing en banc granted*, 2014 WL 1013859 (Mar. 12, 2014).

(Rep. App. at A-2.) The panel further ordered the clerk of the court to stay the mandate. (*Id.*)

On April 10, 2014, Respondent filed his brief in opposition to Petitioner's petition for writ of certiorari. In his brief, Respondent requested that the Court either deny the petition or suspend proceedings pending the Ninth Circuit's en banc decision in *McKinney*.

REQUEST TO DEFER CONSIDERATION

In light of the Ninth Circuit's order of April 2, 2014, Petitioner respectfully submits that it is in the interests of justice and judicial economy to defer ruling on his petition for writ of certiorari until the Ninth Circuit has issued a final order denying his petition for panel rehearing. Petitioner therefore respectfully requests that the Court (1) defer the petition pending the Ninth Circuit's resolution of his petition for panel rehearing; and (2) permit further briefing, as appropriate, following the Ninth Circuit's resolution of Petitioner's case.

Respectfully submitted: April 25, 2014.

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No. 13-9097

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT ALLEN POYSON,
PETITIONER,

-vs-

CHARLES RYAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO NINTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTIONS PRESENTED BY PETITIONER

Question 1: Petitioner Poyson concedes that this Court has traditionally allowed circuits to resolve their own internal conflicts, yet urges this Court to grant review to resolve the alleged intra-circuit conflict. Respondents do not believe there is a conflict in the Ninth Circuit opinions regarding the Arizona courts' application of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), but, even if there is, an active majority of Ninth Circuit judges declined to grant rehearing *en banc* in this case to resolve any such conflict, but have granted rehearing *en banc* in another case with the same issue, in which the Ninth Circuit *en banc* panel can decide whether there is a conflict and how to resolve it. Moreover, in all of the panel opinions regarding this issue, the Ninth Circuit panels have determined whether there was an *Eddings* violation by examining the particular language used in the special verdicts written by the sentencing judges and/or the language used by the Arizona Supreme Court in its independent review of the mitigating circumstances. Another fact-intensive inquiry discussed in some of the panel opinions has been whether, under all the circumstances of the particular case, any *Eddings* error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Accordingly, the first question in deciding whether to grant review in this case is whether, in view of the Ninth Circuit's ability to resolve any intra-circuit conflict in its cases, and the fact-intensive nature of the *Eddings* and *Brecht* analyses, this Court should grant certiorari review?

Question 2: Poyson also asserts that the Ninth Circuit opinion in this case, which states that there must be a "clear indication" of *Eddings* error for a prisoner to be entitled to federal habeas relief, conflicts with this Court's decisions regarding a prisoner's burden on federal habeas corpus review. To the contrary, the "clear indication" standard is fully consistent with this Court's opinions regarding the deferential standard for habeas review under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). If anything, the clear indication standard understates the prisoner's burden under AEDPA, because this Court has stated that even "clear error" is not sufficient for federal habeas relief. Furthermore, the Ninth Circuit properly relied on the well-established principle that state courts are presumed to know and follow the law (*Eddings* in this case) in deciding federal constitutional issues. Poyson attempts to reverse the presumption by arguing that the Ninth Circuit was required to presume that the Arizona courts consistently follow a state-law rule requiring a violation of *Eddings* (an argument that misstates Arizona law), and to presume that the Arizona courts necessary violated *Eddings* in this case, despite the express language in the detailed discussion of mitigation in both the sentencing judge's special verdict and the Arizona Supreme Court's opinion. Accordingly, the second question in deciding whether to grant certiorari review is whether the Ninth Circuit's panel opinion is contrary to this Court's cases by holding that the lack of a "clear indication" in the record that the state courts violated *Eddings* required denial of habeas relief?

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* * *

STATEMENT OF THE FACTS AND THE CASE

The Arizona Supreme Court summarized the facts supporting Poyson's convictions in its opinion on direct appeal.[1] (Petitioner's Appendix (PA) 162-164.)

> Poyson met Leta Kagen, her 15-year-old son, Robert Delahunt, and Roland Wear in April 1996. Poyson was then 19 years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to 48-year-old Frank Anderson and his 14-year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.
>
> Anderson informed Poyson that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt, and Wear in order to steal the latter's truck.
>
> On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt's screams and ran to the travel trailer. While Anderson held Delahunt down, Poyson bashed his head against the floor. He also beat the victim's head with his fists, and pounded it with a rock. This, however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear. Although the blade penetrated the victim's skull and exited through his nose, the wound was not fatal. Poyson thereafter continued to slam Delahunt's head against the floor until he lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes. Remarkably, Kagen and Wear, who were in the main trailer with the radio on, never heard the commotion coming from the small trailer.
>
> After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find any ammunition, Poyson borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to help rescue him. Poyson loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later

[1] The facts found in the Arizona Supreme Court's opinion are entitled to a presumption of correctness on federal habeas review. *See Wainwright v. Goode*, 464 U.S. 78, 85 (1983); *Sumner v. Mata*, 449 U.S. 539, 546–47 (1981). Moreover, Poyson does not contest the guilty verdicts, but rather only the imposition of the death sentences.

that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Poyson first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering his upper right teeth. A struggle ensued, during which Poyson repeatedly clubbed Wear in the head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, Poyson twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head. After Wear stopped moving, Poyson took his wallet and the keys to his truck. In order to conceal the body, Poyson covered it with debris from the yard. Poyson, Anderson, and Lane then took the truck and traveled to Illinois, where they were apprehended several days later.

After being arrested in Evanston, Illinois, Poyson was questioned by Sergeant Ralph Stegall of the Illinois State Police. After being advised of his rights, Poyson confessed to the murders of Delahunt, Kagen, and Wear. (PA 164).

A jury convicted Poyson for three counts of first-degree murder, one count of conspiracy to commit first-degree murder, and one count of armed robbery. (PA 161). The trial court sentenced him to death on all three murder convictions, and to terms of imprisonment on the other three convictions. (*Id.*) The trial court found that the State had proved, beyond a reasonable doubt, three aggravating circumstances regarding the murders of Delahunt and Wear: these murders were committed in expectation of pecuniary gain (A.R.S. § 13-703(F)(5)); these murders were especially cruel (A.R.S. § 13-703(F)(6)); and that Poyson had been convicted of multiple homicides committed during the same offense (A.R.S. § 13-703(F)(8)). (PA 165.) It found two aggravating circumstances—based on (F)(5) and (F)(8)—regarding the murder of Kagen. (*Id.*)

On direct appeal, Poyson argued, *inter alia*, that the trial court erred in not finding two *statutory* mitigating circumstances: A.R.S. § 13-703(G)(1) and (G)(5). (PA 177.) Pursuant to Arizona law, the Arizona Supreme Court also independently reviewed all of the proffered statutory and non-statutory mitigating circumstances and evidence. (PA 177-187.) It rejected Poyson's challenges, concluded that the

mitigating evidence was not sufficiently substantial to call for leniency, and affirmed the death sentences. (PA 186-187.)

Poyson's amended habeas corpus petition was filed on January 13, 2005, and included Claim 2, which asserted:

> PETITIONER'S DEATH SENTENCES WERE UNCONSTITUTIONALLY IMPOSED BECAUSE, AT THE TIME HE WAS SENTENCED, ARIZONA LAW REQUIRED PETITIONER TO ESTABLISH A CAUSUAL NEXUS BETWEEN HIS MITIGATING EVIDENCE AND THE CRIME, IN VIOLATION OF *TENNARD V. DRETKE* AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. BECAUSE THE TRIAL COURT COULD NOT FIND A CAUSAL CONNECTION BETWEEN MUCH OF PETITIONER'S MITIGATING EVIDENCE AND THE CRIMES, IT REFUSED TO CONSIDER THE MITIGATING EVIDENCE.

(PA 190.) This heading was followed by several pages of argument. (PA 190-195.)

On January 20, 2010, the district court filed a memorandum of decision and order denying habeas relief. (PA 101-160.) The decision set forth a comprehensive legal and factual analysis (PA 106-127) in support of its finding that both the sentencing judge and the Arizona Supreme Court had adequately considered and weighed all of Poyson's proffered mitigation. (PA 128.) The district court, nonetheless, granted a certificate of appealability on the claim. (PA 160.)

After briefing and oral argument, the Ninth Circuit panel majority issued an opinion, which discussed: the mitigation proffered by Poyson; the trial court's discussion, in its special verdict, of the proffered mitigating circumstances and evidence; and the Arizona Supreme Court's independent review of the mitigating circumstances and evidence. (PA 062-073.) It addressed Poyson's argument on appeal that the Arizona Supreme Court had contravened *Lockett v. Ohio,* 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1989), and *Penry v. Lynaugh*, 492

U.S. 302 (1989). (PA 075.) The panel majority found some degree of "ambiguity" in the Arizona Supreme Court's application of *Eddings*, but concluded that ambiguity precluded habeas relief. (PA 079.) Specifically, Ninth Circuit opinion stated, "in the absence of a clear indication in the record that the state court applied an unconstitutional standard, we see no alternative but to affirm." (PA 081.) Judge Thomas dissented, concluding that the state courts had unconstitutionally excluded mitigating evidence from consideration. (PA 089-100.)

On November 7, 2013, Poyson's petition for panel rehearing and petition for rehearing *en banc* were denied (PA 002), the latter being denied because the "matter . . . failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration." (PA 004.) Chief Judge Kozinski wrote a dissenting opinion stating that he would have granted *en banc* review for the reasons stated in Judge Thomas' panel dissent. (PA 005-006.)

On April 2, 2014, the Ninth Circuit issued an order amending its order of November 7, 2013. (Attachment A.) It reaffirmed the denial of rehearing *en banc*, but stayed ruling on the petition for panel rehearing pending the resolution of the *en banc* proceeding in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013), *rehearing en banc granted*, 2014 WL 1013859 (9th Cir. Mar. 12, 2014). (*Id.*)

REASONS FOR DENYING THE WRIT

Certiorari should be denied as a prudential matter because of the Ninth Circuit's order of April 2, 2014, discussed above, that stays the ruling on the petition for panel rehearing pending the *en banc* resolution of *McKinney*. The parties are bound to inform this Court of relevant and important changes in a case.

See Fusari v. Steinberg, 419 U.S. 379, 387, n.12 (1975). Under these circumstances, there is no final Ninth Circuit decision to review. The time to file the petition for certiorari runs from the date of denial of rehearing. Rule 13.3, Rules of the Supreme Court; *Hibbs v. Winn*, 542 U.S. 88 (2004).

"[While [a] petition for rehearing is pending," or while the court is considering, on its own initiative, whether rehearing should be ordered, "there is no 'judgment' to be reviewed." *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990), *quoted in Hibbs*, 542 U.S. at 98. *Cf. Young v. Harper*, 520 U.S. 143, 147, n.1 (1997) (appeals court agreed to consider a late-filed rehearing petition; timeliness for petition of certiorari measured from date court disposed of rehearing petition). In this case, the Ninth Circuit may modify its judgment and alter the parties' rights. *See Hibbs*, 542 U.S. 98. Accordingly, the current petition for certiorari should be dismissed as premature. Alternatively, this Court could suspend the certiorari proceedings in this case until the Ninth Circuit resolves *McKinney* and this case.

Even if the claims presented in the petition are ripe, this Court should deny certiorari review. This Court grants certiorari "only for compelling reasons." Rule 10, Supreme Court Rules. Poyson has presented no such reasons. Poyson concedes that this Court seldom takes review to settle an intra-circuit conflict, yet he asserts this Court should do so here. To the extent that the Ninth Circuit recognizes a conflict, a majority of that court's active judges did not think this was the case to decide a conflict, but rather voted to rehear another case, *McKinney v. Ryan*, in which it may resolve any conflict.

There is no substantial conflict, in any event. In all cases involving this issue, the Ninth Circuit has examined the particular language in the sentencing judge's special verdict and/or the Arizona Supreme Court's independent review, to determine whether the state courts violated *Eddings*.

The question in such cases, under AEDPA, is whether the state court has reasonably applied clearly established federal law, which in this case is *Eddings*. Here, and in many other cases, the Ninth Circuit has found there must be a clear indication that the state courts violated *Eddings*. Poyson erroneously asserts that this "clear indication" standard violates the habeas standards of review set forth in *Bell v. Cone*, 543 U.S. 447 (2005), and *Johnson v. Zerbst*, 304 U.S. 458 (1938). To the contrary, the "clear indication" standard advances the deferential AEDPA habeas standard of review, as interpreted *Harrington v. Richter*, 131 S. Ct. 770 (2011), and other cases.

Rather than applying the proper AEDPA standard of review, Poyson would reverse the presumption that the state courts followed federal law in ruling on the federal question, instead requiring federal courts to assume that the Arizona courts followed Arizona state law that allegedly *required* violation of *Eddings* (despite the finding of the Arizona Supreme Court that is has no such law). The extensive discussion of the mitigating factors and evidence in both the sentencing court's special verdict and the Arizona Supreme Court's independent review show a detailed consideration of the evidence that satisfied *Eddings*, rather than an exclusion from consideration of the evidence, as a matter of law, which is what *Eddings* forbids.

Poyson has not established that the Ninth Circuit Court of Appeals' decision conflicts with a decision from another United States Court of Appeal or a state court of last resort; that the Ninth Circuit decided an important question of federal law not yet settled by this Court; or that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* The *Eddings'* analysis in the Ninth Circuit cases is necessarily fact-intensive, but itinvolves the application of straightforward and well-defined legal principles. *See Butler v. McKellar*, 494 U.S. 207, 429 (1990) (Brennan, J., dissenting) ("[The] Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (quotations omitted). This Court should deny his request for certiorari review.

I

AT BEST, POYSON PRESENTS AN INTRA-CIRCUIT CONFLICT, WHICH THE NINTH CIRCUIT DECIDED TO ADDRESS *EN BANC* IN A DIFFERENT CASE.

At best, Poyson presents an intra-circuit conflict and he concedes that "the Court has traditionally allowed circuits to resolve their own internal conflicts." Pet. at 20. This Court should deny review, both because the Ninth Circuit can resolve its own intra-circuit conflicts, and because the *Eddings*[2] analysis depends on the

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[2] Poyson no longer relies on *Tennard v. Dretke*, 542 U.S. 274 (2004), as the authority for his "failure to consider mitigation" claim; he does not cite it in his brief. (Pet. at vii.) Poyson's Claim Two in his habeas petition relied on *Tennard*, and did not cite *Eddings*. (PA 190-195.) The district court noted Poyson relied on *Tennard*; but found that opinion did not entitle Poyson to relief. (PA 119, 121.) The

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the assistance of counsel," this Court remanded to the district court to make findings regarding the waiver of counsel. *Id.* at 469. Thus, the Ninth Circuit panel opinion does not conflict with *Johnson*.

Second, any reliance on the two pre-AEDPA opinions cited by Poyson to argue for a lenient standard of proof must fail in light of AEDPA and this Court's recent cases reiterating the prisoner's high burden in federal habeas proceedings. Accordingly, the Ninth Circuit opinion is consistent with this Court's authority.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Poyson's petition for a writ of certiorari. Alternatively, this Court should suspend this proceeding pending the Ninth Circuit's *en banc* decision in *McKinney*.

Respectfully submitted,

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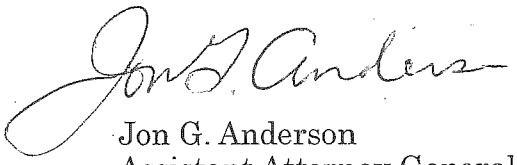

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ALLEN POYSON, *Petitioner-Appellant,* v. CHARLES L. RYAN, *Respondent-Appellee.*	No. 10-99005 D.C. No. 2:04-cv-00534-NVW ORDER

Filed April 2, 2014

Before: Sidney R. Thomas, Raymond C. Fisher, and Sandra S. Ikuta, Circuit Judges.

ORDER

The order filed November 7, 2013 is **AMENDED**. The order, as amended, reads as follows:

Judge Thomas has voted to grant the petition for rehearing en banc. Judge Ikuta has voted to deny the petition for rehearing en banc and Judge Fisher has so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

Appellant's petition for rehearing en banc, filed April 12, 2013, is **DENIED**.

Appellant's petition for panel rehearing, filed April 12, 2013, remains pending. The panel will stay proceedings on the petition for panel rehearing pending resolution of en banc proceedings in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013), *rehearing en banc granted*, 2014 WL 1013859 (Mar. 12, 2014).

This opinion filed at 711 F.3d 1087 (9th Cir. 2013) is amended, and an Amended Opinion was filed concurrently with the original version of this Order.

No further petitions will be entertained.

The clerk shall stay the mandate.

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

ROBERT ALLEN [illegible],

Appellant.

No. CR-98-0510-AP

MOHAVE COUNTY
SUPERIOR COURT
No. CR-96-865

Appellee's Answering Brief

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court commit clear and manifest error by admitting Appellant's statements?

2. Did the trial court clearly abuse its discretion when it denied Appellant's motion to preclude evidence concerning a palm print found in the travel trailer, and when it denied Appellant's alternative motion to continue the trial?

3. Did the trial court err in its consideration of aggravating and mitigating factors?

4. Is the Arizona death penalty statute unconstitutional?

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III

THE TRIAL COURT DID NOT ERR IN ITS CONSIDERATION OF AGGRAVATING AND MITIGATING FACTORS.

Appellant argues that the trial court failed to give proper consideration to mitigating factors. Appellee disagrees, and contends that the trial court did not err in its consideration of aggravating, as well as mitigating, factors.

The death penalty can only be imposed if the state has proved the existence of at least one aggravating factor beyond a reasonable doubt. *State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (citing A.R.S. § 13-703(E) and *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980)).

The aggravating factor of pecuniary gain (F5) is present when "[t]he defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." *State v. Greene*, 192 Ariz. 431, ¶ 27, 967 P.2d 106 (1998) (quoting A.R.S. § 13-703(F)(5)). Thus, the evidence must show that financial gain was a motive for the murder. *Greene*, 192 Ariz. at ¶ 27, 967 P.2d at ¶ 27; *State v. Soto-Fong*, 187 Ariz. 186, 208, 928 P.2d 610, 632 (1996).

The aggravating factor of committing an offense in an especially cruel manner (F6) is found if the victim consciously suffers physical or mental anguish. *State v. Djerf*, 191 Ariz. 583, ¶ 45, 959 P.2d 1274 (1998); *State v. Roscoe*, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996). The physical or mental anguish suffered by the victim must be reasonably foreseeable. *Djerf*, 191 Ariz. at ¶ 45, 959 P.2d at ¶ 45;

State v. Adamson, 136 Ariz. 250, 266, 665 P.2d 972, 988 (1983). Mental anguish includes uncertainty as to one's ultimate fate, and it may also include knowledge that a loved one has been killed. *Djerf, id.*; *State v. Lavers*, 168 Ariz. 376, 392, 814 P.2d 333, 349 (1991); *State v. Gretzler*, 135 Ariz. 42, 53, 659 P.2d 1, 12 (1983). Even when shots, stabbings, or blows are inflicted in rapid succession, quickly leading to unconsciousness, a finding of cruelty based on physical pain is warranted if additional evidence demonstrates that the victim suffered before becoming unconscious. *Soto-Fong*, 187 Ariz. at 203-04, 928 P.2d at 627-28.

In determining whether evidence supports the aggravating factor that a murder was committed during the commission of another murder (F8), a court must analyze the temporal, spatial, and motivational relationships between the homicides, as well as the nature of the homicides, and the identities of the victims. *Lavers*, 168 Ariz. at 393, 814 P.2d at 350. In undertaking this analysis, the temporal relationships between the homicides should not be unduly emphasized—a court should not "hold a stopwatch on the events" in order to determine whether there was one continuous course of criminal conduct. *Lavers*, 168 Ariz. at 394, 814 P.2d at 351; *State v. Ortiz*, 131 Ariz. 195, 210, 639 P.2d 1020, 1035 (1981).

The burden of proving mitigating circumstances is on the defendant, as is the duty to call such evidence to the court's attention. A.R.S. § 13-703(C); *State v. Medina*, 193 Ariz. 504, ¶ 43, 975 P.2d 94 (1999); *State v. Lopez*, 175 Ariz. 407, 415-16, 857 P.2d 1261, 1269-70 (1993). "Because facts tending to show mitigation

are peculiarly within the defendant's knowledge, it is not unconstitutional to require the defense to establish mitigating circumstances by a preponderance of the evidence." *Medina*, 193 Ariz. at ¶ 43 (citing *Stokley*, 182 Ariz. at 516, 898 P.2d at 465, and *State v. Vickers*, 159 Ariz. 532, 544, 768 P.2d 1177, 1189 (1989)).

In order for a defendant's personal or familial background to be found as a nonstatutory mitigating factor, there must be a nexus, or causal connection, between that background, and the subsequent criminal act. *State v. Sharp*, 193 Ariz. 414, ¶ 42, 973 P.2d 1171 (1999) ("[W]e require a causal connection to justify considering evidence of a defendant's background as a mitigating circumstance"); *State v. Rienhardt*, 190 Ariz. 579, 592, 951 P.2d 454, 467 (1997) (history of substance abuse is only a mitigating factor when a causal connection exists between the substance abuse and the crime); *State v. Jones*, 185 Ariz. 471, 490–91, 917 P.2d 200, 219–20 (1996) (abusive childhood only a mitigating factor if evidence shows a causal connection between that background and the crime committed); *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992) (personality disorder not mitigating without proof that it controlled defendant's conduct or so impaired his mental capacity as to warrant leniency).

This Court also recognizes a defendant's potential for rehabilitation as a possible nonstatutory mitigating factor. *State v. White*, 297 Ariz. Adv. Rep. 29, ¶ 26 (June 10, 1999). However, because of the obvious motive to fabricate, a defendant's self-serving testimony in this regard is not sufficient, by itself, to establish his

potential for rehabilitation as a nonstatutory mitigating factor. *White*, 297 Ariz. Adv. Rep. 29, at ¶ 26; *State v. Medrano*, 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996).

In sentencing a defendant, a trial court must consider all statutory mitigating factors and all relevant mitigating evidence. *Sharp*, 193 Ariz. at ¶ 34, 973 P.2d at ¶ 34. The trial court, however, has discretion to decide how much weight to give each mitigating circumstance proven by the defendant. *Sharp*, *Id.*; *State v. Hyde*, 186 Ariz. 252, 282, 921 P.2d 655, 685 (1996). Thus, in weighing the aggravating and mitigating factors, a court is to consider the quality and strength of the factors, rather than their mere number. *State v. Greene*, 192 Ariz. 431, ¶ 60, 967 P.2d 106 (1998); *State v. McKinney*, 185 Ariz. 567, 578, 917 P.2d 1214, 1225 (1996). This Court independently reviews a trial court's findings regarding aggravating and mitigating circumstances, as well as the propriety of the imposition of a death sentence. A.R.S. § 13-703.01; *Djerf*, 191 Ariz. at 595, 959 P.2d at 1286.

A. AGGRAVATING FACTORS

The trial court did not err when it found that the three murders were committed with the expectation of pecuniary gain, and in a multiple fashion, and that the murders of Robert Delahunt and Roland Wear were especially cruel.

1. EXPECTATION OF PECUNIARY GAIN

In its special verdict[8] for counts 2, 3, and 4, the trial court stated:

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[8]The trial court did not file a written special verdict, but instead read its special verdict into the record. Such a procedure does not violate A.R.S. § 13-703(D), (continued...)

I think that the case law is very clear at this time that this [A.R.S. § 13-703(F)(5)] is not a factor that applies exclusively to a murder for hire. It also includes a situation where the expectation of getting something of monetary worth is a reason behind the commission of the offense.

Now the danger in the application of this aggravating factor [is] that there are many murders that are committed and once a person realizes that the other person is dead and has no use for their property, a decision is made to take property, and those are cases in which this factor would not apply. That is clearly not the situation that we have here.

The desire to get something of value and that fact that—that any common, decent person would think that it was something of very little value compared to the behavior that was engaged in to get it is really not relevant. The fact is that the desire to get the means of transportation to get them out of Golden Valley and get to Chicago, or wherever it was they that they [*sic*] were going, was the sole reason, the driving force behind the commission of these murders.

I believe that the State has proven that overwhelmingly by the evidence. The Court determines that the State has proven, beyond a reasonable doubt, the applicability of the aggravating factors set forth in A.R.S. § -13703(F)(5), that all three murders were committed by the defendant in the expectation of the receipt of something of pecuniary value.

(R.T. 11/20/98, at 42-43.)

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[8](...continued)
where, as here, the trial court "properly considered everything that had been submitted." *State v. Schackart*, 190 Ariz. 238, 258, 947 P.2d 315, 335 (1997). Appellant does not suggest that the record is inaccurate, or that he was prejudiced from the special verdict being read into the record, rather than filed separately. *See State v. McKinney*, 185 Ariz. 567, 585, 917 P.2d 1214, 1232 (1996).

The record clearly supports the trial court's conclusion that all three murders were committed for pecuniary gain. Shortly after arriving at the Golden Valley residence, codefendant Anderson began complaining that he wanted to leave the primitive surroundings. (Exhibit 72, at 208–10.) In response, codefendant Lane suggested that she, Appellant and Anderson could kill the other residents, and steal Roland's truck. (Exhibit 72, at 208–11; R.T. 3/3/98, at 89.) Anderson encouraged Appellant to participate in the plan, by falsely telling Appellant that he was a member of the Mafia, and that if they could get to Chicago, Anderson knew people who could change Appellant's appearance, and Appellant could then work for Anderson selling and transporting drugs. (Exhibit 72, at 231–32, 235; R.T. 3/3/98, at 91, 105.)

2. ESPECIALLY CRUEL

In its special verdict for counts 2 and 4, the trial court stated:

> The sixth factor, the one that we could probably all talk about all day, if we were so inclined, 13–703.F.6, is whether the defendant committed the crimes in an especially cruel, heinous or depraved manner. Probably the key word here is especially, and this is the factor that the cases have emphasized over and over again. It's not to be interpreted too broadly.
>
> Part of the reason that this factor is even subject to federal review is because of the very detailed state appellate decisions which have interpreted this factor and have narrowed it down and have fine-tuned what this factor actually means. The statute of course speaks in the disjunctive, so it's not necessary to find all three of them.
>
> The testimony, I think, was very clear that as to Robert Delahunt and Roland Wear, they were eventually killed only after a protracted and

horrible struggle had taken place in which two of them were literally fighting for their lives; a fight which they eventually lost, and it's very clear that each of them maintained consciousness for a considerable period of time. Robert Delahunt, after having his throat slashed. Roland Wear, after actually having been shot, and having a struggle.

It is indisputable that the two of them have to have [*sic*] suffered physical pain, have to have [*sic*] realized, at some point, that the struggle was going to continue until they were dead, and they had to have been literally looking at death in the eye, knowing that that was coming for a considerable period of time.

This is certainly especially cruel, and the Court finds that the evidence establishes, beyond a reasonable doubt, the existence of the aggravating factor set forth in A.R.S. Section 13-703.F.6, that the murders of Robert Delahunt and Roland Wear were committed in an especially cruel manner.

(R.T. 11/20/98, at 43-44.)

The record amply supports the trial court's finding that Robert and Roland were murdered in an especially cruel manner. When Anderson cut Robert's throat, but the boy did not die, he asked for Appellant's help. (Exhibit 72, at 216; R.T. 3/3/98, at 94.) Because Robert kept struggling, Appellant took the boy's head in his hands, and began smashing it into the floor, as Anderson continued to hold him down. (Exhibit 72, at 217; R.T. 3/3/98, at 93, 95.) Lane brought Appellant a piece of a cinder block, and Appellant began hitting Robert's head with the pointed end. (Exhibit 72, at 217.) However, when Robert continued screaming, Appellant began bashing Robert's head into the floor again. (*Id.*) Lane brought Appellant another rock, one that Appellant could "grip" better, and then used that rock to bludgeon

Robert's head. (Exhibit 72, at 217–18; R.T. 3/3/98, at 127.) When Robert still continued to struggle, Appellant, holding a knife, instructed Anderson to guide the point of the knife into Robert's ear. (Exhibit 72, at 218.) Appellant hit the handle of the knife with a rock twice, attempting to pound it through Robert's head, but the knife bounced out of Robert's ear. (Exhibit 72, at 218; R.T. 3398, at 95–96.) Finally, Appellant pounded the knife through Robert's ear, until the point came out through the boy's nose. (Exhibit 72, at 218; R.T. 3/4/98, at 214–15.) Because Robert still struggled, Appellant then pounded Robert's head with the rock, until he died. (Exhibit 72, at 218; R.T. 3/4/98, at 220–21, 227.) Robert's struggle against Appellant and Anderson lasted a cruel 45 minutes. (R.T. 3/3/98, at 96, 189.)

Likewise, the murder of Roland Wear was both protracted, and immensely cruel. Appellant first shot Roland in his mouth, shattering all of his upper right teeth. (Exhibit 72, at 223; R.T. 3/3/98, at 99–100; R.T. 3/4/98, at 223–24.) Appellant, out of bullets, then used the rifle as a club, hitting Roland repeatedly in his head. (Exhibit 72, at 227.) After struggling with Appellant inside the mobile home, Roland was able to make his way outside, and tried to get into his truck. (Exhibit 72, at 228; R.T. 3/3/98, at 103.) Appellant resumed beating Roland with the rifle, hitting him so hard at one point that the lever of the cocking mechanism stuck in Roland's skull. (Exhibit 72, at 228.) When Roland struggled to his feet, Anderson threw a cinder block at him, striking Roland in his back, and knocking him to the ground again. (*Id.*) Roland lifted his head up, and Appellant kicked him

twice in his head, screaming, "Put your head down!" (Exhibit 72, at 228; R.T. 3/3/98, at 104.) When Roland finally laid his head down on the ground, Appellant picked up the cinder block, and threw it three or four times at Roland's head, until he was dead. (Exhibit 72, at 228; R.T. 3/3/98, at 104.)

3. MULTIPLE HOMICIDES

In its special verdict regarding all three murder counts, the trial court said:

> As to 13-703.F.8, that the defendant has been convicted of one or more other homicides which were committed during commission of the offense, that clearly has been established. I can see absolutely no point in even discussing that any further. That is a factor which applies to every one of the three murders.

(R.T. 11/20/98, at 47.)

The record fully supports the applicability of this aggravating factor. Leta and Roland were murdered only a few hours after the murder of Robert, and all three victims were murdered on the residential property on which they lived. (Exhibit 72, at 214-18, 221-24, 227-29.) Furthermore, the victims were murdered to fulfill a common purpose—to enable Appellant, Anderson, and Lane to steal Roland's truck, and escape the desperate living conditions of the isolated home site. (Exhibit 72, at 208-11, 231-32, 235; R.T. 3/3/98, at 89, 91, 105.)

B. MITIGATING FACTORS

Appellant raised the following potential mitigating factors before the trial court: A.R.S. §§ 13-703(G)(1), (G)(2), and (G)(5); costs of the death penalty; personality disorders; remorse; cooperation; dysfunctional childhood; physical abuse; mental

abuse; good character; diminished mental capacity; potential for rehabilitation; giving of the felony murder instruction; the fact that other defendants convicted of multiple homicides did not receive the death penalty; demeanor during trial; lack of a serious criminal record; follower/coercion; community safety; the fact that the death penalty has no deterrent value, childhood neglect; his confession; his "death wish;" work history; school achievements; past family tragedy; family support; alcohol/drug abuse; and the disparity between his sentence, if given the death penalty, compared to the sentence received by codefendant Lane. (P.I., at 115, 118.) The trial court considered all of these factors, in addition to A.R.S. §§ 13-703(G)(3) and (G)(4), and found that the only proven mitigation factors were his cooperation with law enforcement officials, and his confessions, which the trial court considered as one factor. (R.T. 11/20/98, at 48-72.) Appellant contends that the trial court erred in its rejection of the following seven factors: drug/alcohol abuse; age and related factors; mental health and psychological issues; remorse; dysfunctional and abusive childhood; potential for rehabilitation; and family support.

1. DRUG/ALCOHOL ABUSE

Regarding A.R.S. § 13-703(G)(1), the trial court concluded:

> Moving to the statutory mitigating factors that are set forth in A.R.S. Section 13-703.G, keeping in mind that the burden is on the defense to prove these mitigating factors, by a preponderance of evidence. A.R.S. Section 13-704.G.1 is whether 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.

There has certainly been evidence that the defendant had gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.

Listening to his description of how these murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing on the record, in this case, to suggest the applicability of this mitigating circumstance.

The Court finds that the defense failed to prove, by a preponderance of evidence, the existence of the mitigating factors set forth in A.R.S. Section 13-703.G.1.

(R.T. 11/20/98, at 48-49.) Regarding Appellant's supposed substance abuse, the trial court found:

The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time, that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse [*sic*] and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of Golden Valley, it's very difficult for me to conclude that the defendant's ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.

The Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factors of the defendant's alcohol abuse and/or drug abuse.

(R.T. 11/20/98, at 68-69.)

Appellant contends that the trial court erred when it rejected these proffered mitigation factors, pointing to the evidence he presented at the mitigation hearing, which included evidence that he, his mother, and his biological father were abusers of alcohol and illicit drugs. However, with the possible exception of vague hearsay evidence alleging that Appellant experienced a "PCP flashback" when he saw Robert Delahunt "on the ground and injured,"[9] there was absolutely no evidence presented which demonstrated that Appellant's background as a drug and alcohol abuser, or the similar backgrounds of his mother and biological father, somehow impaired his capacity to appreciate the wrongfulness of his conduct at the time he committed the murders. Indeed, the evidence presented at trial indicates that Appellant suffered from no mental impairment at the time of the murders. When it appeared to him that Anderson might not be willing to go through with Robert's murder, Appellant devised a plan to spur Anderson into action through jealousy. (Exhibit 72, at 214–15.) After Robert's murder, Appellant had the wherewithal to obtain the bullets needed to murder Leta and Roland from his young neighbor, by spinning a lie—he told her that he needed the bullets to kill snakes that threatened Robert. (*Id.* at 220.) Knowing that Roland's rifle sometimes jammed, he then worked the lever mechanism until he was confident that it was operating properly. (*Id.* at 221.) He concocted the plan regarding how Leta and Roland were to be murdered, and prior to putting his plan in action, cut the telephone line leading into

[9](R.T. 10/20/98, at 149.)

the mobile home so that neither Leta nor Roland would be able to call for help if he failed to kill them. (Exhibit 72, at 221-22; R.T. 3/3/98, at 98.) After killing Roland, Appellant covered Roland's body with garbage and wood, in order to delay detection of the murder. (Exhibit 72, at 228-29.) When apprehended, Appellant admitted that his actions in murdering Robert, Leta, and Roland were morally and legally wrong, and that "no person deserves to get their life taken away." (Exhibit 72, at 239-40.)

Thus, even if Appellant's evidence concerning his familial background of alcohol and drug abuse is deemed credible, he has still failed to establish the necessary nexus between that background, and his murder of Robert, Leta, and Roland.

2. Age and Related Factors

In its special verdict, the trial court found:

> G.5 is a little more problematic, and that is the age of the defendant. The defendant was 19 at the time [the murders were committed]. I am certain that both sides can cite cases in support of their respective positions for people around this same age in which this was found a mitigating factor or people around the same age for which was this [was] not found a mitigating factor.
>
> I think the one thing that cases make it clear is that age is not just a number that we look at. We don't plug the number into some computer. If it's below a certain amount, it's mitigation; if it's above a certain amount, it's not mitigation.

The issue is not how young or how old a person is but what connection there may be with their age and the behavior that they engaged in. The defendant was relatively young, chronologically speaking.

As far as the criminal justice system goes, he was not so young. He had been part of that system for some period of time. He was no longer living at home. He had effectively been emancipated for a period of time. He was working on at least a sporadic basis, and there are certainly no questions in this case as to what the defendant's age was, but I do not find his age to have been a mitigating circumstance under the circumstances of this case.

The Court specifically finds that the defense has failed to establish, by a preponderance of evidence, the existence of the mitigating circumstances set forth in A.R.S. Section 13-703.G.5.

. . .

The defense has also argued, as a nonstatutory mitigating factor, the defendant's diminished mental capacity and his low I.Q., and this—this may, to some extent, be incorporated within one of the statutory factors, but there is nothing to prevent me from discussing a fine variation of that as a possible nonstatutory mitigating factor.

The Court would concede that there is certain evidence in this case that would support the proposition that the defendant's mental capacity may be diminished, at least compared to the norm in the population, and that his I.Q. may be low, at least compared to the norm in the population.

However, when you weigh that against the defendant's description of the murders, certain prepatory [*sic*] steps that were taken—admittedly, not overly-sophisticated, but attempts were made to do certain things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle.

The Court finds that even though there is evidence that the defendant may have a diminished mental capacity and a lower-than-average I.Q., that

the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factor of the defendant's diminished capacity and low I.Q.

. . .

The next one [nonstatutory mitigating factor] is that the defendant was a follower of the co-defendant Anderson. Again, I can only go on what was presented during the trial. In this case, certainly there is evidence that [co-defendant] Kimberly Lane was the first person to mention that Frank Anderson may have started the ball rolling, as far as Mr. Delahunt.

After these people made some somewhat faint initial overtures, Mr. Poyson [Appellant] stepped in, needed no one to tell him what to do, took over and essentially murdered three people, pretty much on his own. and there's no indication that he was forced to do this, that [he] was coerced to do this, was somehow intimidated into doing this by Mr. Anderson.

The Court finds that the defense has failed to establish, by a preponderance of evidence, that the defendant was a follower of Frank Anderson, and this would not be a nonstatutory mitigating factor.

(R.T. 11/20/98, at 50-51, 56-57, 61.)

As the trial court found, there is no evidence to suggest a nexus between Appellant's chronological age, and mental capacity, and his murderous acts. Likewise, the evidence firmly established that Appellant was no follower—he, rather than Anderson or Lane, planned, and carried out, the three murders. (Exhibit 72, at 214-16, 220-22; R.T. 3/3/98, at 94, 98.)

3. MENTAL HEALTH AND PSYCHOLOGICAL ISSUES

In addressing this proffered mitigation factor, the trial court held:

> The first statutory mitigating factor that was alleged was personality disorders of the defendant. Again, the defendant had some mental health and psychological issues. I think, depending on what you define a mental or a personality disorder to be, the State—or excuse me—the defense has established that there were certain men—personality disorders that the defendant, in fact, may have been suffering from.
>
> The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses.

(R.T. 11/20/98, at 53–53.)

During the hearing, Appellant presented evidence that, as a child, he had suffered head injuries, was a slow learner, was a bedwetter, and had speech and balance problems. (R.T. 10/20/98, at 119–20, 124. 146.) He also presented evidence that he suffered from headaches, and tinnitus. (R.T. 10/20/98, at 136–37.) However, as pointed out by the trial court, Appellant failed to establish any nexus between these traits and the crimes he committed.

4. *REMORSE*

In rejecting remorse as a mitigating factor, the trial court stated:

> The second nonstatutory mitigating factor alleged is remorse. I am convinced that the defense has established, by a preponderance of evidence, that the defendant was and is, in fact, remorseful about the commission of these offenses.
>
> When I consider that fact that he had time to reflect upon what he was doing, since killing three people did take some period of time, and considering the fact that his remorse could have kicked in at some point and maybe prevented one or two of these murders from taking place—keeping in mind the fact that even though he may have discussed turning himself in; he, in fact, did not turn himself in—even though I find that remorse has been established in this case, I find that it is not, in fact, a nonstatutory mitigating factor.
>
> The Court finds that the defense has failed to show, by a preponderance of evidence, that the defendant's remorse is a nonstatutory mitigating factor.

(R.T. 11/20/98, at 53.) Thus, although the trial court found that Appellant had established his remorse, the trial court determined that his tardy remorse had no mitigating value, given the fact that Appellant could have prevented, but did not, one or more of the murders.

This Court should similarly find that Appellant's remorse was not a mitigating factor, or alternatively if it is found to be mitigating, that it be given *de minimus* weight, given the duration of the abject cruelty and brutality in the manner in which Appellant murdered his victims.

5. *DYSFUNCTIONAL AND ABUSIVE CHILDHOOD*

In considering his childhood background, the trial court found:

Several of these others [proffered mitigating factors] kind of blend together, and it's sort of hard to discuss them separately.

The number 4 nonstatutory mitigating factor is the dysfunctional family and childhood.

Number 5 is the physical and sexual abuse in the defendant's childhood.

And number 6 is the mental abuse in the childhood of the defendant.

I was certainly struck, at the presentencing hearing, by the fact that Mr. Poyson had a childhood that I certainly would not have wanted to have been part of and would not have wanted my children to be part of or anyone that I know.

I can think of people that I know who have been abused as children, who have had parents die when they were young, who have been exposed to separation and anxiety that would certainly be comparable to that that was suffered by Mr. Poyson, and I can think of people who have gone through things remarkably similar to Mr. Poyson and have become productive upstanding members of the community, and I am finding that [the] defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse.

The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood.

The Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factors of his dysfunctional family and child background, the physical and sexual abuse in his childhood, or the mental abuse in his childhood.

(R.T. 11/20/98, at 54–55.) As the trial court points out, Appellant failed to present evidence demonstrating a nexus between his childhood background, and the murders he committed years later.

6. POTENTIAL FOR REHABILITATION

In its special verdict, the trial court stated:

> The defense asserts that potential for rehabilitation of the defendant is a mitigating factor, a nonstatutory mitigating factor. If there is anything that has been presented to even suggest that, I must have missed it. There has been evidence that defendant has been subject to incarceration supervision in the juvenile system, which apparently had very little lasting impact upon him.
>
> I can certainly note, as I will note later, that the defendant has not been any sort of problem, at least as I can tell, during the pendency of this case. That doesn't necessarily equate with rehabilitation.
>
> The Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factor that there is potential to rehabilitate the defendant.

(R.T. 11/20/98, at 57.) Appellant contends that the trial court erred in not considering Appellant's potential for rehabilitation as a mitigating circumstance, quoting the following passage from a forensic evaluation report written by Dr. Celia Drake, and admitted during Appellant's mitigation hearing:

> There are some indications that he [Appellant] had some strengths and he was responsive to the structure provided in various placements. In discharge summaries from all three institutions in which he was placed there was documented progress.

(Exhibit C-46, at 21.) This comment, however, is a far cry from an expert opinion by Dr. Drake that Appellant could be rehabilitated, and without such testimony, from someone other than Appellant, his potential for rehabilitation cannot be considered as a nonstatutory mitigating factor. Additionally, based on his personal history, the only "documented progress" Appellant made throughout his life was one of progressing from less-violent crimes to more-violent crimes, culminating in his murder of Robert, Leta, and Roland. His parade of crimes and aberrant behavior, chronicled in Drake's report, is chilling: alcohol consumption, beginning at age 12; violation of curfew, fighting at school, sexual assault, burglary, vandalism, burning the hair on the back of another boy's head, and commitment to a youth detention center, by age 13; use of marijuana, from age 13-20; gang membership, from age 14-19; selling drugs at school, and commitment to a youth treatment center, by age 15; use of PCP, from age 15-18½; lewd and licentious conduct with a minor, at age 16; commitment to a youth detention center, from age 16-18; use of methamphetamine, age 18; sporadic work history, from age 18-19; triple homicide, age 19. (Exhibit C-46, at 4-7, 10.) There is no evidence to suggest that Appellant can be rehabilitated.

7. FAMILY SUPPORT

In considering this proffered mitigating factor, the trial court stated:

> And we are getting near the end. The next argument that was made is the defendant's current family support. It's hard for me to say this without seeming mean-hearted or—or cruel, but I was astonished at some point

during this case to find out that the defendant actually had relatives that were living in this immediate area.

The one impression that I had throughout this case, up until we got to the sentencing phase, was that poor Mr. Poyson had been cut loose, was stuck out in Golden Valley, didn't have family anywhere nearby and was completely on his own, and was—was virtually isolated there with no sort of family contact, and when I found out that he had family that was a half hour away, I was amazed.

I guess I was amazed because I had never head of it before. Just seemed completely in contradiction to the image that I had of this person who virtually had no family contact. And that's not to rule out the possibility that there was simply no reason to present it or have me know it before then, but I have the impression that the family support in this case has not been very significant.

It may have been more significant when the issue became whether the defendant was going to be executed or not; and again, I don't mean any disrespect to anyone, but I find that [the] defense has failed to establish, by a preponderance of evidence, even the existence of significant family support of the defendant.

(R.T. 11/20/98, at 67–68.) This Court should similarly find that Appellant's "family support" was little more than a last ditch effect to convince the trial court not to sentence Appellant to death. Alternatively, any possible "family support" should be given *de minimus* weight. Appellant's "family support," shallow as a river in the Mohave desert, has little or no mitigating value, when weighed against Appellant's horrific crimes.

* * *

Rejected in *White*, 297 Ariz. Adv. Rep. at ¶ 49.

J. ARIZONA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE IT DOES NOT REQUIRE THE SENTENCER TO FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE ACCUMULATED MITIGATING CIRCUMSTANCES.

Rejected in *White*, 297 Ariz. Adv. Rep. at ¶ 49.

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the judgments and sentences of the trial court.

Respectfully submitted,

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ARIZONA SUPREME COURT

STATE OF ARIZONA, APPELLEE, -VS- ERNESTO SALGADO MARTINEZ, APPELLANT.	CR-98-0393-AP MARICOPA COUNTY SUPERIOR COURT NO. CR-95-08782

APPELLEE'S ANSWERING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court clearly err by denying Appellant's *Batson* challenge to the State's peremptory strike of prospective juror Eric Veitch?

2. By failing to make the argument below, has Appellant waived his new contention on appeal, that removal of Mr. Veitch violated the Arizona Constitution?

3. Did the trial court clearly err by denying Appellant's *Batson* challenge to the State's peremptory strike of prospective juror Linda Preston?

4. Has Appellant demonstrated that the trial court clearly abused its discretion by not striking prospective juror Gail Schroeder for cause?

5. With one exception, has Appellant waived all objections to the trial court's admission of other acts by conceding below that those acts were relevant and probative on identity, motive, and consciousness of guilt, and were not unfairly prejudicial if the evidence was limited as Appellant suggested?

6. By failing to object to the trial court's refusal to give his "nonpresence" instruction, has Appellant waived the issue on appeal?

7. By failing to object to the trial court's deletion of part of his proffered instruction on second-degree murder, has Appellant waived objection on appeal?

8. Did the trial court properly consider Appellant's two 1996 convictions for deadly assault by a prisoner as aggravation under A.R.S. § 13-703(F)(2)?

9. In view of the overwhelming evidence of premeditation, did the trial court err by refusing to find that Appellant had proved, by a preponderance of the evidence, that his ability to conform his conduct to the requirements of the law was significantly impaired when he murdered Officer Martin?

10. In view of the totality of the evidence presented at trial, and at the aggravation-mitigation hearing, did the trial court err by refusing to give substantial weight to the proffered nonstatutory mitigation?

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(R.O.A. at 204, Special Verdict, at 23; emphasis supplied.)

Appellant contends that, if this Court will eliminate the two convictions for deadly assault by a prisoner, the record contains substantial mitigation that will convince this Court to reduce his sentence to life even when weighed against two aggravating circumstances. Of course, this Court always independently reviews the aggravation and mitigation, and determines what weight to give each. As Appellee will demonstrate in Sections IX and X, Appellant failed to carry his burden of producing substantial mitigation. For that reason, even one aggravating circumstance would have warranted the death penalty.

IX

BECAUSE APPELLANT FAILED TO PROVE SIGNIFICANT IMPAIRMENT BY A PREPONDERANCE OF THE EVIDENCE, THE TRIAL COURT PROPERLY REFUSED TO FIND IT.

Appellant asserts that the trial court erred by refusing to find that his capacity to conform his conduct to the requirements of the law was significantly impaired, and constituted a mitigating circumstance under A.R.S. § 13-703(G)(1).[15] As Appellee will demonstrate below, Appellant did not establish a causal connection between any diagnosis and his actions at the time he murdered. In particular, he totally failed to establish a causal link between his childhood and his cold, premeditated killing of Officer Robert Martin. Indeed, his own expert, Dr. Susan

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15. Appellant concedes that his ability to appreciate the wrongfulness of his conduct was not impaired. (Opening Brief, at 82.)

Parrish, conceded that he had made an adamant decision, days *before* the murder, that he was not going back to prison. As Appellee will show, Appellant's actions and statements days before the murder, his conduct after Officer Martin stopped him but before he emptied his .38 revolver into Officer Martin, and his actions subsequent to the murder, demonstrate that he is exactly the narcissistic, egocentric, self-gratifying, antisocial and remorseless murderer that Dr. Michael Bayless diagnosed him to be.

A. GENERAL LEGAL PRINCIPLES.

A capital defendant bears the burden of proving the existence of statutory and nonstatutory mitigation by a preponderance of the evidence, and he must present affirmative evidence to satisfy that burden. *State v. White*, ___Ariz.___, 982 P.2d 819, ¶ 18 (1999). The trial court first must determine whether the defendant has proved the existence of a factor by a preponderance of the evidence, then it must consider whether the factor is in any way mitigating. *Id.*, at ¶ 19. If the trial court finds that the defendant has proved a factor, and that it is mitigating, then the trial court must weigh that factor against the aggravating circumstances to determine whether the mitigation warrants leniency. *Id.* If the trial court finds more than one mitigating factor, it weighs such factors both separately and cumulatively against the aggravation. *Id.* Although the trial court must consider relevant evidence offered in mitigation, it is not required to find the evidence mitigating. *State v. Gonzales*, 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995).

The trial court has broad discretion to determine the credibility and weight of evidence offered in support of the (G)(1) factor, especially mental health evidence. *State v. Kayer*, 298 Ariz. Adv. Rep. 3, ¶ 49 (June 29, 1999); *State v. Doerr*, 193 Ariz. 56, ¶ 64, 969 P.2d 1168 (1998).

A difficult family background is not mitigating unless the defendant can establish a causal link between it and his conduct when he murdered. *State v. Clabourne*, ___Ariz. ___, 983 P.2d 748, ¶ 35 (1999); *Doerr*, at ¶ 69. Indeed, this Court has held that family background is *not relevant* unless the defendant can show that his background is linked to his criminal behavior. *State v. Djerf*, 191 Ariz. 583, ¶ 61, 959 P.2d 1274 (1998).

This Court independently reviews the trial court's findings regarding mitigation, and determines whether the mitigation outweighs the aggravation proved by the State. *Kayer*, at ¶ 28.

B. APPLICABLE FACTS.

The Honorable Christopher Skelly conducted an aggravation-mitigation hearing on July 9, 22, and 31, 1998. Appellant's counsel presented the testimony of Dr. Susan Parrish, a psychologist. (R.T. 7/22/98, at 5.) Dr. Parrish testified that she had not read the police reports and never spoke with Appellant's mother or sister. (*Id.* at 10, 63.) According to Dr. Parrish, Emmet J. Ronan, one of Appellant's attorneys, summarized the facts of the case for her. (*Id.* at 9–10.) She did not ask Appellant about the events surrounding the murder because Mr. Ronan instructed

* * *

X

THE TRIAL COURT PROPERLY REFUSED TO GIVE THE NONSTATUTORY MITIGATION SUBSTANTIAL WEIGHT.

Appellant asserts that the trial court erred by not giving his personality disorder and family history substantial mitigating weight. He again argues regarding the "reaction" syndrome, and the "it's him or me" theory that the trial court correctly found unpersuasive as a statutory mitigating factor. He also reargues the same material under the label of "personality disorder."

The trial court carefully considered alleged PTSD and personality disorder as potential nonstatutory mitigation:

> Although the court does not find that defendant's mental health and personality disorder evidence established "significant impairment" under the (G)(1) statutory mitigating circumstance, the court must still consider whether it should be given any weight as nonstatutory mitigation. . . .
>
> [T]he defendant has established . . . that he suffers from a personality disorder, with primarily anti-social features, but also borderline and narcissistic features. The defendant has not established by a preponderance of the evidence that he suffers from PTSD, or that he was in a dissociative state at the time he killed Officer Martin. The court finds that the defendant's personality disorder is a nonstatutory mitigating circumstance, but that it should not be given substantial weight because the defendant has *not established a sufficient causal connection between his personality disorder and his conduct in committing the murder*. Dr. Bayless concluded that the defendant was not acting in a merely reactionary way, but that he was simply acting in his perceived self-interest. Moreover, the defendant's comments to Oscar Fryer several days before the murder indicate that he *was preparing for the possibility of an incident like the one that occurred with Officer Martin*. There is also abundant evidence of the defendant's

> ability to plan, to think rationally and to make choices even when "threatened" as he would have been when he was confronted and subsequently apprehended by law enforcement officers after the murder.

(R.O.A. at 204, Special Verdict, at 16–18; emphasis added.)

Where the evidence indicates that the defendant's actions are the result of voluntary choice, the trial court may properly give little or no mitigating weight to a personality disorder. *State v. Medina,* 193 Ariz. 504, 516–17, 975 P.2d 94, 106–07 (1999) (where the experts diagnosed the defendant as anti-social, aggressive, with a callous disregard for the rights, property, and safety of others, and the trial judge fund that the defendant's conduct was largely the result of a voluntary choice to emulate his peers, the trial court properly gave the personality disorder little or no mitigating weight); *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 723, 802 (1992) (a personality disorder is not mitigating absent proof that it controlled the defendant's conduct or so impaired his mental capacity as to warrant leniency).

Because Appellant has for years lived—in Dr. MacDonald's words—as a substantial "law unto himself," and he killed Officer Martin merely to avoid reincarceration by a society whose laws he holds in contempt, the trial court correctly gave little mitigating weight to personality disorder.

With respect to family history as mitigation, the trial court said:

> The defendant has established . . . that he was exposed to recurrent episodes of domestic violence by the father toward the mother during the first twelve years of his life. . . The evidence also showed that the defendant's family history included drug use by both the father and mother during the first twelve years of defendant's life. . . Undoubtedly,

defendant's family history was a substantial contributing factor in the formation and development of the personality disorder referenced earlier. The court finds family history to be a mitigating circumstance.

As to the weight to be given this mitigating circumstance, substantial weight is given upon a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions. *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996).

Here, *the domestic violence and parental drug abuse ended 7 or 8 years before the murder when the father became very religious*. Both mother and father have been very devout since 1987 or 1988 when they moved to Globe. The defendant himself was not abused in the early years. *A sister, Julia, experienced a similar family history and has been remarkably successful and well-adjusted.* Defendant's mother testified that the parental drug use was kept from the children and that it ended when they moved to Globe. *And the court does not find that the family history significantly affected the defendant's ability to perceive, to comprehend or to control his actions when Officer Martin pulled him over on the Beeline Highway on August 15, 1995, for the reasons mentioned.* Therefore, family history is not given substantial weight.

(R.O.A. 204, Special Verdict, at 18–19; emphasis added.)

According to this Court's precedent, the trial court acted within its discretion in declining to give personality disorder and family history substantial mitigating weight because Appellant failed to carry his burden of showing that either the disorder or his history significantly affected his conduct when he murdered Officer Martin. *Medina,* 193 Ariz. at 516–17, 975 P.2d at 106–07; *Brewer*, 170 Ariz. at 505, 826 P.2d at 802.

* * *

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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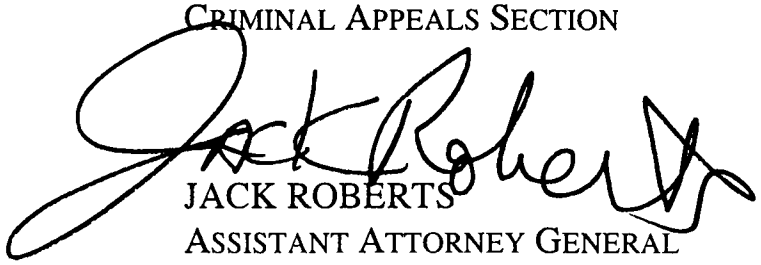

JACK ROBERTS
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ATTORNEYS FOR APPELLEE

ARIZONA SUPREME COURT

STATE OF ARIZONA, APPELLEE/CROSS-APPELLANT, –vs– SCOTT DRAKE CLABOURNE, APPELLANT/CROSS-APPELLEE.	CR–97–0334–AP PIMA COUNTY SUPERIOR COURT NO. CR–06824

APPELLEE'S ANSWERING BRIEF/CROSS-APPELLANT'S OPENING BRIEF

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ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

(APPEAL)

1. Did the trial court consider all proffered mitigation, weigh it against the uncontested aggravating circumstance and properly conclude that the mitigation was not sufficiently substantial to call for leniency? Should this Court reach the same conclusion after conducting its independent review?

2. Has Appellant waived the claim that the trial court erred in refusing to preclude consideration of allegedly hypnotically recalled testimony by failing to proffer intoxication as a mitigating circumstance? Does the record establish that no such evidence was admitted?

3. In light of the facts that Appellant's post-judgment motion was untimely filed and Appellant did not file a timely notice of appeal from denial of the motion, does this Court possess jurisdiction to review the issues raised in the motion?

4. Did the trial court err in considering letters written by members of the victim's family or abuse its discretion in refusing to bifurcate the sentencing proceeding?

5. Is prosecutorial discretion in determining whether to seek imposition of the death penalty unconstitutional? Is proportionality review constitutionally required?

6. Are Arizona's alternative methods of execution unconstitutional?

(CROSS-APPEAL)

In light of the fact that "the economic cost of the death penalty" is totally irrelevant to a defendant's background or character or the facts and circumstances surrounding the offense, did the trial court err in finding it to be a mitigating factor?

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* * *

4. Analysis

As previously noted, a defendant bears the burden of proving proffered mitigation by a preponderance of the evidence. *Rogovich*, 188 Ariz. at 45, 932 P.2d at 801; *Wood*, 180 Ariz. at 70, 881 P.2d at 1175; *see also* A.R.S. § 13-703(C) (burden of establishing the existence of mitigating circumstances is on the defendant). Before an alleged mental illness is entitled to any mitigating weight, the defendant must establish a "causal connection between his alleged mental illness and his conduct on the night of the murder." *State v. Jones*, 185 Ariz. 471, 492, 917 P.2d 200, 221 (1996); *see also Hyde*, 186 Ariz. at 282-83, 921 P.2d at 685-86 (defendant's low IQ and classification as "learning disabled" not tied to his commission of the murders); *State v. Laird*, 186 Ariz. 203, 209, 920 p.2d 769, 775 (1996) (defendant's personality disorders did not prevent him from understanding the significance of his actions).

None of the doctors opined that Appellant was impaired at all as a result of any alleged mental problems at the time he committed the murder. At trial, Dr. Gelardin testified that he thought that Appellant committed the crimes while under the influence of drugs or alcohol, but this was based solely upon Appellant's self-reporting which in inherently suspect and entitled to little, if any, weight. *E.g., State v. McKinney* 185 Ariz. 567, 579, 917 P.2d 1214, 1226 (1996)

(defendant failed to prove intoxication by a preponderance of the evidence where experts' opinions based almost entirely on defendant's "self-reporting"); *State v. Gallegos*, 185 Ariz. 340, 344–45, 916 P.2d 1056, 1060–61 (1996) (expert's report of intoxication based upon defendant's self-reporting should be "discounted" and given little, if any, weight).

Thus, Appellant utterly failed to prove that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was impaired at all, let alone "significantly impaired." Consequently, he fails to prove significant impairment under A.R.S. § 13–703(G(1). Quite simply, Appellant attempts to equate his "unwillingness to control his actions with his inability to do so." *State v. Miller*, 186 Ariz. 314, 326, 921 P.2d 1151, 1163 (196) (quoting *State v. Kiles*, 175 Ariz. 358, 374, 857 P.2d 1212, 1228 (1993)).

Appellant contends that he trial court failed to consider any residual "mental impairment/schizophrenia/psychotic episodes" as non-statutory mitigation because it was "not mentioned" when the trial court discussed other non-statutory mitigation in its special verdict. (Appellant's Opening Brief at 3.) This is incorrect. The trial court specially stated that it "has reviewed and considered . . . all relevant evidence proffered by the Appellant in support of mitigation."

(Resentencing Item 89 at 1–2; see also R.T. 8/14/97 at 4, 8.) The reason the trial court discussed the alleged mental impairment under the heading of statutory mitigation and not *again* under the heading of non-statutory mitigation is because *that is how Appellant briefed and presented it in his sentencing memorandum.* (Resentencing Item 11 at 1176 -96.) Moreover, the State expressly pointed out to the trial court that it "must consider impairment below 'significant impairment' as non-statutory mitigation, if proven by a preponderance of the evidence." (*Id.* Item 68 at 1523.) (citing *State v. Gallegos*, 178 Ariz. 1, 17, 870 P.2d 1047, 1113 (1994)). And, this Court has recently noted that "a verdict is not defective because it 'does not discuss all the circumstances argued by the defense to be mitigating'" *Spreitz*, 190 Ariz. at 149, 945 P.2d at 1280. Here, the trial court *considered* all proffered mental impairment evidence, correctly found that Appellant presented absolutely *no* evidence that he was experiencing *any* sort of mental disorder or impairment when he sexually assaulted and murdered Laura Webster, and correctly concluded, therefore, that any alleged mental disorders at other times in

Appellant's life was not "mitigating."[7] This Court should reach the same conclusion after conducting its independent review.

b. Duress

Appellant contends that the trial court erred in rejecting his claim that he murdered Laura Webster under "duress" because he believed that, if he did not kill her, Larry Langston would kill him. The trial court properly rejected this claim and so should this Court after conducting its independent review.

For the mitigating circumstance of unusual or substantial duress to exist "one person must coerce or induce another person to do something against his will." *Wood*, 180 Ariz. at 71, 881 P.2d at 1176 (*quoting State v. Castaneda*, 150 Ariz. 382, 394, 724 P.2d 1, 13 (1986)); *see also State v. Murray*, 184 Ariz. 9, 44,

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7. Although mental impairment or mental disorder is certainly "relevant" to Appellant's character and background and, therefore, "relevant to mitigation" it is *not* "mitigating" *unless* it contributed to Appellant's commission of the murder. *See Jones*, 185 Ariz. at 492, 917 P.2d at 221; *Hyde*, 186 Ariz. at 282–83, 921 P.2d at 685–86. It is neither "good" character (which would be mitigating) nor "bad" character (which would rebut any related proffered mitigation), but simply a fact or circumstance of life. The only way to find a mental impairment or disorder unrelated to a defendant's commission of the offense "mitigating" is to do so on the basis of "sympathy" or "pity" which injects arbitrariness and capriciousness into the capital sentencing process in violation of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1992). *See Brown*, 479 U.S. at 541–42. A defendant *must* establish a causal nexus between mental impairment and his commission or the murder before it is mitigating or entitled to *any* mitigating weight, statutory *or* non-statutory.

* * *

CONCLUSION

For the reasons set forth above, the sentences imposed by the trial court should be affirmed.

Respectfully submitted,

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ARIZONA SUPREME COURT

STATE OF ARIZONA, APPELLEE, –vs– GRAHAM SAUNDERS HENRY, APPELLANT.	CR–95–0098–AP MOHAVE COUNTY SUPERIOR COURT NO. CR–8286A

APPELLEE'S ANSWERING BRIEF

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ATTORNEYS FOR APPELLEE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court, by its refusal to concede to Appellant's demand to testify at the hearing to strike Judge Conn for cause, denied Appellant's state and federal constitutional rights to testify?

2. Whether the trial court violated Appellant's right to counsel by denying appointed counsel's request to withdraw because of Appellant's continuing dissatisfaction with any counsel who had ever been appointed?

3. Whether the trial court violated Appellant's right to self-representation by denying appointed counsel's motion to withdraw?

4. Whether the use of an electric belt during a presentence hearing violates any constitutional provision?

5. Whether the presiding judge violated Appellant's right to counsel/self-representation by refusing to substitute counsel the day that the hearing was scheduled?

6. Whether application of *Tison* in this case violates the *ex post facto* doctrine?

7. Whether the evidence supports a finding of A.R.S. § 13-703(F)(2)?

8. Whether A.R.S. § 13-703(F)(2) applies absent a finding that Appellant did kill or intended to kill?

9. Whether the disparity in sentences supports a mitigating circumstance?

10. Whether the trial court considered nonstatutory mitigating circumstances?

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* * *

multitude of factors relating to sentencing an individual defendant. *Id.* at 307 n.28. Thus, far from fostering the Eighth Amendment's requirement that capital sentencing decisions be based upon "the character and record of the individual offender and the circumstances of the particular offense," *Id.*, at 303, considering the *sentence* received by a co-defendant involved in the same murder promotes arbitrariness.

The implausibility of comparing Appellant's sentence to that of codefendant Foote is readily apparent in the present case. Foote's trial ended in a hung jury, on all four counts. As a result, he received a plea agreement that would reduce his liability from first-degree murder, kidnapping, robbery and theft, to attempted first-degree murder, robbery and theft. (R.T. of Feb. 23, 1995, at 142–45.) Appellant was tried and convicted of first-degree murder, kidnapping, robbery and theft. Foote had no prior felony convictions, Appellant had several prior conviction involving violence. In the circumstances, the sentence received by Foote is simply irrelevant to "mitigation" with respect to Appellant.

Even if this Court continues to "occasionally" consider disparity in sentence as a mitigating circumstance, it considers only "unexplained disparity." *Schurz*, 176 Ariz. at 57. For the reasons set forth in the sentencing transcript, the present disparity is easily explained. Whatever disparity there is between a sentence of 15 years and death sentence is more than justified on these facts. *Id.* The trial court's finding that Foote's penalty did not rise to the level of a non-statutory mitigating factor is fully supported by the record.

X

THE TRIAL COURT PROPERLY CONSIDERED, BUT REJECTED AS MITIGATING, VARIOUS NON-STATUTORY FACTORS.

Appellant contends that the trial court refused to consider various non-statutory factors as mitigating, rendering unreliable the sentence of death. The

trial court is obligated, in any capital case, to consider any factor proven by the defendant that is relevant to mitigation. A.R.S. § 13-703(G); *State v. Walden*, ___ Ariz. ___, ___, 905 P.2d 974, 998 (1995). Relevant mitigation is any aspect of the defendant's background or the offense that relates to the application of capital punishment. *Bible*, 175 Ariz. at 605, 858 P.2d at 1208. The trial court complied with this mandate.

In its special verdict, the sentencing court found two aggravating factors 703 (F)(1) and (2), prior convictions weighed as one, and (F)(5), pecuniary gain, and one statutory mitigating circumstance, 703(G)(1), diminished capacity. (R.T. of Feb. 23, 1995, at 145.) It expressly considered several nonstatutory mitigating factors, including Appellant's intelligence and education, his troubled and traumatic upbringing, possible psychological disturbance, saver of lives, his cooperation with the police, his remorse, the cost/benefit consideration, the barbarity of death penalty, the impropriety of California convictions, the giving of a felony-murder instruction, his honorable conduct while in prison, his work at establishing a prison library, assisting other inmates, his good behavior in jail, and the disparity in sentences. (R.T. of Feb. 23, 1995, at 134-46.) For reasons stated on the record, the court declined to find that any nonstatutory circumstance qualified as mitigation. (*Id.*) Each of those comments is supported by the record.

A. Intelligence and education; not mitigating because Appellant used these attributes to commit his crimes of violence, to mislead authorities, and to attempt to thwart the judicial process. (*Id.* at 135.) The record sustains the trial court's findings. Despite his intelligence, Appellant continuously manipulated the system, with his attempts to misdirect the police, his unauthorized use of library time, and his blatant attempts to postpone any and all court proceedings by requesting substitute counsel. If anything, Appellant's use of his intelligence is a factor that would rebut other mitigating circumstances. The trial court was correct to reject

this factor as mitigation. *See State v. Murray (Roger)*, ___ Ariz. ___, ___, 906 P.2d 542, 578 (1995) (Educational accomplishments did not prevent the crime.).

B. Troubled and traumatic upbringing. Appellant presented no evidence that his childhood affected his conduct with respect to this crime. (*Id.*) Therefore, it is not mitigating. *Id.*, 906 P.2d at 577 (failure to show how dysfunctional family affected behavior at time of murder).

C. Psychological disturbance. The trial court found that Appellant had presented no evidence of a psychological disturbance. Therefore, it cannot be considered as mitigating. Contrast with *Murray*, 906 P.2d at 578 (evidence of hyperactivity entitled to some mitigating weight).

D. Saved lives. Supported by Appellant's self-serving testimony, but not sufficiently related to his character or the offense. In fact, it is contrasted with this offense that involved taking of a life. Consequently, it is entitled to little, if any, weight as mitigation.

E. Cooperation with police. This factor is invalidated by the record. Appellant was deceptive so long as it was beneficial to him. (R.T. of Apr. 24, 1987, at 20–46.) As noted by the trial court, "Mr. Henry's cooperation kicked in when he saw that he was going to be implicated in this . . ." (R.T. of Feb. 23, 1995, at 136.) Rather than being a mitigating circumstance, this factor could be use to rebut any other mitigation. The trial court properly rejected it.

F. Remorse. The trial court found that there was no evidence of remorse, especially in light of Appellant's refusal to acknowledge his participation in the murder. (*Id.*) In the circumstances, this factor does not constitute mitigation. *State v. Stokley*, 182 Ariz. 505, 525, 898 P.2d 454, 474 (1995).

G. Cost/benefit consideration. This factor is irrelevant with respect to either Appellant's character or the circumstances of the offense. *Bible*, 175 Ariz. at 605, 858 P.2d at 1208 (relevant mitigation is any aspect of the defendant's background

or the offense that relates to the application of capital punishment). Therefore, it was proper for the trial court to refuse to consider this factor as mitigation.

H. Barbaric sentence. This factor is also irrelevant with respect to either Appellant's character or the circumstances of the offense. *Bible*, 175 Ariz. at 605, 858 P.2d at 1208 (relevant mitigation is any aspect of the defendant's background or the offense that relates to the application of capital punishment). Therefore, it was proper for the trial court to refuse to consider this factor as mitigation.

I. Validity of the California convictions. This factor is irrelevant to either Appellant's character or the circumstances of the offense. *Bible*, 175 Ariz. at 605, 858 P.2d at 1208 (relevant mitigation is any aspect of the defendant's background or the offense that relates to the application of capital punishment). At best, any argument could be used to rebut the aggravating circumstances found under A.R.S. § 13-703 (F)(1) and (2). Therefore, it was proper for the trial court to refuse to consider this factor as mitigation.

J. Felony-murder instruction. Because of the trial court's finding of Appellant's responsibility for the murder, it held that the felony-murder instruct given here did not qualify as a mitigating circumstance. (R.T. of Feb. 23, 1995, at 139.) This finding is consistent with the law. *Murray*, 906 P.2d at 578 (felony-murder instruction is mitigating only where there is some doubt regarding Appellant's intent to kill). The sentencing court had no trouble finding that Appellant qualified under *Tison*. (R.T. of Feb. 23, 1995, at 139.) Therefore, it properly rejected the instruction as mitigation.

K. Conduct in prison. The trial court rejected this factor because there was no evidence that Appellant was a model prisoner. (*Id.*) That he was in a setting conducive to avoiding disciplinary problems does not rise to the level of mitigation, especially when Appellant's violent history is considered. *Walden*, 905

P.2d at 999. The trial court properly rejected Appellant's conduct while incarcerated.

L. Disparity in sentencing. This claim was addressed in Argument IX.

Each of the trial court's rulings is justified by the record before this Court. Either the factor was not supported by the evidence or it was contrary to evidence that did exist. The trial court properly rejected each of the non-statutory mitigating circumstances.

CONCLUSION

Appellant has failed to state any legal or factual claim on which he would be entitled to appellate relief. Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the death sentence imposed by the trial court.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE

ARIZONA SUPREME COURT

STATE OF ARIZONA,

APPELLEE,

-vs-

CHARLES MICHAEL HEDLUND,

APPELLANT.

CR-93-0377-AP

MARICOPA COUNTY
SUPERIOR COURT
NO. CR-91-90926(A)

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Rule 31.22, Arizona Rules of Criminal Procedure, Appellee submits the following supplemental citation of legal authority.

DATED this 20th day of October, 1995.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

Supplemental authority for Argument 8 of the Answering Brief at pages 51–57:

State v. Stokley, 193 Ariz. Adv. Rep. 23, 29 (June 27, 1995) (psychologist's opinion of significant alcohol impairment, based entirely on defendant's self-reporting, was insufficient to overcome "much evidence" to the contrary, including post-killing evasive activity and a detailed recall; no statutory diminished capacity showing had been made, and no non-statutory mitigation could be found in defendant's alleged substance abuse).

State v. King, 180 Ariz. 26, 883 P.2d 1024 (1994) (defense expert's opinion that defendant's intoxication prevented him from appreciating "the full consequences of his behavior," insufficient to prove substantial impairment because the only support for intoxication came from defendant's own words and the record did not support a finding that the defendant was significantly intoxicated).

State v. Bolton, ___ Ariz. ___, 892 P.2d 830 (1995) (claim that defendant was intoxicated at the time of the murder was supported only by the defendant's self-serving testimony, and, therefore, was not proven).

Supplemental authority for Argument 9 of the Answering Brief at pages 58–62:

State v. Stokley, 193 Ariz. Adv. Rep. 23, 29 (June 27, 1995) (abusive and chaotic childhood was not a mitigating factor because, the defendant failed to show that his childhood had an impact on his behavior on the night of the crimes that was beyond his control, and adult offenders have a greater burden of proof due to a greater degree of personal responsibility for their actions).

State v. Walden, 201 Ariz. Adv. Rep.___ (CR–92–0530–AP) (Oct. 10, 1995) (claim that defendant's father was verbally abusive, an alcoholic and convicted of sex crimes, failed to show that defendant's childhood "had an effect or impact on his behavior that was beyond the defendant's control"; defendant's claim that his childhood caused him to suffer low self-esteem and alcoholism did not relate to the commission of the offenses).

State v. Bolton, ___ Ariz. ___, 896 P.2d 830 (1995) (19-year-old defendant's "undisputed severe emotional and physical abuse as a child" was not a mitigating circumstance because it failed to prove that it "had an effect or impact on his behavior that was beyond the defendant's control").

State v. Wood, 180 Ariz. 53, 881 P.2d 1158 (1994) (defendant failed to demonstrate how his alleged poor upbringing related to the murders).

Supplemental authority for Argument 9(c) of the Answering Brief at pages 62–63:

State v. Stokley, 193 Ariz. Adv. Rep. 23, 29 (June 27, 1995) (defendant's claim of minor participation rejected as a mitigating circumstance because jurors found defendant guilty of first-degree murder; the defendant killed one victim and intended to kill the other).

. . . .

Supplemental authority to Argument 10 of the Answering Brief at pages 63–68:

State v. Williams, 200 Ariz. Adv. Rep. 11, 19–20 (Sep. 26, 1995) (defendant's conviction for armed robbery satisfied A.R.S. § 13–703(F)(2), although the offense occurred after the murder and the convictions were simultaneous).

State v. Walden, 201 Ariz. Adv. Rep.___ (CR–92–0530–AP) (Oct. 10, 1995) (simultaneous convictions may be used to satisfy A.R.S. § 13–703(F)(1), finding that a conviction is entered for purposes of A.R.S. § 13–703(F)(1) when there has been a determination of guilt, and rejecting the claim that our death penalty statute is a recidivist or enhancement statute).

RESPECTFULLY SUBMITTED this 20th day of October, 1995.

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ATTORNEYS FOR APPELLEE

COPY

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ARIZONA SUPREME COURT

FILED
APR 12 1995
NOEL K. DESSAINT
CLERK SUPREME COURT
BY

STATE OF ARIZONA,

APPELLEE,

-vs-

CHARLES MICHAEL HEDLUND,

APPELLANT.

CR-93-0377-AP

MARICOPA COUNTY
SUPERIOR COURT
NO. CR-91-90926(A)

APPELLEE'S ANSWERING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Trial Issues

1. Did the absence of Appellant's trial counsel during the voir dire of Joe Lemon, regarding the admissibility of impeachment evidence pursuant to Rule 609(d), Arizona Rules of Criminal Procedure, constitute a structural defect warranting reversal of his convictions?

2. Did the trial court abuse its discretion by denying Appellant's motion to impeach Joe Lemon with his prior juvenile misconduct, pursuant to Rule 609(d), Arizona Rules of Evidence?

3. Did Appellant waive his claim that the trial court erred by refusing to consider his guilty plea because he failed to preserve a record for review on appeal? Waiver notwithstanding, did the trial court abuse its discretion?

4. Did the use of dual juries, in which the trial court permitted leading questions on direct examination, deprive Appellant of a fair trial?

5. Were Appellant's constitutional rights violated because the jurors saw that Appellant was wearing a leg brace during trial? Should this court reject Appellant's claim because he failed to establish actual prejudice?

6. Did the trial court commit clear and manifest error by denying Appellant's motion to suppress?

7. Did the trial court abuse its discretion by refusing to dismiss Juror Blanc for cause?

Sentencing Issues

8. Did the trial court err by evaluating the credibility of the psychological evidence presented to support the mitigating circumstances offered by Appellant?

9. Did the trial court err in its consideration of the mitigating evidence?

10. Can a conviction obtained simultaneous to the capital conviction be considered as an aggravating circumstance for purposes of A.R.S. § 13-703(F)(2)?

11. Did the trial court err by finding that Appellant murdered Jim McClain with the expectation of pecuniary gain?

12. Does A.R.S. § 13-703(D) require the trial court to file a written special verdict in addition to the oral special verdict pronounced at sentencing?

13. Does Arizona's death penalty statute violate the Eighth and Fourteenth Amendments?

14. Does Arizona's death penalty statute adequately channel the sentencer's discretion?

15. Does the equal protection clause require a jury, rather than the trial court, to determine the existence of aggravating circumstances?

16. Should this Court engage in a proportionality review of the propriety of Appellant's death sentence?

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IX. THE TRIAL COURT DID NOT ERR IN ITS CONSIDERATION OF THE MITIGATING EVIDENCE.

Appellant contends the trial court erred by failing to find his difficult childhood and alleged minor participation as mitigating circumstances. The record supports the trial court's rejection of this evidence to support a finding of diminished capacity under A.R.S. § 13-703(G)(1).

A. APPELLANT'S DIFFICULT CHILDHOOD.

In a capital case, the trial court must consider and evaluate whether the defendant has proved, by a preponderance of the evidence, the fact or circumstance. *State v. Henry,* 176 Ariz. 569, 588, 863 P.2d 861, 883 (1993) (trial court considered defendant's childhood in mitigation, but found it was entitled to little or no weight). Once the existence of the circumstances has been established, the trial court considers whether it is in some way mitigating. *Id.*; *e.g., State v. Spencer,* 176 Ariz. 36, 44, 859 P.2d 146, 154 (1993) (good behavior at trial not relevant to mitigation), *cert. denied,* 114 S. Ct. 705 (1994).

This Court has recognized that a difficult childhood, in and of itself, is not a mitigating circumstance because "nearly every defendant could point to some circumstance in his or her background that would call for mitigation." *State v. Wallace,* 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied,* 494 U.S. 1047 (1990). Generally, before a difficult childhood rises to the level of a mitigating circumstance, there must be a relationship between that childhood and the defendant's commission of the crime. *Id.* A difficult childhood is not a relevant mitigating circumstance unless "a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." *State v. Ross,* 180 Ariz. Adv. Rep. 3, 7 (Dec. 22, 1994) (citing *Wallace,* 160 Ariz. at 427, 773 P.2d at 986); *see also State v. White,* 168 Ariz. 500, 512-13, 815 P.2d 869, 881-82 (1991) (rejecting family background

as mitigating circumstance when defendant failed to show it had anything to do with the murders), *cert. denied,* 502 S. Ct. 1105 (1992). While evidence of a difficult childhood may be especially relevant if the defendant is a minor at the time of his offense, an adult defendant must accept personal responsibility for his actions. *Wallace,* 160 Ariz. at 427, 773 P.2d at 986; *State v. Gretzler,* 135 Ariz. 42, 58, 659 P.2d 1, 17 (1983).

Appellant offered his difficult childhood as a statutory mitigating factor under (G)(1). To establish this, Appellant presented Holler's testimony. (R.T. of July 27, 1993, at 21, 32–34, 41.) Although Holler opined that Appellant's childhood abuse satisfied the requirements of (G)(1), other portions of his testimony undermine his opinion. (*Id.*) Holler testified that Appellant knew that burglary and murder were wrong, and that, had a police officer been in the vicinity of the crimes, "certainly that would be something that I do believe he would consider in regard to any potential criminal action." (*Id.* at 33–34.) Thus, according to Holler, if a police officer were nearby, creating the threat of apprehension, Appellant would have been deterred from committing the crimes. (*Id.*) The trial testimony bears this out because, during the Vine Street burglary, Appellant moved his car from the prearranged pick up spot to avoid police officers who were patrolling the area. (R.T. of Oct. 29, 1992, at 79, 127.) Holler also testified that Appellant's cognitive ability was intact, that he was aware his conduct violated the law, and he did not suffer from psychosis, illusions, or hallucinations. (R.T. of July 27, 1993, at 35–36.) Holler's testimony supports the trial court's conclusion that Appellant failed to prove that his capacity to conform or appreciate the wrongfulness of his actions was significantly impaired.

Here the trial court considered Appellant's difficult childhood offered in mitigation and properly rejected it as a statutory mitigating circumstance under A.R.S. § 13–703(G)(1), but found that it had independent mitigating weight:

> Furthermore, there was no persuasive testimony presented that led to the conclusion that the abuse by—that the defendant suffered as a child resulted in him being under unusual or substantial duress at the time of the murders. I'm specifically finding that there is no substantial evidence to support a finding under (G)(1).
>
> . . . .
>
> I have concluded . . . that the evidence regarding Mr. Hedlund's childhood can be considered as truthful by the court, that there were significant aspects of his childhood which were clearly abusive. . . . I have considered it. I think it is the court's obligation to consider it, whether or not it complies with the requirements of (G)(1).

(R.T. of July 30, 1993, at 21, 23–24.) Thus, the trial court properly found that Appellant's difficult childhood was not a mitigating factor because it did not influence Appellant's ability to appreciate the wrongfulness of his conduct or conform his conduct to the law under (G)(1). *Ross,* 180 Ariz. Adv. Rep. at 7 (childhood emotional, physical, and sexual abuse was not a mitigating circumstance because it did not affect defendant's actions during the crime).

B. APPELLANT'S CHILDHOOD WAS NOT THE CAUSE HIS ALLEGED ALCOHOLISM.

Appellant also appears to argue that his difficult childhood resulted in his alcoholism, which contributed to his alleged impairment under (G)(1). To support this contention Appellant offered Dr. Shaw's testimony. The trial court properly rejected Appellant's contention because there was no evidence to support the assertion that Appellant was drinking on the night of Jim's murder, or that his drinking impaired his capacity to conform his conduct. (R.T. of July 30, 1993, at 19.) *State v. Herrera (Jr.),* 176 Ariz. 21, 35, 859 P.2d 131, 145 (1993) (intoxication, by itself, is not a mitigating circumstance, unless the defendant's it results in an impairment under (G)(1)), *cert. denied,* 114 S. Ct. 398 (1993).

Shaw testified about general factors of alcoholism and the characteristics an alcoholic may show. (R.T. of July 27, 1993, at 63–69.) He opined that Appellant

was an alcoholic, basing his opinion solely on Appellant's self-reporting without interviewing his family, friends, or employer. (*Id.* at 82.) Shaw opined that:

> Well, it just is my opinion that his disease had a great deal to do with those things that you just mentioned, and one has to wonder if he did not have that disease would the same things have occurred.

(*Id.* at 76.) Shaw formulated his opinions without having any specific information regarding whether or how much Appellant had been drinking during the murders and admitted that he was speaking from generalities. (*Id.* at 88, 90.) Shaw did consider Appellant's self-serving assertion that, if he had not been drinking, he would not have been involved in the crimes. (*Id.* at 85.) Further, Shaw testified that, although criminal acts could result from alcohol abuse, the converse was true that an alcoholic may not engage in criminal activity. (*Id.* at 84.) This lack of concrete information regarding the circumstances of the murders renders Shaw's opinion speculative at best.

Further, Shaw's testimony did not establish that, even if Appellant had been drinking prior to the offenses, his perception and judgment were impaired. (*Id.* at 88–89.) When posed with the hypothetical situation of assuming Appellant drank eight beers around the time of the crimes, Shaw opined that Appellant would not lose his sense of what constitutes moral conduct and that his judgment *might* be effected. (*Id.*) Thus, Shaw's general opinions based on incomplete facts regarding the murder failed to establish that Appellant's ability to conform his conduct to the law was significantly impaired. Shaw's testimony at best was that Appellant was an alcoholic, which standing alone is insufficient to establish impairment under (G)(1). *Herrera (Jr.),* 176 Ariz. at 35, 859 P.2d at 145; *see also State v. King,* 180 Ariz. 268, 282–83, 883 P.2d 1024, 1038–39 (1994) (general statement by expert regarding the defendant's impulsivity was insufficient to establish (G)(1) because many impulsive people still manage to stay within the

bounds of the law). As stated above, the lay witness testimony presented in mitigation undermined the conclusions regarding Appellant's alcoholism.

Most importantly, the circumstances of Jim's murder and the burglary of his home have the earmarks of well planned and deliberately executed crimes. Appellant sawed off his rifle, modifying it into a concealable weapon, after he had buried McKinney's handgun in the desert. Christine had been killed two weeks prior to Jim's murder, providing Appellant with sufficient time for reflection. Appellant entered Jim's house during the night armed with his rifle, when it was likely that Jim would be home. Jim, an elderly man, was murdered in his sleep, as opposed to an unexpected confrontation, indicating the deliberate nature of the murder. *State v. Salazar,* 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) (killing was foreseeable because the defendant knew that a frail old woman lived in the house and could see that it was occupied), *cert. denied,* 113 S. Ct. 3017 (1993). Appellant searched for and stole items that could easily be resold; the watch and guns. Jim's car was submerged in the stock pond by placing rocks on the accelerator, which was a deliberate step in hiding the stolen car as opposed to merely abandoning it. These actions are not those of an impaired individual, rather they are the calculated and deliberate tracks of a cold-blooded killer. Therefore, beyond Appellant's self-serving statements to Shaw, there is no evidence that Appellant was drinking, let alone excessively prior to Jim's murder. *Bible,* 175 Ariz. 549, at 605–06, 858 P.2d 1152, at 1208–09 (because the only evidence of intoxication came from the defendant's own self-serving statements, the trial court properly rejected this mitigating circumstance). The trial court's conclusion that Appellant was not impaired under (G)(1) must be affirmed.

C. APPELLANT WAS A MAJOR PARTICIPANT IN JIM'S MURDER.

Appellant also contends the trial court erred by refusing to find Appellant's alleged minor participation in the crime in mitigation. The trial court correctly

concluded that the jury verdict "is supported by substantial if not overwhelming evidence." (R.T. of July 30, 1993, at 21–22.)

As stated above, the circumstances surrounding the burglary and killing indicate that Appellant's participation was far from inconsequential. (R.T. of July 30, 1993, at 6-12.) The trial court found that Appellant associated himself with co-defendant McKinney, a known killer, and participated in the ongoing scheme to burglarize residences of known victims. (*Id.* at 7, 10.) Appellant assisted in burying and concealing the first murder weapon and converted his rifle into a concealable weapon prior to Jim's murder. (*Id.* at 7.) Appellant participated in the selection of Jim as a victim. (*Id.* at 9.) Appellant's prints were found on Jim's brief case. (*Id.* at 12.) Immediately after the murder, Appellant participated in the sale of the Jim's guns and also tried to sell the murder weapon. (*Id.* at 9.) After Jim's murder, Appellant hid his rifle, which prevented its discovery during the first search warrant. (*Id.*at 7.) Appellant contacted Chris and attempted to have him remove the weapon without alerting the residents. (*Id.* at 8.) The bullet removed from Jim's head was not inconsistent with being fired from Appellant's rifle. (*Id.* at 7–8.) Appellant's prints were found on the rifle's magazine and there was blood on the tip of the rifle. (*Id.* at 8.) Appellant expressed remorse after his arrest. (*Id.* at 20.) Thus, because the evidence showed that Appellant actively participated in the planning and was a major participant in the killing, the trial court properly rejected this as a mitigating circumstance.

X. THE TRIAL COURT DID NOT ERR BY USING APPELLANT'S CONVICTION FOR THE SECOND-DEGREE MURDER OF CHRISTINE TO SATISFY A.R.S. § 13–703(F)(2).

Appellant contends the trial court erred by considering his conviction for the second-degree murder of Christine to satisfy A.R.S. § 13–703(F)(2). Appellant

* * *

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests this Court to affirm the judgments and sentences of the trial court.

Respectfully submitted,

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PAUL J. McMURDIE
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Mona Peugh-Baskin

MONA S. PEUGH-BASKIN
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ATTORNEYS FOR APPELLEE

ARIZONA SUPREME COURT

STATE OF ARIZONA, APPELLEE, -VS- ANTHONY MARSHALL SPEARS, APPELLANT.	CR-93-0139-AP MARICOPA COUNTY SUPERIOR COURT NO. CR-92-90457

APPELLEE'S ANSWERING BRIEF II - State of #2

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QUESTIONS PRESENTED FOR REVIEW

1. Because the evidence presented showed that the officers had probable cause to believe that Appellant had stolen the victim's vehicle, did the trial court abuse its discretion in denying Appellant's motion to suppress?

2. Because Appellant made no claim that the conditions in the jail caused him to make a statement, and because there is no requirement that officers clarify an ambiguous request for counsel, did the trial court properly deny Appellant's motion to suppress his statement?

3. Because Appellant made no objection to the admission of the shell casing, and stipulated to the chain of custody, is he precluded from raising this issue on appeal?

4. Because the State presented sufficient evidence from which the jurors could conclude that Appellant killed the victim and did so with premeditation, and could determine the value of the vehicle, did the trial court abuse its discretion in denying Appellant's motions for judgment of acquittal?

5. Because Appellant's motion for a new trial based on the nondisclosure of Smith's prior felony conviction was untimely, did the trial court have jurisdiction to grant relief on that claim; moreover, because of the nature of Smith's testimony, did the trial court abuse its discretion in concluding that impeachment of smith would not have affected the verdict?

6. Because Appellant's motion for new trial based on juror misconduct was untimely, was the trial court without jurisdiction to consider it; moreover, did the grounds alleged entitle Appellant to relief?

7. Is Arizona's capital sentencing procedure constitutional?

8. Did the trial court properly find the existence of one aggravating circumstance, properly evaluate the mitigating evidence, and properly weigh the aggravating and mitigating circumstances, and thus properly impose the sentence?

9. Because Arizona presumes that a trial court does not consider improper evidence, and because there is nothing in the record to show that the trial court considered the opinions that Appellant should receive a sentence of death when it determined what the proper sentence would be, did the trial court properly sentence Appellant?

10. Did the trial court properly order restitution?

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* * *

a. Appellant's Age.

Appellant contends that the trial court erred in not finding that his age was a mitigating circumstance. Age is a mitigating circumstance only when, because of the defendant's youth or old age, the defendant lacked substantial judgment in committing the crime. *State v. Salazar,* 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992), *cert. denied,* 113 S. Ct. 3017 (1993); *State v. Johnson,* 131 Ariz. 299, 305, 640 P.2d 861, 867 (1982). Appellant was 34 when he committed the crime, and offered no evidence to show how his age or 34 caused him to lack substantial judgment in committing the crime. Appellant therefore failed to carry his burden of establishing this mitigating circumstance.

b. Appellant's family and psychological history.

Appellant contends that the trial court erred in not finding that his family background was a mitigating circumstance. This Court held that a difficult family background is a mitigating circumstance only if the defendant can show that something in that background had an effect on the defendant's behavior that was beyond the defendant's control. *State v. Wallace,* 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied,* 494 U.S. 1047 (1990). The evidence presented show that Appellant's father was a good man and a hard worker who always kept his family in home and food. (R.T. of Mar. 5, 1993, at 41.) He was very religious, and wanted his children to dress properly for school. (*Id.* at 45, 48.) He was a severe disciplinarian, but it appeared that the administration of discipline was for the purpose of having Appellant exercise responsibility and behave properly, and not for any malicious reasons. (*Id.* at 52–53.) Appellant's own psychologist testified that Appellant did not exhibit the violent kinds of things that one would expect from one who had been abused. (*Id.* at 17–18.) Appellant thus failed to establish that his family background had an effect on his behavior that was beyond his control. Thus, the trial court properly found that Appellant failed to establish this as a mitigating circumstance.

c. Appellant's love for his family and his family's love for him.

Appellant contends that the trial court erred in not finding that his love for his family and his family's love for him was a mitigating circumstance. The trial court considered in mitigation Appellant's mother's love for him. (R.T. of Mar. 31, 1993, at 14.) It further found that Appellant had not seen his daughter in 10 years, and that he had not maintained a close relationship with his mother or his siblings. (*Id.* at 11-12.) The record supports these findings, thus the trial court gave proper weight to these factors.

d. Appellant's employment and military service.

Appellant contends that the trial court erred in not finding that his military service was a mitigating circumstance. The record shows that Appellant went AWOL while in service. It further showed that Appellant had no steady employment since he got out of the military. The trial court did state that Appellant's military service did have some mitigating value. (R.T. of Mar. 31, 1993, at 14.) The trial court therefore did not abuse its discretion in the amount of weight that it gave to this mitigating factor.

e. Appellant's conduct while incarcerated.

Appellant contends that the trial court erred in not finding that his conduct while incarcerated was a mitigating circumstance. The trial court stated that Appellant's conduct while incarcerated had some mitigating value. (R.T. of Mar. 31, 1993, at 14.) The evidence showed that Appellant had no disciplinary write-ups, which is neutral, but nothing of a positive nature. The trial court therefore did not abuse its discretion in the amount of weight that it gave to this mitigating factor.

f. Appellant's new goals.

Appellant contends that the trial court erred in not finding that his new goals in life were a mitigating circumstance. All Appellant presented was his statement that he now had some higher goals in life, but presented nothing to show that he was doing anything to obtain them. The trial court therefore did not abuse its discretion in the amount of weight that it gave to this mitigating factor.

g. Residual doubt.

Appellant contends that the trial court erred in not finding that residual doubt was a mitigating circumstance. Once the jurors have found that the defendant is guilty beyond a reasonable doubt, any lingering doubt about guilt is not a mitigating circumstance. *State v. Atwood,* 171 Ariz. 576, 653, 832 P.2d 593, 670 (1992), *cert. denied,* 113 S. Ct. 1058 (1993).

h. The cumulative weight of Appellant's mitigating factors.

Appellant contends that the trial court erred in not considering the cumulative weight of all of the mitigating circumstance. The trial court stated that it considered Appellant's character, his propensities, his lack of a criminal record, and everything that was mitigating or potentially mitigating, and weighed it against the one aggravating circumstance. (R.T. of Mar. 31, 1993, at 15.) The trial court therefore considered the cumulative effect of all of Appellant's mitigating factors.

C. THE TRIAL COURT PROPERLY CONCLUDED THAT THE ONE AGGRAVATING CIRCUMSTANCE OUTWEIGHED THE MITIGATION PRESENTED.

Appellant contends that the trial court erred in not finding that the mitigating circumstances were sufficiently substantial to call for leniency. The record showed that Appellant made a lonely, unattractive woman think that he loved her and wanted to go off with her, and then came to Phoenix for the sole purpose of killing her and taking her property. This puts this crime above the norm of first-degree murders, and shows that the mitigation presented did not outweigh the cold-blooded nature of the crime. The trial court therefore properly weighted the aggravation and the mitigation, and concluded that a sentence of death was the proper punishment.

* * *

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

GRANT WOODS
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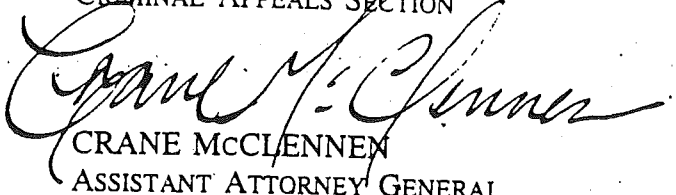

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IN THE SUPREME COURT

OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, -vs- GRAHAM SAUNDERS HENRY, Appellant.	NO. CR-88-0123-AP/PC MOHAVE COUNTY SUPERIOR COURT NO. CR-8286A

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QUESTIONS PRESENTED FOR REVIEW

A. NONSENTENCING ISSUES

1. Whether sufficient evidence exists to sustain the convictions for first-degree murder, kidnapping, and robbery?

2. Whether sufficient evidence exists to sustain the conviction for theft?

3. Whether the trial court properly denied the motion for new trial?

4. Whether appellant's statements to Patterson were knowing, voluntary, and intelligent?

5. Whether appellant's speedy trial rights were violated?

6. Whether evidence of the California arrest warrant was admissible to prove motive?

7. Whether the prosecutor commented on appellant's silence?

8. Whether Foote's statements were properly rejected?

9. Whether the court properly precluded appellant from calling Foote as a witness?

10. Whether the trial court properly denied appellant's request for surrebuttal?

11. Whether the prosecutor's comments constituted reversible error?

12. Whether the evidence supports lesser offense instructions?

13. Whether the robbery instructions adequately cover the elements of the offense?

14. Whether the court's instruction adequately covered kidnapping?

15. Whether the evidence supports a duress instruction?

16. Whether the evidence supports a Willits instruction?

17. Whether appellant exercised and waived his self-representation right?

18. Whether appellant was entitled to represent himself post-trial?

19. Whether counsel was ineffective in providing assistance?

B. SENTENCING ISSUES

1. Whether the evidence supports a finding of two prior convictions in support of A.R.S. § 13-703(F)(1), and (2)?

2. Whether manslaughter is a crime of violence?

3. Whether the record supports the trial court's finding that appellant was a major participant in the killing and that he acted with reckless indifference?

4. Whether the record supports a finding that the murder was committed in the expectation of anything of pecuniary value?

5. Whether armed robbery is a crime of violence?

6. Whether the record supports a finding of a prior robbery conviction?

7. Whether the trial court properly balanced the aggravating and mitigating factors?

8. Whether codefendant's sentence mandates a life sentence for appellant?

9. Whether appellant received adequate notice of the proposed aggravating factors?

10. Whether a proportionality review, if required at all, would call for a reduced sentence here?

11. Whether A.R.S. § 13-1105 or § 13-703 are overbroad?

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conclusion that that court was troubled by the truthfulness of appellant's descriptions of his public mindedness and troubled youth. This disbelief is further manifested in the court's findings on the mitigating factors:

> I do not find the fact that the Defendant had a troubled and traumatic upbringing, if he had one, would be a mitigating factor in this case.
>
> . . . .
>
> [E]ven if the Defendant has saved the life of two people . . . .

(R.T. of Apr. 1, 1988, at 116, emphasis added.) Appellee submits that appellant failed to carry his burden of proving the existence of either of these factors by the required standard. The record supports such a conclusion. This Court should reject both circumstances as not founded in fact.

Assuming arguendo, that appellant's testimony did establish that he suffered a troubled youth, appellant cannot demonstrate that that circumstance was relevant in determining whether to impose the death penalty. State v. Schad, 163 Ariz. 411, 421, 788 P.2d 1162, 1172 (1980), affirmed, Schad v. Arizona, 501 U.S. ___, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991). A difficult family background by itself is not a mitigating factor. State v. White, ___ Ariz. ___, ___, 815 P.2d 869, 881 (1991) (difficult family background, without effecting appellant's behavior here, is not a mitigating circumstance); State v. Wallace, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), cert. denied, 110 S. Ct. 1513 (1990). Appellant did not and has not related this factor to mitigation in this case. He has failed to demonstrate that his troubled youth had any effect or impact on his behavior.

Consequently, it should not apply to sentence consideration in this case.

Appellant's attempts to save lives does reflect on character. The issue is not existence but weight. The trial court accorded the proper weight to this issue.

Finally, even if appellant met the above requirements, he cannot seriously claim that the trial court failed to consider and apply either or both of the factors. The court stated:

> As far as the Defendant's troubled and traumatic upbringing, I'm not sure that it was all that troubled and traumatic. Certainly not anywhere near as bad as some of the upbringings for other non-capital defendants that I have had to sentence before. I also have to take into consideration the fact that some 20 to 25 years have intervened since that upbringing and I believe that at some point a person has to accept responsibility for his own life and not always fall back on what happened when he was young. I do not find the fact that the Defendant had a troubled and traumatic upbringing, if he had one, would be a mitigating factor in this case.
>
> . . . .
>
> As far as the fact that the Defendant at some point may have saved the lives of other people and may have done some sort of charitable type work, at the risk of being facetious and I certainly don't mean it this way, even if the Defendant has saved the life of two people that ran into a telephone pole near where he lived, when I consider that against the fact that he has a prior homicide conviction and has been found guilty of first degree murder in this case, it seems to me at most the Defendant is breaking even and I just don't find anything in that factor that justifies my considering it as a mitigating factor.

(R.T. of Apr. 1, 1988, at 116-17.)

The trial court carefully considered each factor that appellant offered in mitigation. With respect to these two, the trial court questioned the credibility of the evidence

but nevertheless gave appellant the benefit of the doubt. Then the court determined that neither was sufficient to call for leniency. The record supports this conclusion. This Court should adopt the findings of the trial court. Appellant's contentions are without merit.

VIII

THE DISPARITY IN SENTENCES BETWEEN THAT OF APPELLANT AND HIS CODEFENDANT DOES NOT REQUIRE A REDUCTION OF SENTENCE AS A MATTER OF LAW. AS A MATTER OF FACT, THE TRIAL COURT DID CONSIDER THE DISPARITY ISSUE AT THE POST-CONVICTION HEARING AND HELD THAT THAT FACTOR WOULD NOT HAVE ALTERED THE SENTENCE IMPOSED. THE RECORD SUPPORTS THAT CONCLUSION.

Appellant contends that it is fundamentally unfair that he be sentenced to death while his accomplice codefendant, who was at least equally responsible for the murder, serves a substantially lesser sentence of 15 years in prison. He argues that the disparity in sentences requires this Court to reduce his sentence to life imprisonment or, in the alternative, remand to the trial court for resentencing.

The question of disparity in codefendant sentences was briefly addressed in State v. Smith, 138 Ariz. 79, 86, 673 P.2d 17, 24 (1983), cert. denied, 465 U.S. 1074 (1984), where one codefendant was given total immunity in return for trial testimony against defendant Smith. This Court expressed its concern about the treatment afforded the accomplice in that case -- whose testimony both convicted Smith and earned him the death penalty -- but nevertheless affirmed the judgments and sentence. Justice Feldman dissented with respect to the conviction. He felt that the decision of life or death should not be supported solely "by the uncorroborated testimony of a witness whose motive

* * *

circumstances. State v. Stanley, 167 Ariz. 519, 528, 809 P.2d 944, 953 (1991). Every precaution has been taken to assure that the death penalty is reserved for murders that stand out above the norm and murderers whose backgrounds set them apart from the usual murderer. State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981), cert. denied, 456 U.S. 981 (1982).

Appellant qualifies for capital punishment both because the offense is considered to stand out from the norm -- it was committed in expectation of pecuniary gain -- and because appellant's character sets him apart from the usual murderer -- two felony convictions involving violence or subject to life imprisonment. A.R.S. § 13-703 is not overbroad on its face and was not improperly applied. This issue is without merit.

CONCLUSION

There is no factual or legal basis on which appellate relief should be granted. The convictions are supported by the evidence. Any errors that were committed are harmless beyond a reasonable doubt. The sentences are supported by the evidence and are justified in these circumstances. Appellee requests that this Court affirm the convictions and sentences.

Respectfully submitted,

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