CAPITAL CASE

No. 19A735

IN THE

Supreme Court of the United States

LEROY D. CROPPER,

Applicant,

v.

STATE OF ARIZONA,

Respondent.

SECOND APPLICATION DIRECTED TO THE HONORABLE ELENA KAGAN
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY

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February 4, 2020

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for Arizona:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicant Leroy D. Cropper respectfully requests a further 14-day extension of time, up to and including March 5, 2020, within which to file a petition for a writ of certiorari to review the judgment of the Superior Court of Arizona, Maricopa County in this case. The judgment of the Maricopa County Superior Court was entered on February 7, 2017. The Arizona Supreme Court denied review on October 23, 2019. (A copy of the Arizona Supreme Court's order denying Cropper's petition for review of the dismissal of his petition for post-conviction relief is attached hereto as Attachment 1. A copy of the Maricopa County Superior Court's order dismissing

Cropper's petition for post-conviction relief—the last reasoned decision in this case—is attached hereto as Attachment 2.) The petition was initially due on January 21, 2020. On January 2, 2020, Justice Kagan granted a 30-day extension of time, to and including February 20, 2020, within which to file the petition for writ of certiorari. This application has been filed more than 10 days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision in this case.

1. This case involves the constitutionality of Cropper's death sentence and, in particular, whether he received the effective assistance of counsel during the sentencing phase of his capital trial when he was sentenced to death by a jury that was never told that the only other alternative was life without parole.

2. In 1997, while Cropper was serving a sentence in an Arizona state prison for possession of drugs for personal use, a hostile interaction between him and a corrections officer led Cropper to stab the officer, causing his death. *State v. Cropper*, 68 P.3d 407, 408-09 (Ariz. 2003); *see also* Ex. 12 to Pet. for Post-Conviction Relief, No. CR 1997-003949 (Ariz. Super. Ct., Mariposa Cty. Jan. 25, 2015). In 1999, Cropper pleaded guilty in Arizona state court to first-degree murder in connection with the 1997 killing. *Cropper*, 68 P.3d at 408-09. In 2000, a judge sentenced Cropper to death. *Id.* at 409-10. But after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the Arizona Supreme Court vacated Cropper's sentence. *State v. Cropper*, 76 P.3d 424 (Ariz. 2003). In 2006, the jury that was empaneled to resentence Cropper ultimately hung because it could not reach a unanimous verdict. *See* Attachment 2

at 2, 13. The State tried again. And, in 2008, a second jury sentenced Cropper to death. *See id.* at 2, 37-38. The Arizona Supreme Court affirmed Cropper's sentence on direct appeal. *See State v. Cropper*, 225 P.3d 579 (Ariz. 2010), *cert. denied*, 562 U.S. 982 (2010).

3. In 2015, Cropper filed a petition for post-conviction review in the Maricopa County Superior Court. Among other things, Cropper argued that counsel's performance was ineffective because he failed to request an instruction under *Simmons v. South Carolina*, 512 U.S. 154 (1994), or otherwise inform the sentencing jury that Cropper was ineligible for parole. Cropper argued that counsel's performance was deficient; that he should not have to prove prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984); and that, if such a showing were required, he had demonstrated prejudice. The Maricopa County Superior Court disagreed and dismissed his petition. *See* Attachment 2.

4. Cropper petitioned the Arizona Supreme Court for review. On October 23, 2019, the Arizona Supreme Court denied his petition. *See* Attachment 1.

5. This case is the latest in a series of cases where state courts—first South Carolina, then Arizona—have refused to adhere to the teachings of *Simmons v. South Carolina*, 512 U.S. 154 (1994), and its progeny. It is undisputed that Cropper was ineligible for parole under Arizona law at the time of his sentencing, and that the State had raised the issue of Cropper's potential future dangerousness. Accordingly, the jury should have been instructed or otherwise informed about Cropper's parole ineligibility. But defense counsel never asked for such an instruction. A prior jury

hung because it was unable to reach a unanimous verdict. And the second jury sentenced Cropper to death without knowing that the only alternative was life without parole.

6. This Court's review is warranted to rectify that injustice, to ensure that its death penalty jurisprudence is being followed by state courts, and to address confusion among the courts regarding when prejudice can be presumed both on direct review (in the nature of a structural error) and on collateral review (in the context of a *Strickland* prejudice analysis).

7. The petition in this case is currently due on February 20, 2020. A brief further extension of time is warranted to prepare and file a petition for a writ of certiorari in this case.

8. As referenced in the prior application, Cropper has retained Supreme Court counsel at the law firm of Latham & Watkins LLP to represent him before this Court. Although the original extension has given newly retained counsel time to review the extensive, complex record, additional time is needed to narrow the issues presented to this Court and to prepare the petition itself. The additional time is also needed due to competing professional commitments during the month of February. Counsel has intentionally limited this second extension request to 14 days (instead of 30) to balance those commitments with the desire to get this petition filed and acted on as expeditiously as reasonably possible.

9. The extension requested would not work any meaningful prejudice on any party. No date has yet been scheduled for Cropper's execution.

10. For these reasons, Cropper respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended to and including March 5, 2020.

February 4, 2020

Respectfully submitted,

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ATTACHMENT 1

Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

October 23, 2019

RE: STATE OF ARIZONA v LEROY D CROPPER
Arizona Supreme Court No. CR-17-0566-PC
Maricopa County Superior Court No. CR1997-003949

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 23, 2019, in regard to the above-referenced cause:

ORDERED: Petition for Review of Order Dismissing Petition for Post-Conviction Relief (Capital Case) = DENIED.

Justice Lopez and Justice Beene did not participate in the determination of this matter.

Janet Johnson, Clerk

TO:
Lacey Stover Gard
Laura P Chiasson
Michael J Meehan
Todd E Hale
Leroy D Cropper, ADOC 091432, Arizona State Prison, Florence
Eyman Complex-Browning Unit (SMU II)
Dale A Baich
Timothy R Geiger
Amy Armstrong
kj

ATTACHMENT 2

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
02/08/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-003949 02/07/2017

JUDGE M. SCOTT MCCOY

CLERK OF THE COURT
E. Masis
Deputy

STATE OF ARIZONA

v.

LEROY D CROPPER (A)

LAURA PATRICE CHIASSON

MICHAEL J MEEHAN

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

RULING
(PETITION DISMISSED/PCR MATTER/CAPITAL CASE)

The Court has reviewed the defendant's *nunc pro tunc* Petition for Post-Conviction Relief[1] ("NPT Petition") filed 4/1/2016 *nunc pro tunc* 1/25/2015, the Defendant's Supplemental Rule 32 Claim ("Pro Per Claim") filed 5/10/2015, the State's response filed 1/11/2016, and the Defendant's reply filed 6/7/2016; and the

[1] Defendant filed a Petition for Post-Conviction Relief on 1/25/2015, with exhibits and declarations. The January petition (but not the attachments) was replaced by a similarly-captioned Petition for Post-Conviction Relief, sub-captioned "Nunc Pro Tunc Filing" filed simultaneously with Notice of Errata ib11/13/2015, followed by a subsequent identically-captioned Petition for Post-Conviction Relief, sub-captioned "Nunc Pro Tunc Filing" filed 4/1/2016 ("NPT Petition"). The Court has reviewed and compared the index of claims in the January 2015 and April 2016 petitions and has found the listings identical; the Court, therefore, addresses the April 2016 pleadings ("NPT Petition").

Supplement to Petition for Post-conviction Relief filed 8/20/2016, the supplemental response filed 10/3/2016 and the supplemental reply filed 11/29/2016, as well as the court file. This is the defendant's timely, first Rule 32 proceeding after the Arizona Supreme Court's affirmed his convictions and death sentence in *State v. Cropper (Cropper III)*, 223 Ariz. 522, 225 P.3d 579 (2010).

PROCEDURAL HISTORY

The procedural history of *State v. Cropper, CR1997-003949,* is stated in *Cropper III*:

> Leroy D. Cropper pled guilty to first degree murder in 1999 for the 1997 killing of an Arizona Department of Corrections officer.[1] A Maricopa County Judge determined that Cropper should be sentenced to death for the murder and an automatic appeal followed. *See State v. Cropper* (*Cropper I*), 205 Ariz. 181, 183–84 ¶ 12, 68 P.3d 407, 409 (2003). While the appeal was pending, the Supreme Court decided *Ring v. Arizona* (*Ring II*), which held that jurors, not judges, must find aggravating factors that expose defendants to capital sentences. 536 U.S. 584, 609, 122 S.Ct. 2428 (2002). In response to that decision, and subsequent legislation, this Court vacated Cropper's sentence and remanded for resentencing under the appropriate statutes. *State v. Cropper* (*Cropper II*), 206 Ariz. 153, 158 ¶ 24, 76 P.3d 424, 429 (2003).
>
> On remand, a jury found two aggravating factors: Cropper had a prior serious conviction and he committed the murder while incarcerated. *See* Ariz. Rev. Stat. ("A.R.S.") § 13–751(F)(2), (F)(7) (Supp.2009). That jury, however, could not reach a verdict as to whether the killing was especially cruel, A.R.S. § 13–751(F)(6), or whether death was the appropriate sentence. A second jury was impaneled, *see* A.R.S. § 13–752(K), and concluded that the murder was committed in an especially cruel manner and that death was the appropriate punishment. This automatic appeal followed. Ariz. R. Crim. P. 26.15, 31.2. We have jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. § 13–4031 (2001).

Cropper III, 223 Ariz. at 524, ¶¶ 1-2, 225 P.3d at 581 (footnotes omitted).

On direct appeal in *Cropper I*, our Supreme Court affirmed the convictions, addressing the following guilt-phase issues on appeal (after finding the facts) and holding:

- The State provided adequate notice of a third aggravating factor, (F)(2) "prior serious offense," before Defendant entered a guilty plea to aggravated assault in a separate case (CR2000-000245).

- Any challenge to the aggravated assault plea in CR2000-000245 must be made in that case.

- Defendant provided no evidence sufficient to support his claim that the trial judge should have recused himself from hearing the capital case for bias or prejudice, simply because he presided over the aggravated assault proceedings; and

- Based on the decisions in *Ring I – III*, the Court would address sentencing issues in a future, separate opinion (*i.e.*, in *Cropper II*).

On direct appeal in *Cropper II*, the Supreme Court vacated the judge-imposed death sentence. The Court held that a jury should determine whether a "causal nexus" existed between defendant's background and the murder sufficient to support the "altered state/dissociative state" mitigation, which the sentencing judge had rejected.

In *Cropper III,* our Supreme Court addressed re-sentencing issues and held that:

- A change in the law permitting the state to retry the penalty phase in a capital case when the first jury could not reach a decision did not violate the state and federal Ex Post Facto Clauses;

- The prosecutor did not commit misconduct in argument relating to a victim's suffering for "significant period of time" under cruelty aggravator, suggesting the phrase be interpreted in "subjective terms," by "what it means to you";

- Cruelty aggravator (that the officer experienced pain and that the defendant knew or should have known he would) was established beyond a reasonable doubt with Dr. Keen's testimony;

- The defendant established by a preponderance of the evidence that he suffered an abusive childhood;

- The defendant's allocution and related testimony regarding his remorse would not be given substantial weight in reviewing propriety of death sentence; and

- Considering the "quality and strength" of aggravating and mitigating factors, a capital sentence was warranted based on significant aggravating factors and comparatively minimal mitigation evidence.

PRELIMINARY MATTERS

CR2000-000245

Defendant attempts to base his claims "upon such filings [pleadings, orders, transcripts, exhibits and other papers]" in the non-capital case of *State v. Cropper*, CR2000-000245 (Victim: Antoine Jones). NPT Petition at 1. Defendant previously attempted to consolidate that case with the capital case appeal. The Supreme Court held that issues raised in that separate case were not properly before it. *State v. Cropper*, 205 Ariz. 181, 185, ¶¶ 18-20, 68 P.3d 407, 411, *supplemented,* 206 Ariz. 153, ¶¶ 18-20, 76 P.3d 424 (2003). The Court notes that the judge in the non-capital case also ordered:

IT IS FURTHER ORDERED denying defendant's request to consolidate this matter with the capital post-conviction relief pending in CR1997-003949(A).

ME dated 8/23/2012.

Similarly, this Court declines to consider the pleadings or address that separate matter, CR2000-000245, in this capital post-conviction proceeding.

Sworn Statements

The Court has reviewed and considered the State's Motion to Strike Juror and Expert Declarations filed 7/26/2016, the Defendant's response filed 8/24/2016, and the State's reply filed 9/2/2016.

Defendant attached declarations from "the jurors who heard Defendant's case" as Exhibits 33 through 37, in support of his claim regarding the mitigation presentation. Reply to NPT Petition at 21-22. The Defendant claims that the exhibits are not precluded because "the jurors were not asked to, nor did they, declare anything about either their deliberations or their vote. Rather they provide information about the kind of evidence which they would have found useful to consider." Reply to NPT Petition at 22-23, FN7.

Rule 24.1(d) prohibits the Court from considering "testimony or affidavit ….which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict."

The Court finds that asking the jurors about mitigation evidence that they might have considered had it been presented necessarily implicates (1) their deliberations, subjective motives and mental processes relating to the evidence actually presented, considered, and evaluated upon which the juror (and jurors; both singular and plural) actually deliberated; and (2) the basis of their assent or dissent from the verdict, which in this defendant's case was to impose the death

penalty (The question posed by PCR counsel was, essentially "would additional evidence related to mental health have changed your vote?").

The Court will consider the expert declaration of Garrett Simpson to the extent that any specialized knowledge may be helpful to the Court in accordance with Rules 702 and 703, Arizona Rules of Evidence.

Based on the above,

IT IS ORDERED granting the State's Motion to Strike Juror and Expert Declarations, as to the juror declarations (Exhibits 33-37) only.

CLAIMS FOR RELIEF

In his post-conviction pleadings the defendant raises numerous issues in sixteen (16)[2] numbered claims. The issues raised relate to ineffective assistance of trial and/or appellate counsel ("IAC" claims) in connection with:

A. Mitigation (Claims I, II, XIV).
B. Inadvertent Disclosure of Defense Memoranda (Claims III, IV, V).
C. The (F)(6) Aggravating Factor (Claims VI, VII)
D. Future Dangerousness/Parole (Claims VIII, IX, XV).
E. Timing and Effect of Guilty Plea (Claims X, XII).
F. Victim Impact Statements (Claim XI).
G. Restitution (Claim XIII).
H. Death Penalty (Claim XVI).

[2] Defendant raised Claims I - XIV in his *nunc pro tunc* petition; in his supplemental petition, he added Claims XV and XVI, and supplemented Claims V, IX, XIII and XIV. His exhibits remain attached to the 1/25/2015 petition. The Court notes that the page numbers identified in the Supplement's Table of Contents at i-iii appears to differ from the actual pagination as to Claims XV, XIII and XVI.

I. Cumulative Error and "Failure to Federalize."
J. Resentencing by a Jury (Pro Per Claim).

For convenience, and hoping to avoid confusion, the Court follows this organization and grouping in its analysis of Defendant's claims in Section II, below.

I. Ineffective Assistance of Counsel – Legal Standards

The United States Supreme Court has established a two-prong test to determine whether counsel was constitutionally effective in representing a defendant:

1. "First, the defendant must show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

2. Second, the defendant must demonstrate that prejudice resulted from defense counsel's performance. *Id*.

Failure to satisfy either prong is fatal. *Id*.

A. Deficient Performance

Strickland requires that courts afford a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in assisting the defendant. *Strickland*, 466 U.S. at 690. "[T]he proper measure of attorney performance remains simple reasonableness under prevailing professional norms" and is itself an objective, two-part analysis. *Id*. at 688.

To prevail under *Strickland*'s highly deferential standard, a defendant must "identify the acts or omissions of counsel" that were neither: (1) reasonable; nor (2) based in strategy. *Id*. at 690; *Murtishaw v. Woodford*, 255 F.3d 926, 939 (9th

Cir. 2001). Actions or omissions by counsel that "might be considered sound trial strategy" do not constitute ineffective assistance, and this Court must take into account all of the attendant circumstances in making this determination. *Strickland*, 466 U.S. at 688–89 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Additionally, this Court should "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) (en banc). Rather, as *Strickland* holds, this Court must make "every effort [ ] to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Disagreements in trial strategy will not support an ineffective assistance of counsel claim, "provided the challenged conduct has some reasoned basis." *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987).

In capital cases, as in applying *Strickland* generally, a court averts the effects of hindsight by reviewing the case from the perspective that counsel had at the time counsel made critical, strategic decisions and by giving a "heavy measure of deference to counsel's judgments." *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (quoting *Strickland*, 466 U.S. at 689, 691). The Supreme Court has made clear that counsel in capital cases need only "make objectively reasonable choices." *Bobby v. Van Hook*, 558 U.S. 4, 9 (2009) (*per curiam*), quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (*Strickland* does not even require counsel "to present mitigating evidence at sentencing in every case."). To evaluate the performance of counsel for Sixth Amendment purposes, the relevant perspective is at the time of trial, or at the time of sentencing, not afterwards when counsel did not succeed in avoiding a guilty verdict or the death penalty.

B. Prejudice Required

The second prong of the *Strickland* analysis requires a showing of prejudice. *Strickland*, 466 U.S. at 691–92. The United States Supreme Court has held that even when counsel has performed deficiently, it "does not warrant setting aside the

judgment of a criminal proceeding if the error had no effect on the judgment." *Id*. Indeed, *Strickland* "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

Prejudice is not presumed. *Jackson v. Calderon*, 211 F.3d 1148, 1155 (9th Cir. 2000). Rather, a petitioner must affirmatively prove actual prejudice—the mere possibility that he may have suffered prejudice is insufficient. *See Cooper v. Calderon*, 255 F.3d 1104, 1109 (9th Cir. 2001).

Regarding prejudice in capital cases, the petitioner must show:

> [A] reasonable probability that, absent the errors, the sentencer—including the appellate court, to the extent that it independently reweighs the evidence—would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.

Strickland, 466 U.S. at 695; *see also Wong v. Belmontes*, 130 S. Ct. 383, 390–91 (2009) ("*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.")

C. ABA Guidelines

To the extent that Defendant cites the ABA Guidelines in support of his claims, the Court finds the ABA Guidelines provide only guidance as to what may constitute reasonable conduct; the guidelines do not impose absolute duties on defense counsel. *See Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) ("'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition."). Additionally, the comments to Ariz. R. Crim. P. 6.8 expressly state that a deviation from the guidelines is not *per se* ineffective assistance of counsel and, in fact, some of the guidelines may not even be applicable to Arizona practice or to the circumstances of a particular case. Instead, the standard for evaluating counsel's performance continues to be that set forth in *Strickland*.

II. Analysis of Claims

A. Ineffective Assistance – Mitigation (Claims I, II, XIV).

In Claim I Defendant alleges that trial counsel provided ineffective assistance by "[ignoring or rejecting] the mental health and organic brain dysfunction mitigation case, and its aggravation by prolonged solitary confinement, instead of presenting a dangerous and unpersuasive mitigation case of defendant's life and behavior, without the guidance of the experts who were available to explain defendant's true situation and lack of moral culpability."

The Arizona Supreme Court summarized and analyzed the 2000 mitigation presentation this way:

> Cropper offered several mitigating circumstances for the court's consideration. The trial judge found only two mitigators, and he did not find their weight sufficiently substantial to call for leniency.
>
> The defense's main theory in mitigation was that the cell search caused Cropper to relive childhood trauma, thereby forcing him into a dissociative state. According to the defense, Cropper, as a child, was severely abused by his stepmother. Cropper's father often witnessed the abuse and did not intervene on behalf of his son. These past psychological traumatic experiences allegedly matched the cell-search event closely enough to trigger Cropper's reaction and subsequent conduct. Therefore, Cropper became verbally confrontational with Officer Landsperger because he believed that she, like his stepmother, did not respect him and his property. While it was she who allegedly disrespected his property, Cropper held Lumley ultimately responsible because he, like his father, should have intervened.

> The defense presented the testimony of three experts, including one neurologist, to support its theory. One of the defense experts, Dr. Susan Parrish, was questioned about Cropper's dissociative state and about why Cropper would attack Officer Lumley rather than Officer Landsperger. Dr. Parrish answered:
>
> > Leroy was in a dissociative state and was flashing back to what happened in his childhood. Because it's his father that he has the hatred for. He, he doesn't-he does not blame his stepmother. I mean in his, in his view, you know, there's a principle here. This is a man, you know, a father with a-an architect father here is standing by and allowing an injustice, that the person doing it is not recognizing because they have their own, own set of problems. So it's the person who allows **429 *158 this to go on and knows that it's wrong that is the focus of his anger.
> > ....
> > [E]arly on he felt very close to his father. And it's possible that that sense of closeness that his father ... from his standpoint betrayed, is what created the foundation for such hate towards a male authority figure. And, and sort of dismissing the role of the female.
>
> The State presented rebuttal evidence in the form of testimony by psychologist Dr. Jess Miller. Dr. Miller evaluated Cropper and concluded that he did not commit the murders in an "altered state," as theorized by Dr. Parrish. Instead, in Dr. Miller's opinion, Cropper suffers from a sociopathic personality disorder. Dr. Miller concluded that Cropper manipulated the psychological evaluations.

Cropper II, 206 Ariz. at ¶¶ 19-22, 76 P.3d at 428–29.

In the jury resentencing hearings, trial counsel did not call experts. Whether to call an expert is a strategic decision. *State v. Broughton,* 156 Ariz. 394, 752 P.2d 483 (1988). Trial counsel is presumptively competent, and in this case

made a reasonable strategic decision not to call experts, whose testimony would have been vulnerable to damaging rebuttal.[3]

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[3] The Court notes that the State's 2000 sentencing rebuttal was both vigorous and portending. Illustratively:

> Dr. Parrish [Derello's own expert] allows that Cropper would know right from wrong in his "manic, plotting stage" and in his cover-up stage, but maintains that when he actually murdered Lumley he would not. By all accounts the murder took less than five minutes. This Court is therefore presented with a man who intended to kill, plots to kill, does kill, then covers up his crime and is in all respects responsible for his conduct but for the five minutes spent in the CD control room alone with his victim.
>
> Not surprisingly this scenario is refuted by [State's expert] Dr. Miller….Dr. Miller notes that at the time of the offense, Cropper was not suffering from a mental illness, but rather a personality disorder, knew right from wrong, and could conform his conduct to the requirements of the law.
>
> On the issue of PTSD, Dr. Miller testified that if properly triggered, Cropper would have experienced an adrenaline rush and would have reacted impulsively, becoming immediately violent; instead, Cropper murdered for revenge, planning the death of Officer Lumley over a period of hours.
>
> Further, because attacking Officer Lumley involved four or five complicated parts of a plan involving other persons and certain arrangements, Dr. Miller is certain Cropper was not in an altered state of consciousness during the killing. Additionally, had Cropper really been in this supposed dissociative state, he would have been overwhelmed with remorse and grief once he found out what he had

Rather, trial counsel focused on child abuse and rage at the first resentencing hearing (the 2006 hung jury), adding more positive evidence of Defendant's remorse and rehabilitation at the second jury-resentencing. Trial counsel made reasonable strategic decisions. Argument to the contrary merely indulges in "the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d at 673.

The Court finds that Defendant presented mental health evidence to a trial judge, and that it was contested by the State with adverse admissions of the defense experts, the opinions of its own expert and strong argument. Had mental health evidence been presented to the resentencing jury, the State likely would have cross-examined the defense experts with "other acts" and writings of Defendant that would not have been helpful nor would it have changed the verdict of death.

Claim I is therefore not colorable.

In Claim II Defendant alleges that trial counsel provided ineffective assistance by "[presenting] the 'full Monty' mitigation case that was so broadly-defined and presented that it necessarily broadened the scope of the 'rebuttal' evidence the state was allowed to present, resulting in the prejudicial admission of

---

> done. Instead, Cropper's immediate reaction was "I left the knife in the mother fucker's throat."
>
> Finally, according to Doctors Parrish and Miller, one experiencing a dissociative episode would have a fragmented or no memory of the event. According to Dr. Parrish, you don't get back information when in an altered state. But testifying under oath in *State v. Kyzar and Long* on September 2, 1999, Cropper gave a chilling, detailed account of every step of the murder [that occurred] in the CD control room.

State's Response to Defendant's Mitigation (filed 10/10/2000), at 10 – 11.

much evidence of [the defendant's] subsequent bad acts and alleged 'future dangerousness.'"

Defendant's premise – *i.e.,* that had trial counsel made a narrower mitigation presentation, certain harmful evidence would not have been admitted – is dubious. By the time of Defendant's resentencing in 2008, courts interpreted expansively the scope of rebuttal to mitigation, to include "any evidence that demonstrates that the defendant should not be shown leniency." A.R.S. §13-751(G).[4]

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[4] *See also* A.R.S. §13-752(G):

> "At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, regardless of whether the defendant presents evidence of mitigation, the state may present any evidence that demonstrates that the defendant should not be shown leniency including any evidence regarding the defendant's character, propensities, criminal record or other acts."

See also, *State v. Pandeli*, 215 Ariz. 514, ¶¶ 52-53, 161 P.3d 557 (2007) (upholding admission of evidence of a murder in a separate incident as relevant to whether defendant deserved leniency); *State v. Armstrong,* 218 Ariz. 451, 461 ¶ 38, 189 P.3d 378, 388 (2008):

> Armstrong also suggests that the language in A.R.S. § 13–703.01(G) allowing the State to "present any evidence that demonstrates that the defendant should not be shown leniency" should be interpreted with *Gulbrandson* in mind, such that the state's right to present rebuttal evidence in the penalty phase is limited to rebutting specific mitigating circumstances advanced by the defendant. Armstrong is misguided for two reasons. First, A.R.S. § 13–703.01(G) regulates the admission of evidence at the penalty phase; everything Armstrong references was introduced during the

The Court finds that the primary difference between Defendant's 2006 and 2008 mitigation cases was asking the 2008 jury to consider additional evidence (of Defendant's remorse and rehabilitation. *See* RT 4/25/2008 at 8-9. Either or both had the potential to present the Defendant in a more positive and humane light, and to suggest to the jury that leniency might be appropriate. This is a strategic decision, and trial counsel is presumed to provide effective assistance.

The procedural context of the decision also supports the reasonableness of defense counsel's decision. The jury in 2006 hung on the (F)(6) aggravator. Yet that same group did *not* hand down a life sentence on the mitigation then presented. Defense counsel had to consider the possibility that the next jury would find the (F)(6) aggravator, and that the 2006 mitigation evidence would not suffice. Trial counsel's decision to include evidence of remorse and progress toward rehabilitation was a reasonable strategic decision – not deficient performance.

Further, there was no prejudice by admission of any "other act" and other writings in State's rebuttal; the rebuttal would have been admissible to cross-

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> aggravation phase. Indeed, the State offered little rebuttal evidence during the penalty phase. Armstrong fails to identify any evidence admitted in rebuttal that went outside the scope of A.R.S. § 13–703.01(G). Second, we have made clear that the underlying facts of a murder are relevant during the penalty phase because they tend to show whether the defendant should be shown leniency. *State v. Roque,* 213 Ariz. 193, 220–21 ¶ ¶ 107, 110, 141 P.3d 368, 395–96 (2006). Thus, to the extent Armstrong argues that the jury was prejudiced during the penalty phase by evidence describing details of his crime that may not have been especially relevant to the aggravating circumstances, that argument has no merit.

State v. Armstrong, 218 Ariz. 451, 461, ¶¶ 37-38, 189 P.3d 378, 388 (2008).

examine any testifying experts in response to mental health mitigation, had it been presented as Defendant now suggests should have been done.[5]

The Court finds **Claim II** not colorable.

In Claim XIV Defendant alleges that trial counsel provided ineffective assistance by failing to "do a thorough and competent social history in [the defendant's] case, both because there were no defense team members possessing the training and experience required to screen individuals for the presence of mental or psychological disorders or impairments, and because counsel did an incomplete social history investigation."[6]

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[5] The Court further notes that the Court in 2008 was adamant that the jury would not learn "…that he was subject to the death penalty prior to this proceeding" (RT 4/24/2008 at 11); and also precluded testimony about the facts underlying the (F)(2) aggravating factor. For example, the State wanted to ask Ms. Bolinger about defendant: "Are you aware of your client taking the cell door off of another inmate's cell while he was in a custodial setting?" to establish that "in a very secure facility, he took the door off another inmate's cell" to counter the "give him life and he'll be secure" argument…Court continued to preclude use of Antoine Jones incident. (RT 4/24/2008 at 1-7)

[6] Defendant further claims that "[p]ost-conviction counsel and mitigation investigators have not had sufficient time to do a complete social history investigation."
The Court finds that PCR counsel was appointed 4/29/2013; had the benefit of three Arizona Supreme Court decisions broadly outlining the mitigation presented either to the judge or to a jury; had the benefit of any underlying transcripts that served as the basis for the Supreme Court's summary of mitigation; filed this claim in January 2015, and again in April 2016 *nunc pro tunc* to January 2015 repeated the claim of "insufficient time." Three years after being appointed and a year and a half after first making the claim of "insufficient time," Defendant (and PCR counsel) filed a supplement in August 2016 repeating the claim of insufficient

In his Supplement to Claim XIV (at 18-29), the Defendant alleges that "the insufficient and constitutionally ineffective mitigation investigation by the trial team [prejudiced him]."

The Court finds that defense counsel consulted with appropriate mental health experts to obtain expertise absent from the team. The Court further finds that had counsel completed an extensive and exhaustive social history investigation, such evidence would not have been persuasive, because "childhood troubles deserve little value as a mitigator for ... murder[ ] ... committed at age thirty-three," as Cropper was at the time of this offense. *Cropper III*, 223 Ariz. at ¶ 30, 225 P.3d at 586.

The Court finds that trial counsel did not perform deficiently nor did Defendant suffer prejudice in connection with the social history/mental health mitigation presentation. The Court finds that sufficient material was available to trial counsel to establish the "abusive childhood" mitigator without expert testimony; that a decision to present mental health evidence rather than "rehabilitation/remorse" evidence would not have changed the admissible rebuttal.

Accordingly, the Court finds **Claim XIV** is not colorable.

B. Ineffective Assistance – Inadvertent Disclosure of Defense Memoranda (Claims III, IV, V).

"Sometime in 2006" trial counsel permitted the prosecutor to review the defense mitigation materials in advance of the 2006 re-sentencing. RT 4/25/2008 at 5; *see also Id.* at 8.
Defendant describes the contents of the notes as including:

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time." Twenty years and three mitigation presentations later, the Court finds PCR counsel's "insufficient time" claim not to be viable.

> [Defendant's] detailing of the crime, including critical details relating directly to the contested issue of the duration of [the victim's] conscious suffering, upon which the especially cruel aggravator turned. They also reveal the most intimate and personal family information about [defendant], as well as the otherwise unknown fact that while in the Navy he had the nickname "Lucky" because he did not get caught for breaking rules.

Supplemental Petition at 7.

Trial counsel became aware of the disclosure and immediately sought a mistrial. The State indicated that the materials were turned over voluntarily in connection with the 2006 sentencing mitigation, and that any information in the notes "has already come out in this trial through other sources." RT 4/25/2008 at 8. The State indicated that it had not used the notes. The Court framed the issue as "whether, in fact, there has been a breach of the attorney/client privilege sufficient to warrant a motion for mistrial," and concluded that "there are a number of things I can put into place to protect us from that…" RT 4/25/2008 at 10. The Court directed that the notes were to be marked as an exhibit to be sealed and filed with the Clerk and not disclosed to the jury; the Court further directed that the notes were not to be used in cross-examining the witness, Mr. "Abernathy".[7] RT 4/25/2008 at 11.

As to Claims III, IV and V, the Court finds that trial counsel disclosed protected client interviews – perhaps intentionally in connection with the 2006 sentencing or inadvertently at that time and in connection with the 2008 resentencing. The Court finds that providing such materials for other than a carefully-considered strategic reason would constitute deficient performance.

In Claim III Defendant alleges that trial counsel provided ineffective assistance "by disclosing to the state numerous memoranda of their interviews with

[7] The trial transcript refers to the investigator's last name as "Abernethy" while the PCR pleadings refer to "Abernathy." The Court adopts the PCR version, Abernathy, other than when quoting from trial materials.

[the defendant], which were privileged attorney/client communications and constituted work product."

Yet, and though having access to both the notes and the trial transcripts, Defendant identifies only a single alleged misuse of the inadvertently disclosed materials – *i.e.*, namely, that the prosecution improperly used the privileged information to cross examine a mitigation specialist, who acknowledged defendant had been given the nickname "Lucky" during his military service.

Defendant was so nicknamed for his ability to escape detection for infractions, something Defendant claims the State discovered in the notes. Even if true, the Court finds the material insufficiently substantial to warrant a mistrial; the nickname is unrelated to the crime, provides somewhat minor background information only and was not unduly prejudicial.

Although Defendant claims that the trial court permitted the State to call the defense investigator, Mr. Abernathy, in its rebuttal case, based on "waiver of privilege" due to the disclosure of the notes, the record demonstrates otherwise. As the record demonstrates – the Court was careful to advise counsel to build a foundation unrelated to the notes for any statements:

> …make sure that the statements were previously testified to by Miss Bolinger [the mitigation specialist, called by the defense in its case-in-chief]. And [that] he's only confirming or affirming what has already been disclosed by Miss Bolinger. And if that's the case, then the objection is overruled.
>
> If it's not the case, and was a separate and distinct conversation that Mr. Abernethy had with the defendant, then I don't believe that the defendant has waived any privilege he may have with respect to conversations which were held between Mr. Abernethy, and the defendant, and his counsel in a separate and distinct conversation. Thank you.

RT 4/24/2008 at 103-104.

The Court finds that Defendant has not demonstrated prejudice from the disclosure of interview notes relating to conversations between counsel and himself. **Claim III** therefore is not colorable.

In Claim IV Defendant alleges that trial counsel provided ineffective assistance by "failing to argue that the State's failure to return the inadvertently disclosed materials and the State's use of such materials during the trial were prosecutorial misconduct in violation of E.R. 4.4(B) and the inadvertent disclosure doctrine."

Arizona courts have addressed the obligations of the parties in connection with inadvertently disclosed materials:

> When a party has inadvertently disclosed privileged information, Rule 26.1(f)(2) outlines the proper procedure for claiming privilege and resolving any dispute.[2] The party who claims that inadvertently disclosed information is privileged should "notify any party that received the information of the claim and the basis for it." Ariz. R. Civ. P. 26.1(f)(2). Once the receiving party has been notified of the privilege claim, that party "must promptly return, sequester, or destroy the specified information ... and may not use or disclose the information until the claim is resolved." *Id.; accord* Fed. R. Civ. P. 26(b)(5)(B). Our rule, like its federal counterpart, "is intended merely to place a 'hold' on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition." Ariz. R. Civ. P. 26.1(f)(2) State Bar committee's note to 2008 amend.

Lund v. Myers, 232 Ariz. 309, 311, ¶ 11, 305 P.3d 374, 376 (2013).

Upon becoming aware of his disclosed interview notes, trial counsel acknowledged his role, sought a mistrial, and pursued sealing and the preclusion of the use of the notes by the State. Learning mid-trial of the State's possession of certain notes, trial counsel reacted quickly and located and cited *People v.*

Knippenberg, 362 N.E. 2d 681 (1977),[8] in support of his motion for mistrial, arguing "where an investigator inadvertently, or somehow, turned over attorney/client notes. And those notes were used to later impeach the defendant, who was on the witness stand….The prejudice to the defendant could not be overcome. And even though there wasn't an objection at trial, it was overturned." RT 4/25/2008 at 6-7. Defendant sought a mistrial, which the trial court denied. The Court finds that *Knippenberg,* an Illinois decision, although not establishing a *per se* determination of prejudice, provided a strong and quickly-located argument in support of the mistrial motion.

The record further indicates that the State appears to have understood the materials to have been voluntarily disclosed in connection with 2006 mitigation; trial counsel's reaction in 2008 suggests the disclosure was inadvertent. Based on trial counsel's avowal that the notes were not intended to be shared with the State, the State determined not to question the witness about a particular conversation. RT 4/24/2008 at 117. The day after learning of the inadvertent disclosure, the trial court immediately sealed the notes for filing with the Clerk, directed that the contents not be used, and accepted the avowals of both counsel ("…just as you [referring to trial counsel] have claimed it wasn't a strategy, [the prosecutor] has claimed he didn't use the notes for any purpose in the cross-examination of Mr. Abernethy. I'm willing to take both counsel – I see no contradicting evidence one way or another, as I have listened to the testimony from yesterday and the preceding testimony, as well." RT 4/25/2008 at 12), denying the mistrial and concluding, "…I intend to allow the continuation of this matter. I don't see that it – I think any prejudice or harm has been forestalled, by virtue of our having addressed the issue, and that's that. We'll move on from here." RT 4/25/200 at 12.

[8] *Knippenberg* held that the use of confidential materials *for impeachment of defendant, whose version of events was contradicted by the materials*, was prejudicial, constituted ineffective assistance in violation of the Sixth Amendment and violated Due Process right to a fair trial, and was not harmless as it may have contributed to the conviction.

The Court finds that even had trial counsel claimed a breach of E.R. 4.4(B), the trial court would have denied the request for mistrial for reasons similar to those stated above. **Claim IV** is therefore not colorable.

In Claim V Defendant alleges that appellate counsel provided ineffective assistance by "failing to present a claim that the State's possession, retention, and use of defense counsel's inadvertently disclosed privileged notes was prosecutorial misconduct in violation of [the defendant's] 6th, 8th and 14th Amendment and analogous Arizona constitutional rights [and E.R. 4.4(B)."

Even assuming prosecutorial misconduct occurred at trial, to constitute a due process violation, the misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (internal quotations and citations omitted); *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998). "Reversal on the basis of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.' " *State v. Atwood,* 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *United States v. Weinstein,* 762 F.2d 1522, 1542 (11th Cir.1985) (quoting *United States v. Blevins,* 555 F.2d 1236, 1240 (5th Cir.1977))); *see also State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (cited in *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998)).

The Court accepted the avowals of counsel regarding the inadvertence of the disclosure (from defense trial counsel) and the non-use of the materials (from the prosecutor). The Defendant provides no support for his claim that the State used privileged defense material, other than possibly in connection with discovery of the Defendant's nickname, Lucky. The Court finds no evidence that the State utilized the materials "detailing… the crime, including critical details relating directly to the contested issue of the duration of [the victim's] conscious suffering, upon which the especially cruel aggravator turned. They also reveal the most intimate and personal family information about [Defendant]" in connection with securing either the aggravation or the penalty phase verdicts. The Court further finds no

evidence that a claim of prosecutorial misconduct would have been supported by the record on appeal

The Court finds that a claim of prosecutorial misconduct is speculative at best. The Court finds no evidence that the State used the materials in a manner that deprived Defendant of a fair trial or sentencing, once notified of the inadvertent disclosure or even prior to notification. The Court finds neither deficient performance nor prejudice. Thus, Defendant has not presented a colorable claim of ineffective assistance of appellate counsel in connection with **Claim V**.

In his Supplement to Claim V: [at 1-13], Defendant alleges that "appellate counsel was ineffective for failing to present a claim that the State's retention and use of the privileged notes violated [defendant's] 6th and 14th Amendment and analogous Arizona constitutional rights" and in failing to "federalize" the claim.

Defendant claims that he was prejudiced because the notes formed the basis of waiver of privilege, permitting the State to call the defense investigator (Abernathy) in rebuttal, after Defendant called his mitigation witness to testify. RT 4/24/2008 at 82-89. The prosecution argued initially that disclosure supported calling Abernathy,[9] but trial court permitted examination based on mitigation expert's testimony and cautioned that the now-sealed notes could not be the basis for State's questions. The trial court initially stated:

> My ruling is that any materials that have been disclosed as communications between Mr. Abernethy and the defendant will be subject to cross-examination or examination by Mr. Abernethy. Anything that hasn't been disclosed won't be.

Id. at 89. The trial court later clarified that - as to conversations with the Defendant - if Ms. Bolinger (the mitigation specialist) had previously testified to the matter in the defense mitigation case, then any privilege had been waived; however, if

[9] Abernathy had previously been sworn during the defense mitigation presentation, to introduce video interviews of Defendant's sister, Leanne. RT 4/21/2008 at 5-9.

Abernathy had a separate conversation with the defendant, the privilege remained. RT 4/24/2008 at 108.

Thereafter, the trial court took precautions to avoid disclosing privileged material to the jury, based upon representations of counsel that disclosure of notes was inadvertent and that the State had not used the notes. The trial court further determined there was not "any prejudice or harm" occurred as the notes were not used in the cross-examination of Mr. Abernathy. RT 4/25/2008 at 4-11; 12.

The Court finds no prejudice because the trial court permitted Abernathy to testify not because of any "waiver through discovery" attributable to the inadvertent disclosure of privileged materials but rather because of a "waiver through testimony of a witness, Ms. Bolinger, the mitigation specialist, called by the defense." The trial court properly instructed the prosecutor, sealed the materials, and secured assurances that materials had not been nor would they be used.

The Court further finds that Defendant has not provided, other than speculation: any documentation that the disclosed materials produced directly or indirectly any significant evidence used at trial (Reply to NPT Petition at 52-53); any support for the claim the materials were improperly used in connection with sentencing (see Reply to NPT Petition at 46); or any support for the claim that privileged information was used to resolve the "hotly contested" (F)(6) aggravating factor (Supplemental Reply at 6).

The Court further finds the conclusion that prejudice occurred because the "2006 hearing – which was not impacted by the foregoing, prejudicial privileged information – ended in a hung jury" (Supplemental Reply at 6-7) untenable. There is no evidence the materials were used, or contributed to the verdict. The prosecutors denied using information to examine witnesses. The conclusion that the materials were not used in 2006 (albeit disclosed before that sentencing) but must have been used in 2008 because jury did not hang is a non sequitur.

The Court finds **Claim V** not to be colorable.

C. Ineffective Assistance – The (F)(6) Aggravating Factor (Claims VI, VII).

In Claim VI Defendant alleges that appellate counsel provided ineffective assistance by "failing to present a claim challenging the constitutionality of the 'especially cruel' aggravator because it fails adequately to narrow the class of murderers eligible for the death penalty in violation of the 8th and 14th Amendments to the United States Constitution and analogous Arizona constitutional provisions," and by failing to "federalize" the claim.

> "Cruelty exists if the victim consciously experienced physical or mental pain prior to death and the defendant knew or should have known that suffering would occur." *State v. Trostle,* 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997) (citation omitted). The evidence demonstrates that Cropper sought out a violent confrontation. The struggle lasted up to two minutes, he acknowledged. Further, the medical testimony regarding the victim's wounds and blood loss demonstrates that the officer suffered physical pain. *See State v. Bearup,* 221 Ariz. 163, 172 ¶ 49, 211 P.3d 684, 693 (2009) (cruelty established when assault lasted between sixty and ninety seconds and resulted in substantial blood loss); *State v. Amaya–Ruiz,* 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990) (evidence of struggle demonstrated cruelty).
>
> Dr. Philip Keen, former chief medical examiner of Maricopa County and a specialist in forensic pathology, testified in detail on the nature of the attack. He explained that the wounds inflicted would have been particularly painful because of the "higher concentration of nerves" in the neck; the officer would have felt a "stinging, burning kind of pain."
>
> Keen also testified that the officer suffered a number of "penetrating injuries." The deeper of these cuts severed his thyroid gland, the jugular vein, and his chest cavity and lung. The officer bled to death as a result of these injuries. The officer did not, however, experience significant arterial damage from the attack because his aorta and carotid arteries were not

> damaged. Thus, the time it would have taken to lose consciousness was the time it took him to bleed out, Keen confirmed. Based on the injuries, the officer would have "progressively" lost consciousness. Keen testified that it would have taken "minutes" for him to lose consciousness based on the amount of blood found in his chest cavity and at the scene. Despite Cropper's contentions, Keen concluded that it was unlikely the officer would have lost consciousness in less than a minute. Taken together, these facts establish beyond a reasonable doubt that the officer consciously suffered physical pain and Cropper knew or should have known he would experience such pain.

Cropper III, 223 Ariz. at ¶¶ 18-20, 225 P.3d at 584–85.

The Court finds that the narrowing function of the (F)(6) aggravating factor has been upheld. In *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), the United States Supreme Court held the "especially heinous, cruel, or depraved" language is facially vague, but stated that the Court had given adequate "substance to the operative terms" for the construction of the aggravating circumstance to meet constitutional requirements. *Id.* at 654, 110 S. Ct. at 3057. The Court specifically held in *Gretzler* that the aggravating circumstance of "especially heinous, cruel, or depraved" must separate particular crimes from the "norm" of first degree murders, or the factor will not be upheld. *Gretzler*, 135 Ariz. at 53, 659 P.2d at 12. Post-*Ring*, the Arizona Supreme Court has continued to reject vagueness challenges to the (F)(6) factor where the jury imposed death. *See State v. Guarino*, 238 Ariz. 437, ¶¶39-40, 362 P.3d 484 (2015) (noting previous rejection of argument); *State v. Tucker*, 215 Ariz. 298, ¶28, 160 P.3d 177 (2007) ("The (F)(6) aggravator is facially vague but may be remedied with appropriate narrowing instructions, whether a judge or a jury makes the sentencing determination."); *State v. Anderson*, 210 Ariz. 327, ¶¶109-14, 111 P.3d 369, *supplemented by* 211 Ariz. 59, 116 P.3d 1219 (2005) (observing that the (F)(6) aggravator was sufficiently narrowed by jury instructions that "gave substance to the terms 'cruel' and 'heinous or depraved' in accordance with our case law narrowing and defining those terms").

This Court can find no support for Defendant's position in Arizona or federal case authority. Defendant's argument incorrectly assumes that the (F)(6) aggravator has the same purpose in both capital and non-capital sentencing. These two are different and therefore comparing them is irrelevant for purposes of Eighth Amendment analysis. This was explained by the Arizona Supreme Court in *State v. Martinez*:

> The Court finds that each challenge to the death penalty has been rejected by appellate courts. The Court finds that the claims are meritless, based on the state of the law at the time of the defendant's trial proceedings, and as conceded by Defendant who acknowledges the existence of – and cites – authority rejecting each of the claims.
>
> We also note that determining aggravating factors in a capital case serves a somewhat different purpose than that served by determining aggravating factors in non-capital cases. The Eighth Amendment to the United States Constitution requires that aggravating factors in capital cases must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct 2733 (1983). In non-capital sentencing, however, aggravating factors serve only to establish the range of sentence and do not involve Eighth Amendment issues.

Martinez, 210 Ariz. 578, 585 n.5, 115 P.3d 618 (2005).

The fact that (F)(6) can be used to determine a non-capital sentence does not mean that it no longer serves its narrowing function in the capital sentencing scheme

The Court finds that appellate counsel did not perform deficiently by failing to argue that the (F)(6) aggravating factor fails to perform the narrowing function adequately nor was Defendant prejudiced by having been found to be death-eligible,

at least in part,[10] by the jury finding that the constitutional (F)(6) aggravator applied to him.

Claim VI is therefore not colorable.

In Claim VII Defendant alleges that appellate counsel provided ineffective assistance by "failing to 'federalize' and argue that the trial court unconstitutionally allowed the state to argue that the amount of the victim's conscious suffering required to establish the 'especially cruel' aggravator was a 'subjective' standard subject to the whims of each juror and thus failed to objectively narrow that factor in violation of the 8th and 14th Amendments to the United States Constitution and analogous Arizona constitutional provisions."

The Court finds that appellate counsel raised the issue of the prosecutor's argument on appeal, as prosecutorial misconduct. Our Supreme Court held:

> Cropper next contends that the prosecutor committed misconduct in his arguments regarding the (F)(6) cruelty aggravator. At Cropper's request, the trial court instructed the jury that, to establish the cruelty prong of the (F)(6) aggravator, the State was required to show a victim's suffering "existed *for a significant period of time.*"[6] (Emphasis added). In their arguments, both defense counsel and the prosecutor attempted to explain to the jury what constituted a "significant period of time." The defense objected after the prosecutor told jurors that the standard was "subjective," suggesting that the phrase should be defined by "what that means to you." The trial court overruled the objection, and the prosecutor again explained the "significant period of time" language in "subjective" terms. The defense ultimately moved for a mistrial, which was denied.
>
> The prosecutor's remarks must be assessed in context. The instruction Cropper requested, to which the State objected, differed from (F)(6) cruelty

[10] The Defendant was rendered death-eligible based on the jury's finding of the (F)(7) and (F)(2) aggravators.

instructions this Court has previously approved. Our cases make clear that an (F)(6) instruction is sufficient if it requires the state to establish that " 'the victim consciously experienced physical or mental pain and the defendant knew or should have known that' the victim would suffer." *State v. Tucker,* 215 Ariz. 298, 310–11 ¶¶ 31–33, 160 P.3d 177, 189–90 (2007) (alterations removed) (quoting *State v. Anderson,* 210 Ariz. 327, 352 n. 18 ¶ 109, 111 P.3d 369, 394 n. 18 (2005)). No set period of suffering is required. *See State v. Soto–Fong,* 187 Ariz. 186, 203–04, 928 P.2d 610, 627–28 (1996) (rejecting any "bright-line, arbitrary temporal rule" to determine whether cruelty has been established). An instruction consistent with this standard sufficiently narrows the (F)(6) aggravator for constitutional purposes. *See Tucker,* 215 Ariz. at 310–11 ¶¶ 31–33, 160 P.3d at 189–90; *see also Walton v. Arizona,* 497 U.S. 639, 654–56, 110 S.Ct. 3047 (1990) (concluding that Arizona court's construction of the (F)(6) aggravator is appropriate under the Eighth Amendment), *overruled on other *527 **584 grounds by Ring II,* 536 U.S. at 608–09, 122 S.Ct. 2428.

To evaluate "the propriety of a prosecutor's arguments, we consider 'whether the remarks called to the jurors' attention matters that they should not consider.' " *State v. Morris,* 215 Ariz. 324, 336 ¶ 51, 160 P.3d 203, 215 (2007) (quoting *State v. Roque,* 213 Ariz. 193, 224 ¶ 128, 141 P.3d 368, 399 (2006)). In his comments, the prosecutor sought to clarify the meaning of "significant period of time" for the jury. The comments with which Cropper takes issue deal directly with the otherwise-unexplained jury instruction language he requested; the comments did not dispute the essential elements of physical cruelty. Consistent with this Court's case law, the prosecutor's comments emphasized that "significant period of time" did not mean a particular amount of time, but nevertheless recognized that the state was required to establish conscious suffering. Because the argument focused on considerations proper for the jury in light of the instruction Cropper requested, the prosecutor did not commit misconduct.

Cropper III, 223 Ariz. at ¶¶ 12-14, 225 P.3d at 583–84.

As held by the Supreme Court, the argument was proper, especially so since the trial court instructed the jury that "The law that applies is stated in these instructions and it is your duty to follow all of them…" Final Aggravation Phase Instructions filed 4/8/2008 at 2. As requested by trial counsel, the trial court instructed the jury that "the victim's conscious suffering [must have] existed for a significant period of time." The jury instruction language included the word "significant" and the State's proof obligation, irrespective of what the State permissibly argued as to its meaning. *Id*. at 5. A jury is presumed to follow the court's instructions to determine that "the victim's conscious suffering existed for a significant period of time."

The record further demonstrates that in establishing this aggravating factor, it was the State's intent to "rely on statements made by the Defendant to Lloyd Elkins, other inmates, detention officers at Maricopa County Sheriff's Office, and written correspondence of the defendant. The State will additionally offer proof through medical testimony of the method of infliction of death and nature of the injuries." State's Notice of Aggravating Factors filed 5/13/1999.[11]

Defendant couples the State's argument with its conclusory statement that the "[Defendant] stabbed [the victim] in the neck in quick succession [and the victim] lost consciousness." Reply to NPT Petition at 61. Defendant neglects to note that the Medical Examiner, Dr. Keen, indicated that the victim may have been conscious for "minutes" but certainly more than "seconds." Thus, though argument as to the "subjectivity" of what was "significant" was proper, considering its "ordinary meaning," the use of the word "significant period of time" provided a more than minimal threshold.

Further, Dr. Keen testified to the length of the attack, based on the blood evidence: if wound untreated, death would occur more slowly (RT 4/8/2008 at 53); would take minutes (*id.* at 61). *See also*, *id*. at 64. The Defendant secured an

[11] Note that the State had evidence in support of the "especial cruelty" aggravator in 1999, seven years before the defense "inadvertent disclosure." See Claim V, as supplemented.

instruction that the State "must show conscious suffering for a significant period of time" (RT 4/7/2008 at 89) and extracted on Dr. Keen's concession on cross-examination that the timing he testified to was his opinion; that, in fact, various factors could decrease the victim's time of consciousness, including "syncope"; that there were no eyewitnesses; and that he had read only Cropper's testimony.

> "Cruelty exists if the victim consciously experienced physical or mental pain prior to death and the defendant knew or should have known that suffering would occur." *State v. Trostle,* 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997) (citation omitted). The evidence demonstrates that Cropper sought out a violent confrontation. The struggle lasted up to two minutes, he acknowledged. Further, the medical testimony regarding the victim's wounds and blood loss demonstrates that the officer suffered physical pain. *See State v. Bearup,* 221 Ariz. 163, 172 ¶ 49, 211 P.3d 684, 693 (2009) (cruelty established when assault lasted between sixty and ninety seconds and resulted in substantial blood loss); *State v. Amaya–Ruiz,* 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990) (evidence of struggle demonstrated cruelty).
>
> Dr. Philip Keen, former chief medical examiner of Maricopa County and a specialist in forensic pathology, testified in detail on the nature of the attack. He explained that the wounds inflicted would have been particularly painful because of the "higher concentration of nerves" in the neck; the officer would have felt a "stinging, burning kind of pain."
>
> Keen also testified that the officer suffered a number of "penetrating injuries." The deeper of these cuts severed his thyroid gland, the jugular vein, and his chest cavity and lung. The officer bled to death as a result of these injuries. The officer did not, however, experience significant arterial damage from the attack because his aorta and carotid arteries were not damaged.
> Thus, the time it would have taken to lose consciousness was the time it took him to bleed out, Keen confirmed. Based on the injuries, the officer would have "progressively" lost consciousness. Keen testified that it would have

> taken "minutes" for him to lose consciousness based on the amount of blood found in his chest cavity and at the scene.
> Despite Cropper's contentions, Keen concluded that it was unlikely the officer would have lost consciousness in less than a minute. Taken together, these facts establish beyond a reasonable doubt that the officer consciously suffered physical pain and Cropper knew or should have known he would experience such pain.[7]

Cropper III, 223 Ariz. at 527–28, ¶¶ 17-20, 225 P.3d at 584–85.

The Court finds that Defendant was not prejudiced by the (F)(6) finding. Defendant committed the murder while in prison, and was also death-eligible because of the (F)(7) aggravating factor, which has been held to be "extremely weighty."[12] Further, even without the (F)(6) aggravating factor, the State would have been permitted to present "circumstances of the offense" for the jury's consideration as it evaluated mitigation.

For all these reasons, **Claim VII** is not colorable.

D. Ineffective Assistance – Future Dangerousness/Parole (Claims VIII, IX, XV).

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[12] The aggravators in this case, in contrast, are entitled to substantial weight. The (F)(7) aggravator, for example, represents a legislative judgment that inmates who commit first degree murder while incarcerated have failed to make even minimal efforts to comply with societal norms and thus warrant particularly serious treatment. Likewise, Cropper's aggravated assault conviction warrants particular weight, as it stemmed from another violent attack some eighteen months after he murdered the corrections officer. Finally, the (F)(6) aggravator is likewise entitled to considerable weight. In light of the significant aggravating factors, and the comparatively minimal mitigation, a capital sentence is warranted.

State v. Cropper, 223 Ariz. at ¶ 32, 225 P.3d at 586.

In Claim VIII Defendant alleges that appellate counsel provided ineffective assistance by "failing to raise the trial court's error in allowing the State to present argument about [the defendant's] alleged 'future dangerousness,' which effectively created a new, non-statutory aggravating circumstance" and by failing to "federalize" the claim.

Defendant concedes that the State did not actually argue "future dangerousness" in the 2006 trial. Rather, the State presented evidence that the Defendant was "a career criminal committing robberies," placed emphasis on the Antoine Jones assault aggravator [without describing the underlying facts], and read defendant's letters portraying him as an inmate who decided to be "'tough,' including "engaging in fights if necessary." Supplemental Reply at 25, FN 4.

The 2008 trial court addressed and determined that defendant's claim of remorse and rehabilitation made rebuttal evidence of "future dangerousness" relevant. Had the issue been raised on appeal, the trial judge's ruling would have been reviewed for abuse of discretion (relevant rebuttal) and upheld on appeal. Had appellate counsel argued, as Defendant now suggests, that "future dangerousness" created an additional non-statutory aggravating factor, a reviewing court would have determined that the evidence was properly admitted and, even if not, any error was harmless as the trial court properly limited the aggravators to those actually proven, instructing the jury "that three (3) aggravating circumstances exist." (Final Penalty Phase Instructions filed 4/25/2008 at 3). Further, in the final instructions the trial court thereafter refers to "the aggravating circumstances" or "the aggravating factors," emphasizing those three originally-named factors. See JI at 5, 6.

Further, even before its final instructions, the trial court told the jury:

> …Three aggravating circumstances exist. They are: (1) the defendant committed the murder while in the custody of the Department of Corrections; (2) Mr. Cropper has a prior serious conviction; and (3), the offense was committed in an especially cruel manner. You must accept these

> aggravating circumstances as proven. These are the only aggravating circumstances you may consider in your sentencing decision…

Preliminary Penalty Phase Instructions filed 4/10/2008 at 2.

Because jurors are presumed to follow their instructions, the reviewing court would have determined that the jurors did not ignore the court's limitation of the aggravators to the three identified aggravating factors and – in violation of those instructions – improperly consider "future dangerousness" as a fourth aggravating factor.

The Court finds that Defendant has failed to raise a colorable claim of ineffective assistance of appellate counsel as to **Claim VIII**.

In Claim IX Defendant alleges that appellate counsel provided ineffective assistance by "failing to raise the trial court's error in refusing to allow the jury to hear, as mitigating evidence, [the defendant's] willingness unequivocally to waive any right ever to seek parole," and by failing to "federalize" the claim.

In his Supplement to Claim IX [at 14-17], Defendant alleges that trial counsel provided ineffective assistance by "failing to argue to the court that the jury should have been told that [defendant] would waive parole because the court could not have given [defendant] a life sentence with the possibility of parole. Defendant also alleges that appellate counsel provided ineffective assistance by "failing not only to raise this issue but failing to raise as a question presented [defendant's] right to tell the jury he was waiving parole, because the court could not have given him a life sentence including the possibility of parole."

Defendant presents an unsigned waiver, which has never been executed. Petition Exhibit 13, filed 1/26/2015. The fact is, Defendant did not waive his right to seek parole. He merely offered to do so. The Court finds that **Claim IX** is not colorable.

In his Supplement adding Claim XV (at 36-44), Defendant alleges that trial counsel provided ineffective assistance by "failing to recognize that a statute prohibited . . . a life sentence which included the possibility of parole; and in failing to request a jury instruction to that effect;" and in failing to "argue that [Defendant] was entitled to present his waiver of parole to the jury." Defendant also alleges that appellate counsel provided ineffective assistance by "failing to recognize the same, and raise the issue, at least as was fundamental error;" in other words, "appellate counsel's failure to raise these issues as questions on appeal" constituted ineffective assistance.

> The penalty for First Degree Murder occurring in 1997 is set forth below:
>
> Death; life sentence without release on any basis for the remainder of the defendant's natural life. (An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release.) If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until having served 25 calendar years if the victim was 15 years of age or older and 35 calendar years if the victim was under 15 years of age. A.R.S. § 13-703.

1997 Criminal Code.[13] However, the legislature abolished parole as to murders committed after 1994; the instant murder occurred in 1997. *See State v. Rosario*,

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[13] 13–703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

> **A.** A person guilty of first degree murder as defined in section 13–1105 shall suffer death or imprisonment in the custody of the state department of corrections for life<<-, without possibility of release->> <<+as determined and in accordance with the procedures provided in subsections B through G of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not

195 Ariz. 264, 268 ¶ 26 (App. 1999) ("The Arizona legislature enacted laws effective January 1, 1994, eliminating the possibility of parole for crimes committed after that date. *See* A.R.S. § 41-1604.09(I).").

The Court finds that counsel should have been aware of the sentencing options, including the availability or non-availability of parole. This finding alone, however, does not mean counsel performed deficiently.

In light of the law in Arizona as it existed until 2016, both trial and appellate counsel made reasonable decisions in connection with the *Simmons/Lynch* claims. Counsels' decision tracked with subsequent precedent that remained in effect in Arizona until 2016. Counsel had no reason to anticipate a change in the law.[14]

> be released+>> on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age<<-, as determined and in accordance with the procedures provided in subsections B through G of this section->>.

CRIMES—DEATH SENTENCES, 1993 Ariz. Legis. Serv. Ch. 153 (H.B. 2048) (WEST).

[14] *Lynch* holds that a defendant is entitled to a *Simmons* instruction upon request if the State argues a defendant's "future dangerousness." *Lynch* was decided by the United States Supreme Court in 2016. In *Lynch* the United States Supreme Court overruled not just *Lynch* but prior Arizona decisions to the extent that they preclude the jury from being instructed and defense counsel being able to argue that any life sentence imposed by the jury mandates that the defendant be incarcerated for life short of receiving executive clemency.

In *State v. Cruz,* 218 Ariz. 149 (2008) our Supreme Court held that *Simmons* did not apply in Arizona.

> "Cruz's case differs from *Simmons*. No state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence. *See* A.R.S. § 13-703(A) (2004). The

The Court finds that it was objectively reasonable for counsel not to pursue this claim. The Court finds that this ineffectiveness claim is not colorable in connection with either trial or appellate counsel.

Nor does the Court find Defendant has demonstrated prejudice.[15] At trial in 2008, the Court gave the following instructions:

> You individually determine whether mitigation exists. In light of the aggravating circumstances you have found, you must then individually determine if the total of the mitigation is sufficiently substantial to call for leniency. "Sufficiently substantial to call for leniency "means that mitigation must be of such quality or value that it is adequate, in the opinion of an individual juror, to persuade that juror to vote for a sentence of life in prison.
>
> Even if a juror believes that the aggravating and mitigation circumstances are of the same quality or value, that juror is not required to vote for a sentence of death and may instead vote for a sentence of life in prison. A juror may find mitigation and impose a life sentence even if Defendant does not present any mitigation evidence.

> jury was properly informed of the three possible sentences Cruz faced if convicted: death, natural life, and life with the possibility of parole after twenty-five years."

[15] The jury did not reach a penalty phase verdict at the conclusion of the 2006 resentencing. The preliminary jury instructions identified possible sentences, other than death, as including life without release for 25 years or natural life. RT 12/14/2006 at 13. The final penalty phase jury instructions referred only to a life sentence, referring to "life with 25/natural life" in response to a jury question.

> A mitigating factor that motivates one juror to vote for a sentence of life in prison may be evaluated by another juror as not having been proved or, if proved, as not significant to the assessment of the appropriate penalty. In other words, each of you must determine whether, in your individual assessment, the mitigation is of such quality or value that it warrants leniency in this case.
> ……
>
> If you unanimously find that the Defendant should be sentenced to life imprisonment, your foreperson shall sign the verdict from indicating your decision. If you unanimously find that the Defendant should be sentenced to death, your foreperson shall sign the verdict form indicating your decision….

Final Penalty Phase Instructions filed 4/25/2008 at 5-6.

Both the preliminary and the final penalty phase instructions referred to "life imprisonment" and "life in prison" and did not reference "parole" or the "possibility of parole." *See* Final Penalty Phase Jury Instructions 4/25/2008 at 6.

The Court finds no colorable claims of prejudice, as any error would have been deemed harmless. The jury was faced with a Defendant who had previously been sentenced to probation, who had been placed on parole, and who had murdered a corrections officer while in prison, as well later had committed an aggravated assault. *See* RT 12/14/2006 at 68; 83; and the (F)(2), (F)(6) and (F)(7) aggravators. The availability of parole, whether waived by Defendant or unavailable by statute and procedures, is unlikely to have been sufficiently substantial to suggest leniency to change the verdict of death to "life" in even a single juror's mind.

The Court finds Claim **XV** is not colorable.

E. Ineffective Assistance – Timing and Effect of Guilty Plea (Claims X, XII).

In Claim X Defendant alleges that trial counsel "for the first trial in this case, as well as [the defendant's] counsel in *State v. Cropper*, CR 2000-000245" provided ineffective assistance by "failing to inform and advise [the defendant] about the effects of a plea of guilty in [the noncapital] case 245. [The defendant's] counsel in this case were ineffective for failure to contest the State's election to add, as an additional aggravating factor,[the defendant's] conviction for a crime which occurred the [sic] after [the defendant] had pled guilty."

In Defendant's Declaration filed 1/26/2015 he states, "Had I known the state could use the plea as an aggravator, I would definitely have gone to trial... [My] attorney" never clearly told me that the state could use a plea…." Defendant says he agreed to the plea in exchange for leniency for co-defendant.

Initially, the Court notes that the Arizona Supreme Court had been advised orally that the aggravated assault plea would be used to establish the (F)(2) aggravating factor:

> Cropper also argues that the State failed to comply with the rule because it did not give him written notice. The purpose of Rule 15.1.g(2)'s requirement of written notice is to ensure that a defendant receives timely, actual notice of the state's penalty phase objectives. In this case, Cropper did receive actual notice that the State would argue the F.2 aggravator just three days after the precipitating crime occurred and four months before the aggravation/mitigation hearing began. He does not attest that, under those facts, he faced any real danger of prejudice. *Cf. State v. Lee,* 185 Ariz. 549, 556, 917 P.2d 692, 699 (1996) (holding not prejudicial the state's inadvertent failure to provide defendant notice of intent to seek the death penalty under Rule 15.1.g(1) until eighty-seven days after such notice was required because defendant had actual notice of the prosecutor's intent to seek the death penalty).

> Because Cropper had actual, although oral, notice of the prosecutor's intent to use the aggravated assault conviction as a prior serious offense aggravating circumstance and the delay caused him no prejudice, the State adequately noticed the prior serious conviction aggravating circumstance.

Cropper I, 205 Ariz. at ¶¶ 15-17, 68 P.3d at 410–11, *supplemented,* 206 Ariz. 153, 76 P.3d 424.

The Court is bound by the Supreme Court's determination.

Were the court to address the substance of the claim, the Court would determine that it lacked merit. The Court finds that pleadings filed over fifteen years ago demonstrate that both trial counsel and Defendant appear to have entered the guilty plea for strategic reasons, in order to support an argument that not only was use of a subsequent plea to support the (F)(2) aggravator improper, but also to support an argument that a guilty plea (as opposed to a conviction after trial) was insufficient to support the (F)(2) aggravating factor.[16]

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[16] Defendant's present statement of the facts is belied by representations made by the State, and inferences in his own pleadings made at the time. In connection with the (F)(2) aggravating factor that was based on the Antoine Jones incident, the State wrote:

> …As a result [of the 1999 assault on Jones with a shank, Defendant] was indicted on Aggravated Assault charges in CR 2000-000245. Shortly thereafter, Defendant and the Court were advised that the State intended to use any conviction in the new cause number as an aggravating factor under A.R.S. § 13-703(F)(2). Court and counsel [agreed to continue the 703 Hearing until the disposition of the Jones case]. On June 22, 2000, [Defendant] pled guilty to Aggravated Assault [with sentencing to be contemporaneous with the capital case].

State's Sentencing Memorandum re: Aggravating Factors filed 9/5/2000.

Further, the Court notes that the conviction in CR 2000-000245 has not been vacated, and that neither the Due Process Clause nor the Eighth Amendment are offended by its use in support of the (F)(2) aggravator. S*ee State v. McCann,* 200 Ariz. 27, 31, 21 P.3d 845, 849 (2001) (unchallenged-at-trial prior conviction entitled to presumption of constitutional validity).

The Court further finds no colorable claims of prejudice due to the existence of an additional aggravating factor, the "extremely weighty" (F)(7) aggravating factor.

For all these reasons, **Claim X** is not colorable.

In Claim XII Defendant alleges that trial counsel provided ineffective assistance by "advising [the defendant] to plead guilty to the murder charge, before having completed the psychiatric evaluation that Dr. Lewis recommended be completed."

Even had trial counsel secured the psychiatric examination before Defendant entered his guilty plea in the instant (Lumley) case, the record provides no

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In response, the Defendant wrote:

> Counsel previously objected to the Court granting a continuance of the 703 hearing until the state obtained the conviction forming the substance of this factor. Counsel reserves all of this argument.
> Further, counsel would further object to the use of a conviction resulting from facts which occurred after the facts of this case. Counsel would show the Court that use of a case which occurred not only after the date of the offense here, but also, which occurred after his guilty plea, violates the notice requirements of Rule 15.1(g) [*inter alia*].

Response to State's Sentencing Memorandum (filed 9/25/2000).

evidence that the verdict of guilt would have changed had Defendant gone to trial. The psychiatric evaluation does not appear to support – nor does the record establish – a basis for a GEI defense, which could potentially negate a guilty plea. Rather, the record demonstrates that trial counsel ascertained that a psychiatric evaluation might properly be used at the sentencing hearing to seek leniency. Trial counsel secured, and argued, the reports of three experts at sentencing. Defendant's Mitigation Memorandum filed 9/26/2000.

Further, the record demonstrates that observing his co-defendants' trials, and seeing the victim's wife, Mrs. Lumley, allegedly had a profound effect on the Defendant, resulting in his desire to accept responsibility and to cooperate. RT 4/25/2008 at 16 (began to feel badly about events per Brian Abernathy testimony).

Defendant's change of plea, as explained by trial counsel Steinle at the time, was intended to facilitate "what [the defendant] originally wanted to do, which is to come into court and accept responsibility for what he did. Is that correct, Mr. Cropper?" To which Mr. Cropper responded, "That's right." RT 5/4/1999[17] at 17.

In more detail, trial counsel explained:

> Judge, on the voluntariness and whether or not it's an intelligent plea, I'd like to indicate to the Court that our discussions in this matter started last October while Mr. Cropper was back at the Department of Corrections. We had several opportunities to talk about it. We had several opportunities to talk about what rights he would give up. We discussed at length my view of the, the evidence and where we thought we were going. We also discussed what would be the impact on appeal if the entered guilty pleas. And over the course of October to today, there's been numerous discussions with myself and other members of the defense team from our office on the issue. And a lot of what we're trying to do today is accomplish what Mr. Cropper

[17] The transcript cover page incorrectly identifies the change of plea date as 5/6/1999; the correct date is 5/4/1999.

originally wanted to do, which is to come into court and accept responsibility for what he did.

Is that correct, Mr. Cropper?

Mr. Cropper: That's right.

Trial counsel continued:

This wasn't a decision that came in the last few weeks. This has been an ongoing process to try to accomplish pretty much what Mr. Cropper wanted from last October.

The Court: Do you agree with what Mr. Steinle just said, Mr. Cropper?
Mr. Cropper: Yes, I do.
…….
Trial counsel added:

Judge, one other thing that I'd like to point out to the Court for the purposes of the voluntariness of the plea. We did it now so that I could complete virtually all of the witness interviews. We've interviewed every significant witness in the case. We've had access to the transcripts in both of the Howell trials to go over. So the timing was more to make sure that I completed all of the discovery to make sure that I was satisfied as to the, the basis of it. And I want that also to be part of the record.

RT 5/4/1999 at 16-18.

Further, in "testimony of September 2nd, 1999, in the Eugene Long and Dino Kyzar trial" beginning at page 163, Defendant testified under oath:

After I ate my lunch, and I was formulating my plans to make – to murder Mr. Lumley, I watched out the window, and I seen Landsperger walk into the gates, letting inmates in or out. And I seem Mr. Lumley by the CD control, and I seen Mr. Lumley enter the CD

control. Then I seen Landsperger just going back and forth, so I knew Mr. Lumley was in the CD control.

Question from Mr. Schutts: So you didn't have any help that day, as this was going on; is that correct?

Answer: I didn't need any help.

Question: From any other inmates?

Answer: No. This whole murder of Mr. Lumley was my plan, my actions. There was nobody else involved in it, no matter how much you want them to be involved.

RT 4/25/2008 at 24 (transcript excerpt read by Mr. Abernathy, who was in court when Defendant testified).

The Court finds that the record demonstrates that Defendant determined to accept responsibility for the murder of Mr. Lumley for his own reasons; that trial counsel and the defense team counseled with the Defendant; and that there is no indication that the Defendant was either not competent or mentally incapable of entering a knowing, intelligent and voluntary plea.

As Defendant now suggests, he may have been "entitled to explore the question and impact of his claimed 'character trait of impulsivity, and lack of the ability to inhibit his aggression and impulse control.' Supplemental Reply at 38, FN 8. However, given the nature of the crime and Defendant's role in planning and securing assistance, the Court finds that the claim that trial counsel provided ineffective assistance by failing to secure further mental health evaluations prior to the plea is unsupported.

The Court therefore finds that **Claim XII** is not colorable.

F. Ineffective Assistance – Victim Impact Statements (Claim XI).

In Claim XI Defendant alleges that appellate counsel provided ineffective assistance by "failing to raise as an issue the impropriety of allowing victim impact

statements under an inapplicable Arizona statute, and violation of the 8th and 14th Amendments to the United States Constitution, of the victim impact statements in this case. The victim impact statements made to the sentencing jury in 2008 violated defendant's constitutional rights under United States Constitution Amendment XIV, and analogous Arizona constitutional provisions."

Before the 2000 judge-sentencing hearing Defendant filed a Motion to Preclude Victim Impact Evidence (filed 11/30/1999) on state and federal constitutional grounds, supporting his request with a ten-page Memorandum of Points and Authorities. As has since been recognized, by case law and statutes, a victim has a right to tell the jury about the impact of a defendant's crime before the defendant is sentenced, but may not suggest the sentence. *Lynn v. Reinstein*, 205 Ariz. 186, 189, ¶ 10, 68 P.3d 412, 415 (2003).

Had appellate counsel raised on appeal the propriety of the victim impact statement and of the victim's request that the jury "give me closure," the reviewing court would have found the victim impact statement to be admissible, and would have further found that this victim's request properly addressed how the victim's death affected his family and was not outside appropriate bounds of victim impact testimony and not unduly prejudicial. *State v. Gallardo*, 225 Ariz. 560, 242 P.3d 159 (2010). The statement did not seek a particular penalty but rather sought finality for the victims, in whatever form the jury determined was warranted.

The trial court further described the use to be made of the Victim Impact Information:

> Relatives of the victims made statements relating to personal characteristics and uniqueness of the victim and the impact of the murder on the victim's family, you may consider this information to the extent that it rebuts mitigation. You may not consider the information as a new aggravating circumstance.

Final Penalty Phase Instructions filed 4/25/2008 at 5.

The Court finds that **Claim XI** not colorable.

G. Ineffective Assistance – Restitution (Claim XIII).[18]

In Claim XIII Defendant alleges that "[a]n unlawful sentence is being carried out against [the defendant], because the Department of Corrections is violating the terms of his sentencing judgment, by withdrawing from [the defendant's] prisoner drawing account not only a percentage of his earnings, but of monies received from others and put into his prison account."

In his Supplement to Claim XIII (at 49-52) Defendant re-alleges that an "[u]nlawful sentence is being carried out by [the] amount of restitution funds withdrawn from [defendant's] account," in order to attach Exhibit 41 (allegedly "confirming [defendant's] qualifications for prison labor").

Defendant claims that by citing to A.R.S. § 31-254(D) and (E), the sentencing court necessarily limited any restitution payment to an amount that "shall be 30% of defendant's earnings…." Restitution Order entered 11/3/2000. Defendant alleges that in 2009 ADOC began withdrawing restitution from defendant's A.R.S. § 31-230 spendable account, which included monies gifted to him.

Yet gifts are not exempt from statutory provisions authorizing the collection of restitution from inmates. *State v. Glassel,* 226 Ariz. 369, 248 P.3d 217 (App. 2011); *State v. Stocks,* 227 Ariz. 390, 258 P.3d 208 (App. 2011). Nor can the Court discern any legitimate basis for faulting defense counsel in connection with such orders.

[18] To the extent argued independent of any claim of ineffectiveness, the Court finds that this claim is either: i) not cognizable under Rule 32.1(a); or ii) procedurally precluded pursuant to Rule 32.6(c) in a direct appeal of the Court's earlier orders. For the reasons stated above, the Court also finds them lacking in merit.

The Court therefore finds **Claim XIII** is not colorable.

H. Ineffective Assistance – Death Penalty (Claim XVI).

In his Supplement adding Claim XVI (at 53),Defendant alleges that "[t]he imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." In support of his claim, Defendant cites "evolving standards of decency" as articulated by various dissenting justices.

The Court finds that although the Arizona Supreme Court has advised that execution-related issues may properly be raised in post-conviction proceedings, it is premature as to this defendant. This defendant is not currently facing imminent execution because a warrant of execution has not been issued in his case. In fact, executions are currently stayed in Arizona. *See Wood v. Ryan*, CV 14-01447-PHX-NVW, United States District Court, District of Arizona, Order dated 11/24/2014. Because there is no guarantee as to what Arizona's protocol will be at the time of his execution, if any, this issue is not yet in controversy, and is not ripe for determination.

Further, our Supreme Court has previously upheld the constitutionality of the Arizona capital punishment scheme, and has specifically determined that the Arizona statute—

> …constitutionally prescribes that the method of death shall be lethal injection. *See State v. Hinchey,* 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995) (considering and rejecting argument that death by lethal injection constitutes cruel and unusual punishment). *Hinchey's* pronouncement that lethal injection as a method of execution comports with the Eighth Amendment was not conditioned upon the use of particular procedures in implementing lethal injection. Moreover, the United States Supreme Court has never held that death by lethal injection is cruel and unusual absent specific procedures for implementation, nor does Andriano cite any cases to

that effect. Andriano has thus failed to establish an Eighth Amendment right to a particular protocol for lethal injection.

State v. Andriano, 215 Ariz. 497, 510, 161 P.3d 540, 553 (2007) *abrogated by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

Death by lethal injection has been determined to be constitutional. *State v. Lynch*, 238 Ariz. 84, 357 P.3d 119 (2015) (lethal injection held not to violate the Eighth Amendment to the United States Constitution and Article 2, Section 15, of the Arizona Constitution; nor to constitute cruel and unusual punishment)

The Court finds **Claim XVI** is not colorable.

I. Ineffective Assistance – Cumulative Error and "Failure to Federalize."

Throughout his pleadings Defendant claims he is entitled to relief on the basis of "cumulative error." In accordance with Arizona law, the Court finds that Defendant has no basis for this claim. Arizona law may provide relief on the basis of individual error; Arizona law does not recognize the cumulative error doctrine, other than in the context of prosecutorial misconduct. The Court finds that this claim is not colorable.

Throughout his pleadings Defendant similarly claims that appellate counsel's "failure to federalize" various claims constitutes ineffective assistance of appellate counsel. *See* Claims V (disclosure of privileged materials); VI (unconstitutionality on its face and as applied of "especially cruel" aggravating factor); VII (arguments relating to cruelty instruction as "mere error of state law); VIII ("future dangerousness" argument as additional aggravating factor); and IX (willingness to waive parole).

Defendant has failed to establish deficient performance. Counsel's failure to "federalize" a state claim that was not demonstrably a winning claim at the time of appeal does not constitute deficient performance under *Strickland*.

Absent such a showing – as is the case here – the Court cannot conceive of a reasoned basis for finding prejudice. To find prejudice, the Court would have to speculate not only as to what the appellate court "might have done" in the past, had the claim been raised, but also what *habeas* counsel and then what a federal court on *habeas* review "might do" in the future. Defendant cites no authority holding that the failure to federalize a claim constitutes prejudice *per se*, and this Court declines to so hold.

The Court finds that the "failure to federalize" claims not colorable.

J. Ineffective Assistance – Resentencing by a Jury (Pro Per Claim).

In his pro per Claim, Defendant alleges that Arizona statutes changed the definition of "capital murder," and also alleges that Arizona statutes that authorize a jury that did not hear the guilt phase to adjudicate the aggravation and penalty phases at resentencing, violate defendant's state and federal constitutional rights to counsel, to a jury trial and to due process.

Pursuant to Rule 32.6(c), the Court finds that this claim is procedurally precluded from Rule 32 relief. An issue is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Pursuant to this authority and Rule 32.2(a)(1), the Court finds the defendant's proper claim to be precluded from relief.

Alternatively, the Court finds that this claim is not colorable. First, the Defendant has always been - ever since the filing of the State's Notice of Intention to Seek the Death Penalty on 5/5/1997 - potentially guilty of "capital murder:"

pre-*Ring* when the judge found at least one aggravating factor (rendering Defendant eligible for the death penalty) and sentenced him to death, and post-*Ring* when the jury made the findings of death-eligibility and penalty.

The Defendant appears also to be arguing that when he pled guilty, he thought the penalty phase (mitigation; sentencing) would be determined by a judge, and that *Ring III*[19] changed the posture of the case such that his guilty plea is invalid. *Ring III* was a procedural change that recognized the right of a defendant in a death penalty case to be sentenced by a jury:

> In *Ring III,* this Court explained that "Arizona's change in the statutory method for imposing capital punishment is clearly procedural." 204 Ariz. at 547 ¶ 23, 65 P.3d at 928. This is so because the change to jury sentencing made no change in punishment and added no new element to the crime of first degree murder. *Id.* Moreover, the Court rejected the argument that the procedural change had a substantive impact, noting that the state is still required to prove aggravating circumstances beyond a reasonable doubt. *Id.* at ¶ 24. "The only difference is that a jury, rather than a judge, decides whether the state has proved its case." *Id.*
>
> Our holding in *Ring III* was based, in part, on the Supreme Court's identical conclusion in *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290 (1977). *Id.* at 546 ¶ 20, 65 P.3d at 927. In the context of a capital resentencing after a change in sentencing procedure, *Dobbert* explained that no *526 **583 ex post facto claim arises when "[t]he new statute simply alter[s] the methods employed in determining whether the death penalty was to be imposed," and not "the quantum of punishment attached to the crime." 432 U.S. at 293–94, 97 S.Ct. 2290.

Cropper III, 223 Ariz. at ¶¶ 9-10, 225 P.3d at 582–83.

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[19] *State v. Ring,* 204 Ariz.534, 65 P.3d 915 (2003) *(Ring III)*.

When Defendant entered his guilty plea, he did so in anticipation of a constitutional sentencing, which is what occurred. At all times he was represented by competent counsel. Due process was satisfied. The Court finds this claim not to be colorable.

CONCLUSION

The Court finds that the defendant has failed to raise colorable claims for relief regarding all claims raised in these post-conviction pleadings, including the pro per and supplemental claims. A colorable claim for post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle,* 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); Ariz. R. Crim. P. 32.6(c) ("court shall order…petition dismissed" if claims present no "no material issue of fact or law which would entitle defendant to relief"); 32.8(a) (evidentiary hearing required "to determine issue of material fact").

Based on all of the above,

IT IS THEREFORE ORDERED dismissing Defendant's *nunc pro tunc* Petition for Post-Conviction Relief ("NPT Petition"), the Defendant's Supplemental Rule 32 Claim ("Pro Per Claim"), and the Supplement to Petition for Post-Conviction Relief.

On March 7, 1997, ADOC corrections officers at the Perryville State Prison in Goodyear, Arizona, discovered that some mops were missing from the Building 26 supply room. Officers Brent Lumley and Deborah Landsperger began searching for the missing mops in the nearby cells. They found no mops in the first cell searched, number 257, occupied by inmates Eugene Long and Bruce Howell. The officers moved on to the adjacent cell, number

258, which held inmates Cropper and Lloyd Elkins. While searching cell 258, Officers Lumley and Landsperger uncovered various contraband items, including a knife, tattooing equipment and a possible “hit” list. While the officers conducted the search, Cropper repeatedly approached and entered the cell, yelling at the officers and complaining of the search. The search obviously distressed Cropper, who believed the officers disrespected him and his property, and he became enraged because the searchers damaged a photograph of his mother. After Officers Lumley and Landsperger finished their search, they placed Cropper and Elkins on “lockdown” status in their cell, whereby their cell door was locked from the master control panel in the control room and the two inmates were unable to leave.

Through his cell door and a common vent between cells 257 and 258, Cropper spoke to several fellow inmates about his plan to kill Officer Lumley. Inmates Eugene Long and Joshua Brice agreed to help and retrieved an eight-inch steel carving knife buried in one of the Building 26 yards. Using two fly-swatters attached to one another Long passed Cropper the knife through the vent between the two cells. The inmates in cell 257 then passed a right-handed glove through the vent to Cropper. Cropper removed a lace from one of his shoes and wrapped it around the knife handle to provide a better grip.
Cropper needed to find a way out of his cell. An inmate is able to leave a locked cell if a fellow inmate “spins the lock” to his cell door. This lock picking procedure, performed manually on the cell door lock from outside the cell, bypasses the control room's electronic lock command. Howell and another inmate, Arthur Zamie, successfully opened the door, and then looked for Officers Lumley and Landsperger. Howell and Long returned to Cropper's cell and told him that Lumley was in the control room, with the door unlocked.

Cropper left his cell, walked down the hall and entered the control room. Cropper snuck up behind Officer Lumley and thrust the knife into his neck, partially pulled it out, then pushed it in a second time from another direction.

By the time Cropper finished, Lumley suffered a total of six stab wounds. Cropper left the control room, leaving the knife protruding from his victim's neck.

Cropper ran back to his cell from the control room and found the cell door locked. He tried to enter another locked cell and eventually reached cell 257, where he found the door unlocked. As he entered, he told Howell, who was inside cell 257, "I got him."

Cropper's clothes were covered with blood. He removed his sweatshirt and undershirt and threw them into Howell's trash can. He tore off a name tag sewn on the collar of his shirt and flushed it down Howell's toilet.

Cropper returned to his cell after an unidentified inmate spun the cell door lock. Cropper's cellmate Elkins helped him wipe away the blood on his body. Cropper also soaked his pants and shoes in a mixture of water and laundry detergent to clean off the blood.

Meanwhile, Howell gathered the bloody clothes from his trash can and placed them inside a garbage bag, which he threw onto the Building 26 roof. Howell then wiped blood from the door knob to Cropper's cell with one of his socks. DNA tests showed that the blood recovered from Cropper's shoes, underwear and the glove was consistent with Lumley's blood.

Cropper I, 205 Ariz. at, ¶¶ 2-9, 68 P.3d at 408–09, *supplemented,* 206 Ariz. 153, 76 P.3d 424.