No. _____

In The
Supreme Court of the United States

LEROY D. CROPPER,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF ARIZONA,
MARICOPA COUNTY

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that a capital defendant is entitled to inform the jury about his parole ineligibility when future dangerousness is at issue. In 2016, the Court summarily reversed the Arizona Supreme Court for refusing to allow a capital defendant to inform the jury about his parole ineligibility. *See Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam). In this case, the Arizona courts again upheld a death sentence even though the jury was never told that the capital defendant was ineligible for parole. The difference between this case and *Lynch* is that the jury here was never told because defense counsel never asked.

The question presented is:

Whether a death sentence may be carried out when defense counsel unreasonably fails to inform the jury of parole ineligibility under *Simmons v. South Carolina*, 512 U.S. 154 (1994), resulting in prejudice.

LIST OF RELATED PROCEEDINGS

State v. Cropper, No. CR 1997-003949, Arizona Superior Court, Maricopa County. Special Verdict filed November 16, 2000. Sentenced to Death on May 2, 2008. Petition for Post-Conviction Relief dismissed February 8, 2017.

State v. Cropper, No. CR 00-0544, Arizona Supreme Court. Judgment entered May 5, 2003. Supplemental Judgment entered September 5, 2003.

State v. Ring (consolidated cases, including *State v. Cropper*, No. CR 00-0544), Nos. CR 97-0428 et al., Arizona Supreme Court. Judgment entered April 3, 2003.

State ex rel. Thomas v. Heilman (Leroy D. Cropper, Real Party in Interest), No. 1 CA-SA 08-0009, Arizona Court of Appeals. Order declining petition for special action filed January 17, 2008.

State v. Cropper, No. CR 08-0116, Arizona Supreme Court. Judgment entered March 11, 2010.

Cropper v. Arizona, No. 10-5584, United States Supreme Court. Petition for Writ of Certiorari denied October 18, 2010.

State v. Cropper, No. 17-0566, Arizona Supreme Court. Petition for Review of Order Dismissing Petition for Post-Conviction Relief denied October 23, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Leroy D. Cropper, an Arizona prisoner under sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the Superior Court of Arizona, Maricopa County in this case.

OPINIONS BELOW

The opinion of the Maricopa County Superior Court dismissing Cropper's petition for post-conviction relief (App. 1a-63a) is unreported. An order of that court amending the opinion dismissing Cropper's petition (App. 64a-65a) is unreported. The order of the Arizona Supreme Court denying Cropper's petition for review of that dismissal (App. 66a-67a) is also unreported. The first opinion of the Arizona Supreme Court reviewing Cropper's 2000 sentence on direct appeal and ordering supplemental briefing (App. 68a-79a) is reported at 68 P.3d 407. The supplemental opinion of the Arizona Supreme Court vacating Cropper's 2000 sentence (App. 80a-90a) is reported at 76 P.3d 424. The opinion of the Arizona Supreme Court affirming Cropper's 2008 sentence on direct review (App. 91a-109a) is reported at 225 P.3d 579.

JURISDICTION

The judgment of the Maricopa County Superior Court was entered on February 7, 2017. App. 1a. The Arizona Supreme Court denied review on October 23, 2019. *Id.* at 66a. On January 2, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 20, 2020. On February 4, 2020, Justice Kagan further extended the time to and including March 5, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are reproduced in the appendix to this petition. App. 110a-11a.

INTRODUCTION

The decision between a life sentence and a death sentence in this case was an exceedingly close one. The Arizona Supreme Court recognized that a reasonable jury could find that a death sentence was not warranted. And the first jury to consider a death sentence hung because the jurors could not reach a unanimous verdict. Leroy Cropper's second jury did reach a death verdict, but only after his counsel performed deficiently in one critical respect. Despite this Court's repeated admonitions about the importance of informing the jury when the only alternative sentence is life without parole, the jury never received this information because counsel never asked for such an instruction. If Cropper's counsel had simply asked, the Arizona court would have been constitutionally required to inform the jury that he was ineligible for parole, and there is *at least* a reasonable probability that Cropper would not be awaiting an execution date today. Indeed, that conclusion should follow as a matter of law.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that a capital defendant is entitled to inform the jury about his parole ineligibility when future dangerousness is at issue. And in the ensuing years, this Court has repeatedly granted certiorari to reverse death sentences where state trial courts have refused to inform the jury of parole ineligibility under *Simmons*. Most recently, six Justices voted to summarily reverse the Arizona

Supreme Court for committing precisely this error. *See Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam). This petition comes to the Court from Arizona, and on state post-conviction review, without the complications of federal habeas relief or the exigencies of an impending execution date. The Court's review is needed to ensure that an unconstitutional death sentence is not carried out.

STATEMENT OF THE CASE

1. Leroy Cropper had an abusive childhood. App. 101a. His stepmother severely abused him, as his father stood by and watched without intervening. *Id.* at 87a, 101a. Cropper's father also beat him, once choking Cropper to the point of losing consciousness. *Id.* at 101a. After visits to his father and stepmother, Cropper would return to his biological mother's apartment and violently bang his head against the wall until the apartment shook. RT[1] 2006-11-21 at 54, 57.

2. Notwithstanding his turbulent upbringing, up until the offense for which he was sentenced to death, Cropper's criminal history was limited, non-violent, and the product of drug abuse and addiction. *See* Ex. 12 at 1 to MCSC[2] Pet. for Post-Conviction Relief ("PCR Pet.") (Jan. 25, 2015). In 1991, at the age of 27, Cropper was first convicted of forgery. *Id.* Over the course of the next two years, Cropper was either in prison or on probation or parole. *Id.* Then, in 1993,

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[1] "RT" refers to the Reporter's Transcript of Proceedings in Nos. CR 1997-003949 and CR 08-0116, Arizona Superior Court, Maricopa County.

[2] "MCSC" refers to court filings in No. CR 1997-003949, Arizona Superior Court, Maricopa County.

Cropper was convicted and sentenced to six years for possession of drugs for personal use. *Id.*[3]

While Cropper was serving his sentence for those non-violent drug offenses, something snapped. In March 1997, two corrections officers entered Cropper's cell to conduct a search. App. 69a. In the course of the search, a female officer damaged Cropper's family photographs, including a photograph of his biological mother. *Id.* For Cropper, this mirrored the childhood trauma he suffered at the hands of his stepmother, without any intervention from his father. *Id.* at 87a-89a. Working with other inmates, Cropper was able to escape from his cell following the search. *Id.* at 70a. Still enraged, he found Brent Lumley—the male officer who had assisted with the search—in a control room, and stabbed him multiple times, killing him. *Id.*; MCSC Special Verdict 4 (Nov. 16, 2000).

3. The State charged Cropper with first degree murder and other crimes. App. 71a. In 1999, Cropper pleaded guilty, *id.* at 68a, 71a, and the State sought the death penalty. After his guilty plea, but before sentencing, Cropper was charged with aggravated assault of another inmate. *Id.* at 71a-72a. The State delayed Cropper's sentencing to secure a conviction on that offense as well, which it did on June 22, 2000, when Cropper pleaded guilty. *Id.* at 72a.

a. With that second conviction in hand, the State then sought the death penalty based on three aggravating factors: (i) the killing of Officer Lumley was committed while in prison; (ii) Cropper had a

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[3] Cropper was convicted of two counts of possession, and the resulting six-year and four-year sentences were imposed to run concurrently. PCR Pet. Ex. 12 at 1.

conviction for a prior serious offense (*i.e.*, the subsequent aggravated assault conviction); and (iii) the killing of Officer Lumley was committed in an "especially cruel, heinous or depraved manner." *Id.* at 71a-72a. Under Arizona law at that time, a judge was responsible for finding whether these factors were present and for sentencing Cropper. *See id.* at 72a-73a. The sentencing judge found all three. *Id.*

The first aggravating factor was undisputed. MCSC Special Verdict 4. As for the second, the court held—over Cropper's objection—that a post-conviction crime could serve as a "prior offense" because the second crime took place before Cropper was sentenced. *Id.* at 2. With respect to the third aggravator, the evidence demonstrated that Officer Lumley remained conscious for three to five minutes and died soon thereafter; a state expert testified that it was unclear whether the stabbing would have caused a substantial amount of pain; and there was nothing else tortuous or vile about the crime. *Id.* at 2-4; App. 84a-85a. The court nonetheless rejected Cropper's argument that "the manner in which the crime [wa]s committed" did not raise it "above the norm of first degree murders." MCSC Resp. to State's Sentencing Mem. 1-2 (Sept. 25, 2000) (quoting *State v. Hensley*, 691 P.2d 689, 694 (Ariz. 1984)).

The sentencing judge also found mitigating circumstances, including Cropper's strong relationship with his family and his remorse for the crime, which the court concluded was genuine. MCSC Special Verdict 6. But the court held that "the two mitigating circumstances [we]re not sufficiently substantial to call for leniency," and sentenced Cropper to death. *Id.* at 7.

b. While Cropper's direct appeal was pending, this Court held the sentencing regime under which Cropper was sentenced unconstitutional. *Ring v. Arizona*, 536 U.S. 584 (2002). Based on *Ring*, the Arizona Supreme Court vacated Cropper's sentence and remanded for resentencing by a jury. App. 80a, 89a. Before remanding, the court performed a harmless error analysis and concluded that the error in Cropper's case was not harmless. *Id.* at 81-89a (citing *State v. Ring,* 65 P.3d 915, 936 (Ariz. 2003)). The court explained that it "c[ould not] hold that all reasonable juries would find the especially cruel aggravating circumstance established beyond a reasonable doubt," and "c[ould not] conclude, beyond a reasonable doubt, that a jury would not have weighed differently the established mitigating circumstances or found additional mitigating circumstances." *Id.* at 86a, 89a.

c. The first resentencing before a jury began in 2006. RT 2006-11-07 at 1, 4.

Arizona had abolished parole as to murders committed after 1994, so the only two sentencing options were life in prison without parole or death. App. 43a; *see* Ariz. Rev. Stat. Ann. § 41-1604.09(I). The jury was instructed that it was either "life" or death, but the instructions did not define a life sentence. RT 2006-12-18 at 10, 14-15. During deliberations, the jury zeroed in on Cropper's eligibility for parole, asking the court: "Is 'Life' without parole or with a chance for parole?" RT 2007-01-08 at 3. The court responded (incorrectly): "If you unanimously determine that the appropriate verdict is life, then it is for the Judge to determine whether the sentence will be for natural life, i.e., life imprisonment without the possibility of parole, or a

life sentence, i.e., life imprisonment with a possibility of parole after serving 25 years." *Id.* at 8; *see also* App. 45a.

The jury found the first two aggravating factors but could not reach a unanimous decision on the "especially cruel" aggravator. App. 92a. And the jury hung because it was also unable to reach a unanimous decision on whether Cropper deserved the death penalty. *Id.*

d. The State sought the death penalty against Cropper for a third time and, in 2008, held a second resentencing before a jury. *Id.*; RT 2008-04-03. Under Arizona law, if this second jury failed to reach a unanimous decision, Cropper would automatically receive a life sentence (without parole). Ariz. Rev. Stat. Ann. § 13-752(K). The same counsel from the 2006 resentencing represented Cropper in 2008.

The question of Cropper's future dangerousness was squarely presented to the jury. According to the court, Cropper's counsel had put his "future dangerousness" at issue and the State could raise an argument of future dangerousness in response. RT 2008-04-29 at 6-7. And it did. The State argued that "[k]illing an officer . . . increases the likelihood of other violence," *id.* at 85-86, and portrayed Cropper as having a "capacity for violence" and a "heart . . . [w]illing and anxious to inflict pain and suffering on another man . . . [f]or sport," *id.* at 86. The State argued that instead of learning "[t]he value of human life," Cropper had "becom[e] a cold-blooded killer." *Id.* at 91. In its closing remarks, the State summarized its case: "[Cropper] would have you believe that he [ha]s now finally turned the corner," that "now years later, finally, the wind is supposedly gone from his sails of violence. The wind is gone. What happens

when the next big gale comes along? What happens then? Who will speak to his next victim and say, we thought he was all done with this? Who's going to do that?" *Id.* at 96.

The State's closing arguments also put the issue of parole front and center. The State emphasized that Cropper had already been "given second chances on probation and parole." *Id.* at 92. And the State argued that, by seeking a life sentence, Cropper was now asking "for another second chance from you." *Id.* at 93. The State urged the jury: "Don't do it." *Id.*

The State did so even though, as in 2006, the jury had only two choices under Arizona law—either life in prison without the possibility of parole or death. App. 42a-44a. The judge instructed the jury that it could "vote for a sentence of death . . . [or] vote for a sentence of life in prison." *Id.* at 45a (quoting MSCS Final Penalty Phase Instructions 5-6 (Apr. 25, 2008)); RT 2008-04-29 at 42-44. But, as in 2006, the instructions did not make clear that "life" meant life without parole. App. 45a-46a. Defense counsel never requested a more specific instruction explaining that Cropper was categorically *in*eligible for parole. *Id.* at 44a-46a. Nor did counsel otherwise attempt to inform the jury that a life sentence could not include parole. *Id.* To the contrary, defense counsel (wrongly) believed that parole *was* available, sought to "waive" that parole, and asked the court to instruct the jury that Cropper would be eligible for release in 35 years. *Id.* at 43a; MCSC Def.'s Proposed Penalty Phase Instructions for Retrial 10-11; RT 2008-04-29 at 66-68.

This time, the jury found the "especially cruel" aggravator and sentenced Cropper to death. App. 92a.

e. On direct appeal, Cropper's counsel raised a number of arguments that were barred by existing state law for the purpose of preserving them for federal review. *Id.* at 106a-09a. But Cropper's counsel did not challenge the jury instructions or otherwise argue that the jury should have been informed about Cropper's ineligibility for parole. *See id.* at 93a-97a. The Arizona Supreme Court affirmed Cropper's death sentence, *id.* at 105a, and this Court denied certiorari, *see Cropper v. Arizona*, 562 U.S. 982 (2010) (No. 10-5584).

4. Cropper then sought post-conviction review in state court. App. 2a, 7a. Post-conviction review counsel pursued leads that previous counsel had not. Based on preliminary findings from a 1999 report, which had gone unexplored to that point, counsel had an MRI conducted that confirmed Cropper's organic brain dysfunction—evidence that had never been presented to a jury. *See id.* at 11a-15a. Post-conviction review counsel also recognized, as previous counsel had not, that Cropper was categorically ineligible for parole. In his petition for post-conviction relief, Cropper argued (among other things) that 2008 counsel was ineffective for failing to request an instruction or otherwise argue to the jury that he was ineligible for parole under *Simmons* and its progeny. *Id.* at 42a-46a.

a. The Arizona trial court rejected that argument. *Id.* at 46a. The court did not dispute that Cropper's future dangerousness had been put at issue or that Cropper was not eligible for parole under Arizona law. *Id.* at 42a-46a. The court also acknowledged that defense counsel was not aware that Cropper was ineligible for parole, and that he "should have been aware of the sentencing options, including the

availability or non-availability of parole." *Id.* at 43a. The court nevertheless held that counsel's performance was not "deficient[]" because it was "objectively reasonable" for counsel not to request a *Simmons* instruction "[i]n light of the law in Arizona as it existed until 2016"—*i.e.*, as it existed before this Court summarily reversed the Arizona Supreme Court in *Lynch* based on its failure to follow *Simmons*. *Id.* at 43a-44a. According to the court, before *Lynch*, the Arizona Supreme Court had "held that *Simmons* did not apply in Arizona." *Id.* at 44a n.14. Cropper's counsel, the court reasoned, "had no reason to anticipate a change in the law." *Id.* at 44a.

The trial court also held that Cropper failed to show prejudice. *Id.* at 44a-46a. The court never addressed Cropper's argument that prejudice should be presumed in these circumstances. *Id.* at 44a-47a; *see* MCSC Supp. to PCR Pet. 44-48 (Aug. 20, 2016). Nor did the court take note of the fact that the 2006 jury in Cropper's case had specifically asked whether "life" referred to life with or without parole. App. 44a-47a; *see* MCSC Supp. to PCR Pet. 31-33, 48. And although the court acknowledged that "[t]he jury did not reach a penalty phase verdict at the conclusion of the 2006 resentencing," the court concluded that "[t]he availability of parole . . . 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." App. 44a, 46a.

b. The Arizona Supreme Court denied Cropper's petition for review. *See id.* at 66a-67a.

REASONS FOR GRANTING THE WRIT

This petition is the latest in a series of cases where a handful of state courts have refused to adhere to the

teachings of this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). Just four years ago, six Justices of this Court voted to summarily reverse the Arizona Supreme Court for doing just that. In *Lynch v. Arizona*, Arizona trial counsel tried to inform the jury about the defendant's parole ineligibility, but the court prevented him from doing so. 136 S. Ct. 1818 (2016) (per curiam). Here, Arizona trial counsel did not even try to inform the jury about defendant's parole ineligibility, so the court did nothing. That is the only difference between the two cases. And that cannot be the difference between life and death.

This is an easy case of ineffective assistance. Future dangerousness was indisputably put at issue. Cropper was not eligible for parole. Counsel failed to seek a *Simmons* instruction or otherwise inform the jury of that fact only because he did not understand the available sentences under state law. Any objectively reasonable death penalty counsel would have understood the sentencing options and would have informed the jury that parole was not an option. And that is true regardless of an Arizona Supreme Court decision that grossly misread this Court's decision in *Simmons*—as this Court held in *Lynch*—and that was handed down *after* Cropper's sentencing phase began.

The resulting prejudice is also apparent. Prejudice is inescapable given the nature of a *Simmons* error. It is fundamentally unfair to be sentenced to death by a jury that does not understand that release is not an option and that is more likely to vote for death if it mistakenly believes the defendant may one day roam free. And, in any event, prejudice is readily demonstrated in Cropper's case. The nature of a *Simmons* error, paired with the compelling facts

of this case, make it *at least* reasonably probable that the outcome would have been different if the jury had been informed parole was off the table.

Indeed, Cropper's 2006 jury specifically asked whether "life" meant life without parole. The Arizona Supreme Court recognized that a reasonable jury could conclude that a death sentence is not warranted here. The 2006 jury hung because some jurors could not vote for death. And if even one juror had been unable or unwilling to vote for death in 2008, there would have been no further proceedings; Cropper would have automatically received a life sentence. The Arizona post-conviction court's conclusion that not a "single juror[]" would vote for "life" without parole cannot possibly be squared with these facts. This is as compelling a case of prejudice as they come.

This Court's intervention is needed to ensure that an unconstitutional death sentence is not carried out.

I. COUNSEL WAS DEMONSTRABLY INEFFECTIVE UNDER *SIMMONS*

In *Simmons*, this Court held that a capital defendant is entitled to inform the jury about his parole ineligibility when future dangerousness is at issue. 512 U.S. at 156 (plurality opinion); *id.* at 178 (O'Connor, J., concurring in the judgment). Seven years later, in *Shafer v. South Carolina*, the Court reaffirmed that "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility.'" 532 U.S. 36, 39 (2001) (alteration in original) (citation omitted). And the following year, in *Kelly v. South Carolina*, the Court

reiterated that same holding again. 534 U.S. 246, 248 (2002).

In *Simmons* itself, there was some debate over whether due process could be satisfied by the argument of defense counsel, or whether a jury instruction was required. *See Simmons*, 512 U.S. at 173 (Souter, J., concurring); *id.* at 174 (Ginsburg, J., concurring). And there was some discussion about whether the Eighth Amendment might require a jury instruction regardless of future dangerousness. *See id.* at 162 n.4 (plurality opinion); *id.* at 172-74 (Souter, J., concurring). But by 2002 (at the latest), this Court's case law was crystal clear that if (i) future dangerousness was at issue, and (ii) the jury's only two choices were death or life without parole, then the capital defendant had a due process right to tell the jury that he was ineligible for parole. *Kelly*, 534 U.S. at 248.

In *Lynch*, the Court held exactly that when it summarily reversed an Arizona Supreme Court decision that refused to follow the teachings of *Simmons* and its progeny. 136 S. Ct. at 1818-19. There was no dispute that Lynch's future dangerousness had been put at issue. *Id.* at 1819. There was no dispute that, under Arizona law, "parole is available only to individuals who committed a felony before January 1, 1994," and that Lynch had committed his offense in 2001. *Id.* (citation omitted). Nor was there any dispute that defense counsel had tried to inform the jury of Lynch's parole ineligibility. *Id.* The only reasons Arizona offered for not complying with *Simmons* were the availability of executive clemency under current law, and the possibility that Arizona could make parole available in future legislation. *Id.* at 1819-20. But, as this

Court explained, *Simmons* had already "expressly rejected" both arguments. *Id.* at 1819. Because the Arizona Supreme Court's decision was foreclosed by this Court's decade-old precedents, the Court summarily reversed without merits briefing or argument. *Id.* at 1820.

The question in this case is the necessary corollary to *Lynch*. The two cases are the same with one exception: the jury was not informed of Cropper's parole ineligibility because defense counsel did not ask for a *Simmons* instruction or otherwise attempt to inform the jury that parole was unavailable. For that reason alone, the decision in *Lynch* was reversed and Cropper remains sentenced to death. The Arizona post-conviction review court countenanced that result with minimal reasoning. And the Arizona Supreme Court declined to even review that decision. Even the most pro forma application of *Strickland v. Washington*, 466 U.S. 668 (1984), makes clear why Cropper's death sentence cannot stand.

A. Counsel's Failure To Ensure That The Jury Was Informed Of Cropper's Parole Ineligibility Was Patently Deficient

Cropper was undisputedly entitled to inform the jury of his parole ineligibility under this Court's precedent. "[T]he [Arizona] legislature abolished parole as to murders committed after 1994 . . . ." App. 43a; *see* Ariz. Rev. Stat. Ann. § 41-1604.09(I). And the 2008 sentencing court explicitly found that Cropper's "future dangerousness [was at] issue." RT 2008-04-29 at 6. Cropper was therefore entitled to "rebut the State's case" by presenting evidence of his parole ineligibility. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment). If counsel had asked for

a *Simmons* instruction or to otherwise inform the jury of Cropper's parole ineligibility, the trial court would have been constitutionally required to allow it. That is what this Court held in *Lynch*.

Trial counsel's decision not to request a *Simmons* instruction or otherwise inform the jury that Cropper was ineligible for parole was not strategic. It was based entirely on the fact that counsel wrongly believed that Cropper *was* eligible for parole. Indeed, counsel went so far as to attempt to "waive" parole rights that did not exist, App. 41a-43a; RT 2008-04-29 at 66-68, and to seek an instruction informing the jury that Cropper *could* be released after 35 years, MCSC Def.'s Proposed Penalty Phase Instructions for Retrial 10-11 (Feb. 8, 2008). In other words, counsel did not understand the sentencing options available to the jury in the sentencing phase of Cropper's death case. But, as even the Arizona post-conviction review court acknowledged, "counsel should have been aware of the sentencing options, including the availability or non-availability of parole." App. 43a.

The court nevertheless held that counsel's performance was not deficient. The court gave only one reason: because, in *State v. Cruz*, 181 P.3d 196, 207 (Ariz. 2008), *cert. denied*, 555 U.S. 1104 (2009), the Arizona Supreme Court had "held that *Simmons* did not apply in Arizona"; that decision was not reversed by this Court until its 2016 decision in *Lynch*; and counsel had no reason to anticipate a change in the law. App. 44a & n.14. That reason is fatally flawed.

Adverse state court precedent can neither explain nor excuse counsel's failure to inform the jury of Cropper's parole ineligibility or preserve a *Simmons* error. *Cruz* was not decided until April 21, 2008. 181

P.3d at 196. Two months *prior to* that decision, defense counsel proposed final penalty-phase jury instructions regarding "Parole Eligibility" seeking to inform the jury that Cropper "would be eligible for release from prison" after 35 years. MCSC Def.'s Proposed Penalty Phase Instructions for Retrial 10-11 (Feb. 8, 2008). In the ensuing two months *before Cruz*, defense counsel proposed preliminary instructions that said nothing about Cropper's parole *in*eligibility. MCSC Def.'s Proposed Preliminary Instructions for Penalty Phase Retrial (Mar. 31, 2008); Def.'s Second Set of Proposed Preliminary Instructions for Penalty Phase Retrial (Apr. 9, 2008). And defense counsel never objected to the court's preliminary instructions which informed the jury (without elaboration) that it could impose a "life sentence" or death. RT 2008-04-10 at 5, 10 (instructions given April 10, 2008). That is, for months before *Cruz* and at a time when this Court's precedents plainly entitled Cropper to inform the jury that he was ineligible for parole, defense counsel made no attempt to get that critical information to the jury.[4] That failure had nothing to do with any purported change in the law, and everything to do with the fact that counsel wrongly believed that Cropper *was* eligible for parole. The happenstance that *Cruz* was decided less than two weeks before the jury recommend a death sentence for Cropper (RT 2008-05-02 at 5) neither explains nor excuses counsel's deficient performance.

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[4] Indeed, the same counsel failed to inform the 2006 jury of Cropper's parole ineligibility too—two years before the adverse Arizona decision in *Cruz*. App. 44a n.15.

In any event, the notion that "*Simmons* did not apply in Arizona" (App. 44a n.14) was demonstrably wrong under *Simmons* itself. By 2008, the Court had found *Simmons* violations in three cases. *Kelly*, 534 U.S. 246; *Shafer*, 532 U.S. 36; *Simmons*, 512 U.S. 154. *Lynch* was a straightforward application of that decade-old precedent. 136 S. Ct. at 1820 ("*Simmons* and its progeny establish Lynch's right to inform his jury of that fact [that he was ineligible for parole]."). The only argument the State advanced in *Lynch* was that the possibility of executive clemency or future legislative reform made *Simmons* inapplicable. *See id.* The Court dismissed those arguments out of hand because *Simmons* had already expressly rejected them. *Id.* at 1819-20. That is presumably *why* six Justices on this Court voted to summarily reverse, rather than grant plenary review. *Id.* at 1818-20.

A reasonable attorney cannot disregard the precedent of *this* Court. And, here, a reasonable attorney familiar with the applicable law would have concluded, as this Court did, that the unfavorable Arizona precedent was directly contrary to *Simmons* and would have attempted to inform the jury of parole ineligibility. *See id.* at 1819. The uncontested evidence below established that "reasonable lawyers defending capital cases in Maricopa County, and in Arizona in general, in 2006 and 2008, were requesting courts to instruct jurors that the life sentence that the jurors might be choosing . . . did not include parole . . . in reliance on *Simmons*." PCR Pet. Ex. 46 ¶ 5 (Decl. of Garrett Simpson) (Arizona attorney with 29 years of capital case experience, including acting as attorney of record in approximately 20 capital trial, appellate, and PCR cases (*see* PCR Pet. Ex. 27 ¶ 3)). Indeed, even between *Cruz* (2008) and *Lynch* (2016),

counsel in numerous Arizona cases attempted to inform the jury of parole ineligibility.[5]

The attorneys in all of these cases were requesting a *Simmons* instruction for good reason: it would have been "unreasonable for a lawyer not to request such an instruction." PCR Pet. Ex. 46 ¶ 5. That is what the prevailing professional norms required. The ABA Guidelines, for example, explain that death penalty counsel should evaluate a legal claim "in light of" both "the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence" and "the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.8(A)(3)(b)-(c)—The Duty to Assert Legal Claims (rev. ed. 2003); *see Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (relying on ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989) as a "guide[] to determining what is reasonable" (quoting *Strickland*, 466 U.S. at 688)); *see also Williams v. Taylor*, 529 U.S. 362, 396-97 (2000).[6] Recognizing the

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[5] *See, e.g.*, *State v. Rushing*, 404 P.3d 240, 249 (Ariz. 2017), *cert. denied*, 139 S. Ct. 66 (2018); *State v. Escalante-Orozco*, 386 P.3d 798, 829 (Ariz.), *cert. denied*, 138 S. Ct. 238 (2017); *State v. Boyston*, 298 P.3d 887, 900-01 (Ariz.), *cert. denied*, 571 U.S. 870 (2013); *State v. Benson*, 307 P.3d 19, 32-33 (Ariz. 2013); *State v. Hausner*, 280 P.3d 604, 634 (Ariz. 2012); *State v. Hardy*, 283 P.3d 12, 23-24 (Ariz. 2012), *cert. denied*, 568 U.S. 1127 (2013).

[6] Notably, adverse precedent did not stop Cropper's counsel from preserving a host of constitutional arguments for later appeal. App. 106a-09a.

importance of preserving issues, this Court has held that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Engle v. Isaac*, 456 U.S. 107, 130 (1982); *id.* at 128-29 (petitioner's federal habeas claim was procedurally defaulted and petitioner could not demonstrate cause for the default).

Counsel's failure to request a *Simmons* instruction, or to otherwise inform the jury of Cropper's parole ineligibility, was "[un]reasonable[] under prevailing professional norms," *Strickland*, 466 U.S. at 688, and was "not supported by a reasonable strategy," *Massaro v. United States*, 538 U.S. 500, 505 (2003).

B. Counsel's Failure To Inform The Jury Of Cropper's Parole Ineligibility Was Prejudicial

Counsel's failure to inform the jury of Cropper's parole ineligibility was plainly prejudicial. Indeed, the better view is that prejudice is inescapable any time a *Simmons* instruction is clearly warranted but not requested. The same reasoning that prompted this Court to hold that information about parole eligibility is both confusing to jurors and critical to their deliberations supports a finding of prejudice as a matter of law in instances where a jury is deprived of that information based solely on counsel's failure to provide it. But, in any event, the nature of a *Simmons* error paired with the facts of this case make clear that there was actual prejudice here as well. It is *at least* reasonably probable that Cropper would have received a life sentence had the jury been informed that the only alternative to death was life without parole.

1. *Simmons* Errors Result In Inescapable Prejudice

"The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding . . . ." *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993). In particular, "the 'prejudice' component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 372. Consistent with notions of fairness, in *Strickland*, the Court set "a general requirement that the defendant affirmatively prove prejudice," but warned against treating "the principles [it] ha[s] stated [as] establish[ing] mechanical rules." 466 U.S. at 693, 696. For example, the Court explained, "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id*. at 692.

This Court has found prejudice as a matter of law where an error impacts the fundamental fairness of criminal proceedings. *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). When "the likelihood that the verdict is unreliable"—and therefore unfair—"is so high that a case-by-case inquiry is unnecessary," prejudice is necessarily established. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002).

The same considerations result in the conclusion that prejudice exists as a matter of law where a defendant meets the requirements for a *Simmons* instruction but counsel deficiently fails to inform the jury of parole ineligibility. *Simmons* errors render sentencings fundamentally unfair and unreliable because (i) jurors are inherently confused about the

availability of parole; (ii) parole eligibility plays a significant role in juror decisionmaking; and (iii) an erroneous death sentence is irrevocable.

First, as this Court recognized in *Simmons*, there is a "grievous misperception" among jurors "about the meaning of 'life imprisonment.'" 512 U.S. at 159, 161-62 (plurality opinion). Because "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" *Kelly*, 534 U.S. at 257 (first alteration in original) (quoting *Shafer*, 532 U.S. at 52). And statistical evidence bears out what common sense suggests. Relying on a survey of jury-eligible adults in South Carolina, the Court in *Simmons* noted that "nearly three-quarters thought that release certainly would occur in less than 30 years." 512 U.S. at 159 (plurality opinion).

Second, this misconception is "grievous" because parole eligibility makes it far more likely jurors will vote for death. *Simmons*, 512 U.S. at 161-62 (plurality opinion). That, effectively, is the reasoning underlying *Simmons* and its progeny. When future dangerousness is put at issue in a capital sentencing proceeding, informing the jury of parole ineligibility "will often be the *only* way that a violent criminal can successfully rebut the State's case." *Id.* at 177 (O'Connor, J., concurring in the judgment) (citation omitted). Put another way, "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." *Id.* at 163-64 (plurality opinion).

Here too, studies corroborate the importance and impact of parole eligibility on juror decisionmaking.

In *Simmons*, the Court pointed to a study showing that "[m]ore than 75 percent of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an 'extremely important' or a 'very important' factor in choosing between life and death." *Id.* at 159 (plurality opinion) (citation omitted); *see also Baze v. Rees*, 553 U.S. 35, 78-79 (2008) (Stevens, J., concurring in the judgment) ("[T]he available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence." (citing Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1845 (2006))).

Third, the irrevocability of a death sentence makes the need for fairness in capital cases uniquely compelling. As this Court has explained, because of "its finality," "[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long," and "there is a corresponding difference in the need for reliability." *Lankford v. Idaho*, 500 U.S. 110, 125 n.21 (1991) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *see Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("[T]he Court[] [has] insiste[d] that capital punishment be imposed fairly . . . or not at all.").

That this Court has never hinted at (let alone performed) a harmless error analysis in a *Simmons* case is also notable. Each case in the *Simmons* line has drawn a dissent, several of which emphasize the depravity of the crime and suggest that parole ineligibility could not possibly have made a difference in the outcome. *See, e.g.*, *Simmons*, 512 U.S. at 181

(Scalia, J., dissenting) ("I am sure it was the sheer depravity of [the defendant's] crimes, rather than any specific fear for the future, which induced the . . . jury to conclude that the death penalty was justice."); *Lynch*, 136 S. Ct. at 1821 (Thomas, J., dissenting) (arguing that, "[a]s in *Simmons*, it [wa]s the 'sheer depravity of [Lynch's] crimes'" that caused the jury to sentence him to death (quoting *Simmons*, 512 U.S. at 181 (Scalia, J., dissenting)). If a *Simmons* error were susceptible to harmless error review, one might have expected the Court to remand for the state court to engage in such an analysis. *Cf. Ring v. Arizona*, 536 U.S. 584, 609 n.7 (2002) (explicitly "leav[ing] it to lower court[] to pass on the harmlessness of error in the first instance"). And although the error here arises in the context of an ineffective assistance of counsel claim, similar concerns about fundamental fairness lead to the conclusion that prejudice exists as a matter of law.

2. There Is Overwhelming Evidence Of Actual Prejudice Here

The facts of this case underscore the prejudicial impact of *Simmons* errors—and easily establish actual prejudice. The very nature of a *Simmons* error (as set forth above), paired with the facts of this case, lead to at least a reasonable probability of a different outcome if the jury had been informed that the only alternative to death was life without parole.

This was always a marginal case for imposition of a death sentence. The Arizona Supreme Court recognized as much when it remanded Cropper's case for resentencing by a jury after concluding that the *Ring* error was not harmless. As the court explained, it "c[ould not] hold that all reasonable juries would

find the especially cruel aggravating circumstance established beyond a reasonable doubt." App. 86a. Nor could it "conclude, beyond a reasonable doubt, that a jury would not have weighed differently the established mitigating circumstances or found additional mitigating circumstances." *Id.* at 89a.

Then, on remand, *the first jury hung*. The 2006 jury could not reach a unanimous verdict on the "especially cruel" aggravator. *Id.* at 92a. Nor could it reach a unanimous verdict on whether the death penalty was warranted. *Id.* It is hard to think of better evidence that a jury might not have sentenced Cropper to death than the fact that the first jury did *not* sentence Cropper to death. And had even a single juror in 2008 not voted for death, Cropper would have automatically received a life sentence. *See* Ariz. Rev. Stat. Ann. § 13-752(K).

Judged against the baseline norm of all first-degree murders, there is also not "overwhelming record support" for death. *Strickland*, 466 U.S. at 696. At the time of the capital offense, Cropper was in prison for non-violent drug crimes and had no prior conviction for any violent offense. The only aggravators were the fact that the murder was committed in prison; a post-conviction assault of another inmate that was not deadly; and an "especially cruel" aggravator based on minutes of consciousness after the stabbing. The facts here stand in marked contrast to many death penalty cases in which this Court has reversed, including for *Simmons* errors. *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (reversing denial of state habeas); *id.* at 1761 (Thomas, J., dissenting) (defendant "confessed to murdering [a 79-year-old woman in her home] after sexually assaulting her

with a bottle of salad dressing"); *Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting) (defendant "bound the hands of the victim (who was six months pregnant) behind her back, stabbed her over 30 times, slit her throat from ear to ear, and left dollar bills fastened to her bloodied body"); *Simmons*, 512 U.S. at 181 (Scalia, J., dissenting) (defendant brutally murdered "a 79-year-old woman in her home" and had "three prior crimes . . . , all rapes and beatings of elderly women, one of them his grandmother").

That Cropper's capital offense occurred while he was in prison does not defeat a showing of prejudice—as the facts of this case and the Court's case law make clear. Cropper's first resentencing jury specifically asked whether parole was available. RT 2007-01-08 at 3. That is, despite the nature of Cropper's offense, the availability of parole was relevant and important to the jury's deliberations. And this Court has explained that, although a state may certainly argue that the defendant will still be a danger in prison, a jury may well weigh that differently than the risk that the defendant will be a danger to the general public if released on parole. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment); *Kelly*, 534 U.S. at 253-54.

The Arizona post-conviction review court held that "[t]he availability of parole . . . 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." App. 46a. In so holding, the court did not mention the Arizona Supreme Court's harmlessness finding. And it said nothing about the 2006 hung jury—or that jury's question specifically inquiring about parole. The court appeared to offer

only two reasons for finding no prejudice. Neither has merit.

First, the court noted that the instructions "referred to 'life imprisonment' and 'life in prison' and did not reference 'parole' or the 'possibility of parole.'" *Id.* To the extent the state court was implying that the jury necessarily understood that parole was not available based on the undefined reference to "life" in the jury instructions, that argument is squarely foreclosed by this Court's precedents. The mere mention of "life" without more is insufficient to inform the jury that parole is categorically unavailable. *See Kelly*, 534 U.S. at 257; *Shafer*, 532 U.S. at 52-53. Indeed, in *Shafer*, this Court found a *Simmons* error despite the "judge['s] repeated[] expla[nation] [to the jury] that 'life imprisonment means until the death of the defendant'"; a jury instruction that included a "defin[ition] [of] 'life imprisonment' as 'incarceration of the defendant until his death'"; and a dissenting opinion concluding that these explanations "left no room for speculation by the jury." *Shafer*, 532 U.S. at 56-57 (Thomas, J., dissenting).

This case is far easier: the jury instructions had no reference to a life sentence being "until the death of the defendant" or any other suggestion that it might be without parole. The State's arguments implied that Cropper *would* be eligible for parole. RT 2008-04-29 at 92-93 (arguing for death because Cropper had already been "given second chances on probation and parole" and he did not deserve "another second chance"). And even defense counsel (wrongly) believed that "life" could include parole—which he then tried to waive. App. 42a; RT 2008-04-29 at 66-68.

Second, the court explained that Cropper had "murdered a corrections officer while in prison," "later had committed an aggravated assault," had "previously been sentenced to probation," and was later "placed on parole." App. 46a. But as discussed above, Cropper's offense of conviction and subsequent non-deadly assault hardly distinguishes him from other first-degree murderers who have received life sentences. The absence of other aggravators *does* distinguish him from other first-degree murderers who have received death sentences. And the time Cropper previously spent on probation or parole was for the non-violent offense of forgery. Cherrypicking certain facts and ignoring the rest of the record evidence—including the fact that the first jury did *not* sentence Cropper to death; that the Arizona Supreme Court recognized a reasonable jury may well not; and that the first jury asked about parole—falls far short of a proper *Strickland* prejudice analysis, especially in a death penalty case.

II. THIS COURT'S INTERVENTION IS NEEDED

As this Court has recognized, the *Simmons* rule is one of limited applicability. It applies only to the sentencing phase of a death penalty case. And even in 1994, only three states (South Carolina, Virginia, and Pennsylvania) had "a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse[d] to inform sentencing juries of this fact." *Simmons*, 512 U.S. at 168 n.8 (plurality opinion).[7] Arizona joined those

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[7] Virginia later changed its law to entitle capital defendants to an instruction "that the words 'imprisonment for life' mean 'imprisonment for life without possibility of parole.'" *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999).

three states later—after *Ring* rendered its judge-sentencing scheme unconstitutional. 536 U.S. at 609.

So *Simmons* is a rule of limited applicability, but it is an issue that—somewhat surprisingly—has not gone away. This Court has granted certiorari in no fewer than six cases raising a *Simmons*-related issue over the past twenty some years—underscoring the recurring nature of *Simmons* errors and this Court's commitment to enforcing the rule of *Simmons* itself.[8] And it has granted, vacated, and remanded several more.[9] Yet more than two decades after *Simmons*, and after a summary reversal, Arizona courts are still reluctant to adhere to this Court's teachings. The solution cannot be to allow Arizona to hide behind years of its blatant disregard of *Simmons* and defense counsel's failures; it should be to send the message loud and clear that ineffective assistance of counsel claims are not yet another way to evade *Simmons*.

This case comes to the Court in a state post-conviction review posture, without the federalism concerns of habeas review or the complexities of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) (noting that in AEDPA ineffective assistance of counsel claims, "the question is not whether counsel's actions were reasonable . . . [but] whether there is any reasonable argument that

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[8] *Lynch*, 136 S. Ct. at 1818; *Rompilla v. Beard*, 545 U.S. 374, 380 n.1 (2005); *Kelly*, 534 U.S. at 248; *Shafer*, 532 U.S. at 39-40; *Ramdass v. Angelone*, 530 U.S. 156, 164-65 (2000); *O'Dell v. Netherland*, 521 U.S. 151, 155 (1997).

[9] *See, e.g.*, *Price v. North Carolina*, 512 U.S. 1249, 1249 (1994); *Wright v. Virginia*, 512 U.S. 1217, 1217 (1994); *Mickens v. Virginia*, 513 U.S. 922, 922 (1994).

counsel satisfied *Strickland*'s deferential standard"). Because "state courts are the principal forum" for ineffective assistance of counsel claims, the Court's review in this posture is vital to ensure that the right to counsel is respected. *Id.* at 103; *see Amici Curiae* Br. of James S. Brady et al. in Supp. of Pet'r 7-10, 12-15, *Andrus v. Texas*, No. 18-9674 (July 12, 2019). And this case comes to the Court without the exigencies of an imminent execution date. Resolution of this question may well be the difference between life or death for Cropper. This Court's intervention is needed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 5, 2020

APPENDIX

TABLE OF CONTENTS

Page

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.	LAURA PATRICE CHIASSON
LEROY D CROPPER (A)	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

[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") 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 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

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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").

> 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[1]) 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)

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[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.

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).

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 done.

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-

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> 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.

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 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

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.

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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 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).

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-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

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.

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

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:

> [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 [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

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[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.

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

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[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.

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.

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.

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[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.

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 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

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

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 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

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[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.

"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 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).

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.

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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.

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*, 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

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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 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).

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]

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:

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[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 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

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.

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.

……

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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.

> 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

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,

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> 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.

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).

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 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.

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

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 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

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[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.

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.

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

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

> 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.

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.

1

> 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

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> 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.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
07/03/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-003949	06/30/2017
JUDGE M. SCOTT MCCOY	CLERK OF THE COURT K. L. Johnson Deputy
STATE OF ARIZONA v.	LAURA PATRICE CHIASSON
LEROY D CROPPER (A)	MICHAEL J. MEEHAN TODD E HALE COURT ADMIN-CRIMINAL-PCR

MINUTE ENTRY

The Court has received and reviewed the State's Motion for Rehearing, Defendant's Motion for Rehearing, and all briefing on each motion.

IT IS ORDERED denying Defendant's motion.

IT IS FURTHER ORDERED granting the State's motion in part and denying it in part, and amending the Court's February 7, 2017 order, as follows:

1. On page 39, the words "found that Defendant" are inserted immediately after the words "Arizona Supreme Court".

2. On page 45, deleting the words "and of the victim's request that the jury 'give me closure'".
3. On page 46, footnote 18, deleting the citation to Rule "32.6(c)" and inserting "Rule 32.2(a)(3)" in its place.
4. On page 47, deleting "Ineffective Assistance" from the heading to Claim XVI.
5. On page 49, deleting "Ineffective Assistance" from the heading.
6. On page 49, deleting the citation to Rule "32.6(c)" and inserting "Rule 32.2(a)(3)" in its place.

[seal omitted]

SUPREME COURT

STATE OF ARIZONA

ROBERT BRUTINEL	ARIZONA STATE COURTS BUILDING	JANET JOHNSON
Chief Justice	501 WEST WASHINGTON STREET, SUITE 402	Clerk of the Court
	PHOENIX, ARIZONA 85007	
	TELEPHONE: (602) 452-3396	

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

SUPREME COURT OF ARIZONA

STATE of Arizona, Appellee,

v.

Leroy D. CROPPER, Appellant.

No. CR–00–0544–AP.

En Banc.

May 5, 2003.

68 P.3d 407

OPINION

McGREGROR, Vice Chief Justice

¶ 1 Leroy D. Cropper appeals from his convictions and death sentence entered on November 3, 2000. The State charged Cropper with first degree murder, conspiracy to commit first degree murder and three counts of promoting prison contraband in connection with the March 7, 1997 murder of Arizona Department of Corrections (ADOC) Officer Brent Lumley.[1] At the time of the offenses, Cropper was an ADOC inmate housed at the Perryville State Prison. Cropper pled guilty to all counts on May 4, 1999.[2] We have jurisdiction under Article VI, Section 5.3 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 13–4031 (2001).

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1 The State also charged two other ADOC inmates who are not involved in this appeal.

2 The trial court granted the State's motion amending the indictment to replace the conspiracy count with a count of dangerous or deadly assault by a prisoner.

I.

¶ 2 We view the facts in the light most favorable to sustaining the verdict. *State v. Gallegos,* 178 Ariz. 1, 9, 870 P.2d 1097, 1105 (1994). 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.

¶ 3 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.

¶ 4 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.

¶ 5 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.

¶ 6 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."

¶ 7 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.

¶ 8 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.

¶ 9 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.

¶ 10 On April 14, 1997, a grand jury indicted Cropper for first degree murder and other counts related to Officer Lumley's death. On May 4, 1999, Cropper pled guilty to all counts. The State filed its list of aggravating factors on May 13, 1999, indicating it would seek to prove the murder was committed (1) in an especially cruel, heinous or depraved manner, A.R.S. section 13–703.F.6, and (2) while the defendant was an ADOC inmate, A.R.S. section 13–703.F.7.

¶ 11 On December 12, 1999, while in the custody of the Maricopa County Sheriff's Office awaiting the Lumley murder sentencing proceeding, Cropper stabbed a fellow inmate, Antoin Jones, for which he faced an aggravated assault charge. During a telephone conference on December 15, 1999, the State asked the trial court to continue the upcoming capital aggravation/mitigation hearing pending the outcome

of the aggravated assault case. The prosecutor advised the court and Cropper's attorney that the State would seek to prove a prior serious conviction aggravating circumstance under A.R.S. section 13–703.F.2 if Cropper was convicted of aggravated assault. On April 11, 2000, at the opening of the initial capital aggravation/mitigation hearing, the prosecutor again told the court, Cropper and his attorney that the State would use an aggravated assault conviction as an aggravating circumstance. On April 18, 2000, the court granted the State's motion to continue the hearing pending the outcome of Cropper's aggravated assault case. Cropper pled guilty to one count of aggravated assault for the Jones stabbing on June 22, 2000.

¶ 12 Following the close of the aggravation/mitigation hearing on October 13, 2000, the trial court found that the State had established three aggravating circumstances. In its special verdict dated November 3, 2000, the court found (1) Cropper had been convicted of a prior serious offense, A.R.S. section 13–703.F.2; (2) Cropper committed the murder in an especially cruel manner, A.R.S. section 13–703.F.6; and (3) Cropper committed the crime while in the custody of the ADOC, A.R.S. section 13–703.F.7.[3] The court also found two mitigating circumstances: (1) Cropper had a strong relationship with certain members of his family and (2) he felt and expressed remorse for Officer Lumley's death. After considering the aggravating and mitigating circumstances, the court concluded that the mitigating circumstances were not "sufficiently

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[3] Cropper conceded the facts underlying this aggravating circumstance.

substantial to call for leniency." A.R.S. § 13-703.E. The court sentenced Cropper to death. This appeal followed.

II.

A.

¶ 13 Cropper argues that the prosecutor failed to give notice of the State's intent to prove the third aggravating circumstance, prior serious conviction, within the time period prescribed by Arizona Rule of Criminal Procedure 15.1.g(2).[4] As a result, Cropper argues, he unknowingly prejudiced himself by entering the guilty plea in the aggravated assault case.

¶ 14 The State admittedly did not file notice of the prior serious conviction aggravating circumstance within ten days of Cropper's first degree murder

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[4] This rule has been amended twice since Cropper's trial. The version then in effect provided:

> **Rule 15.1. Disclosure by state**
>
> . . . .
>
> **g. Additional disclosure in a capital case.**
>
> . . . .
>
> (2) The prosecutor, no later than 10 days after a verdict of first degree murder in a case in which the prosecutor is seeking the death penalty, shall provide to the defendant the following:
>
> (a) A list of the aggravating factors which the state intends to prove at the aggravation/mitigation hearing.

Ariz. R.Crim. P. 15.1.g(2)(a) (2000).

The rule now requires the prosecutor to notice aggravating circumstances when she notices the state's intent to seek the death penalty. Ariz. R.Crim. P. 15.1.g(2). The death penalty must be noticed "no later than 60 days after the arraignment." *Id.* 15.1.g(1).

conviction, as required by superseded Rule 15.1.g(2).[5] The State, however, could not give notice of the prior serious conviction aggravating circumstance until Cropper committed the precipitating crime. We therefore consider whether the State's delay prejudiced Cropper's position.

¶ 15 When the state fails to comply with a deadline, our primary concern involves prejudice suffered by the defendant. We have considered an analogous situation in several cases involving Arizona Rule of Criminal Procedure 15.1.g(1), which establishes the state's procedural obligations for noticing its intent to seek the death penalty. The state cannot seek the death penalty if its failure to comply with Rule 15's time requirement results in prejudice to the defendant. In *Barrs v. Wilkinson,* we held that precluding the death penalty "may be appropriate where . . . the state's violation is particularly egregious or the defendant will clearly suffer harm." 186 Ariz. 514, 516, 924 P.2d 1033, 1035 (1996); *accord Holmberg v. De Leon,* 189 Ariz. 109, 111, 938 P.2d 1110, 1112 (1997) (holding prosecution's notice to seek the death penalty filed eighteen days

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[5] The state can use a prior serious offense conviction as a prior conviction aggravating circumstance if *the conviction* occurs *before* the sentencing hearing in the capital case, even though the defendant committed the crime and was convicted after the murder occurred. *State v. Rogovich,* 188 Ariz. 38, 44, 932 P.2d 794, 800 (1997) (holding F.2 aggravating circumstance applies "to convictions entered prior to the sentencing hearing, regardless of the order in which the underlying crimes occurred or the convictions entered"); *State v. McKinney,* 185 Ariz. 567, 580–81, 917 P.2d 1214, 1227–28 (1996) (holding F.2 aggravating circumstance applied where defendant was simultaneously convicted of first and second degree murder because the convictions occurred before the first degree murder sentencing).

before trial prejudiced defendant who did not have actual notice). In *Barrs,* the State failed to provide written notice of its intent to seek the death penalty until almost three months after the Rule 15.1.g(1) deadline passed. *Id.* at 515, 924 P.2d at 1034. We held that the State's failure prejudiced the defendant because he had planned and structured his defense for months believing the State would seek a prison sentence. *Id.* at 517, 924 P.2d at 1036. Unlike Barrs, Cropper does not allege that the delay prejudiced his ability to contest the F.2 aggravating circumstance.

¶ 16 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).

¶ 17 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.[6]

B.

¶ 18 Cropper also claims that his guilty plea in the aggravated assault case should be overturned because he did not enter the plea knowingly, intelligently and voluntarily. He would not have pled guilty, he argues, had he known that the State intended to offer his conviction as an aggravating circumstance in his upcoming capital sentencing hearing. The State asserts that whether Cropper entered a valid plea to the aggravated assault case is an issue not properly before the court. We agree with the State.

¶ 19 The aggravated assault plea was entered at a proceeding unrelated to the first degree murder trial. Arizona law requires this court to hear direct appeals in criminal cases when the defendant is sentenced to death. A.R.S. § 13-703.01 (2001), *renumbered at* A.R.S. §§ 13-703.04 to 13-703.05 (Supp.2002). We can review only those issues directly arising from the capital proceeding. *See State v. Shattuck,* 140 Ariz. 582, 584, 684 P.2d 154, 156 (1984).

¶ 20 Moreover, because Cropper pled guilty to aggravated assault, he waived any right to direct appeal in that action. *State v. Smith,* 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996). If he wishes to challenge the validity of his plea, he must do so through the

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[6] For obvious reasons, the state should make every effort to comply with all notice requirements, including the requirement that notice be written.

post-conviction relief procedures provided by Rule 32 of the Arizona Rules of Criminal Procedure.

C.

¶ 21 Cropper finally argues that the trial judge should have recused himself from the capital sentencing phase because he presided over the aggravated assault proceedings. We reject this argument because Cropper has not presented any evidence of bias or prejudice.

¶ 22 A party challenging a trial judge's impartiality must overcome a strong presumption that trial judges are "free of bias and prejudice." *State v. Medina,* 193 Ariz. 504, 510 ¶ 11, 975 P.2d 94, 100 (1999) (quoting *State v. Rossi,* 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987)). Overcoming this burden means proving "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *In re Guardianship of Styer,* 24 Ariz.App. 148, 151, 536 P.2d 717, 720 (1975). The moving party must "set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *Medina,* 193 Ariz. at 510 ¶ 11, 975 P.2d at 100.

¶ 23 In *State v. Medina,* the defendant argued his state and federal due process rights were violated because the trial judge did not recuse himself from his capital trial. *Id.* at 509 ¶ 10, 975 P.2d at 99. The same judge had presided over a prior trial in which the defendant was convicted of aggravated assault and robbery. *Id.* Those convictions served as the basis for an F.2 aggravating circumstance. *Id.* We rejected the defendant's argument because he neither filed a Rule 10.1 motion nor presented tangible

evidence of bias.[7] *Id.* at 510 ¶¶ 12-13, 975 P.2d at 100. We held that a judge's capacity for fairness and impartiality should not be questioned for "mere speculation, suspicion, apprehension, or imagination." *Id.* at 510 ¶ 12, 975 P.2d at 100 (quoting *Rossi,* 154 Ariz. at 248, 741 P.2d at 1226).

¶ 24 Cropper has presented no facts that meet the test set out in *Medina* and never filed a Rule 10.1 motion. Accordingly, we reject the argument that the trial judge was biased and prejudiced.

III.

¶ 25 In *Ring v. Arizona* (*Ring II*), the United States Supreme Court held unconstitutional that portion of A.R.S. section 13–703 that allowed judges to find facts that led to the aggravation of a defendant's sentence. 536 U.S. 584, 608, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002). The Court declared that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S.Ct. at 2432. The Court reversed our decision in *State v. Ring* (*Ring I*) and remanded for further proceedings consistent with its decision. *Ring II,* 536 U.S. at 589–90, 122 S.Ct. at 2443 (reversing *Ring I,* 200 Ariz. 267, 25 P.3d 1139 (2001)). Following the *Ring II* decision, we consolidated all death penalty cases in which this Court had not yet issued a direct appeal mandate, including Cropper's, and ruled that we would order supplemental briefing on sentencing issues affected

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[7] The Arizona Rules of Criminal Procedure allow a defendant to file a motion requesting a new judge for cause. Ariz. R.Crim. P. 10.1.

by *Ring II* after issuance of our decision in *State v. Ring,* 204 Ariz. 534, 65 P.3d 915 (2003) (*Ring III*). Because *Ring III* has been issued, by separate order, we direct the parties to submit supplemental briefing in accordance with that opinion. We will address sentencing issues in a supplemental opinion.

IV.

¶ 26 For the foregoing reasons, we affirm Cropper's convictions.

CONCURRING: CHARLES E. JONES, Chief Justice, REBECCA WHITE BERCH, Justice, MICHAEL D. RYAN, Justice, and WILLIAM E. DRUKE, Judge (Retired).*

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* The Honorable Andrew D. Hurwitz recused himself; pursuant to Article VI, Section 3 of the Arizona Constitution, the Honorable William E. Druke, (Retired) Judge of the Court of Appeals, Division Two, was designated to sit in his stead.

SUPREME COURT OF ARIZONA

STATE of Arizona, Appellee,

v.

Leroy D. CROPPER, Appellant.

No. CR–00–0544–AP.

Sept. 5, 2003.

76 P.3d 424

SUPPLEMENTAL OPINION

McGREGROR, Vice Chief Justice

¶ 1 The only issue before us is whether reversible error occurred when a trial judge sentenced Leroy D. Cropper to death under a procedure that violated the right to a jury trial under the Sixth Amendment to the United States Constitution. *See Ring v. Arizona,* 536 U.S. 584, 609, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002) (*Ring II*). We have jurisdiction pursuant to Article VI, Section 5.3 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 13–4031 (2001). Based on our review of the record, we cannot conclude that the Sixth Amendment violation constituted harmless error.

I.

¶ 2 In *Ring II,* the United States Supreme Court held that Arizona's former capital sentencing scheme violated the Sixth Amendment. *Ring II,* 536 U.S. at 609, 122 S.Ct. at 2443. The Court declared that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S.Ct. at 2432. The Court reversed our decision in

State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001) (*Ring I*), and remanded for further proceedings consistent with its decision. *Ring II,* 536 U.S. at 609, 122 S.Ct. at 2443.

¶ 3 Following the Supreme Court's *Ring II* decision, we consolidated all death penalty cases in which this court had not yet issued a direct appeal mandate to determine whether *Ring II* requires this court to reverse or vacate the defendants' death sentences. In *State v. Ring,* 204 Ariz. 534, 555 ¶ 53, 65 P.3d 915, 936 (2003) (*Ring III*), we held that we will examine a death sentence imposed under Arizona's superseded capital sentencing statutes for harmless error.

II.

¶ 4 Cropper pled guilty to first degree murder, dangerous or deadly assault by a prisoner, and three counts of promoting prison contraband for the murder of Arizona Department of Corrections (ADOC) Officer Brent Lumley. Officer Lumley was murdered after he and a fellow corrections officer, Deborah Landsperger, searched Cropper's cell at the Perryville State Prison.[1]

¶ 5 After entering judgment, the trial judge conducted a sentencing hearing to determine whether any aggravating or mitigating circumstances existed. *See* A.R.S. § 13–703 (Supp.1999), *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1. The judge found three aggravating circumstances and two mitigating circumstances. He found, beyond a reasonable doubt, that Cropper had been convicted of

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[1] For a more thorough description of the facts, see *State v. Cropper,* 205 Ariz. 181, 68 P.3d 407 (2003).

a prior serious offense, A.R.S. section 13–703.F.2 (Supp.2002), that he murdered Officer Lumley in an especially cruel manner, A.R.S. section 13–703.F.6, and that he committed the murder while in the custody of ADOC, A.R.S. section 13–703.F.7.

¶ 6 Cropper presented six mitigating circumstances to the court. The judge accepted two non-statutory mitigators: that Cropper has a strong relationship with certain family members and that he expressed remorse for the killing. He rejected four: that Cropper's capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of the law were significantly impaired, A.R.S. section 13–703.G.1; that Cropper grew up in a dysfunctional family; that he has a substance abuse problem; and that his psychological background and dysfunctional family contributed to his behavior. The judge concluded that the established mitigating circumstances were not sufficiently substantial to call for leniency and sentenced Cropper to death.

¶ 7 We affirmed Cropper's convictions on direct appeal and ordered supplemental briefing on the issue of whether the Sixth Amendment *Ring II* error was harmless. *Cropper,* 205 Ariz. at 186 ¶ 25, 68 P.3d at 412. We will find constitutional error harmless if we conclude, beyond a reasonable doubt, that the error did not contribute to or affect the sentencing outcome. *Ring III,* 204 Ariz. at 565, ¶¶ 103-04, 65 P.3d at 946. If we conclude that reasonable doubt exists, however, then the error is prejudicial and the case must be remanded for a new sentencing hearing under Arizona's amended capital sentencing statutes. *Id.* at 565, ¶ 102, 65 P.3d at 946.

III.

A.

¶ 8 Under Arizona law, an aggravating circumstance exists when "[t]he defendant was previously convicted of a serious offense, whether preparatory or completed." A.R.S. § 13–703.F.2. The trial judge found that Cropper had been previously convicted of aggravated assault. *Cropper,* 205 Ariz. at 183 ¶¶ 11–12, 68 P.3d at 409.

¶ 9 In *Ring III,* we held "that the Sixth Amendment does not require a jury to determine prior convictions under sections 13–703.F.1 and F.2." 204 Ariz. at 556 ¶ 55, 65 P.3d at 937. Accordingly, we will not disturb the trial judge's finding that the prior serious conviction aggravating circumstance exists.

B.

¶ 10 An aggravating circumstance exists when the defendant commits first degree murder while in the custody of ADOC. A.R.S. § 13–703.F.7. Because Cropper concedes this aggravating circumstance, we recognize it as established.[2] *See Ring III,* 204 Ariz. at 536 ¶ 93, 65 P.3d at 944.

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[2] Although Cropper concedes that the in-custody aggravating circumstance exists, the F.7 aggravator also can be implicit in a verdict. *Cf. Ring III,* 204 Ariz. at 561 ¶ 83, 65 P.3d at 942 (holding that the age of the victim aggravating circumstance can be implicit in a jury verdict where the defendant is simultaneously convicted of a relevant-age-dependent crime). When a jury simultaneously convicts a defendant of first degree murder and deadly or dangerous assault by a prisoner, the F.7 aggravator is implicitly established even though the aggravator itself was not found by a jury.

C.

¶ 11 Another aggravating circumstance exists when "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." A.R.S. § 13–703.F.6. The State must prove at least one of the three components to establish this aggravator. *State v. Jeffers,* 135 Ariz. 404, 429, 661 P.2d 1105, 1130 (1983).

¶ 12 The trial judge found that Cropper committed the murder in an especially cruel manner. In *State v. Knapp,* we defined "cruel" as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic." 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977) (quoting Webster's Third New Int'l Dictionary). Physical cruelty exists when "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) (citations omitted).

¶ 13 At the aggravation/mitigation hearing, the State presented testimony from Dr. Philip Keen, Chief Medical Examiner for Maricopa and Yavapai Counties. Dr. Keen testified that Officer Lumley was attacked from behind and stabbed six times. The knife entered his neck and chest; the most critical entry penetrated one of his lungs. According to Dr. Keen, Officer Lumley lived at least five minutes after the stab wounds were inflicted and remained conscious for at least three of those minutes. Dr. Keen further testified that the cuts severed a group of nerves in Lumley's body. The nerve damage, according to Dr. Keen, would have caused suffering. When asked if the injury would have caused a

substantial amount of pain, Dr. Keen responded, "There would be some pain. Substantial? Everybody . . . has a different pain threshold and so I don't know how to quantitate the individual pain." The defense presented no credible rebuttal evidence.

¶ 14 In *State v. Soto–Fong,* we clarified the meaning of an *especially* cruel murder. 187 Ariz. 186, 203–04, 928 P.2d 610, 627–28 (1996). We held that the State had failed to produce sufficient evidence to support the trial court's finding of physical cruelty because the finding was "based on the assumption that a murder is especially cruel whenever the victim remains conscious for some moments after being shot." *Id.* at 203, 928 P.2d at 627. Although proving the aggravator does not depend on satisfying "a bright-line, arbitrary temporal rule," we cautioned that finding a murder especially cruel within the meaning of section 13–703.F.6 based on such an assumption would frustrate the narrowing purpose of the aggravating circumstance. *Id.* at 204, 928 P.2d at 628. Instead, we concluded, "where shots, stabbings, or blows are inflicted in quick succession, one of them leading rapidly to unconsciousness, a finding of cruelty, *without any additional supporting evidence,* is not appropriate." *Id.*

¶ 15 Our decision in *Soto–Fong* developed our holding in *State v. Gretzler,* 135 Ariz. 42, 659 P.2d 1 (1983), in which we had distinguished between two groups of cases involving the cruelty aggravator. The first group consisted of two cases in which we sustained an F.6 finding. In *Knapp,* we upheld the trial court's finding where the "defendant burned to death his two infant daughters." *Id.* at 51, 659 P.2d at 10, *quoted in Soto–Fong,* 187 Ariz. at 203, 928 P.2d at 627. Similarly, in *State v. Mata,* 125 Ariz. 233, 609

P.2d 48 (1980) we upheld the finding where "the killers performed successive rapes and severe beatings on the victim prior to murdering her." *Id., quoted in Soto–Fong,* 187 Ariz. at 203, 928 P.2d at 627.

¶ 16 The second *Gretzler* group consisted of three cases in which we reversed or vacated the trial court's finding of especial cruelty because the State failed to sufficiently establish physical suffering. In *State v. Ortiz,* 131 Ariz. 195, 639 P.2d 1020 (1981), and *State v. Ceja,* 126 Ariz. 35, 612 P.2d 491 (1980), we overturned the trial judge's finding of cruelty because the evidence of the victim's suffering was inconclusive. *Gretzler,* 135 Ariz. at 51, 659 P.2d at 10, *cited by Soto–Fong,* 187 Ariz. at 203, 928 P.2d at 627. In *State v. Bishop,* 127 Ariz. 531, 622 P.2d 478 (1980), and *State v. Clark,* 126 Ariz. 428, 616 P.2d 888 (1980), we held that suffering could not have occurred because the evidence indicated the victims died immediately after the attack. *Gretzler,* 135 Ariz. at 51, 659 P.2d at 10, *cited by Soto–Fong,* 187 Ariz. at 203, 928 P.2d at 627.

¶ 17 The manner in which Officer Lumley died is neither as patently cruel as were the deaths in *Knapp*and *Mata* nor as swift as those in *Bishop* and *Clark.* Because Officer Lumley remained conscious for a relatively short time, however, the State bore the burden of providing some additional supporting evidence of cruelty. *Soto–Fong,* 187 Ariz. at 204, 928 P.2d at 628. On this record, we cannot hold that all reasonable juries would find the especially cruel aggravating circumstance established beyond a reasonable doubt. *Cf. State v. Jones,* 205 Ariz. 445, 449 ¶ 14, 72 P.3d 1264, 1268 (2003) (holding that a jury could conclude that the victim lost consciousness

immediately following the first assault); *State v. Cañez,* 205 Ariz. 620, 624 ¶ 15, 74 P.3d 932, 936 (2003) (same). Therefore, Cropper is entitled to a jury finding on this aggravating circumstance.

IV.

¶ 18 To sentence a defendant to death, not only must the trier of fact find, beyond a reasonable doubt, the existence of one or more aggravating circumstances, but it also must consider whether any mitigating circumstances are sufficiently substantial to call for leniency. *See* A.R.S. § 13–703.E (Supp.2002). We may "affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Ring III,* 204 Ariz. at 565 ¶ 104, 65 P.3d at 946.

¶ 19 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.

¶ 20 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.

¶ 21 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 this to go on and knows that it's wrong that is the focus of his anger.
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> . . . .
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> [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.

¶ 22 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.

¶ 23 The judge rejected this mitigating circumstance because he failed to find a causal nexus between Cropper's childhood experiences and Officer Lumley's murder. After reviewing the trial record, we cannot conclude, beyond a reasonable doubt, that a jury would do the same. Dr. Parrish testified both that Cropper committed the murder while in a dissociative state and that his childhood trauma caused him to enter that state. Whether or not this theory is credible and, if so, whether a causal nexus exists between Cropper's early life experiences and the murder are questions of facts that require judging the credibility and weight of the defense's mitigation evidence and the State's rebuttal. We cannot conclude, beyond a reasonable doubt, that a jury would not have weighed differently the established mitigating circumstances or found additional mitigating circumstances.

V.

¶ 24 For the foregoing reasons, we vacate Cropper's death sentence and remand for resentencing under A.R.S. sections 13–703 and 13–703.01 (Supp.2002).

CONCURRING: REBECCA WHITE BERCH and MICHAEL D. RYAN, Justices.

Justice HURWITZ took no part in the consideration or decision of this case.

JONES, C.J., concurring in part, dissenting in part:

¶ 25 I concur in the result, but dissent from the majority's conclusion that harmless error analysis is appropriate where sentencing determinations are made by the trial judge in the absence of the jury. The right to trial by an impartial jury is fundamental. The sentencing phase is, of itself, a life or death matter. Where a judge, not a jury, determines all questions pertaining to sentencing, I believe a violation of the Sixth Amendment to the Constitution of the United States has occurred. In the aftermath of the Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (*Ring II*), the absence of the jury in the sentencing phase of a capital trial necessarily amounts to structural error. I would remand the case for resentencing, simply on the basis of the Sixth Amendment violation. *See State v. Ring,* 204 Ariz. 534, 565–67 ¶¶ 105–14, 65 P.3d 915, 946–48 (2003) (Feldman J., concurring in part, dissenting in part) (*Ring III*).

SUPREME COURT OF ARIZONA

STATE of Arizona, Appellee,

v.

Leroy D. CROPPER, Appellant.

No. CR–08–0116–AP.

En Banc.

March 11, 2010.

225 P.3d 579

OPINION

RYAN, Justice

¶ 1 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, 153 L.Ed.2d 556 (2002). In response to that decision, and subsequent legislation,[2] this Court vacated Cropper's sentence and remanded for

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[1] Cropper also pled guilty to dangerous and deadly assault by a prisoner and three counts of promoting prison contraband.

[2] After *Ring II,* legislation was enacted providing for a jury trial as to both the existence of capital aggravating circumstances and the appropriate sentence. 2002 Ariz. Sess. Laws, ch. 1, § 3 (5th Spec. Sess.); *see State v. Ring* (*Ring III*), 204 Ariz. 534, 545 ¶ 13, 65 P.3d 915, 926 (2003).

resentencing under the appropriate statutes. *State v. Cropper* (*Cropper II*), 206 Ariz. 153, 158 ¶ 24, 76 P.3d 424, 429 (2003).

¶ 2 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).[3] 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).

I.

¶ 3 Cropper was an inmate at the Perryville prison in 1997.[4] Two corrections officers, one female, another male, were looking for missing mops and brooms. The female guard approached Cropper's cell and saw Cropper and his cell mate sitting on a bunk. She discovered contraband tattooing material in the cell and ordered the two inmates out so the officers could conduct a search. The officers found a home-

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[3] Arizona's capital sentencing statutes were reorganized and renumbered to A.R.S. §§ 13–751 to –759. 2008 Ariz. Sess. Laws, ch. 301, §§ 26, 38–41 (2d Reg. Sess.). Because the renumbered statutes are not materially different, we cite the current version, unless otherwise noted.

[4] A detailed description of the facts is set forth in *Cropper I,* 205 Ariz. at 182–83 ¶¶ 2–9, 68 P.3d at 408–09.

made tattoo gun, needles and ink, a shank, and another item with security implications. Cropper became angry that the female officer, in Cropper's opinion, had been disrespectful of him and his property.

¶ 4 Although the female officer had angered Cropper, he sought out a violent confrontation with the male officer—"an innocent man"—because he did not want to be known as a "ladykiller." Cropper had been placed on lockdown, but he obtained a knife from another inmate and escaped from his cell with the help of others.

¶ 5 The male officer was alone in the control room of the cellblock in which Cropper was held. Cropper banged open the door, rushed at the officer and stabbed him in the neck. The men crashed into a desk. Cropper pinned the officer up against a wall while a "very violent" struggle continued for up to two minutes. Believing he had seen the officer die, Cropper ran back to his cell and attempted to clean himself up while prison officers were changing shifts.

¶ 6 Officers coming on duty discovered the victim. They performed CPR on him in the control room for about ten minutes and continued life-saving efforts until the officer was finally brought to Perryville's main building. One officer testified that he believed that the victim remained alive, moving his eyes and maintaining a faint pulse in the moments after he was discovered. The control room was covered in blood.

II.

¶ 7 Because the first jury to consider Cropper's penalty could not reach a verdict, he argues that the second penalty-phase trial violated his rights under

the Ex Post Facto Clauses of the United States and Arizona Constitutions. U.S. Const. art. I, § 10; Ariz. Const. art. 2, § 25. Those provisions "prohibit[ ] a state from 'retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts.'" *State v. Ring* (*Ring III*), 204 Ariz. 534, 545 ¶ 16, 65 P.3d 915, 926 (2003) (quoting *Collins v. Youngblood,* 497 U.S. 37, 43, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)); *see also State v. Noble,* 171 Ariz. 171, 173–74, 829 P.2d 1217, 1219–20 (1992). Cropper contends that by permitting the State to retry the penalty phase after a jury deadlocked, the legislature changed the substantive standard applicable to capital defendants.

¶ 8 Under A.R.S. § 13–752(K), if the penalty-phase jury "is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury." It is only after that second jury cannot resolve the case that a court must impose a life sentence. *Id.* In contrast, Cropper claims, under prior law, A.R.S. § 13–703 (2001), a trial judge could not have "hung," but rather was charged with determining in a single proceeding whether a capital or lesser sentence was warranted based on an assessment of aggravating factors and mitigating evidence. Thus, he argues, permitting a second jury to determine whether a death sentence was appropriate when the first trier of fact "determined that there was some doubt as to whether death was the appropriate punishment, and when the law at the time of the offense would not have permitted a second trial, violates the ex post facto prohibition."

¶ 9 This Court, however, has rejected similar challenges. *See Ring III,* 204 Ariz. at 546–47 ¶¶ 20–21, 65 P.3d at 927–28; *see also State v. Dann,* 220 Ariz.

351, 367 ¶¶ 82–83, 207 P.3d 604, 620 (2009) (no ex post facto violation for failure to require special verdicts or interrogatories); *State v. Bocharski,* 218 Ariz. 476, 492 ¶¶ 76–78, 189 P.3d 403, 419 (2008) (same). 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.*

¶ 10 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, 53 L.Ed.2d 344 (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 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.

¶ 11 Cropper's attempt to distinguish these principles is flawed for two reasons. First, it attempts to compare the roles of trial judges and juries. A judge, unlike a jury, cannot "deadlock" on a sentencing decision. Second, it misapprehends the effect of a hung jury. A jury's decision to acquit a

defendant differs from a jury's failure to reach a decision. *Cf. Yeager v. United States,* —— U.S. ——, ——, 129 S.Ct. 2360, 2366, 174 L.Ed.2d 78 (2009) (second trial after failure to reach a verdict is not prohibited by double jeopardy principles). As in *Ring III,* the change in the law permitting the state to retry the penalty phase when the first jury could not reach a decision neither adds a new element to the crime of first degree murder nor increases the punishment for the crime. Therefore, Cropper's ex post facto argument fails.[5]

III.

¶ 12 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

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[5] Citing *State v. Valencia*, Cropper argues that the previous standard of proof for a capital sentence was that "[w]here there is a doubt whether the death sentence should be imposed, [it should be] resolve[d] . . . in favor of a life sentence." 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982). But this statement reflects this Court's standard with regard to independent review. *See State v. Roque,* 213 Ariz. 193, 231 ¶ 170, 141 P.3d 368, 406 (2006) (applying penalty doubt standard on independent review). The legislature made no substantive change in shifting from judge sentencing to jury sentencing. *Ring III,* 204 Ariz. at 547 ¶ 23, 65 P.3d at 928.

[6] The instruction read:

> All first degree murders are, to some extent, cruel, however, this aggravating circumstance cannot be found to exist unless the State has proven beyond a reasonable doubt that the murder was especially cruel. "Especially" means unusually great or significant. The term "cruel" focuses on

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.

¶ 13 The prosecutor's remarks must be assessed in context. The instruction Cropper requested, to which the State objected, differed from (F)(6) cruelty 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

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the victim's pain and suffering. A murder is especially cruel if the State proves beyond a reasonable doubt that the victim suffered pain prior to losing consciousness, the victim's conscious suffering existed for a significant period of time, and the defendant knew or should have known that the victim would suffer pain.

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, 111 L.Ed.2d 511 (1990) (concluding that Arizona court's construction of the (F)(6) aggravator is appropriate under the Eighth Amendment), *overruled on other grounds by Ring II,* 536 U.S. at 608–09, 122 S.Ct. 2428.

¶ 14 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.

IV

¶ 15 Because the murder was committed before August 1, 2002, this Court "independently review[s] the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13–755 (Supp.2009); *see* 2002 Ariz. Sess. Laws, ch. 1, § 7 (5th Spec. Sess.).

¶ 16 Cropper does not contest that the prior serious offense aggravator, § 13–751(F)(2), and the offense committed while in custody aggravator, § 13–751(F)(7), were proven. These aggravating circumstances are established, respectively, by Cropper's guilty plea for a 1999 aggravated assault on another inmate in the Maricopa County jail and the undisputed evidence that Cropper was in prison when he murdered the corrections officer.

¶ 17 Cropper does, however, argue that in our independent review, we should find the § 13–751(F)(6) aggravator was not established beyond a reasonable doubt. *See State v. Speer,* 221 Ariz. 449, 459 ¶ 51, 212 P.3d 787, 797 (2009) (explaining that on independent review the Court "must independently determine whether the State has established the aggravating circumstance beyond a reasonable doubt").

A

¶ 18 "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).

¶ 19 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."

¶ 20 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]

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[7] In *Soto–Fong* we stated that "where shots, stabbings, or blows are inflicted in quick succession, one of them leading rapidly to unconsciousness, a finding of cruelty, *without any*

B

¶ 21 In mitigation, Cropper argues that we should find that he suffered an abusive childhood and he has expressed remorse for his actions. In our review, we have considered all of the mitigation evidence presented to the jury.

¶ 22 We conclude that Cropper has established by a preponderance of the evidence that he suffered an abusive childhood. *See* A.R.S. § 13–751(C). Testimony detailed that both his father and stepmother abused him. For example, evidence suggests that Cropper's father beat Cropper and once choked him to the point of passing out. When Cropper did not properly clean a toilet, his stepmother beat his head against it and flushed his head in it. Other evidence indicates that Cropper was neglected as he grew up in New York: he had to sneak food to eat and was left without a winter coat.

¶ 23 Cropper's claims of remorse present a closer question. For example, Cropper, in allocution, expressed remorse, stating that he regretted his action and recognized its impact on the officer's family and on his own. He presented testimony, including some by his mitigation specialist, that he had changed while in prison. We have found allocution sufficient

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additional supporting evidence, is not appropriate." 187 Ariz. at 204, 928 P.2d at 628. But this is not a case in which the proof of cruelty relies on a claim that the method by which the murder was committed was inherently cruel. *See State v. Ellison,* 213 Ariz. 116, 142 n. 19 ¶ 121, 140 P.3d 899, 925 n. 19 (2006) (rejecting state's claim that strangling inherently cruel). Rather, the State provided ample evidence of pain and consciousness, as well as other evidence indicating that Cropper sought out a violent conflict.

to establish remorse. *State v. Velazquez,* 216 Ariz. 300, 315 ¶ 74, 166 P.3d 91, 106 (2007).

¶ 24 In rebuttal, however, the State presented strong evidence contradicting genuine remorse and reform. Cropper threatened penal personnel and wrote letters mocking them and bragging about the murder. For example, when he was found with two toothbrushes in his possession in the Maricopa County jail, Cropper told a jail guard "You wouldn't know what a shank was unless it was sticking out of your neck," adding that "the next time I get a toothbrush, I will stick it in your fucking neck." Asked during an investigation whether he was an "expert" on shanks, Cropper said, "Let's just say I know what I'm talking about. I've been around." Cropper bragged that he had "stainless for each hand" in a letter to another inmate. He once told an officer that if he wanted an officer dead, he would be dead already.

¶ 25 Further, Cropper threatened a "repeat episode of blood and guts" and bragged he would probably "be on the TV again," in a letter. He signed letters using "in your neck" and "Fuck them all in the neck" as epigrams and "IYN" as a return address. After the murder, Cropper wrote a letter addressed "Greetings fellow psychopaths," in which he boasted about the slaying, writing "Yee haw. Are we having fun yet? He he." He mocked the prison personnel who had responded to the killing as "a bunch of keystone cops all running around totally fucking panicked and deathly scared." Finally, he bragged that protective vests worn by officers "protect the heart, lungs, kidney, etcetera, etcetera, but their daring necks are always exposed. Imagine that."

¶ 26 After the murder, Cropper also continued to have disciplinary problems and act violently. For example, while in the Maricopa County jail, Cropper was found with a six-inch shank; he was also involved in the December 10, 1999 incident for which he was later convicted, establishing the § 13–751(F)(2) aggravator. As late as 2002 he attempted to injure another inmate with a dart.

¶ 27 In addition, Cropper was heavily invested in prison culture. For instance, when Cropper pled guilty to the murder, he said that he did not want his plea referred to as a plea agreement, confirming that he did not "want anybody to get the wrong impression that [he had] somehow cooperated with the State." He stated that under the inmate codes, snitches are among the worst people. Significantly, Cropper took the stand in the trial of the other inmates and took personal responsibility for the entire crime, despite the fact that co-conspirators aided him in committing it.

¶ 28 In light of this evidence, it is difficult to conclude that Cropper's later remorse is genuine. Indeed, we have found similar evidence sufficient to rebut or foreclose a finding of remorse. *See State v. Greene,* 192 Ariz. 431, 443 ¶ 59, 967 P.2d 106, 118 (1998) (stating that evidence of defendant's "vile state of mind," shown in letters after the crime, rebuts remorse); *State v. Djerf,* 191 Ariz. 583, 598 ¶¶ 64–65, 959 P.2d 1274, 1289 (1998) (stating that defendant's tactical motives and statements of potential for future killing prevent finding of remorse). Accordingly, although we credit Cropper's allocution and related testimony, we cannot give such evidence substantial

weight in reviewing the propriety of the death sentence.[8]

C

¶ 29 In considering the propriety of the death sentence, "we do not merely consider the quantity of aggravating and mitigating factors which were proven, but we look to the quality and strength of those factors." *State v. Newell,* 212 Ariz. 389, 405 ¶ 82, 132 P.3d 833, 849 (2006). "The relationship between the mitigation evidence and the crime . . . can affect the weight given to such evidence." *State v. Ellison,* 213 Ariz. 116, 144 ¶ 132, 140 P.3d 899, 927 (2006). Three aggravators, including the (F)(6) cruelty aggravator, are established.

¶ 30 Cropper urges us to give significant weight to his abusive childhood, arguing that the cell search triggered an uncontrollable rage. We do not find this argument persuasive. First, "childhood troubles deserve little value as a mitigator for . . . murder[ ] . . . committed at age thirty-three," as Cropper was at the time of this offense. *Id.* Further, the record does not demonstrate a crime of rage. Rather, it demonstrates that Cropper specifically sought out a male officer as a victim, obtained a weapon, and launched a calculated, violent attack. "This was not a crime of passion or an impetuous reaction to difficult circumstances." *Speer,* 221 Ariz. at 465 ¶ 94, 212 P.3d at 803. Moreover, he continued to engage in acts of violence and other infractions in jail and prison.

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[8] Evidence also established that Cropper harbored an interest in murdering guards for some time. At one point he wrote that "[m]any times I go back and forth with delusions of killing these guards."

¶ 31 Similarly, the evidence of remorse and reform he provided is of limited weight in light of his words and actions suggesting his remorse and reform are not genuine. *See Greene,* 192 Ariz. at 443 ¶ 59, 967 P.2d at 118; *Djerf,* 191 Ariz. at 598 ¶¶ 64–65, 959 P.2d at 1289.

¶ 32 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.[9]

V

¶ 33 For the above reasons, we affirm Cropper's death sentence.

CONCURRING: REBECCA WHITE BERCH, Chief Justice, W. SCOTT BALES and A. JOHN PELANDER, Justices, PHILIP HALL, Judge.*

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[9] Cropper raises several issues previously decided by the Supreme Court, or this Court, to preserve for federal review. These are listed verbatim in the attached appendix, along with authority he identifies as having rejected his arguments.

* Justice Andrew D. Hurwitz has recused himself from this case. Pursuant to Article 6, Section 3 of the Arizona

Appendix

Cropper seeks to preserve twelve issues for later federal review, which are listed as presented along with the authority Cropper cites as rejecting the issues:

1. The prosecutor's discretion to seek the death penalty has no standards and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 1, 4, and 15 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See State v. Sansing,* 200 Ariz. 347, ¶ 46, 26 P.3d 1118 (2001), vacated on other grounds, *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *State v. Rossi,* 146 Ariz. 359, 366, 706 P.2d 371, 378 (1985).

2. Arizona's death penalty is applied so as to discriminate against poor, young, and male defendants in violation of Article 2, Sections 1, 4, and 13 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See Sansing,* at ¶ 46.

3. The death penalty is cruel and unusual under any circumstances and violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See State v. Harrod,* 200 Ariz. 309, ¶ 59, 26 P.3d 492 (2001).

4. The absence of proportionality review of death sentences by Arizona courts denies capital defendants due process of law and equal protection, and amounts

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Constitution, the Honorable Philip Hall, Judge of the Arizona Court of Appeals, Division One, was designated to sit on this matter.

to cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Section 15 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See Harrod,* at ¶ 65; *State v. Salazar,* 173 Ariz. 399, 416, 844 P.2d 566, 583 (1992).

5. Arizona's capital sentencing scheme is unconstitutional because it does not require that the State prove that the death penalty is appropriate. Failure to require this proof violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Section 15 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See State v. Ring,* 200 Ariz. 267, ¶ 64, 25 P.3d 1139 (2001), *rev'd on other grounds, Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

6. The death penalty is cruel and unusual because it is irrationally and arbitrarily imposed. The statute requires imposition of a death sentence if the jurors find one or more aggravating circumstances and no mitigating circumstances sufficiently substantial to call for life imprisonment. Furthermore, the death penalty serves no purpose that is not adequately addressed by a sentence of life imprisonment. Therefore, it violates a defendant's right to due process under the Fourteenth Amendment to the United States Constitution and Article 2, Sections 1 and 4 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See State v. Pandeli,* 200 Ariz. 365, ¶ 88, 26 P.3d 1136 (2001); *State v. Beaty,* 158 Ariz. 232, 247, 762 P.2d 519, 534 (1988).

7. A.R.S. § 13–703 provides no objective standards to guide the jurors in weighing the aggravating and mitigating circumstances and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See Pandeli,* at ¶ 90.

8. A.R.S. § 13–703 does not sufficiently channel the sentencing jurors' discretion. Aggravating circumstances should narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a harsher penalty. The broad scope of Arizona's aggravating factors encompasses nearly anyone involved in a murder, violating the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See Pandeli,* at ¶ 90.

9. Execution by lethal injection is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, and Article 2, § 15 of the Arizona Constitution. Appellant recognizes authority to the contrary. *See State v. Van Adams,* 194 Ariz. 408, ¶ 55, 984 P.2d 16 (1999).

10. A proportionality review of a defendant's death sentence is constitutionally required. Appellant recognizes authority to the contrary. *See State v. Gulbrandson,* 184 Ariz. 46, 73, 906 P.2d 579, 606 (1995).

11. Arizona's death penalty statute violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 4 and 15 of the Arizona Constitution because it does not

require multiple mitigating factors to be considered cumulatively or require the fact-finder to make specific findings as to each mitigating factor. Appellant recognizes authority to the contrary. *See Van Adams,* at ¶ 55.

12. Arizona's death penalty statute is constitutionally deficient because it requires defendants to prove that their lives should be spared. Appellant recognizes authority to the contrary. *See State v. Fulminante,* 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988).

U.S. CONSTITUTION,

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONSTITUTION,

AMENDMENT XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.